ISSN 1897-5577

Ius Novum

Vol. 13
Number 1
2019

January–March

DOI: 10.26399/iusnovum.v13.1.2019

English edition

Quarterly of the Faculty of Law and Administration
of Lazarski University

Warsaw 2019

Pełne teksty artykułów w języku polskim wraz ze spisem treści i streszczeniami
w językach polskim i angielskim są zamieszczone na stronie internetowej:
https://iusnovum.lazarski.pl/ius-novum-online/archiwum/
oraz w serwisie The Central European Journal of Social Sciences and Humanities: http://cejsh.icm.edu.pl/

The texts of articles in the Polish language with contents and summaries in Polish and English are available on:
https://iusnovum.lazarski.pl/ius-novum-online/archiwum/
and the service of the Central European Journal of Social Sciences and Humanities: http://cejsh.icm.edu.pl/

The journal is included in The European Reference Index for the Humanities and the Social Sciences (ERIH PLUS)

ISSN 1897-5577

Zadania:
1. Kontynuacja wydawania anglojęzycznej wersji kwartalnika Ius Novum
2. Stworzenie abstraktu każdego artykułu publikowanego w Ius Novum w językach: niemieckim, francuskim, hiszpańskim, włoskim i rosyjskim

są finansowane w ramach umowy nr 886/P-DUN/2019 z dnia 2 sierpnia 2019 r., ze środków Ministra Nauki i Szkolnictwa Wyższego przeznaczonych na działalność upowszechniającą naukę.

Ministerstwo Nauki
i Szkolnictwa Wyższego

DOM WYDAWNICZY ELIPSA

Desktop publishing, print and cover:
ELIPSA Publishing House
ul. Inflancka 15/198, 00-189 Warsaw
tel. +48 22 635 03 01,
e-mail: elipsa@elipsa.pl, www.elipsa.pl

LAZARSKI UNIVERSITY PRESS
02-662 Warsaw, ul. Świeradowska 43
tel. +48 22 54 35 450
www.lazarski.pl
wydawnictwo@lazarski.edu.pl

CONTENTS

SPIS TREŚCI

ÍNDICE

СОДЕРЖАНИЕ

INHALTSVERZEICHNIS

TABLE DES MATIÈRES

INDICE

Ius Novum
1/2019

DISMISSAL OF AN OBSTRUCTIVE EVIDENTIARY MOTION

JACEK KOSONOGA*

DOI: 10.26399/iusnovum.v13.1.2019.01/j.kosonoga

1. INTRODUCTION

The lengthiness of criminal proceedings is undoubtedly a highly undesired phenomenon. It is assumed that a trial should constitute a sequence of logically organised activities performed efficiently without any unjustified delay and lengthiness. This is what is prescribed in the directive on fast proceeding, in accordance with which a judicial decision in a case should be taken in a reasonable time limit, thus in a continuous way without idleness (Article 2 § 1(4) Criminal Procedure Code, henceforth CPC). Such an assumption, on the one hand, reduces the trial costs and the risk of limitation of criminal liability and, on the other hand, facilitates establishing facts and as a result implements the directive on the right penal response.

The issue of fast proceeding becomes especially important also in the context of individual prevention. It is rightly argued that a penalty that can actually be imposed in the distant future loses deterrence and the ability to have educational influence on a perpetrator because then the immediate relationship between a penalty and an act disappears.[1] A judgment issued in a reasonable time limit also eliminates the uncertainty of the accused with respect to their legal status and, in case of conviction, it allows earlier erasure of record or the beginning of a potential probation period provided that probation measures are applicable. The directive on fast proceeding is especially important in cases where remand is applied as it cannot constitute advance punishment and should only ensure an appropriate course of the proceedings. The social aspect of the lengthiness of criminal proceedings is also

* PhD hab., Associate Professor of Lazarski University in Warsaw, Department of Criminal Law, Faculty of Law and Administration; e-mail: jacek.kosonoga@lazarski.pl; ORCID: 0000-0001-7348-944X

[1] M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1984, p. 340.

important. The situation weakens the prestige of the justice administration system, discourages citizens from cooperating with law enforcement bodies and results in the sense of criminals' impunity. Thus, the legal maxim "justice delayed is justice denied" is quite justified.

However, issuing judgments in reasonable time limits is a model assumption, which does not take into account intentional disregard for procedural obligations of the parties' to the proceedings as well as the conduct that formally remains within the scope of their rights but, in fact, is obstructive. There are many procedural measures that are aimed at preventing this phenomenon, e.g. Article 170 § 1(5) CPC allowing dismissal of an evidentiary motion that is clearly intended to prolong the proceedings.

The main motive behind the introduction of this circumstance as grounds for dismissal of an evidentiary motion, inspired by the solutions known, e.g. in the German procedure,[2] was to develop legal mechanisms for responding to the misuse of procedural rights by the accused and their counsel for the defence.[3] In spite of the initial sceptical attitude to this solution[4] in the legal doctrine, the circumstance is evaluated positively and the case law proves that, against the concerns expressed earlier, the application of Article 170 § 1(5) CPC does not constitute a threat to the appropriate exercise of the right to defence or instrumental use of law by the procedural bodies. On the other hand, there are some doubts connected with the issue of the mutual relation between the provision and other circumstances for the dismissal of an evidentiary motion. The considerations are also inspired by the general issue of misusing procedural rights, which is directly connected with the subject-matter indicated in the title. Its axiological aspect is also significant because it is at the intersection of such values as the right to defence, the adversarial system and pursuit of true facts, on the one hand, and speed and efficiency of proceedings, on the other hand.

2. REQUIREMENTS FOR A MOTION DISMISSAL

In accordance with Article 170 § 1(5) CPC, dismissal of an evidentiary motion takes place in a situation when it is clearly intended to prolong the proceedings. However, each evidentiary motion, to a smaller or bigger extent, causes a slowdown in the proceedings. This is so because it requires appropriate drafting, lodging and hearing. Thus, it is rightly indicated in the case law that the importance of Article 170 § 1(5) CPC cannot be directly decoded but only based on the conclusions resulting from a grammatical interpretation. Conclusions based on this type of interpretation would

---

[2] See M. Wąsek-Wiaderek, *Oddalenie wniosku dowodowego zmierzającego w sposób oczywisty do przedłużenia postępowania w polskiej procedurze karnej*, [in:] L. Leszczyński, E. Skrętowicz, Z. Hołda (eds), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, Lublin 2005, pp. 716–718.

[3] Sejm of the 4th term, Sejm print No. 182.

[4] K. Zgryzek, *Oddalenie wniosku dowodowego w nowelizacji kodeksu postępowania karnego*, [in:] M. Płachta (ed.), *Aktualne problemy prawa i procesu karnego. Księga ofiarowana Profesorowi Janowi Grajewskiemu*, Gdańskie Studia Prawnicze Vol. XI, 2003, p. 175 et seq.

make it possible to dismiss every motion lodged in the course of proceedings and not included in a complaint initiating particular proceedings if admitting it, in fact, would lead to the lengthening of the proceedings launched by this complaint. Such interpretation would result in absurdity and it can be stated with certainty that the legislator did not mean to introduce such rules. Dealing with evidentiary motions in such a way would hinder defence and thus would make a trial unfair. Therefore, the rules of functional interpretation do not allow such understanding of the content of Article 170 § 1(5) CPC.[5] Thus, as a result, a purpose-related interpretation is of key importance in determining the reasons for dismissal of an evidentiary motion intended to obstruct the proceedings.

As it has been mentioned above, *ratio legis* of Article 170 § 1(5) CPC leads to providing the court that hears a case on the merits with such tools that would make it possible to efficiently prevent procedural obstruction attempted by the parties, i.e. intentional use of procedural rights in order to prevent the trial or to slow it down.[6] In this context, the evaluation of the grounds laid down in Article 170 § 1(5) CPC in the case law and the doctrine mainly consists in an analysis of two fundamental issues: firstly, the aim of the author of the motion; secondly, the moment when it is lodged.

For the recognition of a motion as obstructive, it is necessary to prove that the author of the motion intends only to lengthen the proceedings and that this intention is unquestionable. Thus, it is necessary to objectively assess the aim of the applicant's activities. An evidentiary motion is designed to prove a precisely specified evidentiary thesis,[7] which in the applicant's opinion is to serve the explanation of a given issue. In a broader sense, also the implementation of the directive on appropriate penal response and the principle of truth should be recognised as such an aim. However, another aim, i.e. to prolong proceedings, is not accepted. It constitutes negation of the essence of an evidentiary motion. Therefore, a procedural body that dismisses an evidentiary motion on those grounds is obliged to prove that the applicant does not intend to explain significant circumstances of the case in compliance with the principle of truth and, at the same time, show the probability of the intention to lengthen the proceedings. This concerns cynical hampering a procedural body in carrying out the proceedings efficiently by misuse of procedural rights; a specific, obstructive attitude of the party to the proceedings who misuses the guaranteed rights.[8] The applicant's aim must be obvious at the same time, i.e. not raising any doubts, unquestionable, certain, recognised at first

---

[5] The Supreme Court ruling of 14 March 2007, IV KK 481/06, OSNwSK 2007, item 624.

[6] D. Szumiło-Kulczycka, [in:] S. Waltoś, J. Czapska (ed.), *Zagubiona szybkość procesu karnego. Jak ją przywrócić?*, Warszawa 2005, p. 52; the Supreme Court ruling of 14 March 2007, IV KK 481/06, OSNwSK 2007, item 624; the Supreme Court ruling of 3 April 2012, V KK 30/12, LEX No. 1163966.

[7] For more see A. Bojańczyk, *Teza dowodowa jako normatywny wyznacznik zakresu przeprowadzenia dowodu w procesie karnym o charakterze inkwizycyjnym i kontradyktoryjnym*, [in:] P. Wiliński (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa 2013, pp. 260–268, M. Błoński, *Wniosek dowodowy*, Studia Prawno-Ekonomiczne 2000, No. 2, pp. 73–96.

[8] M. Wąsek-Wiaderek, *supra* n. 2, p. 710.

glance.[9] This conclusion can be drawn indirectly from a party's conduct, especially from the fact of lodging an evidentiary motion in a particular procedural situation. A typical circumstance that is subject to evaluation in judicial judgments is the fact of lodging an evidentiary motion at the later stage of the proceedings while it was possible earlier.

The Supreme Court rightly states that an evidentiary motion may be lodged at any time, even long after an event, however, this does not mean that a moment of lodging evidentiary motions should be made exempt from a court's evaluation. However, one cannot, as the Supreme Court does, draw a conclusion from this statement that deciding to lodge an evidentiary motion at a later stage of the proceedings, one should take into account that such a fact, regardless of the merit, will be subject to evaluation.[10] Such a conclusion might result in an assumption that the moment of lodging an evidentiary motion constitutes a *sui generis* independent reason for its dismissal, regardless of the factual grounds for an evidentiary thesis and the usefulness of the given evidence. This interpretation would not only pervert the *ratio legis* of Article 170 § 1(5) CPC but would also violate the principle of truth. The provision does not concern a late motion but a motion aimed at obviously lengthening the proceedings.

Thus, a party's late evidentiary initiative may, although does not have to, indicate that the circumstance specified in Article 170 § 1(5) CPC occurs. In particular, such a circumstance, what is confirmed in practice, can occur in case of purposeful lodging of many motions just before the latest possible deadline, although there has been a procedural possibility and factual grounds for lodging them at the earlier stage of the proceedings. All those circumstances together indicate the instrumental treatment of a party's procedural rights and purposeful refraining from an evidentiary initiative only in order to use it at the final stage of a trial and lengthen it.

Thus, in general, an evidentiary motion should be lodged without delay after the occurrence of a fact that results in the necessity of examining the evidence given in the motion. Otherwise, it can be rightly stated that lodging an evidentiary motion at the later stage of a trial, in a situation when the circumstances justifying such a motion existed earlier, aims to groundlessly lengthen the trial.[11]

Therefore, if the analysis of an evidentiary motion together with the entire factual circumstances, especially the factual opportunity to lodge a motion at an earlier stage of the proceedings with no harm to the adopted defence policy, leads to unambiguous recognition that the motion aims to lengthen criminal proceedings, the application of the norm laid down in Article 170 § 1(5) CPC is not only justified but also necessary and cannot be effectively challenged by making reference to

---

[9] See, e.g. S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. III, Warszawa 2003, p. 76.

[10] The Supreme Court ruling of 17 November 2004, III KK 69/04, OSNwSK 2004, No. 1, item 2098.

[11] The Supreme Court ruling of 20 December 2016, II KK 377/16, LEX No. 2188791.

the principle of objective truth, which is not superior to the principle of fast proceedings.[12]

This is why, the lack of the earlier lodging of an evidentiary motion, although the parties were encouraged to do so, especially in the case a party is represented by a qualified lawyer, may result in dismissal of such a motion lodged in an appeal as one that obviously aims to lengthen the criminal proceedings (Article 170 § 1(5) CPC).[13]

However, what is important is not only the term of lodging an evidentiary motion but also the time of its examination. It is rightly indicated in case law that Article 170 § 1(5) CPC cannot be referred to if an evidentiary motion is lodged nine months before it is examined.[14] The proceeding body should not transfer the consequences of its own sluggishness on a party to the proceedings. Similarly, there are no grounds for referring to the above-mentioned legal provision in a situation where neither the stage of the proceedings when motions were lodged nor, in the light of the necessity of performing other formerly planned procedural activities, the potential acceptance of the given evidence might delay the end of the proceedings.[15]

The reasons for the dismissal of a motion concerning an expert opinion look a bit different. There is an established stand in case law that the provision of Article 170 § 1 CPC with regard to this type of evidence can only be applicable to the examination of the first motion to appoint experts that have not been appointed so far or to appoint an expert to present an opinion on the matter different from the one specified in the motion lodged before. However, if an evidentiary motion concerns the appointment of new experts to present opinions on the circumstances covered in the opinion already issued, its examination and thus acceptance of dismissal shall be based on Article 201 CPC and not Article 170 § 1 CPC. The former provision indicates in what situations it is possible to summon the same experts to be heard in connection with their opinions or to appoint new experts to present their opinions on the same matter. Thus, *a contrario*, if the circumstances specified in Article 201 CPC do not exist, but not in the situations specified in Article 170 § 1 CPC, such a motion will be dismissed.[16] It is a right stance. The provisions

---

[12] The Supreme Court ruling of 3 April 2012, V KK 30/12, LEX No. 1163966; D. Szumiło-Kulczycka, *supra* n. 6, pp. 211–212.

[13] The Supreme Court ruling of 3 September 2014, III KK 7/14, OSNKW 2015, No. 2, item 11.

[14] The Supreme Court judgment of 9 October 2008, V KK 135/08, OSNwSK 2008, item 1990.

[15] The Supreme Court ruling of 28 April 2016, II KK 79/15, LEX No. 2044473.

[16] The Supreme Court ruling of 17 May 2017, IV KK 133/17; judgment if the Court of Appeal in Wrocław of 3 December 2014, II AKa 292/14, LEX No. 1649351; judgment of the Court of appeal in Kraków of 4 March 1999, II AKa 29/99, KZS 1999, No. 3, item 20; the Supreme Court ruling of 7 July 2006, III KK 456/05, OSNKW 2006 No. 10, item 95; the Supreme Court judgment of 13 June 1996, IV KRN 38/96, OSNKW 1996, No. 9–10, item 56 with a critical gloss by K. Zgryzek, OSP 1997, No. 9, p. 421; the Supreme Court judgment of 13 February 1997, IV KRN 219/96, OSNKW 1997, No. 7–8, item 66; judgment of the Court of Appeal in Kraków of 24 May 2001, II AKa 58/01, OSN Prok. i Pr. 2002, No. 5, item 30; judgment of the Court of Appeal in Białystok of 25 September 2008, II AKa 119/08, OSAB 2008, No. 2–3, item 52; judgment of the Court of Appeal in Katowice of 30 September 2006, II AKa 225/08, KZS

of Article 193 CPC and Article 201 CPC determine independent circumstances for the acceptance of evidence from expert opinions and constitute special regulations (*lex specialis*) in relation to general provisions under Article 170 CPC.

On the other hand, the statement that in the situation where the reasons for challenging expert opinions laid down in Article 201 CPC do not take place a motion to appoint another expert should be recognised as one that aims to obviously lengthen the proceedings (Article 170 § 1(5) CPC) is not absolutely convincing.[17] While in the situation where the opinion is incomplete or unclear, or there is a contradiction within the same opinion or between different opinions on the same issue, the same experts can be summoned or new experts can be appointed, still it is not done, i.e. a motion is dismissed, when the opinion is complete, clear and without contradictions. The legal basis for the acceptance and dismissal of an evidentiary motion is in this case the same and excludes the application of Article 170 § 1(5) CPC. It would also be difficult in this case to use a test on the intention of the author of the motion, which is typical of the decision-taking under Article 170 § 1(5) CPC. The more so as for the purpose of accepting the evidence from other experts' opinions, it is not important whether the already obtained experts' opinions are convincing from the point of view of a party demanding a new opinion but whether the opinion is incomplete or unclear from the point of view of the proceeding body.[18]

An evidentiary motion that has been defectively drafted, even if in the proceeding body's opinion it obviously aims to lengthen the proceedings, does not meet the criteria for dismissal. The Supreme Court rightly states that if an evidentiary motion does not indicate circumstances that must be proved and regardless of a call to eliminate this deficiency until a fixed deadline it has not been done, this motion, as one that does not meet formal requirements laid down in Article 169 § 1 CPC and does not qualify for dealing with, should be left unexamined by analogy to Article 120 CPC and should not dismissed based on one of the criteria specified in Article 170 § 1 CPC.[19]

The mutual relation between Article 170 § 1(5) and other reasons for an evidentiary motion dismissal constitutes another issue. On the one hand, it is decidedly stated that the dismissal of an evidentiary motion based on Article 170

2008, No. 1, item 97; judgment of the Court of Appeal in Katowice 29 November 2017, II AKa 379/17, LEX No. 2480863.

[17] Judgment of the Court of Appeal in Katowice of 3 October 2012, II AKa 220/12, LEX No. 1236410; also see judgment of the Court of Appeal in Katowice of 17 December 1998, II AKa 253/98, Biul. SA w Katowicach 1999, No. 1, item 5.

[18] Judgment of the Court of Appeal in Kraków of 22 March 2012, II AKa 270/11, OSN Prok. i Pr. 2012, No. 12, item 25; for more, see K. Bronowska, *Teoretyczne zagadnienia kontroli i oceny opinii biegłego*, [in:] H. Kołecki (ed.), *Kryminalistyka i nauki penalne wobec przestępczości. Księga pamiątkowa dedykowana Profesorowi Mirosławowi Owocowi*, Poznań 2008, pp. 103–117; M. Całkiewicz, *Ocena dowodu z opinii biegłego przez organ procesowy w postępowaniu karnym*, Problemy Kryminalistyki No. 68, 2008, pp. 55–61; D. Drajewicz, *Ocena opinii biegłego w postępowaniu karnym*, Przegląd Sądowy No. 6, 2014, pp. 76–87; J. Gurgul, *O swobodnej ocenie opinii biegłego*, Prokuratura i Prawo No. 10, 2013, pp. 34–56.

[19] The Supreme Court ruling of 5 October 2004, II KK 121/03, OSNKW 2004, No. 10, item 97; the Supreme Court judgment of 4 February 2003, V KK 88/02, LEX No. 76992; also see M. Błoński, *supra* n. 7, p. 73 et seq.

§ 1(5) CPC may take place when there are no grounds for the dismissal based on Article 170 § 1(1)–(4) CPC. Thus, before taking a decision on the acceptance of a motion, it is first of all necessary to analyse an evidentiary motion through the prism of the statutory grounds for inadmissibility of evidence laid down in Article 170 § 1(1)–(4) CPC. Only then, if the analysis results in the recognition that an evidentiary motion cannot be dismissed on those grounds, a court that hears the case on the merits is obliged to consider whether the motion obviously aims to lengthen the proceedings or not.[20]

On the other hand, there are also more balanced opinions that the dismissal of an evidentiary motion on those grounds is most often connected with the statement that there is no possibility of referring to whichever of the other reasons for the dismissal of a motion laid down in Article 170 § 1(1)–(4) CPC.[21] Thus, the statement indicates that it is possible to accumulate grounds for the dismissal of an evidentiary motion. The opinion seems to be more convincing because it is not possible to *a priori* exclude it that the reasons for the dismissal of an evidentiary motion may overlap and that apart from an obvious aim to lengthen the proceedings, the necessity of dismissing the motion may result from other additional circumstances. The same situation may occur, e.g. when an obstructive motion at the same time aims to prove a thesis already proved in compliance with the applicant's statement (Article 170 § 1(2) CPC) or when the provision of evidence is not admissible (Article 170 § 1(1) CPC), especially if the circumstance was well-known to the applicant.

The issue of a potential concurrence of the reasons for the dismissal of an evidentiary motion is well-seen especially at the stage of an appellate proceedings. In general, the Criminal Procedure Code does not introduce temporary limitations concerning the lodging of an evidentiary motion. Theoretically, it may happen at any stage of a trial, including within the examination of the forms of the complaint. Some differences in this area are laid down in Article 427 § 3 CPC, in accordance with which the appellant can indicate new facts or evidence only if they were not able to provide them in the proceedings before the first-instance court. It is rightly indicated that the functional and systemic interpretation of this provision leads to a conclusion that in Article 427 § 3, the legislator only regulated the issue of admissibility of providing new evidence in the course of appellate proceedings. However, the appellant's right to refer to this provision as the grounds for an evidentiary motion is not included in it since the term "evidence" used in Article 167 CPC, *lege non distinguente*, covers also new evidence.[22] Thus, in the situation when the appellant was able to provide a new fact or new evidence before the first-instance court, they cannot do this in an appellate mode. Therefore, the provision indicates that the time limit for lodging evidentiary motions concerning evidentiary sources and means well-known to the party expires the moment the first-instance sentence is issued. However, in the case of the sources and means that the party did

[20] The Supreme Court ruling of 14 March 2007, IV KK 481/06, OSNwSK 2007, item 624.

[21] The Supreme Court ruling of 28 April 2016, II KK 79/15, LEX No. 2044473.

[22] D. Świecki, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 2018, p. 65; compare K. Woźniewski, *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdynia 2001, p. 136.

not know, an evidentiary motion can be lodged in the appellate measure as well as in the form of an independent evidentiary motion lodged later.[23]

The construction laid down in Article 427 § 3 CPC is also important in the context of the grounds for potential dismissal of such an evidentiary motion. If the provision imposes on the applicant an obligation to prove that they could not provide new facts or evidence during the first-instance court proceedings, the circumstances should be recognised as an additional requirement for the acceptance of an evidentiary motion. Failure to meet it results in the dismissal of an evidentiary motion as inadmissible by virtue of the statute (Article 170 § 1(1) CPC). Only after the procedural verification whether the requirements for the acceptance of evidence that are laid down in Article 427 § 3 CPC in conjunction with Article 170 § 1(1) CPC, can it be considered whether the motion aims to lengthen the proceedings. As it has been mentioned above, it is not possible to exclude it that the motion is not only inadmissible but also obstructive.

The possibility of an evidentiary motion dismissal based on Article 452 § 2 CPC also demonstrates certain specificity. It is possible to give up taking evidence in a situation when taking evidence by an appellate court is purposeless because of the reasons specified in Article 437 § 2 second sentence CPC. The latter provision lays down three bases for overruling a judgment and referring a case for rehearing. This concerns: strict appellate reasons under Article 439 § 1 CPC; *ne peius* rules determined in Article 454 §§ 1 and 3 CPC and the necessity of conducting the trial again from scratch. In the context of Article 452 § 2 CPC, each of those bases precludes adjudicating in the second instance, which can indicate purposelessness of taking evidence by an appellate court. The reason for a discussed evidentiary motion dismissal is formal in nature and is connected with the economics of trials. It is purposeless to take evidence if, regardless of its content, there are grounds for overruling a judgment and referring a case for rehearing. This basis does not concern the factual grounds for a motion. There may be grounds for taking evidence, however, it will take place at the stage of the appellate proceedings as the case will be reheard for other reasons.

As a result, it is necessary to share the opinion that Article 452 § 2 CPC constitutes an additional basis for an evidentiary motion dismissal concerning only appellate proceedings. On the other hand, Article 170 § 1 CPC contains general grounds for an evidentiary motion dismissal. As a general provision, it is also applicable in appellate proceedings. Therefore, at the stage of appellate proceedings, Article 452 § 2 supplements grounds for an evidentiary motion dismissal indicated in Article 170 § 1 CPC.[24] Thus, if an appellate court states that there is a reason for an evidentiary motion dismissal laid down in Article 452 § 2 CPC, there is no need to evaluate whether an evidentiary motion is also obstructive.

---

[23] D. Świecki, *supra* n. 22, p. 68; compare S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej w świetle nowelizacji kodeksu postępowania karnego*, Prokuratura i Prawo No. 1–2, 2015, p. 155 et seq.

[24] D. Świecki, *supra* n. 22, p. 332.

3. PROCEEDING IN CASE OF AN EVIDENTIARY MOTION THAT IS OBSTRUCTIVE

The acceptance of an evidentiary motion is a decision that, as favourable to the applicant, does not require in-depth justification, and in some cases even the form of a decision. It takes place if the other party does not raise an objection to the motion (Article 368 CPC). The issue of an evidentiary motion dismissal is more complex. It takes the form of a formalised procedural decision containing: the indication of a body, person or persons that issued the decision (Article 94 § 1(1) CPC); date of issue (Article 94 § 1(2) CPC); the indication of a perpetrator and the subject-matter concerned (Article 94 § 1(3) CPC); the adjudication and its legal grounds (Article 94 § 4(1) CPC) and justification (Article 94 § 1(5) CPC).[25]

Apart from just the decision concerning an evidentiary motion, the justification is its immanent element. The Criminal Procedure Code does not thoroughly specify the requirements that the motives part of the decision must meet and leaves the issue to be determined by the doctrine and the judicature. In case law, the issue of maintaining an appropriate level of substantive justification is noticed and standards in this area were established in numerous judgments. Inter alia, it is stated that the justification of the decision should, as in the case of the justification of a judgment, fulfil at least a minimum persuasive function, i.e. enunciate the reasons for the decision so that the parties can be convinced that it is right, and a control function, i.e. provide the appellate body with the bases for checking its rightness.[26] It is also rightly argued that the justification cannot be laconic and general meaning that it cannot use brief arbitrary mentions that simulate justification.[27] It also cannot be limited to the quotation of the content of the legal provisions that are grounds for the use of a given measure with no indication of factual evidence collected in the case;[28] it is absolutely necessary to comprehensively explain the legal and factual grounds for the decision.[29] There are even opinions expressed that the requirements applicable to the justification should by analogy be the same as those that must be

---

[25] For more, see S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2013, p. 343 et seq.

[26] Ruling of the Court of Appeal in Kraków of 21 June 2000, II AKz 219/00, KZS 2000, No. 6, item 17; similarly in the ruling of the Court of Appeal in Kraków of 3 July 2002, II AKz 245/02, KZS 2002, No. 7–8, item 48; also see K. Woźniewski, *Prawidłowość czynności procesowych w polskim procesie karnym*, Gdańsk 2010, p. 113.

[27] Ruling of the Court of Appeal in Kraków of 3 July 2002, II AKz 245/02, KZS 2002, No. 7–8, item 48; the Supreme Court ruling of 7 October 2003, V KK 65/03, OSNwSK 2003, item 2115; also see the Supreme Court judgment of 4 July 1974, III KRN 33/74, OSNKW 1974, No. 11, item 201; the Supreme Court judgment of 11 March 1993, III KRN 21/93, OSNKW 1993, No. 5–6, item 34; the Supreme Court ruling of 29 July 1997, II KKN 313/97, OSNKW 1997, No. 9–10, item 85.

[28] The Supreme Court ruling of 15 October 1996, II KZ 78/96, OSNKW 1996, No. 11–12, item 84 with a gloss by T. Grzegorczyk, Palestra No. 7–8, 1997, p. 202; and commentaries by Z. Doda and J. Grajewski, Przegląd Sądowy No. 11–12, 1997, p. 94.

[29] See the Supreme Court judgment of 26 June 2003, III KK 65/02, OSNwSK 2003, item 1376; the Supreme Court ruling of 5 October 2005, II KK 139/05, OSN 2005, No. 1, item 844.

met in case of a judgment justification determined in Article 424 § 1 CPC,[30] because considering its essence, the justification should present all important reasons that a decision-making body has taken into account.[31] On the other hand, it is also rightly noticed that decisions resolve many issues that are varied in nature, thus it is not sensible to construct general requirements for justifying every decision. Therefore, the content of the decision should depend on its subject-matter.[32]

There should be no doubts, however, that the dismissal of an evidentiary motion constitutes a very important procedural decision that, in fact, is a concession to the inquisitorial system. It is due to the fact that it limits the parties' evidentiary initiative, which at the same time is the major manifestation of an adversarial trial but also the main correlate of the right to defence. This is why, the right to get to know a complete stand of the procedural body with respect to the evaluation of an obstructive evidentiary motion constitutes the manifestation of a fair trial.

Thus, it is not only necessary to refer to a particular item of Article 170 § 1 CPC but also to explain the approach to the circumstance specified in it. The content of the justification should explain why, in the opinion of the procedural body, an evidentiary motion in an obvious way aims to lengthen the proceedings. The reasoning should be based on factual argumentation indicating real causes of the decision taken. As it has been mentioned above, just the conclusion that a motion obviously aims to lengthen the proceedings in the case does not meet the requirements[33] because the motives behind the decision must be explained and not the content of the legal grounds quoted. Such simplification not only makes it difficult for a party to get to know the stand of the procedural body and does not comply with properly interpreted obligation to justify decisions, but also prevents an appellate court from checking the appropriateness of the first instance-court adjudication.[34] At the same time, it is necessary to explain not only the fact that a motion aims to lengthen the proceedings but also that it is obvious, and thus

---

[30] Ruling of the Court of Appeal in Kraków of 3 July 2002, II AKz 245/02, KZS 2002, No. 7–8, item 48.

[31] The Supreme Court ruling of 15 February 2001, III KKN 595/00, LEX No. 51949; also see the Supreme Court ruling of 15 February 2001, III KKN 595/00, OSNPK 2001, No. 7–8, item 5, ruling of the Court of Appeal in Kraków of 21 June 2000, II AKz 219/00, KZS 2001, No. 6, item 17; the Supreme Court judgment of 9 February 2006, III KK 1/05, LEX No. 176048; the Supreme Court ruling of 9 February 2005, II KZ 86/04, LEX No. 146188.

[32] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2011, p. 647; this is a fully justified opinion because, e.g. the justification of a decision to end investigation is totally different from the justification of a decision to apply a penalty of imprisonment.

[33] The Supreme Court judgment of 21 November 2007, V Kk 222/07, LEX No. 351203; judgment of the Court of Appeal in Katowice of 21 November 2014, II AKa 304/14, KZS 2015, No. 5, item 100, II AKa 7/13; judgment of the Court of Appeal in Rzeszów of 21 February 2013, LEX No. 1280995; judgment of the Court of Appeal in Gdańsk of 14 December 2011, II AKa 368/11, Przegląd Orzecznictwa Sądu Apelacyjnego w Gdańsku No. 3, 2012, pp. 141–143; the Supreme Court judgment of 4 February 2003, V KK 88/02, LEX No. 76992.

[34] Judgment of the Court of Appeal in Wrocław of 24 April 2013, II AKa 106/13, LEX No. 133466; the Supreme Court judgment of 27 July 1977, V KR 84/77, OSNKW 1978, No. 1, item 11.

does not raise any doubts, i.e. it is unquestionable. It cannot be a stand based on the procedural body's supposition or intuition.

It is rightly noticed in case law that aggregate treatment of all evidentiary motions and at the same time stating that "the collected evidence is complete and sufficient for the court to take a decision in the case and performing further activities will not have influence on the court's decision concerning the evaluation of the collected evidence but only lead to unjustified lengthiness" manifests the violation by the court of the norm of Article 170 § 2 CPC. Dismissing motions in this way, especially justifying the decision, still before the end of the evidentiary proceedings, and adjudicating, the court expresses its conviction that the accused is guilty, which is based on the evidence taken so far.[35]

The justification is made in writing together with the decision (Article 98 § 1 CPC). In a complicated case or for other important reasons, the development of the justification can be postponed for up to seven days (Article 98 § 2 CPC). Such a situation should rather not take place in the case of an evidentiary motion dismissal. A potential use of such a possibility results in the necessity of presenting the most important reasons for the decision orally (Article 100 § 6 CPC) and an obligation to deliver the decision with the justification after it is developed (Article 100 § 4 CPC). One must fully agree with the opinion that the justification of the decision issued in accordance with Article 170 § 1 CPC and not the justification of the judgment is the place appropriate for indicating the reasons for an evidentiary motion dismissal.[36]

The issue concerning the procedural consequences of the violation consisting in the omission of an evidentiary motion lodged by a party by a procedural body constitutes another issue. Undoubtedly, failure to present a formal stance on it constitutes a breach of Article 170 § 3 CPC. However, the evaluation of the consequences of such a violation requires individual analysis of the circumstances of a particular case. In general, the infringement does not automatically justify the dismissal or change of the judgment appealed against. This is so because it can take place only when the contempt of the procedural provisions can have impact on the content of the judgment, which unambiguously results from Article 438(2) CPC.[37] However, the right opinion that prevails in case law is that omitting a lodged evidentiary motion, failing to include the opinion of the evidence in the minutes of the trial or the justification of the judgment, a court commits a flagrant infringement of the provisions of the procedural law under Articles 167 and 170 CPC, which can have a significant influence on the content of the judgment.[38] It is due to the fact that it does not allow evaluation of the appropriateness of a court decision and should result in overruling of the judgment appealed against and referring the case for rehearing.

---

[35] Judgment of the Court of Appeal in Katowice of 27 September 2012, II AKa 328/12, LEX No. 1258299.

[36] The Supreme Court ruling of 16 March 2017, IV KK 57/17, OSN Prok. i Pr. 2017, No. 5, item 9; the Supreme Court judgment of 9 September 2011, IV KK 37/11, LEX No. 1027187; the Supreme Court ruling of 25 June 2009, V KK 35/09, LEX No. 512077; the Supreme Court judgment of 5 October 2010, III KK 61/10, LEX No. 610173.

[37] The Supreme Court judgment of 12 September 2003, SNO 54/03, LEX No. 471888.

[38] The Supreme Court judgment of16 February 2001, IV KKN 609/00, LEX No. 553852; the Supreme Court ruling of 26 June 2003, III KK 65/02, LEX No. 78833.

A procedural decision concerning an evidentiary motion lodged in the appellate proceedings can be replaced with neither a detailed analysis of the evidence referred to in the motion in the written justification of the judgment appealed against nor the inclusion of the mention in those motives, which are to validate the lack of a decision specified in Article 170 § 3 CPC, together with reference to one of the reasons enumerated in Article 170 § 1(1)–(5) CPC.[39] In case of failure to indicate legal grounds for the decision to dismiss an evidentiary motion of a party (especially the accused) and to provide justification of such a decision, it is necessary to act similarly.[40]

An evidentiary motion constitutes a declaration of will of a party to the criminal proceedings and as such can be withdrawn. However, taking into account the procedural body's right to take evidence *ex officio* and its obligation to explain all important circumstances of the case (Article 366 § 1 CPC), the withdrawal of the motion does not bind the court, especially when it has already accepted the motion.[41] It is obvious that the acceptance of evidence does not oblige one to take it. A court may change its stand if it decides that the evidence is useless.[42] The provisions of criminal procedure do not specify the seeming form of an evidentiary motion withdrawal, thus it should be in writing or pronounced orally and recorded in the minutes.[43]

4. DISMISSAL OF AN OBSTRUCTIVE EVIDENTIARY MOTION VERSUS A PROCEDURAL LAW MISUSE CLAUSE

The issue of the dismissal of an evidentiary motion that obviously aims to lengthen the proceedings is strictly connected with the issue of procedural law misuse. Like other detailed regulations that the legislator successively introduces in order to prevent the phenomenon of procedural obstruction, the admission of the possibility of a motion dismissal in accordance with Article 170 § 1(5) CPC is a response to the undesired practice that has developed when using the evidentiary initiative, especially by the passive party, thus its formal entitlements.

It is typical that the legislator resolves the problem selectively reacting *ad hoc* to the phenomenon of misusing the rights. For example, inter alia, the following provisions are anti-obstructive in nature:

– Article 41a CPC, which allows leaving unheard a motion to exclude a judge based on the same factual grounds as under the motion heard earlier;
– Article 81 § 1b CPC, in accordance with which a successive motion to appoint a counsel for defence based on the same circumstances is left unheard;
– Article 117 § 2a CPC, under which the justification of failure to appear because of sickness requires that a certificate issued by a court physician should be submitted;

---

[39] The Supreme Court judgment of 4 May 2005, III KK 227/04, LEX No. 151676.

[40] The Supreme Court judgment of 8 January 2003, WK 42/02, OSNKWSK 2003, item 40.

[41] The Supreme Court judgment of 25 October 1982, Rw 901/82, OSNKW 1983, No. 3, item 24; also see the Supreme Court ruling of 25 March 2003, III KKN 113/01, LEX No. 77026.

[42] See the Supreme Court judgment of 3 October 2008, III KK 121/08, OSNKW 2008, No. 12, item 101.

[43] The Supreme Court judgment of 5 October 2010, III KK 61/10, LEX No. 610173.

- Article 117a CPC, which allows conducting procedural activities in the case at least one of the counsels for defence or proxies appears or conducting those activities in their absence;
- Article 254 § 2 CPC, which limits the possibility of appealing against decisions concerning the dismissal or change of a preventive measure;
- Article 263 § 4 CPC, which allows prolonging the application of remand over the period laid down in Article 263 §§ 2 and 3 CPC, due to intentional lengthening of the proceedings by the accused;
- Article 263 § 4b CPC, which excludes limitations of prolonging remand, due to the realistic expected penalty in a situation when the necessity of such prolongation is caused by purposeful lengthening of the proceedings by the accused;
- Article 353 § 5 CPC, which allows leaving unheard a motion to bring the arrested accused to court and a motion to appoint a counsel for defence *ex officio* in a situation when it would necessitate a change of the date of the hearing or session;
- Article 376, Article 377 CPC, which allow conducting a trial in the absence of the accused;
- Article 378 CPC, which allows continuing the proceedings with the participation of the original counsel in the case of dissolution of the defence agreement;[44]
- Article 404 §§ 2 and 3 CPC, under which a decision on the continuation of the adjourned hearing and the hearing started after the proceedings have been suspended is left to a court's discretion;
- Article 451 CPC, which excludes the necessity of hearing a motion to bring the arrested accused to court to take part in appellate proceedings, provided it has been lodged after the deadline when this results in the necessity of adjourning the hearing;
- Article 545 § 3 CPC, which allows refusing to accept a motion that is not lodged by the entitled person without calling to eliminate formal defects if the content of the motion indicates its obvious groundlessness.

Also general provisions serve the prevention of misusing procedural rights. This nature is rightly attributed in the doctrine to Article 366 § 1 CPC, due to the leading role of the presiding judge who is obliged by the provision to safeguard the appropriate course of the trial.[45] Article 372 is interpreted similarly and it is stated that since it is possible to issue various orders to maintain peace and order in the courtroom (Article 372 CPC), it is also possible to issue ones that constitute a response to the misuse of procedural law (e.g. when making an oral statement, during a final speech, etc.).[46]

---

[44] For more on the issue of the evolution of this provision, see M. Wąsek-Wiaderek, *Przeciwdziałanie nadużyciu uprawnień procesowych w polskiej procedurze karnej – wybrane zagadnienia*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (eds), *Interpretacja prawa międzynarodowego w sprawach karnych. Konferencja Sędziów Izby Karnej i Izby Wojskowej Sądu Najwyższego*, Jachranka 2006, pp. 74–77.

[45] Thus, e.g. R.A. Stefański, [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 2004, p. 784; H. Kempisty, *Metodyka pracy sędziego w sprawach karnych*, Warszawa 1986, p. 154.

[46] Thus S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2013, p. 516; S. Stachowiak, *Przemówienia stron na rozprawie w kolegium pierwszej instancji*, Zagadnienia

The common denominator of the mentioned provisions is necessary prevention of the symptoms of procedural law misuse in practice. It is rightly noticed that, while before 1997 the successive amendments to the criminal procedure law had aimed to adjust this law to the standards of human rights and to increase the possibility of combating organised crime, after that year they aimed first of all to prevent the occurring lengthiness of a trial.[47] This, on the other hand, as it has been mentioned above, to a great extent depends on the way of exercising the procedural rights by the parties to the proceedings. Thus, the need to eliminate procedural obstruction is becoming the problem that is as current as the necessity of making the proceeding more efficient and less formal.

In the same way as it is not possible to challenge the general theoretical concept of law misuse that has a multi-century tradition (*summum ius, summa iniuria*), it is difficult to find its general basis in the provisions of the Criminal Procedure Code. At the same time, it does not seem, even in the case of the holistic approach to the system of law, that a procedural law misuse clause can be drawn from Article 5 of the Civil Code.[48] This is a solution that is too distant to be applicable to the criminal procedure. It is especially hard to apply the social-economic criterion of the purpose of law or the rules of social coexistence to the evaluation of the sphere of procedural rights in criminal proceedings. Although formulating the aims of criminal procedure the legislator refers to the rules of social coexistence (Article 2 § 1(2) CPC), which might suggest grounds for that thesis and the universal nature of Article 5 Civil Code, it is done in a totally different context.[49]

However, referring to other fields, it is worth noticing that the concept of law misuse is also known to the civil procedure law. It is present first of all in Article 3 of the Code of Civil Procedure (henceforth CCP), which obliges the parties to and participants of the proceedings to perform procedural activities in compliance with good manners as well as, indirectly, rules laid down in the provisions of the Code of Civil Procedure.[50] It is assumed in case law that Article 3 CCP regulates the issue of law misuse in a complex way.[51] It is also stated that the court's assumption that

---

Wykroczeń No. 4–5, 1983, p. 20; also see A. Bojańczyk, T. Razowski, *Glosa do wyroku Sądu Apelacyjnego we Wrocławiu z 6 kwietnia 2005 r., II AKa 32/05*, CzPKiNP 2006, No. 2, p. 259; P.K. Sowiński, *Ostatnie słowo oskarżonego (art. 406 k.p.k.)*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010, p. 680; R.A. Stefański, *supra* n. 45, p. 784; H. Kempisty, *supra* n. 45, p. 154.

[47] S. Waltoś, *O obstrukcji procesowej, czyli kilka uwag o nadużyciu prawa procesowego*, [in:] L. Leszczyński, E. Skrętowicz, Z. Hołda (eds), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, Lublin 2005, p. 623.

[48] *Ibid*.

[49] See J. Kosonoga, [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postepowania karnego. Komentarz*, Vol. I, Warszawa 2017, pp. 54–55; also compare the Supreme Court ruling of 14 March 2000, II CKN 483/00, LEX No. 52550; the Supreme Court resolution of 19 May 2006, III CZ 28/2006, LEX No. 188379; judgment of the Court of Appeal in Katowice of 26 May 2006, I ACa 2191/05, LEX No. 196074; A. Łazarska, *Rzetelny proces cywilny*, Warszawa 2012, p. 547.

[50] Also see, e.g. Articles: 103 § 1–2, 155 § 2, 120 § 4, 214 § 2, 207 § 6, 217 § 2 in conjunction with Article 6 § 2 and Article 217 § 3 and Articles 252–253 in conjunction with Articles 255 and 381 CCP.

[51] The Supreme Court resolution of 11 December 2013, III CZP 78/13, OSNC 2014, No. 9, item 87; the Supreme Court ruling of 16 June 2016, V CSK 649/15, OSNC 2017, No. 3, item 37.

the exercise of a procedural entitlement by a party to the proceedings constitutes the misuse of procedural rights may take place only based of an in-depth evaluation of the circumstances of the case, which fully justifies the finding that a party's activity is motivated by an unfair aim, especially an intention to hamper or lengthen the proceedings, which can be done by the comparison of the aim of the procedural entitlement with the significance of using it in a particular way.[52] A similar stance is presented in the doctrine.[53] It results from the fact that deceitful conduct (*fraus*) is the opposite side of the principle of objective truth.[54]

Thus, possibly following the model of regulations in the Code of Civil Procedure, instead of being limited to individual normative solutions serving the prevention of misusing procedural rights, it would be more appropriate to solve this complex problem by introducing a standard general clause. Refraining from general theoretical considerations concerning misuse of law, especially its limits, one can assume that it takes place when exercising procedural rights for purposes different from those for which they were designed.[55] In order to determine this, it is necessary to carry out the misuse test, which, generally speaking, consists in the comparison of the aim that the party to the proceedings has with the aim laid down in statute. The clash of those aims will mean the misuse, which should result in the loss of the right. Giving a procedural body the possibility of evaluating each activity of a party to the proceedings in the context of obstructive conduct would make it possible to regulate the issue comprehensively and thus it would *in genere* prevent the symptoms of the procedural obstruction.

Due to the fact that the misuse of procedural law most often takes place at the stage of court proceedings, especially at the main trial, the proposed solution might be classified in Chapter 43 CPC and, on the one hand, introduce the obligation to perform procedural activities pursuant to their aim and function[56] and, on the

---

[52] Compare the Supreme Court judgment of 25 March 2015, II CSK 443/14, LEX No. 1730599. The Supreme Court took the same stance in its ruling of 16 June 2016, V CSK 649/15, LEX No. 2072198, the ruling of 21 July 2015, III UZ 3/15, LEX No. 1925809, and the resolution of 11 December 2013, III CZP 78/13, OSP 2017, No. 6, item 60.

[53] A. Marciniak, [in:] A. Marciniak, K. Piasecki (eds), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2016, p. 76; J. Bodio, [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Komentarz do art. 1–729*, Vol. I, Warszawa 2017, pp. 42–43; K. Piasecki, *Nadużycie praw procesowych przez strony*, Palestra No. 11, 1960, p. 20 et seq.

[54] T. Ereciński, [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze*, Vol. I, Warszawa 2016, p. 165 et seq.; P. Błaszczak, *Klauzula generalna „dobrych obyczajów" z art. 3 k.p.c.*, Polski Proces Cywilny No. 2, 2014, p. 196; also see A. Łazarska, *supra* n. 49, p. 544.

[55] M. Niemöller, *Nadużycie prawa w procesie karnym*, Prokuratura i Prawo No. 9, 2002, p. 98; for more, see M. Warchoł, *Pojęcie „nadużycia prawa" w polskim procesie karnym*, Prokuratura i Prawo No. 11, 2007, p. 48 et seq.; M. Wąsek-Wiaderek, *supra* n. 44, p. 65 et seq.; S. Waltoś, *Pragmatyzm i antypragmatyzm w procedurze karnej*, [in:] T. Nowak (ed.), *Nowe prawo karne procesowe. Księga ku czci Profesora Wiesława Daszkiewicza*, Poznań 1999, p. 51 et seq.; based on civil law, compare inter alia K. Osajda, *Nadużycie prawa w procesie cywilnym*, Przegląd Sądowy No. 5, 2005, p. 47 et seq.; T. Cytowski, *Procesowe nadużycie prawa*, Przegląd Sądowy No. 5, 2005, p. 81 et seq.

[56] Compare the Supreme Court resolution of 11 December 2013, III CZP 78/13, OSNC 2014, No. 9, item 87 with a gloss by A. Łazarska, OSP 2017, No. 6, item 60; the Supreme Court ruling of 16 June 2016, V CSK 649/15 OSNC 2017, No. 3, item 37; for more also see A. Szpunar, *Nadużycie*

other hand, grant a court the right to deprive a party of the entitlement in case of its misuse. Such a solution would also match the general axiological assumption, in accordance with which an autonomous and independent court decides about the most important interference into the sphere of rights, freedoms and procedural guarantees.

BIBLIOGRAPHY

Błaszczak P., *Klauzula generalna „dobrych obyczajów" z art. 3 k.p.c.*, Polski Proces Cywilny No. 2, 2014.

Błoński M., *Wniosek dowodowy*, Studia Prawno-Ekonomiczne No. 62, 2000.

Bodio J., [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Komentarz do art. 1–729*, Vol. I, Warszawa 2017.

Bojańczyk A., *Teza dowodowa jako normatywny wyznacznik zakresu przeprowadzenia dowodu w procesie karnym o charakterze inkwizycyjnym i kontradyktoryjnym*, [in:] P. Wiliński (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa 2013.

Bojańczyk A., Razowski T., *Glosa do wyroku Sądu Apelacyjnego we Wrocławiu z 6 kwietnia 2005 r., II AKa 32/05*, CzPKiNP No. 2, 2006.

Bronowska K., *Teoretyczne zagadnienia kontroli i oceny opinii biegłego*, [in:] H. Kołecki (ed.), *Kryminalistyka i nauki penalne wobec przestępczości. Księga pamiątkowa dedykowana Profesorowi Mirosławowi Owocowi*, Poznań 2008.

Całkiewicz M., *Ocena dowodu z opinii biegłego przez organ procesowy w postępowaniu karnym*, Problemy Kryminalistyki No. 68, 2008.

Cieślak M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1984.

Cytowski T., *Procesowe nadużycie prawa*, Przegląd Sądowy No. 5, 2005.

Doda Z., Grajewski J., *Uwagi do postanowienia SN z 15 października 1996 r.*, II KZ 78/96, Przegląd Sądowy No. 11–12, 1997.

Dolecki H., *Nadużycie prawa do sądu*, [in:] J. Góral, R. Hauser, J. Trzciński (eds), *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005*, Warszawa 2005.

Drajewicz D., *Ocena opinii biegłego w postępowaniu karnym*, Przegląd Sądowy No. 6, 2014.

Dubisz S. (ed.), *Uniwersalny słownik języka polskiego*, Vol. III, Warszawa 2003.

Ereciński T., [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze*, Vol. I, Warszawa 2016.

Grzegorczyk T., *Glosa do postanowienia SN z 15 października 1996 r., II KZ 78/96*, Palestra No. 7–8, 1997.

Gurgul J., *O swobodnej ocenie opinii biegłego*, Prokuratura i Prawo No. 10, 2013.

---

prawa podmiotowego, Kraków 1947, p. 25 et seq.; T. Justyński, *Nadużycie prawa w polskim prawie cywilnym*, Kraków 2000, p. 63 et seq.; F. Longchamps de Berier, *Nadużycie prawa u początków problemu*, [in:] H. Izdebski, A. Stępkowski (eds), *Nadużycie prawa. Konferencja Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 1 marca 2002*, Warszawa 2003, p. 45 et seq.; K. Osajda, *supra* n. 55, p. 69 et seq.; K. Piasecki, *supra* n. 53, p. 24 et seq; L. Leszczyński, *Nadużycie prawa – teoretycznoprawny kontekst aksjologii luzu decyzyjnego*, [in:] H. Izdebski, A. Stępkowski (eds), *Nadużycie prawa*, Warszawa 2003, p. 25; P. Przybysz, *Nadużycie prawa w prawie administracyjnym*, [in:] H. Izdebski, A. Stępkowski (eds), *ibid.*, p. 187 et seq.; H. Dolecki, *Nadużycie prawa do sądu*, [in:] J. Góral, R. Hauser, J. Trzciński, (eds), *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005*, Warszawa 2005, p. 130 et seq.

Hofmański P., Sadzik E., Zgryzek K., *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2011.

Justyński T., *Nadużycie prawa w polskim prawie cywilnym*, Kraków 2000.

Kempisty H., *Metodyka pracy sędziego w sprawach karnych*, Warszawa 1986.

Kosonoga J., [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postepowania karnego. Komentarz*, Vol. I, Warszawa 2017.

Leszczyński, *Nadużycie prawa – teoretycznoprawny kontekst aksjologii luzu decyzyjnego*, [in:] H. Izdebski, A. Stępkowski (eds), *Nadużycie prawa*, Warszawa 2003.

Longchamps de Berier F., *Nadużycie prawa u początków problemu*, [in:] H. Izdebski, A. Stępkowski (eds), *Nadużycie prawa. Konferencja Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 1 marca 2002*, Warszawa 2003.

Łazarska A., *Rzetelny proces cywilny*, Warszawa 2012.

Łazarska A., *Glosa do uchwały SN z 11 grudnia 2013 r. III CZP 78/13*, Orzecznictwo Sądów Polskich 2017, No. 6, item 60.

Marciniak A., [in:] A. Marciniak, K. Piasecki (eds), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2016.

Niemöller M., *Nadużycie prawa w procesie karnym*, Prokuratura i Prawo No. 9, 2002.

Osajda K., *Nadużycie prawa w procesie cywilnym*, Przegląd Sądowy No. 5, 2005.

Piasecki K., *Nadużycie praw procesowych przez strony*, Palestra No. 11, 1960.

Przybysz P., *Nadużycie prawa w prawie administracyjnym*, [in:] H. Izdebski, A. Stępkowski (eds), *Nadużycie prawa*, Warszawa 2003.

Sowiński P.K., *Ostatnie słowo oskarżonego (art. 406 k.p.k.)*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010.

Stachowiak S., *Przemówienia stron na rozprawie w kolegium pierwszej instancji*, Zagadnienia Wykroczeń No. 4–5, 1983.

Stefański R.A., [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 2004.

Steinborn S., [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2013.

Steinborn S., *Postępowanie dowodowe w instancji apelacyjnej w świetle nowelizacji kodeksu postępowania karnego*, Prokuratura i Prawo No. 1–2, 2015.

Szpunar A., *Nadużycie prawa podmiotowego*, Kraków 1947.

Szumiło-Kulczycka D., [in:] S. Waltoś, J. Czapska (eds), *Zagubiona szybkość procesu karnego. Jak ją przywrócić?*, Warszawa 2005.

Świecki D., [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 2018.

Waltoś S., *Pragmatyzm i antypragmatyzm w procedurze karnej*, [in:] T. Nowak (ed.), *Nowe prawo karne procesowe. Księga ku czci Profesora Wiesława Daszkiewicza*, Poznań 1999.

Waltoś S., *O obstrukcji procesowej, czyli kilka uwag o nadużyciu prawa procesowego*, [in:] L. Leszczyński, E. Skrętowicz, Z. Hołda (eds), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, Lublin 2005.

Waltoś S., Hofmański P., *Proces karny. Zarys systemu*, Warszawa 2013.

Warchoł M., *Pojęcie „nadużycia prawa" w polskim procesie karnym*, Prokuratura i Prawo No. 11, 2007.

Wąsek-Wiaderek M., *Oddalenie wniosku dowodowego zmierzającego w sposób oczywisty do przedłużenia postępowania w polskiej procedurze karnej*, [in:] L. Leszczyński, E. Skrętowicz, Z. Hołda (eds), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, Lublin 2005.

Wąsek-Wiaderek M., *Przeciwdziałanie nadużyciu uprawnień procesowych w polskiej procedurze karnej – wybrane zagadnienia*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (eds), *Interpretacja prawa międzynarodowego w sprawach karnych. Konferencja Sędziów Izby Karnej i Izby Wojskowej Sądu Najwyższego*, Jachranka 2006.

Woźniewski K., *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdynia 2001.

Woźniewski K., *Prawidłowość czynności procesowych w polskim procesie karnym*, Gdańsk 2010.

Zgryzek K., *Glosa do wyroku SN z 13 czerwca 1996 r., IV KRN 38/96*, Orzecznictwo Sądów Polskich No. 9, 1997.

Zgryzek K., *Oddalenie wniosku dowodowego w nowelizacji kodeksu postępowania karnego*, [in:] M. Płachta (ed.), *Aktualne problemy prawa i procesu karnego. Księga ofiarowana Profesorowi Janowi Grajewskiemu*, Gdańskie Studia Prawnicze Vol. XI, 2003.

DISMISSAL OF AN OBSTRUCTIVE EVIDENTIARY MOTION

Summary

The article discusses the issue of the dismissal of an obstructive evidentiary motion that is aimed at lengthening of proceedings (Article 170 § 1(5) CPC). The author analyses the scope of this circumstance and its relation to other grounds for refusal to accept an evidentiary motion. Other considerations focus on the procedure concerning an obstructive evidentiary motion, in particular the issue of appropriate substantiation of a procedural decision. The author also discusses general issues of misusing procedural rights directly related to the main topic.

Keywords: evidentiary proceedings, evidentiary motion, misuse of procedural rights, procedural obstruction

ODDALENIE OBSTRUKCYJNEGO WNIOSKU DOWODOWEGO

Streszczenie

W opracowaniu poruszono problematykę oddalenia wniosku dowodowego zmierzającego w sposób oczywisty do przedłużenia postępowania (art. 170 § 1 pkt 5 k.p.k.). Analizie poddano zakres przedmiotowy tej przesłanki, a także jej relację do pozostałych podstaw nieuwzględnienia wniosku dowodowego. Odrębne rozważania poświęcono postępowaniu w przedmiocie obstrukcyjnego wniosku dowodowego ze szczególnym uwzględnieniem problematyki odpowiedniego uzasadnienia decyzji procesowej. Poruszono również ogólne zagadnienie nadużycia praw procesowych, z którym bezpośrednio wiąże się tytułowa problematyka.

Słowa kluczowe: postępowanie dowodowe, wniosek dowodowy, nadużycie praw procesowych, obstrukcja procesowa

DESESTIMACIÓN DE LA SOLICITUD DE PRUEBA OBSTRUCTIVA

Resumen

El artículo trata de la problemática de desestimación de solicitud de prueba que de forma evidente tiende a prorrogar el proceso (art. 170 § 1 punto 5 del código de procedimiento penal). Se analiza el ámbito objetivo de este requisito, así como su relación con otros fundamentos de desestimación de solicitud de prueba. Se dedica parte del artículo al procedimiento sobre la solicitud de prueba obstructiva considerando en particular la problemática de fundamentar la decisión procesal. Se menciona también el abuso de derechos procesales, con los cuales está relacionada directamente la prueba obstructiva.

Palabras claves: procedimiento probatorio, solicitud de prueba, abuso de derechos procesales, obstrucción procesal

ОТКАЗ В УДОВЛЕТВОРЕНИИ ХОДАТАЙСТВА О ПРИОБЩЕНИИ ДОКАЗАТЕЛЬСТВА, НАЦЕЛЕННОГО НА ВОСПРЕПЯТСТВОВАНИЕ ПРОЦЕССУ

Резюме

В работе обсуждается проблематика, связанная с отказом в удовлетворении ходатайства о приобщении доказательства, очевидным образом направленного на затягивание процесса (ст. 170 § 1 п. 5 УПК). Анализ охватывает предметное содержание данной отрицательной предпосылки, а также ее связь с другими основаниями для отклонения ходатайства о приобщении доказательства. Отдельное место посвящено разбирательству, касающемуся ходатайства о приобщении доказательства, нацеленного на воспрепятствование процессу. При этом особое внимание уделено вопросу надлежащего обоснования процессуального решения. В связи с рассматриваемой проблематикой затронуты также общие вопросы злоупотребления процессуальными правами.

Ключевые слова: рассмотрение доказательств, ходатайство о приобщении доказательства, злоупотребление процессуальными правами, воспрепятствование процессу

DIE ABWEISUNG OBSTRUKTIVER BEWEISANTRÄGE

Zusammenfassung

Die Studie befasst sich mit der Frage der Abweisung eines Beweisantrags, der offensichtlich darauf abzielt, das Verfahren in die Länge zu ziehen (Artikel 170 Absatz 1 Nummer 5 der polnischen Strafprozessordnung). Eine Analyse unterzogen werden der sachliche Geltungsbereich dieses Kriteriums sowie sein Verhältnis zu den anderen Gründen für die Nichtberücksichtigung eines eingereichten Beweisantrags. Gesondert erörtert wurde das Verfahren in Bezug auf einen obstruktiven, rechtshemmenden Beweisantrag, wobei besonderes Gewicht auf die Frage einer angemessenen Begründung für die Verfahrensentscheidung gelegt wurde. Behandelt wird außerdem das allgemeine Problem des Missbrauchs von Verfahrensrechten, das in direktem Zusammenhang mit der Problematik in der Überschrift steht.

Schlüsselwörter: Beweisaufnahme, Beweisantrag, Missbrauch von Verfahrensrechten, Verfahrensbehinderung

REJET D'UNE DEMANDE D'ADMINISTRATION DE LA PREUVE OBSTRUCTIVE

Résumé

L'étude traite de la question du rejet d'une demande d'administration de la preuve visant à prolonger la procédure de manière claire (article 170 § 1 point 5 du code de procédure pénale). Le champ d'application de cette prémisse a été analysé, ainsi que son lien avec les autres motifs de non-examen de la demande d'administration de la preuve. Des considérations distinctes ont été consacrées à la procédure relative à la demande des preuves obstructive, en mettant particulièrement l'accent sur la question de la justification appropriée d'une décision d'instance. La question générale de l'abus de droit procédural, directement liée aux questions de titre de l'article, a également été abordée.

Mots-clés: procédure de preuve, demande d'administration de la preuve, abus de droit procédural, obstruction processuelle

RESPINGIMENTO DI ISTANZE PROBATORIE OSTRUZIONISTICHE

Sintesi

Nell'elaborato si è trattata la problematica del respingimento delle istanze probatorie presentate in maniera evidente allo scopo di prolungare il procedimento (art. 170 § 1 punto 5 del Codice di procedura penale). é stato analizzato l'ambito oggettivo di tale condizione ed anche il suo rapporto con le altre basi per il rigetto dell'istanza probatoria. Una riflessione distinta è stata dedicata al procedimento sulle istanze probatorie ostruzionistiche, con particolare attenzione alla problematica dell'adeguata motivazione della decisione processuale. Si è trattata anche la questione generale dell'abuso dei diritti processuali, ai quali è direttamente legata la problematica del titolo.

Parole chiave: procedimento probatorio, istanza probatoria, abuso dei diritti processuali, ostruzione processuale

Cytuj jako:

Kosonoga J., *Oddalenie obstrukcyjnego wniosku dowodowego [Dismissal of an obstructive evidentiary motion]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 17–36. DOI: 10.26399/iusnovum.v13.1.2019.01/j.kosonoga

Cite as:

Kosonoga, J. (2019) 'Dismissal of an obstructive evidentiary motion'. *Ius Novum* (Vol. 13) 1, 17–36. DOI: 10.26399/iusnovum.v13.1.2019.01/j.kosonoga

SUBJECTIVE AND OBJECTIVE LIMITS OF TAPPING IN CRIMINAL PROCEEDINGS

RADOSŁAW KOPER*

DOI: 10.26399/iusnovum.v13.1.2019.02/r.koper

The application of tapping in a criminal proceedings is the criminal procedure related issue, which can be said to be one of the most controversial. A thesis expressed many years ago that the question raises many fears and emotions in society is still up to date.[1]

The possibility of ruling that an individual's communications should be intercepted and recorded in an institutionalised way designated by public authorities implies petrification of an individual's position in relation to the state. In other words, a weaker, as a rule, position of an individual in relation to public authorities is intensified by a possibility of using a coercive measure which is characterised by considerable level of painfulness. Interception of a particular person's communications means interference into their privacy and this is not only connected with getting to know the details of their private and family life but also, in the case of extended tapping, may result in a state of big discomfort for many people who recognise the state of a threat to their privacy. This typical weakening of the sense of citizens' security occurs as a side effect of the state's expansive policy in the field of interception of communications if one takes into account that a potential, analogous possibility also characterises surveillance activities that are conducted beyond the scope of criminal proceedings.

However, one cannot lose sight of the fact that tapping, also the procedural one, constitutes an important and still efficient measure that makes it possible to detect and collect evidence, and prevent new crimes. Thus, the application of this

* PhD hab., Professor of the University of Silesia in Katowice, Department of Criminal Procedure, Faculty of Law and Administration; e-mail: radoslaw.koper@us.edu.pl; ORCID: 0000-0002-6447-8981

1 K. Dudka, *Kontrola korespondencji i podsłuch w polskim procesie karnym*, Lublin 1998, p. 60; G. Musialik, *Dopuszczalność stosowania podsłuchu telekomunikacyjnego w stosunku do osób zobowiązanych do zachowania tajemnicy zawodowej na gruncie Kodeksu postępowania karnego z 1997 roku*, Palestra No. 11–12, 1998, p. 86.

measure is in the interest of society because it helps to combat crime efficiently.[2] In this context, the application of tapping seems to be the necessary price for the limitation of an individual's privacy that is paid in the name of fulfilment of important tasks connected with the protection of public order. It is obvious that interception of communications cannot be unlimited and, in this sense, it may take place to such an extent that is necessary from the point of view of procedural needs. This necessity, as a general condition of admissibility of limitations of citizens' rights in criminal proceedings, has strong grounds in the Constitution. Article 49 Constitution guarantees the freedom and privacy of communication and stipulates that limitations thereon may be imposed only in cases and in a manner specified by statute. This necessity to apply tapping within criminal proceedings also has other effects. Thus, limits of its application must be determined within the scope of particular proceedings. In general, there are two critical and probably most important aspects of the issue of tapping connected with the answer to the questions: What requirements must be met to apply tapping? And what are its limits?

The article is devoted to the issue of the scope of interception of communications. As its title suggests, the analyses will cover two aspects of the limitation of tapping: the subjective and objective ones, which means that the framework of the article does not cover the temporal scope. It seems that such an approach is justified especially as the normative development of the issue of the time limits of this measure (Article 238 § 1–2 CPC) does not raise serious objections and doubts, while a totally different conclusion can be drawn in relation to the assessment of the legal regulation concerning the subjective and objective scopes. Moreover, in 2016 the legislator amended some provisions of the Criminal Procedure Code concerning tapping,[3] determining its subjective and objective limits, which justifies focussing only on those aspects.

The starting point for the direction of considerations highlighted this way should be the theses expressed by the Supreme Court: "The subjective-objective limits of admissibility of tapping outlined by the legislator give it a character of a guarantee excluding whatever exception to this legal rule. Even a great social interest does

---

[2] For instance, K. Marszał, *Podsłuch w polskim procesie karnym de lege lata i de lege ferenda*, [in:] L. Tyszkiewicz (ed.), *Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok*, Katowice 1996, pp. 343–344; *idem*, *Problemy podsłuchu w procesie karnym*, [in:] H.J. Hirsch, P. Hofmański, E.W. Pływaczewski, C. Roxin (eds), *Prawo karne i proces karny wobec nowych form i technik przestępczości. Niemiecko-polskie kolokwium prawa karnego. Białystok/Rajgród 12–17 września 1995*, Białystok 1997, p. 489; R. Kmiecik, *Kontrola rozmów telefonicznych jako czynność procesowa i operacyjno-rozpoznawcza*, [in:] H. Groszyk, L. Dubel (eds), *Wybrane problemy teorii i praktyki państwa i prawa*, Lublin 1986, p. 219; J. Machlańska, *Dowód z podsłuchu procesowego a ochrona tajemnicy obrończej*, Palestra No. 1–2, 2016, p. 74. Also compare M. Rogalski, *Kontrola i utrwalanie treści rozmów telefonicznych oraz przekazywania danych*, [in:] J. Kasprzak, B. Młodziejowski (eds), *Kryminalistyka i inne nauki pomostowe w postępowaniu karnym*, Olsztyn 2009, p. 665; and G. Musialik-Dudzińska, *Podmioty uprawnione do zarządzenia podsłuchu elektronicznego oraz forma i treść decyzji w tym przedmiocie na gruncie prawa niemieckiego*, [in:] P. Hofmański, K. Zgryzek (eds), *Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Profesora Kazimierza Marszała*, Katowice 2003, p. 287.

[3] Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, Dz.U. 2016, item 437; hereinafter referred to as the March amendment.

not justify infringement of the provisions regulating methods of obtaining evidence by means of phone tapping."[4] Regardless of the fact that the Supreme Court was not right to treat the conditions and limits for tapping in the same way, there is no doubt that precise indication of the subjective and objective scope of tapping in the Criminal Procedure Code is of great importance in the context of the stability of the law, and thus it allows predictability of setting limits of the use of this measure resulting from a decision on its application. The Supreme Court rightly emphasised the importance of the limits of tapping because, undoubtedly, the compliance with both subjective and objective scopes of the application of this measure determines its lawfulness. It cannot be otherwise if it is an issue of key importance from the point of view of the aim and construction of this specific coercive measure. As a result, the subjective and objective limits must be cumulatively respected so that interception of communications can be recognised as legal.[5] The considerable painfulness of tapping causes that the interception applied cannot be abstract in nature, *ergo* the court decision on the application of tapping must determine a person that is subject to it and the act that is to be targeted.[6]

As far as the subjective scope of tapping is concerned, it was determined in Article 237 § 4 CPC. In accordance with this provision, it is admissible to apply interception of communications to a suspect, the accused and to the aggrieved or another person who can contact the accused or who can have connection with the accused or an imminent crime. In literature, it is highlighted that the circle of people is quite wide but, at the same time, it is precisely determined. Apart from that the approach is right due to the necessity of achieving the aims of the criminal proceedings.[7] The observations should be approved of because, in fact, Article 237 § 4 CPC rightly covers all people who may need to be subject to the application of procedural phone tapping. One cannot exclude such a possibility not only in relation to a suspect/the accused but also in relation to the aggrieved or persons who are not parties to the proceedings (at least at a given stage of it). It is obvious, at the same time, that admissibility of phone tapping applied to a person who the accused

---

[4] The Supreme Court judgment of 24 October 2000, WA 37/00, LEX No. 332949; the judgment cited in the work: K. Dudka, H. Paluszkiewicz, D. Szumiło-Kulczycka, *Kodeks postępowania karnego. Wybór orzecznictwa z komentarzem*, Warszawa 2015, p. 331.

[5] J. Skorupka, *Krytycznie o stanowisku Sądu Najwyższego w kwestii legalności kontroli rozmów telefonicznych*, Prokuratura i Prawo No. 4, 2011, p. 6.

[6] *Ibid*., pp. 6 and 7; J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki (ed), S. Steinborn, *Kodeks postępowania karnego. Komentarz do art. 1–424*, Vol. I, Warszawa 2013, p. 752. According to the Supreme Court, at the given stage of the proceedings, when the name of a person whose communications should be intercepted cannot be determined also for technical reasons, it is necessary to indicate the user of a given device used for personal communications as well as a carrier of information used for communications, see the Supreme Court judgment of 3 December 2008, V KK 195/08. By the way, this carrier should also be always determined in a court's decision on interception of communications but it has been ignored in the text of the article, due to the need to emphasise two fundamental elements significant in the matter: the subject and object of conduct (an act).

[7] T. Grzegorczyk, *Podsłuch telefoniczny i kontrola korespondencji w projekcie nowej procedury karnej*, Acta Universitatis Lodziensis. Folia Iuridica No. 60, 1994, p. 55; K. Dudka, *supra* n. 1, p. 82; B. Kurzępa, *Kontrola i utrwalanie rozmów telefonicznych według kodeksu postępowania karnego*, Prokuratura i Prawo No. 3, 1999, p. 81.

may contact or who may have connection with the accused or an imminent crime takes place when there is reliable information indicating that such circumstances occur.[8] Apart from that, if the legislator decides to legalise tapping, they must also determine such frameworks of its application that will allow achieving the set objectives efficiently (detecting and obtaining evidence, preventing the commission of another offence, revealing property subject to forfeiture pursuant to Article 45 § 2 CC and Article 33 § 2 FPC). Particular categories of persons listed in the provision referred to were determined with the use of normative or relatively precise phrases. Although the concept of a suspect is not interpreted in a uniform way in the doctrine and case law,[9] nevertheless, in practice, law enforcement agencies in general manage to create such a subject in the *in rem* phase of the preparatory proceedings. The fact of admissibility of tapping applied with respect to a wide circle of people may also be neutralised as a result of appropriate development of the group of guarantee-related regulations in the Criminal Procedure Code that ensure rational narrowing of the scope of tapping, which successively implies specified (as far as possible) protection of privacy of the person who is subject to tapping. The option of postponing the announcement of the decision on the use of tapping (Article 239 CPC) makes the exercise of the fundamental right in this area, i.e. the right to appeal against the decision (Article 240 CPC), possible only *ex post*, i.e. after interception of communications has finished (with the restriction of Article 239 § 2 CPC).

The objective limits of procedural tapping are regulated by means of enumerating offences in Article 237 § 3 CPC in relation to which tapping is admissible. The proceeding in progress or a justified fear that a new offence can be committed must concern an act or acts listed in the above-mentioned provision and the indication of a particular type of a given offence. This is a good solution because it is clear and does not raise any doubts. Since the Criminal Procedure Code of 1997 entered into force, the idea of the regulation has been based on the admissibility of the application of tapping only in cases concerning the most serious offences. The provision referred to has been amended and as a result the objective scope of tapping has been extended,[10] but it does not seem it should be disapproved of. The thesis that interception of communications is possible when the proceedings concern an act of extraordinary significance is still valid.

However, Bolesław Kurzępa argued that the addition of a new paragraph to Article 237 CPC in order to extend the application of tapping to other acts than those listed in Article 237 § 3 CPC would be a better solution because only in this way it is possible to obtain evidence that proves the commission of an offence.[11]

---

[8] J. Skorupka, *Zgodność z prawem dowodów z podsłuchu telefonicznego na podstawie art. 237 k.p.k.*, [in:] A. Przyborowska-Klimczak, A. Taracha (eds), *Iudicium et scientia. Księga jubileuszowa Profesora Romualda Kmiecika*, Warszawa 2011, p. 623.

[9] For more on the issue, see e.g. R.A. Stefański, *Prawo do obrony osoby podejrzanej*, [in:] T. Grzegorczyk, J. Izydorczyk, R. Olszewski (eds), *Z problematyki funkcji procesu karnego*, Warszawa 2013, pp. 298–299; R. Koper, *Prawo do obrony osoby podejrzanej*, Prokuratura i Prawo No. 2, 2016, pp. 18–21.

[10] Compare K. Dudka, *supra* n. 1, pp. 66–67; B. Kurzępa, *supra* n. 7, pp. 83–84; J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki (ed.), S. Steinborn, *supra* n. 6, p. 750.

[11] B. Kurzępa, *supra* n. 7, p. 83.

The proposal raises considerable doubts because its acceptance would destroy the stability of the law resulting from the provision referred to and, moreover, it might lead to interpreting the objective scope freely and even to abuse. It was suggested in the doctrine in the past that the decision on admissibility of interception of communications should depend on the occurrence of offences carrying a statutory penalty of deprivation of liberty.[12] Still, this suggestion does not evoke positive opinions because one can imagine offences matching such general criteria in relation to which, due to their role and nature, the application of tapping would not be appropriate or acts that do not match those general statutory criteria in relation to which tapping would be *in abstracto* possible. The weight of a given type of offence in the aspect of potential negative (individual and social) effects that can result from this act should be decisive.

As a result, taking a decision on the application of tapping, a court must take into account legal classification adopted by a prosecutor in the decision on instigating preparatory proceedings or a decision to present charges but, at the same time, it should also examine (analysing the collected evidence) whether there is well-grounded suspicion of the commission of a given crime in order to eliminate a prosecutor's attempts to classify offences instrumentally to make use of the possibility of tapping.[13] In this context, it is obvious that in case of the change of legal classification of an act into an offence referred to in Article 237 § 3 CPC, the interception of communications should be immediately stopped because the activities become legally inadmissible.[14] However, this change made after the application of tapping does not make the interception illegal.[15]

Such a construction of the provision of Article 237 § 3 CPC is conducive to its strict interpretation. Due to the fact that the legislator determined the types of offences in this provision (except para. 19) and did not indicate specific provisions of the Criminal Code or other statutes in which a given act is classified, it is in compliance with restrictive interpretation to perceive those offences not only through the prism of the basic type but also the aggravated type and one carrying a mitigated penalty. The fact of similarity of any act that is outside the catalogue of this provision to an act that is in the catalogue as well as the fact of analogous level of statutory penalty for a "catalogue act" against the background of another offence classified in the legal system cannot constitute grounds for determining the objective scope of tapping,[16] because it clearly escapes from this area.

---

[12] Z. Młynarczyk, *Kontrola i utrwalanie rozmów telefonicznych w procesie karnym*, Prokuratura i Prawo No. 2–3, 1996, p. 49.

[13] J. Skorupka, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2015, p. 554 and literature referred to therein. Also compare K. Eichstaedt, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2017, p. 835.

[14] J. Skorupka, *supra* n. 13, p. 554; S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2016, p. 380; D. Drajewicz, *Zakaz dowodowego wykorzystania procesowej kontroli rozmów*, Państwo i Prawo No. 8, 2010, p. 75; M. Błoński, *Zakres przedmiotowy i podmiotowy podsłuchu procesowego*, Palestra No. 7–8, 2012, p. 88.

[15] J. Skorupka, *supra* n. 13, p. 554.

[16] The Supreme Court judgment of 30 January 2013, III KK 130/12, LEX No. 1288689. To tell the truth, the judgment concerned non-procedural tapping regulated in Article 19 para. 1 of the Act on the Police but, as it is rightly emphasised in literature, arguments expressed in

The extension of the limits of interception in the course of tapping is the most controversial and extremely complex issue within the framework of the subject matter of this article. It concerns admissibility of tapping in the extended scope in connection with the extension of the limits to a person different from or an act different from those listed in a court's decision on the application of this measure. In this context, as we know, there are three options possible: (1) a person different from the one referred to in a court's decision, (2) an act different from the one referred to in the decision, (3) a person and an act different from the ones referred to in the decision. In the further perspective, the solution to the problem is *in concreto* of considerable significance with respect to whether there are possibilities of evidentiary use of information obtained within those extended limits or not.

At the beginning, it is necessary to emphasise that in the first version of the Criminal Procedure Code in force, there was no regulation determining the signalled problem. The legislator was clearly silent as far as this issue is concerned. It is significant that the judicature outstripped legislative solutions because the Supreme Court judgments in some sense constituted the starting point for the later legislative changes.

In 2007, the Supreme Court presented a stand that evidence obtained as a result of the application of non-procedural tapping, making it possible to instigate criminal proceedings or having importance for proceedings already in progress, may only concern the so-called catalogue offences. However, if it concerns a person different from the one referred to in a court's decision on tapping or if it concerns catalogue offences different from those referred to in the decision, it may be used in criminal proceedings only in the case a court gives consecutive consent that is prescribed in urgent situations.[17] Although this judgment was issued in relation to non-procedural tapping, it constituted an important tip on the possible way of solving a problem concerning the extension of the limits of surveillance in the course of proceedings. In another judgment of 2008, the Supreme Court referred to an analogous case but already based on the provisions of the Criminal Procedure Code.[18] It ruled that an urgent situation within the meaning of Article 237 § 2 CPC is not only a situation in which a court for the first time legalises tapping ordered by a prosecutor but also one in which in the course of legal surveillance formerly ordered by a court,

---

this judgment maintain its full importance in relation to the institution regulated in Article 237 and the following CPC. See K. Dudka, H. Paluszkiewicz, D. Szumiło-Kulczycka, *supra* n. 4, pp. 333–334.

[17] The ruling of seven judges of the Supreme Court of 26 April 2007, I KZP 6/07, OSNKW 2007, No. 5, item 37.

[18] The Supreme Court judgment of 3 December 2008, V KK 195/08, OSNKW 2009, No. 2, item 17. In the judgment, the Supreme Court presented its stance that it is not necessary to extend the scope of tapping or apply to a court for consent within the mode laid down in Article 237 § 2 CPC when in the course of surveillance other offences of the statutory catalogue under Article 237 § 3 CPC strictly connected with an offence or offences in relation with which tapping has been applied are detected. This thesis was criticised; see J. Skorupka, *supra* n. 5, pp. 7–9. It was emphasised that the Supreme Court introduced a new, non-statutory condition for legalising interception and the recording of communications, which is in addition judgmental and imprecise. The Supreme Court theses are supported by M. Błoński, *supra* n. 14, pp. 87–88.

there is a need to extend it in relation to persons different from those referred to in the decision or catalogue factors different from those indicated in the decision or different carriers of information. Such approach was established in case law as a result of a successive judgment issued by the Supreme Court in 2011.[19] According to the Supreme Court, within criminal proceedings, evidence obtained as a result of the application of surveillance is only evidence concerning the catalogue offences referred to in a court's decision on its use or in the decision on giving consecutive consent (by analogy to the issue of a person who is subject to surveillance). It is also worth mentioning that the Supreme Court expressed an opinion, within the context of potential need to extend the subjective limits, that when tapping was applied after taking into account formal conditions, i.e. based on a court's decision issued after preparatory proceedings started, and the proceedings that are in progress concern the catalogue offence under Article 237 § 3 CPC, the issue of using the content recorded in the course of tapping in the proceedings should depend on the evaluation of its significance in the proceedings carried out by the court.[20]

In practice, there were still problems with determination of subjective and objective limits of admissible use of material obtained in procedural tapping. To respond to this issue, in 2011 the legislator decided to regulate it in the Criminal Procedure Code[21] by adding § 8 to Article 237 CPC, which stipulates as follows: "In cases in which surveillance results in obtaining evidence for the offence under Article 237 § 3 committed by a person who was subject to surveillance ordered in relation to a different offence or committed by a different person, a prosecutor, in the course of surveillance or not later than within two months from its completion, can lodge a motion to a court to give consent to use the evidence in criminal proceedings. A court shall issue a decision during a sitting without the participation of the parties within 14 days."

In 2016, the March amendment entered into force and it shaped the legal state *de lege lata*. The provision of Article 237 § 8 was repealed. Instead, the provision of Article 237a CPC was edited as follows: "In the case surveillance results in obtaining evidence that a person who was subject to it committed an offence prosecuted *ex officio* or a fiscal offence different from the one referred to in the decision on the

---

[19] Resolution of seven judges of the Supreme Court of 23 March 2011, I KZP 32/10, OSNKW 2011, No. 3, item 22.

[20] The Supreme Court ruling of 25 March 2010, I KZP 2/10, OSNKW 2010, No. 5, item 42. The Supreme Court erroneously assumed that a court's decision to apply tapping in relation to a person whose communications are to be subject to interception is extended onto a person who takes part in the communications with them and in this context it is not necessary for a prosecutor to apply Article 237 § 2 CPC and apply to a court for consecutive consent. In literature, it is rightly argued that the approval of the Supreme Court thesis would mean going beyond the subjective limits of tapping determined in Article 237 § 4 CPC because a court's consent to tapping concerns only one person involved in communications who must be indicated in a court's decision, *ergo* information originating from another person taking part in communications will not constitute evidence in a case; thus J. Skorupka, *supra* n. 5, pp. 12–16. Similarly, J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki (ed.), S. Steinborn, *supra* n. 6, p. 756. A bit differently, M. Błoński, *supra* n. 14, p. 89.

[21] Act of 4 February 2011 amending the Act: Criminal Procedure Code and some other acts, Dz.U. No. 53, item 273.

application of surveillance, or that another person who was not referred to in the decision committed an offence prosecuted *ex officio* or a fiscal offence, a prosecutor takes a decision on the use of this evidence in criminal proceedings."

In the light of those legislative changes, it is necessary to try to reconstruct a model of subjective and objective limits of the application of tapping in accordance with the provision in force and, apart from this, it is necessary to think about an optimum model in this area. It is so because both the regulation shaped by the amendment of 2011 and the norms of the March amendment give rise to various questions and doubts.

First of all, it should be emphasised that *de facto* a court still remains the body deciding on the application of tapping. Only a court takes a decision on the use of tapping as a response to a prosecutor's motion in a classic situation referred to in 237 § 1 CPC. In case of an urgent situation within the meaning of Article 237 § 2 CPC, a prosecutor may order interception and the recording of the content of communications but he/she should apply to a court for the approval of the decision within a short three-day time limit and a court should decide on this within a short five-day time limit. Thus, it is finally a court that decides on the admissibility of tapping in urgent situations and it depends on its decision whether the given tapping is legal. The difference between the two cases consists in the fact that the typical mode of giving consent to tapping is prior to its application and in urgent cases the consent is consecutive in nature.

Thus, starting the analysis of the statutory regulations that are in force and the former ones, it is necessary to ask a question about the admissibility of extending the limits of tapping by an offence that is not included in the statutory catalogue under Article 237 § 3 CPC. The above-presented outline of the evolution of the applied provisions indicates that Article 237 § 8, introduced to CPC by the amendment of 2011, did not leave the slightest doubts concerning the issue. The possibility of evidentiary use of the material obtained as a result of tapping was exclusively restricted to cases in which tapping was used in relation to the catalogue offences. There was a clear barrier to the application of the material concerning offences that are not included in the statutory catalogue in criminal proceedings.

Does the repealing of Article 237 § 8 CPC mean the change of the legislator's stance on this issue, then? It is not easy to answer this question. On the one hand, such a legislative action can be recognised as not accidental in the sense that it extends the scope of tapping onto acts that are not included in the statutory catalogue.[22] Such an assumption can be recognised as supported by the content of Article 237a CPC which does not lay down that the extension of the limits of surveillance may take place in relation to offences referred to in Article 237 § 3 CPC but makes a general mention of an offence prosecuted *ex officio* different from the one referred to in a court's decision on the application of surveillance.

On the other hand, the adoption of such a way of interpretation would undermine constitutional guarantees and constitute an indication of unacceptable

[22] Thus K.T. Boratyńska, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2016, pp. 584 and 586.

interference into the sphere of citizens' freedoms. It is obvious that the limitation of the freedom of communications, within the meaning of Article 49 in conjunction with Article 31 para. 3 Constitution, can take place only in cases that are strictly and precisely determined by statute. The Criminal Procedure Code *de lege lata* lacks a provision that would allow the extension of the scope of interception and the recording of communications beyond the statutory catalogue and the new content of Article 237a CPC does not necessarily constitute grounds for such an extension, although, frankly speaking, it is hard to draw an unambiguous conclusion in this matter. Nonetheless, the provision discussed should not constitute grounds for actions going beyond the statutory catalogue laid down in Article 237 § 3 CPC,[23] i.e. actions that take place after a court issues a decision concerning an act within the catalogue.

Thus, it is necessary to try to carry out pro-constitutional interpretation. It seems that what is of key importance in the issue discussed is the content of Article 237 § 3 CPC, which stipulates that: "Interception and the recording of communications is allowed *only when* (...)" (emphasis added by R.K.). The legislator unambiguously suggests that only offences in the catalogue laid down in this provision give grounds to apply tapping and extend its scope. Thus, if offences in relation to which tapping is applicable are indicated, their listing would make no sense if we assumed that the application of this measure was also possible in relation to offences that are not in the catalogue.[24] It may also be helpful to use an argument indicating the content of Article 237 § 1 CPC by emphasising the purposefulness of tapping within the meaning that it is inadmissible to use information obtained from surveillance carried out in the course of proceedings in which surveillance is inadmissible.[25] In other words, if the aim of tapping is to detect or obtain evidence or prevent a new offence from being committed, the application of tapping is admissible only within those proceedings in relation to which tapping is legally possible in order to achieve one of the aims of the proceedings. Thus, it concerns full coherence of procedural actions.

However, it is worth mentioning that the presented interpretation is in some sense insufficient. If, since the Criminal Procedure Code of 1997 entered into force, Article 237 § 3 CPC has contained a mention of admissibility of the application of tapping only in cases concerning offences listed in the provision, it is absolutely useless to emphasise that it is not possible in relation to other offences. A positive opinion on this statement would also mean the recognition that the repealed provision of Article 237 § 8 CPC constituted a typical *superfluum*, thus was a useless inflated regulation. In the period when Article 237 § 8 CPC was in force, it was in general approved of because, as it was emphasised, it unambiguously eliminated whatever attempts to legalise material concerning offences that were not listed in Article 237 § 3 CPC, also in the context of different opinions on the admissibility of

---

[23] *Ibid.*, p. 586.

[24] M. Błoński, *supra* n. 14, p. 84.

[25] J. Skorupka, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2016, p. 534.

using the material presented in literature.[26] Thus, it is clearly seen that the absolute and in general unambiguous regulation of Article 237 § 3 CPC does not have to be an obstacle to exclude evidentiary use of material concerning offences not listed in the indicated provision. Maybe, the approach resulted from erroneous and too far-reaching application of the principle that "what is not forbidden is allowed". Apart from that, the new content of Article 237a CPC seems to negate the absolute sense of Article 237 § 3 CPC,[27] which can raise some fears that this latter provision will be avoided in order to comply with the former one.

In conclusion, it seems that in order to create a state of legal stability, it would be good to include in the Criminal Procedure Code a provision similar to the repealed Article 237 § 8, giving the feature of evidence only to the material obtained in the course of surveillance carried out in relation to the catalogue offences. This would mean inadmissibility of extending the limits of interception and the recording of communications to other acts, i.e. automatic recognition of unlawfulness of evidence obtained within that extended scope. Moreover, the issue whether such evidence could be recognised as unlawful in the light of the new content of Article 168a CPC constitutes another problem. However, this goes beyond the framework of this article. Nevertheless, it is necessary to state that legal inadmissibility of tapping within determined limits should always imply unlawfulness of evidence obtained this way.

Further analysis should concern the issue of the *modus operandi* in case of recognition in the course of tapping that it is necessary to go beyond its subjective or objective limits. The mention of obtaining a court's consecutive consent in such a situation disappeared from Article 237a CPC.

First, it is necessary to strongly emphasise that a court's consent to interception and the recording of communications must always be definite in nature. This means that a court finally determines the subjective and objective limits of the application of tapping.[28] If a court is the only entity competent to take a decision on tapping at all, the logical result of this is a court's right to determine the scope of application of this measure. If a court is responsible for determining the limits of tapping, the court should also have the exclusive competence to extend those limits. Lawful tapping does not only mean respecting the requirement of the exclusiveness of the court's decision on the application of this measure but also tapping within the limits determined and modified by a court, because otherwise the court's consent

---

[26] For instance, *ibid.*; Sz. Stypuła, *Podsłuch procesowy na gruncie znowelizowanego kodeksu postępowania karnego*, Palestra No. 7–8, 2012, p. 94 and literature referred to therein.

[27] K. Eichstaedt, *supra* n. 13, pp. 833–834 and 842.

[28] T. Grzegorczyk, *Procesowa i pozaprocesowa kontrola rozmów jako legalne wkraczanie w sferę konstytucyjnie chronionej wolności i tajemnicy komunikowania się, po zmianie przepisów w tej materii w 2011 r.*, [in:] P. Kardas, W. Wróbel, T. Sroka (eds), *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, Vol. II, Warszawa 2012, p. 1626. Also compare comments by J. Skorupka concerning a court's consent in the constitutional aspect, *Prokonstytucyjna wykładnia przepisów prawa dowodowego w procesie karnym*, [in:] T. Grzegorczyk, R. Olszewski (eds), *Verba volant. Scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa 2017, p. 356.

to interception and the recording of communications would become a worthless formality.[29] As it has been indicated above, Article 49 Constitution requires that the limitation of communications should take place in cases determined in statute and in the way prescribed therein, and this means that the court's consent does not have a purely formal nature but must be connected with the fulfilment of various conditions determining the lawfulness of tapping. In the context analysed, the extension of tapping onto a person different from the one indicated in a court's decision undoubtedly requires definite indication of that other person, because otherwise the court's decision would be a blanket norm in nature and possible verification of the extension of the limits of tapping by a court would be seeming.[30]

The fact of repealing the requirement of obtaining a court's consecutive consent from Article 237a CPC in the conditions of simultaneous establishment of a prosecutor's competence to assess the use of evidence originating from the extension of the limits of tapping in criminal proceedings may constitute an impulse to ask various questions and formulate various doubts. In the doctrine, commentators highlight that this way the institution of a court's consecutive consent was eliminated;[31] moreover, they emphasise inadmissibility of using information concerning the catalogue offence not referred to in a court's decision on the application of tapping and information concerning the commission of an offence by a person different from the one indicated in the decision in a trial.[32] There are also opinions that, in the provision analysed, the legislator introduced the institution of a consecutive consent given by a prosecutor, who takes a binding decision pursuant to Article 237a CPC, even at the stage of court proceedings.[33]

Thus, when introducing a new regulation, it should be taken into consideration that in fact Article 237a CPC does not give grounds for stating that a court's consecutive consent legally exists. In the above-presented context concerning the significance of a court's consent to tapping, one can have doubts whether such a change is justified. There are also serious constitutional reservations. In case there was a possibility of unlimited tapping without a court's supervision, the charges of infringement of Articles 47, 49, 51 para. 2 in conjunction with Article 31 para. 3 and Article 45 para. 1 Constitution would become justified.[34]

Article 237a CPC does not grant a prosecutor the right to give consecutive consent because this legal institution inevitably (taking into account the construction of tapping application, axiological assumptions of coercive measures and legal tradition) cannot belong to the scope of a prosecutor's competences. A prosecutor has not been given the right to exclusively and absolutely decide on evidentiary use of information obtained within the extended limits of tapping. The above provision prescribes a prosecutor should decide on taking evidence and it concerns "criminal

---

[29] T. Grzegorczyk, *Procesowa*, *supra* n. 28, pp. 1626–1627.

[30] J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki (ed.), S. Steinborn, *supra* n. 6, p. 757.

[31] K.T. Boratyńska, *supra* n. 22, p. 587.

[32] J. Skorupka, *supra* n. 25, p. 535.

[33] K. Eichstaedt, *supra* n. 13, p. 843.

[34] J. Skorupka, *supra* n. 25, p. 535; K.T. Boratyńska, *supra* n. 22, p. 587.

proceedings", however, this prosecutor's competence can only be exercised at the stage of preparatory proceedings because a prosecutor has a *dominus litis* status there. Thus, a court cannot be bound by a prosecutor's decision on this matter and can dismiss evidence provided by a prosecutor (also by means of dismissing an evidentiary motion).[35] In this context, referring to the rule of legalism within the justification of a different opinion[36] does not change anything because the obligation to prosecute resulting from it can be fulfilled in the conditions undermining the construction of tapping application and the axiology of criminal proceedings.

In the light of such a state of things, a question is raised whether the obligation to obtain a court's consent to extend the limits of tapping can be derived from other provisions of the Criminal Procedure Code regulating interception and the recording of communications. Certainly, the norm contained in Article 237 § 1 CPC, where a court's competence to order tapping and the aims of that measure are laid down, does not constitute grounds in the area.

The content of Article 237 § 2 CPC evokes more adequate associations. As it been argued above, before the amendment to the Criminal Procedure Code of 4 February 2011 entered into force, this provision was perceived as a legal basis for obtaining a court's consecutive consent to extension of the limits of tapping, which resulted from the Supreme Court clear stand in the above-mentioned judgment of 2008.[37] A closer analysis of Article 237 § 2 CPC may raise certain doubts concerning this matter. One can have an impression that this provision concerns only a procedural situation in which a prosecutor notices a necessity of applying tapping in relation to a certain person or persons and orders the application of that measure after which he/she asks a court for the approval of his/her decision. A *modus operandi* established in this way is typical of the application of some coercive measures in urgent situations requiring fast and special response. The legislator directly refers to the construction of an urgent situation, which is rightly defined in the doctrine, for the purpose of tapping, as a necessity of urgent application of tapping because of the fear that information will be lost or evidence will be removed or destroyed, thus obtaining a court's consent to apply this measure would prevent or seriously hamper obtaining evidence.[38] Thus, the provision in question, as it seems, concerns only a situation in which collection of information within interception and the recording of communications takes place from the moment a prosecutor orders it but does not apply to a situation in which a court approves of the information obtained after a court has given former consent to introduce tapping and originating from

---

[35] K.T. Boratyńska, *supra* n. 22, p. 587; J. Skorupka, *supra* n. 25, p. 535. Katarzyna T. Boratyńska also indicates that a prosecutor's competence pursuant to Article 237a CPC is in general unlimited in time, however, in fact it can be implemented until the end of preparatory proceedings due to the content of Article 238 § 4 CPC, in accordance with which after the proceedings are finished a prosecutor applies for destruction of recorded parts of communications that are not significant for criminal proceedings in which tapping was ordered and do not constitute evidence within the meaning of Article 237a CPC.

[36] Thus, K. Eichstaedt, *supra* n. 13, p. 843.

[37] The Supreme Court judgment of 3 December 2008, V KK 195/08, OSNKW 2009, No. 2, item 17.

[38] T. Grzegorczyk, *Procesowa*, *supra* n. 28, p. 1610; J. Skorupka, *supra* n. 25, p. 532.

the extension of its limits by a prosecutor.[39] On the other hand, it is rightly argued in literature that since Article 237 § 2 CPC lets a court to approve of interception and the recording of communications ordered by a prosecutor, it can also constitute grounds for legalisation of interception carried out based on a court's decision but in the scope broader than the one originally determined by a court.[40] In other words, it concerns the simplification of legal arguments in the following pattern: if it is allowed to do something bigger, it is even more justified to do something smaller. However, as it is seen, adjusting the content of Article 237 § 2 CPC to the situation analysed is not based on interpretation providing an unambiguous result because certain doubts in this area still remain. The issue of the mode of extending the limits of tapping is too important to look in this area for a legal basis in a norm possible to be interpreted in two ways excluding each other. Apart from that, the application of the provision discussed to a case of an urgent extension of the scope of tapping requires current supervision of the course of such surveillance, while in practice this supervision is not carried out.[41] There is also a question concerning a possibility of applying this provision in cases where there is no necessity of urgent extension of the scope of tapping.

Due to the fact that *de lege lata* it is not possible to find whatever another provision in the Criminal Procedure Code that could give grounds for obtaining a court's consecutive consent to extend the limits of interception and the recording of communications, it is necessary to be satisfied with an assumption that Article 237 § 2 CPC guarantees the only, although in some sense imperfect, legal basis. However, it is not known how the norm resulting from Article 237a CPC in its current wording in relation to it and vice versa should be interpreted. Article 237a CPC does not make a distinction within the category of "another offence prosecuted *ex officio* or a fiscal offence" and the category of "a person different from the one referred to in the decision on surveillance". Thus, how can a prosecutor's right to take a decision on evidentiary use of information obtained as a result of the extension of the limits of tapping be reconciled with a prosecutor's obligation to apply to a court for consecutive consent? In such conditions, it is difficult to admit two different modes of operating in the field. If the legislator completely eliminated Article 237a CPC, it would be more justifiable to state that the issue of the mode of a prosecutor's action as a result of the extension of the limits of surveillance results from the content of Article 237 § 2 CPC. In general, the content of Article 237a CPC rather unambiguously suggests that the provision regulates an exclusive method of acting in the case of the extended scope of interception and the recording of communications. In this context, as it has been stated above, such a conclusion (also in the constitutional context) cannot be satisfactory.

Did the legal state that was in force in the period 2011–2016 shaped by the amendment to the Criminal Procedure Code of 2011 deserve positive assessment? Regardless of the mess that occurred and various types of interpretational

---

39 Similar doubts are expressed by J. Skorupka, *supra* n. 5, p. 11.

40 *Ibid.*, p. 12.

41 T. Grzegorczyk, *Procesowa*, *supra* n. 28, p. 1610.

concurrence that, in the context of recognising Article 237 § 2 CPC as a basis for obtaining consecutive consent to extend the limits of surveillance, were undertaken in order to establish the relation of that provision to Article 237a CPC in its wording then,[42] it seems that in the period indicated the assessment of the legal regulations concerned was not positive. The provision of Article 237a CPC in the version that was in force in that period made it possible to marginalise the importance of a court's consecutive consent. A prosecutor was not obliged to apply to a court for consent to extend the limits of tapping immediately when he/she noticed the necessity of such an extension but he/she could apply to a court for consent to evidentiary use of the material originating from tapping carried out within extended limits at any time in the course of this surveillance, and even within two months after it was finished. This meant a prosecutor had a possibility of free modification of the limits of tapping determined in a court's order to apply such surveillance without the need to immediately apply to a court for consent in this area. Having been given a court's consent to apply tapping once, a prosecutor could ignore its limits and carry out almost total tapping because, even if an offence commission in connection with which the measure was ordered was not confirmed but evidence of a catalogue offence committed by a person or persons who were not subject to this measure was obtained, it was possible to apply to a court for consecutive consent to use the evidence.[43] What is worse, there were no normative criteria a court should use giving consent in accordance with Article 237a CPC.[44] Such a state could not evoke positive opinions in the context of constitutional protection of the right to privacy (Articles 47, 49, 51 para. 2 Constitution).

Summing up the discussion of the issue of extending the limits of tapping, it should be emphasised that there is a necessity of enacting a new regulation in the Criminal Procedure Code that would properly meet constitutional requirements. It seems that the introduction of a uniform mode of acting in case of extended limits of tapping would be an optimum solution. It would be a norm following the model of the construction used in an urgent situation within the meaning of Article 237 § 2 CPC but concerning not only cases of this type. Its essence would consist in the necessity of applying to a court for consent each time a prosecutor wants to extend the limits of interception and the recording of communications. Due

---

[42] Tomasz Grzegorczyk rightly concluded that in practice the regulation of Article 237 § 2 CPC and the construction of an urgent situation laid down in it becomes marginal this way and is irrelevant; *ibid*., p. 1627. Michał Błoński took a stand that the extension of the subjective limits can inspire a prosecutor to apply Article 237 § 2 CPC, while the change of the objective limits justifies the choice of Article 237a CPC, because a prosecutor must assess whether the information about a new offence will be useful in a trial; M. Błoński, *supra* n. 14, pp. 86–87. On the other hand, S. Steinborn was of the opinion that Article 237a CPC is applicable only when new evidence is obtained accidentally, in a way by chance, when tapping was carried out in relation to persons determined and in connection with offences indicated in a court's decision; J. Grajewski, S. Steinborn, [in:] J. Grajewski, L. K. Paprzycki (ed.), S. Steinborn, *supra* n. 6, pp. 752–753.

[43] T. Grzegorczyk, *Procesowa*, *supra* n. 28, p. 1629.

[44] *Ibid*.; M. Błoński, *supra* n. 14, p. 87. In literature, adequate criteria are rightly proposed by S. Steinborn, see J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki (ed.), S. Steinborn, *supra* n. 6, p. 757.

to the fact that the requirement of obtaining prior consent would be burdensome in practice and it would negate the necessity of urgent response in extraordinary situations, and apart from that the requirement must be met in case of an order to apply tapping in accordance with Article 237 § 1 CPC, it might be satisfactory to obtain consecutive consent. The time limits for a prosecutor's application to a court and a court's decision might be similar to those prescribed within the provision of Article 237 § 2 CPC. Such a solution, appropriately emphasising the need of a court's supervision, should prevent unlimited, in fact, application of tapping that constitutes a very painful limitation of an individual's privacy. Meeting all those requirements connected with the scope of interception and the recording of communications would imply a possibility of evidentiary use of material obtained within the scope. There is no need of special, final approval of tapping by a court that would supervise whether the conditions of a prior consent to apply tapping or extend its limits are met.[45] Apart from that, even the regulation of Article 237a CPC in its former version constituted the basis for the final supervision of tapping but only with respect to the extension of its limits and in an evidentiary aspect, thus only concerning this element of tapping which a court could assess earlier. The introduction of a requirement of obtaining a court's consent to interception and the recording of communications each time means stabilisation of an evidentiary situation in the proceedings, meaning that evidence is legally admissible only if it originates from surveillance that a court has approved of. In addition, the issue of potential admissibility or usefulness of evidence obtained as a result of tapping is not completely outdated. Taking into account that procedural tapping in general takes place in the course of preparatory proceedings, at the stage of jurisdictional proceedings, a court has broad possibilities of disqualifying evidence or completely eliminate it from factual grounds for a sentence, due to its defect or unreliability. Moreover, it should be reminded that a court has a possibility of supervising tapping as a result of a complaint filed (Article 240 CPC).

Recapitulating the arguments concerning the scope of the present article, it is necessary to emphasise that, while the issue of general determination of the subjective and objective scope of procedural tapping was in fact properly shaped, it is hard to present such an optimistic conclusion in relation to the issue of extension of the scope of tapping during the application of that measure. The way in which the latter issue is treated in the Criminal Procedure Code has not been satisfactory for years. At the same time, this extremely important aspect of the application of tapping should find reflection in the statutory regulation properly determining balance between the need to take into account the interest of justice administration and a need to protect an individual's privacy.

---

[45] In accordance with the legal state shaped by the amending Act of 4 February 2011, Grzegorz Artymiak noticed in the regulation of Article 237a CPC the reflection of such final supervision of tapping by a court from the point of view of compliance with the provisions in force, including as concerns meeting the limits of surveillance, see G. Artymiak, *Charakter prawny terminu „wniesienie wniosku o wyrażenie zgody następczej" – przyczynek do dyskusji*, [in:] W. Cieślak, S. Steinborn (eds), *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013, p. 617.

BIBLIOGRAPHY

Artymiak G., *Charakter prawny terminu „wniesienie wniosku o wyrażenie zgody następczej" – przyczynek do dyskusji*, [in:] W. Cieślak, S. Steinborn (eds), *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013.

Błoński M., *Zakres przedmiotowy i podmiotowy podsłuchu procesowego*, Palestra No. 7–8, 2012.

Drajewicz D., *Zakaz dowodowego wykorzystania procesowej kontroli rozmów*, Państwo i Prawo No. 8, 2010.

Dudka K., *Kontrola korespondencji i podsłuch w polskim procesie karnym*, Lublin 1998.

Dudka K., Paluszkiewicz H., Szumiło-Kulczycka D., *Kodeks postępowania karnego. Wybór orzecznictwa z komentarzem*, Warszawa 2015.

Grzegorczyk T., *Podsłuch telefoniczny i kontrola korespondencji w projekcie nowej procedury karnej*, Acta Universitatis Lodziensis. Folia Iuridica No. 60, 1994.

Grzegorczyk T., *Procesowa i pozaprocesowa kontrola rozmów jako legalne wkraczanie w sferę konstytucyjnie chronionej wolności i tajemnicy komunikowania się, po zmianie przepisów w tej materii w 2011 r.*, [in:] P. Kardas, W. Wróbel, T. Sroka (eds), *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, Vol. II, Warszawa 2012.

Kmiecik R., *Kontrola rozmów telefonicznych jako czynność procesowa i operacyjno-rozpoznawcza*, [in:] H. Groszyk, L. Dubel (ed.), *Wybrane problemy teorii i praktyki państwa i prawa*, Lublin 1986.

Koper R., *Prawo do obrony osoby podejrzanej*, Prokuratura i Prawo No. 2, 2016.

Kurzępa B., *Kontrola i utrwalanie rozmów telefonicznych według kodeksu postępowania karnego*, Prokuratura i Parwo No. 3, 1999.

Machlańska J., *Dowód z podsłuchu procesowego a ochrona tajemnicy obrończej*, Palestra No. 1–2, 2016.

Marszał K., *Podsłuch w polskim procesie karnym de lege lata i de lege ferenda*, [in:] L. Tyszkiewicz (ed.), *Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok*, Katowice 1996.

Marszał K., *Problemy podsłuchu w procesie karnym*, [in:] H.J. Hirsch, P. Hofmański, E.W. Pływaczewski, C. Roxin (eds), *Prawo karne i proces karny wobec nowych form i technik przestępczości. Niemiecko-polskie kolokwium prawa karnego. Białystok/Rajgród 12–17 września 1995*, Białystok 1997.

Młynarczyk Z., *Kontrola i utrwalanie rozmów telefonicznych w procesie karnym*, Prokuratura i Prawo No. 2–3, 1996.

Musialik G., *Dopuszczalność stosowania podsłuchu telekomunikacyjnego w stosunku do osób zobowiązanych do zachowania tajemnicy zawodowej na gruncie Kodeksu postępowania karnego z 1997 roku*, Palestra No. 11–12, 1998.

Musialik-Dudzińska G., *Podmioty uprawnione do zarządzenia podsłuchu elektronicznego oraz forma i treść decyzji w tym przedmiocie na gruncie prawa niemieckiego*, [in:] P. Hofmański, K. Zgryzek (eds), *Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Profesora Kazimierza Marszała*, Katowice 2003.

Paprzycki L.K. (ed.), *Kodeks postępowania karnego. Komentarz do art. 1–424*, Vol. I, Warszawa 2013.

Rogalski M., *Kontrola i utrwalanie treści rozmów telefonicznych oraz przekazywania danych*, [in:] J. Kasprzak, B. Młodziejowski (eds), *Kryminalistyka i inne nauki pomostowe w postępowaniu karnym*, Olsztyn 2009.

Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2016.

Skorupka J., *Krytycznie o stanowisku Sądu Najwyższego w kwestii legalności kontroli rozmów telefonicznych*, Prokuratura i Prawo No. 4, 2011.

Skorupka J., *Zgodność z prawem dowodów z podsłuchu telefonicznego na podstawie art. 237 k.p.k.*, [in:] A. Przyborowska-Klimczak, A. Taracha (eds), *Iudicium et scientia. Księga jubileuszowa Profesora Romualda Kmiecika*, Warszawa 2011.
Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2015.
Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2016.
Skorupka J., *Prokonstytucyjna wykładnia przepisów prawa dowodowego w procesie karnym*, [in:] T. Grzegorczyk, R. Olszewski (eds), *Verba volant. Scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa 2017.
Stefański R.A., *Prawo do obrony osoby podejrzanej*, [in:] T. Grzegorczyk, J. Izydorczyk, R. Olszewski (eds), *Z problematyki funkcji procesu karnego*, Warszawa 2013.
Stypuła Sz., *Podsłuch procesowy na gruncie znowelizowanego kodeksu postępowania karnego*, Palestra No. 7–8, 2012.
Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz*,. Vol. I, Warszawa 2017.
Waltoś S., Hofmański P., *Proces karny. Zarys systemu*, Warszawa 2016.

SUBJECTIVE AND OBJECTIVE LIMITS OF TAPPING IN CRIMINAL PROCEEDINGS

Summary

The article discusses the subjective and objective scope of tapping in criminal proceedings. To that end, the author analyses the provisions of the Code of Criminal Procedure in relation to interception and the recording of communications. The issue of admissibility of applying such a coercive measure is strictly linked with giving consideration to the protection of interests of the administration of justice and to the possibility of interference into the privacy of an individual. Under this thesis, the article aims to balance the contradictory interests so that a compromising solution can be found. It is particularly apparent with respect to the controversial and complex issue of the extension of the limits of tapping. In this scope, the amendments to the Criminal Procedure Code introduced by the Act of 4 February 2011 and by the Act of 11 March 2016 have been analysed and new amendments have been proposed. The opinion is herein presented that going beyond the subjective and objective limits set forth in the relevant court's decision without a court's consent should not be admissible.

Keywords: tapping, right to privacy, subjective and objective limits, criminal proceedings, court's consent

PODMIOTOWE I PRZEDMIOTOWE GRANICE STOSOWANIA PODSŁUCHU W PROCESIE KARNYM

Streszczenie

W artykule omówiono zakres podmiotowy i przedmiotowy stosowania podsłuchu w procesie karnym. W tym celu szczegółowej analizie poddano przepisy k.p.k. dotyczące kontroli i utrwalania rozmów. Kwestia dopuszczalności stosowania tego środka przymusu ściśle łączy się z rozważaniem ochrony dobra wymiaru sprawiedliwości oraz możliwości ograniczenia

prywatności jednostki. Ta teza powoduje, że celem artykułu jest zrównoważenie sprzecznych wartości w taki sposób, aby odnaleźć rozwiązanie kompromisowe. Jest to szczególnie widoczne w odniesieniu do kontrowersyjnej i złożonej kwestii rozszerzenia granic podsłuchu. W tym zakresie dokonano oceny nowelizacji do k.p.k. z 2011 r. i 2016 r. oraz sformułowano propozycje zmian legislacyjnych. Wyrażono pogląd, że stosując podsłuch, bez zgody sądu niedopuszczalne powinno być wyjście poza granice podmiotowe i przedmiotowe określone w postanowieniu sądu o zarządzeniu tego środka.

Słowa kluczowe: podsłuch, prawo do prywatności, podmiotowe i przedmiotowe granice, proces karny, zgoda sądu

LÍMITES SUBJETIVOS Y OBJETIVOS DE USO DE ESCUCHAS EN EL PROCESO PENAL

Resumen

El artículo versa sobre el ámbito subjetivo y objetivo de uso de escuchas en el proceso penal. Se analiza detalladamente la normativa del código de procedimiento penal relativa al control y grabación de conversaciones. La admisión de uso de este medida de coacción está relacionada con la protección del bien de la administración de justicia y posibilidad de limitar la intimidad de individuo. El artículo tiene por fin equilibrar valores contradictorios para encontrar la solución de compromiso. Esto es particularmente visible en cuanto a la cuestión de controversia de ampliar el uso de escuchas. Se valora la reforma del código de procedimiento penal de 2011 y de 2016 y se formulan propuestas de modificaciones legislativas. Se expresa la opinión de que usando escuchas sin autorización del tribunal, es inadmisible traspasar limites subjetivos y objetivos determinados en auto judicial de aplicación de esta medida.

Palabras claves: escuchas, derecho a la intimidad, limites subjetivos y objetivos, proceso penal, autorización de tribunal

СУБЪЕКТИВНЫЕ И ОБЪЕКТИВНЫЕ ПРЕДЕЛЫ ИСПОЛЬЗОВАНИЯ ПЕРЕХВАТА РАЗГОВОРОВ В УГОЛОВНОМ ПРОЦЕССЕ

Резюме

В статье рассматриваются субъективные и объективные рамки использования перехвата разговоров в уголовном процессе. С этой целью проведен подробный анализ положений УПК, касающихся прослушивания и записи разговоров. Вопрос о приемлемости данной меры принуждения тесно связан с рассмотрением вопроса об обеспечении интересов правосудия и о возможности ограничения права граждан на неприкосновенность частной жизни. Соответственно, в статье делается попытка найти баланс между противоречащими друг другу правовыми ценностями таким образом, чтобы можно было указать компромиссное решение. Это особенно очевидно в отношении спорного и сложного вопроса о расширении границ допустимости прослушивания разговоров. В этой связи анализируются поправки в Уголовно-процессуальный кодекс, внесенные в 2011 и 2016 годах, и формулируются предложения по внесению изменений в законодательство. По мнению автора,

использование прослушивания не должно выходить за субъективные и объективные пределы, определенные в постановлении суда о принятии такой меры. Выход за эти рамки возможен только с согласия суда.

Ключевые слова: прослушивание телефонных разговоров, неприкосновенность частной жизни, субъективные и объективные пределы, уголовный процесс, согласие суда

DER SUBJEKTIVE UND SACHLICHE ANWENDUNGSBEREICH VON ABHÖRMASSNAHMEN IM STRAFVERFAHREN

Zusammenfassung

In dem Artikel werden die subjektiven und sachlichen Grenzen des Einsatzes von Abhörmaßnahmen im Strafverfahren besprochen. Dazu wurden die Bestimmungen der polnischen Strafprozessordnung zur Kontrolle und Aufzeichnung von Gesprächen einer eingehenden Analyse unterzogen. Die Frage der Zulässigkeit dieser Zwangsmaßnahme ist eng mit der Frage verbunden, wie der Schutz des Wohls der Justiz und Einschränkungen der Privatsphäre des Einzelnen gegeneinander abzuwägen sind. Das heißt, das Ziel des Artikels ist es, gegensätzliche Werte in einer solchen Weise miteinander auszugleichen, dass eine Kompromisslösung gefunden werden kann. Dies zeigt sich insbesondere in Bezug auf das umstrittene und komplexe Problem der Erweiterung der Grenzen für Abhörmaßnahmen und Telekommunikationsüberwachung. Dazu wurden eine Bewertung der Novellierung der polnischen Strafprozessordnung von 2011 und 2016 vorgenommen und Vorschläge für Gesetzesänderungen formuliert. Der Verfasser vertritt die Ansicht, dass es bei Abhör- und Überwachungsmaßnahmen unzulässig sein muss, ohne Zustimmung des Gerichts über die in dem gerichtlichen Beschluss über die Anordnung dieser Maßnahme festgelegten Grenzen des subjektiven und sachlichen Anwendungsbereichs der Überwachung- und Abhörmaßnahmen hinauszugehen.

Schlüsselwörter: Telekommunikationsüberwachung, Abhören, Recht auf Schutz der Privatsphäre, subjektiver und sachlicher Anwendungsbereich, Strafverfahren, richterliche Genehmigung

LIMITES SUBJECTIVES ET OBJECTIVES DE L'UTILISATION DE L'ÉCOUTE ÉLECTRONIQUE DANS LES PROCÉDURES PÉNALES

Résumé

L'article traite de la portée subjective et objective de l'écoute électronique dans les procédures pénales. À cette fin, les dispositions du Code de procédure pénale relatives au contrôle et à l'enregistrement des conversations ont fait l'objet d'une analyse détaillée. La question de l'admissibilité de cette mesure coercitive est étroitement liée à la nécessité de protéger le bien de la justice et à la possibilité de restreindre la vie privée de l'individu. Cette thèse signifie que le but de l'article est d'équilibrer des valeurs contradictoires de manière à trouver une solution de compromis. Cela est particulièrement évident en ce qui concerne la question controversée et complexe de l'extension des limites de l'écoute électronique. À cet égard, des amendements au

code de procédure pénale de 2011 et 2016 ont été évalués et des propositions de modifications législatives ont été formulées. L'avis a été exprimé que, en utilisant l'écoute électronique, sans le consentement du tribunal, il devrait être inadmissible d'aller au-delà des limites subjectives et objectives spécifiées dans la décision du tribunal d'ordonner cette mesure.

Mots-clés: écoute électronique, droit à la vie privée, limites subjectives et objectives, procès pénal, consentement du tribunal

LIMITI RATIONE PERSONAE E RATIONE MATERIAE DI UTILIZZO DELLE INTERCETTAZIONI NEL PROCESSO PENALE

Sintesi

Nell'articolo è stato descritto l'ambito di applicazione ratione personae e ratione materiae dell'utilizzo delle intercettazioni nel processo penale. A tal scopo sono state sottoposte ad analisi dettagliata le norme del codice di procedura penale riguardanti il monitoraggio e la registrazione delle conversazioni. La questione dell'ammissibilità di tale misura coercitiva è strettamente legata alla riflessione della tutela del bene della giustizia nonché della possibilità di limitare la privacy del singolo. Tale tesi fa sì che l'obiettivo dell'articolo sia equilibrare tali valori in contraddizione tra loro in modo tale da trovare una soluzione di compromesso. Questo è particolarmente evidente in riferimento alla questione controversa e complessa dell'estensione dei limiti delle intercettazioni. In tale ambito sono state valutate le riforme del codice di procedura penale del 2011 e del 2016 ed è stata formulata una proposta di modifiche legislative. Si è espressa l'opinione che facendo uso delle intercettazioni, senza l'autorizzazione del tribunale dovrebbe essere inammissibile superare i limiti ratione personae e ratione materiae stabiliti nell'ordinanza del tribunale di applicazione di tale misura.

Parole chiave: intercettazioni, diritto alla privacy, limiti ratione personae e ratione materiae, processo penale, autorizzazione del tribunale

Cytuj jako:

Koper R., *Podmiotowe i przedmiotowe granice stosowania podsłuchu w procesie karnym [Subjective and objective limits of tapping in criminal proceedings]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 37–56. DOI: 10.26399/iusnovum.v13.1.2019.02/r.koper

Cite as:

Koper, R. (2019) 'Subjective and objective limits of tapping in criminal proceedings'. *Ius Novum* (Vol. 13) 1, 37–56. DOI: 10.26399/iusnovum.v13.1.2019.02/r.koper

Ius Novum
1/2019

EXTRAORDINARY APPEAL IN CRIMINAL PROCEEDINGS

JAN KLUZA*

DOI: 10.26399/iusnovum.v13.1.2019.03/j.kluza

1. INTRODUCTION

On 25 September 2017, the President of the Republic of Poland undertook a legislative initiative and presented a draft law on the Supreme Court prepared in consultation with experts.[1] This was the President's response to the previously vetoed deputies' bill.[2] The bill was progressed to the Polish Lower House of Parliament (Sejm) on 14 November 2017.[3] The act[4] adopted by the Parliament introduces a new extraordinary appeal against decisions of common courts as an extraordinary remedy, which in the course of the subsequent amendment[5] to the Supreme Court Act was partially restricted. The extraordinary appeal was put forward as early as in the previous deputies' bill. The *ratio legis* behind its introduction is connected with the government's and the President's view that the errors of the judiciary in the form of unsafe judgments are too frequent, and the existing remedies provided for in judicial procedures are ineffective and, as such, the purpose of the reform of the Supreme Court carried out under the new act, in accordance with its Article 1(1)(b) is to review, on an extraordinary basis, final court decisions to warrant the rule of law and social justice by examining extraordinary appeals. In view of the above, it should be considered reasonable to examine the premises and the procedure for lodging this remedy, and its nature and relationship with the extraordinary remedies provided for in judicial procedures.

* MA, PhD student at the Department of Criminal Procedure, Faculty of Law and Administration of the Jagiellonian University in Kraków; e-mail: jan.kluza@student.uj.edu.pl; ORCID: 0000-0002-0929-6093

1 Presidential draft law on the Supreme Court, http://www.prezydent.pl/prawo/ustawy/zgloszone/art,17,projekt-ustawy-o-sadzie-najwyzszym.html.

2 Sejm print No. 1727, Sejm of the 8th term of office.

3 Sejm print No. 2003, Sejm of the 8th term of office.

4 Supreme Court Act of 8 December 2017, Dz.U. 2018 item 5; hereinafter: SC Act.

5 Act of 10 May 2018 amending the Act: Law on the system of common courts, the Supreme Court Act and some other acts, Dz.U. of 2018, item 1045.

In particular, it should be considered whether the solution proposed by the President of the Republic of Poland is an adequate way to make the promises come true and whether it is the golden means for reforming the justice system.

2. GROUNDS FOR EXTRAORDINARY APPEAL

Pursuant to Article 26 SC Act, extraordinary appeals are to be examined by the newly appointed Extraordinary Control and Public Affairs Chamber. The basis for lodging the remedy in question is Article 89 SC Act, which stipulates that an extraordinary appeal may be lodged against any decision terminating the proceedings once the grounds for lodging the same set out therein have been met. In addition, an extraordinary appeal cannot be based on the allegations that have been put forward in the cassation appeal (whether in civil or criminal proceedings) examined by the Supreme Court, if the same have been lodged, which corresponds to the general rule that a decision issued by the Supreme Court cannot be appealed against (Article 90 § 2 SC Act). As per the original wording of Article 89 SC Act, these premises were as follows:

A. the need to ensure the rule of law and social justice;
B. the decision has defects to such an extent that:
   1. it violates the principles, or the freedoms or rights of persons and citizens enshrined in the Constitution,
   2. it flagrantly breaches the law on the grounds of its misinterpretation or misapplication,
   3. there is an obvious contradiction between the relevant court's findings and evidence gathered in the case;
C. the decision cannot be reversed or amended by means of other extraordinary remedies.

The premises for the extraordinary appeal so formulated should be considered incorrect. Firstly, they are incorrect from the point of view of legislation. This concerns in particular the method of regulating the second premise which is enumerated from (1) to (3) in the provision. The structure of the provision leaves no doubt that the premises A–C must be met jointly, which is apparent from the use of the conjunction "and" between the individual grounds of the appeal. However, certain doubts may arise as regards premise B, preceded by the first premise connected with it by means of a conjunction, and closed by the third premise, introduced after a dash. There is no conjunction between its individual points contained in the provision, which may cause some difficulties as regards the correct interpretation of the provision. It should be recognised, however, that the enumeration contained in this provision applies to one premise relating to the characteristics of a given decision, which is met if the decision is affected by one of the defects mentioned in the provision,[6] which Krzysztof Szczucki defines as specific substantive premises.[7]

[6] M. Dobrowolski, *Opinia prawna dotycząca zgodności z Konstytucją RP przedłożonego przez Prezydenta projektu ustawy o Sądzie Najwyższym*, Warszawa, 27 October 2017, p. 6.

[7] K. Szczucki, *Skarga nadzwyczajna – nowy środek kontroli prawomocnych orzeczeń sądowych*, Warszawa 2018, pp. 6–7.

However, given the concerns addressed by the European Commission[8] regarding compliance of the new legislation with the rule of law, the legislator decided to amend the premises for lodging an extraordinary appeal by changing the content of the first one in such a way that the extraordinary appeal is admissible if it is "necessary to ensure compliance with the principle the democratic rule of law implementing the principles of social justice". It is worth recalling here the position of the European Commission which held that "This new extraordinary appeal procedure raises concerns as regards the principle of legal certainty which is a key component of the rule of law. As noted by the Court of Justice, attention should be drawn to the importance, both for the EU legal order and national legal systems, of the principle of *res judicata*: 'in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question'. As noted by the European Court of Human Rights, extraordinary review should not be an 'appeal in disguise', and 'the mere possibility of there being two views on the subject is not a ground for re-examination'."

It should also be mentioned that in the course of parliamentary work on the Act, the Justice and Human Rights Committee limited the scope of admissibility of lodging the appeal, excluding from its scope judgments establishing non-existence of marriage, judgments annulling marriage or divorce judgments, if at least one of the parties contracts marriage after the judgment has become final, against adoption decisions (Article 90 § 3 SC Act), as well as in minor offences and minor fiscal offences (Article 90 § 4 SC Act). In the case of judgments establishing the rights relating to status, this solution should be assessed as apparently correct, which clearly corresponds to the analogous regulation of Article 398^2 §§ 2 and 3 of the Code of Civil Procedure (henceforth CCP). As for minor offences and minor fiscal offences, the argument advanced in support of the change compared to the original version of the draft was the low number of sentences rendered in such cases and their social significance. One could, however, consider whether a sentence of 30 days in custody may not be prejudicial to the sense of social justice since in minor offence cases a cassation appeal may be lodged by the Prosecutor General, the Ombudsman and the Ombudsman for Children (Article 110 § 1 of the Code of Misdemeanour Procedure).

The need to ensure the rule of law and social justice was the fundamental and most prominent ground of an extraordinary appeal in the original version of the Supreme Court Act. The conjunction contained in the provision of Article 89 § 1 SC Act implied that the decision under appeal must violate both the sense of the rule of law and the sense of social justice to such an extent that it is advisable for that decision to be eliminated from the legal system. As such, this ground is defined in very broad terms and the assessment whether it has occurred is extremely subjective.

---

[8] See Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ EU L 17/50.

The rule of law and social justice are vague terms that are difficult to define. Therefore, the Supreme Court Act mentions an additional ground that refers to the defects of a decision and provides for an exhaustive list of three circumstances, of which at least one must be met. The defects mentioned in this provision are nothing more than an illustration of breaches that may qualify as a violation of the rule of law and a sense of social justice. However, as already mentioned, the provision of Article 89 § 1 SC Act was amended to such effect that the ground referred to in the introductory part was determined as a necessity to ensure compliance with the principle of a democratic rule of law implementing the principle of social justice. By determining this ground in such terms, the legislator intended to curtail the scope of application of the extraordinary appeal by narrowing one of its grounds to extraordinary situations that are prejudicial to the foundations of a democratic state ruled by law. Indeed, when comparing the earlier wording of the provision and the current legal status, the ground has not been limited. Rather, it has merely been restated. There is no doubt that a decision that violates constitutional rights or freedoms of a person that flagrantly violate the law or whose findings of fact manifestly contradict the evidence, violates the rule of law and contradicts the sense of social justice, which was the previous ground of the appeal, and which, as such, contradicts the principle of a democratic state ruled by law.

From the point of view of the *ultima ratio* of the application of the extraordinary appeal, instead of using the conjunction "and" that follows the first of the grounds, which renders the list appearing later in the provision a separate ground, it would be more appropriate to use the preposition "through", as a result of which the list would specify the forms of violation of the rule of law and the sense of social justice. The decision under appeal may not be challenged by way of other extraordinary remedies, either. This ground will be met in a situation where no extraordinary appeal can be lodged against a given decision, the time limit for lodging the same has expired, or where the remedy has not been allowed. Consequently, it will also be possible to lodge the appeal if the decision cannot be reversed or amended due to the party's failure to avail of the extraordinary remedies available to them within the statutory time limit, e.g. a cassation appeal in criminal proceedings or an extraordinary appeal in civil proceedings. It is arguable whether this solution is correct since in a situation where a party does not exercise their rights to challenge a decision, it is difficult to consider that it contradicts the sense of social justice.

Furthermore, according to the explanatory memorandum to the bill, the appeal will also be available for decisions against which no "ordinary appeal" (in Polish *odwołanie*) has been lodged (otherwise unknown to civil and criminal proceedings), which is justified by the fact that "the introduction of this legal instrument for reviewing court decisions, which is utterly radically from the existing extraordinary remedies, is one of the important social obligations incumbent on the President".[9] This argument cannot succeed. The fact of giving a party that has not even appealed against a decision the opportunity to challenge the decision should be perceived as far-reaching interference in the stability of final court decisions. However, it is also

[9] Explanatory memorandum, pp. 6–7.

questionable whether, in such situation, a court decision will essentially contradict the rule of law and the sense of social justice. If, in turn, the decision has been reviewed by the Supreme Court, the appeal cannot be based on the allegations put forward in the cassation appeal under review. As such, an extraordinary appeal is a breakthrough in the principle that Supreme Court decisions cannot be appealed. Consequently, one cannot agree with the view presented by Bogusław Banaszak in the course of parliamentary work on the bill, according to which "[a] n extraordinary appeal would be available only in relation to decisions rendered by common courts, military courts, and the Supreme Court. It would not extend to administrative court decisions",[10] while comparing it later with an extraordinary review that was previously available under Polish law. The statement by this author that the scope of the appeal "only" extends to the decisions he mentioned is a logical fallacy since the appeal extends to all types of final decisions rendered by common courts, military courts and the Supreme Court. The author's criticism of the current model of remedies, which allegedly leaves the party who is dissatisfied with a decision without any means of challenge, which, in his opinion, justifies the introduction of an extraordinary appeal, is likewise incomprehensible.[11] It is enough to say that these arguments are frivolous (even by reason of Article 5 of the Civil Code and Article 440 CCP) and are strongly biased. The eclecticism of the structure in question, manifested in a complex combination of the elements of an extraordinary review, a cassation appeal and a constitutional appeal, and the very frequent use of vague phrases, which may affect the practical application of this remedy, which falls foul of the expectations, was appropriately addressed by Sławomir Patyra in his opinion.[12]

Work on the Supreme Court bill in the Commission eliminated the major drawback of the presidential draft consisting in reference, to the extent not regulated by the act, to the provisions of civil procedure on a cassation appeal, without, however, providing for *mutatis mutandis* application of the provisions of the Criminal Procedure Code (henceforth CPC) on a cassation appeal. Originally, Article 92 SC Act provided for a reference, to the extent not regulated by the Act, with regard to extraordinary appeal proceedings, to the provisions on a cassation appeal in civil proceedings, yet to the exclusion of Article 398^4 § 2 CCP. This provision stipulates that, in addition to the so-called essential requirements of the cassation appeal, it should include an application for its recognition and reasons. Thus, even the provisions on the inadmissibility of the appeal (Article 398^2 CCP), which in civil cases strongly limit the admissibility of a cassation appeal, are not excluded from application since *prima facie* they are not regulated differently in the

---

[10] B. Banaszak, *Opinia o zgodności z Konstytucją RP przedłożonego przez Prezydenta projektu ustawy o Sądzie Najwyższym*, print No. 2003, Sejm of the 8th term of office, Opinie Biura Analiz Sejmowych, http://www.sejm.gov.pl, p. 5.

[11] *Ibid.*, pp. 5–6.

[12] S. Patyra, *Opinia prawna na temat zgodności z Konstytucją Rzeczypospolitej Polskiej przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o Sądzie Najwyższym*, print No. 2003, Sejm of the 8th term of office, Opinie Biura Analiz Sejmowych, http://www.sejm.gov.pl, p. 19.

Supreme Court Act. This should be considered an apparent legislative oversight. In this case, a *mutatis mutandis* application provision will exclude the provisions that would limit the possibility of lodging a cassation appeal. In the light of the original wording of the provision, the *mutatis mutandis* application of the institution of so-called initial examination (Article 398^9 CCP), which allows the Supreme Court sitting in chambers as a single judge to carry out a preliminary review of cassation appeals and to decline to accept those that do not deserve merit, also raised an issue. In the face of thousands of new remedies to be examined, this solution could allow a more effective operation of the new remedy; however, the possibility of its analogous application to extraordinary appeals will be prevented by the fact that no appropriate grounds for a preliminary review have been established as the grounds set out in Article 398^9 § 1 CCP apparently will not be applicable in this respect. Concerns in this regard were addressed by the new wording of Article 95 of the SC Act which also prevents Article 398^9 of the Code of Civil Procedure from being applied *mutatis mutandis*. Thus, however, by way of reference, the legislator also allows applying *mutatis mutandis* Article 398^2 CCP, which strongly limits the possibility of applying a cassation appeal due to the amount claimed. However, that was not what the legislator intended in this respect. In the light of Article 90 § 3 and § 4 SC Act, it should be concluded that since these are the only grounds for excluding the applicability of the extraordinary appeal, this area is no longer unregulated and, accordingly, Article 398^2 CCP cannot be applied.

In the course of the work of the Commission, a reference to the application of the provisions of the Criminal Procedure Code in the unregulated scope was also added, as opposed to the original version of the draft Supreme Court Act. This means, therefore, that when examining an extraordinary appeal with regards to judgments in criminal cases the Supreme Court will be required to apply the provisions on a cassation appeal (Chapter 55 CPC), and also, based on a chain reference under Article 518 CPC, other provisions of the Criminal Procedure Code. This is a very significant change as the original draft Supreme Court Act did not provide for any guarantees in this respect for criminal defendants, which was clearly contrary to the Constitution. An extension of the guarantee for criminal defendants in relation to the original version of the draft is also the inadmissibility of granting the cassation appeal which has been lodged after one year of the decision becoming final, and if a criminal cassation appeal or a civil cassation appeal has been lodged against the decision – after six months of the appeal being examined (Article 89 § 3 SN Act). However, this leads to a contradiction between the provisions of the Code and the provision regarding the appeal. Pursuant to Article 524 § 3 CPC, the appeal cannot be granted against a criminal defendant after one year of the decision becoming final. Therefore, this would mean that the Supreme Court examining a cassation appeal may not decide against a criminal defendant after one year, but it may do so if it examines an extraordinary appeal within six months of the criminal cassation appeal being examined. Unlike civil law cases, a reference in criminal cases to the provisions on a criminal cassation appeal contained in the Criminal Procedure Code does not explicitly provide for exclusion of any of the provisions of Chapter 55 CPC. However, a *mutatis mutandis* application of the provision will

exclude most of the provisions of this chapter that limit the right to lodge an appeal or that are otherwise regulated in the Supreme Court Act. Still, as it has already been mentioned, this reference is essential because of the procedural guarantees for criminal defendants. At this point, one should highlight concerns relating to the issue that an extraordinary appeal will be available with regards to court decisions rendered as a result of examining by the court competent to hear the case in the first instance, acting as an appellate court, interlocutory appeals against the prosecutor's decisions refusing to initiate and discontinuing proceedings (Article 465 § 2 CPC). As noted by Krzysztof Szczucki, the Supreme Court case law,[13] according to which a final court order upholding the challenged order is not a final court decision terminating the proceedings within the meaning of Article 521 § 1 CPC, will remain valid in this respect. As such, no extraordinary appeal will be available in this regard.[14]

Article 90 § 1 SC Act stipulates that an extraordinary appeal against the same decision may only be lodged once in the interest of the same party. This solution thus corresponds to procedural extraordinary remedies which provide for a similar limitation for the parties. If one of these remedies is lodged, this prevents the possibility of subsequently putting forward the arguments that were being examined in the previous case, which occurs both in civil proceedings on examining the cassation appeal (Article 398^{1}(2) CCP) and reopening proceedings (Article 424^{1a} § 1 CCP), as well as in criminal proceedings in the case of a cassation appeal (Article 522 CPC).

3. LODGING OF AN EXTRAORDINARY APPEAL

A group of entities that have standing to lodge an extraordinary appeal is defined in very broad terms. Indeed, pursuant to Article 89 § 2 SC Act, an extraordinary appeal may be lodged by the Prosecutor General,[15] the Ombudsman and, within the scope of his jurisdiction, the President of the Prosecutor General Counsel to the Republic of Poland, the Ombudsman for Children, the Ombudsman for Patient Rights, the Chairman of the Polish Financial Supervision Authority, the Financial Ombudsman and the President of the Office of Competition and Consumer Protection. Amended

[13] See resolution of the Supreme Court of 29 November 2016, I KZP 6/16, LEX No. 2155212.

[14] K. Szczucki, *supra* n. 7, p. 6.

[15] It is worth noting here that the Supreme Court Act enumerates, among those with legal standing to lodge an extraordinary appeal, the Prosecutor General, and not the Minister of Justice – Prosecutor General, while referring, at the same time, to the position of the Minister of Justice elsewhere in the Act (e.g. Article 79 § 9 SC Act). A different regulation applies with regard to entities that have legal standing to lodge an extraordinary appeal in criminal proceedings, where the Criminal Procedure Code in Article 521 § 1 uses the term the Minister of Justice – Prosecutor General, which is associated with the elimination of a separate function of the Prosecutor General under the Act of 28 January 2016: Law on the Prosecution Office, Dz.U. item 177.

Article 89 § 2[16] SC Act also confers this right on a new entity provided for in the Entrepreneurs Law, namely on the Ombudsman for SMEs. Thus, in the course of the work of the Commission, a group of at least 30 deputies or 20 senators has been eliminated from the group of those with legal standing to lodge the appeal, with the said right having been conferred on the President of the Office for Competition and Consumer Protection.

The Supreme Court Act is silent as regards the formal requirements of the appeal or the procedure for lodging the same. Therefore, the provisions on civil cassation appeals and criminal cassation appeals will apply *mutatis mutandis*. As such, the appeal should set out the requirements specified in Article 398^4 CCP read with Article 126 CCP and Article 120 CPC read with Article 427 and Article 518 CPC, i.e. contain, inter alia, reference of the decision, grounds for the appeal and their justification, application for the decision to be reversed or amended. Both the provisions of the civil and criminal procedure require that a counsel represents the parties lodging extraordinary remedies. Article 87^2 CCP provides that this representation does not apply to the public prosecutor and, as such, in accordance with the structure of the prosecution office, also to the Prosecutor General. This also extends to the Ombudsman under Article 14(6) of the Ombudsman Act.[17] Similarly, the scope of powers of the Ombudsman for Children is governed by Article 10 para. 1(3) of the Ombudsman Act.[18] In turn, in criminal matters Article 526 § 2 CPC explicitly provides that these entities are released from the obligation to have a cassation appeal drafted by a counsel. This will mean that the other entities with legal standing to lodge an extraordinary appeal will be subject to the requirement of being represented by a counsel. Also, the Act is silent on the manner of lodging an extraordinary appeal. In this respect, the provisions governing civil and criminal procedures differ from one another. Article 398^5 § 1 CCP provides that a cassation appeal must be lodged with the court that has issued the appealed decision, irrespective of the entity that lodges the same, whereas Article 525 § 2 read with Article 521 CPC stipulates that an extraordinary appeal originating from the Prosecutor General, the Ombudsman and the Ombudsman for Children must be lodged directly with the Supreme Court. This would lead to an unjustified dichotomy as to the manner of lodging an extraordinary appeal in civil and criminal cases, while the lack of regulation as to the other entities initiating proceedings before the Supreme Court should mean that they should, in each case, lodge an extraordinary appeal through the court that has issued the appealed decision. This approach should be considered incorrect and unjustified. It should be considered that, although this does not result from any provision of the Act, an extraordinary appeal should be lodged directly with the Supreme Court in every single case.

---

[16] Act of 6 March 2018: Provisions introducing the Act – Entrepreneurs Law and other acts regarding business activity, Dz.U. 2018, item 650.

[17] Ombudsman Act of 15 July 1987, consolidated text, Dz.U. 2017, item 958; see resolution of the Supreme Court of 13 July 2011, III CZP 28/11, LEX No. 852332.

[18] Act of 6 January 2000 on the Ombudsman for Children, consolidated text, Dz.U. 2017, item 922.

Thus, the entities with legal standing to initiate a review in respect of a given decision do not include parties to the proceedings in the context of which the decision concerned has been issued. This is a surprising solution, in particular taking into account the strongly "socialised" arguments of the drafter and the ruling camp that, in order to support the need for changes in the Supreme Court, repeatedly referred to the Supreme Court rulings that were incomprehensible or prejudicial to members of the public. Likewise, it is primarily the parties to the proceedings that want to challenge a final decision. In such situation, the parties can do nothing more than approaching the entities with legal standing to lodge the appeal. On the other hand, *mutatis mutandis* application of the provisions on criminal and civil cassation appeals allows a conclusion that the parties to the proceedings affected by the extraordinary appeal are entitled to lodge a reply to the appeal directly with the Supreme Court.

The fact of conferring the right to initiate proceedings before the Supreme Court on the Prosecutor General, the Ombudsman and the Ombudsman for Children, except that in the case of the latter, the appeal may only concern the scope of his jurisdiction and, as such, must relate to decisions violating the rights of a child, which corresponds to the rights of these entities to lodge extraordinary remedies in civil and criminal proceedings, does not give rise to any fundamental concerns. The appeal may also be lodged, within the scope of their jurisdiction, by the President of the General Counsel to the Republic of Poland, the Ombudsman for Patients' Rights, the Chairman of the Polish Financial Supervision Authority, the Financial Ombudsman and the President of the Office for Competition and Consumer Protection. In the procedural provisions in force, these entities are not referred to as having any specific standing to lodge extraordinary remedies, with their status and role being determined by the provisions that create their respective offices. The new right for these authorities is, therefore, a material extension of their competences. For instance, in civil cases, the Ombudsman for Patients' Rights could heretofore request the initiation of and participate in proceedings on such terms as those applicable to the public prosecutor.[19] If it was necessary to challenge a final decision, the Ombudsman for Patients' Rights had to approach the Ombudsman or the Ombudsman for Children as he lacked legal standing himself, as in the case of criminal cases. Similarly, the Financial Ombudsman may bring legal action on behalf of clients of the financial market entities in cases involving unfair market practices regarding the operations of these entities, and also, with the claimant's consent, take part in the ongoing proceedings.[20] The Chairman of the Polish Financial Supervision Authority is also vested with the public prosecutor's rights in civil cases arising from relationships related to participation in trading on the financial market or concerning entities performing activities on this market, while in cases regarding

[19] See Article 55 of the Act of 06 November 2008 on the Ombudsman for Patients' Rights, consolidated text: Dz.U. 2017, item 1318.

[20] See Article 26 of the Act of 5 August 2015 on examination of complaints by financial market entities and the Financial Ombudsman, consolidated text, Dz.U. 2016, item 892.

certain offences he is vested with the injured person's rights if he so requests.[21] When compared to the above-mentioned authorities, the General Counsel to the Republic of Poland, whose main task is to represent the State Treasury, has different tasks.[22] As such, the General Counsel is a procedural party in proceedings involving the State Treasury and, therefore, the fact of vesting in the President of the General Counsel the right to lodge an extraordinary appeal, which the adverse party does not have, apparently extends the scope of his rights.[23] An amendment under which the President of the Office for Competition and Consumer Protection was also vested with the right to lodge an extraordinary appeal was added in the course of the work of the Commission. This solution also raises an issue as the President of the Office for Competition and Consumer Protection is a party to proceedings in competition and consumer protection cases and, as such, is the authority issuing decisions in these cases in the first instance.[24] As already mentioned, under the provisions introducing the Entrepreneurs Law,[25] the Ombudsman for SMEs was also vested with the right to lodge an extraordinary appeal. Pursuant to Article 16 para. 1 of the Entrepreneurs Law, the Ombudsman upholds the rights of micro, small and medium-sized enterprises.[26] The Ombudsman's competence is specified in the Act on the Ombudsman for SMEs[27] which, in its Article 1 para. 1, stipulates that the Ombudsman upholds the rights of micro, small and medium-sized enterprises, in particular, respect for the principle of freedom of economic activity, deepening entrepreneurs' trust in public authority, impartiality and equal treatment, sustainable development and the principle of fair competition and respect for good practices and legitimate interests of entrepreneurs. Pursuant to Article 9 para. 1 of the Act, in the field of protection of the entrepreneurs' rights, the Ombudsman may, among others, request the initiation of administrative proceedings, lodge appeals and cassation appeals with the administrative court, as well as participate in these proceedings, in which case he enjoys the rights of the public prosecutor, requests that a competent prosecutor launch an investigation in offences prosecuted *ex officio* or approaches the Supreme Court with a legal issue. More interestingly though, no rights regarding civil proceedings have been vested in the Ombudsman for SMEs. Therefore, the fact that within the scope of his jurisdiction, the Ombudsman may lodge extraordinary appeals precludes the Ombudsman from lodging extraordinary appeals in civil cases since the act regulating his rights does not confer on him any competence in civil proceedings.

---

[21] See Article 6 of the Act of 21 July 2006 on examination of complaints by financial market entities and the Financial Ombudsman, consolidated text, Dz.U. 2017, item 196.

[22] See Article 4 of the Act of 15 December 2016 on the General Counsel to the Republic of Poland, Dz.U. 2016, item 2261.

[23] M. Chmaj, *Ekspertyza prawna w przedmiocie: oceny zgodności z Konstytucją przedstawionego przez Prezydenta RP projektu ustawy o Sądzie Najwyższym*, Warszawa, 11 October 2017, p. 4.

[24] See the Act of 16 February 2007 on competition and consumer protection, consolidated text, Dz.U. 2017, item 229.

[25] Act of 6 March 2018: Entrepreneurs Law, Dz.U. 2018, item 646.

[26] As regards the concept of micro, small and medium-sized enterprises, see Article 7 para. 1(1)–(3) of the Entrepreneurs Law.

[27] Act of 6 March 2018 on the Ombudsman for SMEs, Dz.U. 2018, item 648.

Originally, the presidential bill also provided for the right to lodge an extraordinary appeal to be vested in a group of 30 deputies or 20 senators. It was assumed that the appeal originating from a group of deputies or senators should set out the name of the person authorised to act on behalf of the applicants and that the appeal would be filed through the Speaker of the Sejm or Senate, as appropriate, that are empowered to authorise the Chancellery of the Sejm or Senate, an advocate or an attorney-at-law to pursue the appeal. This solution must be strongly criticised. The solution is unknown to Polish law when it comes to judicial proceedings in private matters and only occurs in proceedings before the Constitutional Tribunal, where a group of deputies and senators defined in the same way may request the review of the constitutionality of legal acts (Article 191 para. 1(1) of the Constitution of the Republic of Poland). The right of MPs to initiate judicial proceedings was also provided for by deputies' bills regarding the invalidation of decisions handed down against former deputies to the Sejm of the Republic of Poland that had been convicted in the Brest trial in relation to the activities performed for the benefit of a democratic Polish State[28] which, nonetheless, did not take effect. As such, vesting a group of deputies or senators with legal standing to proceed before the Supreme Court in individual cases of citizens is not supported by the Polish legal tradition. This solution also raises an issue as to compliance with the principle of the separation of powers since MPs, as persons exercising legislative power, are equipped with a tool to contest judgments of the judiciary issued by an autonomous and independent court. It is impossible not to disregard the political motives behind the changes in the Supreme Court.[29] The enactment of the Supreme Court Act has triggered the need to make personal changes in the composition of the Supreme Court which, along with a parallel amendment to the Act on the National Council of the Judiciary, justifies the concern that political aspects will have a decisive impact on whether judgments will be challenged by means of this new remedy. It is also arguable whether it is altogether necessary to vest the right to lodge an appeal in deputies and senators, in particular in view of the fact that the Act, in addition to the Prosecutor General and the Ombudsman, also makes reference to other authorities that have, within their jurisdiction, legal standing to lodge an appeal. Submission by deputies and senators also raises technical issues. It merely appeared from proposed Article 86 § 2 SC Act that the submission to the Speaker of the relevant chamber should set out the details of the applicants' representative, and furthermore the Speaker could authorise an employee of the Chancellery, an advocate or an attorney-at-law to pursue the appeal. The requesting deputies and senators would act in a case as a single appellant represented by the designated deputy (senator), and not each of the MPs individually.

Pursuant to Article 89 § 3 SC Act, an extraordinary appeal may be lodged within five years of the appealed decision becoming final. The provision also establishes a procedural guarantee, according to which the extraordinary appeal cannot be

---

[28] Article 3, Sejm print no. 363, Sejm of the 7th term of office; Sejm print no. 232, Sejm of the 8th term of office.

[29] M. Chmaj, *supra* n. 23, p. 4.

allowed against a criminal defendant after six months from the decision becoming final or from the criminal cassation appeal being examined. However, pursuant to Article 115 § 1 SC Act, within three years of its entry into force, the appeal may also be lodged against final decisions terminating proceedings in a case which became final after 17 October 1997, i.e. the date of entry into force of the currently applicable Constitution of the Republic of Poland. However, the amendment introduced Article 115 § 1a SC Act under which an extraordinary appeal against a decision that became final prior to the date of entry into force of the new Supreme Court Act may only be lodged by the Prosecutor General or the Ombudsman. However, this regulation no longer applies to extraordinary appeals against decisions rendered after the entry into force of the Act. Accordingly, this right will still be available to a vast array of entities, which is not justified given the unique nature of the remedy. This solution only partially satisfies the demands made by the European Commission since it does not sufficiently limit the possibility of challenging final decisions that were rendered 20 years ago. In view of the demands for legal certainty and fair trial principles, Michał Balcerzak rightly addresses the concerns, pointing out that, "no time frame imposed on the Prosecutor General's right to seek reversal of any final decision by the Supreme Court violates the principle of legal certainty and, in the case at hand, violates the appellant's right to a fair trial".[30] In support of the foregoing, Balcerzak refers to the position of the European Court of Human Rights which held that, "[l]egal certainty presupposes respect of the principle of *res judicata* (...), that is the principle of finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute a review. The review cannot be treated as an appeal in disguise, and the mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character."[31] In light of the foregoing, it should be concluded, as the above named author rightly points out, that when examining extraordinary appeal the Supreme Court should take into account not only the substantive grounds for the appeal but also the standards of international law, in particular, Article 6(1) ECHR,[32] in the context of the principles of fair trial.

Initially, the provision of Article 89 § 4 SC Act stipulated that if five years have passed since the appealed decision became final and the decision has caused irreversible legal effects or if so warranted by the principles or freedoms and human

---

[30] M. Balcerzak, *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka*, Palestra No. 1–2, 2018, p. 18.

[31] *Ibid.*; see: judgment of the European Court of Human Rights of 24 July 2003, application no. 52854/99, cited therein.

[32] Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No. 2, Dz.U. 1993, No. 61, item 284.

and civil rights enshrined in the Constitution, the Supreme Court may confine itself to declaring that the appealed decision was issued in violation of law and to set forth the circumstances for such declaration. A similar solution was originally contained in Article 115 § 2 SC Act with regard to appeals lodged under Article 115 § 1 thereof. However, the amendment materially changed both the provision of Article 89 § 4 SC Act and Article 115 § 2 SC Act. Consequently, the Supreme Court now confines itself to declaring that the appealed decision was issued in violation of law where the appealed decision has caused irreversible legal effects, in particular, if five years have passed since the appealed decision became final and if the reversal of the decision would violate the international obligations of the Republic of Poland. At the same time, however, the final part of this provision contains an exception to the foregoing, pursuant to which the appeal may be decided on the merits where the principles or freedoms and human and civil rights enshrined in the Constitution warrant that a decision be issued. Also, in this case, the limitation of the possibility of challenging final decisions is aimed at taking into account the demands made by the European Commission.

This solution raises serious issues as to the Supreme Court's capacity to examine all potential appeals retrospectively within a 20-year time span. Although the number of potential appeals is difficult to estimate, the very broad grounds for it justify the belief that it will be large. As such, concerns that legal practitioners address with regard to the possibility of having all these cases heard by the Supreme Court deserve all merit. Apart from the technical possibilities of examining appeals lodged against decisions issued between 1997 and 2017, it is likewise important to determine the applicable law which would provide the basis for assessing the merits of the appeal in the context of the grounds set out in Article 86 § 1. Undeniably, during this period, the legal system underwent a significant modification. However, in order to assess whether a given decision has the defects specified in Article 86 § 1 SC Act, the amendments to the law made after the decision became final remain irrelevant. Indeed, this would lead to a review of the case on the basis of the new legal situation in violation of *ne bis in idem* principle which, nonetheless, is not the purpose of an extraordinary appeal. For this reason, the assessment will seek to establish whether a given decision based on the legal status which existed as of the date of its issuance meets the conditions specified in Article 86 § 1 SC Act. It might appear that the list of the grounds for the appeal set out in Article 86 § 1 SC Act is narrow and concerns irregularities so serious that challenging the affected decision should raise no issue. At the same time, however, they are defined in such abstract and general terms that a number of steps must be taken in order to establish whether a given decision actually has defects. Given the absence of grounds limiting the possibility of lodging an extraordinary appeal and a very broadly defined time limit for lodging the appeals, it may take very long to examine the appeal. This will, in turn, have a negative impact on the sense of stability regarding final judgments.[33] This will trigger further criticism regarding the inefficiency of the Supreme Court.

[33] M. Dobrowolski, *supra* n. 6, p. 8.

In this respect, the new legal solution will not bring the intended result and, what is more, it seriously undermines the constitutional right to a court insofar as it violates the essence of the stability of final court decisions.[34]

4. EXAMINATION OF AN EXTRAORDINARY APPEAL

An extraordinary appeal is examined by a panel composed of two professional judges of the Extraordinary Review and Public Affairs Chamber and one lay judge of the Supreme Court (Article 94 § 1 SC Act). However, if the appeal concerns a decision made as a result of the proceedings in the course of which a decision was issued by the Supreme Court, it is examined by a panel of professional judges and two lay judges (Article 94 § 2 SC Act). As such, the extended panel examining the appeal will cover the situation where the appealed decision was rendered by a common court of law, but the earlier decision was reversed on cassation appeal. As per the earlier wording of the provision, the extended adjudicating panel examined only appeals against the Supreme Court decisions. The institution of a Supreme Court lay judge is introduced by the Act in Chapter 6. Their number is determined by the College of the Supreme Court and they are nominated by the Senate for a four-year term of office. The appeal is examined at a hearing on the merits. This is apparent from Article 91 § 1 SC Act which provides for the types of decisions that are made following the examination. Pursuant to Article 92 SC Act, the Supreme Court may request that reasons for the decision be drafted if they are not set forth in the appealed decision. The voluntary nature of drafting reasons in such a manner should be criticised. Firstly, the provision of Article 89 SC Act as a *lex specialis* excludes in this respect the general rule stemming from Article 387 § 4 CCP, according to which if no reasons have been drafted in the case and a cassation appeal has been lodged, the appellate court should draft the reasons of its own motion within two weeks of the appeal being lodged. This leads to a situation where the Supreme Court will be in a position to examine an extraordinary appeal without consulting the reasons for the decision that are essential in this respect. This may be specifically true for those judgments that were issued many years ago. It is inconceivable that the Supreme Court requests that reasons be drafted for a judgment issued in 1997. The potential difficulties in this respect are quite apparent; the judge or judges who rendered the decision may no longer be alive, they may be unable to recall the relevant facts of the case or of the case in general, or the case files may have been destroyed in an appropriate manner[35] or as a result of natural phenomena.

The types of rulings issued following the examination of the appeal are provided for in Article 91 § 1 SC Act. The Supreme Court may grant or dismiss the appeal. When granting the appeal, the Supreme Court reverses the appealed decision and, depending

[34] A. Rakowska-Trela, *Ocena zgodności z Konstytucją RP przedstawionego przez Prezydenta RP projektu ustawy o Sądzie Najwyższym*, Warszawa, 10 October 2017, p. 16.

[35] See the Regulation of the Minister of Justice of 5 March 2004 on the storage of court case files and their transmission to state archives or for destruction, consolidated text, Dz.U. 2014, item 991.

on the results of the hearing, either decides on the merits of the case or remands the case to the competent court for re-examination, also reversing, where necessary, the decision of the court of first instance, or discontinues the proceedings. The appeal is dismissed if there are no grounds for reversing the appealed decision. The Supreme Court is required to refer a question to the Constitutional Tribunal if it considers that the principles or freedoms and human and civil rights enshrined in the Constitution have been violated by reason of the act being non-compliant with the Constitution. The Supreme Court may also stay proceedings of its own motion if the outcome of the case depends on the outcome of other proceedings that are already pending before the Constitutional Tribunal. As the First President of the Supreme Court rightly points out in her opinion,[36] this regulation overlaps with the scope of the constitutional appeal. Indeed, such violation of the principles or freedoms and human and civil rights is one of the grounds for the extraordinary appeal (Article 89 § 1(1) SC Act). This means that any appeal lodged on this ground will automatically result in a legal question being referred to the Constitutional Tribunal. This approach is unreasonable since the appellant may lodge a cassation appeal with the Constitutional Tribunal on their own. If the appeal is granted, this would subsequently lead to the stay of judicial proceedings. The First President of the Supreme Court must also draw attention to the unconstitutionality of the mandatory nature of referring a legal question to the Constitutional Tribunal with this requirement being clearly defined in Article 193 of the Constitution of the Republic of Poland as voluntary. Article 91 § 3 SC Act also regulates the proceedings in a situation where the panel examining the appeal intends to depart from the legal rule adopted by the Supreme Court Chamber.

The Act allows the Supreme Court to render a reformatory judgment "as appropriate to the outcome of the hearing", which is a clear departure from the rule presented by a cassation judgment in the case of examining extraordinary remedies. Pursuant to Article 398[16] CCP, the Supreme Court may rule on the merits only if the alleged violation of substantive law is manifestly justified, provided that the appeal is not based on the alleged violation of the procedural regulations or that the latter proves to be unfounded. On the other hand, Article 537 § 2 CPC provides that the Supreme Court may discontinue the proceedings or acquit a criminal defendant if the conviction is manifestly unsafe. For this reason, when examining extraordinary appeals, the Supreme Court is not limited by a narrow scope of deciding on the merits of the case. At that point, it is difficult to predict the tendency of the Supreme Court to issue reformatory judgments in lieu of judgments when examining this remedy. Yet, such broad possibility raises concerns, in particular as regards decisions issued in criminal cases as far as the procedural guarantees of a criminal defendant are concerned. In the case of criminal cases, however, taking into account the provisions of Article 454 § 1 and § 3 CPC, the Supreme Court will not be at liberty to aggravate the penalty by imposing a life sentence or to render a conviction if an acquittal, a judgment conditionally discontinuing proceedings or a judgment discontinuing proceedings has been previously issued. In such situation, the Supreme Court will

[36] M. Gersdorf, *Opinion of the First President of the Supreme Court of 6 October 2017 on the Draft Supreme Court Act Submitted by the President of the Republic of Poland*, pp. 5–6.

only be in a position to reverse the appealed decision and to remand the case to the competent court; it will also be in a position to apply a preventive measure (Article 537 § 2 CPC).

Article 93 SC Act also provides that if the First President of the Supreme Court or the President of the Supreme Court considers that the protection of the principles or freedoms and human and civil rights enshrined in the Constitution so warrant, that is, as mentioned above, in any situation where the appeal is lodged on this very ground, he or she may appoint a participant in the proceedings to act as a public interest advocate who should have (although not necessarily) the competence required to perform the function of a Supreme Court judge. Pursuant to Article 93 § 1, second sentence, SC Act, the Ombudsman seeks to give effect to the constitutional principles, in particular, the common interest and social justice, and the protection of human dignity in the application of freedoms and human and civil rights. The public interest advocate must be informed of the hearings to be held in the case in respect of which they have been appointed. Although, as it might appear from the above-mentioned provision, setting forth the tasks of a public interest advocate, who is full of grand ideas, their powers are negligible. The public interest advocate may only make written submissions, participate in the hearing and present an opinion, which is a direct replication in the extraordinary appeal proceedings of the rights vested in a social representative in a criminal trial.[37] In the light of the foregoing, in particular, given the fact that the Supreme Court panel examining the appeal also comprises lay judges, this institution should be considered superfluous. Indeed, it is the lay judges of the Supreme Court who are responsible for the social review which should give effect to all the objectives for which the public interest advocate has been appointed.

When examining an extraordinary appeal, the Supreme Court will also be in a position to present a legal issue arising in the course of proceedings to the enlarged panel of the Supreme Court if the panel examining the appeal intends to depart from the legal rule adopted by the Supreme Court Chamber (Article 94 § 3 SC Act). A resolution on the presented issue will be decided by the panel of the entire Extraordinary Review and Public Affairs Chamber if the panel intends to depart from the legal rule adopted by the panel of the Extraordinary Review and Public Affairs Chamber; or the panel of the Extraordinary Review and Public Affairs Chamber and the chamber which adopted the legal rule if the panel intends to depart from the legal rule adopted by the panel of the chamber other than the Extraordinary Review and Public Affairs Chamber. In the latter case, the combined panels of the chambers may present the issue to the entire panel of the Supreme Court (Article 94 § 4 read with Article 88 § 3 SC Act).

[37] Cf. Article 91 CPC.

5. EXTRAORDINARY APPEAL VS EXTRAORDINARY REMEDIES

The above analysis of the rules governing extraordinary appeals demonstrates that its operation in the legal system is likely to give rise to numerous problems. Reference to the *mutatis mutandis* application of the provisions on a cassation appeal in civil proceedings and a cassation appeal in criminal proceedings does not resolve this situation. The original absence of reference to the provisions of the Criminal Procedure Code in this respect clearly contravened the Constitution. Indeed, in this state of affairs, neither the provisions of the Supreme Court Act regarding extraordinary appeals nor the provisions on cassation appeals in civil proceedings, as applied *mutatis mutandis*, provide for any procedural guarantees for a criminal defendant or other parties to the proceedings. This is particularly evident given the fact that the Supreme Court may issue decisions on the merits following examination of the appeal. None of the provisions of the Supreme Court Act, let alone the Code of Civil Procedure, precludes an acquitted person from being subsequently convicted, or a more severe penalty in the form of life imprisonment from being imposed, or precludes an extraordinary remedy lodged against a criminal defendant from being granted one year after the judgment became final. In this respect, the amendment adopted by the Committee on Justice and Human Rights, which requires the provisions of the criminal procedure on a cassation appeal to be applied *mutatis mutandis*, was absolutely correct and necessary. Furthermore, no appeal is available against the Supreme Court ruling on the merits of the case. This would, therefore, lead to a criminal defendant being deprived of the fundamental guarantees as regards their rights of defence.

At this point, it is worth presenting the relationship between an extraordinary appeal and extraordinary remedies. As it has already been mentioned, it will be possible to lodge an appeal against any final judgment, irrespective of whether the party has exercised the legal remedies available to them in relevant judicial proceedings. Only extraordinary appeals against judgments establishing non-existence of marriage, judgments annulling marriage or divorce judgments, if at least one of the parties contracts marriage after the judgment has become final, against adoption decisions, as well as in minor offences and minor fiscal offences. Given their very abstract and vague terms, the grounds for lodging an extraordinary appeal are much broader than those for a cassation appeal in civil and criminal proceedings. As a result, the extraordinary appeal and the remedies laid down in judicial proceedings essentially overlap. From this point of view, the solution provided for in the presidential bill may be surprising as there are no substantive provisions among the transitional and amending provisions of other acts concerning the changes regarding the possibility of lodging extraordinary appeals. It is in this respect that the changes, primarily related to the extension of the cassation grounds in civil proceedings by part of the grounds for the extraordinary appeal under Article 86 § 1 SC Act, could bring the intended effect in the form of increasing the sense of social justice, and what is more, the proceedings would be faster and more effective than the examination of the extraordinary appeal under the Supreme Court Act. While cassation proceedings may be commonly referred to as the third instance at which only the correctness of the lower-instance proceedings is examined with respect to certain cassation grounds, an extraordinary appeal may be

perceived as the fourth instance designed to review every procedural aspect. In view of the five-year time limit for its lodging, including its retroactive effect to 1997, such a significant postponement of the finality of an apparently final judgment should be assessed as negative. In such a case, it would be worth considering the unification of these extraordinary remedies in a single proceeding before the Supreme Court. This could consist in extending the cassation grounds to include the above grounds for an extraordinary appeal, which would result in the Supreme Court's jurisdiction being extended to the proceedings as a whole and not only to narrowly defined allegations. Such change would, to a certain extent, bring cassation proceedings closer to the model that existed under the previously applicable legislation, under which an extraordinary review was designed to review final decisions.[38] This would lead to a cassation appeal becoming once again the third instance which is, however, a better solution than the creation of the fourth possibility of challenging a decision that extends to all other remedies.

6. CONCLUSION

There is no doubt that the Supreme Court Act was to be one of the cornerstones of the comprehensive reform of the judiciary that has recently been underway in Poland. One of its objectives was to make it possible to review decisions that, in the opinion of the public, undermine the sense of social justice, which is one of the foundations of a democratic state governed by the rule of law. However, the extraordinary appeal itself, intended to be a remedy for the errors of the judiciary, contradicts the constitutional principles and human and civil freedoms, to which it repeatedly refers. Its fundamental drawbacks, which give rise to deep concerns as regards the *ratio legis* of this regulation, are the period of its application, which dates back 20 years, and limited procedural guarantees for the parties to the proceedings. The introduction of a new extraordinary remedy for challenging final decisions will be a revolution for the judiciary as all issued decisions will be capable of being reviewed in the context of the preservation of the rule of law and social justice. The need for such revolutionary changes is arguable. The objectives pursued by the extraordinary appeal may be achieved by appropriate changes to the admissibility of civil and criminal cassation appeals and the grounds on which those remedies may be based. This solution would not only satisfy the demands for changes in the judiciary made by the ruling camp and part of the members of the public, but it would also be more economical and, above all, would not violate the Constitution of the Republic of Poland in numerous respects. However, as it stands now, despite the cosmetic changes made to the original solution presented by the President, the extraordinary appeal is characterised by a number of constitutional and practical deficiencies, which suggests that the new legal remedy should be considered more a populist political tool than a genuine attempt to reform the judiciary.

---

[38] P. Hofmański, S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2016, p. 545; T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2013, p. 946.

BIBLIOGRAPHY

Balcerzak M., *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka*, Palestra No. 1–2, 2018.

Banaszak B., *Opinia o zgodności z Konstytucją RP przedłożonego przez Prezydenta projektu ustawy o Sądzie Najwyższym*, print No. 2003, Sejm of the 8th term of office, Opinie Biura Analiz Sejmowych, http://www.sejm.gov.pl.

Chmaj M., *Ekspertyza prawna w przedmiocie: oceny zgodności z Konstytucją przedstawionego przez Prezydenta RP projektu ustawy o Sądzie Najwyższym*, Warszawa, 11 October 2017.

Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ EU L 17/50.

Dobrowolski M., *Opinia prawna dotycząca zgodności z Konstytucją RP przedłożonego przez Prezydenta projektu ustawy o Sądzie Najwyższym*, Warszawa, 27 October 2017.

Gersdorf M., *Opinion of the First President of the Supreme Court of 6 October 2017 on the Draft Supreme Court Act Submitted by the President of the Republic of Poland*.

Grzegorczyk T., Tylman J., *Polskie postępowanie karne,* Warszawa 2013.

Hofmański P., Waltoś S., *Proces karny. Zarys systemu*, Warszawa 2016.

Patyra S., *Opinia prawna na temat zgodności z Konstytucją Rzeczypospolitej Polskiej przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o Sądzie Najwyższym*, print No. 2003, Sejm of the 8th term of office, Opinie Biura Analiz Sejmowych, http://www.sejm.gov.pl.

Presidential draft law on the Supreme Court, http://www.prezydent.pl/prawo/ustawy/zgloszone/art,17,projekt-ustawy-o-sadzie-najwyzszym.html.

Rakowska-Trela A., *Ocena zgodności z Konstytucją RP przedstawionego przez Prezydenta RP projektu ustawy o Sądzie Najwyższym*, Warszawa, 10 October 2017.

Szczucki K., *Skarga nadzwyczajna – nowy środek kontroli prawomocnych orzeczeń sądowych*, Warszawa 2018.

EXTRAORDINARY APPEAL IN CRIMINAL PROCEEDINGS

Summary

The article presents the latest extraordinary appeal measure against the final judicial decisions that was provided for in the Supreme Court Act. The analysis of the grounds for this extraordinary appeal and of the procedure before the Supreme Court proves that this solution is of a cosmetic nature and will not bring about the desired changes in the system of justice.

Keywords: extraordinary appeal, appeal remedies, social justice, administration of justice

SKARGA NADZWYCZAJNA W POSTĘPOWANIU KARNYM

Streszczenie

Artykuł przedstawia analizę nowego środka nadzwyczajnego służącego do wzruszenia prawomocnych orzeczeń sądowych, który został zawarty w ustawie o Sądzie Najwyższym. Analiza przesłanek skargi nadzwyczajnej i trybu postępowania przed Sądem Najwyższym uzasadnia stwierdzenie, że rozwiązanie to ma charakter fasadowy i nie przyniesie zakładanych przez projektodawców pożądanych zmian w wymiarze sprawiedliwości.

Słowa kluczowe: skarga nadzwyczajna, środki zaskarżenia, sprawiedliwość społeczna, wymiar sprawiedliwości

RECURSO EXTRAORDINARIO EN EL PROCESO PENAL

Resumen

El artículo presenta el análisis del nuevo recurso extraordinario que sirve para la reapertura de sentencias firmes que está previsto en la ley sobre el Tribunal Supremo. El análisis de requisitos del recurso extraordinario y forma de procedimiento ante el Tribunal Supremo permite constatar que tal solución es ficticia y no conducirá a modificaciones pretendidas por el legislador en la administración de justicia.

Palabras claves: recurso extraordinario, recursos, justicia social, administración de justicia

ЧРЕЗВЫЧАЙНАЯ АПЕЛЛЯЦИОННАЯ ЖАЛОБА В УГОЛОВНОМ ПРОЦЕССЕ

Резюме

В статье анализируется новое чрезвычайное средство обжалования вступивших в силу судебных решений, которое предусмотрено Законом «О Верховном суде». Анализ оснований для подачи чрезвычайной жалобы и соответствующей процедуры в Верховном суде позволяет утверждать, что это нововведение носит фасадный характер и не приведет к изменениям в судебной системе, которые предполагались авторами законопроекта.

Ключевые слова: чрезвычайная апелляционная жалоба, средства обжалования, социальная справедливость, органы правосудия

DER AUSSERORDENTLICHE RECHTSBEHELF IN STRAFVERFAHREN

Zusammenfassung

In dem Artikel wird ein neuer außerordentlicher Rechtsbehelfs zur Aufhebung rechtsgültiger justizieller Entscheidungen analysiert, der in das Gesetz über den Obersten Gerichtshof, die höchste Instanz in Zivil- und Strafsachen in der Republik Polen, aufgenommen wurde. Die

Analyse der Voraussetzungen für den Rechtsbehelf der außerordentliche Beschwerde und der Verfahrensweise vor dem Obersten Gerichtshof lassen die Feststellung zu, dass diese Lösung nur fassadenhaften Charakter hat, wirkungslos bleibt und nicht die von den Initiatoren beabsichtigten und gewünschten Änderungen in der Rechtspflege bringt.

Schlüsselwörter: außerordentlicher Rechtsbehelf, Rechtsbehelf, soziale Gerechtigkeit, Justiz

PLAINTE EXTRAORDINAIRE EN MATIÈRE PÉNALE

Résumé

L'article présente une analyse d'une nouvelle mesure extraordinaire visant à annuler les décisions judiciaires définitives, qui a été incluse dans la loi sur la Cour suprême. L'analyse des prémisses de la plainte extraordinaire et de la procédure devant la Cour suprême justifie l'affirmation selon laquelle cette solution a un caractère de façade et n'entraînera pas les changements souhaités dans l'administration de la justice assumés par les promoteurs du projet.

Mots-clés: plainte extraordinaire, moyens de recours, justice sociale, système de justice

IL RICORSO STRAORDINARIO NEL PROCEDIMENTO PENALE

Sintesi

L'articolo presenta un'analisi del nuovo mezzo di impugnazione straordinario che permette l'annullamento di sentenze passate in giudicato, contenuto nella legge sulla Corte Suprema. L'analisi delle condizioni del ricorso straordinario e della modalità procedurale presso la Corte Suprema giustifica l'affermazione tale soluzione ha un carattere di facciata e non porta i desiderati cambiamenti nel sistema giudiziario, postulati dagli autori del progetto.

Parole chiavi: ricorso straordinario, mezzi di impugnazione, giustizia sociale, sistema giudiziario

Cytuj jako:

Kluza J., *Skarga nadzwyczajna w postępowaniu karnym [Extraordinary appeal in criminal proceedings]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 57–77. DOI: 10.26399/iusnovum.v13.1.2019.03/j.kluza

Cite as:

Kluza, J. (2019) 'Extraordinary appeal in criminal proceedings'. *Ius Novum* (Vol. 13) 1, 57–77. DOI: 10.26399/iusnovum.v13.1.2019.03/j.kluza

Ius Novum
1/2019

REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER FOR 2017 CONCERNING SUBSTANTIVE CRIMINAL LAW, EXECUTIVE PENAL LAW, MISDEMEANOUR LAW AND FISCAL PENAL LAW

RYSZARD A. STEFAŃSKI*

DOI: 10.26399/iusnovum.v13.1.2019.04/r.a.stefanski

1. UNSUCCESSFUL ATTEMPT TO COMMMIT AN OFFENCE (ARTICLE 13 § 2 CC)

Unsuccessful attempt, in accordance with Article 13 § 2 CC, takes place when a perpetrator does not realise that perpetration is not possible because of the lack of an object suitable for the commission of a prohibited act or due to the use of a means unsuitable for the commission of a prohibited act. There is a doubt connected with this provision how to interpret the phrase: "the lack of an object suitable for the commission of a prohibited act". The question is whether it is an object that a perpetrator intends to target or another object potentially suitable for the commission of a prohibited act on it. The opinions in the doctrine and the judicature differ[1] and three stands can be distinguished: subjective, objective and subjective-objective.

According to the representatives of the subjective stand, the lack of an object suitable for the commission of a prohibited act takes place when it is not an object that a perpetrator targets or is interested in; thus, an object suitable for the commission of an offence on it is connected with a perpetrator's intention. The perpetrator does not have an intention to target whatever object but an object having specific features,

* Professor, PhD hab., Head of the Department of Criminal Law, Faculty of Law and Administration of Lazarski University in Warsaw; e-mail: sterysz@interia.pl; ORCID: 0000-0003-0995-9499

[1] K. Janczukowicz, *Brak przedmiotu oczekiwanego przez sprawcę a nieudolność usiłowania kradzieży (rozboju)*, LEX/el. 2015.

e.g. of a certain type or value. It is the perpetrator who assesses the object. The objective possibility of committing a prohibited act on an object different from the one targeted by the perpetrator may be decisive for the classification of the attempt as successful.[2] The Supreme Court emphasised that: "It cannot be decided that an attempt is successful based on the fact that a perpetrator, matching the features of the offence of robbery and not stealing money for objective reasons, did not steal another thing (did not steal any other thing of value and being the victim's property), although 'in general' such a possibility existed."[3]

According to the representatives of the objective stand, the decision whether there is a lack of an object suitable for the commission of a prohibited act depends on an objective possibility of its commission on whatever designation of the object of an executive action.[4] The Supreme Court stated that: "The lack of an object suitable for the commission of a prohibited act referred to in Article 13 § 2 CC should be

---

[2] The Supreme Court resolution of 20 November 2000, I KZP 36/2000, OSNKW 2001, No. 1–2, item 1 with glosses of approval by: A. Wąsek, OSP No. 4, 2001, pp. 172–174, J. Giezek, Prok. i Pr. No. 9, 2001, pp. 105–111, E. Markowska, Prok. i Pr. No. 9, 2005, pp. 125–130, Sz. Majcher TBSPUJ No. 11–12, 2004; critical ones by: J. Biederman, Palestra No. 7–8, 2001, pp. 212–217, with critical comments by S. Zabłocki, *Przegląd orzecznictwa Sądu Najwyższego – Izba Karna*, Palestra No. 1–2, 2001, pp. 205–206 and R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego i prawa wykroczeń za 2000 r.*, WPP No. 1, 2001, pp. 98–100; judgment of the Court of Appeal in Wrocław 13 August 2015, II AKa 171/15, LEX No. 1798770; judgment of the Court of Appeal in Lublin of 26 February 2013, II AKa 18/13, LEX No. 1292669; judgment of the Court of Appeal in Lublin of 4 April 2006, II AKa 66/06, LEX No. 183573; judgment of the Court of Appeal in Łódź of 28 March 2006, II AKa 45/06, LEX No. 273995; judgment of the Court of Appeal in Katowice of 24 May 2005, II AKa 155/05, LEX No. 165204; judgment of the Court of Appeal in Katowice of 21 April 2005, II AKa 114/05, Prok. i Pr. – supplement 2006, No. 1, item 17; judgment of the Court of Appeal in Łódź of 21 February 2002, II AKa 17/02, Prok. i Pr. – supplement 2004, No. 3, item 24; judgment of the Court of Appeal in Katowice of 28 February 2002, II AKa 549/01, Prok. i Pr. – supplement 2002, No. 12, item 27; judgment of the Court of Appeal in Lublin of 8 April 1997, II AKa 55/97, Prok. i Pr. – supplement 1997, No. 10, pp. 12–13; judgment of the Court of Appeal in Lublin of 22 April 1997, II AKa 65/97, KZS 1998, No. 1 item 35; R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 2007, p. 43; T. Sroka, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komenatrz. Art. 1–116*, Warszawa 2017, p. 386; K. Wiak, [in:] A. Grześkowiak, K. Wiak, (eds), *Kodeks karny. Komentarz*, Warszawa 2018, pp. 169–170.

[3] The Supreme Court resolution of 20 November 2000, I KZP 36/2000, OSNKW 2001, No. 1–2, item 1.

[4] The Supreme Court ruling of 16 February 2010, V KK 354/09,OSNwKW 2010, item 340; the Supreme Court ruling of 28 April 2001, V KK 33/11, LEX No. 817558; judgment of the Court of Appeal in Katowice of 28 February 2002, II AKa 549/01, LEX No. 56778; judgment of the Court of Appeal in Łódź of 4 June 2013, II AKa 97/12, LEX No. 1409183; judgment of the Court of Appeal in Lublin of 24 September 2013, II AKa 131/13, LEX No. 1439168; judgment of the Court of Appeal in Białystok of 18 June 2015, II AKa 73/15, LEX No. 1439168; O. Chybiński, *Rozbój*, Wrocław 1975, p. 25; A. Marek, *Istota nieudolnego usiłowania przestępstwa*, RPEiS No. 1, 1968, p. 100; *idem*, *Kodeks karny. Komentarz*, Warszawa 2010, p. 66; R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 1–31*, Vol. I, Warszawa 2010, p. 588; A. Zoll, [in:] W. Wróbel, A. Zoll, (eds), *Kodeks karny. Cześć ogólna, Komentarz do art. 1–52*, Vol. I, part 1, Warszawa 2016, p. 297; B.J. Stefańska, [in:] R.A. Stefański, (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, pp. 213–214; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek, (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 112.

interpreted as an objective lack and not the fact that the perpetrator disqualified it, i.e. recognised it as unsuitable for him."[5]

The representatives of the subjective-objective stand believe that the assessment of an object as suitable for the commission of a prohibited act should be done from the subjective and objective point of view. This means specific objectifying subjective assessment, which is expressed by a perpetrator's conduct. If he commits an attack, it means he is convinced that there is an object that his attack can target. On the other hand, if in his opinion there is a lack of such an object, the natural consequence is that he gives up undertaking or continuing an attack, of course provided that his behaviour is rational. In the former case the objectifying consists in the recognition that either designation of the feature specifying the object of an attack really existed in the given situation (successful attempt) or there was a lack of such designation (unsuccessful attempt). In the latter case, since the perpetrator decided that there was no object suitable for targeting an attack, such assessment should not be verified by recognising the occurrence of whatever designation or its lack. Thus, as a result, there is a lack of an object suitable for the commission of a prohibited act on it, in spite of the existence of its designation, which is a circumstance of unsuccessfulness of an attempt.[6]

In the resolution of seven judges of 19 January 2017, I KZP 16/16 (OSNKW 2017, No. 3, item 12), the Supreme Court stated that:

1) **The phrase "the lack of an object suitable for the commission of a prohibited act" used in Article 13 § 2 CC means the lack of such an object that belongs to a group of designations of the features of an object of an executive action of the prohibited type, which a perpetrator aims to commit.**
2) **Holding a perpetrator of an unsuccessful attempt liable (Article 13 § 2 CC) may *in concreto* depend on the recognition of an intention to commit a prohibited act on a given object.**

In literature, the resolution encountered both criticism[7] and approval[8].

The Supreme Court supported the objectivist conception and justifying this stance, it took into account linguistic, functional and historical interpretation. As far as the first one is concerned, the Court indicated that the term "an object suitable for the commission of a prohibited cat on it" is directly connected with the feature of an object of a performed act of the offence type, and the phrase "does not realise

---

[5] The Supreme Court ruling of 28 April 2011, V KK 33/11, Prok. i Pr. – supplement 2011, No. 12, item 1.

[6] J. Giezek, *Glosa do uchwały SN z dnia 20 listopada 2000 r., I KZP 36/2000*, Prokuratura i Prawo No. 9, 2001, p. 111; *idem*, [in:] M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2010, pp. 220–221; E. Markowska, *Glosa do uchwały SN z dnia 20 listopada 2000 r., I KZP 36/2000*, Prokuratura i Prawo No. 9, 2005, p.125; judgment of the Court of Appeal in Łódź of 28 March 2006, II AKa 45/06, Prok. i Pr. – supplement 2007, No. 7–8, item 31.

[7] See critical glosses on the resolution by A. Jezusek, *Glosa do uchwały SN z dnia 19 stycznia 2017 r., I KZP 16/16*, Prokuratura i Prawo No. 4, 2017, pp. 151–166; K. Kmąk, *Glosa do uchwały 7 sędziów SN z dnia 19 stycznia 2017 r., I KZP 16/16*, Prokuratura i Prawo No. 6, 2017, pp. 156–167; M. Małecki, *Glosa do uchwały 7 sędziów SN z dnia 19 stycznia 2017 r., I KZP 16/16*, OSP No. 7–8, 2017, item 79.

[8] See a gloss of approval by D. Krakowiak, LEX/el. 2017; M. Mozgawa, [in:] M. Mozgawa, (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 68.

that the perpetration is not possible" is a component of the aspect concerning the subject/agent. It argues that Article 13 § 2 CC specifies the form of committing every type of offence, however, that it is not possible to perform any of them, due to the fact that the perpetrator was unaware that there was no object suitable for targeting an act on it. Due to the verbal connection between "an object suitable for the commission of a prohibited act on it" and the perpetrator's intention, the feature of suitability means that an object the lack of which the perpetrator does not realise belongs to the group specified as the feature of an object of a performed act of an offence type. If an object is within the scope of an executive action undertaken by the perpetrator, it cannot be assumed that the commission is not possible because of the lack of an object suitable for that. In such a situation, a perpetrator who has directly aimed to commit an act does not match the basic feature of an unsuccessful attempt as one that could never lead to commission. The Court argues that the rational legislator formulated the provisions of Article 13 § 1 and § 2 CC in the way that the borderline between successfulness and unsuccessfulness could not be relativised to the perpetrator's intention that can be different depending on the given circumstances of an act that occur at the stage of aiming to commit it.

Having compared the former regulations on an unsuccessful attempt, the Supreme Court drew a conclusion that the legislator successively objectivised the description of the normative construction of an unsuccessful attempt. In the Criminal Code of 1932, inability to commit an act because of the lack of a suitable object was referred to an intended offence. In the Criminal Code of 1969, intention was linked to an effect that a perpetrator does not achieve because of the use of unsuitable means. In the Criminal Code of 1997, the description of an unsuccessful attempt does not contain a phrase indicating a perpetrator's "intention", which means that, abandoning the use of the phrase in Article 13 § 2 CC, the legislator refers the concept of intention to every attempt; within the scope of unsuccessful attempt, the legislator refers to the commission of a prohibited act within the same meaning as it is used in the provision defining the basic form of an attempt (Article 13 § 1 CC).

The Supreme Court was aware of the fact that supporting the objectivist conception may suggest that in case a perpetrator's opinion about an object does not match his expectations and he does not commit an act, i.e. he abandons an attempt, as a result, he is not subject to a penalty (Article 15 § 1 CC). Thus, the Court states that in such a situation the feature of voluntariness is not matched because the essence of voluntariness of abandoning the commission is that a perpetrator abandons it due to his will.[9] However, a perpetrator does not commit a prohibited act only because an object does not meet his expectations.

The arguments quoted by the Supreme Court are not convincing. It is rightly noted in literature that a prohibited act referred to in Article 13 § 2 CC is a prohibited act which a perpetrator directly aims to commit; the conduct that constitutes that direct aim concerns a prohibited act which a perpetrator intends to commit. Thus, Article 13 § 2 CC concerns the lack of an object suitable for the commission of

[9] The Supreme Court judgment of 3 January 1980, I KR 329/79, OSNKW 1980, No. 9, item 73; D. Gajdus, *Czynny żal w polskim prawie karnym*, Toruń 1984, p. 83.

a prohibited act on it as a perpetrator intended and not the lack of an object suitable for the commission of whatever prohibited act on it by a perpetrator.[10] In the doctrine, it is stated that "The lack of the commission of a prohibited act, in case of an unsuccessful attempt, results from inability to commit that act in the given circumstances of this act because of the lack of an object suitable for the commission of an intended prohibited act on it or because a perpetrator uses a means unsuitable for the implementation of the intention."[11] Moreover, a series of right critical comments were presented in the above-indicated critical glosses on this resolution.

The assessment whether an object was unsuitable for the commission of a prohibited act on it cannot be done without considering a perpetrator's intention but it cannot be decisive and it should be assessed from the objective perspective. Thus, the subjective-objective conception is the most appropriate, however, the Supreme Court as well as the authors of glosses on the resolution failed to notice it.

Moreover, it is easy to note that the Supreme Court erroneously concluded that the imaginary offence consists in aiming directly to commit a prohibited act, which is not successfully performed for reasons different from the lack of an object suitable for its commission or the use of a means unsuitable for the commission of a prohibited act. The opinion is erroneous because an imaginary offence is based on the fact that a perpetrator erroneously thinks his conduct is an offence,[12] and the indicated conduct should be assessed as unsuccessful attempt, which does not carry a penalty.[13]

2. CONDITIONAL RELEASE (ARTICLE 77 § 1 CC)

In accordance with Article 77 § 1 CC, a court may conditionally release a convict sentenced to imprisonment only when his attitude, features and individual conditions, as well as circumstances of the offence committed and his conduct after its commission and at the time of serving the sentence justify the conviction that after the release the convict will apply the penal or preventive measure adjudicated and will not break the order, in particular will not commit an offence again. In accordance with the provision, the decision on the conditional release depends on the criminological forecast, and the directives on the judicial penalty are not applicable. The same opinion is expressed in the case law and the doctrine.[14] Nevertheless,

---

[10] A. Jezusek, *supra* n. 7, p. 157.

[11] A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *supra* n. 4, p. 291.

[12] R.A. Stefański, *Przestępstwo urojone*, Prokuratura i Prawo No. 3, 2008, pp. 33–34.

[13] A. Jezusek, *supra* n. 7, p.155; K. Kmąk, *supra* n. 7, p.161.

[14] The Supreme Court ruling of 21 June 2000, V KKN 160/2000, Prok. i Pr. – supplement 2000, No. 12, item 4; ruling of the Court of Appeal in Warsaw of 6 October 1998, II AKz 14/98; the appeal: Court of Appeal in Warsaw 1999, No. 1, item K – 2; ruling of the Court of Appeal in Łódź of 20 October 1998, II AKz 152/98, Prok. i Pr. – supplement 2000, No. 5, item 19; ruling of the Court of Appeal in Kraków of 8 July 1999, II AKz 299/99, Prok. i Pr. – supplement 1999, No. 11–12, item 13; ruling of the Court of Appeal in Kraków of 8 July 1999, II AKz 322/99, KZS 1999, No. 6–7, item 9; ruling of the Court of Appeal in Lublin of

a positive criminal forecast results not only from a convict's conduct at the time of serving a sentence but also personality features he demonstrated when he committed an offence. That is why, the legal classification of an offence is not sufficient; it is also necessary to consider the material content of an offence, especially the elements of the subjective aspect of an offence and executive actions.[15]

---

16 August 1999, II AKz[1] 320/99, Prok. i Pr. – supplement 2000, No. 3, item 24; ruling of the Court of Appeal in Kraków of 19 August 1999, II AKz[1] 352/99, Prok. i Pr. – supplement 2000, No. 1, item 22; ruling of the Court of Appeal in Kraków of 20 October 1999, II AKz 441/99, LEX No. 38624; ruling of the Court of Appeal in Kraków of 29 October 1999 r., II AKz[1] 441/99, KZS 1999, No. 10, item 43; ruling of the Court of Appeal in Kraków of 21 June 2000, II AKz[1] 217/00, KZS 2000, No. 6, item 12; ruling of the Court of Appeal in Kraków of 27 June 2000, II AKz[1] 202/00, Prok. i Pr. 2000, No. 12, item 20; ruling of the Court of Appeal in Kraków of 6 June 2001, II AKz[1] 189/01, Prok. i Pr. – supplement 2002, No. 4, item 25, with a gloss of approval by S. Lelental, Prz. Więzien. Pol. No. 36, 2002, pp. 156–158; ruling of the Court of Appeal in Kraków of 7 June 2001 II AKz 209/01, KZS 2001, No. 6, item 29; ruling of the Court of Appeal in Lublin of 7 November 2001, II AKz 563/01, OSA 2002, No. 5, item 38; ruling of the Court of Appeal in Kraków of 13 December 2001, II AKz[1] 484/01, KZS 2001, No. 12, item 25; ruling of the Court of Appeal in Kraków of 27 June 2003, II AKz 273/02, KZS 2003, No. 6, item 30; ruling of the Court of Appeal in Kraków of 25 June 2004, II AKzw 292/04, KZS 2004, No. 6, item 22; ruling of the Court of Appeal in Kraków of 19 August 2005, II AKzw 521/05, KZS 2005, No. 7–8, item 80; ruling of the Court of Appeal in Lublin of 12 October 2005, II AKzw 594/05, OSA 2007, No. 9, item 47; ruling of the Court of Appeal in Lublin of 28 December 2005, II AKzw 880/05, LEX No. 166038; ruling of the Court of Appeal in Lublin of 2 October 2006, II AKzw 768/06, LEX No. 229387; ruling of the Court of Appeal in Lublin of 27 December 2007, II AKzw 1075/07, LEX No. 357121; ruling of the Court of Appeal in Wrocław of 12 October 2007, II AKzw 754/07, LEX No. 327521; ruling of the Court of Appeal in Wrocław of 24 January 2007, II AKzw 76/07, Prok. i Pr. – supplement 2008, No. 2, item18; ruling of the Court of Appeal in Lublin of 8 August 2007, II AKzw 527/07, KZS 2007, No. 10, item 70; ruling of the Court of Appeal in Lublin of 27 July 2008, KZS 2008, No. 6, item 57; ruling of the Court of Appeal in Lublin of 15 April 2009, II AKzw 285/09, LEX No. 508303; ruling of the Court of Appeal in Lublin of 27 October 2010, II AKzw 846/10, LEX No. 677930, ruling of the Court of Appeal in Białystok of 31 January 2013, II AKz 43/13, LEX No. 1271803; ruling of the Court of Appeal in Kraków of 22 October 2015, II AKzw 1039/15, KZS 2015, No. 11, item 38; J. Kulesza, *Glosa do postanowienia SA w Warszawie z dnia 3 listopada 1998 r., II AKz 115/98*, Palestra No. 1, 2000, p. 179 et seq.; M. Kosiada, *Glosa do postanowienia SA we Wrocławiu z dnia 13 października 2004 r., II AKzw 685/04*, Prokuratura i Prawo No. 5, 2007, pp. 168–174; J. Lachowski, *Instytucja warunkowego przedterminowego zwolnienia*, Państwo i Prawo No. 2, 2008, p. 110 et seq.; *idem*, *Przesłanka materialna warunkowego przedterminowego zwolnienia na gruncie kodeksu karnego*, Prokuratura i Prawo No. 11, 2008, p. 36 et seq.; *idem*, *Warunkowe zwolnienie z reszty kary pozbawienia wolności*, Warszawa 2010, p. 204; *idem*, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Warszawa 2017, p. 1029; A. Marek, *Kodeks karny*, *supra* n. 4, p. 186; T. Kalisz, *Warunkowe przedterminowe zwolnienie z reszty kary pozbawienia wolności z perspektywy problemów z ustalaniem treści i kierunku prognozy kryminologicznej*, [in:] T. Kalisz (ed.), *Nowa Kodyfikacja Prawa Karnego*, Vol. XXX, Wrocław 2013, p. 179; S. Lelental, [in:] M. Melezini (ed.), *System Prawa Karnego. Kary i inne środki reakcji karnoprawnej*, Vol. 6, Warszawa 2016, pp. 1165–1167; *idem*, *Glosa do postanowień SA w Gdańsku z 18 października 2000 r., II AKz 943/2000 i z dnia 7 czerwca 2005 r., II AKzw 399/2005*, Prz. Więzien. Pol. No. 51, 2006, p. 173 et seq.; K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2016, pp. 971–973; *idem*, *Glosa do postanowienia SA w Krakowie z dnia 22 października 2015 r., II AKzw 1039/15*, LEX/el. 2016.

[15] Ruling of the Court of Appeal in Kraków of 26 November 1998, II AKz[1] 87/98, Prok. i Pr. – supplement 1999, No. 4, item 16; ruling of the Court of Appeal in Warsaw of 3 November 1998, II AKz[1] 115/98, Appeal, Court of Appeal in Warsaw 1999, No. 3, item K – 11, with a gloss of approval by J. Kulesza, Palestra 1999, No. 12/2000, No. 1, pp. 179–184; ruling of the Court

The judicature also assumed that general directives on sentencing, in accordance with Article 56 CC, are applicable to conditional release.[16] It was stated that: "The circumstances taken into account by a court hearing the case cannot be ignored when adjudicating on conditional release so that the sentence is not depreciated and the duration of serving the sentence is not (as a result) transferred onto the stage of the penal executive proceedings."[17]

In the resolution of seven judges of 26 April 2017, I KZP 2/17 (OSNKW 2017, No. 6, item 32), the Supreme Court rightly explained that: **The criteria laid down in Article 77 § 1 CC constitute the basis for adjudicating on conditional release from serving the remainder of the imprisonment sentence. However, the directives on sentencing laid down in Article 53 CC, Article 54 § 1 CC and Article 55 CC (Article 56 CC) are not the criteria of adjudicating on this matter.** The opinion is approved of in the doctrine.[18]

The essence of the issue is whether the reference made in Article 56 CC to applying Article 53, Article 54 § 1 and Article 55 CC by analogy to adjudicate other measures prescribed in this code also concerns conditional release from serving the rest of imprisonment sentence. Examining the issue, the Supreme Court highlighted that the application, via Article 56, of the directives on sentencing laid down in those provisions to the institution of conditional release is not possible without decoding

---

of Appeal in Kraków of 10 December 1998, II AKz[1] 143/98, KZS 1998, No. 12, item 28; ruling of the Court of Appeal in Kraków of 25 February 1999, II AKz 52/99, KZS 1999, No. 3, item 26; ruling of the Court of Appeal in Kraków of 25 February 1999, II AKz 53/99, KZS 1999, No. 3, item 27; ruling of the Court of Appeal in Katowice of 9 June 1999, II AKz[1] 386/99, Prok. i Pr. – supplement 1999, No. 11–12, item 12; ruling of the Court of Appeal in Wrocław of 21 October 2004, II AKzw 709/04, KZS 2005, No. 7–8, item 108.

[16] Ruling of the Court of Appeal in Szczecin of 9 February 2012, II AKzw 60/12, OSAS w Szczecinie 2012, No. 4, pp. 50–55; ruling of the Court of Appeal in Kraków of 16 June 1999, II AKz[1] 275/99, KZS 1999, No. 6–7, item 19; ruling of the Court of Appeal in Gdańsk of 18 October 2000, II AKz[1] 943/00, Prok. i Pr. – supplement 2001, No. 4, item 21, with a critical gloss by S. Lelental, Prz. Więzien. Pol. No. 51, 2006, pp. 173–177; ruling of the Court of Appeal in Szczecin of 16 May 2008, II AKzw 272/08, Orz. SA w Szczecinie, PA w Szczecinie; ruling of the Court of Appeal in Szczecin of 2 July 2008, II AKzw 434/08, Orz. SA w Szczecinie, PA w Szczecinie; ruling of the Court of Appeal in Szczecin of 20 October 2010, II AKzw 819/10, Prok. i Pr. – supplement 2012, No. 4, item 23; ruling of the Court of Appeal in Szczecin of 9 February 2012, II AKzw 60/12, Prok. i Pr. – supplement 20123, No. 1, item 20; J. Wojciechowska, [in:] G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 1999, p. 932; Z. Sienkiewicz, [in:] O. Górniok. S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. I, Gdańsk 2005, p. 657; Z. Świda, *Charakter i stosowanie instytucji warunkowego przedterminowego zwolnienia od odbycia reszty kary pozbawienia wolności*, [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warszawa 2007, p. 375; W. Wróbel, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część ogólna. Komentarz do art. 53–116*, Vol. I, part II, Warszawa 2016, p. 95; V. Konarska-Wrzosek, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 442; J. Skupiński, J. Mierzwińska-Lorencka, [in:] R.A. Stefański (ed.), *Kodeks karny*, Warszawa 2018, p. 580.

[17] Ruling of the Court of Appeal in Łódź of 23 March 1999, II AKz 114/99, Prok. i Pr. 2000, No. 7–8, p. 89, with a critical gloss by G. Wiciński, Prok. i Pr. 2000, No. 7–8, pp. 89–95; ruling of the Court of Appeal in Gdańsk of 23 February 2000, II AKz1 67/00, Biul. PA w Gdańsku 2000, No. 5, p. 17.

[18] See a gloss of approval of this resolution by K. Postulski, LEX/el. 2018.

the regulation included in Article 77 § 1 CC. Analysing Article 77 § 1, especially the phrase "only when", it drew a conclusion that it concerns only the specification of the requirement necessary to apply this institution and, at the same time, noticed that in the case the catalogue of requirements laid down in the given regulation is not closed, the legislator uses the phrase "in particular". As a result, it referred to the systemic interpretation and emphasised that Article 56 CC is placed in Chapter VI entitled "Rules of administration of penalties and penal measures", which means that it concerns jurisdictional proceedings at the exploratory stage. Thus, Article 56 CC concerns those measures that constitute reaction to a committed offence. Although at this stage adjudication concerns measures connected with probation regulated in Chapter VII CC, where conditional release is also laid down, nevertheless, as the Supreme Court emphasises, the institution is commonly recognised as a form of earlier release of a person already convicted and serving a sentence, with the imposition of obligations on him and the continuation of the process of exerting influence (resocialisation) in non-custodial conditions, within the set probation period.[19] It is not connected with sentencing but with the execution of a sentence. Conditional release is not a response to an offence committed but to progress in a convict's resocialisation at the time of serving an imprisonment sentence.[20] The Supreme Court is right to state that the legislator shaped the institution of release in such a way that it is only a reflection of individual prevention and the achievement of other objectives of a penalty, including in particular those within the scope of general prevention, does not constitute grounds for its application.

In this context, it is hard to approve of Judge Wiesław Kozielewicz's dissenting opinion that Article 77 § 1 CC only determines the minimum requirements that a convict must meet in order to make it possible to consider the possibility of applying the institution of conditional release from serving the remainder of the imprisonment sentence. Only after all the requirements are met, can the possibility of applying conditional release be considered and it actually can be ruled when the requirements laid down in Article 53 CC (determining the general and special directives on sentencing), Article 54 § 1 CC (prescribing directives on sentencing minors) and Article 55 CC (constituting the principle of an individual penalty), which are applied by reference to them in Article 56 CC, are met. In his opinion, the concept of other measures prescribed in the Criminal Code covers the measures connected with probation laid down in Chapter VIII CC, including conditional release.

3. AGGREGATE PENALTY (ARTICLE 85 § 3 CC)

In accordance with Article 85 § 3 CC, it is not possible to aggregate a penalty for an offence committed by a convict after he starts and before he finishes serving a sentence for another offence. This means that even if a penalty for an offence

[19] T. Kalisz, *supra* n. 14, p. 175.
[20] T. Lachowski, *Instytucja*, *supra* n. 14, pp. 120–121.

committed by a perpetrator after he starts and before he finishes serving a former sentence is of the same or another type that is normally subject to aggregation, it cannot be joined with the sentence served at the time of an offence commission. As it is rightly emphasised in the case law, "The negative circumstance under Article 85 § 3 CC refers to any penalty imposed and executed concerning a perpetrator who, at the time of serving a sentence (i.e. after he starts and before he finishes it), commits another offence. Thus, only after a sentence (a single or aggregate one) has been served, in accordance with the above-mentioned provision, there is an adequate normative context (background) for a successive offence committed by this perpetrator. As a result, the commission of such an offence after the former sentence has been served means, *a contrario*, that there is no additional negative condition (circumstance) for an aggregate penalty."[21]

In the light of this provision, a doubt arose whether the provision is applicable in case of an offence committed at the time of a convict's conditional release without supervision for a period not exceeding 14 days (Article 138 § 1(8) Executive Penal Code, henceforth EPC).

In the ruling of 19 January 2017, I KZP 12/16 (OSNKW 201, No. 2, item 8), the Supreme Court rightly assumed that: **A convict who was released from prison without supervision for a period not exceeding 14 days in accordance with Article 138 § 1(8) EPC, is serving a sentence at that time within the meaning of Article 85 § 3 CC. The commission of an offence for which the perpetrator is punished with the same or another type of penalty that is normally subject to aggregation at the time of serving a sentence is a negative circumstance for adjudicating an aggregate penalty. A situation in which a perpetrator commits an offence after the release period expires, i.e. at the time of being at large unlawfully, should be assessed similarly.**

The opinion has been approved of in literature.[22] The Supreme Court emphasised that in the case a perpetrator is at large as a result of a permission to leave prison for a short period (Article 91 para. 7, Article 92 para. 9, Article 138 § 1(7) and (8), Article 141a § 1, Article 165 § 2, Article 234 § 2 and others EPC), the time is not subtracted from the period of serving a sentence and the period spent outside prison is treated as the time of serving a sentence.[23] If it is treated as the period of serving a sentence, an offence committed at that time is committed at the time of serving a sentence.

---

[21] Ruling of the Court of Appeal in Szczecin of 10 March 2016, II AKz 68/16, OSA w Szczecinie 2016, No. 1, pp. 44–60.

[22] See a gloss on this ruling by D. Krakowiak, LEX/el. 2017

[23] K. Postulski, *Kodeks*, *supra* n. 14, pp. 64–65; *idem*, *Komentarz do niektórych przepisów ustawy z dnia 6 czerwca 1997 r. Kodeks karny wykonawczy, w zakresie zmian wprowadzonych ustawą z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks karny wykonawczy (Dz.U.16.428)*, LEX/el. 2016, thesis 7; L. Osiński, [in:] J. Lachowski (ed.), *Kodeks karny wykonawczy. Komentarz*, Warszawa 2016, p. 22; J. Lachowski, *Pozbawienie praw publicznych w Kodeksie karnym*, Prokuratura i Prawo No. 10, 2003, pp. 67–68; R.A. Stefański, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2018, thesis 18 on Article 43. The Supreme Court resolution of 21 April 1989, V KZP 2/89, LEX No. 20351; the Supreme Court ruling of 17 May 1990, V KZP 5/90, PS 1990, No. 9, p. 103, with a gloss of approval by R.A. Stefański, OSP No. 1, 1991, item 1, partly critical one by J. Kulesza, Przegląd Sądowy No. 9, 1992, p. 103 et seq.; ruling of the Court of Appeal in Lublin of 24 September 1992, II AKo 32/92, LEX No. 21142.

What can raise doubts is the offence committed by a convict after his temporary release from prison ends and he does not come back, which is an offence under Article 242 § 1 CC. In accordance with Article 140 § 4 CC, the time when a convict is outside prison is not subtracted from the period of serving the sentence, unless a judge rules otherwise in case the convict betrays trust in him. Undoubtedly, in the case discussed there are grounds for such a ruling. With regard to such a situation, the Supreme Court rightly assumed inability to aggregate a penalty for this offence with the penalty being served because a different solution would lead *ad absurdum*; it would mean that when a convict is at large as a result of temporary release from prison, there is a negative circumstance for adjudicating an aggregate penalty (Article 85 § 3 CC) because he has not stopped serving his sentence, and when he unlawfully stays outside prison, there are no obstacles to adjudicate an aggregate penalty as the serving of the sentence has stopped. The Court rightly highlights that a convict's unlawful stay outside prison should not be rewarded with the aggregation of penalties, which would not be possible in the case of lawful stay outside prison.

4. MEANING OF THE PHRASE "THREAT REFERRED TO IN ARTICLE 190" (ARTICLE 115 § 12 CC)

An unlawful threat, in accordance with Article 115 § 12 CC, means a threat referred to in Article 190 and a threat of leading to criminal proceedings or disseminating defamatory information about the threatened person or their next of kin; however, the announcement of the intention to initiate criminal proceedings in order to protect the infringed right does not constitute an unlawful threat. Article 190 § 1 CC covers a threat of committing an offence against another person or their next of kin that makes the threatened person believe that it will really take place. The reference to Article 190 CC raises doubts whether it concerns threatening another person that an offence will be committed against them or their next of kin or it is required that the threat cause the threatened person justified fear that it will take place. There is no unanimous stand on this issue in the case law.[24] There are opinions that it concerns:

1) a threat of committing an offence against a given person or their next of kin, provided that it causes a threatened person's fear that it will take place;[25]
2) a threat of committing an offence against another person or their next of kin, even if it did not cause a threatened person's justified fear that it will take

[24] K. Janczukowicz, *Wzbudzenie obawy jako warunek odpowiedzialności za przestępne wywieranie wpływu na uczestnika postępowania*, LEX/el. 2015.

[25] The Supreme Court judgment of 7 December 1999, WA 38/99, LEX No. 39910; judgment of the Court of Appeal in Lublin of 3 October 2013, II AKa 152/13, LEX No. 1388873; judgment of the Court of Appeal in Wrocław of 23 August 2012, II AKa 227/12, LEX No. 1220370; judgment of the Court of Appeal in Lublin of 13 October 2008, II AKa 236/08, LEX No. 477863.

place.[26] The argument for that is that if causing fear were to be an element constituting the feature of an unlawful threat in all its forms, it would have to be included in its statutory definition.[27]

In the ruling of 14 September 2017, I KZP 7/17 (OSNKW 2017, No. 11, item 63), the Supreme Court stated: **The term "a threat referred to in Article 190 CC", laid down in Article 115 § 12 CC, concerns only a perpetrator's conduct and does not cover the effect in the form of causing a justified fear that the threat will be carried out.** The opinion is erroneous, although it met with approval in literature.[28]

The definition of an unlawful threat laid down in Article 115 § 12 CC also covers a punishable threat, which results from reference to a threat specified in Article 190 CC. Although it is not indicated in that reference which item of the provision it refers to, it does not raise any doubts whether it concerns Article 190 § 1 CC, which, as it has been mentioned above, specifies a threat of committing an offence against another person or their next of kin if the threat causes a threatened person's justified fear that the threat will be carried out. Assuming that the legislator is rational, it is hard to conclude that only the initial part of the provision is meant; if it were to have this meaning, the legislator would repeat only this part and would not make reference to the whole provision. Since it is not done, it is obvious that the definition contains the rest of its content, i.e. the requirement of a fear that the threat will be carried out. The Supreme Court statement that the so-called internal reference contained in Article 115 § 12 CC was applied only in order to make the text concise, which makes it possible to depart from assigning the key role to the linguistic interpretation of the provision, is not convincing.

The following arguments are not convincing. Firstly, the fact of causing a fear that a threat will be carried out is contained in characteristics of many types of offences (Article 124 § 1, Article 128 § 3, Article 153 § 1, Article 197 § 1, Article 224 § 1, Article 232 § 1, Article 249, Article 250 and Article 260 CC), and with the use of a threat causing an effect that is a feature of those acts, e.g. in the form of exerting pressure (Article 128, Article 224 § 1, Article 232 § 1, Article 250), already contains the implementation of the subjective element of fear that the threat will be carried out. Secondly, in case of formal offences in which the main objects of protection are more general interests, e.g. undisturbed functioning of state bodies (Article 224 § 2 CC and Article 245 CC), an offence is committed the moment an activity is undertaken and a threat reaches its addressee. It is hard to assume that the commission of such an offence depends on the development of a threatened person's justified fear that the threat of committing an offence will be carried out. Thirdly, the differentiation of a perpetrator' legal situation depending on the type of an unlawful threat that

---

[26] The Supreme Court ruling of 27 March 2014, I KZP 2/14, OSNKW 2014, No. 7, item 53; the Supreme Court ruling of 14 February 2013, II KK 120/12, LEX No. 1405555; judgment of the Court of Appeal in Białystok of 9 October 2014, II AKa 202/14, LEX No. 1532570; judgment of the Court of Appeal in Katowice of 24 March 2014, II AKa 20/14, LEX No. 1646974; judgment of the Court of Appeal in Lublin of 6 September 2012, II AKa 189/12, LEX No. 1217723.

[27] Judgment of the Court of Appeal in Białystok of 9 October 2014, II AKa 202/14, LEX No. 1532570.

[28] See a gloss of approval by K. Nazar, Ius Novum No. 3, 2018, pp. 194–204.

they have used does not seem to be rational because a threat of committing an offence harms individual interests most strongly, which can be concluded based on the fact that only this type of an unlawful threat was classified in Article 190 § 1 CC. The way in which the legislator classifies the influence of a feature in the form of a threat on the victim's behaviour has no influence on the definition of a threat.

5. PERSON PERFORMING A PUBLIC FUNCTION (ARTICLE 115 § 19 CC)

In accordance with 115 § 19 CC, a person performing a public function means, inter alia, a person employed in an organisational unit financed from public funds, unless they only provide services. In the context of this provision, a question is raised whether the head of the operation suite of a voivodeship hospital is a person performing a public function.

The Supreme Court dealt with a similar issue and decided that: "Performing a public function referred to in Article 228 § 1 CC covers the activities performed by the head of a ward in a public healthcare institution, which are connected with its administration as well as the provision of healthcare services specified in Article 2 of the Act of 5 December 1996 on the profession of a physician (Dz.U. 1997, No. 28, item 152, as amended) and Article 3 of the Act of 30 August 1991 on healthcare institutions financed from public funds (Dz.U. No. 91, item 408, as amended)."[29]

In its ruling of 26 April 2017, I KZP 18/16 (OSNKW 2017, No. 7, item 38), the Supreme Court indicated that: **A person performing a public function within the meaning of Article 115 § 19 CC is a person employed in an independent public healthcare institution as an organisational unit financed from public funds, unless he performs only service-related functions in it.**

Justifying this opinion, first of all, the Court rightly dealt with the issue whether an organisational unit in which a given person is employed is financed from public funds within the meaning of Article 115 § 19 CC. It rightly referred to Article 5 para. 1 of the Act of 27 August 2009 on public finance,[30] which specifies public funds, although the conception is rejected in the doctrine.[31] It is justified by the fact that this Act is of fundamental importance in the field and, due to that, is also applicable

---

[29] Resolution of seven judges of the Supreme Court of 20 June 2001, I KZP 5/01, OSNKW 2001, No. 9–10, item 71, with glosses of approval by S. M. Przyjemski, Pr. i Med. 2002, No. 11, pp. 131–136, J. Kulesza, Prok. i Pr. 2002 No. 10, pp. 103–108, T. Krawczyk, Prok. i Pr. 2002, No. 11, pp. 115–121, and critical comments by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego i prawa wykroczeń za 2001 r.*, WPP 2002, No. 1, pp. 121–128, and comments of approval by S. Zabłocki, *Przegląd orzecznictwa Sądu Najwyższego – Izba Karna*, Palestra No. 5–6, 2002, p. 139.

[30] Dz.U. 2017, item 2077, as amended.

[31] J. Majewski, [in:] W. Wróbel, A. Zoll (eds), *supra* n. 4, pp. 1046–1051; J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2012, pp. 729–730; C. Nowak, *Korupcja w polskim prawie karnym na tle uregulowań międzynarodowych*, Warszawa 2008, p. 344; R Kardas, *Zatrudnienie w jednostce organizacyjnej dysponującej środkami publicznymi jako ustawowe kryterium wyznaczające zakres znaczeniowy pojęcia „osoba pełniąca funkcję publiczną"*, CzPKiNP No. 1, 2005, p. 50; A. Barczak-Oplustil, *Glosa do postanowienia SN z dnia 30 września 2010 r., I KZP 16/10*, CzPKiNP No. 4, 2010, pp. 154–155; T. Kanty, *Glosa do postanowienia SN z 30 września 2010 r.,*

in other legal acts.[32] Its application is justified by the fact that independent public healthcare institutions, in accordance with Article 9 para. 10 of the Act on public finance, belong to the sector of public finance.

6. INTRODUCTION OF DESIGNER DRUGS FOR SALE (ARTICLE 165 § 1(2) CC)

Causing danger to life or health of many people or to the property of considerable size by the production and introduction for sale of substances, foodstuff or other goods of everyday use that are dangerous to health or pharmaceuticals that do not meet binding quality standards is an offence specified in Article 165 § 1 CC. In the light of this provision, a doubt was raised whether analogues of controlled substances, called designer drugs, are dangerous to health. In accordance with Article 27 para. 27 of the Act of 29 July 2005 on the prevention of drug addiction,[33] an analogue of a controlled substance is a product containing a psychoactive substance that affects the central nervous system, which may be used for the same purposes as a narcotic, a psychotropic substance or a new psychoactive substance the production of which and introduction for sale is not regulated by separate legal provisions.

In its ruling of 31 May 2017, I KZP 5/17 (OSNKW 2017, No. 7, item 40), the Supreme Court took a stance that: **If, as a result of the defective production of a good (an agent, a substance, etc.), the departure from the declared quality standard, the defective storage or transport or the introduction for sale of a product that is actually different from what its description or name suggests etc., and when at the same time the product is dangerous for health to an extent constituting danger to health or life of many people, its production or introduction for sale matches the features of the offence under Article 165 § 1(2) CC.** It is an erroneous stand and it rightly met with criticism in literature.[34] The essence of the problem is the interpretation of the phrase "substances harmful to health" used in Article 165 § 1(2) CC. In the doctrine, there are two opinions: the first one recognises that they are not substances harmful by nature but have acquired harmful features as a result of, e.g. the defective production or storage;[35] the second one assumes that substances harmful to health are those that can pose

---

I KZP 16/10, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 3, 2011, pp. 145–159.

[32] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2010, p. 212. The same opinion is presented in the doctrine and case law. Cf. O. Górniok, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 828; R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna Komentarz. Art. 1–116*, 2017, p. 1414; ruling of the Supreme Court of 30 September 2010, I KZP 16/10, OSNKW 2011, No. 11, item 96; judgment of the Court of Appeal in Wrocław of 6 October 2005, II AKa 195/05, OSA 2006, No. 1, item 2; judgment of the Court of Appeal in Katowice of 12 March 2008, II AKa 356/07, LEX No. 447045.

[33] Dz.U. of 2018, item 1030, as amended.

[34] See a critical gloss by B. Gadecki, OSP 2017, No.11, item 115.

[35] G. Bogdan, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część szczególna. Komentarz do art. 117–211*, Vol. II, Warszawa 2017, p. 447; K. Buchała, [in:] A. Zoll (ed.), *Kodeks karny, Część szczególna. Komentarz do art. 117–277 Kodeksu karnego*, Vol. II, Zakamycze 1999, p. 340.

a threat to health in contact with them.[36] The Supreme Court supported the former opinion in the discussed ruling, which had influence on its final stance. In literature, it is rightly indicated that the legislator did not include any restriction in the provision with respect to the nature of substances harmful to health, and thus substances harmful to health are not only those that have acquired the features of harmfulness as a result of, e.g. the defective production of storage, but also those that are harmful by nature.[37] Therefore, the production and/or introduction for sale of designer drugs may match the features of an offence under Article 165 § 1(2) CC, provided that, due to their chemical composition and the amount, they pose a real danger to life or health of many people. The provision concerns a danger to health that is a common hazard and not the harmfulness to health at a slight level, causing temporary and not serious body functioning disorder.[38] There are no normative grounds for justifying an opinion that: "The provision of Article 165 § 1(2) CC does not concern substances dangerous by nature, trafficking in which is prohibited, but it concerns the protection of life and health of many people when they have contact with commonly available substances that they may have the right to believe are safe if used in a 'standard' way."[39]

Thus, it is rightly assumed in case law that "The perpetrator's conduct – the introduction for sale of substances harmful to health – will match the features under Article 165 § 1(2) CC only when it is proved that 'the harmfulness of a substance' is of such nature and importance that poses a real and definite threat to human life or health to a great extent and is a common hazard."[40]

7. MAINTENANCE EVASION (ARTICLE 209 § 1 CC)

The offence of maintenance evasion consists in non-compliance with the obligation to pay for the support of a next of kin determined in a court ruling, an agreement negotiated in court or any other body, or another agreement if the total maintenance arrears equal three periodical payments or one payment different from a periodical one is delayed for at least three months (Article 209 § 1 CC).

In the light of this provision, the Supreme Court was asked a prejudicial question: "Do breaks between the periods when a perpetrator persistently evades the obligation to support a next of kin or another person, and thus exposes such a person to a situation where they cannot satisfy their essential needs (Article 209 § 1 CC), make his conduct, with the exception of the break periods, one act or many acts?"

---

[36] P. Pętasz, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna. Komentarz do artykułów 117–221*, Vol. I, Warszawa 2017, p. 387; M. Gałązka, G. Hałas, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warszawa 2018, p. 913.

[37] B. Gadecki, *Glosa do postanowienia SN z dnia 31 maja 2017 r., I KZP 5/17*, OSP No. 11, 2017, item 115.

[38] The Supreme Court judgment of 30 May 1977, IV KR 84/77, OSNPG 1977, No. 11, item 104.

[39] Judgment if the Court of Appeal in Lublin of 11 January 2018, II AKa 266/17, LEX No. 2455116.

[40] Ruling of the Court of Appeal in Kraków of 11 December 2013, II AKz 483/13, LEX No. 1402863.

In the ruling of 26 April 2017, I KZP 1/17 (OSNKW 2017, No. 6, item 33), the Supreme Court rightly assumed that: **The criterion of time that decides on the unity or plurality of offences should be interpreted in the same way as in the case of a continuous act under Article 12 CC and in the case of the types of prohibited acts the commission of which consists in many types of conduct, including the evasion of maintenance under Article 209 § 1 CC.** The opinion was partially criticised.[41] Justifying this stance, the Supreme Court rightly indicated that general assessment in this area is not possible and depends on a particular factual state. Nevertheless, the Court highlighted that the occurrence of breaks between particular stages of conduct constituting evasion of maintenance and resulting from the fact that the obliged person was not able to fulfil his maintenance obligation or the beneficiary was not exposed to a dangerous situation in some periods causes that one deals with more than one offence.[42]

Failure to fulfil the maintenance obligation for objective reasons, especially because of no possibility of paying those benefits, cannot constitute grounds for criminal liability for the offence under Article 209 § 1 CC. In a situation where the state separated periods when the fulfilment of the obligation was possible, in general, many offences were committed. This plurality is possible provided that there are no circumstances of a continuous act (Article 12 CC). The Supreme Court rightly emphasised that the assessment is based on general criteria and many acts, which also include an element of time, i.e. a period that has passed between two acts, e.g. if the period is longer, in general the unity of an act is rejected and, as a result, the occurrence of many offences is recognised.

8. APPLICATION OF ARTICLE 4 § 1 CC IN PENAL EXECUTIVE PROCEDURE (ARTICLE 152 EPC)

Conditional suspension of the penalty of deprivation of liberty, as a rule, takes place in the course of the hearing proceedings but is also possible in the course of the penal executive proceedings. Article 152 § 1 EPC admits conditional suspension of the execution of the penalty of deprivation of liberty not exceeding one year for a period of at least one year. Due to a change introduced by the Act of 20 February 2015 amending the Act: Criminal Code and some other acts[43] consisting in a decrease in the maximum limit of the penalty of deprivation of liberty that can be conditionally suspended from two years to one year, a problem arose whether, in accordance with Article 152 § 1 EPC, it is possible to conditionally suspend a penalty of deprivation of liberty for a period longer than one year, imposed for an act committed before the Act entered into force. The resolution depends on the nature of Article 152 § 1 EPC and such a possibility

---

41 See a partially critical gloss by M. Nawrocki, Prawo w Działaniu No. 28, 2016, pp. 248–254.

42 The Supreme Court judgment of 19 May 2010, V KK 74/10, LEX No. 584784; the Supreme Court judgment of 9 November 2011, IV KK 321/11, LEX No. 1044059; the Supreme Court judgment of 5 March 2015, III KK 414/14, LEX No. 1665592, with a critical gloss by S. Kowalski, OSP No. 5, 2017, item 47.

43 Dz.U. 2015, item 396.

should be admitted, in accordance with Article 4 § 1 CC, in case of recognition that the provision is substantive in nature. However, the issue raises controversies in case law.[44]

There is an opinion that Article 152 § 1 EPC is substantive in nature and, due to that, it is subject to guarantees resulting from the content of Article 4 § 1 CC and is not subject to the regime of direct application of a new statute, which was laid down in the Executive Penal Code.[45] The Supreme Court took a stance that: "Article 4 § 1 CC should be applied in the penal executive proceedings in which 'the adjudication on the offence' takes place, in particular with respect to the size and form of a perpetrator's criminal liability adjudicated in a sentence issued earlier."[46] There is also an opinion that Article 4 § 1 CC should not be applied in the penal executive procedure.[47]

In the ruling of 19 January 2017, I KZP 13/16 (OSNKW 2017, No. 2, item 9), the Supreme Court rightly decided that: (**1) The provision of Article 4 § 1 CC is applicable to any penal norms that are substantive in nature, regardless of the type of statute in which they are prescribed. (2) The provision of Article 152 § 1 EPC contains a norm that is substantive in nature, thus it is subject to guarantees resulting from the content of Article 4 § 1 CC.**

Justifying this opinion, the Supreme Court highlighted that the phrase "the time of adjudication" used in Article 4 § 1 CC should be interpreted not only as the time of issuing a sentence on a perpetrator's criminal liability but also the time of adjudication in all the phases of criminal proceedings, i.e. the preparatory, main and execution ones, in which a decision must be taken concerning the fate of the person against whom the proceedings are carried out.[48] Moreover, the application of conditional suspension of the execution of a penalty imposes an obligation on the court to assess the aims of penalties laid down in Article 53 CC, and in this sense it resembles a modification of validly adjudicated penalties that is laid down in Article 75a CC.[49] The opinion is also supported by the fact that a possibility of conditional suspension of the execution of a penalty of deprivation of liberty at the stage of the execution procedure, as it is emphasised in the doctrine, constitutes a departure from the principle of stability of judicial decisions.[50]

---

[44] K. Janczukowicz, *Wybór ustawy względniejszej przy warunkowym zawieszeniu wykonania kary w postępowaniu wykonawczym*, LEX/el. 2016.

[45] Judgment of the Court of Appeal in Gdańsk of 30 December 2015, II AKa 397/15, LEX No. 2017742; ruling of the Court of Appeal in Katowice of 11 March 2016, II AKzw 202/16, LEX No. 2087741.

[46] The Supreme Court ruling of 28 August 2013, V KK 160/13, LEX No. 1362629.

[47] Ruling of the Court of Appeal in Kraków of 28 October 2002, II AKz 454/02, LEX No. 74993.

[48] W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Kraków 2003, p. 631.

[49] W. Wróbel, *Aktualne problemy intertemporalne okresu przejściowego po wejściu w życie ustawy z 20 lutego 2015 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, CzPKiNP No. 3, 2015, pp. 76–77.

[50] K. Postulski, *Stosowanie art. 152 kodeksu karnego wykonawczego*, Przegląd Sądowy No. 7–8, 2001, pp. 71 and 73.

9. CONSUMPTION OF ALCOHOL IN PUBLIC PLACES (ARTICLE 431 PARA. 1 ACT OF 26 OCTOBER 1982 ON UPBRINGING IN SOBRIETY AND PREVENTION OF ALCOHOLISM)

The consumption of alcoholic beverages, which breaches bans laid down in Article 14 paras 1 and 2a–6 of the Act of 26 October 1982 on upbringing in sobriety and prevention of alcoholism,[51] is a misdemeanour laid down in Article 43[1] para. 1 of this statute. Article 14 para. 2a of the statute before its change by the Act of 10 January 2018 amending the Act on upbringing in sobriety and prevention of alcoholism and the Act on mass events security[52] laid down a ban on the consumption of alcoholic beverages in streets, squares and parks with the exception of points of sale dedicated to their consumption. Based on this provision, a doubt was raised concerning the meaning of the word "street".

In the ruling of 19 January 2017, I KZP 14/16 (OSNKW 2017, No. 3, item 13), the Supreme Court rightly stated that: **The misdemeanour laid down in Article 43[1] para. 1 of the Act of 26 October 1982 on upbringing in sobriety and prevention of alcoholism (Dz.U. 2016, item 487), in the face of reference made in it to the content of the provision of Article 14 paras 1–6 of the statute, is committed only if a person consumes alcohol in the places indicated in those provisions or determined in a resolution passed by a commune council based on Article 14 para. 6 of the statute. The content of Article 14 paras 1–6 of this statute clearly indicates that the consumption of alcohol in the whole public space is not prohibited; the term "street" used in Article 14 para. 2a should be interpreted in accordance with its legal definition laid down in Article 4 para. 3 of the Act of 21 March 1985 on public roads (Dz.U. 2016, item 1440, as amended), supplemented by a definition of a road laid down in Article 4 para. 2 therein.** The explanation is of historic importance because, in accordance with the present wording of Article 14 para. 2a of the statute, the consumption of alcohol in public places is prohibited, with the exception of points of sale dedicated to the consumption of such beverages, thus its scope was considerably extended.

10. TECHNICAL PROVISIONS IN THE GAMBLING SECTOR VS FISCAL-PENAL LIABILITY FOR AN OFFENCE UNDER ARTICLE 107 § 1 FPC (ARTICLE 6 PARA. 1 AND ARTICLE 14 PARA. 1 ACT OF 19 NOVEMBER 2009 ON GAMBLING[53])

The Supreme Court was asked a prejudicial question: "Are the provisions of Article 6 para. 1 and Article 14 para. 1 of the Act of 19 November 2009 on gambling (Dz.U. 2015, item 612), within the scope of fruit machines, limiting the use of them only to the activity based on a casino licence, technical within the meaning of

[51] Dz.U. 2018, item 2137.
[52] Dz.U. 2018, item 310.
[53] Dz.U. 2018, item 165, as amended.

Article 1 para. 11 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204 of 21.07.1998, as amended), and if so, in the face of non-notification of the European Commission about those provisions, are criminal courts hearing cases concerning fiscal offences laid down in Article 107 § 1 of the Fiscal Penal Code (henceforth FPC) authorised to refuse their application as ones that are in conflict with the EU law based on Article 91 para. 3 Constitution?"

In the resolution of seven judges of 19 January 2017, I KZP 17/16 (OSNKW 2017, No. 2, item 7), the Supreme Court stated that: **The collision of national law with the Union law, in the light of the principle of direct application of the European Union law (Article 91 para. 3 Constitution), may lead to the substitution of the Union law for the national law or to the exclusion of a national legal norm with the use of a directly effective norm of the European Union. In consequence, the norm of non-application of a national technical provision about the bill of which the European Commission has not been notified, which results from Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204 of 21.07.1998, as amended), excludes the possibility of applying Article 14 para. 1 Act of 19 November 2009 on gambling (Dz.U. 2015, item 612) in the original version in the case concerning an offence under Article 107 § 1 FPC. On the other hand, Article 6 para. 1 of the statute could and still can constitute the supplementation of the blanket disposition laid down in Article 107 § 1 FPC, provided the factual circumstances of a given case make it possible to establish that the provision is applicable and has been breached.** This is a right opinion and its justification is abundant and convincing, thus it should be approved of in full extent.

11. PHRASE "WITHIN THE TIME LIMIT FOR TAX PAYMENT" (ARTICLE 28 PARA. 4 ACT OF 26 JULY 1991 ON PERSONAL INCOME TAX)

Tax on income obtained from the sale of real property and property rights is payable without a call within 14 days from the date of sale into the bank account of the Revenue Office managed by the Head of Revenue Office having jurisdiction over the place of residence of the taxpayer, and the taxpayer is obliged to submit a tax return in a fixed format in the term of tax payment (Article 28 paras 2 and 4 of the Act of 26 July 1991 on personal income tax, in the wording that was in force until 31 December 2006[54]). In the light of that, a doubt arose: "Does the phrase 'within the time limit of tax payment' refer to the time when the tax is paid indicated in para. 2 sentence 2 of the Article 28 or the time when the tax is paid referred to in para. 3 of Article 28 of the statute?"

[54] Dz.U. 2000, No. 14, item 176, as amended.

In the ruling of 14 September 2017, I KZP 8/17 (OSNKW 2018, No. 1, item 1), the Supreme Court explained that: **The phrase "within the time limit of tax payment" used in the text of Article 28 para. 4 of the Act of 26 July 1991 on personal income tax, in the wording that was in force until 31 December 2006 (Dz.U. 2000, No. 14, item 176, as amended, at present: consolidated text, Dz.U. 2016, item 2032) in conjunction with Article 7 para. 1 of the Act of 16 November 2006 amending the Act on personal income tax and some other acts (Dz.U. 2006, No. 217, item 1588, as amended), refers to the term of tax payment indicated in Article 28 para. 2 Act on personal income tax as well as Article 28 para. 3. Thus, if a taxpayer submits a declaration referred to in Article 28 para. 2a of the statute but does not act in the way declared in the declaration, the time limit of tax payment, in accordance with Article 47 § 3 Act on Tax Law of 29 August 1997 (Dz.U. 2017, item 201, as amended) in conjunction with Article 28 para. 3 Act on personal income tax, is the next day after two years that have passed from the date of sale of real property or property rights. Until this deadline, a taxpayer is obliged to calculate and pay the tax indicated in Article 28 para. 2 Act on personal income tax with interest referred to in Article 28 para. 3 of the statute, pursuant to Article 28 para. 4, and submit a tax return in a fixed format.** This stance should be approved of and the arguments for it are well grounded.

BIBLIOGRAPHY

Barczak-Oplustil A., *Glosa do postanowienia SN z dnia 30 września 2010 r., I KZP 16/10,* CzPKiNP No. 4, 2010.

Biederman J., *Glosa do uchwały SN z dnia 20 listopada 2000 r., I KZP 36/2000*, Palestra No. 7–8, 2001.

Bogdan G., [in:] W. Wróbel, A. Zoll (eds), *Kodeks kamy. Część szczególna. Komentarz do art. 117–211*, Vol. II, Warszawa 2017.

Buchała K., [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz do art. 117–277 Kodeksu karnego*, Vol. II, Zakamycze 1999.

Gadecki B., *Glosa do postanowienia SN z dnia 31 maja 2017 r., I KZP 5/17*, OSP No. 11, 2017, item 115.

Gajdus D., *Czynny żal w polskim prawie karnym*, Toruń 1984.

Gałązka M., Hałas G., [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warszawa 2018.

Giezek J., *Glosa do uchwały SN z dnia 20 listopada 2000 r., I KZP 36/2000*, Prokuratura i Prawo No. 8, 2001.

Giezek J., [in:] M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2010.

Giezek J. [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2012.

Góral R., *Kodeks karny. Praktyczny komentarz*, Warszawa 2007.

Janczukowicz K., *Brak przedmiotu oczekiwanego przez sprawcę a nieudolność usiłowania kradzieży (rozboju)*, LEX/el. 2015.

Janczukowicz K., *Wzbudzenie obawy jako warunek odpowiedzialności za przestępne wywieranie wpływu na uczestnika postępowania*, LEX/el. 2015.

Janczukowicz K., *Wybór ustawy względniejszej przy warunkowym zawieszeniu wykonania kary w postępowaniu wykonawczym*, LEX/el. 2016.

Jezusek A., *Glosa do uchwały 7 sędziów SN z dnia 19 stycznia 2017 r., I KZP 16/16*, Prokuratura i Prawo No. 4, 2017.

Kalisz T., *Warunkowe przedterminowe zwolnienie z reszty kary pozbawienia wolności z perspektywy problemów z ustalaniem treści i kierunku prognozy kryminologicznej*, [in:] T. Kalisz (ed.) *Nowa Kodyfikacja Prawa Karnego*, Vol. XXX, Wrocław 2013.

Kanty T., *Glosa do postanowienia SN z dnia 30 września 2010 r., I KZP 16/10*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 3, 2011.

Kardas R., *Zatrudnienie w jednostce organizacyjnej dysponującej środkami publicznymi jako ustawowe kryterium wyznaczające zakres znaczeniowy pojęcia „osoba pełniąca funkcję publiczną"*, CzPKiNP No. 1, 2005.

Kmąk K., *Glosa do uchwały 7 sędziów SN z dnia 19 stycznia 2017 r., I KZP 16/16*, Prokuratura i Prawo No. 6, 2017.

Konarska-Wrzosek V., [in:] R.A. Stefański (ed.), *Kodeks kamy, Komentarz*, Warszawa 2018.

Konarska-Wrzosek V., [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.

Kosiada M., *Glosa do postanowienia SA we Wrocławiu z dnia 13 października 2004 r., II AKzw 685/04*, Prokuratura i Prawo No. 5, 2007.

Kowalski S., *Glosa do wyroku SN z dnia 5 marca 2015 r., III KK 414/14*, OSP No. 5, 2017.

Krakowiak D., *Glosa do uchwały 7 sędziów SN z dnia 19 stycznia 2017 r., I KZP 16/16*, LEX/el. 2017.

Krakowiak D., *Glosa do postanowieni SN z dnia 19 stycznia 2017 r. I KZP 12/16*, LEX/el. 2017.

Krawczyk T., *Glosa do uchwały 7 sędziów SN z dnia 20 czerwca 2001 r., I KZP 5/01*, Prokuratura i Prawo No. 11, 2002.

Kulesza J., *Glosa do postanowienia SA w Warszawie z dnia 3 listopada 1998 r., II AKz 115/98*, Palestra No. 1, 2000.

Kulesza J., *Glosa do uchwały 7 sędziów SN z dnia 20 czerwca 2001 r., I KZP 5/01*, Prokuratura i Prawo No. 10, 2002.

Lachowski J., *Pozbawienie praw publicznych w Kodeksie karnym*, Prokuratura i Prawo No. 10, 2003.

Lachowski J., *Instytucja warunkowego przedterminowego zwolnienia*, Państwo i Prawo No. 2, 2008.

Lachowski J., *Przesłanka materialna warunkowego przedterminowego zwolnienia na gruncie kodeksu karnego*, Prokuratura i Prawo No. 11, 2008.

Lachowski J., *Warunkowe zwolnienie z reszty kary pozbawienia wolności*, Warszawa 2010.

Lachowski J., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116,* Warszawa 2017.

Lelental S., *Glosa do postanowienia SA w Krakowie z dnia 6 czerwca 2001 r., II AKz[1] 189/01*, Przegląd Więziennictwa Polskiego No. 36, 2002.

Lelental S., *Glosa do postanowień SA w Gdańsku z 18 października 2000 r., II AKz 943/2000 i z dnia 7 czerwca 2005 r., II AKzw 399/2005,* Przegląd Więziennictwa Polskiego No. 51, 2006.

Lelental S., [in:] M. Melezini (eds), *System Prawa Karnego. Kary i inne środki reakcji karnoprawnej*, Vol. 6, Warszawa 2016.

Majcher Sz., *Glosa do uchwały SN z dnia 20 listopada 2000 r., I KZP 36/2000*, TBSPUJ No. 11–12, 2004.

Majewski J., [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część ogólna. Komentarz do art. 53–116*, Vol. I, part 1, Warszawa 2016.

Małecki M., *Glosa do uchwały 7 sędziów SN z dnia 19 stycznia 2017 r., I KZP 16/16*, OSP No. 7–8, 2017, item 79.

Marek A., *Istota nieudolnego usiłowania przestępstwa*, RPEiS No. 1, 1968.

Marek A., *Kodeks karny. Komentarz*, Warszawa 2010.

Markowska E., *Glosa do uchwały SN z dnia 20 listopada 2000 r., I KZP 36/2000*, Prokuratura i Prawo No. 9, 2005.
Mozgawa M., [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2017.
Nawrocki M., *Glosa do postanowienia 7 sędziów SN z dnia 26 kwietnia 2017 r., I KZP 1/17*, Prawo w Działaniu No. 28, 2016.
Nazar K., *Glosa do postanowienia SN z dnia 14 września 2017 r., I KZP 7/17*, Ius Novum No. 3, 2018.
Nowak C., *Korupcja w polskim prawie karnym na tle uregulowań międzynarodowych*, Warszawa 2008.
Osiński L., [in:] J. Lachowski (ed.), *Kodeks karny wykonawczy. Komentarz*, Warszawa 2016.
Pętasz P., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna. Komentarz do artykułów 117–221*, Vol. I, Warszawa 2017.
Postulski K., *Stosowanie art. 152 kodeksu karnego wykonawczego*, Przegląd Sądowy No. 7–8, 2001.
Postulski K., *Glosa do postanowienia SA w Krakowie z dnia 22 października 2015 r., II AKzw 1039/15,* LEX/el. 2016.
Postulski K., *Kodeks karny wykonawczy. Komentarz*, Warszawa 2016.
Postulski K., *Komentarz do niektórych przepisów ustawy z dnia 6 czerwca 1997 r. Kodeks karny wykonawczy, w zakresie zmian wprowadzonych ustawą z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks karny wykonawczy (Dz.U.16.428)*, LEX/el. 2016.
Postulski K., *Glosa do uchwały składu 7 sędziów SN z dnia 26 kwietnia 2017 r., I KZP 2/17*, LEX/el. 2018.
Przyjemski S.M., *Glosa do uchwały 7 sędziów SN z dnia 20 czerwca 2001 r., I KZP 5/01,* Pr. i Med. No. 11, 2002.
Sienkiewicz Z., [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. I, Gdańsk 2005.
Skupiński J., Mierzwińska-Lorencka J., [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
Sroka T., [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Warszawa 2017.
Stefańska B.J., [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
Stefański R.A., *Glosa do postanowienia SN z dnia 17 maja 1990 r., V KZP 5/90*, OSP No. 1, 1991, item 1.
Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego i prawa wykroczeń za 2000 r.*, WPP No. 1, 2001.
Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego i prawa wykroczeń za 2001 r.*, WPP No. 1, 2002.
Stefański R.A., *Przestępstwo urojone*, Prokuratura i Prawo No. 3, 2008.
Stefański R.A., [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2018.
Świda Z., *Charakter i stosowanie instytucji warunkowego przedterminowego zwolnienia od odbycia reszty kary pozbawienia wolności*, [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warszawa 2007.
Wąsek A., *Glosa do uchwały SN z dnia 20 listopada 2000 r., I KZP 36/2000*, OSP No. 4, 2001.
Wiak K., [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warszawa 2018.
Wiciński G., *Glosa do postanowienia SA w Łodzi z dnia 23 marca 1999 r., II AKz 114/99*, Prokuratura i Prawo No. 7–8, 2000.
Wojciechowska J., [in:] G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 1999.
Wróbel W., *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Kraków 2003.

Wróbel W., *Aktualne problemy intertemporalne okresu przejściowego po wejściu w życie ustawy z 20 lutego 2015 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, CzPKiNP No. 3, 2015.

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

Zabłocki S., *Przegląd orzecznictwa Sądu najwyższego – Izba Karna*, Palestra No. 1–2, 2001.

Zabłocki S., *Przegląd orzecznictwa Sądu Najwyższego – Izba Karna*, Palestra No. 5–6, 2002.

Zawłocki R., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 1–31*, Vol. I, Warszawa 2010.

Zawłocki R., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Warszawa 2017.

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

Zoll A., [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Cześć ogólna, Komentarz do art. 1–52*, Vol. I, part 1, Warszawa 2016.

REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER FOR 2017 CONCERNING SUBSTANTIVE CRIMINAL LAW, EXECUTIVE PENAL LAW, MISDEMEANOUR LAW AND FISCAL PENAL LAW

Summary

The article analyses resolutions and rulings issued in 2017 by the Criminal Chamber of the Supreme Court and resulting from adjudication of legal issues concerning substantive criminal law, executive penal law, misdemeanour law and fiscal penal law. The article discusses: the concept of "the object of a prohibited act", which is one of the elements of an unsuccessful attempt to commit an offence (Article 13 § 2 CC); condition for ruling conditional release of a person sentenced to the penalty of deprivation of liberty from serving the remainder of the penalty (Article 77 § 1 CC); the significance of a conviction for a crime committed by a convict released from prison without supervision (Article 138 § 1(8) EPC) as a negative condition for ruling an aggregate penalty in the form of an aggregate sentence (Article 85 § 3 CC); interpretation of a punishable threat determined in Article 190 § 1 CC constituting one of the elements of the definition of a threat (Article 115 § 12 CC); performing a public function by a person employed in an independent public healthcare institution (Article 115 § 19 CC); liability for trafficking the so-called designer drugs (Article 165 § 1(2) CC); legal significance of breaks between periods in which a perpetrator persistently evades the duty to take care by not providing maintenance for the next of kin or other persons (Article 209 § 1 CC); in case of change in legislation, application of a more relevant statute to a perpetrator (Article 4 § 1 CC) in order to rule a conditional suspension of the execution of the penalty of deprivation of liberty in penal executive proceedings (Article 152 EPC); the misdemeanour of alcohol consumption in a public place (Article 431(1) of the Act of 26 October 1982 on upbringing in sobriety and prevention of alcoholism); technical regulations in the gambling sector vs fiscal penal liability for an offence under Article 107 § 1 FPC (Article 6(1) and Article 14(1) of the Act of 19 November 2009 on gambling (Dz.U. 2015, item 612)); the phrase "within the time limit for tax payment" (Article 28(4) of the Act of 26 July 1991 on personal income tax).

Keywords: designer drugs, public function, unlawful threat, gambling, aggregate penalty, tax, Supreme Court, resolution, maintenance evasion, attempt, more relevant statute, conditional release

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO MATERIALNEGO, PRAWA KARNEGO WYKONAWCZEGO, PRAWA WYKROCZEŃ I PRAWA KARNEGO SKARBOWEGO ZA 2017 R.

Streszczenie

W artykule zostały poddane analizie uchwały i postanowienia Izby Karnej Sądu Najwyższego zapadłe w trybie rozstrzygania zagadnień prawnych w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa wykroczeń i prawa karnego skarbowego za 2017 r. Przedmiotem rozważań są: pojęcie „przedmiotu nadającego się do popełnienia na nim czynu zabronionego", będącego jednym z elementów nieudolnego usiłowania przestępstwa (art. 13 § 2 k.k.); przesłanki orzekania o warunkowym przedterminowym zwolnieniu z reszty kary pozbawienia wolności (art. 77 § 1 k.k.); znaczenie skazania za przestępstwo popełnione podczas korzystania przez skazanego z zezwolenia na opuszczenie zakładu karnego bez dozoru (art. 138 § 1 pkt 8 k.k.w.) w aspekcie negatywnej przesłanki wymierzenia kary łącznej w trybie wyroku łącznego (art. 85 § 3 k.k.); rozumienie groźby karalnej określonej w art. 190 § 1 k.k., stanowiącej jeden z elementów definicji groźby (art.115 § 12 k.k.); pełnienie funkcji publicznej przez osobę zatrudnioną w samodzielnym publicznym zakładzie opieki zdrowotnej (art. 115 § 19 k.k.); odpowiedzialność za wprowadzanie do obrotu tzw. dopalaczy (art. 165 § 1 pkt 2 k.k.); znaczenie prawnokarne przerw pomiędzy okresami, w których sprawca uporczywie uchyla się od wykonania ciążącego na nim obowiązku opieki przez niełożenie na utrzymanie osoby najbliższej lub innej osoby (art. 209 § 1 k.k.); stosowanie ustawy względniejszej dla sprawcy w razie jej zmiany (art. 4 § 1 k.k.) do orzekania warunkowego zawieszenia wykonania kary pozbawienia wolności w postępowaniu karnym wykonawczym (art. 152 k.k.w.); wykroczenie spożywania alkoholu w miejscu publicznym (art. 431 ust. 1 ustawy z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi); przepisy techniczne w sektorze gier hazardowych a odpowiedzialność karna skarbowa za przestępstwo z art. 107 § 1 k.k.s. (art. 6 ust. 1 i art. 14 ust. 1 ustawy z dnia 19 listopada 2009 r. o grach hazardowych, Dz.U. z 2015 r., poz. 612); określenie „w terminie płatności podatku" (art. 28 ust. 4 ustawy z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych).

Słowa kluczowe: dopalacze, funkcja publiczna, groźba bezprawna, gry hazardowe, kara łączna, podatek, Sąd Najwyższy, uchwała, uchylanie się od alimentów, usiłowanie, ustawa względniejsza, warunkowe zwolnienie

REVISIÓN DE ACUERDOS DE LA SALA DE LO PENAL DEL TRIBUNAL SUPREMO RELATIVOS AL DERECHO PENAL, DERECHO PENAL DE EJECUCIÓN, DERECHO DE FALTAS Y DERECHO PENAL FISCAL DE 2017

Resumen

El artículo analiza acuerdos y autos de la Sala de lo Penal del Tribunal Supremo relativos a cuestiones legales de derecho penal, derecho penal de ejecución, derecho de faltas y derecho penal fiscal de 2017. Versa sobre: el concepto de "objeto susceptible para cometer hecho antijurídico" que constituye uno de los elementos de la tentativa inidónea (art., 13 § 2 del código penal); requisitos para dictar puesta condicional anticipada en libertad (art. 77 § 1 del código penal); significado de condena por delito cometido durante el disfrute por el condenado del

permiso para abandonar el centro penitenciario sin vigilancia (art. 138 § 1 punto 8 del código penal de ejecución), requisito para condenar a la pena conjunta por la vía de sentencia conjunta en su aspecto negativo (art. 85 § 3 del código penal); significado de amenaza punible determinado en el art. 190 § 1 del código penal que constituye uno de los elementos de la definición de la amenaza (art.115 § 12 del código penal); desempeño de la función pública por la persona empleada en el centro público de salud (art. 115 § 19 del código penal); responsabilidad por la introducción al mercado de las llamadas drogas sintéticas (art. 165 § 1 punto 2 del código penal); significado legal de pausas entre períodos en los cuales el autor reiteradamente evade la ejecución de obligación de cuidado mediante la falta de mantener a la persona cercana o a otra persona (art. 209 § 1 del código penal); aplicación de ley más favorable para el sujeto en caso de su modificación (art. 4 § 1 del código penal), requisitos para la suspensión condicional de ejecución de la pena de privación de libertad en el proceso penal de ejecución (art. 152 del código penal de ejecución); la falta de consumir alcohol en lugar público (art. 431 ap. 1 de la ley de 26 de octubre de 1982 sobre la educación en sobriedad y prevención del alcoholismo), normas técnicas en el sector de juegos de azar y la responsabilidad penal fiscal por el delito del art. 107 § 1 del código penal fiscal (art. 6 ap. 1 y art. 14 ap. 1 de la ley de 19 de noviembre de 2009 sobre juegos de azar (B.O. de 2015, asiento 612); expresión "en el plazo de pago de impuesto" (art. 28 ap. 4 de la ley de 26 de julio de 1991 sobre el impuesto sobre la renta de las personas físicas).

Palabras claves: droga sintética, función pública, amenaza punible, juegos de azar, pena conjunta, impuesto, Tribunal Supremo, acuerdo, evasión de alimentos, tentativa, ley más favorable, puesta anticipada en libertad

ОБЗОР ПОСТАНОВЛЕНИЙ УГОЛОВНОЙ ПАЛАТЫ ВЕРХОВНОГО СУДА ЗА 2017 ГОД В ОБЛАСТИ МАТЕРИАЛЬНОГО УГОЛОВНОГО ПРАВА, ИСПОЛНИТЕЛЬНОГО УГОЛОВНОГО ПРАВА, ПРАВА ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ И НАЛОГОВОГО УГОЛОВНОГО ПРАВА

Резюме

В статье анализируются резолюции и постановления Уголовной палаты Верховного суда за 2017 год, принятые при рассмотрении юридических вопросов в сфере материального уголовного права, исполнительного уголовного права, права об административных правонарушениях и налогового уголовного права. Предметом рассмотрения являются: понятие «надлежащего объекта совершения преступления» как одного из элементов негодного покушения на совершение преступления (ст. 13 § 2 УК);предпосылки для принятия решения об условно-досрочном освобождении от отбытия оставшегося срока лишения свободы (ст. 77 § 1 УК); значение приговора за преступление, совершенное осужденным лицом, которое воспользовалось разрешением покинуть пенитенциарное учреждение без надзора (ст. 138 § 1 п. 8 УИК), в качестве отрицательной предпосылки при назначении совокупного наказания в приговоре по совокупности преступлений (ст. 85 § 3 УК); трактовка наказуемой угрозы, определение которой содержится в ст. 190 § 1 УК, как одного из элементов определения угрозы (ст. 115 § 12 УК); выполнение публичной функции лицом, работающим в отдельном государственном учреждении здравоохранения (ст. 115 § 19 УК); ответственность за торговлю так называемыми «дизайнерскими наркотиками» (ст. 165 § 1 п. 2 УК); уголовно-правовая значимость перерывов между периодами, в течение которых преступник злостно уклоняется от обязанностей по уходу за близким родственником или другим лицом путем

неуплаты алиментов на содержание (ст. 209 § 1 УК); применение закона, более благоприятного для правонарушителя, в случае, если закон подвергся изменению (ст. 4 § 1 УК), при вынесении решения об условной отсрочке исполнения приговора к лишению свободы в рамках уголовно-исполнительной процедуры (ст. 152 УИК); административное правонарушение, состоящее в потреблении алкогольных напитков в общественном месте (ст. 431 пар. 1 Закона «О воспитании в трезвости и противодействии алкоголизму» от 26 октября 1982 г.); технические регламенты в сфере игорного бизнеса и уголовная ответственность за налоговое преступление, предусмотренное статьей 107 § 1 Уголовного кодекса о налоговых преступлениях (ст. 6 § 1 и ст. 14 § 1 Закона «Об азартных играх» от 19 ноября 2009 г.) (Dziennik Ustaw [Законодательный вестник] за 2015 г., позиция 612); выражение «в срок уплаты налога» (ст. 28 пар. 4 Закона «О подоходном налоге с физических лиц» от 26 июля 1991 г.).

Ключевые слова: дизайнерские наркотики, публичная функция, незаконная угроза, азартные игры, совокупное наказание, налоги, Верховный суд, резолюция, уклонение от уплаты алиментов, покушение на совершение преступления, более благоприятный закон, условное освобождение

ÜBERSICHT ÜBER DIE BESCHLÜSSE DER STRAFKAMMER DES OBERSTEN GERICHTSHOFS IM BEREICH DES MATERIELLEN STRAFRECHTS, DES STRAFVOLLSTRECKUNGSRECHTS, DES ORDNUNGSWIDRIGKEITENRECHTS UND DES STEUERSTRAFRECHTS IM JAHR 2017

Zusammenfassung

Der Artikel analysiert die Beschlüsse und Entscheidungen der Strafkammer des polnischen Obersten Gerichtshofs, der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen, die 2017 im Zuge der Klärung von Rechtsfragen im Bereich des materiellen Strafrechts, des Strafvollstreckungsrechts, des Ordnungswidrigkeitenrechts und des Steuerstrafrechts gefasst wurden. Gegenstand der Betrachtungen sind der Begriff des „Gegenstands, der geeignet ist, dass an ihm eine Straftat verübt werden kann", d.h. des tauglichen Tatobjekts, eines der Elemente des untauglichen Versuchs einer Straftat (Artikel 13 § 2 des polnischen Strafgesetzbuches); die Voraussetzungen für die Entscheidung über die bedingte vorzeitige Haftentlassung (Artikel 77 § 1 des polnischen Strafgesetzbuches); die Bedeutung der Verurteilung wegen einer Straftat, die verübt wurde, während ein Verurteilter die Erlaubnis zum unbeaufsichtigten Verlassen der Strafvollzugsanstalt in Anspruch genommen hat (Artikel 138 § 1 Punkt 8 des polnischen Strafverfolgungsgesetzbuches) unter dem Blickpunkt der negativen Voraussetzungen für die Verhängung einer kumulativen Gesamtstrafe durch ein Gesamturteil (Artikel 85 Absatz 3 des polnischen Strafgesetzbuches); das Verständnis der Bedrohung nach Artikel 190 § 1 des polnischen Strafgesetzbuches, eines der Elemente der Definition von Drohungen (Artikel 115 § 12 des polnischen Strafgesetzbuches); die Ausübung einer öffentlichen Funktion durch in einer eigenständigen Einrichtung des öffentlichen Gesundheitswesens beschäftigte Personen (Artikel 115 § 19 des polnischen Strafgesetzbuches); die Haftung für das Inverkehrbringen von neuen psychoaktiven Substanzen (NPS), sogenannten Legal Highs (Artikel 165 Abs. 1 Punkt 2 des polnischen Strafgesetzbuches); die strafrechtliche Bedeutung von Unterbrechungen zwischen Zeiten, in denen ein Täter sich hartnäckig seiner Fürsorgepflicht entzieht und nicht zum Unterhalt von Angehörigen oder anderen Personen beiträgt (Artikel 209 § 1 des polnischen Strafgesetzbuches); die Anwendung des milderen Strafgesetzes auf einen Täter im Falle seiner Änderung (Artikel 4 § 1 des polnischen Strafgesetzbuches) zur Anordnung der bedingten Aus-

setzung der Vollstreckung einer Freiheitsstrafe im Strafvollstreckungsverfahren (Artikel 152 des polnischen Strafverfolgungsgesetzbuches); die Ordnungswidrigkeit des Alkoholkonsums in der Öffentlichkeit (Artikel 431 Absatz 1 des polnischen Gesetzes vom 26. Oktober 1982 über die Erziehung zur Nüchternheit und die Bekämpfung des Alkoholismus); die technischen Vorschriften im Glücksspielbereich und die steuerstrafrechtliche Haftung für Straftaten nach Artikel 107 § 1 des polnischen Strafgesetzbuches (Artikel 6 Absatz 1 und Artikel 14 Absatz 1 des polnischen Gesetzes vom 19. November 2009 über Glücksspiele – Gesetzblatt Dz.U. 2015, Pos. 612); die Wendung „innerhalb der Steuerzahlungsfrist" (Artikel 28 Absatz 4 des polnischen Einkommensteuergesetzes vom 26. Juli 1991).

Schlüsselwörter: neue psychoaktive Substanzen (Legal Highs), öffentliche Funktion, rechtswidrige Drohung, Glücksspiel, Gesamtstrafe, Steuer, Oberste Gerichtshof, Beschluss, Umgehung des Unterhalts, Versuch, relatives Recht, bedingte Freilassung, Unterhaltsverweigerung, versuchte Straftat, milderes Gesetz, bedingte Haftentlassung

LA REVUE DES RÉSOLUTIONS DE LA CHAMBRE CRIMINELLE DE LA COUR SUPRÊME DANS LES DOMAINES DU DROIT PÉNAL MATÉRIEL, DU DROIT PÉNAL EXÉCUTIF, DU DROIT DES INFRACTIONS ET DU DROIT PÉNAL FISCAL EN 2017

Résumé

L'article analyse les résolutions et décisions de la chambre criminelle de la Cour suprême adoptées dans le cadre de la résolution de problèmes juridiques dans les domaines du droit pénal matériel, du droit pénal exécutif, du droit des infractions et du droit pénal fiscal pour 2017. Les problèmes suivants y sont considérés : la notion «d'objet susceptible d'en commetre un acte défendu», qui est l'un des éléments constitutifs de la tentative de crime inefficace (article 13 § 2 du code pénal); les conditions nécessaires de statuer sur la libération conditionnelle avant terme de l'exécution de la peine (article 77 § 1 du code pénal); le sens de condamnation pour une infraction commise alors que la personne condamnée utilisait son permis pour quitter la prison sans surveillance (art. 138 § 1, point 8 du Code pénal exécutif) dans l'aspect de la condition négative pour imposer une peine cumulative sous la forme d'un jugement conjoint (art. 85 § 3 du code pénal); la compréhension de la menace punissable visée à l'art. 190 § 1 du code pénal constituant l'un des éléments de la définition de la menace (article 115 § 12 du code pénal); l'exercice d'une fonction publique par une personne employée dans un établissement de santé public indépendant (article 115 § 19 du code pénal); responsabilité de la mise sur le marché des nouvelles substances psychoactives/nouveaux produits de synthèse (article 165 § 1 point 2 du code pénal); signification juridique et pénale des pauses entre les périodes au cours desquelles l'auteur se soustrait de manière persistante à l'exécution de son obligation de la tutelle en omettant de pourvoir aux besoins d'un parent proche ou d'une autre personne (article 209 § 1 du code pénal); application d'une loi plus indulgente pour l'accusé/auteur en cas de sa modification (article 4 § 1 du code pénal) en vue d'imposer une suspension d'emprisonnement conditionnelle dans le cadre d'une procédure pénale exécutive (article 152 du code pénal exécutif); infraction de consommation d'alcool dans un lieu public (article 431 alinéa 1 de la loi du 26 octobre 1982 sur l'éducation dans la sobriété et la lutte contre l'alcoolisme); les réglementations techniques dans le secteur des jeux de hasard et la responsabilité pénale et fiscale en cas d'infraction prévue à l'art. 107 § 1 du code pénal fiscal (article 6 alinéa 1 et article 14 alinéa 1 de la loi du 19 novembre 2009 sur les jeux de hasard

(Journal des lois de 2015, point 612); le terme «dans le délai de paiement de l'impôt» (article 28 alinéa 4 de la loi du 26 juillet 1991 sur l'impôt sur le revenu des personnes physiques).

Mots-clés: nouvelles substances psychoactives/nouveaux produits de synthèse, fonction publique, menace illégale, jeux de hasard, peine cumulative, impôt, Cour suprême, résolution, sustraction à ses devoirs alimentaires, tentative, loi plus indulgente, libération conditionnelle

ANALISI DELLE DELIBERE DELLA CAMERA PENALE DELLA CORTE SUPREMA NELL'AMBITO DEL DIRITTO PENALE ESECUTUVO, DEL DIRITTO DELLE CONTRAVVENZIONE E DEL DIRITTO PENALE TRIBUTARIO EMESSE NEL 2017

Sintesi

Nell'articolo sono state analizzate le delibere e le ordinanze della Camera Penale della Corte Suprema emesse nel 2017 esaminando questioni giuridiche nell'ambito del diritto penale sostanziale, del diritto penale esecutivo, del diritto delle contravvenzioni e del diritto penale tributario. Oggetto delle riflessioni sono: concetto di "oggetto atto a commettere su di esso un reato" che costituisce uno degli elementi del tentato reato (art. 13 § 2 del Codice penale); condizioni per l'applicazione della liberazione condizionale (art. 77 § 1 del Codice penale); significato della condanna per un reato commesso da un detenuto durante un permesso (art. 138 § 1 punto 8 del Codice penale esecutivo) come condizione negativa per l'applicazione della pena cumulativa mediante sentenza cumulativa (art. 85 § 3 del Codice penale); comprensione della minaccia definita nell'art. 190 § 1 del Codice penale che costituisce uno degli elementi della definizione di minaccia (art.115 § 12 del Codice penale); esercizio di funzione pubblica da parte di dipendente di un ente pubblico autonomo di assistenza sanitaria (art. 115 § 19 del Codice penale); responsabilità per la commercializzazione di droghe sintetiche (art. 165 § 1 punto 2 del Codice penale); significato penale delle pause tra i periodi nei quali il reo omette ostinatamente di adempiere all'obbligo di assistenza su di lui gravante non pagando il mantenimento di una parente stretto o di un'altra persona (art. 209 § 1 del Codice penale); applicazione di una legge più favorevole per il reo in caso di sua modifica (art. 4 § 1 del Codice penale) per applicare la sospensione condizionale della pena detentiva nel procedimento penale esecutivo (art. 152 del Codice penale esecutivo); contravvenzione di consumo di alcol in luogo pubblico (art. 431 comma 1 della legge del 26 ottobre 1982 sull'educazione alla sobrietà e la lotta all'alcolismo); norme di leggi tecniche nel settore dei giochi d'azzardo e responsabilità penale tributaria per il reato dell'art. 107 § 1 del Codice penale tributario (art. 6 comma 1 e art. 14 comma 1 della legge del 19 novembre 2009 sul gioco d'azzardo (Gazz. Uff. del 2015, voce 612); definizione "nel termine di pagamento dell'imposta" (art. 28 comma 4 della legge del 26 luglio 1991 sull'imposta sul reddito delle persone fisiche).

Parole chiave: droghe sintetiche, funzione pubblica, minaccia, giochi d'azzardo, pena cumulativa, imposta, Corte Suprema, delibera, omesso pagamento degli alimenti, tentativo, legge più favorevole, liberazione condizionale

Cytuj jako:

Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa wykroczeń i prawa karnego skarbowego za 2017 r. [Review of resolutions of the Supreme Court Criminal Chamber for 2017 concerning substantive criminal law, executive penal law, misdemeanour law and fiscal penal law]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 78–105. DOI: 10.26399/iusnovum.v13.1.2019.04/r.a.stefanski

Cite as:

Stefański, R.A. (2019) 'Review of resolutions of the Supreme Court Criminal Chamber for 2017 concerning substantive criminal law, executive penal law, misdemeanour law and fiscal penal law'. *Ius Novum* (Vol. 13) 1, 78–105. DOI: 10.26399/iusnovum.v13.1.2019.04/r.a.stefanski

Ius Novum
1/2019

ADDITIONAL PERIOD FOR ACTIVATING A SUSPENDED SENTENCE

BLANKA JULITA STEFAŃSKA*

DOI: 10.26399/iusnovum.v13.1.2019.05/b.j.stefanska

1. INTRODUCTION

A suspended sentence is applied for an operational period and a decision whether it has been sufficient to achieve the objectives of the punishment against the sentenced person or whether it has failed to meet this objective and it is necessary to activate the original sentence depends on the conduct of the sentenced person during the operational period. The conduct of the sentenced person during the operational period is subject to assessment and, as a rule, the sentence should be activated within that period, but the legislator allows issuing of a decision activating the sentence after the period's expiry. The additional period is justified by the fact that the offender's conduct demonstrated by him or her during the operational period, providing grounds for activation of the sentence, may become apparent only after the end of the operational period and that the offender should not remain uncertain as to his or her fate indefinitely,[1] and it is intended to enable actions to be taken to establish whether or not the grounds for activating the sentence have occurred.[2]

Since in this additional period the sentence may be activated and the sentenced person must serve the originally imposed sentence, it is relevant to determine the period's nature, to correctly calculate it and to indicate the point in time when the activation of the sentence is effective.

* PhD, Assistant Professor, Department of Commercial Law, Faculty of Law and Administration of Lazarski University in Warsaw; e-mail: blanka.stefanska@lazarski.pl; ORCID: 0000-0003-3146-6842

1 M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 266; R. Skarbek, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Komentarz do artykułów 32–116*, Vol. II, Warszawa 2010, p. 476; J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1938, p. 235.

2 The Supreme Court decision of 18 September 1995, III KRN 91/95, LEX No. 24873; R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 2007, p. 162.

2. PERIOD PRECEDING THE ACTIVATION OF THE SENTENCE FOLLOWING THE OPERATIONAL PERIOD

The Criminal Code of 1932 did not explicitly specify the time frame within which a sentence could be activated, but only implied so by stipulating in Article 64 that if the court does not activate the sentence within three months following the period of suspension, the conviction shall be deemed not to have existed and the sentenced person shall regain his or her electoral rights, rights to participate in the administration of justice, parental or guardianship rights, the right to pursue a profession and the ability to acquire other forfeited rights. The Supreme Court rightly assumed that, in accordance with Article 64 of the Criminal Code of 1932 the court could activate the suspended sentence not only during the operational period, but also within three months after its expiry.[3]

The Criminal Code of 1969 explicitly provided that a sentence could only be activated during an operational period and within six months thereafter (Article 79(1) CC).[4] An additional period for activating a sentence was extended by three months, due to the fact that the three-month period was too short and, in many cases, made it impossible to activate the sentence.[5]

The Criminal Code of 1997 contains the same solution, although formulated from the negative perspective, stipulating in Article 75(4) CC that a sentence may not be activated later than within six months following the end of the operational period. The language of this provision demonstrates that the legislator banned the activation of a sentence once this period has elapsed.

3. PERIOD OF CONDUCT OF THE SENTENCED PERSON TAKEN INTO ACCOUNT IN ACTIVATING THE SENTENCE

Although a sentence may be activated also following the end of the operational period, such a decision is based on the conduct of the sentenced person during that period. The decision must not be based on the convicted person's conduct referred to in Article 75 of the Criminal Code, resulting in a decision to activate the sentence, if that conduct took place in this additional period. Article 75 CC stipulates a clear condition, as regards virtually all the reasons for activating a sentence, that the circumstances justifying such a decision occur during the operational period. The exception is the possibility to activate a sentence due to the conduct of the sentenced person before the judgment becomes final, after its issuance, in the event that the sentenced person grossly violates the legal order, and in particular if he or she commits an offence during that time (Article 75(3) CC).

---

[3] The Supreme Court judgment of 29 August 1959, V K 1127/59, LEX No. 169206.

[4] The Supreme Court decision of 31 January 1996, III KRN 184/95, LEX No. 25569.

[5] M. Leonieni, *Warunkowe zawieszenie wykonania kary w polskim prawie karnym. Analiza ustawy i praktyki sądowej*, Warszawa 1974, p. 327.

The Supreme Court rightly notes that a suspended sentence can only be activated on the basis of the conduct of the sentenced person during the period of suspension, and the fact that the sentenced person re-offends prior to the expiry of the additional time limit for activating the sentence, but in any event following the period of suspension, does not provide the grounds for activating the suspended sentence.[6] If a sentence is not activated during the operational period and within further six months, the disclosure of an offence committed by the sentenced person during the operational period does not provide the grounds for activating the sentence.[7]

4. NATURE OF THE ADDITIONAL PERIOD

Determining the nature of the additional time limit for activating a sentence is relevant for the method of its calculation. While the substantive legal grounds for activating a sentence are set out in the Criminal Code (Article 75), the procedural issues relating to its enforcement are set out in the Executive Penal Code (Articles 178 and 178a) and in the Criminal Procedure Code (henceforth CPC). The fact that this regulation is included in the Criminal Code and its substantive content suggest that the additional time limit for activating a sentence is of a substantive nature. Therefore, the provisions set out in Articles 122 to 127 CPC do not apply to its calculation.

This time limit is calculated as per calendar time, as indicated by its being specified in months in Article 75(4) CC. Unlike the Criminal Procedure Code, the Criminal Code does not provide guidance on how to calculate time limits. As regards the running of substantive-law time limits, the doctrine indicates the possibility of using two methods:

1) *computatio naturalis*, based on calculating the running of the time limit as to the day, hour and minute (*a momento ad momentum*);
2) *computatio civilis*, according to which the running of the time limit is calculated on a day-to-day basis (*dies a qua*).[8]

It is accepted in the literature that the latter method is more advantageous for the offender since it includes the day on which the time limit begins to run.[9] However,

---

[6] The Supreme Court judgment of 29 August 1959, V K 1127/59, LEX No. 169206; the Supreme Court resolution of 20 November 2000, I KZP 34/00, OSNKW 2001, No. 1–2, item 3, with approving comments by S. Zabłocki, *Przegląd orzecznictwa Sądu Najwyższego – Izba Karna*, Palestra No. 1–2, 2001; R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego i prawa wykroczeń za 2000 r.*, WPP 2001, No. 1, pp. 107–109.

[7] The Supreme Court decision of 13 March 1996, IV KKN 464/96, LEX No. 1674082; the Supreme Court decision of 9 April 1997, IV KKN 8/97, Prok. i Pr. – supplement 1997, No. 10, item 2; the Supreme Court decision of 13 March 1997, I KZP 42/96, Prok. i Pr. – supplement 1997, No. 5, item 2; M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1965, p. 121; J. Bafia, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Vol. 1, Warszawa 1987, p. 303; A. Zoll, [in:] K. Buchała (ed.), *Komentarz do kodeksu karnego. Część ogólna*, Warszawa 1994, p. 428.

[8] M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warszawa 2014, p. 222; K. Marszał, *Przedawnienie w prawie karnym*, Warszawa 1972, p. 142.

[9] M. Kulik, *supra* n. 8, p. 222; K. Banasik, *Przedawnienie w prawie karnym w systemie kontynentalnym i anglosaskim*, Warszawa 2013, p. 127.

it is assumed that the *a momento ad momentum* principle applies to the calculation of a custodial sentence, a non-custodial sentence and penal measures, as well as to the limitation period.[10] Having regard to the fact that the beginning of the operational period is determined by the finality of a judgment, which is an institution of the criminal procedural law, the *computatio civilis* method should be adopted.

The additional period begins running *verba legis* "as of the end of the operational period" (Article 75(4) CC). It is, therefore, important to determine the end of this period which, in turn, is defined by its beginning, i.e. the moment when a ruling becomes final. Article 70(1) CC provides that the operational period begins running "upon the ruling becoming final". In the doctrine, the same expression contained in Article 43(2) CC is construed as the moment when a judgment becomes final and, as such, this period is counted from moment to moment, i.e. the period begins running from the beginning of the day following the day on which the event giving rise to the finality of the judgment occurs.[11] This view is correct as it concerns the finality which is an institution of the criminal procedural law and, as stipulated under Article 123(1) CPC, the day from which the running of the time limit is calculated is not included in the calculation of the period. A judgment becomes final when:

– the time limit for submitting an application for drafting in writing and serving a statement of reasons for the judgment has expired (Article 422(1) CC);
– the time limit for filing an appeal has expired (Article 460 CPC);
– the president of the first-instance court has declined to accept an appeal filed out of time or by an unauthorised person or an appeal which is inadmissible by virtue of law (Article 429(1) CPC), and no interlocutory appeal has been filed or granted; in the former case, a judgment becomes final after the expiry of the time limit for filing an interlocutory appeal, while in the latter – as of the date the interlocutory appeal is not granted;
– the appellate court has left the accepted appeal unexamined due to it being filed out of time, by an unauthorised person or due to it being inadmissible by virtue of law or if the appeal has been accepted as a result of an unjustified reinstatement of the time limit (Article 430(1) CPC), and no interlocutory appeal has been filed or granted; in the former case, a judgment becomes final after the expiry of the time limit for filing an interlocutory appeal, while in the latter – as of the date the interlocutory appeal is not granted;
– an appeal is withdrawn by the party (Article 431(1) CPC); the judgment becomes final on the date the appeal is left unexamined by the appellate court (Article 432 CPC);
– the appellate court has upheld or varied the judgment under appeal; the judgment of the first-instance court becomes final when the judgment of the appellate court is issued (Article 426(1) CPC).

---

[10] I. Nowikowski, *O regułach obliczania terminów w procesie karnym (kwestie wybrane)*, [in:] A. Michalska-Warias, I. Nowikowski, J. Piórkowska-Flieger (eds), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, Lublin 2011, p. 881.

[11] *Ibid.*, p. 883.

To conclude, the operational period runs from the day when the judgment becomes final and binding, i.e. from the day following the last day on which an application for a statement of reasons for the judgment could be filed or from the day following the last day on which the judgment could be appealed, and in the event that the judgment is appealed, the operational period runs from the day the judgment is pronounced by the court of second instance.[12]

The operational period is determined in years, between one and three years (Article 70(1) CC) or between two and five years (Article 70(2) CC), and therefore the end of this period, as per the calendar time, falls on the day of the month which corresponds to its beginning. Since the additional six-month period runs *verba legis* "as of the end of the operational period", this means that it begins running on the day immediately following the expiry of the operational period. Its end is the day of the month which corresponds to the beginning of this period.

These moments set the time frame for issuing a decision to activate a sentence.[13] This time limit is final, may neither be exceeded nor extended,[14] and additionally no court action may interrupt its running.[15] If no decision to activate a sentence is issued within six months as of the end of the operational period, this means that the operational period has been passed successfully, even if it is subsequently revealed that there were reasons for activating the sentence.[16] Consequently, if the sentence is not activated during the operational period and within the subsequent six months, then it cannot be activated at any time thereafter.[17] Any obligations imposed on the sentenced person and not complied with expire.[18]

The expiry of this time limit has irreversible legal effects.[19] Once this period has expired, no sentence may be activated and the conviction becomes spent by operation of law.[20] A conviction becomes spent by operation of law within six months as of the end of the operational period (Article 76(1) CC), unless a fine, a penal measure, a forfeiture or a compensatory measure has been imposed on the sentenced person, in which case the conviction may not become spent prior to their enforcement, remission or limitation of enforcement thereof. Nor may a conviction become spent prior to the enforcement of a preventive measure (Article 76(2) CC).

---

[12] The Supreme Court decision of 18 September 1995, III KRN 91/95, LEX No. 24873.

[13] The Supreme Court decision of 22 November 2006, V KK 374/06, OSNwSK 2006, No. 1, item 2224.

[14] The Supreme Court decision of 14 October 2008, V KK 263/08, OSNwSK 2008, No. 1, item 1998; the Supreme Court decision of 28 April 2004, II KK 37/04, LEX No. 109476.

[15] M. Kalitowski, [in:] S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. I, Gdańsk 2005, p. 650.

[16] J. Skupiński, *Warunkowe skazanie w prawie polskim na tle porównawczym*, Warszawa 1992, p. 310.

[17] The Supreme Court decision of 9 April 1997, IV KKN 8/97 LEX No. 30360; the Supreme Court judgment of 29 August 1959, V K 1127/59, LEX No. 169206.

[18] M. Leonieni, *supra* n. 5, p. 328; the Supreme Court (7 judges) decision of 11 May 1966, RNw 11/66, OSNKW 1966, No. 9–10, item 93.

[19] Judgment of the Court of Appeal in Katowice of 20 July 2017, II AKa 290/17, LEX No. 2382750.

[20] The Supreme Court decision of 18 September 1995, III KRN 91/95, LEX No. 24873; M. Leonieni, *supra* n. 5, p. 314.

It is also unacceptable to issue an effective sentence if the penalty imposed for a really concurrent offence could neither be enforced at the time of imposing an effective sentence nor can it ever be brought into operation as six months have elapsed since the end of the operational period.[21]

5. TIME LIMIT FOR ISSUING A DECISION TO ACTIVATE A SENTENCE

The provision of Article 75(4) CC, specifying the ultimate time limit within which a conditionally suspended sentence should be activated, requires that a procedural decision in the form of a decision to activate the sentence be issued. In assessing whether the sentence has been effectively activated in the case, the provisions determining the moment when a judgment becomes enforceable are conclusive.[22]

It has been disputed in the doctrine and jurisprudence whether a decision to activate a sentence is to be issued not later than before the expiry of the additional six-month period, or whether it must become final before the period's expiry. The same issue became apparent in the context of the revocation of conditional release from the remainder of the custodial sentence, which may also take place within six months of the end of the operational period (Article 82(1) CC).

The Supreme Court held that:

– "The time limit specified in Article 75(4) CC is observed if a decision to activate a custodial sentence is issued and becomes final within six months as of the end of the operational period";[23]
– "The provision of Article 75(4) CC explicitly regulates the period within which it is possible to activate a conditionally suspended sentence upon occurrence of the grounds for such a decision as set out in paras 1 and 2 thereof. It is the operational period specified in the judgment and further six months following the end of the operational period. During that period, it is necessary not only

---

[21] The Supreme Court judgment of 21 March 2017, III KK 72/17, LEX No. 2271448; the Supreme Court judgment of 10 April 2018, III KK 99/18, LEX No. 2497988; judgment of the Court of Appeal in Katowice of 20 July 2017, II AKa 290/17, LEX No. 2382750; the Supreme Court judgment of 14 March 2017, IV KK 363/16, LEX No. 2261744.

[22] The Supreme Court decision of 21 March 2017, IV KK 51/17, LEX No. 2254802

[23] The Supreme Court decision of 14 July 2010, V KK 108/10, OSNwSK 2010, No. 1, item 1437; the Supreme Court decision of 4 September 2008, II KK 227/08, OSNwSK 2008, No. 1, item 1757; the Supreme Court decision of 4 October 2007, V KK 275/07, OSNwSK 2007/1/2186; the Supreme Court decision of 9 November 2005, V KK 298/05, OSNwSK 2005, No. 1, item 2042; the Supreme Court decision of 22 September 2005, III KK 312/05, OSNwSK 2005, No. 1, item 1734; the Supreme Court decision of 21 July 2005, V KK 193/05 OSNwSK 2005, No. 1, item 1378; the Supreme Court decision of 28 April 2004, II KK 37/04, LEX No. 109476; the Supreme Court decision of 1 February 1995, III KRN 203/94 OSNKW 1995, No. 3–4, item 18, with a critical gloss by K. Postulski, PS 1996, No. 2, p. 85 et seq.; decision of the Court of Appeal in Kraków of 11 September 2001, II AKz 362/01, LEX No. 49494; R. Góral, *supra* n. 2, p. 162; A. Marek, *Kodeks karny. Komentarz*, Warszawa 2010, p. 241; R. Skarbek, *supra* n. 1, p. 476.

to make a decision to activate a conditionally suspended sentence, but also that it become final in order to be compliant with substantive law".[24]

As to the revocation of conditional release from the remainder of the sentence, that authority held that:

– the expression "conditional release has not been revoked", as used in Article 97 CC (currently Article 82(1) – note by B.J.S.), refers to a situation where no final decision on this matter has been issued within six months after the end of the operational period";[25]
– "Due to the significance of the substantive-law consequences of the expiry of the time limit referred to in Article 82(1) CC, a decision to revoke an early release from the remainder of the custodial sentence must not only be issued, but it must also become final during the operational period or within further six months".[26]

The Supreme Court argued that a decision must be final because the Act does not provide for the possibility of interrupting this time limit as a result of a specific procedural act. If one took a different view, then an appealable decision to activate the sentence could be reversed, even on numerous occasions, by the appellate authority and remanded for re-examination. Consequently, a new decision to activate the sentence could be issued in the first instance within a period significantly exceeding six months.[27]

The Supreme Court has also taken a different view, considering that this additional time limit is observed if a decision to activate the sentence, even if not final yet, has been issued prior to the expiry thereof, considering that: "The six-month time limit provided for in Article 75(4) CC is observed if a decision to activate the sentence, even if not yet final, has been issued prior to the expiry thereof."[28]

---

[24] The Supreme Court decision of 10 September 2005, III KK 312/05, Biul. PK 2005, No. 6, item 1.2. 10; the Supreme Court decision of 28 April 2004, II KK 37/04, LEX No. 109476; decision of the Court of Appeal in Kraków of 11 September 2001, II AKz[1] 362/0l, Prok. i Pr. – supplement 2002, No. 3, item 20.

[25] The Supreme Court (7 judges) resolution of 30 January 1996, I KZP 34/95, OSNKW 1996, No. 3–4, item 14, with approving comments by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego za 1996 r.,* WPP 1997, No. 1, pp. 93–95; the Supreme Court resolution of 26 June 2014, I KZP 7/14, OSNKW 2014, No. 9, item 67, with approving glosses by T. Pudo, Prok. i Pr. No. 11, 2015, pp. 152–161, D. Wysocki, OSP 2014, No. 12, item 120, critical glosses by K. Postulski, LEX/el. 2014, M.J. Szewczyk, LEX/el. 2015; the Supreme Court decision of 17 May 2011, III KK 92/2011, LEX No. 795786, with an approving gloss by K. Dąbkiewicz, PS 2013, No. 1, pp. 125–134; the Supreme Court decision of 12 May 2009, IV KK 88/09, LEX No. 599415; the Supreme Court decision of 14 October 2008, V KK 263/08, OSNwSK 2008, No. 1, item 1998; the Supreme Court decision of 3 November 2003, IV KK 373/03, LEX No. 82302.

[26] The Supreme Court decision of 10 December 2015, II KK 233/15, LEX No. 1941891.

[27] The Supreme Court decision of 2 April 1996, IV KKN 7/96, LEX No. 25591.

[28] The Supreme Court decision of 9 October 2013, V KK 177/13, LEX No. 1400154; the Supreme Court resolution of 18 January 1962, VI KO 62/61, OSNKW 1962, No. 4, item 62; the Supreme Court resolution of 18 February 1972, VI KZP 70/71, OSNKW 1972, No. 5, item 77; the Supreme Court judgment of 24 March 1970, V KRN 673/66, OSNKW 1970, No. 6, item 61; M. Leonieni, *Odwołanie warunkowego zawieszenia wykonania kary*, Insert to Bulletin of the Ministry of Justice, No. 4/1995, p. 12; *idem*, *supra* n. 5, p. 328.

The doctrine has also presented the view that in order for a sentence to be effectively activated, it is sufficient for a decision to be issued within the said period, supported by the argument that this period is interrupted not by the decision becoming final but by it being issued, since the same is enforceable upon being issued. It has also been stressed that if the decision issued within the said period is subsequently reversed on appeal and the case is remanded to the court of first instance for re-examination, the sentence cannot be activated unless that court issues a new decision within the six-month period, calculated as of the end of the operational period.[29]

The essence of the dispute actually boiled down to determining the moment of enforceability of the decision activating the sentence. This issue was resolved in Article 178(5) Executive Penal Code (henceforth EPC), as introduced therein by the Act of 16 September 2011 amending the Act: Executive Penal Code and certain other acts.[30] Although pursuant to Article 9(3) EPC a decision in executive proceedings becomes enforceable upon issuance, unless the law provides otherwise or the court suspends its enforcement, but as regards decisions to activate a sentence, this issue is otherwise regulated in Article 178(5) EPC. Pursuant to this provision, a decision to activate a sentence under Article 75(2) and (3) CC becomes enforceable once it has become final. This concerns an optional activation of a sentence, i.e. due to a gross violation of the legal order by the sentenced person, in particular by committing an offence other than a similar intentional offence, for which a final immediate custodial sentence was passed, or by evading payment of the fine, supervision, compliance with the imposed obligations or penal measures, compensatory measures or forfeiture (Article 75(2) CC), or a gross violation of the legal order, and in particular by committing an offence after the sentence was passed, but before it became final (Article 75(3) CC).

In the event of such decision being appealed, a custodial sentence cannot be administered as this is precluded by Article 178(5) EPC. Although Article 462(1) CPC provides that lodging an appeal does not halt the enforcement of the judgment, this provision does not apply in this case since it is excluded by Article 178(3) EPC as per *lex specialis derogat legi generali* principle.[31]

Based on *a contrario* reasoning, it may be inferred from the content of Article 178(5) EPC that where a sentence must be activated, a decision to activate the sentence becomes enforceable upon its issuance. Article 9(3) EPC, pursuant to which a decision issued in executive proceedings becomes enforceable upon its issuance, is fully applicable.[32] The Supreme Court has rightly noted that: "A decision to activate the sentence issued under Article 75(1), (1a) and (2a) CC becomes enforceable upon

---

[29] K. Postulski, *Glosa do postanowienia SN z dnia 1 lutego 1995 r., III KRN 203/94*, Przegląd Sądowy No. 2, 1996, p. 85 et seq.

[30] Dz.U. No. 240, item 1431.

[31] J. Lachowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna. Komentarz. Art.1–116*, Warszawa 2017, p. 1015.

[32] P. Hofmański, L.K. Paprzycki, A. Sakowicz, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 573; K. Postulski, *Glosa do postanowienie SN z dnia 9 lutego 2016 r., IV KK 431/15*, LEX/el 2016; *idem*, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2017, p. 862; S. Lelental, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2017, p. 731.

issuance within the period specified in Article 75(4) CC, unless the court issuing the decision or the court competent to examine an interlocutory appeal suspends its enforcement; in the event of such suspension, the decision may not be enforced until it has become final, provided that it occurs within the time limit for activating the sentence."[33]

This refers to activation of a sentence:

– concerning the sentenced person who committed, during the operational period, a similar intentional offence for which an immediate custodial sentence was passed (Article 75(1) CC);
– concerning the sentenced person convicted for an offence involving the use of violence or unlawful threat towards an immediate family member or another minor living together with the offender who, during the operational period, grossly violated the legal order by re-using violence or unlawful threat towards an immediate family member or another minor living together with the offender (Article 75(1a) CC);
– concerning the sentenced person who, having been given a written warning by a professional court-appointed probation officer, grossly violated the legal order, in particular by committing an offence other than a similar intentional offence, for which an immediate custodial sentence was passed, or evaded payment of the fine, supervision, compliance with the imposed obligations or penal measures, compensatory measures or forfeiture (Article 75(2a) read together with Article 75(2) CC).

Such decision should be referred for enforcement on the date it is issued. However, it is possible to depart from this principle in particularly justified cases and to suspend enforcement of the decision (Article 9(4) EPC). According to the Supreme Court, the enforcement of a decision may be suspended only exceptionally if there are circumstances indicating that immediate enforcement action will entail irreversible and irreparable consequences for the sentenced person.[34] The literature indicates that such decision should be justified by specific and unequivocal circumstances indicating that the enforcement of the decision, at the time of its issuance, would have too serious consequences for the sentenced person.[35] The doctrine rightly points out that a decision to suspend the enforcement of the decision is an exception to the principle of immediate enforcement of sentences, and the reasons for such decision cannot be interpreted extensively. The decision in question should, nevertheless, take into account the principle of humanitarianism and respect for the dignity of the sentenced person.[36]

---

[33] The Supreme Court decision of 20 June 2013, I KZP 3/13, OSNKW 2013, No. 8, item 63, with an approving gloss by K. Postulski, Lex/el 2013, and approving comments by R.A. Stefański, *Przegląd uchwał Izby Karnej oraz Izby Wojskowej Sądu Najwyższego w zakresie prawa karnego materialnego za 2013 r.*, Ius Novum No. 1, 2014, pp. 193–194.

[34] The Supreme Court decision of 26 September 2012 – V KK 218/12, LEX No. 1220962.

[35] B. Orłowska-Zielińska, K. Szczechowicz, *Wykonalność postanowień, udział stron i inne wybrane aspekty nowelizacji kodeksu karnego wykonawczego*, Prokuratura i Prawo No. 3, 2013, p. 113; the Supreme Court decision of 26 September 2012, V KK 218/12, LEX No. 1220962.

[36] K. Postulski, *Wykonalność orzeczeń karnych w aspekcie zasady humanitaryzmu i poszanowania godności ludzkiej skazanego*, Palestra No. 11–12, 2013, p. 166.

As rightly held by the Supreme Court: "As the law now stands, the legislator has decided to draw a demarcation line as regards the enforceability of decisions to activate a conditionally suspended custodial sentence depending on the legal basis on which the said decisions are issued, i.e. mandatory (Article 75(1), (1a) or (2a) CC) or optional (Article 75(2) and (3) CC) activation of a sentence. The Executive Penal Code generally provides that decisions issued in executive proceedings become enforceable at the time they are issued. A decision to activate a sentence, issued under Article 75(1), (1a) and (2a) CC, becomes enforceable upon issuance within the period specified in Article 75(4) CC, unless the court issuing the decision or the court competent to examine the interlocutory appeal suspends its enforcement. This moment may exceptionally be postponed where the law so provides or where the court of first instance or the appellate court orders suspension of enforcement of the decision."[37] In such cases Article 9(3) EPC is applicable since other regulations do not provide for an exception to the rule expressed therein as regards the enforceability of decisions on mandatory activation of a conditionally suspended sentence and, therefore, the six-month period specified in Article 75(4) is observed if, prior to its expiry, the court issues a relevant decision, even if it becomes final after the expiry of said period.[38] The authority aptly noted that "Article 9(3) EPC sets out the rule of enforceability and any exceptions thereto should result from express statutory exclusions or a court decision taken in a specific set of proceedings. As regards the first group of exceptions, Article 178(3) EPC should, among others, be mentioned. It reads that a decision to activate a sentence issued under Article 75(2) and (3) CC becomes enforceable upon it becoming final."[39]

It is therefore surprising that, despite the issue being expressly regulated by Article 178(1) EPC, a decision to activate the sentence must not only be issued, but also become final within six months following the end of the operational period.[40]

---

[37] The Supreme Court decision of 14 September 2016, V KK 230/16, Prok. i Pr. – supplement 2016, No. 11, item 4; the Supreme Court decision of 12 April 2017, IV KK 425/16, LEX No. 2281269; the Supreme Court decision of 21 March 2017, IV KK 51/17, LEX No. 2254802; the Supreme Court decision of 14 September 2016, V KK 230/16, LEX No. 2108519; the Supreme Court decision of 9 February 2016, IV KK 431/15, LEX No. 1973565; the Supreme Court decision of 12 April 2017, IV KK 425/16, LEX No. 2281269. See also V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), Kodeks *karny. Komentarz*, Warszawa 2016, p. 440; P. Hofmański, L.K. Paprzycki, A. Sakowicz, *supra* n. 32, pp. 572–573; J. Lachowski, *supra* n. 31, p. 1015.

[38] K. Postulski, *supra* n. 36, pp. 164–165.

[39] The Supreme Court resolution of 26 June 2014, I KZP 7/14, OSNKW 2014, No. 9, item 67. See also M. Pacura, *Upływ okresu próby a wydanie postanowienia o odwołaniu warunkowego zwolnienia*, LEX/el. 2014.

[40] M. Budyn-Kulik, *supra* n. 1, p. 266; A. Zoll, [in:] W. Wróbel, A. Zoll (eds), Kodeks *karny. Część ogólna. Komentarz do art. 53–117*, Vol. I, part 2, Warszawa 2016, pp. 342–343; G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Komentarz*, Vol. I, Warszawa 2012, pp. 515–516; S. Jaworski, *Przesłanki zarządzenia wykonania zawieszonej kary – uwagi praktyczne*, Monitor Prawniczy No. 3, 2013, p. 167; S. Hypś, [in:] K. Wiak, A. Grześkowiak (eds), Kodeks *karny. Komentarz*, Warszawa 2018, p. 545.

6. CONCLUSIONS

1) A suspended sentence is applied for an operational period and a decision whether it has been sufficient to achieve the objectives of the punishment against the sentenced person or whether it has failed to meet this objective and it is necessary to activate the original sentence depends on the conduct of the sentenced person during the operational period. The assessment concerns the conduct of the sentenced person during the operational period and, as a rule, the sentence should be activated within the said period but the legislator allows issuing of a decision to activate the sentence after the period's expiry (Article 75(4) CC). This is justified by the fact that the offender's conduct demonstrated by him or her during the operational period, justifying the activation of the sentence, may not become apparent until the end of the operational period and that the offender should not remain in a state of uncertainty about his or her fate indefinitely, and it is intended to enable actions to be taken to establish whether the circumstances justifying the activation of the sentence have occurred or not.
2) The fact that this additional time limit is regulated in the Criminal Code and that it is related to the substantive-law grounds for activating a sentence, support the view that it should be considered a substantive-law time limit. Therefore, the provisions set out in Articles 122 to 127 CPC do not apply to its calculation.
3) Having regard to the fact that the beginning of the operational period is determined by the finality of a judgment, which is an institution of the criminal procedural law, the *computatio civilis* method, according to which the running of the time limit is calculated on a day-to-day basis (*dies a qua*), should be adopted for its determining. The additional six-month time limit begins to run, *verba legis*, "as of the end of the operational period", i.e. as of the day immediately following the end of the operational period. Its final limit is the day of the month which corresponds to the beginning of this period.
4) The time limit for activating a sentence is observed if, where the sentence activation is discretionary (Article 75(2) and (3) CC), a decision to activate the sentence is issued and becomes final within six months following the end of the operational period (Article 178(5) EPC) or, where the sentence activation is mandatory (Article 75(1), (1a) and (2a) CC), it is sufficient for such decision to be issued within the said time limit.

BIBLIOGRAPHY

Bafia J., Mioduski K., Siewierski M., *Kodeks karny. Komentarz*, Vol. 1, Warszawa 1987.
Banasik K., *Przedawnienie w prawie karnym w systemie kontynentalnym i anglosaskim*, Warszawa 2013.
Buchała K. (ed.), *Komentarz do kodeksu karnego. Część ogólna*, Warszawa 1994.
Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2016.
Giezek J., *Kodeks karny. Komentarz*, Vol. I, Warszawa 2012.
Góral R., *Kodeks karny. Praktyczny komentarz*, Warszawa 2007.

Hoc S., Kalitowski M., Przyjemski S.M., Sienkiewicz Z., Szumski J., Tyszkiewicz L., Wąsek A., *Kodeks karny. Komentarz*, Vol. I, Gdańsk 2005.
Jaworski S., *Przesłanki zarządzenia wykonania zawieszonej kary – uwagi praktyczne*, Monitor Prawniczy No. 3, 2013.
Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa 2016.
Królikowski M., Zawłocki R. (eds), *Kodeks karny. Komentarz do artykułów 32–116*, Vol. II, Warszawa 2010.
Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Warszawa 2017.
Kulik M, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warszawa 2014.
Lelental S., *Kodeks karny wykonawczy. Komentarz*, Warszawa 2017.
Leonieni M., *Warunkowe zawieszenie wykonania kary w polskim prawie karnym. Analiza ustawy i praktyki sądowej*, Warszawa 1974.
Leonieni M., *Odwołanie warunkowego zawieszenia wykonania kary*, Insert to Biuletyn Ministerstwa Sprawiedliwości, No. 4/1995.
Makarewicz J., *Kodeks karany z komentarzem*, Lwów 1938.
Marek A., *Kodeks karny. Komentarz*, Warszawa 2010.
Marszał K., *Przedawnienie w prawie karnym*, Warszawa 1972.
Michalska-Warias A., Nowikowski I., Piórkowska-Flieger J. (eds), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, Lublin 2011.
Mozgawa M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2017.
Orłowska-Zielińska B., Szczechowicz K., *Wykonalność postanowień, udział stron i inne wybrane aspekty nowelizacji kodeksu karnego wykonawczego*, Prokuratura i Prawo No. 3, 2013.
Pacura M., *Upływ okresu próby a wydanie postanowienia o odwołaniu warunkowego zwolnienia*, LEX/el. 2014.
Postulski K., *Glosa do postanowienia SN z dnia 1 lutego 1995 r., III KRN 203/94*, Przegląd Sądowy No. 2, 1996.
Postulski K., *Wykonalność orzeczeń karnych w aspekcie zasady humanitaryzmu i poszanowania godności ludzkiej skazanego*, Palestra No. 11–12, 2013.
Postulski K., *Glosa do postanowienia SN z dnia 9 lutego 2016 r., IV KK 431/15*, LEX/el 2016.
Postulski K., *Kodeks karny wykonawczy. Komentarz*, Warszawa 2017.
Siewierski M., *Kodeks karny. Komentarz*, Warszawa 1965.
Skupiński J., *Warunkowe skazanie w prawie polskim na tle porównawczym*, Warszawa 1992.
Wiak K., Grześkowiak A., *Kodeks karny. Komentarz*, Warszawa 2018.
Wróbel W., Zoll A., *Kodeks karny. Część ogólna, Komentarz do art. 53–117*, Vol. I, part 2, Warszawa 2016.

ADDITIONAL PERIOD FOR ACTIVATING A SUSPENDED SENTENCE

Summary

The article analyses a legal nature of additional six-month since the end of the operational period foreseen to issue a decision on activating a suspended sentence (Article 75 § 4 CC), the method of calculating this time limit and the moment when the decision on executing the penalty is enforceable. The author considers that this time limit is of substantial nature, as it

is regulated in the Criminal Code and it is related with substantial requirements for executing the penalty. To calculate the time limit, the *computatio civilis* method should be applied, which consists in counting its running on a day-to-day basis (*dies a qua*) as the beginning of operational period is determined by a final sentence, i.e. the institution regulated in criminal procedure law. The time limit for activating the suspended sentence is valid if in the case of the discretionary sentence activation (Article 75 § 2 and 3 CC) a decision is issued and it is final before the expiry of six months following the end of the operational period (Article 178 § 5 EPC), and in the case of mandatory activation of the sentence, it is sufficient that such decision is issued within the said time limit (Article 9 § 3 EPC).

Keywords: penalty of deprivation of liberty, operational period, time limit, conditional suspension, decision on activating a suspended sentence

DODATKOWY OKRES DO ZARZĄDZENIA WYKONANIA KARY

Streszczenie

Przedmiotem artykułu jest analiza charakteru prawnego dodatkowego sześciomiesięcznego okresu od zakończeniu okresu próby do zarządzenia wykonania (art. 75 § 4 k.k.), sposobu jego obliczania oraz momentu, w którym postanowienie o zarządzeniu wykonania kary jest skuteczne. Zdaniem autorki termin ten ma charakter materialny, co wynika z faktu jego zamieszczenia w kodeksie karnym oraz jego powiązania z materialnymi przesłankami zarządzenia wykonania. Do jego obliczenia należy stosować metodę *computatio civilis*, polegającą na obliczaniu biegu terminu od dnia do dnia (*dies a qua*) ze względu na to, że początek biegu okresu próby jest określony prawomocnością wyroku, a więc instytucją prawa karnego procesowego. Termin do zarządzenia wykonania kary jest zachowany, jeżeli w wypadku fakultatywnego jej zarządzenia (art. 75 § 2 i 3 k.k.) zostanie wydane i uprawomocni się postanowienie o zarządzeniu wykonania kary przed upływem sześciu miesięcy od zakończenia okresu próby (art. 178 § 5 k.k.w.), a w razie jej obligatoryjnego zarządzenia (art. 75 § 1, § 1a i § 2a k.k.) wystarczające jest, gdy przed tym terminem zostanie wydane takie postanowienie (art. 9 § 3 k.k.w.).

Słowa kluczowe: kara pozbawienia wolności, okres próby, termin, warunkowe zawieszenie, zarządzenie wykonania kary

PERÍODO ADICIONAL PARA EJECUTAR LA PENA SUSPENDIDA

Resumen

El artículo analiza el carácter legal del período adicional de 6 meses desde el final de período probatorio para ejecutar la pena suspendida (art. 75 § 4 del código penal), forma de su computación y momento en el cual el auto de ejecución de la pena suspendida es eficaz. Según la Autora, el carácter del plazo es material, lo que resulta de su ubicación en el código penal y su vinculación con los requisitos materiales de ejecución de la pena suspendida. Para su cómputo hay que aplicar el método *computatio civilis*, que consiste en contar el plazo de día a día (*dies a qua*), debido a que el inicio del período de prueba queda determinado por la firmeza de sentencia, o sea, por una institución de derecho penal procesal. El plazo para

ejecutar la pena suspendida queda preservado si en caso de su ejecución optativa (art. 75 § 2 y3 del código penal) se dicte y sea firme el auto sobre la ejecución de la pena suspendida antes del transcurso de 6 meses desde la finalización del período de prueba (art. 178 § 5 del código penal de ejecución), y en los casos de la ejecución obligatoria (art. 75 § 1, § 1a y § 2a del código penal) será suficiente que se dicte tal auto antes del transcurso de dicho plazo (art. 9 § 3 del código penal de ejecución).

Palabras claves: pena de privación de libertad, período de prueba, suspensión condicional, ejecución de la pena suspendida

СРОК ПРИНЯТИЯ ПОСТАНОВЛЕНИЯ ОБ ИСПОЛНЕНИИ НАКАЗАНИЯ ПОСЛЕ ОКОНЧАНИЯ ИСПЫТАТЕЛЬНОГО СРОКА

Резюме

Предметом данной статьи является анализ правового характера дополнительного шестимесячного срока от окончания испытательного срока, в течение которого может быть принято постановление об исполнении наказания (ст. 75 § 4 УК), методики расчета этого срока, а также момента вступления в силу постановления об исполнении наказания. По мнению автора, дополнительный шестимесячный срок имеет материальный характер, так как он предусмотрен Уголовным кодексом и связан с материальными предпосылками для принятия постановления об исполнении наказания. При его расчете следует использовать метод *computatio civilis*, который заключается в исчислении срока от дня до дня (*dies a qua*), на том основании, что начало течения испытательного срока определяется вступлением приговора в силу, то есть институтом уголовно-процессуального права. При факультативном (на усмотрение суда) распоряжении об исполнении наказания (ст. 75 § 2 и 3 УК) срок, установленный для вынесения постановления об исполнении наказания, считается соблюденным, если постановление принято и вступило в законную силу в течение 6 месяцев от окончания испытательного срока. В случае же обязательного (не предусматривающего усмотрения суда) постановления об исполнении (75 § 1, § 1a и § 2a УК) достаточно, чтобы постановление было принято перед окончанием вышеупомянутого шестимесячного срока (ст. 9 § 3 УИК).

Ключевые слова: наказание в виде лишения свободы, испытательный срок, условное наказание, постановление об исполнении наказания

NACHFRIST ZUR ANORDNUNG DER STRAFVOLLSTRECKUNG

Zusammenfassung

Gegenstand des Artikels ist die Analyse der Rechtsnatur der Nachfrist von sechs Monaten nach dem Ende der Bewährungszeit bis zur Anordnung der Strafvollstreckung (Artikel 75 Absatz 4 des polnischen Strafgesetzbuches), der Methode zur Berechnung der Bewährungsfrist und der Zeitpunkt, an dem die Vollstreckungsanordnung wirksam wird. Nach Auffassung der Autorin hat diese Frist materiellen Charakter, was sich aus ihrer Aufnahme in das Strafgesetzbuch und ihrer Verknüpfung mit den materiellen Voraussetzungen der Vollstreckungsanordnung ergibt. Zur Berechnung der Nachfrist sollte die *Computatio-civilis*-Methode verwendet werden, bei der die Frist ab einem bestimmten Tag bis zu einem Tag (*dies a qua*) berechnet

wird, da der Beginn der Bewährung von der Rechtskräftigkeit des Urteils und damit von einer Institution des Strafprozessrechts abhängt. Die Frist für die Vollstreckungsanordnung wird gewahrt, wenn bei einer fakultativen Anordnung (Artikel 75 Abs. 2 und 3 des polnischen Strafgesetzbuches) der Beschluss über die Anordnung der Strafvollstreckung vor Ablauf von sechs Monaten nach dem Ende der Bewährungszeit ergeht und Rechtskraft erlangt (Artikel 178 Abs. 5 des polnischen Strafgesetzbuches). Bei einer zwingenden Anordnung (Artikel 75 Abs. 1, Abs. 1a und Abs. 2a des polnischen Strafgesetzbuches) reicht es aus, wenn vor diesem Datum eine diesbezügliche Entscheidung ergeht (Artikel 9 Abs. 3 des polnischen Strafgesetzbuches).

Schlüsselwörter: Freiheitsstrafe, Bewährungszeit, Frist, bedingte Strafaussetzung, Vollstreckungsanordnung

DÉLAI SUPPLÉMENTAIRE POUR ORDONNER L'EXÉCUTION D'UNE PEINE

Résumé

Le sujet de l'article est l'analyse de la nature juridique d'une période supplémentaire de six mois à compter de la fin de la période probatoire jusqu'à l'ordonnance d'exécution (article 75 § 4 du Code pénal), de la méthode de calcul utilisée et du moment où la décision exécutoire prend effet. Selon l'auteur, ce délai est de nature matérielle, ce qui résulte de son inclusion dans le code pénal et de son lien avec les prémisses matérielles de l'ordonnance d'exécution. Pour son calcul, il convient d'utiliser la méthode *computatio civilis*, qui consiste à calculer le délai du jour au jour (*dies a qua*) en raison du fait que le début de la période probatoire est déterminé par la date à laquelle le jugement devient définitif, et donc par l'institution du droit procédural pénal. Le délai pour ordonner l'exécution d'une peine est respecté si, dans le cas d'une ordonnance facultative (articles 75 § 2 et 3 du Code pénal), une décision ordonnant l'exécution d'une peine est rendue et devient valide avant l'expiration d'un délai de six mois à compter de la fin de la période probatoire (article 178 § 5 du Code pénal exécutif) , et dans le cas où son ordonnance est obligatoire (article 75 § 1, § 1a et § 2a du Code pénal), il suffit qu'une telle décision soit rendue avant cette date (article 9 § 3 du Code pénal exécutif).

Mots-clés: procédure de preuve, demande d'administration de la preuve, abus de droit procédural, obstruction processuelle

PERIODO ULTERIORE PER LA REVOCA DELLA SOSPENSIONE CONDIZIONALE DELLA PENA

Sintesi

Oggetto dell'articolo è l'analisi del carattere giuridico del periodo ulteriore di 6 mesi dalla conclusione del periodo di prova, per la revoca della sospensione condizionale (art. 75 § 4 del Codice penale), la sua modalità di calcolo e il momento nel quale l'ordinanza di revoca della sospensione condizionale della pena è efficace. Secondo l'autrice tale termine ha un carattere sostanziale, come deriva dal fatto che è stato inserito nel codice penale e che è legato alle condizioni sostanziali di revoca della sospensione condizionale. Per il suo calcolo bisogna utilizzare il metodo *computatio civilis*, consistente nel calcolo della scadenza del termine dal

giorno al giorno (*dies a qua*), a motivo del fatto che l'inizio del decorso del periodo di prova è stabilito con il passato in giudicato della sentenza, e quindi con una istituzione di diritto processuale penale. Il termine per la revoca della sospensione condizionale è rispettato se nel caso di revoca facoltativa (art. 75 § 2 e 3 del Codice penale) viene emessa e passa in giudicato l'ordinanza di revoca della sospensione condizionale della pena prima della scadenza di 6 mesi dalla conclusione del periodo di prova (art. 178 § 5 del Codice penale esecutivo), e nel caso di revoca obbligatoria (art. 75 § 1, § 1a e § 2a del Codice penale) e sufficiente che entro questo termine venga emessa tale ordinanza (art. 9 § 3 del Codice penale esecutivo).

Parole chiave: pena detentiva, periodo di prova, termine, sospensione condizionale, revoca della sospensione condizionale

Cytuj jako:

Stefańska B.J., *Dodatkowy okres do zarządzenia wykonania kary [Additional period for activating a suspended sentence]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 106–121. DOI: 10.26399/iusnovum.v13.1.2019.05/b.j.stefanska

Cite as:

Stefańska, B.J. (2019) 'Additional period for activating a suspended sentence'. *Ius Novum* (Vol. 13) 1, 106–121. DOI: 10.26399/iusnovum.v13.1.2019.05/b.j.stefanska

Ius Novum
1/2019

NEGATIVE PREMISES FOR AGGREGATE SENTENCE UNDER ARTICLE 85 § 4 OF THE POLISH CRIMINAL CODE

ŁUKASZ BUCZEK*

DOI: 10.26399/iusnovum.v13.1.2019.06/l.buczek

1. INTRODUCTION

Many years ago, an outstanding criminal law scientist – Władysław Wolter – noted: "I kept believing that the issue of an actual coincidence of offences as a certain number of offences that is excluding extreme problems, indeed complicated, is a very simple issue on which it is difficult to write. However, an analysis of a specific judgment and certain practical situations indicates it is not. It would be very interesting to look at the problem, but such analysis requires the understanding of such complications and the related difficulties."[1] The words – although relaying on the Criminal Code of 1932 – seem to remain valid today. The relatively fast-changing legal surrounding which implies an unconditional need to search for an objectively correct interpretation of legal texts (related to the issue of coincidence of offences underlying aggregate sentences[2] and the issues related to international criminal law), makes this paper justified.

* MA, Assistant Lecturer, Department of Criminal Law, Faculty of Law and Administration of the University of Szczecin; e-mail: lukasz.buczek@yahoo.com; ORCID: 0000-0002-7902-7526

1 W. Wolter, *O warunkach orzeczenia kary łącznej*, Nowe Prawo No. 1, 1962, p. 26.

2 In that respect, see the opposite standpoint of Dariusz Kala and Maja Klubińska who state that in the current legal environment it is ungrounded to treat coincidence of offences as a base for an aggregate sentence since, in fact, aggregate sentences are passed – in the light of their review – only for a certain accidental multiple of committed offences so only a "coincidence of punishment" may be referred to; see D. Kala, M. Klubińska, *Realny zbieg przestępstw – konieczny czy zbyteczny warunek orzekania kary łącznej? Uwagi na tle projektowanych zmian Kodeksu karnego*, [in:] I. Sepioło-Jankowska (ed.), *Reforma prawa karnego*, Warszawa 2014, p. 145 et seq., and D. Kala, M. Klubińska, *Kara łączna w projektach nowelizacji Kodeksu karnego – wybrane zagadnienia*, Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury No. 13, 2014, p. 91 et seq. Compare also the standpoint presented here and accepted, inter alia, by

It is divided into three core parts. The first stresses the existence of a legal definition of "conviction" as set forth in Article 114a § 1 CC along with clarification of the content. Correct understanding of the impact of implementing a legal definition to the current code provisions is expected – as assumed – to clarify the issues referred to in the two other parts of the paper, that is related to the theoretical legal contestation of identifying so-called negative premises for passing aggregate sentences and an attempt to determine if it is possible to incorporate in the term of aggregate punishment also penalties passed with judgments other than "conviction" within the meaning of Article 114a § 1 CC.

2. ARTICLE 114A § 1 CC AS DEFINITION

The implementation of Article 114a CC[3] to the Polish legal system with the amending Act of 2011[4] was the result of the EU Framework Decision 2008/675/JHA,[5] aimed inter alia at maintaining and developing the space of freedom, security and justice by accepting convictions passed in other member states.[6] During the work on the recent major reform of law and criminal procedures, two alternative versions of the regulation were presented. Piotr Kardas, as the reporter, stated as follows:

Marek Bielski, Piotr Kardas and Andrzej Sakowicz; see M. Bielski, *Przesłanki wymiaru kary łącznej orzekanej w trybach wyroku skazującego i wyroku łącznego na tle nowego modelu kary łącznej*, Palestra No. 7–8, 2015, p. 90; P. Kardas, *Zbieg przestępstw czy zbieg kar?*, Czasopismo Prawa Karnego i Nauk Penalnych No. 3, 2015, pp. 35–36; A. Sakowicz, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2015, p. 1184.

[3] In the wording in force until the end of June 2015: "Criminal proceedings shall take into account final convictions issued in another European Union Member State by a court competent for criminal offences, finding a person guilty of an offence other than the act covered with criminal proceedings, unless: 1) the conviction was for an offence that is not an offence under Polish law, 2) a punishment was passed that is unknown to Polish law, 3) the perpetrator would not be punished under Polish law, 4) the inclusion would cancel or modify the judgment, 5) there is a justified concern that the inclusion would infringe the freedoms and rights of the sentenced person in another European Union Member State, 6) in accordance with the information obtained from criminal records or a court of a third country, the offence covered with the sentence is subject to pardon as a result of abolition or pardon in the country where it was passed, 7) the information obtained is insufficient to include the sentence."

[4] Act of 20 January 2011 amending the Criminal Code, the Criminal Procedure Code and the Fiscal Penal Code, Dz.U. No. 48, item 245.

[5] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ EU L 220 of 15.08.2008, p. 32); hereinafter Framework Decision. The paper *a priori* omitted analyses related to the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ EU L No. 327 of 5.12.2008, p. 27 (implemented to the legal system in the Act on criminal procedure) as they are not related to the subject of aggregate sentences understood in this paper as a stage of convicting sentence. The other of the decisions relates solely to the procedures of enforcing the punishments.

[6] For more on the nature of the Framework Decision, see e.g. A. Sakowicz, M. Królikowski, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna*, Vol II, *Komentarz do art. 32–116*, Legalis 2015, thesis 2 on Article 114a CC.

"An analysis of the history of versions of the discussed solutions easily shows that in the draft prepared by the Criminal Law Codification Committee, Article 114a § 1 was worded as follows (initially – addition by Ł.B.): 'a conviction will also include a legally final judgment convicting for offences, issued by a court competent for criminal offences in a European Union Member State', while in the government draft the regulation provided that 'a conviction will also include a legally final judgment convicting for offences, issued by a court competent for criminal offences in a third country'."[7]

Finally, the following solution was approved (which became statutory), proposed by the Criminal Law Codification Committee, since 1 July 2015 Article 114a § 1 CC: "A conviction will also include a legally final judgment convicting for offences, issued by a court competent for criminal offences in a European Union Member State, unless according to Polish legal regulations, such act is not an offence, the perpetrator may not be punished or a punishment was passed that is unknown to the law."[8]

In the context of the regulation, Jarosław Majewski – with respect to the theoretical legal observation – rightly stressed that: "Article 114a § 1 sets the legal definition of the term 'conviction'. This is a non-classic definition (covering a scope) and incomplete (partial) since it lists not all but only selected elements of the defined name (this is clearly indicated with the word 'also', used directly after the word 'is'). (…) The legal definition set forth in the reviewed regulation, in the entire Criminal Code is related to (the restriction specified in Article 114a § 3) and in all stages of criminal proceedings."[9] The thesis deduced by the author is to be completely approved. It seems advantageous for correct dogmatic legal understanding of the negative premise under Article 85 § 4 CC that the defining nature of Article 114a § 1 CC was extended, which seems not to be well perceived by the other parties involved in developing the doctrine.[10] The disregard for the defining nature of Article 114a § 1 CC may be to some extent justified with the fact that the nature was assigned to the legal provision as late as before the last great reform of criminal law and criminal procedures. The previous statutory wording of

---

[7] P. Kardas, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część ogólna*, Vol. II, part II, *Komentarz do art. 53–116*, LEX 2016, thesis 96 on Article 85 CC.

[8] The provision of Article 114a CC was divided into three paragraphs. The two other, less interesting with respect to the subject of the paper, provide as follows: "§ 2. In case of a conviction by a court referred to in § 1, in cases of: 1) application of the new criminal law Act that became effective after the conviction was passed, 2) deletion of conviction – the Act shall be applied that was in force at the place the conviction was passed. The provisions of Article 108 shall not apply. § 3. The provisions of § 1 do not apply when the information obtained from criminal records or a court of a European Union Member State is not sufficient to identify the conviction or when the issued sentence is pardoned in the country where the conviction was passed."

[9] J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, LEX 2015, thesis 3 on Article 114a CC.

[10] Although it is worth noting that the legal definition in Article 114a CC is also acknowledged by Witold Zontek (see W. Zontek, *Skazujące wyroki zagraniczne i kara łączna: Między postulatami a rzeczywistością*, Internetowy Przegląd Prawniczy TBSP UJ No. 1, 2015, p. 21).

Article 114a CC by no means justified a statement that the legislator incorporated any legal definition therein.

It is impossible to disregard the very essence of incorporating legal definitions in the structure of legal texts. Maciej Zieliński noted that in the practice of wording statutory acts, the following had been developed: three methods of placing definitions in the text of a legal act: placing a definition in a dedicated fragment of the text, usually referred to as a glossary (which in the Criminal Code was provided in Article 115 CC – addition by Ł.B.), placing a definition in the body of the text in dedicated regulations (which was justly noted by Jarosław Majewski with reference to Article 114a § 1 CC – addition by Ł.B.), placing a definition in footnotes by inserting it in parentheses."[11] Although it could seem *prima facie* that the placement of a text dedicated to legal definitions in a legal text (a glossary, which is a clarification of statutory terms) is fundamental to conclude that it includes all legal definitions occurring in the act; such view would be ungrounded and abstracting from the normative role of individual regulations. It may be noted that the doctrine of criminal law knows legal definitions other than specified in Article 115 CC, like for instance, a legal definition of the term "time of committing a prohibited act", included in Article 6 § 1 CC[12], or the legal definition of the term "place of committing a prohibited act" in Article 6 § 2[13]. The legal definition itself against the background of theory of law is perceived as a legal norm containing material and very strong directives for interpretation of legal texts, relevant for the meaning of the text.[14]

The method of defining the term "conviction" in the context of the Criminal Code, noted by Jarosław Majewski[15] – only partially specifying the meaning – is to be viewed negatively. One may not omit the purposive directive under § 151.2 ZTP,[16] decisive about the fact that implementation of a legal definition to a legal text in its subjective style basically requires a connector "this is", indirectly banning the use of the connector "is".[17] The connector "this is" may be replaced with the connector "as well as" – the connector was used in Article 114a § 1 CC – however, solely "to expand the previous meaning of the term".[18] Both in the Criminal Code and in the Criminal Procedure Code (CPC), the term "conviction" was used multiple times by the legislator, including to define a method of passing an aggregate sentence (Article 568a § 1.1 CPC). However, another legal definition of the term apart from

---

[11] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012, p. 201.

[12] See M. Nawrocki, *Czas popełnienia czynu zabronionego w polskim prawie karnym. Podstawowe zagadnienia materialnoprawne*, Szczecin 2014, p. 33 et seq.

[13] See M. Nawrocki, *Miejsce popełnienia czynu zabronionego*, Warszawa 2016, p. 26 et seq.

[14] Cf. in more detail in M. Zieliński, *supra* n. 11, pp. 214–215.

[15] The author is also right stating that that the definition is binding in the context of the Criminal Code and in all stages of criminal proceedings. However, the author seems to disregard the fact that the wording of Article 116 CC may be binding also in the context of regulations related to the Code.

[16] Regulation of the President of the Council of Ministers on Principles of legislative techniques of 20 June 2002, Dz.U. 2016, item 283.

[17] Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.*, Warszawa 2004, p. 288.

[18] *Ibid*.

Article 114a § 1 CC cannot be found. The legislator, having introduced only a partial definition of the term, assumed that it will add meaning to the term which – in its opinion – has such an acceptable meaning that there is no need to present the entire definition. Such a far-reaching conclusion of the legislator that may be deduced from the legal text, does not seem right, despite the common use of the term "conviction". It seems that a much better solution would be to incorporate a full range-covering definition of the term that would explicitly be decisive for its appropriate meaning.

The above postulate is also necessary in view of the fact that the definition of "conviction" provided in Article 114a § 1 CC is far from editorial perfection since Article 114a CC contains multiple subjective restrictions limiting the scope of the partial definition. The statement by Jarosław Majewski quoted above[19] shows that such restrictions are included in Article 114a § 3 CC, which clearly specifies situations when § 1 of the Article is not applied (that is those that are not updated with the legal norm requiring recognition of a legally final conviction for offences issued by a court competent for criminal offences in an EU member state as a conviction in line with the domestic code). The restriction of the range of the definition is also included in the same § 1 of Article 114a CC, after a comma, where, similarly to § 3 of Article 114a CC, the range of circumstances was restricted when the legal norm is updated that requires the application of the partial legal definition of "conviction". Considering the structure of the legal definition resulting from the subjective restrictions (in both paragraphs of Article 114a CC), it may be noted that the application scope of the legal norm containing the legal definition is relatively narrow. When determining if a specific legally final judgment passed by a competent criminal court in the European Union member state is a "conviction" within the meaning of Article 114a § 1 CC, it is necessary to review:[20] (a) if the act underlying the conviction of the perpetrator in another EU member state constitutes an offence within the meaning of Polish criminal laws; (b) if the perpetrator can be punished (in compliance with the Polish legal regulations for the act attributed to him/her in another EU member state); (c) if a punishment known to Polish criminal laws has been passed in another EU member state; (d) if the information obtained from criminal records or courts of another EU member state is sufficient to determine the conviction in such country; (e) if the punishment passed in another EU member state is subject to pardon in that country (of if it has not been pardoned in the country). If at least one negative reply is provided to any question in items (a)–(e), the reviewed judgment passed in another EU member state is not a "conviction" within the meaning of Article 114a § 1 CC.[21]

---

[19] J. Majewski, *supra* n. 9.

[20] A review of the circumstances specified in items (a)–(e) requires prior decision if one reviews a legally final judgment issued by a court competent for criminal matters in another EU Member State.

[21] It may also be added that the EU legislator clearly stated that in Article 2 Framework Decision it introduced a definition of the term "conviction", applicable in the context of the Framework Decision; the regulation provides as follows: "For the purposes of this Framework Decision 'conviction' means any final decision of a criminal court establishing guilt of a criminal offence."

3. ON THEORETICAL LEGAL CONTESTATION OF NEGATIVE PREMISES TO PASS AGGREGATE SENTENCES

In the context of the current legal environment, the criminal law doctrine perceives the role of subsequent paragraphs of Article 85 CC in a relatively uniform way, although in my opinion, not really adequately in theoretical legal terms. In that context, the opinion of Piotr Kardas is representative: "The amended provisions of Chapter IX of the Criminal Code provide for additional premises that need to be complied with in order to pass an aggregate sentence".[22] He further reasons as follows: "The amended regulations concerning aggregate sentences introduce a number of additional, previously unknown conditions underlying aggregate sentences as specified in Article 85 § 1–4 CC."[23] As a result, it is noted that Article 85 § 2–4 contains so-called negative premises of aggregate sentences (and also exceptions to passing aggregate sentences) relating solely to the mode to aggregate sentences in the form of aggregate judgments (under Article 568 § 1.2 CPC), preventing the passing of an aggregate sentence pursuant to Article 85 § 1 CC.[24]

However, acceptance of the set of notions is not combined with contesting the obligatory institution of the aggregate sentence, perceived solely in the context of the earlier legal environment.[25] In the aspect of normative significance of the institution of the aggregate sentence, it is rightly noted by Łukasz Pohl that: "Article 85 CC contains the regulation addressed to courts requiring the passing of aggregate sentences. (…) In Article 85 CC stress was put on identifying the conditions updating the norm",[26] which resulted in the author's conclusion that: "In Article 85 CC the legislator indicated that the norm, obliging courts to resort to its legal competencies to pass an aggregate judgment, may be applied solely to a situation strictly defined in the regulation."[27] Approving a view that Article 85 CC contains a legal norm requiring the passing of an aggregate sentence, it should be noted that the norm was included in the Article as a result of the segmentation of its wording[28] when the legal

---

22 P. Kardas, *Kara łączna i ciąg przestępstw*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Kraków 2015, p. 487.

23 *Ibid*., p. 488.

24 Cf. *ibid*., pp. 488–510; P. Hofmański, L.K. Paprzycki, A. Sakowicz, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, LEX 2016, theses 9, 11 and 13 on Article 85 CC; and S. Żółtek, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks*, *supra* n. 6, theses 26–36 on Article 85 CC (who sees exceptions to applying the institution of aggregate sentence solely in Article 85 §§ 3–4 CC).

25 See resolution of the Supreme Court of 25 February 2005, I KZP 36/04, OSN 2005, No. 2, item 13; the Supreme Court judgment of 6 April 2006, IV KK 5/06, OSN 2006, No. 1, item 767, and the Supreme Court judgment of 25 July 2007, V KK 200/07, OSN 2007, No. 1, item 1726, and the interesting reasoning of Mikołaj Małecki in the context of the mandatory institution of aggregate sentence before the great reform of law and criminal procedures; see M. Małecki, *Kara łączna: obligatoryjna czy fakultatywna? Wyrok łączny: z urzędu czy na wniosek? Szkic zagadnienia*, [in:] W. Górowski et. al. (eds), *Zagadnienia teorii i nauczania prawa karnego. Kara łączna. Księga Jubileuszowa Profesor Marii Szewczyk*, Warszawa 2013, p. 473 et seq.

26 Ł. Pohl, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2015, p. 533. See also *idem*, *Prawo karne. Wykład części ogólnej*, Warszawa 2015, p. 225.

27 Ł. Pohl, [in:] R.A. Stefański (ed.), *supra* n. 26, p. 533.

28 For more, on the segmentation of the wording, see M. Zieliński, *supra* n. 11, pp. 119–133.

text was drafted. It is Article 85 § 1 CC that is a fundamental[29] legal regulation[30] – a basis to reconstruct the legal norm in legal interpretation. Consistently, the other paragraphs of the article should be treated: "(…) as regulations providing in an adequate wording (modifying regulations) a complete syntactically norm-creating expression underlying the setting of a legal norm wording that require courts to pass aggregate sentences (as an aggregate judgment – addition by Ł.B.[31]), and more precisely, restricting the use of the wording of the interpreted legal norm."[32]

In view of the above, Article 85 § 4 CC is to be treated not as a negative premise to the passing of an aggregate sentence which – more adequately in theoretical legal terms – as a legal regulation restricts the circumstances where the legal norm requiring the passing of an aggregate sentence is applied. However, the situation is not as described by Sławomir Żółtek that the regulation introduces an "(…) exception to Article 85 § 1 CC (providing for premises for aggregate sentences)"[33] due to the fact that Article 85 § 1 CC – or in any other legal provision – such disposition cannot be found. Making a favourable interpretation of this author's statement, it may be deduced that he reaches a similar conclusion as in this paper as to the role of Article 85 § 4 CC, while narrowing the application of the legal norm, fundamentally worded in Article 85 § 1 CC, requiring the passing of an aggregate sentence. However, he applies notions that are completely unacceptable in the context of contemporary legal theories since they may suggest both that the legal regulation is identical with the legal norm and that the author approves a view – not rightly rejected – of a three-component structure of the legal norm, composed of a hypothesis, disposition and sanctions.[34]

---

[29] On the difference between the legal regulation and the legal norm, see *ibid.*, p. 14.

[30] As claimed by Maciej Zieliński: "A fundamental regulation is such that institutes a minimum element of order (ban) combined with an element describing the behaviour. A fundamental regulation which words all syntactic elements of a norm is a complete fundamental regulation (a complete fundamental normative regulation), while a fundamental regulation where two terms are missing: the addressee or circumstances, is an incomplete fundamental regulation"; see *ibid.*, p. 111.

[31] Just marginally – in order to leave the main reasoning quite clear – it should be noted that Article 85 § 1 CC may be treated as a fundamental regulation to interpret minimum two norms: first that requires passing of an aggregate sentence as a conviction, and the other – requiring the passing of an aggregate sentence as an aggregate judgment. The negative premises of passing aggregate judgments noted by the doctrine, incorporated in Article 85 §§ 2–4 CC, support the adequate wording of the second norm.

[32] See Ł. Buczek, *Zmiany naprawcze w instytucji kary łącznej (w art. 85 § 3 k.k.) w świetle nowelizacji Kodeksu karnego z 2016 r. – próba oceny*, Przegląd Prawniczy Europejskiego Stowarzyszenia Studentów Prawa ELSA Poland, issue IV, 2016, p. 155 and the theoretical legal arguments quoted therein.

[33] S. Żółtek, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks*, *supra* n. 6, thesis 31 on Article 85 CC.

[34] See the reasons underlying the rejection of the specific convention in S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 2001, p. 149 et seq. It is worth stressing that the allegation of inadequacy relating to the notions applied by Sławomir Żółtek relates solely to the quoted publication and should not be interpreted broadly. However, there is no doubt as to the vast theoretical legal knowledge of the author which was reflected, for instance, in his post-doctoral thesis (see S. Żółtek, *Znaczenie normatywne ustawowych znamion typu czynu zabronionego. Z zagadnień semantycznej strony zakazu karnego*, Warszawa 2017, *passim*).

4. ON THE POSSIBILITY OF APPLYING AGGREGATE SENTENCES TO PUNISHMENTS PASSED IN LEGALLY FINAL JUDGMENTS OF OTHER COUNTRIES OTHER THAN "CONVICTIONS" UNDER ARTICLE 114A § 1 CC

The valid wording of Article 85 § 4 CC in accordance with which: "Aggregate sentences shall not apply to punishments passed by judgments referred to in Article 114a CC" raises material dogmatic legal doubts. The doubts are focused on two issues: (1) is it possible to apply aggregate judgments to sentences passed in the EU member states that are not "convictions" within the meaning of the partial legal definition in Article 114a § 1 CC, and (2) is it possible to apply aggregate judgments to sentences passed in non-EU member states?

In the context of the first issue, Małgorzata Gałązka stated as follows: "Purposive and systemic aspects, in particular in the context of the EU law (…) are decisive for excluding such interpretation (an interpretation supporting such understanding of the construction of aggregate sentences – addition by Ł.B.)."[35] Thus, it is worth reminding that in the analysed case a discussion is whether aggregate sentences passed in the form of an aggregate judgment may be based solely on a sentence passed in an EU member state which, however, was not passed in a judgment falling under the term of "conviction" in the domestic legal system. No possibility to determine that a sentence has been passed as a "conviction" is related to the subjective restrictions specified earlier, as set forth in Article 114a § 1 CC of the legal definition of the term.

Without questioning the validity of the purposive and systemic aspects noted by Małgorzata Gałązka and the context of the EU law – which in the author's opinion are to prevent the passing of aggregate sentences composed of sentences passed in the EU member states not as "convictions" – one more material circumstance has to be noted. In the reference in Article 85 § 4 CC, the legislator relates to "sentences specified in Article 114a", and not to "convictions referred to in Article 114a § 1", or even to "sentences referred to in Article 114a § 1 CC". This plain observation seems to carry a material normative value. In my opinion, the negative premises of passing aggregate sentences in Article 85 § 4 CC – and more adequately in theoretical legal terms: the provision restricting the application of the legal norm requiring the passing of aggregate sentences – is not just a reference to sentences passed in the EU member states that qualify to the legal definition of "conviction" under Article 114a § 1 CC. This is a reference to all sentences that "are mentioned" in Article 114a CC, that is also to such that due to the subjective restrictions contained in §§ 1 and 3 of the Article could not be classified as falling under the definition of "convictions" in compliance with the domestic code.[36]

---

[35] M. Gałązka, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Legalis 2017, thesis 31 on Article 85 CC.

[36] Additionally, it seems that the legislator was bound with Article 3.3 and 3.4 Framework Decision – subject to the definition of "conviction" set forth in Article 2 Framework Decision (see footnote 21) – in the light of paragraphs of Article 3: "3. The taking into account of previous convictions handed down in other Member States, as provided for in paragraph 1

It cannot be left unnoticed that if the legislator wished to restrict the reference only to the specific scope of the extended understanding of "conviction" in compliance with domestic regulations, incorporated in Article 114a § 1 CC, it should state precisely in the reference that the application scope of the norm requiring the passing of aggregate sentences is reduced to sentences passed as "convictions" in the EU member states, which it failed to do. An assumption of the above viewpoint may generate doubts if Article 85 § 4 CC refers to all legally final sentences referred to in Article 114a CC or only to those that in our legal system are termed as judgments (which seems to be indicated by the wording context of Article 85 § 4 CC). It seems that this is a reference covering a broad range since it covers not only sentences of member states that are judgments (note additionally that the term "judgment" has no legal definition in the context of criminal law) but all legally final sentences of criminal courts finding a person guilty of offences, handed down in the EU member states. Such understanding of the reference is supported in particular by the systemic aspects touched upon by Małgorzata Gałązka as taking into account the nomenclature used in the Framework Decision, without appropriate reflection transposed by the Polish legislator to the domestic codes.

Additionally, it should be noted that it is impossible to use a bilateral agreement (even ratified subject to the previous approval required by law)[37] to provide domestic courts with competencies to include in aggregate sentences also sentences handed down with legally final sentences in the EU member states. Provisions of such bilateral agreement would be contrary, inter alia, to Article 3.3 and 3.4 Framework Decision, and thus would constitute a circumvention of the EU law.[38] Therefore, in terms of subject matter, Piotr Kardas notes the following: "The directive set forth in the regulation (Article 85 § 4 CC – addition by Ł.B.) is absolute and thus admits no exceptions. Therefore, due to the fact that convictions have been handed down for coinciding offences as a result of a sentence passed in another member state,

---

(Article 3 of the Decision – added by Ł.B.), shall not have the effect of interfering with, revoking or reviewing previous convictions or any decision relating to their execution by the Member State conducting the new proceedings. 4. In compliance with par. 3, the provisions of par. 1 do not apply to the extent to which the taking into account of a previous conviction – if it were a domestic conviction handed down in a Member State conducting new proceedings – would result, in compliance with the domestic law of such Member State, in an interference, revocation or review of a previous conviction or any decisions relating to their execution."

[37] Or search by domestic courts for such competencies in bilateral agreements concluded by Poland before joining the EU, while the agreements were consumed with the EU law in aspects differently provided for in the EU law. Similarly, this also refers to international agreements concluded by Poland with a larger number of countries.

[38] As a consequence, it is impossible to accept it that a domestic court could refer for instance to Article 19 of the agreement between the Republic of Poland and the Republic of Austria on mutual enforcement of court sentences in criminal cases of 19 April 1990 (Dz.U. 1991, No. 14, item 58), which provides as follows: "Cancellation or modification of a sentence approved for enforcement should be carried out by the country where the sentence was handed down" – which seemingly is search by other authors, although accidentally against the background of an analysis of Poland's relations with countries that are not EU Member States (there is no doubt that Austria is an EU Member); see P. Hofmański, L.K. Paprzycki, A. Sakowicz, [in:] M. Filar (ed.), *supra* n. 24, thesis 13 on Article 85 CC and the case law and literature quoted therein.

a material legal obstacle arises to incorporate the punishment handed down as a result of the issued sentence in aggregate sentence"[39] – in other words, the scope of duty to pass aggregate sentences in no case may cover sentences handed down in other EU member states.

The last of the issues touched upon in this paper, signalled at the beginning, is the possibility to apply aggregate sentences to sentences handed down in countries that are not the EU members.

In that respect, Piotr Kardas stated as follows: "Approval by the legislator of a version of the discussed regulation (Article 114a CC – addition by Ł.B.) corresponding to the concept approved in the draft by the Criminal Law Codification Committee, indicates that the exclusion (from Article 85 § 4 CC – addition by Ł.B.) is restricted in the context of the amended regulations – it does not refer to sentences handed down on the basis of convicting judgments passed by courts in criminal cases in countries other than the EU member states",[40] and in view of its narrow and exceptional nature may be interpreted more broadly.[41] Additionally, he ruled out the possibility of applying aggregate sentences of punishments handed down in convicting judgments in non-EU member states if acceptable by regulations of international criminal law applicable in Poland.[42]

Relating the previous discussion to the issue at hand, the reasoning of Piotr Kardas seems to be justified on its merits. This paper is based on an assumption that Article 85 § 4 CC restricts the scope of the application of the legal norm requiring the passing of an aggregate sentence by certain specific sentences, i.e. sentences referred to in Article 114a CC. Thus, the role of the regulation is to contradict the possibility of treating – as an aggregate sentence – a sentence handed down as a "conviction" in an EU member state or a sentence handed down which, due to subjective restrictions in §§ 1 and 3 of Article 114a CC, could not meet the definition of "conviction". Failure to accept Article 85 § 4 CC in the existing wording, while at the same time introducing Article 114a CC in its wording, would justify a standpoint that sentences passed in "convictions" handed down in the EU member states are treated as unitary sentences that underlie aggregate sentences.[43] Non-existence of a negative premise under Article 85 § 4 CC would additionally raise numerous discussions as to the possibility of incorporating into aggregate sentences such sentences that have been passed in the EU member states apart from "convictions". That would result in an interference in sentences handed down in those countries and finally would imply a statement of an unjustified extension of competencies

---

[39] P. Kardas, *supra* n. 7, thesis 99 on Article 85 CC.

[40] *Ibid*., thesis 96 on Article 85 CC. See also observant notes in this context by D. Kala and M. Klubińska, *Kara łączna*, *supra* n. 2, pp. 95–96.

[41] He further reasoned that: "In the above context, Article 85 § 4 was worded in a narrow manner. Thus, there is no possibility of interpreting the solution more broadly, assuming that, although an appropriate regulation is missing in the Act, the basis of aggregate sentences does not cover punishments handed down with convicting judgments by courts in non-EU member states"; see P. Kardas, *supra* n. 7, thesis 96 on Article 85 CC.

[42] For more, see *ibid*., thesis 97 on Article 85 CC.

[43] Such legislative omission is clearly obstructed by Article 3.3 and 3.4 Framework Decision.

of domestic criminal courts to competencies specific for sovereign foreign states, as well as in abolishing a pillar on which the EU current policies of freedom, security and justice are based.

Article 85 § 4 CC, as rightly noted by Piotr Kardas, does not refer to sentences handed down in non-EU member states. Neither that regulation, nor any other provision of the Criminal Code refer to a possibility of accepting a sentence passed in a third country as a unitary sentence underlying an aggregate sentence, since they do not have to or may not refer to that considering the territorial limited sovereignty in the international arena and the resulting independence in terms of competencies. Were it not for a specific extension of competencies of domestic courts by placing a legal definition of "conviction" in Article 114a § 1 CC, interpreters would have no doubt that an aggregate sentence may be based solely on a sentence or an aggregate sentence passed by a Polish criminal court. The Polish legislator does not have *per se* legislative authority to grant judicial competencies with an intention to interfere with judgments in third countries. However, as noted by Piotr Kardas, granting judicial competencies to domestic courts to interfere in sentences passed down in non-EU member states, by aggregating sentences that have not been passed as aggregated sentences, may be based on an international treaty concluded by Poland with such states.[44]

5. CONCLUSIONS

Summarising the above reasoning, it should be stressed that in the current legal environment interpreters of legal texts should take into account the legal definition of "conviction" set forth in Article 114a § 1 CC. The introduction of the definition with the recent great reform of law and criminal procedures may materially affect a number of institutions of criminal law, including the negative premises for passing aggregate sentences as set forth in Article 85 § 4 CC or, more adequately in theoretical legal terms, the understanding of a legal provision as narrowing the range of circumstances subject to a legal norm that requires passing of an aggregate sentence.

The introduction of rudimentary theoretical legal assumptions to this paper has simplified the reasoning concerning the application of aggregate sentences to other sentences than those passed as "convictions" within the meaning of Article 114a § 1 CC. If in the current legal environment it is impossible to structure an aggregate sentence covering punishments passed in sentences in the EU member states, then an aggregate sentence is possible that would cover punishments passed in sentences in non-EU member states as long as such competencies are provided for in international agreements concluded by Poland.

[44] Additionally, a structure is possible of an aggregate sentence composed of sentences passed by a Polish criminal court and sentences handed down by international criminal tribunals if such competencies are incorporated and clearly specified in international agreements concluded by Poland.

BIBLIOGRAPHY

Bielski M., *Przesłanki wymiaru kary łącznej orzekanej w trybach wyroku skazującego i wyroku łącznego na tle nowego modelu kary łącznej*, Palestra No. 7–8, 2015.

Buczek Ł., *Zmiany naprawcze w instytucji kary łącznej (w art. 85 § 3 k.k.) w świetle nowelizacji Kodeksu karnego z 2016 r. – próba oceny*, Przegląd Prawniczy Europejskiego Stowarzyszenia Studentów Prawa ELSA Poland, Issue IV, 2016.

Gałązka M., [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Legalis 2017.

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

Kala D., Klubińska M., *Kara łączna w projektach nowelizacji Kodeksu karnego – wybrane zagadnienia*, Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury No. 13, 2014.

Kala D., Klubińska M., *Realny zbieg przestępstw – konieczny czy zbyteczny warunek orzekania kary łącznej? Uwagi na tle projektowanych zmian Kodeksu karnego*, [in:] I. Sepioło-Jankowska (ed.), *Reforma prawa karnego*, Warszawa 2014.

Kardas P., *Kara łączna i ciąg przestępstw*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Kraków 2015.

Kardas P., *Zbieg przestępstw czy zbieg kar?*, Czasopismo Prawa Karnego i Nauk Penalnych No. 3, 2015.

Kardas P., [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część ogólna, Komentarz do art. 53–116*, Vol. II, part II, LEX 2016.

Majewski J., *Kodeks karny. Komentarz do zmian 2015*, LEX 2015.

Małecki M., *Kara łączna: obligatoryjna czy fakultatywna? Wyrok łączny: z urzędu czy na wniosek? Szkic zagadnienia*, [in:] W. Górowski, P. Kardas, T. Sroka, W. Wróbel (eds), *Zagadnienia teorii i nauczania prawa karnego. Kara łączna. Księga Jubileuszowa Profesor Marii Szewczyk*, Warszawa 2013.

Nawrocki M., *Czas popełnienia czynu zabronionego w polskim prawie karnym. Podstawowe zagadnienia materialnoprawne*, Szczecin 2014.

Nawrocki M., *Miejsce popełnienia czynu zabronionego*, Warszawa 2016.

Pohl Ł., [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2015.

Pohl Ł., *Prawo karne. Wykład części ogólnej*, Warszawa 2015.

Sakowicz A., [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2015.

Sakowicz A., Królikowski M., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 32–116*, Vol. II, Legalis 2015.

Wolter W., *O warunkach orzeczenia kary łącznej*, Nowe Prawo No. 1, 1962.

Wronkowska S., Ziembiński Z., *Zarys teorii prawa*, Poznań 2001.

Wronkowska S., Zieliński M., *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.*, Warszawa 2004.

Zieliński M., *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012.

Zontek W., *Skazujące wyroki zagraniczne i kara łączna: Między postulatami a rzeczywistością*, Internetowy Przegląd Prawniczy TBSP UJ No. 1, 2015.

Żółtek S., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 32–116*, Vol. II, Legalis 2015.

Żółtek S., *Znaczenie normatywne ustawowych znamion czynu zabronionego. Z zagadnień semantycznej strony zakazu karnego*, Warszawa 2017.

NEGATIVE PREMISES FOR AGGREGATE SENTENCE UNDER ARTICLE 85 § 4 OF THE POLISH CRIMINAL CODE

Summary

This paper touches upon an important issue in practical application of law, i.e. aggregate sentence under the laws changed during the great reform of criminal law and criminal procedure. An often highlighted aspect of the said issue is the normative nature of the construct of the aggregate sentence, whose correct theoretical understanding, in the author's opinion, helps in solving some of the problems with interpretation encountered by scholars. A particularly important issue raised within that area is the negative premise contemplated in Article 85 § 4 of the Polish Criminal Code, and especially the said provision of law, making the wording of the norm requiring the imposition of an aggregate sentence more adequate. Clear highlighting of statutory decoding of the legal definition of the term "conviction" used in Article 114a CC and the importance of the implication of this drafting technique, allows the author to make a clear statement as to the possibility of combining the sentences passed in countries that are not the EU members.

Keywords: aggregate sentence, negative premise, conviction

NEGATYWNA PRZESŁANKA KARY ŁĄCZNEJ Z ART. 85 § 4 K.K.

Streszczenie

Niniejsze opracowanie dotyka istotnego dla praktyki stosowania prawa zagadnienia, jakim jest kara łączna w świetle znowelizowanych wielką reformą prawa i postępowania karnego przepisów prawa. Wielokrotnie podkreślanym aspektem tegoż zagadnienia jest charakter normatywny instytucji kary łącznej, którego prawidłowe teoretycznoprawne zrozumienie, w opinii autora, pozwala na rozwikłanie części nurtujących doktrynę problemów interpretacyjnych. Szczególną kwestią poruszaną w tym względzie jest tzw. przesłanka negatywna kary łącznej z art. 85 § 4 Kodeksu karnego, a dokładniej tenże przepis prawny uadekwatniający treściowo normę prawną nakazującą orzeczenie kary łącznej. Wyraźne podkreślenie ustawowego zdekodowania definicji legalnej wyrażenia „wyrok skazujący" w treści art. 114a Kodeksu karnego i zaznaczenie implikacji tego zabiegu redakcyjnego, pozwala autorowi na jednoznaczne zajęcie stanowiska co do możności objęcia węzłem kary łącznej kar orzeczonych w państwach niebędących członkami Unii Europejskiej.

Słowa kluczowe: kara łączna, przesłanka negatywna, wyrok skazujący

REQUISITO NEGATIVO DE LA PENA CONJUNTA DEL ART. 85 § 4 DEL CÓDIGO PENAL

Resumen

El presente artículo versa sobre cuestión importante para la práctica – la pena conjunta a la luz de la gran reforma de derecho penal y derecho penal procesal. El aspecto subrayado numerosamente de esta cuestión es el carácter normativo de la institución de la pena conjunta,

cuyo entendimiento teórico correcto, según el autor, permite solucionar parte de problemas de interpretación de que se ocupa la doctrina. La cuestión particular en este aspecto consiste en el llamado requisito negativo de la pena conjunta del art. 85 § 4 del código penal; este precepto contiene norma legal que obliga imponer la pena conjunta. La puesta en relieve de manera expresa de la definición legal de la expresión "sentencia sancionadora" en el art. 114a del código penal y acentuación de la implicación de tal redacción permite al autor opinar inequívocamente sobre la posibilidad de incluir en la pena conjunta las penas impuestas en países que no sean miembros de la Unión Europea.

Palabras claves: sentencia conjunta, requisito negativo, sentencia condenatoria

ОТРИЦАТЕЛЬНАЯ ПРЕДПОСЫЛКА ДЛЯ НАЗНАЧЕНИЯ СОВОКУПНОГО НАКАЗАНИЯ СОГЛАСНО СТ. 85 § 4 УК

Резюме

Данная работа посвящена существенной проблеме правоприменения, а именно: совокупному наказанию согласно новым правовым нормам, введенным в законодательство в ходе масштабной реформы уголовного и уголовно-процессуального права. Одним из активно обсуждаемых аспектов данного вопроса является нормативный характер института совокупного наказания, правильная трактовка которого, по мнению автора, позволит решить некоторые из интерпретационных проблем, существующих в правовой доктрине. В этом аспекте особый интерес правоведов вызывает так называемая отрицательная предпосылка для назначения совокупного наказания, содержащаяся в ст. 85 § 4 Уголовного кодекса, а именно, уточнение положения, предусматривающего совокупное наказание. Подчеркивая, что в тексте ст. 114а Уголовного кодекса законодатель расшифровал юридическое определение термина «обвинительный приговор», и указывая на проистекающие из этого факта логические следствия, автор занимает однозначную позицию относительно допустимости или недопустимости включения в совокупное наказание тех наказаний, которые были назначены в государствах, не являющихся членами Евросоюза.

Ключевые слова: совокупное наказание, отрицательная предпосылка, обвинительный приговор

DER AUSSCHLIESSUNGSGRUND FÜR EINE GESAMTSTRAFE NACH ARTIKEL 85 § 4 DES POLNISCHEN STRAFGESETZBUCHES

Zusammenfassung

Diese Studie behandelt vor dem Hintergrund der im Rahmen einer umfangreichen Reform des Strafrechts und des Strafverfahrens novellierten Rechtsvorschriften das für die Praxis der Rechtsdurchsetzung wichtige Thema der Gesamtstrafe. Ein vielfach betonter Aspekt dieses Problems ist der normative Charakter der Rechtsinstitution der Gesamtstrafe, dessen rechtstheoretisch angemessenes Verständnis es nach Ansicht des Autors erlaubt, einen Teil der Auslegungschwierigkeiten zu lösen, die der Rechtsdoktrin anhaften. Ein besonderes Problem in dieser Hinsicht ist der sog. Ausschließungsgrund für eine Gesamtstrafe gemäß Art. 85 § 4 des polnischen Strafgesetzbuches, genauer gesagt derselben Rechtsvorschrift, die inhaltlich die Rechtsnorm begründet, durch die eine Verhängung einer Gesamtstrafe angewiesen wird. Durch die ausdrückliche Betonung der normativen Begriffsbestimmung des Ausdrucks

„Verurteilung" in Artikels 114a des polnischen Strafgesetzbuches und das Unterstreichen der Implikationen dieses redaktionellen Eingriffs ist es dem Autor möglich, eine eindeutige Position hinsichtlich der Möglichkeit einzunehmen, Strafen in Gesamtstrafen einfließen zu lassen, die in Ländern verhängt wurden, die nicht Mitglied der Europäischen Union sind.

Schlüsselwörter: Gesamtstrafe, Ausschließungsgrund, Verurteilung

CONDITION NÉGATIVE POUR IMPOSER UNE PEINE CUMULATIVE EN VERTU DE L'ART. 85 § 4 DU CODE PÉNAL

Résumé

Cette étude aborde une question importante pour la pratique de l'application de la loi, à savoir la peine cumulative à la lumière des dispositions de la loi modifiées par la grande réforme du droit et de la procédure pénale. Le caractère normatif de l'institution de la peine cumulative, dont la compréhension théorique et juridique correcte permet, selon l'auteur, de résoudre certains problèmes d'interprétation dérangeant la doctrine, est un aspect de cette question qui a été souligné à maintes reprises. Un problème particulier à cet égard est le soi-disant prémisse négative pour imposer une peine cumulative en vertu de l'art. 85 § 4 du Code pénal, et plus spécifiquement la même disposition légale qui justifie la norme légale exigeant une peine cumulative. Soulignement explicite du décodage statutaire de la définition juridique de l'expression «condamnation» dans le contenu de l'article 114a du Code pénal et en soulignant les implications de cette procédure éditoriale, permet à l'auteur d'exprimer clairement sa position quant à la possibilité d'inclure une peine totale pour les peines prononcées dans des pays non membres de l'UE. L'accent explicite mis sur le décodage, dans la loi, de la définition juridique de l'expression «condamnation» dans le contenu de l'art. 114a du Code pénal et le soulignement des implications de cette procédure éditoriale, permet à l'auteur d'exprimer clairement sa position quant à la possibilité d'inclure des peines infligées dans des pays non membres de l'Union européenne dans une peine cumulative.

Mots-clés: peine cumulative, prémisse négative, condamnation

CONDIZIONE NEGATIVA DELLA PENA CUMULATIVA DELL'ART. 85 § 4 DEL CODICE PENALE

Sintesi

Il presente elaborato riguarda una questione essenziale nella pratica dell'applicazione del diritto quale è la pena cumulativa, alla luce delle norme del diritto della procedura penale, rinnovate con una radicale riforma. Un aspetto di tale questione più volte sottolineato è la natura normativa dell'istituzione della pena cumulativa, la cui corretta comprensione teorica, secondo l'autore, permette di sciogliere parte di problemi di interpretazione che interrogano la dottrina. Una questione essenziale trattata in tale aspetto è la cosiddetta condizione negativa della pena cumulativa dell'art. 85 § 4 del Codice penale, e più precisamente la norma giuridica che adegua nel contenuto la norma giuridica che impone la comminazione della pena cumulativa. L'espressa sottolineatura della decodifica giuridica della definizione dell'espres-

sione “sentenza di condanna” ai sensi dell’art. 114a del Codice penale e l’indicazione delle implicazioni di tale intervento redazionale permettono all’autore di assumere una posizione univoca circa la possibilità di comprendere in una pena cumulativa pene comminate in stati non membri dell’Unione europea.

Parole chiave: pena cumulativa, condizione negativa, sentenza di condanna

Cytuj jako:

Buczek Ł., *Negatywna przesłanka kary* łącznej *z art. 85 § 4 k.k. [Negative premises for aggregate sentence under Article 85 § 4 of the Polish Criminal Code]*, „Ius Novum” 2019 (Vol. 13) nr 1, s. 122–137. DOI: 10.26399/iusnovum.v13.1.2019.06/l.buczek

Cite as:

Buczek, Ł. (2019) ‘Negative premises for aggregate sentence under Article 85 § 4 of the Polish Criminal Code’. *Ius Novum* (Vol. 13) 1, 122–137. DOI: 10.26399/iusnovum.v13.1.2019.06/l.buczek

Ius Novum
1/2019

COMMENTS ON LIABILITY FOR REFUSAL TO PROVIDE A SERVICE (ARTICLE 138 MISDEMEANOUR CODE) IN THE CONTEXT OF CIVIL LAW

MICHAŁ HARA*

DOI: 10.26399/iusnovum.v13.1.2019.07/m.hara

Terms such as "obligation to perform", "refusal to perform" or the "provision of services" inevitably bring to mind civil law. The very first provision of Book Three of the Act of 23 April 1964: Civil Code[1] (hereinafter referred to as the Civil Code), which concerns obligations, indicates that performance is nothing else than the subject matter of a civil-law obligation.[2] Meanwhile, as practice shows, the notion of performance may be of key importance to another basic area of law, namely the law of misdemeanours. Certain forms of failure to satisfy the obligation to perform (therefore, in fact, a violation of an obligation under civil law) may simultaneously be subject to liability under the law of misdemeanours. This paper is focused on one of such forms of liability arising from Article 138 of the Act of 20 May 1971: Misdemeanour Code[3] (hereinafter MC).

The provision states as follows: "Whoever requests and charges for performance, while providing services professionally, any price higher than the applicable one or whoever intentionally and without due cause refuses to provide performance to which they are obliged shall be subject to a fine. Therefore, the provision covers two forms of a misdemeanour that may be committed by a person providing services professionally:

* MA, advocate, District Bar Association in Warsaw, Sworn Translator of English; e-mail: hara.michal@gmail.com; ORCID: 0000-0003-2385-3308

1 Consolidated text, Dz.U. 2018, item 1025, as amended.

2 Article 353 § 1: An obligation consists in that a creditor may request performance from a debtor and the debtor should provide such performance.

§ 2. Performance may consist in action or omission.

3 Consolidated text, Dz.U. 2018, item 618, as amended.

1) requesting and charging the price that is higher than the applicable one; and
2) refusal, without due cause, to provide performance which they are obliged to provide.

The first form of the misdemeanour is rarely observed in practice in the contemporary social and economic reality since, as a rule, parties to a legal relationship enjoy freedom in determining prices. A misdemeanour under Article 138 MC in the first form mentioned is possible only if there is an official fixed price or a maximum price for a specific service.[4]

It is much easier these days to encounter the second form of the misdemeanour in question. This form seems a little controversial as in its essence it consists in the response of widely understood criminal law to a conduct (or to be precise: an omission), which is in fact of purely civil-law nature. In order to analyse the implications of this *status quo* properly, it seems first necessary to specify what types of conduct may satisfy the elements of the misdemeanour. For this reason, the comments presented in this paper are divided into five sections concerning respectively: (1) the scope of penalisation, (2) proportionality, (3) the possibility of invoking the "conscientious objection" by the service provider, (4) the restriction of the freedom of economic activity under Article 138 MC, and (5) the analysis of Article 138 MC in the light of Article 42(1) of the Constitution of the Republic of Poland (the *nullum crimen sine lege* principle).

1. SCOPE OF APPLICATION OF ARTICLE 138 MC

What is of key importance to determine the scope of the provision in question is a matter of prerequisite of the "obligation to perform".

Liability under Article 138 MC may be claimed only if a person professionally involved in the provision of services is obliged to provide specific performance. This conclusion may be derived directly from the wording of Article 138 MC, which states *in fine*: "performance to which they are obliged". The obligation to perform may arise from a statutory act or another normative act,[5] or from a decision of

[4] Such solutions are provided for in Article 50a of the Act of 16 December 2010 on collective public transport (consolidated text, Dz.U. 2017, item 2136, as amended) and Article 11b of the Act of 6 September 2001 on road transport (consolidated text, Dz.U. 2017, item 2200, as amended), which provide the council of a municipality or a commune with powers to establish maximum rates for a travel by collective public transport and taxis in a municipality or commune. Certain restrictions in the freedom of setting prices are introduced also in Article 21(1)(4a) and (4b) of the Act of 18 April 2002 on the state of natural disaster (consolidated text, Dz.U. 2017, item 1897), Article 21(1a) of the Act of 21 June 2002 on the state of emergency (consolidated text, Dz.U. 2017, item 1928), and Article 24(1)(1a) of the Act of 29 August 2002 on martial law and competences of the Commander-in-Chief of Armed Forces and the principles of the Commander-in-Chief's subordination to constitutional bodies of the Republic of Poland (consolidated text, Dz.U. 2017, item 1932).

[5] For instance, in the case of a public defender, an expert witness or a sworn translator/interpreter in court proceedings.

a competent body,[6] but – as a rule – its source is a legal transaction, namely an agreement between a service provider and a customer.

In order to determine the moment when such obligation arises, the provisions of civil law must be referred to. In accordance with Article 66(1) of the Civil Code, an agreement is considered entered into if one party makes an offer and the other party makes a statement that it accepts the offer. Importantly, the offer must include all key provisions of the future agreement. The very act of making the offer is a statement of will, which means that it should be interpreted in accordance with the rules specified in Article 65(1) of the Civil Code (circumstances in which it was made, the principles of social co-existence and established custom). It should be noted, however, that if any doubts arise, announcements, advertisements, price lists and other pieces of information addressed to the public or individual persons are not deemed an offer, but merely an invitation to enter into an agreement (Article 71 of the Civil Code). Therefore, if it is not clear from the service provider's statement that it was the service provider's intention to make an offer within the meaning of Article 66(1) of the Civil Code, the norm provided for in Article 71 of the Civil Code should be applied and it should be understood that the service provider's statement is only an invitation to enter into an agreement.[7]

As a rule, the very fact of publishing an announcement by a service provider concerning the general provision of services, without supplying specific details (even if some examples of prices are given) would not be an offer. As far as the provision of services is concerned, the norm stipulated in Article 543 of the Civil Code does not apply[8] as this provision, which is a special one, applies solely to the sales agreement.[9]

As it transpires from the above, as a rule, what is necessary for a service agreement to be validly entered into, and consequently for the service provider's performance obligation to arise, is the statement of will made both by the service provider and the customer, in which all significant provisions of the agreement are included, as well as their mutual agreement on matters which are subject to negotiations (Article 72(1) of the Civil Code).

---

[6] For example, the decision of the President of the Office of Electronic Communications designating the universal service provider.

[7] M. Wojewoda, [in:] P. Książek, M. Pyziak-Szafnicka (eds), *Kodeks cywilny. Komentarz. Część ogólna*, LEX/el 2014, commentary on Article 71 Civil Code.

[8] Article 543: A public display of an object with an indication of its price in a place where it is sold is deemed an offer of sale.

[9] This remark is important for the purpose of determining the scope of application of Article 135 MC, which provides for an analogical form of misdemeanour yet with respect to the sales agreement (Article 135: Whoever hides the goods for sale or intentionally and without due cause refuses to sell such goods while being professionally involved in trading in goods in a retailer business or a catering business shall be subject to a fine). The scope of the misdemeanour will be, therefore, significantly wider than the scope of the previously quoted Article 138 MC since an agreement is validly entered into in such circumstances in which it would not be entered into in the case of providing services, i.e. by means of the buyer's indication of an object offered for sale with an indication of its price, and the buyer's statement of will expressing the buyer's intention to buy the object.

The above position may not be obvious for a lawyer specialising in a criminal law. Both in the views of legal scholars and commentators[10] and in courts' case law[11] it has been repeatedly pointed out that the obligation to perform referred to in Article 138 MC should be perceived as being at the disposal of any potential business counterparty. In effect, in accordance with such views, any entity professionally involved in the provision of services has a general obligation to perform to the benefit of any person who expresses his or her interest in receiving such performance. It seems, however, that such observations are excessively focused on the criminal aspect of the misdemeanour and disregard its civil-law aspect expressed precisely in the condition of this "obligation to perform". It may seem that they are a consequence of rather automatic reiteration of the position expressed by the authors of the commentary to the Misdemeanour Code made prior to the systemic transformation in Poland.[12] Meanwhile, it may be argued that the stance discussed has lost its validity in the current social and economic circumstances, given the adoption of the free-market economy model and the introduction of provisions that guarantee freedom of economic activity (in particular Article 20 read in conjunction with Article 22 of the Constitution of the Republic of Poland). Freedom to select a business counterparty is guaranteed not only at the level of civil-law legislation (Article 353^1 of the Civil Code in particular), but also at the level of the Constitution.[13]

Therefore, it is hard to accept the view that the very fact of carrying out professional activity consisting in providing services entails the obligation to provide any performance requested from the service provider by another person or entity. The opinion that the obligation to perform should be defined as being at the disposal of any person who requests the performance for the envisaged price is not supported by the aforementioned civil-law provisions and seems to be in breach of the constitutional principles of freedom of each individual (Article 31(1) and (2) of the Constitution of the Republic of Poland) and freedom of economic activity (Article 20 read in conjunction with Article 22 of the Constitution of the Republic of Poland).[14] Therefore, unless the obligation to perform arises from a legal act

---

[10] For example, T. Bojarski (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2015, p. 534; P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016, p. 877.

[11] For example, the decision of the Supreme Court of 14 June 2018, II KK 333/17; judgment of the Regional Court in Łódź of 26 May 2017, V Ka 557/17. See also a note to the judgment written by J. Kulesza (Państwo i Prawo No. 1, 2018, p. 134), in which the author specifies that in his view the condition of the "obligation to perform" should be read separately from the provisions of civil law.

[12] See J. Bafia, D. Egierska, I. Śmietanka, *Kodeks Wykroczeń. Komentarz*, Warszawa 1974, p. 407. Both A. Michalska-Warias (T. Bojarski (ed.), *supra* n. 10), and M. Kulik (P. Daniluk (ed.) *supra* n. 10) refer to this statement directly in order to justify their theses.

[13] See also L. Garlicki, M. Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el 2016, commentary on Article 22 of the Constitution of the Republic of Poland. See also case law of the Constitutional Tribunal referred to in section 4 below.

[14] See also M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi (art. 138 Kodeksu wykroczeń) na tle kolizji norm konstytucyjnych. Rozważania na kanwie kazusu łódzkiego drukarza o styku prawa karnego sensu largo oraz prawa konstytucyjnego*, Czasopismo Prawa Karnego i Nauk Penalnych No. 7, 2018 (preprint), pp. 33–34. http://www.czpk.pl/preprinty/odpowiedzialnosc-za-odmowe-swiadczenia-uslugi-art-138-kodeksu-wykroczen-na-tle-kolizji-

or a decision of a competent authority, it must result from an agreement between a service provider and a customer.[15]

This conclusion is of paramount importance for further deliberations on the scope of application of Article 138 MC and for the clarification of doubts that may arise in connection with the application of the norm.

2. PROPORTIONALITY

The first doubt that may be expressed in relation to Article 138 MC is a question of the proportionality of the provision, given that it provides for a sanction typical of widely understood criminal law. As follows from the above, it seems nevertheless legitimate to reject the interpretation of the scope of "the obligation to perform" entailing the assumption that a service provider must perform services to any customer who requests so and to accept instead the assumption that the obligation to perform, as referred to in the provision, arises – as a rule – only if a service provider takes up such obligation itself by entering into an agreement with a customer.

It is true that doubts may arise as to whether even in such case the sanction provided under misdemeanour law is an adequate instrument for responding to a breach of contractual obligations and whether liability for failure to perform under civil law would not be sufficient. It should be pointed out, however, that even though the subject matter of protection under Article 138 MC are the interests of widely understood consumers (see section 4 below), this provision currently plays also additional, secondary roles, such as the protection of the certainty of economic transactions. Failure to perform contractual obligations, in particular on the part of entities professionally involved in the provision of services, may lead to a decrease in social confidence and weakened economic growth. One should not ignore also the fact that in certain cases a civil-law procedure to be followed in order to seek the performance may be unavailable for a customer (due to their lack of legal awareness) or non-viable (as the value of the service in question is disproportionally small in contrast to the costs of bringing a civil action). In such circumstances the contemptible conduct of the service provider would go essentially unpunished.

Definitely, Article 138 MC is not an isolated norm of widely understood criminal law that plays the role described above in the Polish legal system. Indeed, the Misdemeanour Code includes a set of provisions aimed at protecting the interest of consumers and the principles of economic transactions in a similar manner (such as other provisions in Chapter XV of the Misdemeanour Code, Article 121(1) and (2) MC). It should also be pointed out that the misdemeanour under Article 138 MC is subject to a fine whose amount is determined in accordance with general rules applicable to the misdemeanour law, namely a fine between PLN 20 and

---

zasad-konstytucyjnych-rozwazania-na-kanwie-kazusu-lodzkiego-drukarza-o-styku-prawa-karnego-sensu-largo-oraz-prawa-konstytucyjnego (accessed 5.07.2018).

[15] It should be emphasised that subject to the relevant provisions of civil law which provide for specific conditions, such agreement may be of any form, i.e. it may be oral or electronic (see Article 66^1 of the Civil Code).

PLN 5,000 (Article 24(1) MC). The sanction is relatively mild in comparison to other misdemeanours sanctioned under Chapter XV MC, for which detention (Article 133, Article 134(1) and (2) and Article 136(1) and Article 137(1)) or the restriction of liberty (Article 133, Article 134(1) and (2) and Article 136(1) and Article 138d(1), Article 139a(1)) are provided for. Furthermore, the only milder type of sanction available in the misdemeanour system is a reprimand (Article 18(4) MC), but this sanction is, as a rule, applied to misdemeanours against order and not to the acts classified in Chapter XV.

It should also be mentioned that an authority carrying out proceedings has a right (given the nature and circumstances of the misdemeanour or the individual features or personal circumstances of the service provider) to refrain from imposing a sanction which may involve applying a social impact measure (under Article 39(1) and (4) MC) or it may even limit itself to apply another formative measure (Article 41 MC).

The sanction provided for the misdemeanour under Article 138 MC does not seem to be disproportionate taking into account the severity of the misdemeanour as it does not involve any detention or even restriction of liberty of the person accused of committing a misdemeanour. It may even be said that, in fact, it is of formative nature and emphasis is put on objectives related to general prevention. In this sense, the function of the sanction provided for the misdemeanour under Article 138 MC can be seen more as a tool used for shaping socially desired attitudes rather than one intended to cause discomfort to a person accused of committing a misdemeanour.

Therefore, it seems legitimate to state that regulating the matter of a sanction for the refusal to perform without due cause in the misdemeanour law, irrespective of any potential liability of the service provider under civil law, may be regarded as justified both systemically and in terms of the objectives pursued.

3. "CONSCIENTIOUS OBJECTION"

It seems that recent years witnessed a growing importance of the idea of "conscientious objection", both in theoretical deliberations on law and in its practical application. To put it simple, the "conscientious objection" consists in the possibility of refraining from a specific conduct on the grounds of instructions of faith or one's conscience. Therefore, if Article 138 MC concerns the refusal to perform, the impact of this idea on the application of this provision should be considered as well.

The "popularity" of the conscientious objection may undoubtedly be traced back, at least partially, to the judgment of the Constitutional Tribunal of 7 October 2015 delivered in case K12/14. In the judgment in question the court declared unconstitutionality of Article 39 of the Act of 5 December 1996 on doctors and dentists professions[16] to the extent in which the provision forces doctors to perform healthcare services contrary to their individual conscience in "other cases of urgency" and to the extent in which it forces doctors refraining from the performance of

[16] Consolidated text, Dz.U. 2017, item 125, as amended.

healthcare services contrary to their conscience to indicate real possibilities of being provided with such performance by another doctor or another healthcare facility. The Constitutional Tribunal stated in the judgment that the right to rely on the "conscientious objection", namely to refrain from specific actions contrary to one's conscience, arises directly from Article 53(1) of the Constitution of the Republic of Poland and may be exercised not only by doctors (with respect to whom it was regulated at the level of a statutory act), but also by "any other person".

The judgment is, however, rightfully criticised by legal scholars and commentators, on the one hand, because of doubtful findings concerning the requirements arising from international law and, on the other hand, due to the fact that the Constitutional Tribunal actually disregarded the meaning of other norms of constitutional rank, in particular Article 83 and Article 31(2) of the Constitution of the Republic of Poland.[17]

Firstly, it is hard to accept the findings of the Constitutional Tribunal that the possibility of relying on the "conscientious objection" in each case arose from the provisions of international law, and in particular Article 9 of the European Convention of Human Rights. As Wojciech Brzozowski points out,[18] the judgment the European Court of Human Rights in *Bayatan v. Armenia*, quoted by the Constitutional Tribunal, concerns strictly the matter of alternative military service and it does not include any general remarks that could be applied to other factual circumstances. The Constitutional Tribunal, in turn, entirely ignores other ECtHR's judgments, in particular the one delivered in *Eweida and Others v. United Kingdom*.[19] It may be concluded from this judgment that the use of the "conscientious objection" is not unlimited and it may concern only such matters that are directly and strongly related to one's beliefs.[20] Additionally, when assessing whether the use of the "conscientious objection" is justified, other legal rights should be considered, such as prohibition of discrimination and the principle of equality in particular.[21]

---

[17] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia (po wyroku Trybunału Konstytucyjnego)*, Państwo i Prawo No. 7, 2017, p. 23 et seq. See also the dissenting opinions of judges S. Biernat and A. Wróbel to the judgment in case K12/14, who directly questioned the superiority of conscience over other constitutional rules which had been assumed in the judgment.

[18] *Ibid.*, p. 25–26.

[19] Judgment of 15 January 2013, applications nos. 48420/10, 59842/10, 51671/10 and 36516/10.

[20] Analogical circumstances are referred to by judge Andrzej Wróbel in his dissenting opinion to the judgment of the Constitutional Tribunal delivered in K 12/14, when he indicates that "Article 53(1) of the Constitution does not protect any moral belief of an individual, but only a moral prohibition, order or permit, as internally and intrinsically obliging to a specific action or omission (in particular circumstances); therefore, common reluctance, bias, aversion, resentment, disgust, abhorrence, disdain, contempt, revulsion, distaste, unfriendliness, unkindness or antipathy towards certain conduct are not protected by Article 53(1) of the Constitution. Moreover, (…) conduct against one's conscience is not any usual conduct against a moral belief, but only such conduct that threatens the identity and integrity of the person shaped by his or her conscience."

[21] At this point, it is worth referring to other ECtHR's judgments explaining the interpretation of Article 9 ECHR, in which the ECtHR declared inadmissibility in response to an application lodged by an applicant whose unemployment allowance was suspended after his refusal to take up employment as a receptionist in a conference centre owned by the Church (decision of 20 September 2007 in *Dutuaj v. Switzerland*) or an application lodged by

Secondly, following the rationale of the Constitutional Tribunal presented in K 12/14, the conclusion should be that Article 53(1) of the Constitution is superior over any other legal norms, also constitutional ones, while individuals may release themselves from any legal obligation by simply invoking their conscience. This ascertainment would obviously lead to absurd conclusions, and in particular to the complete negation of the obligation to respect law (Article 83 of the Constitution) and the obligation to respect rights and freedoms of other people (Article 31(2) of the Constitution).[22]

Therefore, it should be stated that the findings made by the Constitutional Tribunal in its judgment delivered in K 12/14 should be treated as referring to the specific and detailed question being the subject matter of the case raised before the Constitutional Tribunal in those particular proceedings, irrespective of the general language in which the findings were expressed. However, they should not be regarded as a stepping stone for any general arrangements that could be applied to other cases.

It should be reminded that, as already said, a service provider enjoys freedom in his or her decision on entering into an agreement and selecting a business counterparty. In turn, the content of an agreement entered into (even if an agreement has been made orally only), should include all important features of a service to be provided. Prior to entering into a legal relationship with the customer, the service provider may therefore decide to refrain from entering into an agreement with a specific person or an agreement for the provision of a specific service. It is at this stage that service providers have a right to judge whether instructions of their faith or conscience allow such an agreement to be entered into.

Therefore, it is hard to accept the opinion that when an agreement has already been entered into and the obligation to perform arises, the service provider could relieve himself or herself from such obligation unilaterally by relying on one's beliefs or conscience. However, it is worth considering several specific situations to verify whether the service provider is always entitled to follow his or her beliefs or conscience without violating the obligation to perform.

First and foremost, it is impossible not to mention a specific type of agreements widely popular in today's economic transactions such as adhesion agreements. The typical feature of these agreements is that their content is determined in advance and, in a way, imposed on a customer by a service provider.[23] The customer's ability to shape such agreement is very limited or does not exist at all. The freedom of entering into an agreement consists in adhering to an agreement drafted by a service provider or resigning from the service, or alternatively in selecting one of agreement samples drafted by the service provider.[24] In such circumstances the position of

---

an applicant who was sentenced for refusing the sale of contraceptives (decision of 2 October 2001 in *Pichon and Sajous v. France*).

[22] W. Brzozowski, *supra* n. 17, p. 31.

[23] This type of agreement is widely used, among others, in banking services, insurance services, transport services, etc.

[24] W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania. Zarys wykładu*, Warszawa 2009, pp. 141 and 147.

the service provider is even stronger than in the case of individually negotiated agreements as service providers may create conditions beneficial to themselves and the customer must accept them. For this type of agreement, unanimous statements of will expressed by both parties are also necessary. Thus, any remarks made above remain valid: as long as the obligation to enter into the agreement does not arise from a universally applicable legal act, the service provider has no obligation to enter into the agreement.

Another scenario that may be analysed is the one in which a service provider addresses their offer to an unspecified group of customers. This offer may be accepted by a customer and an agreement may be validly entered into through such unilateral statement of will, which may be expressed also through an actual action (e.g. purchasing a ticket for a journey). In such circumstances, however, it should be stated that these are service providers themselves who deprive themselves of the possibility of choosing a business counterparty as they address the offer to any person willing to accept it. When the offer is accepted, service providers are no longer able to release themselves from the obligation to perform, unless there are grounds to do so under civil-law provisions (e.g. the statement of will has been defective). If service providers fail to perform, they are thus subject to misdemeanour liability under Article 138 MC (naturally unless there is "due cause" specified therein).

Finally, yet another scenario to be considered is a situation of a person employed by a service provider who has not entered into an agreement himself or herself, and therefore had no say in the shaping of its content or the selection of a business counterparty, but it takes part in its performance. For employees, the source of obligation to perform is a legal relationship (employment) between them and the employer.[25] In this scenario, the findings of the Regional Court in Łódź should be accepted completely. The Regional Court in Łódź held that the employee "who does not want to process an order for reasons of his or her beliefs should inform the employer thereof, request for being released from the obligation, and if still forced to perform, he or she could resign from employment. Within our legal system there is no forced labour, except for labour ordered as a sanction in final and legally binding judicial judgments, and therefore any person who subjectively believes that the performance of a specific job cannot be reconciled with the system of values pursued may resign from such job. This is what freedom of conscience and belief is about."[26]

In each of such legal configurations, service providers are therefore able to take into account their conscience or belief.

Without ignoring the fact that it is impossible, as a rule, to release oneself from the obligation to perform solely by relying on the principle of conscience or belief, it should finally be asked whether it is possible to invoke these principles effectively in some extraordinary circumstances after the obligation to perform has arisen. Article 138 MC provides for a penalty for a person who refuses to provide obligatory performance without due cause; on the contrary, if such causes exist, there is no

[25] Decision of the Supreme Court of 14 June 2018, II KK 333/17.
[26] Judgment of 26 May 2017, V Ka 557/17.

penalty. The provision in question does not specify, however, the nature of causes that may be seen as due. The legal theory mentions, as a rule, that due circumstances are those external to the service provider, such as lack of materials, equipment failure, illness, leave or even the conduct of a customer.[27] It seems, however, that the provision does not exclude a scenario in which a due cause would be the refusal to perform on the grounds of "internal" circumstances of the refusing party, such as the instructions of faith or conscience. This situation could potentially be faced if a service requested entails a drastic and significant violation of the instructions of faith, which could not have been foreseen by the service provider at the stage of entering into the agreement. Respective assessment depends, however, on specific circumstances of each case and is to be made exclusively by the court hearing the case.[28] It is impossible to state *a priori* and in general that the circumstances of any given type will always constitute a due cause; if this were the intention of lawmakers, it would certainly be pointed out directly in Article 138 MC (e.g. by the use of a quantifier "in particular"). "Due cause", as any general clause, must be narrowed and clarified properly on a case-by-case basis.[29]

4. FREEDOM OF ECONOMIC ACTIVITY

Another matter to be discussed in this paper is the compliance of Article 138 MC with the principle of economic freedom. It will be analysed whether the provision does not violate or restrict the freedom.

There is a wealth of case law of the Constitutional Tribunal concerning the freedom of contract. Worth mentioning at this point are the judgments of the Constitutional Tribunal of 23 June 2009 (K 54/07) and of 21 November 2005 (P 10/03), in which the Constitutional Tribunal stated directly that the freedom of contract is a correlate of the constitutional freedom of economic activity (Article 20 of the Constitution). According to the judgment of 29 April 2003 (SK 24/02), the freedom of contract is derived also from Article 31(2) of the Constitution establishing personal freedom of each individual and introducing a prohibition of forcing anyone "to perform what is not ordered by law". The Constitutional Tribunal in its judgment specified directly, among others, that the selection of a specific business counterparty cannot be imposed on anyone.[30]

Having established the existence and the scope of the constitutional principle of the freedom of contract, it is then worth considering the objective that the norm

---

[27] P. Daniluk (ed.), *supra* n. 10, p. 878; T. Bojarski (ed.), *supra* n. 10, p. 534.

[28] See also, similarly, decision of the Supreme Court of 14 June 2018, II KK 333/17.

[29] See also M. Iwański, *supra* n. 14, p. 44.

[30] As emphasised by the Constitutional Tribunal, "it transpires from Article 31(1) and (2) of the Constitution to the fullest extent that nobody can be forced to enter into an agreement and it is impossible to prohibit such entering into agreement or to force somebody to select a specific business counterparty or to impose specific provisions on anyone, unless legal regulations provide otherwise. This restriction applies to everyone equally. The human freedom understood in this manner, which obviously is only a part of the entire sphere of human freedom, is subject to protection under the Constitution."

included in Article 138 MC is to pursue in the legal system. It should be emphasised that the provision has been unchanged since it was adopted together with the entire Misdemeanour Code in 1971. As lawmakers did not decide to amend it following the systemic transformation, it should be claimed that the basic objective of its existence was recognised by them as deserving further protection. The intention behind Article 138 MC was to protect interests of people using services, namely consumers.[31] This basic function of the norm is indicated, for instance, by the title of Chapter XV MC, in which it is included ("Misdemeanours against the interest of consumers"). Once again, however, the view presented by the Regional Court in Łódź[32] should be shared that in the current economic conditions the constitutional principle of equality suggest that not only consumers defined strictly in Article 22^1 of the Civil Code should be protected, but such protection should apply to any entity using the services, including legal entities.[33] As mentioned above, apart from the basic objective of the norm included in Article 138 MC, one may see also secondary objectives, such as the protection of economic transactions in general.

The attainment of the above objectives may, in essence, consist in limiting, to some extent, the freedom of economic activity. The potential limitation of the freedom must be implemented by a statutory act, it must be introduced in pursuit of the achievement of an important public interest (Article 22 of the Constitution), and also it must satisfy the conditions on proportionality arising from Article 31(3) of the Constitution. The provisions of the Misdemeanour Code obviously have a statutory rank, while the protection of consumers, as well as other aforementioned objectives, may be considered "an important public interest". The last point to consider is therefore a matter of potential proportionality.

When taking into account this aspect, once again it is useful to refer to reflections presented in the first part of this paper. If Article 138 MC penalised the refusal to provide a service requested by a potential customer, even prior to the establishment of a (contractual) legal relationship, in fact doubts could be raised whether such provision would not be in breach of the principle of the freedom of contract, and thus of the Constitution of the Republic of Poland. In fact, the provision penalises the refusal to make such performance to the provision of which the service provider has already been obliged. Prior to entering into an agreement, a service provider

---

[31] J. Bafia, D. Egierska, I. Śmietanka, *supra* n. 12, pp. 390 and 406. The authors indicate that the misdemeanour specified in Article 138 MC is a sort of "preparation" for deceiving a consumer or for creating a situation that facilitates acting to the consumer's detriment. It is also worth noting that Article 138 MC is almost an exact repetition (the only difference being the severity of the penalty) of Article 15 of the Act of 13 July 1957 on combating speculation and protecting the interests of buyers and agricultural producers in trade (Dz.U. No. 39, item 171, as amended). As it may be concluded based on the very title of the act, even at that time the provision was aimed at protecting the interests of buyers in trade (as its wording does not refer to combating speculation or protecting agricultural producers).

[32] Judgment of 26 May 2017, V Ka 557/17.

[33] This was confirmed by the Constitutional Tribunal in its judgment of 2 December 2008, K 37/07, stating that the notion of consumer included in Article 76 of the Constitution is wider than the definition provided for in Article 22^1 of the Civil Code. It should also be noted that Article 138 MC does not provide for the limitation of its scope exclusively to consumers, but other groups of service providers can be protected as well.

enjoys freedom to decide whether to perform a specific service to the benefit of a specific customer. At this point, the service provider may exercise their freedom of contract, which is – as already mentioned – a correlate of the principle of economic freedom. If the service provider decides that entering into an agreement is not beneficial (e.g. economically unprofitable as the cost of performing the service would be higher than the remuneration the customer is willing to pay), the service provider may decide not to enter into such agreement. It is worth noting that this is exactly the same point in time in which the service provider, as explained in the third part of this paper, may invoke the "conscientious objection". Only after an agreement is validly entered into, does an obligation to perform arise that is subject to a sanction under Article 138 MC.[34]

Therefore, in essence, there is no need to carry out a proportionality test which is required under Article 31(3) of the Constitution for the implementation of any restrictions of constitutional rights as Article 138 MC does not introduce any limitation of the principle of economic freedom, with the freedom of contract being one of its emanations. Any potential proportionality test could only apply to specific provisions that provide for a statutory obligation to perform.[35] In order to determine whether a proportionality condition has been satisfied, it would be necessary to conduct a separate analysis which goes beyond the framework of this paper.

5. ARTICLE 138 MC IN THE LIGHT OF ARTICLE 42(1) OF THE POLISH CONSTITUTION

Against the backdrop of the above remarks, it is worth mentioning some views expressed by Mikołaj Iwański, who states that in his opinion an agreement cannot be seen at all as a source of obligation to perform referred to in Article 138 MC. He points out that such understanding of this provision would lead to a conclusion that the provision constitutes a sanction for failure to perform an agreement, which would be a disproportionate intervention of criminal regulations in relationships established under civil law.[36] As it may be concluded based on observations presented in sections 1 and 2 of this paper, it is valid to accept it that the sanction for the misdemeanour classified in Article 138 MC is proportional and justified, while the provision itself stipulates a penalty for culpable and undue refusal to perform an agreement.

Mikołaj Iwański indicates also that in his opinion it is, therefore, a statutory provision that will each time constitute a source of "the obligation to perform"'.[37]

---

[34] It should be mentioned that the case law of the Constitutional Tribunal referred to above supports this understanding of the scope of Article 138 MC as pro-constitutional.

[35] For example Article 84(2) CPC read in conjunction with Article 21(3) read in conjunction with Article 28(2) of the Act of 26 May 1982: Law on Advocates (consolidated text, Dz.U. 2017, item 2368), Article 15 of the Act of 25 November 2004 on the profession of sworn translator (consolidated text, Dz.U. 2017, item 1505), Article 82 of the Act of 16 July 2004: Telecommunications Law (consolidated text, Dz.U. 2017, item 1907).

[36] M. Iwański, *supra* n. 14, p. 35.

[37] *Ibid*.

He sees it in particular in the Act of 3 December 2010 on the implementation of certain provisions of the European Union on equal treatment[38] (hereinafter Anti-discrimination Act), and in particular in its Article 6 prohibiting discrimination, among others, in access to services,[39] but he finds the same also directly in the norm of Article 32 of the Constitution. This author presents complex reasoning that is supposed to support such interpretation of Article 138 MC and Article 6 of the Anti-discrimination Act in that the first provision is a sanctioning norm and the second one is a sanctioned norm. According to the author, this understanding of the scope of Article 138 is of pro-constitutional nature.

The interpretation of statutory provisions should always be pro-constitutional and the authority which applies the law is even obliged to use such methods of interpretation as an objective-oriented or a functional one if literal reading of the provision raises doubts. Only this would ensure systemic (axiological) coherence of legislation. It should not be ignored, however, that the Constitution of the Republic of Poland provides for various types of legal norms which protect values that may occasionally collide in specific factual and legal circumstances. This is a situation witnessed most often if two entities confront each other and both invoke their rights guaranteed under the Constitution.

A similar case may be observed while analysing the scope of Article 138 MC. Iwański refers in particular to Article 32 (positive obligation of equal treatment) and Article 30 (positive obligation to respect human dignity) of the Constitution. At the same time, he overlooks Article 42(1) of the Constitution which stipulates that only a person who has committed an act prohibited under the pain of penalty by a statutory act at the time of committing the act is subject to criminal liability. Of paramount importance in these deliberations is the aspect expressed by the *nullum crimen sine lege certa* principle. The principle of law specificity, even though it applies equally to all areas of law under general principles arising from Article 2 of the Constitution, gains particular meaning on the ground of widely understood criminal law, which includes also the misdemeanour law.[40]

Not a single part of Article 138 MC refers to the Anti-discrimination Act or to the elements related to equal treatment, prohibition of discrimination or protection of equality. As already pointed out in section 4 of this paper, even the very structure

---

[38] Consolidated text, Dz.U. 2016, item 1219.

[39] M. Iwański, *supra* n. 14, p. 37.

[40] Judgment of the Constitutional Tribunal of 22 June 2010, SK 25/08. As the Constitutional Tribunal emphasised: "the principle of the specificity of prohibited acts, arising from the first sentence of Article 42(1) of the Constitution, is a special version of the general principle of the specificity of legal provisions applied to criminal-law requirements. In the area of widely understood criminal (repressive) law, the principle of the specificity of legal provisions is of special importance. A prohibition or a positive obligation that is subject to criminal sanction and is expressed in a criminal-law norm should be worded in a provision that constitutes a ground for such norm in a manner which is particularly precise and strict, as envisaged by the *nullum delictum sine lege certa* principle. The requirement of the specificity of prohibited acts, arising from Article 42(1) of the Constitution and expressed by the already mentioned *nullum crimen, nulla poena sine lege* principle, is the requirement of the maximum specificity as far as the types of crimes classified in statutory acts are concerned. In the area of the application of law, this equals to the prohibition of using analogy and broadening interpretation."

of the Misdemeanour Code indicates that the basic and main function of the norm of Article 138 is the protection of consumers (or more widely, of economic transactions). Thus, the assumption that the provisions of the Anti-discrimination Act or even directly of Article 32 of the Constitution are the source of the obligation for service providers to perform in any abstract situation would mean that the reservation "to which they are obliged" would, in fact, be of no significance in normative terms since service providers would always be obliged to perform. The fact that this reservation was introduced to the wording of Article 138 MC prejudges that the service provider must perform or otherwise is subject to a sanction only if there exists a specific obligation. Therefore, the assumption that the source of the obligation is always a statutory act would, in fact, equal to the application of the broadening interpretation of Article 138 MC to the detriment of the service provider in comparison to its literal wording. In the case of criminal law norms, this reasoning cannot, in turn, be accepted.[41]

Referring to inherent human dignity is not sufficient to justify the departure from the *nullum crimen sine lege certa* principle because also the prohibition of punishing without legal grounds is in itself an emanation of the more general principle of respecting human dignity enshrined in Article 30 of the Constitution.[42]

Therefore, despite Iwański's efforts to make up for the imperfections of the Anti-discrimination Act in the area of sanctions for violations thereof[43] by creative interpretation of Article 138 MC, it should be stated that the interpretation of the provision proposed by this author cannot be reconciled with constitutional guarantees, thus, it is difficult to call it pro-constitutional.

6. CONCLUSIONS

To summarise, it is worth emphasising once again that the controversies related to the application of Article 138 MC seem to arise mostly from misunderstanding of this provision and perceiving it as the one which penalises not the refusal to perform but the refusal to act upon a unilateral request of another person (customer). Meanwhile, neither the wording of the provision, nor legislative context supports such understanding.

Even though it may be wondered whether keeping, within the legal system, a sanction in the area of widely understood criminal law for a violation of obligations arising (in essence) under civil law is justified in today's social and economic conditions,[44] the above analysis suggests that the correctly understood Article 138 MC does not seem contrary to the Constitution of the Republic of Poland.

---

[41] M. Safjan, L. Bosek (eds), *Konstytucja RP. Komentarz. Art. 1–86*, Vol. I, Warszawa 2016, pp. 1039–1040.

[42] *Ibid.*, p. 1010.

[43] The act provides only for the possibility of seeking compensation if its provisions are violated (Article 13(1)).

[44] Similar doubts have been voiced in the context of other provisions of the Misdemeanour Code, such as Article 58(1) MC penalising public begging (see, for example, the general

Potential changes of the current legal *status quo* should be introduced through a legitimate legislative process, carried out with due caution and wide consultations. If Article 138 MC was to be repealed, this would require deeper reflection on the role of the law of misdemeanours in the contemporary society and should be a part of a more comprehensive reform covering also a set of other norms from Chapter XV MC, in particular Article 135 MC, which is almost identical to Article 138 MC, the only difference being that it applies to the sales agreement. The selective approach to questioning Article 138 MC without raising similar reservations to other provisions of the Code does not seem to be justified.[45]

BIBLIOGRAPHY

Bafia, J., Egierska, D., Śmietanka, I., *Kodeks Wykroczeń. Komentarz*, Warszawa 1974.

Bojarski, T. (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2015.

Brzozowski, W., *Prawo lekarza do sprzeciwu sumienia (po wyroku Trybunału Konstytucyjnego)*, Państwo i Prawo No. 7, 2017.

Czachórski, W., Brzozowski, A., Safjan, M., Skowrońska-Bocian, E., *Zobowiązania. Zarys wykładu*, Warszawa 2009.

Daniluk, P. (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016.

Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el 2016.

Iwański, M., *Odpowiedzialność za odmowę świadczenia usługi (art. 138 Kodeksu wykroczeń) na tle kolizji norm konstytucyjnych. Rozważania na kanwie kazusu łódzkiego drukarza o styku prawa karnego sensu largo oraz prawa konstytucyjnego*, Czasopismo Prawa Karnego i Nauk Penalnych No. 7, 2018 (preprint).

Książek, P., Pyziak-Szafnicka, M. (eds), *Kodeks cywilny. Komentarz. Część ogólna*, LEX/el 2014.

Kulesza, J., note to the judgment of the Regional Court in Łódź of 26 May 2017, V Ka, 557/17, Państwo i Prawo No. 1, 2018.

Safjan, M., Bosek, L. (eds), *Konstytucja RP. Komentarz. Art. 1–86*, Vol. I. Warszawa 2016.

statement of the Commissioner for Human Rights addressed to the Minister of Justice of 29 November 2017, II.501.7.2017.VV, https://www.rpo.gov.pl/pl/content/rpo-czas-usunac-zebractwo-z-kodeksu-wykroczen (accessed 5.07.2018).

[45] Therefore, it may be surprising that on 21 December 2017 the Public Prosecutor General decided to refer a case to the Constitutional Tribunal to declare unconstitutionality of Article 138 MC (in case K 16/17). On the basis of the application in this regard, it may be concluded that the Public Prosecutor General misunderstands the scope of application of the norm as well by perceiving the obligation to perform as the service provider's being at the disposal of any person. As it has been already explained in section 1 of this paper, such interpretation of Article 138 MC finds no ground in the provisions of the Constitution of the Republic of Poland or the principles of civil law.

COMMENTS ON LIABILITY FOR REFUSAL TO PROVIDE A SERVICE (ARTICLE 138 MISDEMEANOUR CODE) IN THE CONTEXT OF CIVIL LAW

Summary

The article aims to provide a critical analysis of the regulation of Article 138 MC, which stipulates service provider's liability for refusal to provide a service that he or she is obliged to provide. The reasoning presented aims to determine actual scope of penalisation by indicating that liability under Article 138 MC can be considered only when a service provider is obliged to provide a service within the meaning of civil law. The obligation may result from the law but, as a rule, a contract between a service provider and a customer is its source. In general, a service provider cannot free himself/herself from the obligation to provide a service only based on religious rules or conscience (called conscientious objection). If he or she states that the provision of the service is against the rules of his/her religion or conscience, he or she can refrain from entering a contract. The article presents a few special types of contracts and indicates the way in which conscience is protected in each case (Article 53 of the Constitution of the Republic of Poland). The article also discusses doubts raised in connection with constitutionality of Article 138 MC and indicates, inter alia thanks to a comparison with other norms of the Misdemeanour Code, that the provision is not disproportional and does not violate the constitutional principle of economic freedom. Therefore, its potential change or repealing should be considered in the context of shaping criminal law policy through legislation and not questioning its compliance with the basic law. Working on the article, the author used in particular a formal-dogmatic method as well as a legal-comparative method.

Keywords: criminal law, misdemeanour law, civil law, liabilities, provision of a service, conscientious objection, freedom of economic activity

REFLEKSJE NAD ODPOWIEDZIALNOŚCIĄ ZA WYKROCZENIE ODMOWY ŚWIADCZENIA USŁUGI (ART. 138 K.W.) W KONTEKŚCIE UNORMOWAŃ CYWILNOPRAWNYCH

Streszczenie

Celem opracowania jest krytyczna analiza uregulowania art. 138 Kodeksu wykroczeń, który przewiduje odpowiedzialność usługodawcy za odmowę spełnienia świadczenia, do którego jest obowiązany. Przedstawione rozumowanie zmierza do określenia faktycznego zakresu penalizacji, wskazując, że o odpowiedzialności z art. 138 k.w. można mówić dopiero wówczas, jeśli na usługodawcy ciąży obowiązek świadczenia w rozumieniu prawa cywilnego. Obowiązek ten może wynikać z przepisów prawa, lecz co do zasady jego źródłem będzie umowa pomiędzy usługodawcą i usługobiorcą. Usługodawca nie może co do zasady uwolnić się od obowiązku świadczenia, powołując się jedynie na nakazy wiary lub sumienia (tzw. „klauzula sumienia"). Jeśli bowiem stwierdziłby, że wykonanie danej usługi jest sprzeczne z jego wiarą lub sumieniem, ma możliwość niezawierania danej umowy. Opracowanie przedstawia kilka szczególnych typów umów, wskazując, jak w przypadku każdej z nich chroniona jest wolność sumienia (art. 53 Konstytucji RP). Opracowanie odnosi się także do podnoszonych wątpliwości wobec konstytucyjności art. 138 k.w. i dowodzi – m.in. dzięki porównaniu z innymi normami kodeksu wykroczeń – że przepis ten nie jest nieproporcjonalny oraz że nie narusza konstytucyjnej zasady wolności działalności gospodarczej. Ewentualną jego zmianę

lub uchylenie należy zatem rozważać w kontekście kształtowania polityki karnej na drodze legislacyjnej, nie zaś w drodze kwestionowania jego zgodności z ustawą zasadniczą. Przy tworzeniu opracowania zastosowano w szczególności metodę formalno-dogmatyczną oraz metodę prawnoporównawczą.

Słowa kluczowe: prawo karne, prawo wykroczeń, prawo cywilne, zobowiązania, świadczenie, klauzula sumienia, wolność działalności gospodarczej

REFLEXIONES SOBRE RESPONSABILIDAD POR LA NEGATIVA A PRESTAR UN SERVICIO (ART. 138 DEL CÓDIGO DE FALTAS) EN EL CONTEXTO DE REGULACIONES CIVILES

Resumen

La finalidad del artículo consiste en un análisis crítico de la regulación del art. 138 del código de faltas que prevé la responsabilidad de proveedor de servicios por la negativa a prestar el servicio al que queda obligado. Se pretende a determinar el ámbito real de la penalización, indicando que se puede hablar de responsabilidad del art. 138 del código de faltas sólo cuando el proveedor de servicio tenga una obligación civil de prestar un servicio. Tal obligación puede resultar de la normativa legal, pero como la regla general su fuente resulta de un contrato entre el proveedor de servicios y el cliente. El proveedor de servicio no puede por lo general librarse de la obligación de prestar un servicio únicamente alegando la fe o conciencia (la llamada "objeción de conciencia". En caso la prestación de un servicio sea contraria a su fe o conciencia, tendrá la posibilidad de no suscribir el contrato. El artículo presenta varios tipos de contratos específicos, señalando en cada uno cómo protegen la libertad de conciencia (art. 53 de la Constitución de la República de Polonia). En el artículo se analiza también posible inconstitucionalidad del art. 128 del código de faltas afirmando, p.ej. que tras la comparación con otros preceptos del código de faltas, este artículo no resulta desproporcional y no infringe el principio constitucional de libertad de actividad económica. Su eventual modificación o derogación puede deliberarse en cuanto a la política penal en vía legislativa, pero no cuestionando su conformidad con la ley fundamental. A la hora de elaborar el presente artículo se ha utilizado sobre todo el método formal dogmático y el método comparativo.

Palabras claves: derecho penal, derecho de faltas, derecho civil, obligación, servicio, objeción de conciencia, libertad de actividad económica

РАЗМЫШЛЕНИЯ ОБ ОТВЕТСТВЕННОСТИ ЗА ПРАВОНАРУШЕНИЕ, СОСТОЯЩЕЕ В ОТКАЗЕ В ПРЕДОСТАВЛЕНИИ УСЛУГИ (СТ. 138 КОАП) В КОНТЕКСТЕ НОРМ ГРАЖДАНСКОГО ПРАВА

Резюме

Статья содержит критический анализ положений ст. 138 Кодекса об административных правонарушениях, которые предусматривают ответственность поставщика услуг за отказ в предоставлении услуги, входящей в его обязанности. Автор попытался определить фактические рамки наказуемости данного правонарушения. По его мнению, об ответственности по статье 138 КОАП можно говорить лишь в том случае, когда на поставщика услуг возложено гражданско-

правовое обязательство предоставить услугу. Такое обязательство может проистекать из положений законодательства, однако, как правило, оно следует из договора между поставщиком и получателем услуги. В принципе, поставщик услуги не может уклониться от обязанности оказать услугу только по религиозным или моральным соображениям (на основании так называемой «клаузулы совести»). Действительно, если бы он посчитал, что выполнение данной услуги противоречит его религиозным или моральным убеждениям, то у него имеется возможность не заключать соответствующий договор. В статье рассмотрены несколько типов договора с указанием, как в каждом конкретном случае защищена свобода совести (ст. 53 Конституции Республики Польша). В работе также обсуждаются существующие сомнения в отношении конституционности ст. 138 КОАП. Автор, используя, среди прочего, сравнение с другими нормами Кодекса, указывает, что положения данной статьи не являются несоразмерными и не нарушают конституционный принцип свободы экономической деятельности. Поэтому возможное изменение или отмену этой статьи Кодекса следует рассматривать в контексте законодательного формирования политики в области наказаний за правонарушения, а не с точки зрения несоответствия данной статьи Основному закону. При написании статьи использовался, в частности, формально-догматический метод и метод сравнительного права.

Ключевые слова: уголовное право, право об административных правонарушениях, гражданское право, обязанность, предоставление услуги, клаузула совести, свобода экономической деятельности

ÜBERLEGUNGEN ZUR ORDNUNGSWIDRIGKEITSRECHTLICHEN HAFTUNG FÜR DIE ORDNUNGSWIDRIGKEIT DER LEISTUNGSVERWEIGERUNG (ARTIKEL 138 DES POLNISCHEN GESETZES ÜBER ORDNUNGSWIDRIGKEITEN) IM KONTEXT DER ZIVILRECHTLICHEN REGELUNGEN

Zusammenfassung

Gegenstand der Studie ist eine kritische Analyse der Regelung des Artikels 138 des polnischen Ordnungswidrigkeitsgesetzbuches über die Haftung eines Dienstleistungserbringers wegen Leistungsverweigerung, d.h. bei der Verweigerung einer Leistung, zu der er als Dienstleister verpflichtet ist. Die Ausführungen zielen darauf ab, den tatsächlichen Umfang der Strafbarkeit zu bestimmen, wobei der Autor feststellt, dass erst dann von einer Haftung nach Art. 138 des polnischen Ordnungswidrigkeitsgesetzbuches gesprochen werden kann, wenn der Dienstleister zur Erbringung einer Leistung im zivilrechtlichen Sinne verpflichtet ist. Diese Verpflichtung kann sich aus den gesetzlichen Bestimmungen ergeben, begründet ist die Pflicht zur Leistungserbringung jedoch grundsätzlich in dem zwischen Dienstleistungserbringer und -empfänger geschlossenen Vertrag. Der Dienstleistungserbringer kann sich durch Berufung auf Glaubensgebote oder Gewissensgründe (sog. „Gewissensklausel") grundsätzlich nicht seiner Leistungspflicht entziehen. Stellt er fest, dass die Erbringung der betreffenden Leistung im Widerspruch zu seinem Glauben steht oder sich nicht mit seinem Gewissen vereinbaren lässt, so hat er die Möglichkeit, den betreffenden Vertrag nicht abzuschließen. In der Ausarbeitung werden besondere Arten von Verträgen vorgestellt und es wird gezeigt, wie die Gewissensfreiheit in jedem von diesen geschützt ist (Artikel 53 der polnischen Verfassung). Die Studie bezieht auch Stellung zu Zweifeln an der Verfassungsmäßigkeit von Artikel 138 des polnischen Ordnungswidrigkeitsgesetzbuches und weist nach, unter anderem durch einen Vergleich mit anderen Normen des Ordnungswidrigkeitsgesetzbuches, dass diese Bestimmung nicht unverhältnismäßig ist und auch nicht gegen den Verfassungsgrundsatz der unternehmerischen Freiheit verstößt. Eine mögliche Änderung oder Aufhebung des Artikels sollte daher im Rahmen

der Gestaltung der Strafrechtspolitik auf legislativem Wege und nicht durch Infragestellung seiner Vereinbarkeit mit dem polnischen Grundgesetz erwogen werden. Bei der Erstellung der Studie wurden insbesondere formal-dogmatische Betrachtungen angestellt und die rechtsvergleichende Methode angewendet.

Schlüsselwörter: Strafrecht, Ordnungswidrigkeitenrecht, Zivilrecht, Verpflichtungen, Leistungserbringung, Gewissensklausel, unternehmerische Freiheit

RÉFLEXIONS SUR LA RESPONSABILITÉ DU DÉLIT DE REFUS DE PRESTATION DE SERVICE (ARTICLE 138 DU CODE DES INFRACTIONS) DANS LE CONTEXTE DES RÈGLES DE DROIT CIVIL

Résumé

L'objet de cette étude est une analyse critique de la réglementation de l'art. 138 du Code des infractions, qui prévoit la responsabilité du prestataire de services pour le refus de fournir le service pour lequel il est obligé. Le raisonnement présenté vise à déterminer l'étendue réelle de la pénalisation, en indiquant que l'on peut parler de la responsabilité au sens de l'art. 138 du Code des infractions uniqement si le prestatire de services est tenu de les fournir en vertu du droit civil. Cette obligation peut résulter de dispositions légales mais, en principe, sa source sera le contrat entre le prestataire de services et le destinataire. En principe, le prestataire de services ne peut se libérer de l'obligation de fournir qu'en invoquant l'obligation de foi ou de conscience (la «clause de conscience»). S'il déclare que l'exécution d'un service donné est contraire à sa foi ou à sa conscience, il a la possibilité de ne pas conclure le contrat. L'étude présente plusieurs types de contrats spécifiques indiquant comment la liberté de conscience est protégée dans chacun d'entre eux (article 53 de la Constitution de la République de Pologne). L'étude se réfère également aux doutes soulevés quant à la constitutionnalité de l'art. 138 du Code des infractions, soulignant, entre autres en comparant avec d'autres normes du Code des infractions, que cette disposition n'est pas disproportionnée et ne viole pas le principe constitutionnel de la liberté d'activité économique. Son éventuelle modification ou abrogation devrait donc être envisagée dans le contexte de la formulation de la politique pénale par le biais de la législation, et non en mettant en doute sa conformité avec la loi fondamentale. Lors de la création de l'étude, la méthode formelle dogmatique et la méthode du droit comparé ont été utilisées.

Mots-clés: droit pénal, droit des infractions, droit civil, obligations, prestation, clause de conscience, liberté d'activité économique

RIFLESSIONI SULLA RESPONSABILITÀ PER CONTRAVVENZIONE DI RIFIUTO DI FORNITURA DI SERVIZI (ART. 138 DEL CODICE DELLE CONTRAVVENZIONI), NEL CONTESTO DELLA DISCIPLINA CONTRATTUALE

Sintesi

L'obiettivo dell'elaborato è l'analisi critica della norma dell'art. 138 del Codice delle contravvenzioni, che prevede la responsabilità del fornitore di servizi per il rifiuto di adempimento della prestazione alla quale è obbligato. Il ragionamento presentato mira a stabilire l'ambito

reale di punibilità penale, indicando che si può parlare di responsabilità ai sensi dell'art. 138 del Codice delle contravvenzioni solo nel caso in cui il fornitore di servizi sia sottoposto a obbligo di prestazione ai sensi del codice civile. Tale obbligo può derivare dalle norme del diritto, ma in linea di principio la sua fonte sarà un contratto tra il fornitore di servizi e il cliente. Il fornitore di servizi in linea di principio non può sollevarsi dall'obbligo di prestazione facendo unicamente riferimento a un divieto per ragioni di fede o di coscienza (la cosiddetta "obiezione di coscienza"). Se infatti dovesse stabilire che la realizzazione di un determinato servizio sia in contrasto con la sua fede o la sua coscienza, ha la possibilità di non stipulare un determinato contratto. L'elaborato presenta alcuni tipi particolari di contratti, indicando come nel caso di ognuno di essi è tutelata la libertà di coscienza (art. 53 della Costituzione della Repubblica di Polonia). L'elaborato fa anche riferimento ai dubbi sollevati sulla costituzionalità dell'art. 138 del Codice delle contravvenzioni, indicando, tra l'altro grazie al confronto con altre norme del Codice delle contravvenzioni, che tale norma non è sproporzionata e che non viola il principio costituzionale di libertà dell'attività d'impresa. L'eventuale modifica o annullamento di tale norma va quindi valutata nel contesto della formazione della politica penale in via legislativa, e non contestando la sua conformità alla legge fondamentale. Nella stesura dell'elaborato sono stati in particolare utilizzati il metodo dogmatico-formale e il metodo giuridico comparativo.

Parole chiavi: diritto penale, diritto delle contravvenzioni, diritto civile, obblighi, prestazione, obiezione di coscienza, libertà dell'attività d'impresa

Cytuj jako:

Hara M., *Refleksje nad odpowiedzialnością za wykroczenie z tytułu odmowy świadczenia usługi (art. 138 k.w.) w kontekście unormowań cywilnoprawnych [Comments on liability for refusal to provide a service (Article 138 Misdemeanour Code) in the context of civil law]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 138–157. DOI: 10.26399/iusnovum.v13.1.2019.07/m.hara

Cite as:

Hara, M. (2019) 'Comments on liability for refusal to provide a service (Article 138 Misdemeanour Code) in the context of civil law'. *Ius Novum* (Vol. 13) 1, 138–157. DOI: 10.26399/iusnovum.v13.1.2019.07/m.hara

Ius Novum
1/2019

CUSTOMS PROCEDURES IN THE EU CUSTOMS LAW

ARTUR KUŚ*
PIOTR WITKOWSKI**

DOI: 10.26399/iusnovum.v13.1.2019.08/a.kus/p.witkowski

1. INTRODUCTION

The customs union is the cornerstone of the European Union with regard to the free movement of goods. In the light of the Treaty on the Functioning of the European Union,[1] the customs union extends onto all trade in goods and covers the prohibition of import and export duties between member states and of all charges with an equivalent effect as well as the adoption of a common customs tariff in relations with third countries.

As far as legislation is concerned, the legislative implication of the customs union is the formation of the EU customs law. In accordance with the view established in the doctrine,[2] customs law is a branch of law distinguished from financial law and law of levies in respect of the special nature of the subject-matter of the regulation. It covers the regulation of the rules of foreign trade in goods, the collection of customs and other duties, customs proceedings, customs control, organisation and operation of the customs administration. Customs law is also viewed as a set of legal norms

* Professor, PhD hab., Faculty of Law and Administration of Lazarski University in Warsaw; e-mail: artkus@lazarski.pl; ORCID: 0000-0002-6319-4936

** PhD hab., Assistant Professor, Laboratory of Business Practice, Faculty of Economics of Maria Curie-Skłodowska University in Lublin; e-mail: witkowskip@interia.pl; ORCID: 0000-0001-8084-7620

1 Article 28 of the Treaty on the Functioning of the European Union signed on 13 December 2007, consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union, published in the Official Journal of the European Union of 2012, C 326, p. 47; hereafter: TFEU.

2 A. Huchla, *Prawo celne*, [in:] U. Kalina-Prasznic (ed.), *Encyklopedia prawa*, Warszawa 1999, p. 73.

regulating foreign trade in goods, the collection of customs duties and other duties on such trade, as well as the control of trade.[3]

In the broader perspective of an integrating organisation, customs legislation may be viewed as a set of rules and procedures for international trade in goods, the rights and duties of economic operators, as well as the system of rights and duties of governmental bodies or international economic integration organisations which ensure the implementation of those rules in order to protect and promote the economic and social interests of a member state or member states within that organisation.[4]

The customs law of the European Union is presented in a descriptive way by Michael Lux. Without giving a clear and concise definition of that concept, he assumes that this area includes the definition of the roles of customs administrations, tasked with the collection of import duties for the central budget. Elsewhere, he points out that this administration today operates mainly at the border, as a representative of the state, protecting citizens against crime as well as the import and export of goods that are harmful to health or ones that may pose a threat to the lives of people, animals and plants. He also stresses that virtually all aspects of customs law are covered by international agreements and conventions.[5]

Considering the regulations of the EU customs law, it is justified to conclude that they include the rules and procedures of trade in goods with third countries. These regulations specify, among others, the possibilities of goods handling in cross-border economic and trade relations. Terminologically speaking, these possibilities have been identified in the EU customs legislation, taking the form of customs procedures.[6] They represent a juridical creation that addresses the challenges of the modern, globalised economy, ensuring the possibility to introduce various forms of business activity in the practice of international trade in goods. These regulations delineate the legal plane for the activity of the EU entrepreneurs in their operations with partners from third countries.

The EU customs procedures are an emanation of essential standards relating, among others, to the freedom and equality of cross-border trade in goods. In accordance with the adopted assumptions, the customs regulations of the European Union introduce a broad and free formula of placing goods under customs procedures. It assumes that goods may be placed under such procedures regardless of their nature, quantity, origin, consignment or destination. Goods may be placed

---

[3] W. Wójtowicz, *Cła*, [in:] B. Brzeziński, T. Dębowska-Romanowska, M. Kalinowski, W. Wójtowicz (eds), *Prawo finansowe*, C.H. Beck, Warszawa 2000, p. 449.

[4] W. Czyżowicz, *Pojęcie i przedmiot prawa celnego i przedmiot prawa celnego*, [in:] W. Czyżowicz (ed.), *Prawo celne*, C.H. Beck, Warszawa 2004, pp. 31–32.

[5] M. Lux, *Prawo celne Unii Europejskiej*, BW, Szczecin 2005, pp. 31–33.

[6] In the previous regulations of the EU customs law, the possibilities of handling goods were defined as customs-approved uses, which included: (a) placing goods under a customs procedure, (b) placing goods in a free zone or free warehouse, (c) re-exporting goods outside the customs territory of the Community, (d) destruction of goods, (e) abandonment of goods to the State. Article 4(15) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302, 19.10.1992, p. 1, as amended.

under customs procedures at any time, in accordance with the conditions laid down for them and with their customs status.

The currently binding EU customs law establishes an exhaustive list of customs procedures. These include:[7]

a) release for free circulation;
b) special procedures, broken down into transit, storage, special end-use and customs processing;
c) export.

In view of their design and the legal consequences as well as the importance and practice of the use of customs procedures, they can be classified into procedures involving the change of the customs status of goods (release for free circulation and export) and special procedures (transit, storage, special end-use and processing).

2. CUSTOMS PROCEDURES INVOLVING CHANGE OF THE CUSTOMS STATUS OF GOODS: RELEASE FOR FREE CIRCULATION AND EXPORT

When analysing the EU customs regulations concerning the possibility of handling goods in international trade in goods, it can be pointed out that two customs procedures are of fundamental importance for the legal situation of goods. These are: release for free circulation and export. In economic science and in everyday use, focused on the direction of goods being moved, they are described as imports and exports of goods.

In the customs law of the European Union, they are distinguished on the premise of the customs status of goods.[8] This is a legal construct that allows goods traded with third countries to be classified as Union goods or non-Union goods. Union goods are defined as:[9]

a) goods wholly obtained in the customs territory of the Union and not incorporating goods imported from countries or territories outside the customs territory of the Union;
b) goods brought into the customs territory of the Union from countries or territories outside that territory and released for free circulation (under the release for free circulation procedure);
c) goods obtained or produced in the customs territory of the Union, either solely from goods covered by the release for free circulation, or from goods wholly obtained in the customs territory of the EU and goods placed under the release for free circulation procedure.

---

[7] Article 5(16) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10.10.2013, p. 1, as amended; hereafter: UCC.

[8] For more on the topic, see A. Kuś, *Prawo celne*, Oficyna Wydawnicza Branta, Bydgoszcz–Lublin 2003, p. 226.

[9] Article 5(23) UCC.

Exploration of the concept of the customs status of Union goods allows one to formulate a view that the first way of acquiring this status is the original one, sanctioning the actual status related to the EU origin of goods.[10] In the second case, the focus is on the secondary formula resulting from the implication of the legal act of placing goods under the release for free circulation procedure. In the third case, the acquisition of the status of Union goods will be of a mixed nature, resulting both from a specific factual situation (the process of obtaining, processing) and the legal transaction.

The EU Customs Code has also defined non-Union goods, indicating that these are goods that do not have the status of Union goods, or alternatively, goods that have lost their status of Union goods. The premises which materialise these circumstances include, first of all, the placing of goods brought into the EU customs territory from a third country or territory outside that territory under temporary storage or under a customs procedure which does not change their customs status,[11] and, secondly, the placing of goods under a procedure leading to Union goods being brought outside the EU customs territory.[12]

The customs procedure which is most frequently used in the practice of foreign trade is the procedure of release for free circulation, commonly known as the import procedure or – in a somewhat simplified way – the import of goods.[13] This procedure, which leads to a change of customs status by operation of law, may be applied to non-Union goods destined for the EU internal market, or intended for private use or consumption.[14] For the procedure to be applied, the conditions specified in the regulations of the EU customs law must be met. They include:[15]

a) the collection of any import duty due;
b) the collection, as appropriate, of other charges, as provided for under relevant provisions in force relating to the collection of those charges;
c) the application of commercial policy measures and prohibitions and restrictions insofar as they do not have to be applied at an earlier stage; and
d) completion of the other formalities laid down in respect of the import of the goods.

---

[10] The circumstances of goods wholly obtained and sufficiently worked or processed to acquire the origin include, for example: mineral products extracted from the soil or seabed of the beneficiary country or the Union; vegetable products harvested therein; live animals born and raised therein; products derived from live animals raised therein; products derived from slaughtered animals born and raised therein; products of hunting or fishing carried therein – see Articles 44 and 45 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015, laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ L 343, 29.12.2015, p. 558; hereafter: IR.

[11] This concerns special customs procedures: transit, storage, temporary admission and the inward processing procedure.

[12] This situation takes place in the case of the export procedure and the special customs procedure in the form of outward processing.

[13] A. Kuś, *Podstawy prawa celnego*, [in:] W. Wójtowicz (ed.), *Zarys finansów publicznych i prawa finansowego*, Wolters Kluwer, Warszawa 2017, p. 408.

[14] M. Lux, *Wprowadzenie do unijnego kodeksu celnego – część VII*, Monitor Prawa Celnego i Podatkowego No. 1, 2015, p. 48.

[15] Article 201(2) UCC.

Non-Union goods placed under the release for free circulation procedure are either introduced directly from the territory of a third country or are located in the Union customs territory and are subject to instruments which do not change their customs status (e.g. temporary storage, special customs procedure). Goods placed under release for free circulation procedure in accordance with the principle of the customs union are circulated freely within the customs territory of the European Union. According to the national treatment principle (NT) of the World Trade Organisation (WTO), such goods are treated on an equal footing with goods originating from a member state, particularly as regards the prohibition of any financial and technical obstacles.[16]

Non-Union goods with favourable treatment may be placed under the release for free circulation procedure in circumstances provided for by customs legislation. This favourable treatment is connected with the application of a relief from customs duty. It can be subdivided into two groups. The first group covers reliefs from customs duty in force under the EU duty relief system[17] and the juridical waiver of the determination of customs duties arising under the provisions of the EU Customs Code.[18]

The first group includes a wide range of exemptions from customs duties for, among others, natural persons: tourists, persons transferring their permanent or temporary residence, possibly in connection with marriage and various forms of activity, generally of social, scientific, research, cultural, educational and humanitarian nature to assist the victims of natural disasters, people with disabilities and the blind.[19]

The duty reliefs provided for in the EU Customs Code apply to returned goods[20] and to products of sea fishing and products taken from the sea[21]. In the former case, one deals with non-Union goods which originally had the status of Union goods.[22] That status was lost when the goods in question were brought out of the customs territory of the Union under the relevant customs procedure. These goods are then re-imported into the customs territory of the EU and placed under the release for free circulation procedure.[23] Products of sea-fishing and products taken from the sea which satisfy

---

16 P. Witkowski, *Instrumenty polityki celnej Unii Europejskiej*, WSPiA, Lublin 2016, p. 36.

17 Council Regulation (EC) No 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, OJ L 324, 10.12.2009, p. 1, as amended.

18 Articles 203–209 UCC.

19 The duty reliefs provided for in the Regulation are largely a consequence of the application of the Customs Convention of 4 June 1954 concerning Customs Facilities for Touring, signed in New York, Annex to the Journal of Laws of 1961, Dz.U. No. 42, item 217, as amended.

20 Article 203 UCC.

21 Article 208 UCC.

22 The condition for the returned goods is that they are fully identifiable, which in principle should be unaltered goods. The criteria for the acceptance of returned goods are set out in Article 158 IR. They include, inter alia, not subjecting the goods to treatments and processes outside the EU customs territory that change the appearance of those goods.

23 In these circumstances, a relief may be granted if the goods are reintroduced into the area within three years (renewable) and notified for placing on the market, at the request of the notifier. In the case of re-importation of goods which were originally released for free circulation duty-free or at a reduced rate of import duty on account of their end-use, relief may be granted if the goods are placed under the release for free circulation procedure also for

the conditions for granting this duty relief include products of sea-fishing and other products taken from the territorial sea of a country or territory outside the customs territory of the Union by vessels solely registered or recorded in a member state and flying the flag of that state.[24] These conditions are also met by products obtained from the previously mentioned products by processing carried out on board factory-ships registered or recorded in a member state and flying the flag of that state.

The export procedure is the customs procedure which exhausts the grounds for a change in the customs status of goods. As a rule, this procedure covers Union goods brought out of the EU customs territory.[25] That rule does not apply to goods placed under the outward processing procedure; goods taken out of the customs territory of the Union after having been placed under the end-use procedure; goods delivered, VAT or excise duty exempted, as aircraft or ship supplies, regardless of the destination of the aircraft or ship, for which a proof of such supply is required; goods placed under the internal transit procedure; goods moved temporarily out of the customs territory directly between places situated within the customs territory of the Union.[26]

Union goods placed under an export procedure and actually brought out of the Union customs territory are subject to the following export instruments:[27]

a) the repayment or remission of import duty;
b) the payment of export refunds;
c) the collection of export duty;
d) the formalities required under applicable provisions relating to other charges;
e) the application of prohibitions and restrictions (including controls against drug precursors, goods violating certain intellectual property rights, or cash) justified on the grounds of, inter alia, public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of the environment, the protection of national treasures possessing artistic, historic or archaeological value and the protection of industrial or commercial property, including controls against drug precursors, goods infringing certain intellectual property rights and cash, as well as the implementation of fishery conservation and management measures and of commercial policy measures.

Under the regime of the export procedure, the goods placed under that procedure should be presented at the customs office[28] by the person actually removing them

---

a preferential end-use, otherwise the customs duties will be reduced by the amount collected on their first release for free circulation.

[24] Cf. M. Kałka, *Procedury specjalne w Unijnym Kodeksie Celnym*, Unimex, Wrocław 2017, p. 32.

[25] Article 268 UCC.

[26] Article 269(2) UCC.

[27] Article 267(3) UCC.

[28] Article 221 IR identifies the competent customs office for placing goods under the export procedure. They include: (a) the customs office competent for the place where the exporter is established, (b) the customs office competent for the place where the goods are packed or loaded for export shipment, (c) a different customs office in the Member State concerned which is competent for administrative reasons for the operation in question, (d) the customs office competent for the place of exit of the goods from the Union customs territory, where the goods do not exceed EUR 3,000 in value per consignment and per declarant and are not subject to prohibitions or restrictions, and where the goods are not subject to prohibitions

or by the person in whose name or on whose behalf the person removing the goods acts, or the person who assumes responsibility for the carriage of the goods before their removal.[29]

Union goods placed under an export procedure until they are actually brought out of the customs territory of the Union are placed under customs supervision.[30] The correct implementation of the export procedure, which consists of a number of actions provided for in customs legislation – from the submission of the Exit Summary Declaration (ESD) to the actual exit of the goods – results in the loss of the Union customs status of the goods.

3. CUSTOMS SPECIAL PROCEDURES

Customs special procedures codified in the EU Customs Code offer various possibilities for handling goods in trade with third countries. The main criterion for this differentiation is the direction of movement and the use of goods placed under a customs special procedure. The vast majority of them are applied within the EU customs territory. They include, in principle, the transit procedure, the storage procedure, the specific use procedure, and the inward processing procedure, which is part of the processing procedure. The second type of processing procedure is an outward processing procedure, which is carried out entirely on the territory of a third country. A differentiation in respect of the direction of the movement of goods may occur in the circumstances of a transit procedure and a specific use procedure in the form of the temporary admission procedure for exports using an ATA carnet.[31]

The classification according to the direction of trade in goods with third countries differentiates the customs status of the goods under these procedures. In the case of transport procedures, goods brought into the customs territory of the Union and placed under those procedures do not change their customs status and remain non-Union goods, as per the agreed formula. In relation to the outward processing procedure, Union goods brought out of the customs territory of the EU lose the customs status of Union goods.

The systematisation of special customs procedures and their consequent legal structure create a specific privilege for the goods covered by those procedures in

---

or restrictions, (e) where sub-contracting is involved, the customs office competent for the place where the sub-contractor is established, (f) where justified by the circumstances of an individual case, another customs office better placed for the presentation of the goods to customs.

[29] Pursuant to Article 263 UCC, goods to be taken out of the customs territory of the Union are covered by a pre-departure declaration to be lodged at the competent customs office within a specific time limit before the goods are taken out of the customs territory of the Union.

[30] R. Michalski, *Przywozowe procedury celne*, [in:] E. Gwardzińska, M. Laszuk, M. Masłowska, R. Michalski, *Prawo celne*, Wolters Kluwer, Warszawa 2017, p. 409.

[31] Customs Convention of 6 December 1961 on Customs Convention on the ATA carnet for the temporary admission of goods, made in Brussels, Annex No. 2 to the Journal of Laws of 1969, Dz.U. No. 30, item 242, as amended.

import. It is manifested by the non-application of the legal provisions on the origination and calculation of customs duties and other public levies and the absence of the need for the EU trade policy measures to be applied (apart from specific prohibitions on the introduction of goods into the EU). As a consequence of this structure, the goods are subject to customs supervision[32] and customs control,[33] which are a consequence of the customs legislation in correlation with the terms of the permit.

One implication of the favourable treatment of non-Union goods placed under customs special procedures for import into the EU customs territory is, in principle, the obligation to provide a guarantee against future customs duties. In the case of goods imported for placing under customs special procedures, it arises from their being declared for the procedure rather than that the use of the procedure being authorised. In the case of storage places for customs warehousing, it arises from the intention to operate them, and, therefore, it should be lodged before an authorisation is granted.[34]

Where the EU customs legislation provides for it, the common element for customs special procedures is that their use is subject to authorisation[35] issued by the customs authorities.[36] The condition of holding an authorisation applies to the specific use procedure in the form of temporary admission and end-use, and to the processing procedure in the form of inward and outward processing.[37] A permit is also required for the operation of temporary storage facilities as an element necessary for the application of the storage procedure.[38]

Taking into account the socio-economic heterogeneity of the member states, the UCC provides for the possibility to grant an authorisation with retroactive effect. This solution may be applied if, inter alia, there is no fear of attempted deception, the applicant concerned fulfils the conditions for granting the authorisation, the

---

[32] Article 5(27) UCC: customs supervision means action taken in general by the customs authorities with a view to ensuring that customs legislation and, where appropriate, other provisions applicable to goods subject to such action are observed.

[33] Article 5(3) UCC: customs controls means specific acts performed by the customs authorities in order to ensure compliance with the customs legislation and other legislation governing the entry, exit, transit, movement, storage and end-use of goods moved between the customs territory of the Union and countries or territories outside that territory, and the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure.

[34] R. Michalski, *supra* n. 30, pp. 234–235.

[35] Article 222 UCC: taking into account the change in economic and social relations connected with the course of a customs special procedure, while ensuring its correct application, there is a possibility of transferring the rights and obligations under an authorisation, in whole or in part. This may apply to any procedure other than transit.

[36] The customs authority that grants the permit in the application procedure in Poland is the Head of the Customs and Tax Office, geographically competent for the registered office of the entrepreneur concerned or competent for the organisation and performance of activities falling under the procedure, or the location of the temporary storage facility.

[37] Article 211(4) UCC: a person applying for an authorisation should, in principle, have a registered office in the EU customs territory, ensure the proper conduct of the procedure, provide security for customs duties and other public levies, and ensure the proper use of goods or an organisation of their use within the requested procedure, in particular the temporary admission procedure and inward processing procedure.

[38] Article 211 UCC.

conditions for control and identification of the goods are complied with. A retroactive authorisation does not apply to storage facilities used for the customs warehousing of goods.[39]

The authorisation to use the processing procedure, in its two forms, i.e. inward and outward processing, is granted on condition that an economic analysis is conducted. This is aimed at eliminating the processing that may have a negative impact on the situation of EU domestic entrepreneurs. The rule is that if the procedure is not found to adversely affect the essential interests of the EU producers, then it is admissible.[40] On the other hand, in the circumstances when such a negative impact of the procedure is plausible, a procedure is carried out to verify the fulfilment of the economic conditions at the EU level.

In an authorisation to use a customs special procedure, the customs authorities may authorise the use of what is called equivalence system. Equivalent goods are defined in the UCC as Union goods which are stored, used or processed instead of the goods placed under a special procedure.[41] Under the outward processing procedure, equivalent goods are non-Union goods which are processed instead of Union goods placed under the outward processing procedure. Subject to compliance of the procedure with the law, the equivalence system is provided in particular as regards customs supervision, in the following customs special procedures:[42]

a) the use of equivalent goods under customs warehousing, free zones, end-use and a processing procedure;
b) the use of equivalent goods under the temporary admission procedure, in specific cases.

For the proper use of storage and inward processing procedures, the usual forms of handling or movement must be carried out in respect of the goods covered. Usual forms of handling intend to preserve the goods concerned, improve their appearance or marketable quality or prepare them for distribution or resale.[43] The performance of usual forms of handling does not require an authorisation from a customs authority. In duly justified circumstances, after obtaining a consent from the customs authority, goods placed under a special procedure other than transit

---

[39] Article 211(2) UCC.

[40] In the case of the outward processing procedure, this rule applies in full, whereas for the inward processing procedure Article 167(1)(a)–(s) DR clarifies processing operations that do not give rise to negative consequences, including, inter alia, the processing of *durum* wheat into pasta, the processing of goods into samples, and processing of goods to ensure their compliance with the technical requirements applicable to their release for free circulation, and the processing of solid and fluid fractions of palm oil, coconut oil, fluid fractions of coconut oil, palm kernel oil, fluid fractions of palm kernel oil, babassu oil or castor oil into products which are not destined for the food sector; Article 167(1)(a)–(s) of the Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015, supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, OJ L 343, 29.12.2015, p. 1; hereafter: DR.

[41] Pursuant to Article 223(1) UCC, equivalent goods must, in principle, have the same eight-digit Combined Nomenclature code, the same commercial quality and the same technical characteristics as the goods which they are replacing.

[42] Article 223(2) UCC.

[43] Article 220 UCC.

or in a free zone may be moved between different places in the customs territory of the Union.[44]

The general regulations provide for a procedure for the discharge of a customs special procedure. According to the adopted rule, except for transit procedure, a procedure is discharged where goods or products of processing placed under this procedure are placed under another customs procedure within the Union customs territory, brought out of the Union customs territory or are disposed of by destruction or abandonment to the state.[45] With regard to the transit procedure, it is discharged by the customs authorities when, to the best of their knowledge and records, they can establish that the goods have actually been brought out of the customs territory of the Union or that they have been placed under a subsequent customs procedure within the EU.

Where a customs special procedure has not been discharged, the responsibility of the customs authorities, in accordance with their respective customs supervision and control powers, is to take all steps necessary to regulate the legal status of the goods in accordance with the customs legislation.

The movement of non-Union goods and Union goods from one point to another within the EU customs territory is regulated under a special customs transit procedure. It represents a natural consequence of the harmonisation and simplification of the international supply chain for the movement of goods.

The customs legislation divides the transit procedure into external and internal transit.[46] In the former case, the external transit procedure provides, in principle, for the movement of non-Union goods from one point to another within the customs territory of the EU where the movement process has been initiated or is to be completed outside this territory.

The internal transit procedure is the second form of transit procedure that allows Union goods to move from one point to another within the EU customs territory. It applies where, in the course of a transport operation, goods temporarily leave the territory of the EU and transit through a third country.[47] The prerequisite for the proper conduct of the internal transit procedure is to maintain the customs supervision measures, e.g. customs seals. This is to prevent these goods from being unloaded, transhipped or tampered with outside the EU customs territory.

In principle, the external and internal transit procedure may be carried out in similar circumstances allowing goods to be moved:[48]

a) under the external Union transit procedure – such a possibility must be provided for in an international agreement in the case of internal transit;
b) in accordance with the TIR Convention, in the case of external transit, where such movement has begun or is to end outside the customs territory of the

---

[44] Article 219 UCC.

[45] Disposal of goods is specified in Articles 197–200 UCC, and includes destruction of goods and abandonment to the state.

[46] A. Kuś, *supra* n. 13, p. 410.

[47] This may occur where goods are transported through a third country, e.g. from Germany to Italy via Switzerland.

[48] Article 226(3) UCC.

Union, or is carried out between one point and another point in the customs territory of the Union through the customs territory of a third country;[49]

c) in accordance with the ATA Convention/Istanbul Convention;[50]
d) using the Rhine manifest procedure;[51]
e) Using form 302 provided for in the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed in London on 19 June 1951;[52]
f) by post.[53]

The UCC has introduced the possibility of moving goods, in certain situations, within a separate EU transit. The adopted regulations indicate the obligations of a person carrying out this procedure, the carrier and the consignee of goods. In addition to compliance with customs legislation, which should be considered obvious, the person making use of the procedure must present the required information and intact goods to the customs office of destination within the prescribed period, subject to the measures adopted by the customs authorities to ensure the identification of the goods and the provision of a guarantee against customs duties and other public levies, as provided for by customs legislation. In order to harmonise and simplify the procedure in relation to the transported goods, the UCC empowers the customs authorities to grant the status of authorised consignee and authorised consignor and to use special customs seals as well as simplified and electronic customs declarations.[54]

As in the case of the beneficiary, a carrier or consignee of goods moving under the transit procedure is required to present the goods at the designated customs office of destination within a specified period of time, in the condition corresponding to that on the date of their placing under the procedure, i.e. in the same quantity and type and with the same customs supervision measures.[55]

The possibility of moving goods placed under the external EU transit procedure outside the EU customs territory has been regulated. This takes place in circumstances where it is consistent with the provisions of an international agreement, and the carriage through that country or territory is effected under cover of a single transport

---

[49] Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), done at Geneva on 14 November 1975, consolidated text OJ 2009 L 165, p. 1, as amended. Pursuant to the Convention and the UCC, the use of a TIR operation is subject to a separate permit issued by a customs authority: in Poland by the Director of the Tax Administration Chamber in Warsaw. This permission may be revoked, which, pursuant to Article 229 UCC, means that TIR carnets presented will not be accepted at any customs office in the EU customs territory. This operation is facilitated by the implementation of Article 230 UCC, whereby a customs authority issues a permit to collect goods and close the TIR carnet in a place approved by an authorised consignee.

[50] Customs Convention on the ATA carnet for the temporary admission of goods (ATA Convention), done at Brussels on 6 December 1961, Dz.U. 1969, No. 30, item 242, as amended; Convention on temporary admission, done in Istanbul on 26 June 1990, Dz.U. 1998, No. 14, item 61, as amended.

[51] Convention on the Navigation on the Rhine, done at Mannheim on 17 October 1868.

[52] Dz.U. 2000, item 257, as amended.

[53] Convention, done at Ottawa on 3 October 1957, The Universal Postal Convention, Dz.U. 1957, No. 6, item 51, as amended.

[54] R. Michalski, *supra* n. 30, pp. 270–271.

[55] M. Lux, *supra* n. 14, p. 50.

document drawn up in the customs territory of the Union. Under the customs legislation, this situation results in the suspension of the EU external transit procedure for as long as the goods concerned remain outside the customs territory of the Union.[56]

A special customs procedure for storage is an institution of the UCC which facilitates the implementation of various forms of cross-border business activity. This procedure enables one, among others, to suspend or postpone the deadline for payment of customs duties and other public levies, as well as to conduct transit trade transactions.[57]

The special customs storage procedure is applied to non-Union and Union goods.[58] This procedure provides for two options for storage: as a customs warehousing procedure and a free zone procedure.

As a rule, goods can be placed under these procedures without any time limit. One exception in this respect are the time limits relating to the situation where the nature or characteristics of the goods may, in the case of long-term storage, deteriorate and cause real danger to human, animal or plant health or to the environment.[59]

In accordance with the UCC, a customs warehouse is the place which allows the implementation of the storage procedure in the former form; such warehouse is understood as any place accepted by customs authorities and subject to their control, where goods may be stored in accordance with agreed conditions. The UCC makes a distinction between a public and a private customs warehouse.[60]

The legal construction of a public customs warehouse ensures that it may be used by any person for the storage of goods.[61] Public customs warehouses have been subdivided into three groups. The first one, type I customs warehouse, assumes responsibility for the performance of obligations under the procedure to be borne by the holder of the authorisation for the operation of a warehouse and the holder of the procedure. The second type of customs warehouse is type II: the holder of the procedure is responsible for the performance of obligations. The third group of customs warehouses are type III ones, operated by the customs authorities.[62] As opposed to the public customs warehouse, the private customs warehouse is intended for the storage of goods used exclusively by the operator of that warehouse for their business activity, although the goods do not need to be owned by the operator.

---

[56] Article 234 UCC.

[57] P. Witkowski, *Procedury celne i transport w handlu zagranicznym*, WSPA, Lublin 2012, p. 147.

[58] Article 237(1) and (2) UCC: Union goods may be placed under the customs warehousing or free zone procedure, or introduced into a storage facility for customs warehousing or free zone, excluding their placing under this procedure. In the former case, this possibility is provided for where this is in accordance with the EU legislation governing specific fields, or where the goods concerned benefit from a decision granting repayment or remission of import duty. In the latter case, in circumstances of reasonable economic need and where customs supervision will not be adversely affected, the customs authorities may authorise the storage of Union goods in a storage place intended for customs warehousing.

[59] This applies in particular to goods with a specified time limit for their consumption, or the expiry date of the product.

[60] Article 240(2) UCC.

[61] M. Kałka, *supra* n. 24, p. 75.

[62] P. Witkowski, *supra* n. 16, p. 166.

The operation of a customs warehouse is subject to authorisation by the customs authorities, unless the customs warehouse is operated by those authorities. A person intending to operate a customs warehouse must submit a written application containing the information required to obtain authorisation. Such information includes the data concerning the proposed location of the future customs warehouse and, in particular, the business case for establishing such a warehouse. It also includes information on the applicant, to assess whether the applicant can guarantee the performance of their future obligations.

The holder of a customs warehouse is the person whose goods have been placed under the customs warehousing procedure or, if applicable, the person to whom the rights and obligations arising under that procedure have been transferred. This person is responsible for fulfilling the obligations arising from the procedure concerned.

With a view to economic rationality, non-Union goods may be brought into a customs warehouse for the purpose of being placed under the processing procedure or the end-use procedure, provided that this does not restrict the customs supervision and has been authorised by the customs authorities.[63]

The UCC provides for the implementation of the storage procedure in the form of the free zone procedure. The EU member states have the prerogative to establish free zones as a separate part of the EU customs territory. In Poland, this is done through an ordinance issued by the minister in charge of public finance. The idea behind establishing free zones, in uninhabited locations where effective customs supervision is ensured, is to facilitate international transit traffic, in particular at sea, air and river ports or places adjacent to border crossing points.[64] One important rationale for establishing a free zone is the anticipated acceleration of economic growth in the part of the territory where such zones are located, in particular by stimulating exports and creating new jobs.[65]

A free zone can be formed at the request of a person established in the EU. This person should meet the conditions of certainty as to compliance with the law and should have the right to dispose of the area where the free zone is to be situated. In accordance with the customs regulations, the free zone may be used to conduct economic activity, manufacturing, trade and services.[66] The intention to undertake such activity should be notified to the customs authority supervising the free zone concerned. In view of the requirements of customs supervision or safety and security standards, this authority has the power to impose restrictions and prohibitions as regards the type and scope of economic activity undertaken by business operators in a free zone.[67]

---

[63] Article 241(1) UCC.

[64] Free zones form a separated area of the Union customs territory, subjected to customs supervision. Entrance and exit points are located along the barrier line. The movement of persons, goods and means of transport, which are subject to customs supervision, may only take place at these points.

[65] P. Witkowski, *supra* n. 16, p. 177.

[66] Any construction work within the free zone may only be carried out with the prior approval of the customs authorities.

[67] This right also extends onto the ban on economic activity for individuals who do not guarantee the correct application of customs law.

In principle, non-Union goods brought into a free zone must be presented to the customs authorities and must undergo the customs formalities in the following circumstances:[68]

a) where they are brought into the free zone directly from a third country; this may take place when, e.g. the third country is directly adjacent to the external border of the EU;
b) the goods were originally placed under one of the customs procedures which is discharged when they are introduced into the free zone;
c) when they are placed under the procedure in order to benefit from a decision granting repayment or remission of import duty;
d) where legislation other than the customs legislation provides for such formalities, e.g. for goods where the introduction has an effect equivalent to their export outside the customs territory of the Union.

Non-Union goods in a free zone may undergo operations to have them placed under the release for free circulation procedure, possibly also special inward processing customs procedure, or both special end-use procedures. When this solution is applied, the goods must meet the conditions required under those procedures, which means that they cannot be placed under the free zone procedure.

Union goods may be brought into a free zone with a view to their storage, processing or being used otherwise. While remaining in the free zone, such goods are not placed under the free zone procedure. A person authorised to dispose of goods is entitled to confirm their customs status before the customs authorities. This is the case where the goods are placed, processed in a free zone or placed under the release for free circulation procedure.[69]

The concept of special customs procedures takes into account the specific circumstances of international economic and trade cooperation. They are related, among others, to the broad scope of such cooperation, whereby temporary introduction and use of non-EU goods in the EU customs territory may be required, as well as special customs preferences provided for the EU producers. The legal solution underlying these assumptions is the special end-use procedure established in the UCC. As with previous customs special procedures, this one has been subdivided into the temporary admission procedure and the end-use procedure.

The possibility of using temporary imported non-Union goods in the customs territory of the EU is offered by the temporary admission. Goods placed under this procedure may not undergo operations which bring about a change in their nature or reduce the level of their technological processing. However, repair and maintenance are permitted. The temporary admission procedure may be used in two forms:[70]

---

[68] Article 245(1) UCC.

[69] Article 249 UCC: Where goods are taken out of a free zone into another part of the customs territory of the Union or placed under a customs procedure, they should be regarded as non-Union goods, unless their customs status as Union goods has been proven. Where goods are intended to be brought out of the Union customs territory, they are deemed to be Union goods for the determination of export duties or measures regulating trade in goods, or instruments provided for in the Common Agricultural Policy (CAP) or the Common Commercial Policy (CCP), unless their customs status of non-Union goods has been confirmed.

[70] Article 250 UCC.

a) with total duty relief;
b) with partial duty relief.

Pursuant to the general rules for customs special procedures, non-Union goods placed under temporary admission with total duty relief are not subject to customs duties or other public levies or to commercial policy measures, other than prohibitions on the introduction of goods into the customs territory of the Union. The use of this procedure is conditional upon the requirement that the goods do not undergo any activity that may change their identity, that the goods are identified and that the person authorised to apply the procedure is, in principle, established outside the customs territory of the Union, and that the specific requirements for the use of this procedure have been met.[71]

A temporary admission with partial duty relief is permitted in respect of non-Union goods which are not listed in the implementing provisions or which, being listed therein, do not fulfil all the conditions laid down therein. This concerns, among others, a change in the nature of the imported goods from exhibition goods to an object of an operation test, e.g. machines to perform construction and assembly works, or when they are owned by an entrepreneur established within the customs territory of the Union. The Delegated Regulation expressly sets out the circumstances where the temporary admission procedure with partial duty relief is applied. It refers to professional equipment intended, inter alia, for the industrial packaging of goods, and the exploitation of natural resources (excluding hand tools and the erection, repair or maintenance of buildings, also excluding hand tools).[72]

In the circumstances of a temporary admission procedure with partial duty relief, the amount of import duties payable in respect of goods placed under that procedure is 3% of the amount which would have to be paid if they were placed under the release for free circulation procedure on the date of the declaration for that procedure. The 3% instalments are spread into monthly repayment periods, and the total amount of duty paid may not exceed the amount of customs duty which would be determined when placing the goods under the release for free circulation procedure.

The specific use procedure in the form of the end-use procedure introduces a kind of dichotomy into the application of customs regulations.[73] It consists in the fact that non-Union goods are, in fact, placed under a release for free circulation

---

[71] These include substantive requirements. For example, the procedure may be applied to certain groups of goods, such as means of production and means of transport, with the exception of passenger cars leased, hired out or put into service, imported or exported for business purposes, and goods intended for testing (samples and patterns without any commercial value may be admitted definitively and exempted from customs duty), as well as production models and patterns, or reusable packaging, as well as goods intended for auctions, fairs and exhibitions registered outside the common customs territory, means of road transport, spare parts, accessories and equipment used for their repair and maintenance. Articles 208–213 DR.

[72] Article 226(3) DR.

[73] http://mf-arch.mf.gov.pl/documents/766655/5109033/koncowe+przeznaczenie.pdf (accessed 30.03.2018).

procedure with customs preferences. These preferences are granted conditionally on the basis of the actual end-use of the goods concerned.[74]

In the realities of trade in goods with third countries, this procedure may be applied to goods in respect of which preferential measures are provided for, e.g. in the Common Customs Tariff, in the regulations on non-preferential tariff quotas and on autonomous suspension of the collection of customs duties. Goods may be placed under this procedure at a certain stage of processing which clearly indicates their end-use. With regard to such goods, the customs authorities may indicate the conditions under which those goods may be considered to have been used for the purpose for which duty relief or reduced rates of duty are granted.[75]

The implication of applying the end-use procedure and implementing the production processes provided for therein is the generation of waste, residues and natural losses. They are deemed to have been placed under the end-use procedure except where they have been placed under the storage procedure.[76]

In the current conditions of a globalised and internationalised economy, a customs special procedure of processing is an institution of the EU customs law that enables the implementation of production processes in the international space. It may facilitate production operations carried out in different customs territories within a corporate, transnational economic operator, or it may result from differences in the capital intensity of production. The processing procedure may involve processing operations within the EU customs territory in relation to non-Union goods, and Union goods may be subjected to such operations outside the EU customs territory.

Regardless of the place where it is carried out, the common element of the processing procedure is the productivity rate. It indicates the quantity or percentage of processed products resulting from the processing of a specific quantity of goods placed under the processing procedure.[77] It may be determined by the customs authorities in accordance with the method for its determination, in appropriate circumstances, as a rate of yield or an average rate of yield occurring during the processing operation. The rate of yield or the average rate of yield is established on the basis of the actual situation relating to the processing operation.

The customs clearance procedure has a two-fold character, which is an implication of the place of actual execution of the processes which fall within its scope. When carried out within the Union customs territory, it is known as inward processing, while when the goods exit that territory and the activities are carried out in the territory of a third country, it is known as outward processing. Processing operations involve activities relating to the processing of goods, including the assembly, collation or installation in other goods, and the processing of goods, as well as the destruction and repair of goods, including their overhaul and organisation, as well as the use of goods, the so-called production accessories, which are not part of the

---

[74] In the case of non-Union goods placed under the end-use procedure, a customs debt may arise, public levies emerge and commercial policy measures are applied.

[75] A. Kuś, *supra* n. 13, p. 416.

[76] M. Lux, *Wprowadzenie do unijnego kodeksu celnego – część VIII*, Monitor Prawa Celnego i Podatkowego No. 1, 2015, p. 105.

[77] Article 5(38) UCC.

processed products but which enable or facilitate their production, even if they have been fully or partly used up as part of those operations.[78]

In accordance with the general rules for customs special procedures, the inward processing procedure is not burdened with financial obligations or the operation of commercial policy instruments related to the introduction of goods into the customs territory of the EU. Its aim is to enable the use of non-Union goods in the customs territory of the EU in one or more processing operations.

The inward processing operations should ensure that the processed goods can be identified in the products of processing; this also applies to the use of an equivalence system.[79] Their implementation should not lead to the loss of production accessories as a technological consequence.[80] Moreover, compliance with technical standards relates to the processing products intended to be placed under the release for free circulation procedure and subjected to usual forms of handling.[81]

The inward processing procedure is carried out within the time limit set in the authorisation for its use.[82] In the light of the design of special procedures, the time limit, which starts from the date on which non-Union imported goods are placed under the procedure concerned, should be necessary to carry out processing operations and operations aimed to discharge the procedure. In duly justified circumstances, at the request of the authorisation holder and upon the consent of the customs authority, the time limit may be extended by a reasonable period of time.[83] When equivalent goods are used in the inward/outward processing of goods, the time limit in the authorisation is determined taking into account the formalities related to the operation of the procedure as well as the acquisition and transfer of the goods to the Union customs territory.[84]

The materialisation of the inward processing procedure provides for the possibility to re-export the goods covered by that procedure, or products at an intermediate stage of processing, out of the EU customs territory for further, in-depth technological processing. In accordance with the request made by the authorisation holder, the customs authorities may give their consent to the aforementioned

---

[78] Article 5(37) UCC.

[79] Equivalent goods are Union goods (...) used or processed under the inward processing procedure instead of non-Union goods. In the case of the outward processing procedure, equivalent goods are non-Union goods processed instead of Union goods placed under the outward processing procedure.

[80] This is the case with processing operations other than repair and destruction.

[81] The usual forms of handling of goods placed under a processing procedure aim to preserve the goods in an unaltered condition, improve their appearance or commercial quality, or prepare them for distribution or resale.

[82] R. Michalski, *supra* n. 30, p. 317.

[83] Such authorisation may provide that a period which commences during a specific month, quarter or half-year will end on the last day of the following month, quarter or half-year, respectively.

[84] This time limit is expressed in months and does not exceed six months. It runs from the date of acceptance of the export declaration for processed products obtained from the corresponding equivalent goods. At the request of the authorisation holder, the six-month time limit may be extended even after its expiry, provided that the total of twelve months is not exceeded.

processing operations, with regulations related to outward processing being applicable.

The Union Customs Code provides for the use of Union goods under the processing procedure for processing in the territory of a third country. In the well-established terminology of the EU customs law, this possibility is referred to as outward processing.

Processing products resulting from processing operations may be placed under the release for free circulation procedure for re-importation into the customs territory of the Union. Customs duties are determined with total or partial duty relief. This procedure is used at the request of the authorisation holder or an authorised person.[85]

The EU legislator has enumerated exclusions of goods from the application of the outward processing procedure. They include goods whose exit from the customs territory of the Union entails the repayment or remission of customs duties, and goods which, prior to exportation, were released for free circulation duty-free or at a reduced rate of duty on account of their end-use, for as long as the purposes of that end-use have not been attained, unless the goods are required to undergo repair, and goods which, when exported, entail export refunds, as well as which are entitled to a financial advantage other than refunded goods under the Common Agricultural Policy in connection with their exportation.[86]

In accordance with the rules governing the customs special procedures, authorisation to use outward processing is granted by the customs authorities within the time limits necessary to carry out the manufacturing operations. In setting the time limit for the authorisation, one also takes into account the period necessary for re-importation of processed products and their placing under the release for free circulation procedure, with the application of the privileged determination of customs duties.[87]

Repair of goods outside the EU customs territory, in particular free-of-charge repair, is one of the key features of the outward processing procedure. After being re-imported into the customs territory of the Union, repaired goods placed under the release for free circulation procedure are granted total duty relief when the authorisation holder demonstrates that the repair in question was carried out free of charge under contractual arrangements or legal regulations, or because of defects in workmanship or materials.[88]

The standard exchange system simplifies the processing operations under the outward processing procedure. It provides for the replacement of a processed product to be re-imported with a replacement product. This may be done at the request of

---

[85] An authorised person is any person established in the customs territory of the Union, provided that they have obtained the consent of the authorisation holder and that the conditions laid down therein have been fulfilled.

[86] M. Masłowska, *Procedury wywozowe*, [in:] E. Gwardzińska, M. Laszuk, M. Masłowska, R. Michalski, *Prawo celne*, Wolters Kluwer, Warszawa 2017, p. 414.

[87] The customs authorities may, within reasonable limits, grant an extension of that period upon a reasoned request by the authorisation holder.

[88] This solution is not provided for in situations where a defect in workmanship or materials in the goods is discovered at the time when they are first released for free circulation.

the authorisation holder where the processing is limited to the repair of the defective goods which have the status of Union goods.[89] In principle, replacement products should be classified under the same heading of the Combined Nomenclature (CN) as the processed products. In addition, they should have the same commercial quality, with technical parameters being identical to those of the processed product after repair. Where the goods have been used before being exported out of the customs territory of the Union, the replacement products must also have been used. In this case, the provisions of the UCC stipulate a derogation from this condition if the authorisation holder demonstrates to the customs authorities that due to the obligations of a non-EU contracting party, the replacement product has been provided free of charge.

One simplification that takes into account the singularities of technological and technical processes is the possibility (with the consent of the customs authorities) of earlier import of replacement products into the Union customs territory prior to the export of goods subject to guarantee exchange.[90] The implementation of this operation is dependent on the provision of a guarantee against the amount of the customs debt incurred in respect of a previously imported replacement product.

4. CONCLUSIONS

In 2016, the customs law of the European Union underwent comprehensive, fundamental changes introduced in the UCC as well as in delegated and subordinate regulations. The changes aimed at simplifying the regulations, cutting the "red tape" and using ICT systems in principle.[91] The reasons behind the EU customs law reform were coincided with the modernisation process, which helped to standardise the terminology and concepts related to the handling of goods in trade with third countries. The substantive scope of application was reduced with a view to enhancing clarity of interpretation and harmonisation of the practical implementation of the regulations by businesses.

It can be assumed that the regulations relating to customs procedures, as well as the customs law as a whole, are an outcome of the EU policies, including the customs policy.[92] They are based on internal market objectives, provide solutions to ensure the correct application of customs supervision and control instruments and safeguard the economic and non-economic interests of the EU and its member

---

[89] This system can be applied on condition that the goods covered by it are not subject to instruments of the Common Agricultural Policy or those related to the processing of agricultural products.

[90] The time limit for the export of goods to be repaired is two months, running from the date of acceptance by the customs authorities of the declaration regarding the release of replacement products for free circulation. In exceptional and duly justified circumstances, it may be possible to have a reasonable extension of these time limits by the customs authority.

[91] A. Kuś, *Przyszłość unijnego prawa celnego*, [in:] B. Hołyst (ed.), *Przyszłość prawa. Księga Pamiątkowa XX-lecia Wydziału Prawa i Administracji Uczelni Łazarskiego*, Warszawa 2017, p. 215 et seq.

[92] P. Witkowski, *supra* n. 16, p. 78.

states by taking into account the requirements of common EU policies in the area of trade in goods with third countries. It should be noted that these instruments do not interfere with their flexibility, which guarantees a wide range of possibilities of disposing of goods in cooperation between the EU entrepreneurs and their partners from third countries. This creates a friendly platform for establishing, pursuing and furthering international economic and trade cooperation, which helps, inter alia, to increase the output, boost exports and create new jobs in the EU.

The range of customs procedures includes traditional procedures for release for free circulation and export, which lead to a change in the customs status of goods. One interesting solution is the classification of customs special procedures which includes transit, storage, special end-use and processing. Under these solutions, dichotomous divisions were made into external transit and internal transit, customs warehousing and free zone, temporary admission and end-use, as well as inward and outward processing.

When analysing the current customs law regulations with regard to customs procedures, one can identify certain shortcomings that may affect the actual degree of their practical application. According to the authors of this paper, the EU legislator failed to avoid a specific legislative chaos. This chaos is manifested in the fact that not all forms of handling goods in trade with third countries have been included in customs procedures. They are regulated by the UCC with respect to temporary storage of goods, re-export of goods and disposal of goods, the latter including destruction and abandonment to the state.

A similar duality and inconsistency exists with regard to the determination of the customs status of goods in the case of certain customs special procedures. In particular, this is apparent in the case of the end-use procedure, where the goods covered by that procedure are simultaneously released for free circulation, accompanied by the fulfilment of related obligations which, most likely, leads to a change in the customs status of the goods. It should be stressed that the shortcomings identified in the customs procedures regulated in the EU customs law are difficult to assess unequivocally, given the short time since they became effective and practically applied by customs authorities and economic operators.

Taking the regulation of customs procedures in the EU customs law together, it is reasonable to assume that their broad formula addresses the challenges of today's globalised economy, whereas the solutions that have been adopted help to ensure the proper support and handling of the international supply chain.

BIBLIOGRAPHY

Czyżowicz W., *Pojęcie i przedmiot prawa celnego i przedmiot prawa celnego*, [in:] W. Czyżowicz (ed.), *Prawo celne*, C.H. Beck, Warszawa 2004.

Huchla A., *Prawo celne*, [in:] U. Kalina-Prasznic (ed.), *Encyklopedia prawa*, Warszawa 1999.

Kałka M., *Procedury specjalne w Unijnym Kodeksie Celnym*, Unimex, Wrocław 2017.

Kuś A., *Prawo celne*, Oficyna Wydawnicza Branta, Bydgoszcz–Lublin 2003.

Kuś A., *Podstawy prawa celnego*, [in:] W Wójtowicz (ed.), *Zarys finansów publicznych i prawa finansowego*, Wolters Kluwer, Warszawa 2017.

Kuś A., *Przyszłość unijnego prawa celnego*, [in:] B. Hołyst (ed.), *Przyszłość prawa. Księga Pamiątkowa XX-lecia Wydziału Prawa i Administracji Uczelni Łazarskiego*, Warszawa 2017.
Lux M., *Prawo celne Unii Europejskiej*, BW, Szczecin 2005.
Lux M., *Wprowadzenie do unijnego kodeksu celnego – część VII*, Monitor Prawa Celnego i Podatkowego No. 1, 2015.
Masłowska M., *Procedury wywozowe*, [in:] E. Gwardzińska, M. Laszuk, M. Masłowska, R. Michalski, *Prawo celne*, Wolters Kluwer, Warszawa 2017.
Michalski R., *Przywozowe procedury celne*, [in:] E. Gwardzińska, M. Laszuk, M. Masłowska, R. Michalski, *Prawo celne*, Wolters Kluwer, Warszawa 2017.
Witkowski P., *Instrumenty polityki celnej Unii Europejskiej*, WSPiA, Lublin 2016.
Wójtowicz W., *Cła*, [in:] B. Brzeziński, T. Dębowska-Romanowska, M. Kalinowski, W. Wójtowicz (eds), *Prawo finansowe*, C.H. Beck, Warszawa 2000.

Websites
http://mf-arch.mf.gov.pl/documents/766655/5109033/koncowe+przeznaczenie.pdf

CUSTOMS PROCEDURES IN THE EU CUSTOMS LAW

Summary

The article analyses the customs procedures in force in the European Union. According to the authors, the EU customs procedures constitute a complete and transparent legal basis for the cooperation of the EU entrepreneurs with their counterparties from third countries. Despite generally positive evaluation of legal regulations in this area, shortcomings of the adopted solutions are indicated. This particularly applies to the adopted legal status regarding special customs procedures for special purposes and processing.

Keywords: customs procedures, procedures for changing the customs status of goods, special procedures, customs law of the European Union

PROCEDURY CELNE W PRAWIE CELNYM UNII EUROPEJSKIEJ

Streszczenie

W artykule dokonano analizy obowiązujących w Unii Europejskiej procedur celnych. Zdaniem autorów, unijne procedury celne stanowią kompletną i przejrzystą podstawę prawną dla współpracy unijnych przedsiębiorców z ich kontrahentami z państw trzecich. Pomimo ogólnie pozytywnej oceny uregulowań prawnych w tym zakresie, wskazane zostały mankamenty przyjętych rozwiązań. Dotyczy to zwłaszcza przyjętego stanu prawnego w zakresie specjalnych procedur celnych szczególnego przeznaczenia i przetwarzania.

Słowa kluczowe: procedury celne, procedury zmiany statusu celnego towaru, procedury specjalne, prawo celne Unii Europejskiej

PROCEDIMIENTOS ADUANEROS EN EL DERECHO ADUANERO DE LA UNIÓN EUROPEA

Resumen

El artículo analiza los procesos aduaneros vigentes en la Unión Europea. Según los Autores, los procedimientos comunitarios constituyen fundamento legal completo y transparente para colaboración de empresarios comunitarios con sus partes contratantes de terceros países. A pesar de valoración positiva en general de la regulación en este ámbito, se señalan inconvenientes de las soluciones adoptadas. Se trata sobre todo de regulación de procedimientos aduaneros especiales de particular destino y tratamiento.

Palabras claves: procedimientos aduaneros, procedimiento de cambio de estado aduanero de mercancía, procedimientos especiales, derecho aduanero de la Unión Europea

ТАМОЖЕННЫЕ ПРОЦЕДУРЫ В ТАМОЖЕННОМ ПРАВЕ ЕВРОПЕЙСКОГО СОЮЗА

Резюме

В статье анализируются таможенные процедуры, действующие в Европейском Союзе. По мнению авторов, таможенные процедуры ЕС обеспечивают всеобъемлющую и прозрачную правовую основу для сотрудничества между предпринимателями из стран ЕС и их контрагентами из третьих стран. Несмотря на в целом положительную оценку нормативно-правового регулирования в этой сфере, авторы указывают на некоторые недостатки принятых решений. Это, в частности, касается существующей правовой ситуации в отношении особых таможенных процедур, действующих для товаров специального назначения и товаров, предназначенных для обработки.

Ключевые слова: таможенные процедуры, процедуры изменения таможенного статуса товара, особые процедуры, таможенное право Европейского Союза

DIE ZOLLVERFAHREN IM ZOLLRECHT DER EUROPÄISCHEN UNION

Zusammenfassung

Der Artikel analysiert die Zollverfahren in der Europäischen Union. Den Autoren nach bilden die Zollverfahren der EU eine vollständige und transparente Rechtsgrundlage für die Zusammenarbeit von Unternehmern in der EU mit Vertragspartnern aus Drittstaaten. Trotz einer im Allgemeinen positiven Bewertung der in diesem Bereich erlassenen gesetzlichen Bestimmungen werden auch die Mängel und Unzulänglichkeiten der gewählten Lösungen aufgezeigt. Dies betrifft insbesondere die Rechtslage, die für Zollsonderverfahren bei einem besonderen Bestimmungszweck oder Veredelungszwecken angenommen wird.

Schlüsselwörter: Zollverfahren, Verfahren zur Änderung des zollrechtlichen Status von Waren, Sonderverfahren, Zollrecht der Europäischen Union

LES PROCÉDURES DOUANIÈRES DANS LE DROIT DOUANIER DE L'UNION EUROPÉENNE

Résumé

L'article analyse les procédures douanières en vigueur dans l'Union européenne. Selon les auteurs, les procédures douanières de l'UE constituent une base juridique complète et transparente pour la coopération des entrepreneurs de l'UE avec leurs sous-traitants de pays tiers. Bien que les réglementations légales dans ce domaine fussent généralement évaluées positivement, les auteurs ont également souligné les faiblesses des solutions adoptées. Cela vaut en particulier pour le statut juridique adopté pour les procédures douanières spéciales pour des produits à des fins et pour traitement spéciaux.

Mots-clés: procédures douanières, procédures de modification du statut douanier des marchandises, procédures spéciales, législation douanière de l'Union européenne

PROCEDURE DOGANALI NEL DIRITTO DOGANALE DELL'UNIONE EUROPEA

Sintesi

Nell'articolo sono state analizzate le procedure doganali in vigore nell'Unione Europea. Secondo gli Autori, le procedure doganali comunitarie costituiscono una base giuridica completa e trasparente per la cooperazione degli imprenditori comunitari con i loro contraenti di paesi terzi. Nonostante la valutazione generalmente positiva della regolamentazione in tale ambito, sono stati indicate le carenze delle soluzioni assunte. Questo riguarda soprattutto la situazione giuridica assunta nell'ambito delle procedure doganali speciali per speciale uso o trasformazione.

Parole chiave: procedure doganali, procedure di modifica dello status doganale della merce, procedure speciali, diritto doganale dell'Unione Europea

Cytuj jako:

Kuś A., Witkowski P., *Procedury celne w prawie celnym Unii Europejskiej [Customs procedures in the EU customs law]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 158–180. DOI: 10.26399/iusnovum.v13.1.2019.08/a.kus/p.witkowski

Cite as:

Kuś, A., Witkowski, P. (2019) 'Customs procedures in the EU customs law'. *Ius Novum* (Vol. 13) 1, 158–180. DOI: 10.26399/iusnovum.v13.1.2019.08/a.kus/p.witkowski

ISSUE OF PRIVILEGES IN THE SOCIAL SECURITY SYSTEM. PART 1

ŁUKASZ KASPROWICZ*

DOI: 10.26399/iusnovum.v13.1.2019.09/l.kasprowicz

1. INTRODUCTION

The article aims to:
- answer the question whether the right to retirement for privileged professional groups is justified in the context of the principles laid down in the Constitution of the Republic of Poland;
- present the issues and diversity of privileges available in the social security system for selected professional groups;
- demonstrate the distinctiveness of legal regulations for particular elements of the system and prove that the separated systems provide solutions that are more favourable for their beneficiaries than the common retirement system;
- show that various criteria for acquiring the right to retirement are applied depending on the professional status of people concerned;
- show implications of the privileges for the labour market and the social security system.

The social security system constitutes an extraordinarily important element of the state's social policy that aims to ensure social and existential security to persons who, due to various reasons, cannot earn money or obtain income (old age, illness, unemployment, a breadwinner's death or illness, etc.).

The system is mainly composed of:
- social insurance covering mainly people employed and paying obligatory contributions for a long time;

* PhD, attorney-at-law, Toruń Bar Association of Attorneys-at-Law; e-mail: kasprowicz@interia.com; ORCID: 0000-0002-0120-7199

– a pension scheme consisting in the provision of benefits from the state budget to pensioners who do not have to make contributions to the scheme; it constitutes a method of providing social security by granting the right to pensions (i.e. the non-equivalent provision of gains) based on the criterion of needs or merits;[1]
– social care provided by the state pursuant to statutory criteria for providing assistance as well as aid offered for humanitarian reasons; this part of social security should also cover aid provided by non-governmental organisations operating as charities.

The limited size of the article and the intention to show a broad scope of privileges made the author demonstrate mainly retirement privileges. The spectre of the issues presented and editorial limitations to the size of the article inspired the author to divide the work into two parts. The above-mentioned circumstances as well as the scope of the issues discussed do not make it possible to present an in-depth analysis of some elements.

Part 1 constitutes the introduction to the issues discussed, the presentation of normative acts concerning the social security system and the presentation and discussion of the most painful and burdensome privileges for the social security system. Part 2 presents privileges granted to clerks and public officials, gender-related privileges and privileges resulting from work in harmful or arduous conditions, and the cost of those privileges. It also contains conclusions drawn from both Part 1 and Part 2.

A privilege means an entitlement to special favours. In the past in Poland, it was a monarch's act of granting some people or groups of people particular rights or depriving an individual or a social group of that right.[2]

The beginning of the revived statehood of Poland after 1920 also constituted the beginning of granting privileges to the public officials. The Act of 11 December 1923 on the pension system for the state officials and professional soldiers[3] regulated the right to pension for the public officials, i.e. in accordance with the statute: clerks; post office, telegraph and telephone service officers; Border Guard officers, Police officers; all state and public schools teachers employed by the state; judges, prosecutors and assessors; and retired professional soldiers.

Chancellor Otto von Bismarck was the originator of the social security system.[4] The sources of the right to the social security system should be looked for in the Universal Declaration of Human Rights.[5] The right was developed thanks to the efforts of many generations of international society as a universal value.[6] The

---

[1] G. Szpor, (ed.), *System Ubezpieczeń Społecznych. Zagadnienia podstawowe*, 3rd edn, Wydawnictwo Prawnicze LexisNexis, Warszawa 2006, p. 24.

[2] *Uniwersalny słownik języka polskiego*, Wyd. Naukowe PWN, Warszawa, 2008.

[3] Dz.U. 1924, No. 6, item 46, Article 2.

[4] Bismarck's statutes introduced benefits guaranteed by the state in case of: illness (in 1883), accidents at work (in 1884) and pension insurance connected with the risk of disability, old age and death (in 1889), which were codified in the insurance law in 1891.

[5] The UN General Assembly Resolution 217 A (III Session) adopted and proclaimed on 10 December 1948, Article 25.

[6] See A. Przybyłka, *Przywileje związane z pracą w górnictwie – dawniej i dziś*, [in:] D. Kotlorz (ed.), *Dylematy współczesnego rynku pracy*, Studia Ekonomiczne. Zeszyty Naukowe Wydziałowe Uniwersytetu Ekonomicznego w Katowicach, Katowice, 2011, pp. 169–178.

International Labour Organisation (ILO) Conventions[7] undertake the issues of social security of employees as well as members of their families (children and spouses) who are maintained by them in circumstances that preclude them from earning money, e.g. old age, disability, illness, etc.

After the Second World War, in a new political and social reality of the Polish People's Republic, the 1945 decrees reviewed the social security system, however, the regulations concerning the state officials and the uniformed services were maintained as separate with respect to formal-legal and financial aspects. Generals (admirals), senior officers and non-commissioned officers serving in the Armed Forces of the Polish People's Republic based on a contract were given the right to a pension paid from the state funds for the tenure of service or in the case of disability and members of their families in the case of the breadwinner's death.[8] Pursuant to the provisions of the Decree of 14 August 1954 on pensions for disabled soldiers and their families, soldiers in the case of disability and their families in the case of the breadwinner's death were paid pensions from the state funds.[9]

The Act of 31 January 1959 on pensions for Milicja Obywatelska (the Citizens' Militia) officers and their families[10] stipulated in Article 13 that an officer dismissed from service after 15 years of work, provided he/she served in the Citizens' Militia for at least 10 years, was entitled to a pension.

The provisions of the Decree of 25 June 1954 on the common pension system for employees and their families[11] covered the common pension scheme constituting the social security system for employees and their families. The funds for pensions were collected from the state funds raised as obligatory contributions paid by companies with no deductions from employees' remuneration whatsoever. The regulations differentiated not only the sources of finance for pensions but also the rights of employees based on their professional status.

The analysis of the social security system requires taking into account in particular the provisions of international law and the Constitution of the Republic of Poland. Economic and social, especially demographic, aspects are also important in the process of law development.

The Charter of Fundamental Rights of the European Union[12] recognises and respects the right to pension within the social security system and to social services ensuring the protection, inter alia, due to old age and unemployment in accordance

---

[7] For example: ILO Convention No. 102 on the social security minimum standards, adopted on 28 June 1952; No. 35 on compulsory old age insurance of workers employed in industrial or commercial undertakings or in the liberal professions and to outworkers and domestic servants, adopted on 29 June 1933; No. 128 on invalidity, old age and survivor's benefits, adopted on 29 June 1967, which was not ratified by Poland.

[8] Decree of 18 September 1954 on pensions for generals (admirals), professional senior officers and non-commissioned officers and their families, Dz.U. 1954, No. 41, item 181, Article 1 par.1.

[9] Decree of 14 August 1954 on pensions for disabled veterans and their families, Dz.U. 1954, No. 37, item. 159, Article 1.

[10] Dz.U. 1959, No. 12, item 70.

[11] Dz.U. 1954, No. 30, item 116, Article 1, paras 1–2.

[12] The Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02, Article 34, para. 1.

with the principles established in the EU law and national legislations and practices. Each state can deal with those issues taking into account their own conditions and tradition, and in compliance with international law.

The European Social Charter[13] (ESC) obliges states to maintain standards of social security at the level at least matching the requirements for the ratification of the International Labour Organisation Convention (No. 102) concerning the minimum standards of social security.[14] It also indicates the need to ensure equal treatment of citizens in this area. In Poland, the right to social security results from the provision of Article 67 Constitution of the Republic of Poland. Therefore, the process of enacting regulations developing the system of social security should take into account the above provisions.

The social security system in Poland is based on the principle of social solidarity. Solidarity assumes that the unity of interests should surpass any property, class and social differences in the name of ethnic or state (sometimes human) solidarity.[15] It is expressed in solidarity, meaning assistance offered to others who, for natural reasons, cannot manage and need other people's help. It is a clear and unquestionable imperative resulting from the output of nations' culture as well as international law. The issue of solidarity refers to the obligation, burden, individual contribution and joint effort and not to the division of pecuniary or in-kind benefits. This is how the principle of solidarity laid down in the Preamble to the Constitution as "the obligation of solidarity with others" should be interpreted.[16] The quoted scholar indicates that the principle of solidarity requires the application of balanced contribution and just compensation (with no abuse of benefits), maintaining proportionality of contribution and benefits.

The unfunded[17] (pay-as-you-go) pension system functions in the majority of the European states. It is based on the adoption of a social agreement arrangement consisting in the collection of obligatory social insurance contributions from current employees and keeping them not in individual employees' accounts but in a devoted state fund from which current old age and disability pensioners are paid benefits.

Contemporary governments are formed and function based on and within the limits of the law. The state and law constitute an instrument of one's governance of others. The state is also a type of governing machinery that has its own separated apparatus of coercion.[18] The role of that broadly understood apparatus of coercion is to ensure the implementation of legal norms established by the state. That is why, the above-mentioned reasons may justify the existence of some inequalities in the social security system.

---

[13] The European Social Charter drafted in Turin on 18 October 1961, Dz.U. 1999, No. 8, item 67, Article 12.

[14] ILO Convention No. 102 MOP on the social security minimum standards, adopted on 28 June 1952 and ratified by Poland on 21 August 2003 in Article 26 determines the age of 65 as retirement age.

[15] H. Olszewski, *Historia doktryn politycznych i prawnych*, Państwowe Wydawnictwo Naukowe, Warszawa–Poznań 1976, p. 398.

[16] J. Jończyk, *Prawo zabezpieczenia społecznego*, Zakamycze, Kraków, 2006, pp. 39–40 et seq.

[17] The unfunded system means the distribution of goods by the state.

[18] H. Olszewski, *supra* n. 15, p. 290.

Social security is the right to benefits financed from public funds and awarded also in situations that are not based on labour (professional activity) but only based on recognition of a particular need by law or merits by a state body. Pension plans for people involved in services for the state constitute a special form of benefits. In Poland they currently cover, inter alia, militarised services: professional soldiers, police officers, border guard officers, prison warders and fire fighters.[19]

The right to earlier retirement benefits, recognised as privileges especially in relation to uniformed services, is justified by the risk or danger to the health and life of soldiers, fire fighters, police officers, etc. The privileges granted are also justified by their special role, position and responsibility in society.[20] But is this argumentation sufficient to separate many of the above listed groups from the common social security system and to develop separate regulations for them? I believe that it is not and there should be a uniform and coherent system of social security covering all people obtaining income from work.

Privileged groups are well organised and have a strong social position. Thus, it is in the interest of the political class to very thoughtfully limit those privileges, due to social support and consequences of potential conflicts. Loyalty of those professional groups and services and the limitation of their dissatisfaction must cost and are connected with the necessity of increasing the burdens of privileges. The costs of privileges in current conditions exceed the financial possibilities of the state and force the introduction of particular changes. The above-presented conclusions indicate that the costs of social insurance burden first of all those who are insured and the state budget because it has to subsidise Fundusz Ubezpieczeń Społecznych (Social Insurance Fund, FUS). This means that the costs of benefits paid because of illnesses, old age, disability, etc. are incurred by all the insured, and people who do not share the burden of contributions to the FUS also obtain benefits.

The common social insurance system, in spite of the changes introduced by the Act of 13 October1998 on the social insurance system[21] and the Act of 17 December 1998 on old age and disability pensions from the Social Insurance Fund[22], still does not cover many privileged professional groups, including uniformed services, judges and prosecutors, miners and farmers, regardless of the initial assumptions to develop a uniform universal social insurance system.

Justice means honesty and constitutes the material binding of civil society. Thus, justice should mean that everyone is treated equally, unless there is a very serious reason for unequal treatment.[23] In accordance with Article 32 Constitution:

---

[19] W. Muszalski, *Prawo socjalne*, Wydawnictwo Prawnicze PWN, Warszawa, 2012, pp. 98–99.

[20] S. Golinowska, *Funkcje państwa w zabezpieczeniu dochodów na okres starości. Zmiana warunków i paradygmatu na przykładzie polskiej reformy systemu emerytalnego*, [in:] K.W. Frieske, E. Przychodaj (eds), *Ubezpieczenia społeczne w procesie zmian. 80 lat Zakładu Ubezpieczeń Społecznych*, Instytut Pracy i Spraw Socjalnych and Zakład Ubezpieczeń Społecznych, Warszawa 2014, p. 91.

[21] Consolidated text, Dz.U. 1998, No. 137, item 887, Article 6, para. 1.

[22] Consolidated text, Dz.U. 1998, No. 162, item 1118.

[23] Ch. Handy, *Wiek paradoksu. W poszukiwaniu sensu przyszłości*, (transl.) L. Jesień, Dom Wydawniczy ABC, Warszawa, 1996, p. 47.

"All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever."

In its numerous judgments, the Constitutional Tribunal (CT) explained the constitutional conception of justice and equality as a principle of equal treatment of all people who are in the same situation[24] and indicated that it depends on the system of norms and values existing in the given community, thus it is subject to historical and class-related conditions. The concept of justice as a generally superior one serves the assessment of grounds for social differences. If there are unjust differences in the distribution of goods and, as a result, the division between people, then the differences are recognised as inequality. As far as the right to old age and disability pensions is concerned, the Tribunal indicated that "the principle of social justice as a rule of constitutional law justifies such differentiation of the employees' right to old age and disability pensions which results from labour input (measured in terms of remuneration in accordance with Article 68 Constitution) and the resulting amount of contribution to the social insurance system as well as the tenure of employment".[25] It also recommended taking into account equality in the context of differentiation of entities so that the features of injustice are not created.

2. NORMATIVE GROUNDS FOR THE INSURANCE SYSTEM

A radical reform of the social insurance system carried out by means of the Act of 13 October 1998 on the social insurance system[26] incorporated the uniformed services into the common social insurance system, regardless of the type of work or service, which should be approved of because of the interest of all the employed. The Act linked the obligatory common social insurance with the provision of labour and constituted the expression of equal treatment of almost all the insured obtaining income from work. The level of pension was to depend, inter alia, on the raised capital. The provisions of the social security system were amended dozens of times. The Act of 23 July 2003 amending the social insurance system and some other acts separated uniformed services from the common system again.

The Act of 11 May 2012 amending the Act on old age and disability pensions from the Social Insurance Fund and some other acts[27] ruined the existing model and increased the retirement age to 65 years for both genders, men and women, which was to be gradually raised until 2040 for women and until 2020 for men. The changes were motivated by the financial situation of the state and economic, economical and demographic reasons: inter alia, the need to stop the decrease in employment and to maintain the growth in GDP and tax revenues obtained from businesses.

---

[24] CT judgment of 9 March 1988, U 7/87, CT judgment of 22 June 1999, K 5/99.
[25] CT judgment of 22 August 1990, K. 7/90.
[26] Consolidated text, Dz.U. 1998, No. 137, item 887, Article 6 par.1.
[27] Consolidated text, Dz.U. 2012, item 637.

The method of introducing those regulations and motives raised serious objections of scientific circles, social organisations and trade unions. The employees at the pre-retirement age suffered from the change of the retirement age most. The opponents of the adopted solutions claimed before CT[28] that the 2012 amendment's provisions were in conflict with the Constitution and accused the legislator of the infringement of Article 20 Constitution due to inappropriate process of enactment, inter alia, by the lack of social consultation and public hearing, and no nationwide referendum on the issue. In response, the Tribunal indicated that Article 20 Constitution does not lay down the obligation to consult about every statute (normative act) amendment and looking at the process of developing and enacting the 2012 amendment, it is in compliance with the concept of majoritarian and not consensus democracy. It is hard to agree with the Tribunal's stance, due to the extremely important interest of millions of people who are subject to the social security system and vitally interested in its rational and just way of functioning. The CT judges who reported dissenting opinions referred to the provisions of Articles 1, 2, 32 and 84 Constitution and indicated the models and obligations of the legislator such as social justice, harmony between communities and people, equal treatment of citizens by the authorities of the Republic of Poland and equal burdens imposed on the citizens.

They emphasised that public authorities should:

– develop and implement systemic solutions and refrain from individual inadequate imposition of burdens on selected social groups and maintaining privileges for many other social groups at the same time;
– equalise burdens and take into account the specificity of legal and non-legal situation of particular social and professional groups;
– absolutely treat equally communities and citizens by appropriately determined burdens for the benefit of common interest.

Taking into account the importance of the discussed regulations and international legal acts referred to herein, it is necessary to agree with the opinions of judges expressed in dissents from the CT judgment of 7 May 2014, K 43/12, that the specification of retirement age should not be allowed by means of standard legislation. The lack of constitutional guarantees limiting the freedom to amend important regulations by means of standard legislation makes it possible to introduce further changes under the influence of current budgetary needs and not necessarily in the interest of all people. Acts on key issues concerning, inter alia, the right to retirement should absolutely be subject to broad social consultation and the qualified majority of the vote in the Parliament should be required to pass them so that the parliamentary majority could not freely shape the rights that are so important for the whole community.

The Act of 16 November 2016 amending the Act on old age and disability pensions from the Social Insurance Fund and some other acts,[29] with the use of Article 1, introduces changes in Article 24 of the Act of 17 December 1998 on old

[28] CT judgment of 7 May 2014, K 43/12.
[29] Dz.U. 2017, item 38.

age and disability pensions from the Social Insurance Fund,[30] which consist in the decrease of the retirement age. Under Article 31 of the Act referred to, the provisions specifying the retirement age entered into force on 1 October 2017. The insured born before 31 December 1948 are entitled to a pension the moment they are 60 in the case of women and at least 65 in the case of men.

The legislator's conduct in relation to both the statute introducing the increased retirement age and next the statute decreasing it to the original level undoubtedly undermines the citizens' trust in the state ruled by law and proves that there is no clear vision of how to build a coherent social security system.

A rational social security system should be self-sufficient and constructed in such a way that the revenue from obligatory social insurance contributions could balance the costs incurred in connection with benefits paid. The relationship between earnings from labour and insurance should be maintained. This means that everyone, regardless of the type of employment relationship, should be subject to obligatory universal social insurance for which they should pay contributions to the system based on remuneration, regardless of the type of employment.

To illustrate the issue, in the further part of the article, the author presents examples of privileged professional groups, especially in the field of retirement rights, and some entitlements recognised as privileges in relation to the majority of employees. However, the author's conclusions and the examples presented are not aimed at criticising the appreciation of people working in conditions that are especially hard and harmful to health.

3. UNIFORMED SERVICES

Until 1998, the social insurance system did not cover professional soldiers and uniformed services officers. Uniformed services were subject to a separate pension scheme. The Act of 13 October 1998 on the social insurance system[31] incorporated uniformed services into the common social insurance system. Next, the Act of 23 July 2003 amending the Act on the social insurance system and some other acts[32] excluded them from this system and all the soldiers and uniformed services officers were covered by a separate pension scheme again. This means that since 1 October 2003, professional soldiers and uniformed services officers are not obliged to pay contributions to the social insurance system.

In the justification for the Act of 23 July 2003, it was argued that all social partners (mainly trade unions of professional soldiers and uniformed services officers sent their opinions on the bill) obviously expressed positive opinions about the proposal of a separate pension scheme for professional soldiers and other officers. The new separated system should support the stability and efficiency of uniformed services. It is hard to accept such reasoning taking into account, inter alia, the organisational

[30] Consolidated text, Dz.U. 1998, No. 162, item 1118.
[31] Dz.U. 1998, No. 137, item 887, Article 6 para. 1.
[32] Dz.U. 2003, No. 166, item 1609.

and legal costs connected with the calculation and payment of benefits to each privileged group instead of one specialised institution, e.g. the Social Insurance Institution (ZUS). Referring to the reform of the 1998 insurance system, scientists expressed different opinions about the retirement privileges but unambiguously stated that "the reflection and regret about such decisions as the exemption of uniformed services from the common system, the exclusion of miners, and delaying the elimination of privileges came too late".[33]

In accordance with the Act of 10 December 1993 on pensions for professional soldiers and their families,[34] professional soldiers dismissed from service are entitled to a pension paid from the state budget based on the tenure of service or disability to serve and members of their families in the case of a beadwinner's death. A professional soldier dismissed from service has the right to a pension after 15 years of service in the Polish Armed Forces, calculated as a sum of the period of military service in the Armed Forces and periods equivalent to this service. This means that the rights resulting from this wording are also applicable to persons involved in activities equivalent to service in the Armed Forces, i.e., inter alia, veterans, the oppressed activists, members of underground organisations, etc.

The Act of 18 February 1994 on pensions for the Police, the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Agency, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Sejm Marshal Guard, the State Protection Service, the State Fire Brigade, the Customs-Fiscal Service and the Prison Service officers and their families[35] introduces new principles of obtaining retirement rights as well as new groups of privileged officers of the Sejm Marshal Guard and the Customs-Fiscal Service. Namely, persons who joined the services after 31 December 2012 shall have the retirement rights after the age of 55 and at least 25 years of service. Those who joined the services before 31 December 2012, i.e. a group of 400,000 persons, maintained their former retirement privileges based on the principle of acquired rights.

The principle of the protection of acquired rights, according CT,[36] concerns the rights already granted to particular persons and regardless of the fact whether the rights were acquired based on an individual act issued by the authorities or based on the statute (the moment particular requirements have been met). It is worth noticing that the legislator specified the rights of the insured in the common retirement system differently and the right of persons who are subject to the pension scheme differently. Such an approach of the legislator may raise the sense of injustice and infringement of the rules of social coexistence.

In accordance with Article 5 of the Civil Code, one cannot make use of their right in the way that is in conflict with social and economic purpose of that right or the principles of social coexistence. Such an activity or omission of the entitled

---

[33] M. Góra, *Reforma reformy emerytalnej?* E. Dąbrowska-Nowacka (ed.), Instytut Badań nad Gospodarką Rynkową and AXA Powszechne Towarzystwo Emerytalne S.A., Warszawa, 2011, p. 20.

[34] Consolidated text, Dz.U. 1994, No. 10, item 36, Article 1, Article 12.

[35] Consolidated text, Dz.U. 1994, No. 53, item 214, Article 12.

[36] CT judgment of 10 April 2006, SK 30/04.

person is not recognised as exercising the right and is not subject to protection. The principles of social coexistence, although they do not have a definition and belong to general clauses, they nevertheless allow connecting the provisions of law with the contemporariness of everyday life, the rules of decorum and socially accepted norms and values. Differentiating the citizens' rights to retirement depending on their professional or social status may be recognised as the infringement of the principles of social justice. According to CT,[37] "the rules of social coexistence" constitute the equivalent of "good will" or "rightness". The activity consisting in obtaining unjustified benefits from the social insurance system at its other participants' expense is the infringement of the rules of social coexistence.[38] In this context, it is hard to agree with the opinion of the Court of Appeal in Warsaw, which stated that "in cases concerning social benefits, the rules of social coexistence are not applicable, and they are replaced by the system of decisions taken by pension administration bodies and issued at their discretion".[39] It is also worth indicating that in spite of the separateness of statutes on pensions for professional soldiers and their families and for officers of other uniformed services, the content of those statutes and the catalogue of privileges are very similar.

The table below illustrates the difference in age and work tenure of the uniformed officers that entitle them to earlier retirement in selected countries.

Officers of the former Eastern Bloc maintained their retirement privileges obtained in the former times, regardless of the political transformation of the 1980s and 1990s and many systemic reforms as well as Poland's accession to the European Union in 2004.

As a result of a serious crisis in the social security system, Polish authorities noticed the problem connected with the above-presented inequalities in rights and costs of them, and introduced amendments to the regulations based on which the newly employed officers shall be subject to new retirement rules. However, it is worth mentioning that officers employed before 1 January 2013 shall maintain their former privileges. Still, the above rules did not cover employees insured in the common social insurance system before the Act of 11 May 2012 amending the Act on old age and disability pensions from the Social Insurance Fund and some other acts entered into force.[40]

Most of the European Union states determine a very similar common minimum retirement age above the age of 50 and the service tenure that entitle one to obtain retirement rights. In the author's opinion, there are no rational arguments for granting persons employed in the uniformed services in Poland the rights that are different from those commonly applied. An officer's retirement after 15 years of service, potentially at the age of 36, constitutes an exception in Europe.

Employees who were insured in the common social insurance system before the Act on the increase in the retirement age of 11 May 2012 entered into force

---

[37] CT judgment of 17 October 2000, SK 5/99.

[38] The Supreme Court judgment of 9 August 2005, III UK 89/05.

[39] Judgment of the Court of Appeal in Warsaw of 29 April 1997, III AUa 364/97, Apel. W-wa 1997, No. 3, item 15.

[40] Consolidated text, Dz.U. 2012, item 637.

were not subject to the protection of the acquired rights. As it has been mentioned, the original retirement age was again maintained only in relation to selected professional groups, which also becomes a topic of many journalistic opinions.[41] The retirement (pension) system financed from the state budget and not from insurance contributions burdens the state budget, mainly the insured in the Social Insurance Fund.

Table 1. Requirements for obtaining retirement rights by officers

	Age	Years of work/service
Poland*	-	15
Belarus	-	20–25
Lithuania	40–50	20
Bulgaria	-	25
Hungary	50	25
Germany	60–65	50–55
Austria	65	20
France	50–60	25
Spain	60–65	30
The Netherlands	60–65	
Belgium	56–65	
Greece	60–65	15–25
Portugal	60	36
The United Kingdom	55	25

* Consolidated text, Dz.U. 1994, No. 53, item 214.

Source: http://isp.policja.pl/isp/aktualnosci/338,Emerytury-policyjne-w-Europie.html (accessed 10.09.2018).

Most adult Poles (80% in 2012 and 61% in 2011) supported the need to change the pension system for the uniformed services that would incorporate soldiers, police officers and officers of other services into the common retirement system.[42] A call for the abolition of retirement privileges for employees of the uniformed services and

[41] Source: http://wyborcza.pl/1,155290,14182124,Koniec_swietych_krow__Policjanci__gornicy__rolnicy.html (accessed 12.09.2018).

[42] *Opinie o planowanych zmianach w systemie emerytalnym*, BS/77/2012, Fundacja Centrum Badania Opinii Społecznej, Warszawa, 2012.

including them in the common pension scheme is a growing trend.[43] Most current and retired officers of the uniformed services who took part in a survey were against changes in the system of pensions for uniformed services.[44] The number of those who would like to be privileged is growing. Recently, as it has been mentioned above, the Customs-Fiscal Service and the Sejm Marshal Guard were added to the catalogue but it is quite possible that some other uniformed services whose officers have the status of public officers, e.g. the State Forest Guard, the State Fishery Guard or municipal police forces, will also demand such privileges soon.

Soldiers and uniformed services have the privileged pension systems. The acquisition of retirement rights as well as the level of benefits paid within the pension scheme for professional soldiers and uniformed services officers are much more favourable than those in the Social Insurance Fund. Pensions within those privileged schemes are paid from the state budget and pensions paid from the FUS burden the insured. The analysis of costs is presented in Part 2 in the subchapter discussing the costs of privileges. The privileged pension scheme for the uniformed services does not lay down an obligation to pay contributions deducted from remuneration, which should be recognised as a symptom of a pathological system of social security, for which there are no rational grounds or social support. Pensions should be paid only from the collected contributions and partially depend on them. It is worth indicating that a considerable number of privileged pensioners get retirement benefits even before they are at the age of 40. Taking into account that they were educated and trained for many years at the expense of the community, one can comment that the state wastes human capital and experience (uniformed services officers and soldiers).

4. SOCIAL INSURANCE FOR THE CLERGY

Social insurance for the clergy constitutes another example of separate regulations. Separate Act of 17 May 1989 on social insurance for the clergy[45] applies to 55,000[46] clergymen[47]. The separateness consists in statutory differentiation but also the rules of calculating and paying insurance contributions. The introduction of the subject of religion to schools[48] in accordance with Instruction of the Minister of National Education of 3 August 1990 resulted in granting clergymen the status of teachers who are subject to insurance regulations laid down in the Teachers' Charter (TC).

---

[43] *Opinie o planowanych zmianach w systemie emerytalnym*, BS/14/2011, Fundacja Centrum Badania Opinii Społecznej, Warszawa, 2011.

[44] *Opinie o planowanych zmianach*, 2012, *supra* n. 42.

[45] Dz.U. 1989, No. 29, item 156.

[46] *Rocznik statystyczny RP*, GUS, 2016.

[47] Act of 13 October 1998 on the social insurance system, Article 8 para. 13, consolidated text, Dz.U. 1998, No. 137, item 887.

[48] Regulation of the Minister of National Education of 14 April 1992 on the conditions and methods of the organisation of teaching religion in public kindergartens and schools, Dz.U. 1992, No. 36, item 155.

In accordance with the Act of 13 October 1998 on the social insurance system,[49] clergymen were incorporated into the common insurance system. The system of calculating insurance contributions was separately determined and laid down in Article 16 para. 10a of the statute. In general, the contributions are paid by the Church Fund founded by the state budget in accordance with the Act of 20 March 1950 on the appropriation of the Church real property, guaranteeing the possession of farms by rectors and founding the Church Fund[50] covering the payments between the State and the Catholic Church in Poland as well as based on the Regulation of the Council of Ministers of 23 August 1990 concerning the extension of the scope of aims of the Church Fund.[51]

Persons who have the status of clergymen in Poland are subject to the obligatory old age and disability pension insurance and accident insurance, and the voluntary healthcare insurance. There are no uniform pension rules for the clergy. Clergymen belong to both the state pension scheme and the church pension system. The state pension scheme covers clergymen who are obligatorily insured within the FUS as a result of income they obtain from labour. The age giving the right to retirement results from the current statutory regulations.[52] It is worth indicating that a clergyman is also subject to canon law, which regulates the issue of age differently[53] than the provisions of the Act on old age and disability pensions from the Social Insurance Fund.

The insurance of clergymen based on the above-mentioned provisions does not apply to clergymen who have the status of a teacher or a soldier. They are subject to the common insurance system and the insurance contribution for them is paid by the employer or from the state budget in accordance with general rules. Contribution to old age pension insurance, disability pension insurance and accident insurance for contemplative enclosed orders and missionaries (in the period of work on missions) are fully (100%) financed from the Church Fund. Contributions for old age pension insurance, disability pension insurance and accident insurance for the remaining clergymen are paid by them (20%) and by the Church Fund (80%).

There are suggestions made in public space that the Church Fund should be liquidated and the social insurance contribution for clergymen should be financed by the Church institutions. The tool and measures of financing the costs of the Church would be the worshippers' tax deducted at a fixed level (0.5–1.0%) from the tax established in the PIT return. However, such initiatives have not been changed into particular legal regulations. The retirement age for clergymen as well as the issue of paying the social insurance contribution for the clergy do not result from uniform legal regulations and may constitute a belief that clergymen hold a privileged position in the field of calculating and the level of contribution as well as the method of calculating and paying pensions.

---

[49] Consolidated text, Dz.U. 1998, No. 137, item 887.

[50] Dz.U. 1950, No. 9, item 87.

[51] Dz.U. 1990, No. 61, item 354.

[52] Act of 16 November 2016 amending the Act on old age and disability pensions from the Social Insurance Fund and some other acts, consolidated text, Dz.U. 2017, item 38.

[53] See Code of Canon Law, Can. 538 § 3, Can. 401 § 1.

5. MINERS' PRIVILEGES

Although miners' privileges are often subject to criticism,[54] analyses and publications, the issue still remains controversial. The right to a miner's pension laid down in the Act of 17 December 1998 on old age and disability pensions from the Social Insurance Fund,[55] in spite of many amendments,[56] still covers a considerable group of privileged people. The mining sector, due to numerous fringe benefits (inter alia the 14th salary, coal allowance and transportation benefit) constitutes an example of inequality between professional groups. Formally, the employer incurs the costs. Thus, if a company has profits, it can pay employees bonuses and awards. However, if coal mines generate a loss and, regardless of that, pay employees bonuses and awards, such an activity should be recognised as being in conflict with the rules of market economy, including equality and social justice, especially if we take into account the fact that coal mines obtain subsidies from the state budget. Employees within other professional groups are not offered such privileges and must follow commonly binding rules of the market.

With the Regulation of the Council of Ministers of 30 December 1981 concerning special privileges given to the mining sector employees: the Miners' Charter,[57] the state gave the whole mining sector a wide range of privileges of honour, pay, working time, time off, social benefits and pensions, and not only the miners of coal, sand, salt, ore, noble metals, clays, barite, anhydrite, caoline, magnesite, gypsum, dolomite, quartzite and sulphur but also companies and entities providing the mining sector with services, including the state inspectorates, authorities and scientific, research and project centres. The above-mentioned mining employees are also entitled to special privileges of earlier retirement and other types resulting from the above-mentioned Miners' Charter.

A miner's work conditions underground are especially dangerous, arduous and harmful to health and, that is why, their earlier retirement should be recognised as justified. However, the system of remuneration and entitlements in mining should be rational and based on economic rules. The pension amount should depend on the tenure of work, the remuneration paid in a given period, the capital raised in the social insurance account and the age of the retiring miner. The above-mentioned Act of 17 December 1998 on old age and disability pensions from the Social Insurance Fund lays down a series of limitations in the rights to earlier retirement, inter alia, applicable to miners. There is still a lack of a comprehensive conception how to make the whole system uniform.

---

[54] Example, source: http://www.rp.pl/artykul/1017179-Ocaleje-emerytalny-raj.html#ap-1; http://www.money.pl/emerytury/raporty/artykul/tysiac;zlotych;rocznie;dopla casz;do;emerytur;rolnikow;gornikow;mundurowych;,71,0,688455.html; http://wyborcza.biz/biznes/1,149543,20823600,zus-skonczyc-z-przywilejami.html?disableRedirects=true (accessed 10.09.2018).

[55] Consolidated text, Dz.U. 1998, No. 162, item 1118, Article 50a, para. 1, Article 50b and the following.

[56] Dz.U. 2017, item 38.

[57] Dz.U. 1982, No. 2, item 13, § 17(1).

6. TEACHERS' PRIVILEGES

Teachers who met the requirements laid down in Article 88 of the Act of 26 January 1982: Teachers' Charter[58] for many years belonged to a professional group having the privilege of retiring at an earlier age. Teachers can also exercise other rights, which can be recognised as privileges both in accordance with the Teachers' Charter and other legal acts.[59] The provisions of the Act of 17 December 1998 on old age and disability pensions from the Social Insurance Fund[60] and the Teachers' Charter stipulate that a teacher's work shall be recognised as work of a special category and so teachers have been granted retirement privileges.

The Act of 16 November 2016 amending the Act on old age and disability pensions from the Social Insurance Fund and some other acts[61] lowered the retirement age from 1 October 2017 and it is now 60 years for women and 65 years for men. The repeal of the teachers' right to retire regardless of age in accordance with Article 88 Teachers' Charter made the legislator introduce another privilege, i.e. a compensatory benefit. Teachers' compensatory benefits are a type of pre-pension benefits financed from the state budget.[62] They are temporary and shall expire in 2032. The Act of 19 December 2008 on bridging pensions[63] for employees working in special conditions or holding special positions laid down bridging pensions for many professional groups, including some teachers.

Analysing compensatory benefits,[64] CT indicated that the system of compensatory benefits for teachers is inconsistent with the social insurance system. The Tribunal indicated that the Act on compensatory benefits for teachers introduced an additional group of privileged persons and granted them benefits that are not prescribed in the common social insurance system (they are not benefits obtained in connection with contributions paid) but are financed from the state budget. Compensatory benefits constitute a privilege for a selected group of the insured that has no rational grounds. The legislator notices the imbalance of the FUS budget and for years has striven to limit or eliminate privileges, which the above provisions confirm.

7. FARMERS' PRIVILEGES

Farmers are entitled to pensions pursuant to rules different from those applicable to other employees belonging to the common social insurance system. They are covered by a separate system called Kasa Rolniczego Ubezpieczenia Społecznego (KRUS).

---

58 Consolidated text, Dz.U. 1982, No. 3, item 19.

59 Regulation of the Minister of National Education and Sport of 28 January 2005 on additional remuneration benefits for appointed and diploma awarded teachers employed on posts requiring pedagogical qualifications, in the Central Examination Commission and regional examination commissions, Dz.U. 2005, No. 22, item 180.

60 Consolidated text, Dz.U. 1998, No. 162, item 1118, Article 32.

61 Consolidated text, Dz.U. 2017, item 38.

62 Act of 22 May 2009 on teachers' compensatory benefits, Dz.U. 2009, No. 97, item 800, Article 6.

63 Consolidated text, Dz.U. 2008, No. 237, item 1656.

64 Judgment of 26 June 2018, SK 32/17.

In accordance with the Act of 24 January 1968 on disability pensions and other benefits for farmers who convey their real property to the State Treasury,[65] a farm owner could, pursuant to the rules laid down in statute, convey all parts of their real estate constituting their farm of at least 5 hectares of arable land to the State Treasury. In return, the state ensured pecuniary benefits in accordance with the Act referred to above, provided the farmer was at least 40 years old or became disabled. Apart from the pecuniary benefit, the state also provided a farmer with a pension based on the provisions on the common pension system for employees and their families, when a farmer reached the retirement age (of 65 in the case of men and 60 in the case of women) or became disabled (Article 3 paras 1–2).

The next stage of changes in the pension system for farmers and their families took place during Edward Gierek's leadership. The provisions of the Act of 27 October 1977 on pensions and other benefits for farmers and their families[66] covered farmers and their families provided that, inter alia, they produced agricultural products and sold them to state-owned business entities. The base for the calculation of a pension was the average annual value of agricultural products the farmer sold to state-owned business entities in the period of five years of their farm cultivation before conveying it to a successor or the State Treasury (Article 5 para. 1). Both spouses had the right to a pension even if only one of them reached the retirement age (Article 9 para. 1), provided that they had made contributions to the Farmers' Pension Scheme. In such a situation, the Social Insurance Institution paid the benefits prescribed in the Act discussed. Due to the fact that the Act referred to covered a wide range of pecuniary and in-kind benefits for farmers, including pensions, extra retirement benefits and healthcare benefits, the Farmers' Old Age and Disability Pension Fund was founded and financed from farmers' contributions and subsidies from the state budget.

The new Act of 14 December 1082 on the social insurance of farmers and their families[67] substituted for the former provisions.[68] The resources retained in the Farmers' Pension Fund account were conveyed to the Farmers' Social Insurance Fund, which is at the Social Insurance Institution's disposal (Article 42 para. 1). This means that part of the benefits were financed from insurance contributions and part constituted social benefits financed from the budgetary resources.

Old age and disability pension insurance contributions paid by farmers are much lower than those which entrepreneurs and non-agricultural employees[69] pay. A farmer who cultivates a farm of up to 50 hectares currently pays a combined quarterly contribution[70] of PLN 390 for old age and disability pension insurance, accident insurance, health insurance and maternity insurance.

---

65 Dz.U. 1968, No. 3, item 15, Article 1 para. 1.

66 Dz.U. 1977, No. 32, item 140.

67 Consolidated text, Dz.U. 1989, No. 24, item 133.

68 Dz.U. 1977, No. 32, item 140.

69 Source: https://www.nik.gov.pl/aktualnosci/nik-o-funkcjonowaniu-krus.html (accessed 19.09.2018).

70 Source: https://www.krus.gov.pl/krus/krus-w-liczbach/wymiar-kwartalnych-skladek-na-ubezpieczenie-spoleczne-rolnikow/ (accessed 19.09.2018).

The number of the KRUS beneficiaries and people who are subject to social insurance of farmers in the period 1991–2015 is illustrated in the table below.

Table 2. Number of beneficiaries and persons insured in KRUS

Year	Number of KRUS beneficiaries	Number of persons insured in KRUS
1991	1,790,640	1,750,000
2000	1,887,258	1,452,368
2005	1,661,800	1,581,929
2010	1,374,647	1,535,461
2015	1,203,200	1,375,462
2016	1,194,415	1,335,198
2017	1,175,305	1,270,525

Source: http://www.krus.gov.pl/krus/krus-w-liczbach/zestawienie-liczby-swiadczeniobiorcow-krus-i-osob-objetych-ubezpieczeniem-spolecznym-rolnikow-w-latach-1991-2014/ (accessed 19.09.2018); *Rocznik statystyczny RP*, GUS, 2018.

The analysis of the presented data indicates that the number of the KRUS beneficiaries is very big in relation to the insured and that in 2005 the number of beneficiaries considerably exceeded the number of the insured, which does not, of course, remain without influence on the condition of the social security system.

The KRUS Farmers' Social Insurance Fund was founded by the Act of 20 December 1990 on the social insurance of farmers.[71] It established the separateness of farmers' insurance. At the same time, farmers' insurance was organised in the way similar to employees' insurance as far as the rights and benefits are concerned. Contributions to the KRUS are symbolic and farmers' benefits are actually lower than those of the employees but high in relation to contributions. A big part of farmers' pensions are financed from the state budget, which is a feature of a benefit system rather than an insurance system.

The Constitutional Tribunal[72] also analysed the issue of the insured farmers' co-participation in financing the insurance system and indicated the need to take into account the economic situation and financial possibilities of the participants of the insurance system financed from public funds, both the contribution payers as well as the state budget participating in financing the system. On the other hand, the Ombudsman rightly indicated the lack of justification for financing insurance contributions for, sometimes, very rich people from the state budget only because they are farmers. Those farmers should be treated in the same way as other insured employees who obtain income from labour, i.e. they should make common obligatory contributions.

[71] Consolidated text, Dz.U. 2016, item 277.
[72] Judgment of 26 October 2010, K 58/07.

The basic function of farmers' social insurance is a social one and it aims to mitigate the effects of the agrarian unemployment at the state budget's expense because it results from the principles of social solidarity, which are referred to in the Preamble to the Constitution.[73] Such an opinion was right in the period of the political transformation in Poland but the current situation on the labour market, also the agrarian one, is totally different. The majority of farmers are entrepreneurs who obtain income often exceeding the income of people involved in business activities and are additionally subsidised by the EU, but pay insurance contributions at the level of 10% in relation to a sole trader (cobbler, barber, tailor) and incomparably lower than workers who are paid remuneration for labour. The regulations that differentiate entities on the market may result in the feeling of inequality, injustice and even unfair competition.

The provisions regulating farmers' social insurance are based on income but the factors should not constitute the justification for their privileges, at least due to the fact that entrepreneurs who do not obtain income nevertheless have to pay social insurance contributions laid down in statute. Therefore, the income-related argument does not seem to be convincing.

Scholars have criticised the current social security system many times. They have indicated that the farmers' social insurance system needs far-reaching changes and that social insurance in Poland needs far-reaching changes consisting in the consolidation of the whole social security system,[74] however, with no considerable effects because of the political circumstances.

From 1 October 2017, based on the new wording of Article 19 para. 1 of the Act of 20 December 1990 on farmers' social insurance,[75] the retirement age for women shall be 60 and for men 65. The legislator, in the circumstances laid down in Article 19 para. 2 of the statute, gave farmers the right to retire at an earlier age. However, the law stipulates that the privilege should gradually expire. According to 82% of Poles surveyed, farmers should pay pension contributions in the same way as other employees, i.e. calculated based on their income.[76] The above circumstances indicate the need of a holistic look at the issue of farmers' costs and income, the financing of social insurance contributions and the payment of benefits to farmers.

---

[73] J. Jończyk, *supra* n. 16, p. 240.

[74] J. Hrynkiewicz, *Opinia o projekcie ustawy o zmianie ustawy o ubezpieczeniu społecznym rolników i ustawy o działach administracji rządowej (druk sejmowy nr 193)*, Opinie i Ekspertyzy No. 44, Uniwersytet Warszawski 2006, downloaded from the website http://ww2.senat.pl/k6/dok/opinia/2006/007/oe44.pdf (accessed 5.10.2018); M. Krajewski, *Wygaszanie ubezpieczenia społecznego rolników jako optymalna metoda jego reformy*, [in:] M. Czuryk, K. Naumowicz (eds), *Prawo ubezpieczeń społecznych. Wybrane problemy*, E-seria Monografie Wydziału Prawa i Administracji UWM w Olsztynie, Olsztyn, 2016; E. Bojanowska, J. Hryniewicz, *Ubezpieczenie społeczne rolników. Zmiana czy kontynuacja?* [in:] J. Hryniewicz (ed.), *Ubezpieczenie społeczne. 10 lat reformowania*, Warszawa 2011; H. Pławucka, *Obowiązek ubezpieczenia społecznego rolników,* Ubezpieczenia Społeczne. Teoria i Praktyka No. 3/2016, Wyd. ZUS, Warszawa, 2016, pp. 180–184; W. Nagel, *Wydolność finansowa funduszu emerytalnego FUS w prognozie. Zalecenia Białej Księgi Komisji Europejskiej*, Ubezpieczenia w Rolnictwie Materiały i Studia No. 46, Wyd. Kasa Rolniczego Ubezpieczenia Społecznego, Warszawa 2012, p. 32 et seq.

[75] Consolidated text, Dz.U. 1991, No. 7, item 24.

[76] *Opinie o planowanych zmianach,* 2011, *supra* n. 43.

8. CONCLUSION

The analysis of the presented legal regulations and scholars' opinions concerning the rights to retirement for the above-mentioned professional groups allows answering the main question of this article and stating that the privileged retirement rights of the selected professional groups do not have any rational justification in the context of the principles laid down in Articles 2, 32 and 84 of the Constitution of the Republic of Poland.

Further analysis of the officials and public officers' privileges based on gender, work in conditions that are arduous and harmful to health as well as the costs of privileges in the social security system together with the conclusions of Part 1 and Part 2 are presented in Part 2.

BIBLIOGRAPHY

Bojanowska E., Hryniewicz J., *Ubezpieczenie społeczne rolników. Zmiana czy kontynuacja?* [in:] J. Hryniewicz (ed.), *Ubezpieczenie społeczne. 10 lat reformowania*, Warszawa 2011.

Golinowska S., *Funkcje państwa w zabezpieczeniu dochodów na okres starości. Zmiana warunków i paradygmatu na przykładzie polskiej reformy systemu emerytalnego*, [in:] K.W. Frieske, E. Przychodaj (eds), *Ubezpieczenia społeczne w procesie zmian. 80 lat Zakładu Ubezpieczeń Społecznych*, Instytut Pracy i Spraw Socjalnych and Zakład Ubezpieczeń Społecznych, Warszawa 2014.

Góra M., *Reforma reformy emerytalnej?* E. Dąbrowska-Nowacka (ed.), Instytut Badań nad Gospodarką Rynkową and AXA Powszechne Towarzystwo Emerytalne S.A., Warszawa, 2011.

Handy Ch., *Wiek paradoksu. W poszukiwaniu sensu przyszłości*, (transl.) L. Jesień, Dom wydawniczy ABC, Warszawa, 1996.

Hrynkiewicz J., *Opinia o projekcie ustawy o zmianie ustawy o ubezpieczeniu społecznym rolników i ustawy o działach administracji rządowej (druk sejmowy nr 193)*, Opinie i Ekspertyzy No. 44, Uniwersytet Warszawski 2006.

Jończyk J., *Prawo zabezpieczenia społecznego*, Zakamycze, Kraków, 2006.

Krajewski M., *Wygaszanie ubezpieczenia społecznego rolników jako optymalna metoda jego reformy*, [in:] M. Czuryk, K. Naumowicz (eds), *Prawo ubezpieczeń społecznych. Wybrane problemy*, E-seria Monografie, Wydziału Prawa i Administracji UWM w Olsztynie, Olsztyn, 2016.

Muszalski W., *Prawo Socjalne*, Wydawnictwo Prawnicze PWN, Warszawa, 2012.

Nagel W., *Wydolność finansowa funduszu emerytalnego FUS w prognozie. Zalecenia Białej Księgi Komisji Europejskiej*, Ubezpieczenia w rolnictwie. Materiały i Studia No. 46, Wyd. Kasa Rolniczego Ubezpieczenia Społecznego, Warszawa 2012.

Olszewski H., *Historia Doktryn Politycznych i Prawnych*, Państwowe Wydawnictwo Naukowe, Warszawa–Poznań 1976.

Pławucka H., *Obowiązek ubezpieczenia społecznego rolników*, Ubezpieczenia Społeczne. Teoria i praktyka No. 3/2016, Wyd. ZUS, Warszawa, 2016.

Przybyłka A., *Przywileje związane z pracą w górnictwie – dawniej i dziś*, [in:] D. Kotlorz (ed.), *Dylematy współczesnego rynku pracy*, Studia Ekonomiczne. Zeszyty Naukowe Wydziałowe Uniwersytetu Ekonomicznego w Katowicach, Katowice, 2011.

Szpor G. (ed), *System Ubezpieczeń Społecznych. Zagadnienia podstawowe*, 3rd edn, Wydawnictwo Prawnicze LexisNexis, Warszawa 2006.

ISSUE OF PRIVILEGES IN THE SOCIAL SECURITY SYSTEM. PART 1

Summary

The author illustrates the problems of privileges for selected professional groups, which entitle them, inter alia, to early retirement, based on legal regulations. The purpose of the article is, in particular, to answer the main research question: Are the privileged pension rights for selected professional groups justified in the context of the principles set out in the Constitution of the Republic of Poland? The aim is also to demonstrate that such a wide range of privileges releasing selected professional groups from the obligation to pay insurance premiums and entitling them to early retirement are very costly and destructive factors for the entire system and for all the insured in the common pension system. The conclusions of the study present the author's views that suggest the elimination of the majority of privileges and the development of a universal, uniform and coherent model of social security system covering all professional groups. Only particularly burdensome or harmful working conditions, significantly affecting health, could constitute an exception in this area.

Keywords**:** pensions, officer, cost, privilege, pension scheme, social security system, benefits, social insurance

PROBLEMATYKA PRZYWILEJÓW W SYSTEMIE ZABEZPIECZENIA SPOŁECZNEGO. CZĘŚĆ I

Streszczenie

Autor obrazuje problematykę przywilejów dla wybranych grup zawodowych, uprawniających m.in. do wcześniejszej emerytury, na podstawie powoływanych regulacji prawnych. Celem artykułu jest w szczególności udzielenie odpowiedzi na główne pytanie badawcze, czy uprzywilejowane uprawnienia emerytalne dla wybranych grup zawodowych mają uzasadnienie w kontekście zasad określonych w konstytucji RP? Celem jest także wykazanie, że tak obszerny zakres przywilejów polegających na zwolnieniu wybranych grup zawodowych z obowiązku opłacania składek na ubezpieczenie i uprawniających do wcześniejszej emerytury to czynniki bardzo kosztowne i destrukcyjne dla całego systemu i dla ogółu ubezpieczonych w powszechnym systemie emerytalnym. W konkluzjach opracowania przedstawiono zapatrywania autora skłaniające do likwidacji większości powoływanych przywilejów i zbudowania powszechnego, jednolitego i spójnego modelu systemu zabezpieczenia społecznego, obejmującego wszystkie grupy zawodowe. Wyjątek w tym zakresie mogłyby stanowić jedynie szczególnie uciążliwe lub szkodliwe warunki pracy, znacząco wpływające na utratę zdrowia.

Słowa kluczowe: emerytury, funkcjonariusz, koszt, przywilej, system emerytalny, system zabezpieczenia społecznego, świadczenia, ubezpieczenie, społeczne

PROBLEMÁTICA DE PRIVILEGIOS EN EL SISTEMA DE SEGURIDAD SOCIAL. PARTE I

Resumen

El Autor presenta la problemática de privilegios legales para profesiones determinadas que consisten, entre otras, en jubilación anticipada. El artículo tiende en particular a responder a la pregunta principal, si los privilegios de jubilación para profesiones determinadas vienen justificados por los principios fijados en la Constitución de la República de Polonia. Se pretende también demostrar que el ámbito amplio de privilegios consistentes en exoneración de profesiones determinadas de cotizar a la seguridad social y en la posibilidad de jubilación anticipada son factores muy costosos y destructivos para todo el sistema y para todos los asegurados en el sistema común de jubilación. Las conclusiones presentan la opinión del autor según la cual quiere derogar la mayoría de privilegios citados y construir un modelo común, uniforme y coherente del sistema de seguridad social que comprenda todas las profesiones. La excepción podría existir únicamente para las condiciones de trabajo nocivas o muy gravosas que afecten significadamente la salud.

Palabras claves: jubilación, funcionario, coste, sistema de jubilación, sistema de seguridad social, prestaciones, seguro, seguridad social

ПРОБЛЕМА ЛЬГОТ В СИСТЕМЕ СОЦИАЛЬНОГО ОБЕСПЕЧЕНИЯ. ЧАСТЬ I

Резюме

Ссылаясь на соответствующие нормы законодательства, автор обсуждает проблему пенсионных льгот для отдельных профессиональных групп, в частности, право на ранний выход на пенсию. Главной целью статьи является поиск ответа на фундаментальный вопрос, а именно: насколько пенсионные льготы для отдельных профессиональных групп обоснованы с точки зрения принципов, закрепленных в Конституции Республики Польша? Еще одна цель работы заключается в том, чтобы продемонстрировать, что настолько широкий спектр льгот, заключающихся в освобождении отдельных профессиональных групп от обязанности уплачивать страховые взносы и в предоставлении им права на ранний выход на пенсию, является очень дорогостоящим и обременительным для системы социального обеспечения и всех лиц, застрахованных в рамках всеобщей пенсионной системы. В заключение статьи автор выражает взгляд, что большинство рассмотренных льгот следует упразднить, построив всеобщую, унифицированную и внутренне непротиворечивую модель системы социального обеспечения, охватывающую все профессиональные группы. Исключением из этого правила могут быть только особо тяжелые или вредные условия труда, оказывающие существенное негативное влияние на здоровье.

Ключевые слова: пенсии, сотрудники силовых структур, затраты, привилегии, пенсионная система, система социального обеспечения, выплаты и льготы, страхование, социальное обеспечение

DIE PROBLEMATIK DER PRIVILEGIEN IM SOZIALVERSICHERUNGSSYSTEM. TEIL I

Zusammenfassung

Der Autor veranschaulicht anhand angeführter gesetzlicher Bestimmungen die Frage der Privilegien für ausgewählte Berufsgruppen, unter anderem des Anspruchs auf einen früheren Renteneintritt. Mit dem Artikel soll insbesondere die zentrale Frage der Untersuchung beantwortet werden, ob bevorzugte Ruhegeldansprüche für ausgewählte Berufsgruppen vor dem Hintergrund der in der polnischen Verfassung festgelegten Grundsätze gerechtfertigt sind. Es soll auch veranschaulicht werden, dass ein derart umfangreiches Spektrum an Privilegien, bei denen ausgewählte Berufsgruppen von der Pflicht zur Zahlung von Versicherungsbeiträgen freigestellt sind und andererseits Anspruch auf einen vorzeitigen Eintritt in den Ruhestand haben, für das gesamte System und alle Versicherten des gesetzlichen Rentensystems sehr kostspielig sind und destruktiv wirken. In den Schlussfolgerungen der Untersuchung werden die Auffassung des Autors verdeutlicht, die dazu aufruft, die meisten angeführten Privilegien zu streichen und ein allgemeines, einheitliches und kohärentes Modell eines Systems der sozialen Sicherheit zu schaffen, das alle Berufsgruppen abdeckt. Eine Ausnahme in dieser Hinsicht könnte lediglich für besonders belastende oder schädliche Arbeitsbedingungen gelten, die mit einer erheblichen Gesundheitsgefährdung verbunden sind.

Schlüsselwörter: Renten, Altersruhegeld, Beamter, Kosten, Privileg, Altersversorgungssystem, Sozialversicherungssystem, Leistungen, Versicherung, Soziale Sicherheit

PROBLÈMES DE PRIVILÈGES DANS LE SYSTÈME DE SÉCURITÉ SOCIALE. PARTIE I

Résumé

L'auteur présente la question des privilèges accordés à certains groupes professionnels, autorisant, entre autres, à la retraite anticipée, sur la base de dispositions légales. Le but de cet article est notamment de répondre à la question principale de la recherche: les droits à la retraite privilégiés de certains groupes professionnels sont-ils justifiés dans le contexte des principes énoncés dans la constitution polonaise? L'objectif est également de montrer qu'un aussi large éventail de privilèges consistant à exempter certains groupes de professionnels de l'obligation de verser des cotisations d'assurance et à leur permettre de prendre une retraite anticipée sont des facteurs très coûteux et destructeurs pour l'ensemble du système et pour tous les assurés du système de retraite général. Les conclusions de l'étude exposent les vues de l'auteur incitant la liquidation de la plupart des privilèges invoqués et la construction d'un modèle de système de sécurité sociale universel, uniforme et cohérent, couvrant tous les groupes professionnels. Une exception à cet égard ne pourrait être que des conditions de travail particulièrement pénibles ou nuisibles qui affectent considérablement la perte de santé.

Mots-clés: pensions de retraite, officier, coût, privilège, système de retraite, système de sécurité sociale, prestations, assurance, sécurité sociale

PROBLEMATICA DEI PRIVILEGI NEL SISTEMA DI PREVIDENZA SOCIALE. PARTE I

Sintesi

L'autore illustra la problematica dei privilegi di determinati gruppi professionali che danno tra l'altro diritto a pensione anticipata, sulla base delle norme giuridiche richiamate. L'obiettivo dell'articolo è in particolare fornire una risposta alla principale domanda dell'analisi, se i diritti pensionistici privilegiati siano motivati o meno nel contesto dei principi stabiliti nella costituzione della Repubblica di Polonia. L'obiettivo è anche indicare che tale esteso ambito di privilegi, che consistono nell'esenzione di determinati gruppi professionali dall'obbligo di versamento dei contributi previdenziali e nel diritto alla pensione anticipata sono fattori molto costosi e distruttivi per l'intero sistema e per la totalità degli assicurati nel sistema pensionistico generale. Nelle conclusioni dell'elaborato sono state presentate le riflessioni dell'autore che inducono a liquidare la maggior parte dei privilegi richiamati e a costruire un modello di sistema di previdenza sociale universale, uniforme e coerente, che comprenda tutti i gruppi professionali. L'unica eccezione in tale ambito potrebbe essere costituita da condizioni di lavoro particolarmente gravose o nocive, che influiscono significativamente sulla perdita della salute.

Parole chiave: pensioni, funzionario, costo, privilegio, sistema pensionistico, sistema di previdenza sociale, prestazioni, assicurazione sociale

Cytuj jako:

Kasprowicz Ł., *Problematyka przywilejów w systemie zabezpieczenia społecznego. Część I* [*Issue of privileges in the social security system, Part I.*], „Ius Novum" 2019 (Vol. 13) nr 1, s. 181–203. DOI: 10.26399/iusnovum.v13.1.2019.09/l.kasprowicz

Cite as:

Kasprowicz, Ł. (2019) 'Issue of privileges in the social security system. Part I'. *Ius Novum* (Vol. 13) 1, 181–203. DOI: 10.26399/iusnovum.v13.1.2019.09/l.kasprowicz

Ius Novum
1/2019

EVOLUTION OF THE AGREEMENT FOR PROJECT CO-FINANCING FROM EU FUNDS IN THE POLISH LEGAL SYSTEM

ROBERT TALAGA*

DOI: 10.26399/iusnovum.v13.1.2019.10/r.talaga

1. INTRODUCTION

In the second half of the 20th century legal academics demonstrated a particular fondness for somewhat "renewed" concepts of the social contract.[1] Such views constituted an emanation of social justice based on the idea of unlimited competition as one of the democratic principles guiding the functioning of the society.[2] The concept of the contractualisation of the social life had easily been adopted in various systems of social life organisation founded on cooperation and coexistence of people with rational mindsets.[3] It was also easily reflected in the European law. Polish administration bodies started to increasingly use consensual forms of action, while implementing the EU law[4]. One example is an agreement for co-financing of a project from public funds which is aimed at providing financial support for particular projects within the framework of a strategically defined state policy.[5] It may form the basis for supporting projects within the framework of implemen-

* PhD, senior judicial clerk, Voivodeship Administrative Court in Poznań; e-mail: r.talaga@wsa.poznan.pl; ORCID: 0000-0002-5281-2188

1 W. Osiatyński, *Ewolucja amerykańskiej myśli społecznej i politycznej*, Warszawa 1983.

2 J. Rawls, *Teoria sprawiedliwości*, PWN, Warszawa 1994.

3 R. Nozick, *Anarchia, państwo i utopia*, Wydawnictwo Aletheia, Warszawa 2010.

4 K. Scheuring, *Stosowanie prawa wspólnotowego przez organy administracyjne państw członkowskich*, Ars Boni et Aequi, Poznań, 2008, p. 4 et seq.

5 A. Zybała, *Polityki publiczne. Doświadczenia w tworzeniu i wykonywaniu programów publicznych w Polsce i innych krajach. Jak działa państwo, gdzie zmierza/chce/musi rozwiązać zbiorowe problemy swoich obywateli?*, Krajowa Szkoła Administracji Publicznej, Warszawa 2012, p. 19 et seq.

tation of specific operational programmes co-financed from European funds.[6] An agreement of this type has been regulated in a number of provisions governing the principles of the functioning of public finances. However, it may include references to other regulations laying down the terms and conditions of co-financing granted from public funds. In many cases, even without such a reference generally binding provisions simply apply.[7] Such regulations included in other acts may be applied to the co-financing agreement in the first place as provisions of a specific nature or may be applied simultaneously as provisions of parallel applicability supplementing or extending regulations of the Public Finance Act.

This paper seeks to present the evolution of the agreement for project co-financing in the Polish legal system. The analysis covers provisions both previously and currently applicable to the co-financing agreement. First, the author addresses the dynamics of changing sources of available European funds which may cover the agreement for co-financing of an individual project. Next, the focus is on the particular way in which the legislator determined the scope of the co-financing agreement as regards specific matters. The analysis of the aforesaid issues concerning the co-financing agreement aims at facilitating the understanding of its nature and specific conditions underlying its practical application.

2. EUROPEAN FUNDS AS PUBLIC FUNDS IN THE POLISH STATE BUDGET

The association between Poland and the European Union marked the beginning of the period of approximation of national laws to the regulations enshrined in the EU law. The amendments introduced also pertained to the issue of state finance. The Act of 5 January 1991: Budget Law[8] was replaced by the Public Finance Act of 26 November 1998[9]. The new regulation took into account the fact that funds from the European Union budget have also become public funds.[10] This category of funds included, among others: funds earmarked for the implementation of pre-accession programmes; funds from structural funds and the Cohesion Fund; and funds from the European Agricultural Guidance and Guarantee Fund "Guarantee Section".[11] From the very beginning the legislator took into account the specific nature of distribution of the EU funds earmarked for the implementation of the Common Agricultural Policy.[12] The European Agricultural Guidance and Guaran-

---

[6] W. Schenk, *EC Grant Management as a Challenge for European Administrative Law*, [in:] O. Jansen, B. Schöndorf-Haubold (eds), *The European Composite Administration*, Intersentia, Cambridge–Antwerp–Portland, 2011, pp. 383–406.

[7] E. Malinowska-Misiąg, W. Misiąg, *Finanse publiczne w Polsce*, LexisNexis, Warszawa 2007, p. 99.

[8] Dz.U. 1991, No. 4, item 18.

[9] Dz.U. 1998, No. 155, item 1014; hereinafter PFA of 1998.

[10] Article 3 para. 1(2) PFA of 1998.

[11] Article 3 para. 3 PFA of 1998.

[12] S. Szumski, *Wspólna Polityka Rolna Unii Europejskiej*, Wydawnictwo Akademickie i Profesjonalne, Warszawa 2007, p. 177.

tee Fund dealt with financing of the common organisation of agricultural markets (Guarantee Section) and structural changes in agriculture (Guidance Section).[13] An identical solution was introduced in the Public Finance Act of 30 June 2005.[14] The public funds category also included funds from the European Union budget.[15] The category covered again: funds earmarked for the implementation of pre-accession programmes; funds from structural funds and the Cohesion Fund; and funds from the European Agricultural Guidance and Guarantee Fund "Guarantee Section".[16] As part of the process of adaptation of the national legal system to further EU requirements, the catalogue of public funds was changed with regard to determining funds from the European Union budget. First of all, apart from the funds from the European Guidance and Guarantee Fund "Guarantee Section" the legislator also identified funds from the European Agricultural Guarantee Fund, as well as funds from the European Agricultural Fund for Rural Development.[17] Next, along with structural funds and the Cohesion Fund, the legislator also identified funds from the European Fisheries Fund.[18] Such a solution took account of the transition period due to the change in the financing rules concerning the common agricultural policy and the cohesion policy after 2006, as a result of which the European Agricultural Guidance and Guarantee Fund ceased to function as a structural fund and was eventually wound up.[19] It was replaced by two funds. One of them was the European Agricultural Guarantee Fund (EAGF),[20] which was designed for tasks previously performed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF). The other one was the European Agricultural Fund for Rural Development (EAFRD),[21] which took over the tasks previously assigned to the Guidance Section of the European Agricultural Guidance and Guarantee Fund

---

[13] A. Jurcewicz, *Wspólna Polityka Rolna Unii Europejskiej*, [in:] P. Czachowskiego (ed.), *Prawo rolne*, LexisNexis, Warszawa 2013, p. 74 et seq.

[14] Dz.U. 2005, No. 249, item 2104; hereinafter PFA of 2005.

[15] Article 5 para. 1(2) PFA of 2005.

[16] Article 5 para. 3(1)–(4) PFA of 2005.

[17] Article 5 para. 3(3)(a)–(c) PFA of 2005 – amendment introduced as of 16 October 2006 due to Article 15(1) of the Act of 22 September 2006 on mobilising funds from the European Union budget allocated to the financing of the Common Agricultural Policy (Dz.U. 2006, No. 187, item 1381).

[18] Article 5 para. 3(2) PFA of 2005 – amendment introduced as of 29 December 2006 due to Article 1(3)(b) second indent of the Act of 8 December 2006 on amendment of the Public Finance Act and some other acts (Dz.U. 2006, No. 249, item 1832).

[19] B. Schöndorf-Haubold, *Die Strukturfonds der Europäischen Gemeinschaft. Rechtsformen und Verfahren europäischer Verbundverwaltung*, Verlag C.H. Beck, München, 2005, pp. 73–76; E. Tomkiewicz, *Polityka rozwoju obszarów wiejskich na lata 2007–2013 (perspektywy na tle dotychczasowej ewolucji ustawodawstwa)*, Studia Iuridica Agraria Vol. 6, 2007, p. 23 et seq.

[20] Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ L 209, 11.8.2005, p. 1); Council Regulation (EC) No. 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No. 1290/2005 on the financing of the common agricultural policy (OJ L 58, 28.2.2006, pp. 42–50).

[21] Council Regulation (EC) No. 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1).

in aid of structural changes (including sustainable development) in rural areas.[22] The latter financial instrument had previously implemented the cohesion policy,[23] whereas after the reform it became an instrument of the common agricultural policy.[24] At the same time, the common fisheries policy,[25] which until that time had been implemented with the use of funds allocated to agriculture, began to be financed from a separate European Fisheries Fund.[26] As a consequence, the national legislator replaced the catalogue of "funds from the European Union budget" with a collective name "funds from the European Union budget and non-reimbursable funds from aid granted by the Member States of the European Free Trade Association (EFTA)". Such a change extended the scope of possible sources of foreign funds classified as national public funds.[27] Thus, it allowed including as public funds also foreign funds not originating from the EU budget, yet possible to be used within the state budget – as "non-reimbursable funds from the aid granted by the Member States of the European Free Trade Association (EFTA)" – for the purpose of implementing international agreements.[28] The funds in question were those from the Norwegian Financial Mechanism, the EEA Financial Mechanism and the Swiss Financial Mechanism.[29] The latter financial instrument was subsequently replaced by the Swiss-Polish Cooperation Programme.[30] However, a detailed list of public funds not included in the category of funds originating from the EFTA, taking into account their source of origin, end-use and beneficiaries, could be determined by the Council of Ministers.[31]

---

[22] M. Szewczak, *Administracyjno-prawne aspekty realizacji Wspólnej Polityki Rolnej w Polsce*, Wydawnictwo KUL, Lublin 2008, pp. 48–50; J. Rowiński, *Program Rozwoju Obszarów Wiejskich na lata 2007–2013*, Wspólnoty Europejskie No. 3, 2008, pp. 23–29.

[23] M. Schäfers, *Die Kohäsionpolitik der Europäischen Gemeinschaft*, Nomos Verlaggeselschaft, Baden 1993, p. 23; E. Małuszyńska, *Polityka Spójności Unii Europejskiej. Cele i problemy oceny*, Przegląd Zachodni No. 3, 2011, pp. 159–179.

[24] Financial instruments under the Common Agricultural Policy have been aimed at supporting regions of those member states with a typically agricultural structure, sustainable development of agricultural and forestry sectors, improving the environment through the development of entrepreneurship and tourism, improving their competitiveness, and consequently increasing employment and developing infrastructure; see M. Klimowicz, *Fundusze strukturalne oraz Fundusz Spójności w państwach Europy Środkowej i Wschodniej*, CeDeWu.pl, Wydawnictwa Fachowe, Warszawa 2010, p. 59.

[25] J. McCormick, *Zrozumieć Unię Europejską*, PWN, Warszawa 2010, pp. 280–281.

[26] P. Trzpis, *Wspólna Polityka Rybacka Unii Europejskiej*, Rocznik Integracji Europejskiej No. 1, 2007, p. 137 et seq.

[27] Article 5 para. 1(2) PFA of 2005 – amendment introduced as of 29 December 2006 due to Article 1(3)(a) of the Act of 8 December 2006 on amendment of the Public Finance Act and some other acts (Dz.U. 2006, No. 249, item 1832).

[28] H.H. Fredriksen, *EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols*, [in:] C. Baudenbacher (ed.), *The Handbook of EEA Law*, Springer Cham, Heidelberg–New York–Dordrecht–London, 2015, p. 95 et seq.

[29] Article 5 para. 3(3a)(a)–(c) PFA of 2005.

[30] Amendment introduced as of 20 December 2008 due to Article 5(1) of the Act of 7 November 2008 on amendment of some acts in connection with the implementation of structural funds and the Cohesion Fund (Dz.U. 2008, No. 216, item 1370).

[31] Article 5 para. 4 PFA of 2005.

The aforesaid public funds from foreign sources were initially disbursed in the Polish legal system with proper application of the regulations defining the accounting rules provided for subsidies from the state budget. Such a solution, used prior to Poland's accession to the European Union, was also applied in the first post-accession years.[32] In these cases, it referred to the non-reimbursable funds from foreign sources, other than those coming from the European Union budget, and funds earmarked for the implementation of pre-accession programmes; as well as funds coming from structural funds and the Cohesion Fund and other funds coming from the European Union budget (excluding those earmarked for the implementation of the common agricultural policy), as well as funds earmarked for co-financing programmes and projects implemented with the use of the funds in question. Many issues were resolved properly only in the course of preparations for the functioning of national finances in the first full programming period of the EU budget, i.e. in the years 2007–2013. It was clearly stipulated that the disbursement of foreign funds[33] had to be related to the implementation of objectives set out in an international agreement or in separate provisions or donor declarations.[34] In practice, they could be used in a manner specified by the parliament, namely for: (1) financing expenditure related to the implementation of programmes or projects financed with the use of structural funds, the Cohesion Fund and the European Fisheries Fund; (2) development grants for public finance sector entities and other entities which are beneficiaries of these funds, as well as for entities entrusted with the implementation of such tasks;[35] (3) financing the common agricultural policy subject to separate provisions.[36] The changes introduced with the entry into force of the Public Finance Act of 27 August 2009 were even more clarifying.[37] As a result, the sources of project financing were further simplified and made more flexible due to the general statement that public funds comprise, among others, funds from the European Union budget and non-reimbursable funds from aid granted by the EFTA Member States, as well as other non-reimbursable funds from foreign sources.[38]

The multitude of potential sources of transfer of foreign funds to the national budget best attests to their importance and the need to properly regulate the procedures for their disbursement. Such a situation prompted the introduction

---

[32] Article 30a PFA of 1998, Article 202 PFA of 2005.

[33] The concept refers to European funds comprising: funds from the structural funds, the Cohesion Fund and the European Fisheries Fund; funds from the European Agricultural Guidance and Guarantee Fund "Guarantee Section", the European Agricultural Guarantee Fund, the European Agricultural Fund for Rural Development; and non-reimbursable funds from the aid granted by the Member States of the European Free Trade Association (EFTA): Norwegian Financial Mechanism, EEA Financial Mechanism, Swiss Financial Mechanism (replaced by the Swiss-Polish Cooperation Programme) and other foreign funds.

[34] Article 202 para. 1 PFA of 2005.

[35] Amendment introduced as of 18 August 2007 due to Article 2 of the Act of 29 June 2007 amending the Act on the principles of development policy and the Public Finance Act (Dz.U. 2007, No. 140, item 984).

[36] Article 202 para. 2 PFA of 2005.

[37] Dz.U. 2009, No. 157, item 1240, consolidated text: Dz.U. 2013, item 885; hereinafter PFA of 2009.

[38] Article 5 para. 1(2)–(3) PFA of 2009.

of specific forms of public administration activity for the purpose of disbursing foreign funds in accordance with their intended use within the framework laid down by the national legal system. The national provisions introduced to this end were only partially common as regards foreign (mainly European) funds potentially available for financing the implementation of development activities of the country. In this respect, the introduction of special regulations governing the distribution of European funds earmarked for specific purposes was initiated, taking into account the specific nature of the policy pursued concerning such issues as, for instance, the development of regions, agriculture or environmental protection.[39]

3. CO-FINANCING AGREEMENT IN THE POLISH LEGAL SYSTEM

The foreign financial funds which began to flow into the national budget led to various forms of their disbursement (both of a binding and non-binding nature) envisaged for the administration bodies. For the most part, the legislator decided on a consensual form of the EU funds distribution.[40] It was an agreement that was to lay down the specific conditions for the use and settlement of funds from the EU budget under the Public Finance Act of 1998.[41] However, the same was not foreseen in respect of the funds from the European Agricultural Guidance and Guarantee Fund "Guarantee Section", i.e. the funds for direct payments to farmers granted on the basis of an administrative decision. Thus, the national legal system provided for a differentiation of the forms of administrative activities related to the disbursement of European funds for agricultural purposes. Such a dualism was also maintained in the years afterwards. The same solution was introduced in the Public Finance Act of 2005. Also here, the legislator provided for a consensual form of distribution of the EU funds earmarked for the implementation of the cohesion policy. It was an agreement that was to lay down the specific conditions for the use and settlement of funds from the EU budget.[42] Such a form of distribution of the EU funds was again not provided for in respect of the funds from the European Agricultural Guidance and Guarantee Fund "Guarantee Section", which within the same programming period of the EU budget were covered by a separate national legal regime. Such a general (almost framework) solution operated until the end of 2006.[43]

Preparatory works for the implementation of the next programming period of the EU budget 2007–2013 led to the initiation of the process of adaptation of the national legal system for the purposes of the implementation of operational

---

[39] M. Świstak, J.W. Tkaczyński, *Wybrane polityki publiczne Unii Europejskiej. Stan i perspektywy*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2015, pp. 57–98, 127–164, 253–283.

[40] J. Wyporska-Frankiewicz, *Publicznoprawne formy działania administracji o charakterze dwustronnym*, Wolters Kluwer, Warszawa 2010, p. 58.

[41] Article 30b para. 1 PFA of 1998.

[42] Article 203 para. 1 PFA of 2005.

[43] Amendment introduced as of 29 December 2006 due to Article 1(65) of the Act of 8 December 2006 on amendment of the Public Finance Act and some other acts (Dz.U. 2006, No. 249, item 1832).

programmes in compliance with the regulations of the EU law. First of all, the legal basis for the distribution of the EU funds was changed.[44] The essence of the changes was the stipulation that it is the "agreement" concluded by the authorising officer and the beneficiary of a development grant that lays down the specific conditions for its transfer and use.[45] Development grants were distributed (in the form of an advance payment or reimbursement of expenses incurred) for the implementation of a specific programme, project or task financed with the use of funds from structural funds, the Cohesion Fund and the European Fisheries Fund.[46] However, since 2008, the aforesaid non-reimbursable funds from the aid granted by the EFTA Member States could also be transferred within the framework of a development grant.[47]

The legislator clearly indicated that such an agreement should contain important components[48] that were extended and modified over time, which was prompted by practical problems arising with regard to its application. The foregoing primarily concerned the obligation to determine the rules of settling bank interest on the funds of development grants in the form of an advance payment.[49] Moreover, the existing elements of the agreement were modified. Firstly, it became possible to introduce provisions regulating the schedule of expenditures under the programme or task, not necessarily every quarter, but covering a period of at least one quarter.[50] Secondly, a possibility was provided to introduce conditions for termination of the agreement for reasons other than irregularities occurring in the course of the implementation of the programme or project. However, the foregoing concerned only such reasons (including irregularities) which were clearly identified by the parties and whose nature rendered further implementation of the provisions of the agreement impossible or inexpedient.[51]

A very similar solution was introduced in the next Public Finance Act which provided that the specific conditions of project financing were to be laid down in

---

[44] The previous role of Article 203 PFA of 2005 was replaced by modified Article 209 PFA of 2005.

[45] Article 209 para. 1 PFA of 2005 – amendment introduced as of 29 December 2006 due to Article 1(65) of the Act of 8 December 2006 on amendment of the Public Finance Act and some other acts (Dz.U. 2006, No. 249, item 1832).

[46] Article 202 par. 3 PFA of 2005.

[47] Article 202 para. 3 PFA of 2005 – amendment introduced as of 20 December 2008 due to Article 5(9) of the Act of 7 November 2008 on amendment of some acts in connection with the implementation of structural funds and the Cohesion Fund (Dz.U. 2008, No. 216, item 1370).

[48] Article 209 para. 2 PFA of 2005.

[49] Article 209 para. 2 (3a) PFA of 2005 – amendment introduced as of 20 December 2008 due to Article 5(13)(a) second indent of the Act of 7 November 2008 on amendment of some acts in connection with the implementation of structural funds and the Cohesion Fund (Dz.U. 2008, No. 216, item 1370).

[50] Article 209 para. 2(2) PFA of 2005 – amendment introduced as of 20 December 2008 due to Article 5(13)(a) first indent of the Act of 7 November 2008 on amendment of some acts in connection with the implementation of structural funds and the Cohesion Fund (Dz.U. 2008, No. 216, item 1370).

[51] Article 209 para. 2(7) PFA of 2005 – amendment introduced as of 20 December 2008 due to Article 5(13)(a) third indent of the Act of 7 November 2008 on amendment of some acts in connection with the implementation of structural funds and the Cohesion Fund (Dz.U. 2008, No. 216, item 1370).

an agreement for project co-financing.[52] In this case, a notable change was that it was no longer stipulated in absolute terms what elements should be included in the agreement, while it was specified instead what elements "in particular" should be included in the co-financing agreement.[53] Consequently, the catalogue of constituent elements of the co-financing agreement ceased to be exhaustive and became open.[54] The parties to the co-financing agreement, at least theoretically, could opt for introducing additional elements to take proper account of the specificity of the planned project and to safeguard its execution. In theory, this solution provided for more discretion as regards contracting the granted co-financing.[55] In practice, however, all elements of such an agreement are decided by an administration body which unilaterally proposes its content (e.g. by specifying its model in the call for proposals for co-financing). Previously, such a method of regulation was applied in the case of financial support for investments.[56] In the case of the co-financing agreement, the legislator decided, however, to extend the scope of its obligatory elements[57] (see table below).

Initially, the legislator used a general concept of an agreement laying down the conditions for the use and settlement of aid granted to beneficiaries under financial law.[58] Over time, however, the name of the agreement in question was made specific, indicating that it concerns the granting of co-financing from public funds.[59] From the legislative point of view, however, complete continuity was maintained as regards the terms which had already been used in the national legal system. The co-financing agreement was in fact introduced in place of the previous solutions. Moreover, the legislator clearly used an independent term for this type of agreement, referring to it as "a co-financing agreement" not only in the Public Finance Act, but also in other acts. As for the agreement, identifying a set of provisions applicable to it was also an important fact.[60] In practice, apart from the set of provisions provided for in the co-financing agreement in the Public Finance Act, it became mandatory to apply all the legal acts to which the Public Finance Act refers, as well as the applicable provisions of the Civil Code, regardless of a direct

---

[52] Article 206 para. 1 PFA of 2009.

[53] Article 206 para. 2 PFA of 2009.

[54] M. Humel-Maciewiczak, A. Nowak-Far, *Środki europejskie i inne środki pochodzące ze źródeł zagranicznych, niepodlegające zwrotowi*, [in:] W. Misiąg (ed.), *Ustawa o finansach publicznych. Komentarz*, C.H. Beck, Warszawa 2015, p. 680.

[55] R. Szczepaniak, *Swoboda umów w sektorze publicznym*, [in:] Z. Kuniewicz, D. Sokołowska (eds), *Prawo kontraktów*, Wolters Kluwer, Warszawa 2017, pp. 425–450.

[56] In the case of financial support, the legislator specified that the agreement concluded by the minister for the economy with an entrepreneur was to specify the obligations of the entrepreneur, including in particular the location, the value of the investment, the schedule of investment project implementation, the name of the purchased technology and the number of employees, as well as the amount and allocation of financial support and the rules for settlement thereof, and the reasons for possible repayment of the support granted; see Article 12 para. 1 of the Act of 20 March 2002 on financial support for investments (Dz.U. No. 41, item 363, as amended).

[57] Article 206 para. 2 PFA of 2009.

[58] Article 30b para. 1 PFA of 1998, then Article 203 (later Article 209) PFA of 2005.

[59] Article 206 para. 1 PFA of 2009

[60] Z. Radwański, *Teoria umów*, PWN, Warszawa 1977, p. 222.

reference contained in such other legal acts or the agreement itself.[61] The elements which have been specified by the legislator are of particular importance in the case of the co-financing agreement. In this respect, it is true to say that they constitute essential elements of the agreement (*essentialia negotii*) which define its specific nature. The scope of such an agreement determined this way, however, is not exhaustive, which means that there is a possibility of introducing additional provisions to such a contract. Due to the structure of the regulation and the lack of statutory definition of the subject matter of this agreement, views have emerged that in this case one deals with elements that constitute only *quasi essentialia negotii* of the legal relationship between the administration body and the beneficiary of the transferred public funds.[62] Whatever the statutory qualification of the elements of such an agreement, the fact is that that there is definitely unlimited freedom as regards shaping the legal relationship concerning the public co-financing of a specific project. At the same time, the indicated features of the agreement which forms the basis for the provision of co-financing to entities using public funds under the Public Finance Act allow its classification as the so-called nominate contract in the light of the criteria set out in the civil law (*contractus nominatus*).[63] Although it is possible to compare the co-financing agreement in question to a donation agreement, it is by no means possible to establish that one deals with the same agreement here. It seems more plausible to assume that in the Polish legal system the legislator intentionally introduced certain elements common to a certain group of agreements concerning the execution of operational programmes implemented in particular programming periods of the EU budget, as indicated by the previous legislative changes. Namely, while amending the existing regulations concerning the implementation of the cohesion policy, the legislator specifically used the name "project co-financing agreement".[64] In addition, such an extended name of the agreement is established in practice by the administrative bodies using it in the context of distribution of public funds earmarked for the implementation of operational programmes.

---

[61] Such a detailed specification of regulations concerning a concluded agreement was also provided for in the Act of 6 December 2006 on the principles of development policy (i.e. Dz.U. 2018, items 1307, 1669), and in the Act of 11 July 2014 on the rules of implementing cohesion policy programmes financed under the 2014–2020 financial perspective (i.e. Dz.U. 2018, items 1307, 1669).

[62] R. Poździk, *Ocena i wybór projektów do dofinansowania z Europejskiego Funduszu Rozwoju Regionalnego, Europejskiego Funduszu Społecznego i Funduszu Spójności*, Wydawnictwo Sejmowe, 2013, p. 199.

[63] The relevant literature distinguishes six reasons for classifying a particular contract as an innominate contract: (1) the existence of a legally valid contract; (2) no particular name; (3) no definition of its essential elements (*essentialia negotii*) in the generally binding provisions; (4) no similarity to a nominate contract; (5) the definition of the parties to the contract and their rights and obligations; (6) the compliance of the contract with the legal system; see W.J. Katner, *Pojęcie umowy nienazwanej*, Studia Prawa Prywatnego No. 1, 2009, pp. 1–18; J. Skąpski, *Zobowiązania. Część ogólna*, [in:] S. Grzybowski, J. Skąpski, S. Wójcik, *Zarys prawa cywilnego*, Warszawa 1988, pp. 170–171; A. Doliwa, *Zobowiązania*, Warszawa 2012, p. 47; A. Brzozowski, [in:] *System Prawa Prywatnego*, Vol. 5, 2013, Chapter V, marginal reference number 46.

[64] Article 21 para. 4, Article 26 para. 1(5), Article 27 para. 1(4), Article 28 para. 2, Article 29 para. 2(10), para. 4, Article 30, Article 30a para. 1 of the Act on the principles of development policy; Article 2(26), Article 52, Article 52a of the Act on the rules of implementing cohesion policy programmes financed under the 2014–2020 financial perspective.

Essential elements of a co-financing agreement as defined in Public Finance Act of 2005 and Public Finance Act of 2009

PFA of 2005 (Article 209(2))	PFA of 2009 (Article 206(2))
1) a description of the project, including the purpose for which the funds were granted and the time limit for its implementation; 2) a quarterly schedule of expenditures under the programme or project; 3) the amount of funds granted to the beneficiary and the procedure for transferring the funds; 4) the beneficiary's undertaking to submit to control and the procedure for controlling the project implementation; 5) the date and method of settlement of the funds granted; 6) the forms of performance bonds as regards the beneficiary's obligations following from the agreement; 7) the conditions of agreement termination due to irregularities occurring in the course of the programme or project implementation; 8) the conditions of and time limits for the repayment of funds improperly used or collected in an excessive amount or in an undue manner; 9) other provisions resulting from Community or national regulations.	1) a description of the project or task, including the purpose for which the funds were granted and the time limit for its implementation; 2) a schedule of expenditures, covering the period of at least one quarter; 3) the amount of funds granted; 4) an undertaking to submit to control and the procedure for controlling the project or task implementation; 4a) an undertaking to apply the guidelines;[a] 5) the date and method of settlement of the project and possible advance payments; 6) the forms of performance bonds as regards the obligations following from the agreement; 7) the conditions of agreement termination due to irregularities occurring in the course of the project implementation; 8) the conditions of and time limits for the repayment of funds improperly used or collected in an excessive amount or in an undue manner.

[a] In this respect, the legislator included a clear reference to the guidelines under Article 2(32) of the Act of 11 July 2014 on the principles of implementation of programmes in the scope of cohesion policy financed under the 2014–2020 financial perspective (Dz.U. item 1146), as well as guidelines under Article 134a(6) of the Act of 12 March 2004 on social assistance (Dz.U. 2013, item 182, as amended) within the scope of the programme financed with the use of funds from the Funds for European Aid for the Most Deprived, see Regulation (EU) No. 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived (OJ L 72, 12.3.2014, p. 1).

4. CONCLUSIONS

The last two decades saw an introduction into the Polish legal system of an agreement regulating the transfer of public funds for the implementation of a specific project. Both national and EU legislators have defined the parties to such an agreement as well as their fundamental rights and obligations. At the same time, the national legislator defined the essential elements of this agreement which are absolute in nature and may not be changed by virtue of the parties' decisions. The foregoing is related to the specific obligation of the administration body to transfer public funds for the implementation of a specific project co-financed from the European funds and the specific obligation of the beneficiary to implement the project in accordance with the terms and conditions laid down in the agreement. As a result, important and characteristic elements have been identified which determine the specific nature of the agreement concerning co-financing of a project as part of the implementation of a specific operational programme. However, the statutory regulations are not exclusive in nature (due to the term "in particular" used), which means that the parties to the agreement may include additional provisions governing mutual relations. Although such agreements have been concluded on the basis of public-law provisions from the very beginning of their introduction into the legal system, this has not affected their legal nature in the Polish legal system.[65] In view of a certain degree of discretion in regulating mutual rights and obligations and the absence of regulations allowing the classification of the agreements as being of public-law kind, they have been considered as civil-law agreements.[66] Nevertheless, the project co-financing agreement has not been included and regulated in the Civil Code, which has not affected its legal nature. At the same time, in the absence of a direct exclusion, it should have been assumed that to the extent not regulated by the provisions of public law acts, the provisions of the Civil Code also apply to the co-financing agreement.[67] As a result, disputes concerning the implementation of the rights and obligations of the parties under the agreement for project co-financing from the European funds are subject to resolution by civil courts.[68] In its statutory form, the co-financing agreement demonstrated a certain similarity to the donation agreement. Due to the specific relations between the parties to the co-financing agreement and its characteristic elements defined by law, it may be assumed that it

---

[65] Judgment of the Supreme Court of 11 May 2012, II CSK 545/11, OSP 2014, No. 2, with a gloss by R. Szczepaniak.

[66] Decision of the Supreme Administrative Court of 10 February 2010, II GSK 86/10, LEX No. 663509; Decision of the Supreme Administrative Court of 13 October 2010, II GSK 844/09, LEX No. 573545.

[67] J. Kuźmicka-Sulikowska, *Klauzule dotyczące stosowania Kodeksu Cywilnego*, [in:] R. Strugała (ed.), *Wykładnia umów. Standardowe klauzule umowne*, C.H. Beck, Warszawa 2016, pp. 428–430.

[68] Judgment of the Supreme Court of 6 May 2011 , II CSK 520/10 OSNC 2012, No. 2, item 34, LEX No. 1027174; judgment of the Supreme Court of 11 May 2012 , II CSK 545/11, LEX No. 1229959; judgment of the Supreme Court of 12 January 2012, IV CSK 287/11, LEX No. 1131135; judgment of the Supreme Court of 2 December 2011, III CSK 55/11, LEX No. 1084604; decision of the Supreme Court of 16 May 2012 , III CZP 19/12, LEX No. 1212819.

has acquired its original nature that distinguishes it from other nominate contracts.[69] Furthermore, it should be recognised that the agreement providing co-financing for the implementation of a specific project, in the course of subsequent changes introduced by the legislator, has changed its status from an innominate to a nominate contract.[70] Thus, the project co-financing agreement has become part of a wider phenomenon of the development of the theory and practice of applying agreements in the Polish legal system.[71] Moreover, it seems that it will undergo further evolution, not least because of the need to ensure adequate protection of the applicants seeking co-financing of their projects.

BIBLIOGRAPHY

Brzozowski A., [in:] *System Prawa Prywatnego*, Vol. 5, 2013.

Doliwa A., *Zobowiązania*, Warszawa 2012.

Fredriksen H. H., *EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols*, [in:] C. Baudenbacher (ed.), *The Handbook of EEA Law*, Springer Cham, Heidelberg–New York–Dordrecht–London 2015.

Humel-Maciewiczak M., Nowak-Far A., *Środki europejskie i inne środki pochodzące ze źródeł zagranicznych, niepodlegające zwrotowi*, [in:] W. Misiąg (ed.), *Ustawa o finansach publicznych. Komentarz*, C.H. Beck, Warszawa 2015.

Jurcewicz A., *Wspólna Polityka Rolna Unii Europejskiej*, [in:] P. Czachowski (ed.), *Prawo rolne*, LexisNexis, Warszawa 2013.

Katner W.J., *Pojęcie umowy nienazwanej*, Studia Prawa Prywatnego No. 1, 2009.

Katner W.J. (ed.), *System prawa prywatnego. Prawo zobowiązań – umowy nienazwane*, Warszawa 2010.

Klimowicz M., *Fundusze strukturalne oraz Fundusz Spójności w państwach Europy Środkowej i Wschodniej*, CeDeWu.pl, Wydawnictwa Fachowe, Warszawa 2010.

Konopacka M., *Kamienie milowe w rozwoju historycznym polskiego prawa umów,* Gdańskie Studia Prawnicze Vol XXXVIII, 2017.

Kuźmicka-Sulikowska J., *Klauzule dotyczące stosowania Kodeksu Cywilnego*, [in:] R. Strugała (ed.), *Wykładnia umów. Standardowe klauzule umowne*, C.H. Beck, Warszawa 2016.

Malinowska-Misiąg E., Misiąg W., *Finanse publiczne w Polsce*, LexisNexis, Warszawa 2007.

Małuszyńska E., *Polityka Spójności Unii Europejskiej. Cele i problemy oceny*, Przegląd Zachodni No. 3, 2011.

McCormick J., *Zrozumieć Unię Europejską*, PWN, Warszawa 2010.

Nozick R., *Anarchia, państwo i utopia*, Aletheia, Warszawa 2010.

Osiatyński W., *Ewolucja amerykańskiej myśli społecznej i politycznej*, Warszawa 1983.

---

[69] See further in W.J. Katner, [in:] W.J. Katner (ed.), *System prawa prywatnego. Prawo zobowiązań – umowy nienazwane*, Warszawa 2010, p. 13.

[70] Such a view without a more in-depth analysis is demonstrated by: R. Poździk, *Sądowa kontrola oceny projektów finansowanych z funduszy unijnych na przykładzie Programu Operacyjnego Innowacyjna Gospodarka*, Europejski Przegląd Sądowy 2010, No. 3, p. 30; R. Poździk, K. Brysiewicz, *Droga sądowa w sprawach związanych z dofinansowaniem projektów z funduszy strukturalnych i funduszu spójności*, Przegląd Sądowy No. 4, 2011, p. 47.

[71] M. Konopacka, *Kamienie milowe w rozwoju historycznym polskiego prawa umów*, Gdańskie Studia Prawnicze Vol. XXXVIII, 2017, pp. 309–321.

Poździk R., *Sądowa kontrola oceny projektów finansowanych z funduszy unijnych na przykładzie Programu Operacyjnego Innowacyjna Gospodarka*, Europejski Przegląd Sądowy No. 3, 2010.
Poździk R., *Ocena i wybór projektów do dofinansowania z Europejskiego Funduszu Rozwoju Regionalnego, Europejskiego Funduszu Społecznego i Funduszu Spójności*, Wydawnictwo Sejmowe, 2013.
Poździk R., Brysiewicz K., *Droga sądowa w sprawach związanych z dofinansowaniem projektów z funduszy strukturalnych i funduszu spójności,* Przegląd Sądowy No. 4, 2011.
Radwański Z., *Teoria umów*, PWN, Warszawa 1977.
Rawls J., *Teoria sprawiedliwości*, PWN, Warszawa 1994.
Rowiński J., *Program Rozwoju Obszarów Wiejskich na lata 2007–2013*, Wspólnoty Europejskie No. 3, 2008.
Schäfers M., *Die Kohäsionpolitik der Europäischen Gemeinschaft*, Nomos Verlaggeselschaft, Baden Baden 1993.
Schenk W., *EC Grant Management as a Challenge for European Administrative Law*, [in:] O. Jansen, B. Schöndorf-Haubold (eds), *The European Composite Administration*, Intersentia, Cambridge–Antwerp–Portland 2011.
Scheuring K., *Stosowanie prawa wspólnotowego przez organy administracyjne państw członkowskich,* Ars Boni et Aequi, Poznań 2008.
Schöndorf-Haubold B., *Die Strukturfonds der Europäischen Gemeinschaft. Rechtsformen und Verfahren europäischer Verbundverwaltung*, Verlag C.H. Beck, München 2005.
Skąpski J., *Zobowiązania. Część ogólna*, [in:] S. Grzybowski, J. Skąpski, S. Wójcik, *Zarys prawa cywilnego*, Warszawa 1988.
Szczepaniak R., *Swoboda umów w sektorze publicznym*, [in:] Z. Kuniewicz, D. Sokołowska (eds), *Prawo kontraktów*, Wolters Kluwer, Warszawa 2017.
Szewczak M., *Administracyjno-prawne aspekty realizacji Wspólnej Polityki Rolnej w Polsce*, Wydawnictwo KUL, Lublin 2008.
Szumski S., *Wspólna Polityka Rolna Unii Europejskiej*, Wydawnictwo Akademickie i Profesjonalne, Warszawa 2007.
Świstak M., Tkaczyński J.W., *Wybrane polityki publiczne Unii Europejskiej. Stan i perspektywy*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2015.
Tomkiewicz E., *Polityka rozwoju obszarów wiejskich na lata 2007–2013 (perspektywy na tle dotychczasowej ewolucji ustawodawstwa)*, Studia Iuridica Agraria Vol. 6, 2007.
Trzpis P., *Wspólna Polityka Rybacka Unii Europejskiej*, Rocznik Integracji Europejskiej No. 1, 2007.
Wyporska-Frankiewicz J., *Publicznoprawne formy działania administracji o charakterze dwustronnym*, Wolters Kluwer, Warszawa 2010.
Zybała A., *Polityki publiczne. Doświadczenia w tworzeniu i wykonywaniu programów publicznych w Polsce i innych krajach. Jak działa państwo, gdzie zmierza/chce/musi rozwiązać zbiorowe problemy swoich obywateli?*, Krajowa Szkoła Administracji Publicznej, Warszawa 2012.

EVOLUTION OF THE AGREEMENT FOR PROJECT CO-FINANCING FROM EU FUNDS IN THE POLISH LEGAL SYSTEM

Summary

The conclusion of an agreement for project co-financing from the European Union funds is a part of the proceedings in the framework of implementation of operational programmes. This agreement sets out the rules for the implementation and the financial settlement of the

planned project (undertaking) that is co-financed from public funds. The legislator defined the parties to such agreement and their essential rights and obligations, as well as its essential elements. As a result, it can be assumed that characteristic elements defined the specificity of the agreement, the subject of which is financing the implementation of a specific project. Given a certain amount of freedom in the regulation of mutual rights and obligations, the same as the lack of regulation allowing to assign such agreements as a public-law contract, lead to conclusion that it should be recognized as a civil-law contract. Due to the specific relations between both parties to the contract and its specific provisions laid down by law, it has changed its status from an innominate to a nominate contract. It seems that the agreement will continue to evolve, if only because of the need to ensure adequate protection of the rights of the applicants for funding.

Keywords: agreement for EU co-financing, project co-financed from EU funds, public-law contract, civil-law contract

EWOLUCJA UMOWY O DOFINANSOWANIE PROJEKTU ZE ŚRODKÓW EUROPEJSKICH W POLSKIM SYSTEMIE PRAWNYM

Streszczenie

Zawarcie umowy o dofinansowanie projektu ze środków europejskich jest elementem postępowania prowadzonego w ramach realizacji programów operacyjnych. Umowa określa zasady realizacji oraz finansowego rozliczenia planowanego projektu (przedsięwzięcia) współfinansowanego ze środków publicznych. Ustawodawca określił strony takiej umowy oraz ich zasadnicze prawa i obowiązki, a także istotne jej elementy. W rezultacie można przyjąć, że wyszczególnione zostały charakterystyczne elementy określające specyfikę umowy, której przedmiotem jest dofinansowanie realizacji określonego projektu. Wobec pewnego zakresu swobody w regulacji wzajemnych praw i obowiązków oraz braku regulacji umożliwiających przypisanie takim umowom charakteru publicznoprawnego uznawano, że mają one charakter cywilnoprawny. Ze względu na specyficzne relacje stron umowy o dofinansowanie oraz jej charakterystyczne postanowienia określone ustawowo uzyskała ona status umowy nazwanej w polskim systemie prawnym. Wydaje się, że będzie ona podlegać dalszej ewolucji, choćby ze względu na potrzebę zapewnienia należytej ochrony wnioskodawcy ubiegającego się o dofinansowanie.

Słowa kluczowe: umowa o dofinansowanie ze środków UE, projekt dofinansowany ze środków UE, umowa publicznoprawna, umowa cywilnoprawna

EVOLUCIÓN DE CONTRATO DE SUBVENCIÓN DE PROYECTO CON FONDOS EUROPEOS EN EL SISTEMA LEGAL POLACO

Resumen

La suscripción del contrato de subvención de proyecto con fondos europeos es uno de elementos de proceso llevado en el marco de ejecución de programas operativos. El contrato fija reglas de ejecución y de liquidación financiera de proyecto planificado (empeño) cofinanciado por fondos públicos. El legislador ha determinado partes de tal contrato y sus derechos

y obligaciones básicas, así como sus elementos esenciales. Se puede asumir que se detallan los elementos característicos que determinan la especialidad del contrato cuyo objeto consiste en subvencionar la ejecución de un proyecto determinado. Dado cierto ámbito de libertad en la configuración de derechos y obligaciones mutuas y falta de regulación que permita atribuir a tales contratos el carácter público, se considera que son de naturaleza civil. Teniendo en cuenta la relación específica de las partes de contrato de subvención y estipulaciones características fijadas por ley, tal contrato es un contrato denominado en el sistema legal polaco. Parece que seguirá evolucionando, dado la necesidad de asegurar la protección debida al solicitante de la subvención.

Palabras claves: contrato de subvención procedente de fondos de la UE, proyecto subvencionado con fondos de la UE, contrato público, contrato civil

ЭВОЛЮЦИЯ СОГЛАШЕНИЯ О СОВМЕСТНОМ ФИНАНСИРОВАНИИ ПРОЕКТА ИЗ ФОНДОВ ЕС В ПОЛЬСКОЙ ПРАВОВОЙ СИСТЕМЕ

Резюме

Заключение соглашения о совместном финансировании проекта из европейских фондов является одним из элементов процедуры, проводимой при реализации оперативных программ. В таком соглашении устанавливаются принципы реализации и финансового урегулирования планируемого проекта (предприятия), частично финансируемого из бюджетных средств бюджета. Законодатель определил стороны такого соглашения, их основные права и обязанности, а также существенные элементы соглашения. Таким образом, можно принять, что характерные элементы, определяющие специфику соглашения о совместном финансировании того или иного проекта, определены на законодательном уровне. Поскольку у сторон имеется определенная степень свободы при определении взаимных прав и обязанностей, а также ввиду отсутствия положений закона, позволяющих считать, что такие соглашения носят публично-правовой характер, считалось, что они относятся к гражданско-правовым договорам. Ввиду особых отношений между сторонами соглашения о совместном финансировании, а также ввиду его характерных положений, определенных на законодательном уровне, в польской правовой системе данный вид соглашения приобрел статус поименованного договора. Представляется, что рассматриваемый тип соглашений будет эволюционировать и в дальнейшем, хотя бы в силу необходимости обеспечить надлежащую защиту прав претендента на получение дополнительного финансирования из фондов ЕС.

Ключевые слова: соглашение о совместном финансировании из фондов ЕС, проект, финансируемый совместно с фондами ЕС, договор публичного права, гражданско-правовой договор

DIE ENTWICKLUNG DES VERTRAGES ÜBER DIE KOFINANZIERUNG VON PROJEKTEN AUS EU-MITTELN IM POLNISCHEN RECHTSSYSTEM

Zusammenfassung

Der Abschluss der Vereinbarung über die Projektförderung aus EU-Mitteln ist Teil des Verfahrens, das im Rahmen der Durchführung von operationellen Programmen Anwendung findet. In dieser Vereinbarung werden die Regeln für die Durchführung und die finanzielle Abwicklung der geplanten Projekte (Vorhaben) bestimmt, die aus öffentlichen Mitteln kofinanziert

werden. Der Gesetzgeber hat die Vertragsparteien einer solchen Vereinbarung sowie ihre grundlegenden Rechte und Pflichten und die wesentlichen Elemente dieses Vertrages festgelegt. Folglich kann davon ausgegangen werden, dass die charakteristischen Elemente spezifiziert wurden, die der Spezifik des Vertrages Rechnung tragen, dessen Gegenstand die Kofinanzierung der Umsetzung eines bestimmten Projekts ist. Angesichts des gewissen Spielraums bei der Regelung der gegenseitigen Rechte und Pflichten und des Fehlens von Regelungen, durch die solche Verträge als öffentlich-rechtliche Vereinbarungen gelten könnten, wurde angenommen, dass es sich um zivilrechtliche Vereinbarungen handelt. Aufgrund der besonderen Beziehungen der Parteien einer Projektfinanzierungsvereinbarung und der besonderen gesetzlich vorgegebenen Bestimmungen besitzen diese Verträge in der polnischen Rechtsordnung den Status eines typischen Vertrags. Es ist davon auszugehen, dass solche Kofinanzierungsvereinbarungen weiter evolvieren werden, allein schon aufgrund der Notwendigkeit, dass ein angemessener Schutz des Antragstellers auf Konfinanzierung gewährleistet werden muss.

Schlüsselwörter: Finanzierungsvereinbarung, Vereinbarung über die Projektförderung aus EU--Mitteln, EU-gefördertes Projekt, öffentlich-rechtlicher Vertrag, zivilrechtlicher Vertrag

L'ÉVOLUTION DU CONTRAT DE COFINANCEMENT DU PROJET PAR DES FONDS EUROPÉENS DANS LE SYSTÈME JURIDIQUE POLONAIS

Résumé

La conclusion du contrat de cofinancement du projet par des fonds européens fait partie des procédures menées dans le cadre de la mise en œuvre des programmes opérationnels. Le contrat définit les règles de mise en œuvre et de règlement financier du projet (entreprise) envisagé cofinancé par des fonds publics. Le législateur a défini les parties à un tel accord, leurs droits et obligations fondamentaux, ainsi que ses éléments essentiels. En conséquence, on peut supposer que les éléments caractéristiques définissant les spécificités du contrat, ayant pour objet le cofinancement de la mise en œuvre d'un projet spécifique, ont été spécifiés. En raison d'un certain degré de liberté dans la réglementation des droits et obligations réciproques et de l'absence de réglementation permettant d'attribuer le caractère de droit public à de tels contrats, il a été considéré qu'ils étaient de nature de droit civile. En raison des relations spécifiques entre les parties au contrat de cofinancement et de ses dispositions spécifiques prévues par la loi, il a obtenu le statut de contrat nommé dans le système juridique polonais. Il semble qu'il sera sujet à une évolution ultérieure, ne serait-ce que pour tenir compte de la nécessité d'assurer une protection adéquate au demandeur de cofinancement.

Mots-clés: contrat de cofinancement de l'UE, projet cofinancé par des fonds de l'UE, contrat de droit public, contrat de droit civil

EVOLUZIONE DEL CONTRATTO DI FINANZIAMENTO DEL PROGETTO CON FONDI EUROPEI NEL SISTEMA GIURIDICO POLACCO

Sintesi

La stipula di un contratto di finanziamento di un progetto con fondi europei è un elemento della procedura condotta nell'ambito della realizzazione dei programmi operativi. Il contratto stabilisce i principi di realizzazione e la contabilizzazione finanziaria del progetto pianificato, cofinanziato con fondi pubblici. Il legislatore ha stabilito le parti di tale contratto e i loro diritti e doveri fondamentali, e anche i suoi elementi essenziali. In effetti è possibile ritenere che siano stati dettagliati gli elementi caratteristici che definiscono le specifiche del contratto, avente per oggetto il cofinanziamento della realizzazione di un determinato progetto. Nei confronti di un determinato ambito di libertà nella regolamentazione dei diritti e doveri reciproci e dell'assenza di norme che permettano di attribuire a tali contratti una natura pubblicistica, si è ritenuto che essi abbiano una natura privatistica. Il contratto di cofinanziamento, a motivo dei rapporti specifici delle sue parti e delle sue norme caratteristiche stabilite per legge, ha ottenuto lo status di contratto tipico nel sistema giuridico polacco. Si direbbe che debba subire un'ulteriore evoluzione, quantomeno a motivo della necessità di garantire un'adeguata tutela al richiedente del cofinanziamento.

Parole chiave: contratto di cofinanziamento con fondi europei, progetto cofinanziato con fondi europei, contratto di diritto pubblico, contratto di diritto privato

Cytuj jako:

Talaga R., *Ewolucja umowy o dofinansowanie projektu ze środków europejskich w polskim systemie prawnym [Evolution of the agreement for project co-financing from EU funds in the Polish legal system]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 204–220. DOI: 10.26399/iusnovum.v13.1.2019.10/r.talaga

Cite as:

Talaga, R. (2019) 'Evolution of the agreement for project co-financing from EU funds in the Polish legal system'. *Ius Novum* (Vol. 13) 1, 204–220. DOI: 10.26399/iusnovum.v13.1.2019.10/r.talaga

PRECAUTIONARY MEASURES IN TURKISH CRIMINAL LAW

ÖZEN INCI*
PIOTR GÓRALSKI**

DOI: 10.26399/iusnovum.v13.1.2019.11/o.inci/p.goralski

1. INTRODUCTION[1]

The Turkish criminal law is specific since it applies in a country on a cross-roads: on the one hand, Turkey is considered a cultural centre of Islam; however, on the other hand, after the reforms started at the beginning of the 20th century by Mustafa Kemal Atatürk, the country underwent a very profound process of modernisation, westernisation and secularisation, getting close to many countries of the western legal cultural world.[2] The first modern Turkish Criminal Code of 1926 was developed mainly under a strong influence of the Italian legal science and Italian court practices.[3] However, the impact did not apply to precautionary measures that already at that time had been incorporated in the Turkish Criminal Code. While the sanctions were very extensive

* PhD, Assistant Professor, Department of Criminal Law and Criminal Procedure of Istanbul Aydın University; e-mail: ozeninci@gmail.com

** PhD hab., Assistant Professor, Department of Substantive Criminal Law, Faculty of Law, Administration and Economics of the University of Wrocław; e-mail: piotr.goralski@uwr.edu.pl; ORCID: 0000-0002-0340-8576

1 The foregoing is a translation from Polish of a lecture originally delivered in German by Dr Özen Inci on 3 September 2018 at the Law Faculty of the University of Augsburg, with subsequent additional sources and comments related to Polish criminal law supplemented by Piotr Góralski.

2 S.P. Huntington, *Zderzenie cywilizacji*, Warszawa 2006, pp. 234–244.

3 S. Tellenbach, *Das türkische Strafgesetzbuch. Deutsche Übersetzung und Einführung*, Berlin 2008, p. 1; A. Sőzűer, *Die Reform des türkischen Strafrechts*, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) No. 3, 2007, p. 91; F.S. Mahmutoğlu, *Das neue türkische Strafgesetzbuch. Allgemeiner Teil*, Annales Vol. XXXVIII, No. 55, 2006, p. 35 (see also www.dergipark.gov.tr/download/article-file/6964); Z. Dağasan, *Von der Sünde zur Strafrecht – Strafrechtstheorie in der türkischen Rezeptions – und Kodifikationsgeschichte*, Inönü Üniversitesi Hukuk Fakültesi Dergisi Cilt:3 Sayı:1 Yıl 2012, p. 384 (see also www. dergipark.gov.tr/download/article-file/ 208413).

in the Italian Criminal Code,[4] the measures in the Turkish code were quite limited: it provided solely for detention of mentally ill perpetrators of prohibited acts in psychiatric hospitals, detoxication treatment of alcohol or drug addicted criminals, and precautionary measures applied to minors who committed punishable acts.[5] Now, this has changed: the scope of the measures and their forms have been materially expanded.[6] The road to the situation was very long: the first works on a new Turkish Criminal Code started in 1987 and lasted with breaks until 2003 when a final bill of the new criminal code was submitted to the Parliament.[7] A common opinion is that the general provisions in the bill remained traditional, mainly under the influence of the Italian penal law science, while the detailed part of the code was developed largely on the basis of French regulations. In the last stage of works on the bill there was also a visible impact of views of Turkish scientists educated in Germany.[8] However, it seems that with respect to provisions relating to precautionary measures, their normative form now in force in the Turkish Criminal Code is specific and is not a direct transposition of penal regulations from any country which served as a model for the Turkish legislators; it was rather a specific synthesis thereof.

The Turkish Criminal Code (*Türk Ceza Kanunu*) of 26 September 2004,[9] (hereinafter referred to as t.k.k.) contains precautionary measures in the second part of Book one. Apart from punishments, this is a separate type of sanctions provided for in the legal act. The catalogue of punishments in the Turkish Criminal Code covers the punishments of a strict life imprisonment, life imprisonment, term imprisonment and fines imposed in daily amounts.[10] The Turkish legislator incorporated the following into precautionary measures: ban on enjoying certain right (Article 53 t.k.k.), confiscation of assets and confiscation of financial benefits

---

[4] At the time when the Turkish Criminal Code was approved and became effective in 1926, Italy had a classicist penal code developed by Giuseppe Zanardelli in 1890. However, in 1921 a draft criminal code was developed by Enrico Ferri who – relying on assumptions of the positivist school – relied solely on social defence measures, rejecting the idea of guilt and punishment. When the legislative proposal was abandoned in 1925, a codification commission was established that was headed by Alfredo Rocco. In 1929 the commission published a final bill of the criminal code which apart from punishments provided for a very extensive system of precautionary measures. Rocco's criminal code of 1930 became effective in Italy in 1931. For more, see M. Filar, *Prawo karne we Włoszech*, [in:] S. Frankowski (ed.), *Prawo karne niektórych państw Europy Zachodniej*, Warszawa 1982, pp. 65–69, 95–96 and 99–105.

[5] S. Tellenbach, *Einführung in das türkische Strafrecht*, Freiburg im Breisgau 2003, p. 58 (see also www. mpicc.de/files/pdf1).

[6] S. Tellenbach, *Zum neuen türkischen Strafgesetzbuch*, Konrad Adenauer Stiftung – Auslandsinformation (KAS) No. 4, 2005, p. 84, www. kas.de/wf/doc/kas_6625-544-1-30 pdf.

[7] *Ibid*., p. 79; A. Sőzűer, *supra* n. 3, p. 91.

[8] S. Tellenbach, *supra* n. 6, p. 79.

[9] The Act became effective on 1 June 2005 (Act No. 5237, official journal No. 25611 of 25.10. 2004).

[10] S. Tellenbach, *supra* n. 6, p. 83; F.S. Mahmutoğlu, *supra* n. 3, p. 47. The term imprisonment in Turkey is imposed for 1 month to 20 years (Article 49.1 t.k.k.). In compliance with the European Convention of Human Rights – to which Turkey has been party since 1954 – a criminal convicted for life imprisonment may apply to be released. A strict life imprisonment punishment is different from the basic form of the punishment solely with a stricter enforcement of the punishment which does not mean that the convict will stay in prison for life.

(Articles 54–55 t.k.k.), measures applied to minors (Article 56 t.k.k.), measures applied to mentally ill criminals (Article 57 t.k.k.), measures applicable to recidivists and very dangerous criminals (Article 58 t.k.k.), as well as expulsion of foreigners from Turkey (Article 59 t.k.k.) and precautionary measures imposed by courts against legal persons (Article 60 t.k.k.).[11] However, Turkish law does not provide for the most specific primitive precautionary measure that has been served for centuries, i.e. by capital punishment, imposed on the most dangerous criminals.[12]

Similarly to other European penal law systems, also in Turkish law the difference between punishments and precautionary measures consists in the fact that punishments are treated as sanctions applied to fully sane criminals, i.e. fault-based liability. Precautionary measures are administered primarily on the basis of danger to which the society is exposed from the criminal: the danger may result, inter alia, from insanity of criminals when committing a prohibited act.[13] Certain precautionary measure incorporated in the Turkish Criminal Code are in fact additional punishments that may be imposed by courts in top of basic punishments[14] if the application of pure punishment would not be adequate for a specific criminal to accomplish the preventive tasks required of criminal law.[15] However, if conditional suspension of punishment is possible, a view predominates in the doctrine of Turkish law that the institution is not appropriate for precautionary measures and should not apply thereto.[16]

Another difference between punishments and precautionary measures is that punishments are retrospective sanctions: the actual punishment is based on the circumstances of the act committed by the perpetrator and it is a retaliation for the committed act. Apart from the purpose of justice, punishments also fulfil functions in the sphere of specific and general prevention, while the purposes served by precautionary measures include solely individual preventive action expressed

---

[11] S. Tellenbach, *supra* n. 6, p. 83; M.E. Artuk, *Sicherungsmaßnahmen*, Gazi Üniversitesi Hukuk Fakultesi Dergisi Vol. XIV, No. 2, 2010 (see also www.gazi.edu.tr/hukuk/dergi/14_2_8 pdf).

[12] Death penalty was for the last time administered in Turkey in 1984. Formally, it was abolished for crimes committed in peace time in 2002. Now, Article 38.10 of the Turkish Constitution, amended in 2004, provides that "Nobody can be sentenced to death penalty". See more: Constitution of the Republic of Turkey of 7 November 1982, Act No. 2709, official journal No. 17863 of 9.11.1982; K. Wojciechowska-Litwinek, D. Haftka-Isik, K. Stanek, Ö. Emiroğlu (transl.), *Konstytucja Republiki Tureckiej (Türkiye Cumhuriyeti Anayasasi)*, Warszawa 2013, p. 77; See also S. Tellenbach, *supra* n. 5, p. 5.

[13] B. Öztürk, M.R. Erdem, *Uygulamali Ceza Hukuku ve Güvenlik Tedbileri Hukuku*, Ankara 2016, p. 505; T. Demirbas, *Ceza Hukuku Genel Hükülmer*, Ankara 2013, p. 609; I. Özgenc, *Ceza Hukuku Genel Hükülmer*, Ankara 2014, p. 760. With respect to distinguishing between punishments and precautionary measures, see V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *Ceza Genel Hukuku Temel Bilgiler*, Ankara 2017, p. 361. In more detail, the premises of the status of insecurity are discussed in the work by M.E. Artuk, A. Gökcen, C. Yenidünya, *Ceza Hukuku Genel Hükülmer*, Ankara 2014, p. 851.

[14] B. Öztürk, M.R. Erdem, *supra* n. 13, p. 506; T. Demirbas, *supra* n. 13, p. 609; I. Özgenc, *supra* n. 13, p. 360.

[15] The Turkish constitutional tribunal several times presented its standpoint on differences between punishments and precautionary measures stressing that precautionary measures may not be treated as punishments; see, e.g. a ruling of the Turkish Constitutional Tribunal of 9 March 1971 (1970/42E, 1971/30K).

[16] M.E. Artuk, *supra* n. 11, p. 214.

primarily by medical treatment or broad re-socialisation (including educational efforts) applied to offenders.[17]

The element that combines the purposes of punishments and precautionary measures in the Turkish penal law is the fact that both sanctions are subject to the principle of legalism (*nulla poena sine lege*),[18] expressed both in Article 38.1 of the Turkish Constitution[19] and in Article 2 of the Turkish Criminal Code.[20] However, despite distinguishing between punishments and precautionary measures, the Turkish legislator failed to regulate a number of major issues incorporated in the general part of the Criminal Code with reference to the other sanction. Such issues include, for instance, the problem of applying the *lex retro non agit* principle to precautionary measures or the impact on the enforcement of such measures of such institutions as amnesty, individual release from punishment or the statute of limitations.[21] Nevertheless, a view predominates in the Turkish penal law science with respect to the principle of non-retroactivity that the principle should be treated as an element of another, broader principle mentioned earlier, i.e. *nulla poena sine lege*; while the principle of legalism in the Turkish Constitution and Criminal Code was clearly referred not only to punishments but also distinctly to precautionary measures, an assumption should be made that the principle of *lex retro non agit* also applies to precautionary measures. Judgments passed by Turkish courts seem to follow the direction.

It should be added that, contrary to administrative sanctions, precautionary measures may be imposed solely by judges, not by government officials, and the regulation thereof may not be provided in a normative regulation subordinate to an Act.[22]

2. TYPES OF PRECAUTIONARY MEASURES IN TURKISH PENAL LAW

2.1. BAN ON EXERCISING CERTAIN RIGHTS

The Turkish Criminal Code provides that courts may impose the following bans as precautionary measures for committed offences:[23]

– ban on performing permanent, temporary or time restricted tasks in public service;

---

[17] T. Demirbas, *supra* n. 13, p. 608; M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 857; I. Özgenc, *supra* n. 13, p. 760; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 360; M.E. Artuk, *supra* n. 11, p. 203.

[18] M.E. Artuk, *supra* n. 11, p. 201.

[19] K. Wojciechowska-Litwinek, D. Haftka-Isik, K. Stanek, Ö. Emiroğlu, *supra* n. 12, pp. 76–77.

[20] S. Tellenbach, *supra* n. 3, pp. 13–14.

[21] M.E. Artuk, *supra* n. 11, pp. 207–215.

[22] *Ibid.*, p. 191. This is clearly stated in Article 38.3 of the Turkish Constitution. See K. Wojciechowska-Litwinek, D. Haftka-Isik, K. Stanek, Ö. Emiroğlu, *supra* n. 12, p. 77.

[23] If the statutes require the application of such measures with respect to offenders, this means that such types of precautionary measures apply to offenders who were sane when they committed the prohibited deed. See M. Koca, I. Üzülmez, *Türk Ceza Hukuku Genel Hükülmer*, Ankara 2009, p. 520.

– ban on exercising duties or parental or guardianship authority. Such ban may not accompany conditionally suspended punishments and would not apply in case of temporary release from serving a punishment. In those two instances, offenders may exercise their authority with respect to persons under their care, in particular children, in the sphere of parental care, guardianship or assistance (Article 53.3 t.k.k.);
– ban on occupying managerial or supervisory positions in foundations, associations, trade unions, employers' unions, companies, enterprises, cooperatives or political parties;
– ban on practising a profession and ban on performing services by a person not fully employed and ban on operating as a craftsperson by a person who has the status on the basis of a decision of a professional organisation that is a public institution or a public-law corporation. However, in this case the court may – at its own discretion and subject to the circumstances of the offence and the offender's personal and social condition – resign from imposing a precautionary measure.[24]

The bans, imposed by courts as precautionary measures and consisting in revoking certain rights, may be applied only when the punishment administered at the same time is absolute: no precautionary measure may be applied with a punishment that has been conditionally suspended and is a short imprisonment punishment;[25] this is set forth in Article 53.4 t.k.k. Such measure does not apply to offenders who were under 18 years of age when they committed the offence. The type of imposed punishment: imprisonment or fine, is of no importance to the possibility of imposing a precautionary measure which is left to the court's discretion. Such form of a precautionary measure lasts for one half of the precautionary measure imposed at the same time and it is enforced when the imprisonment punishment is ended. When a precautionary measure is applied apart from a simultaneously imposed fine, it is enforced when the fine is collected, while a ban (or bans) lasts for one half of the number of daily amounts of the fine imposed on the offender (Article 53.5 t.k.k.).[26]

It should be noted that Article 53.1 t.k.k. contains a general rule that this type of precautionary measure may be applied solely with respect to punishable behaviour that is intentional. However, the provision of Article 53.6 t.k.k. contains an exception to the rule: namely, when the offender has committed an unintentional offence by abusing their professional competencies or artistic skills, or a motor offence is committed as a result of failure to exercise due diligence in motor traffic, then the court may also impose a ban on practising a profession or performing artistic activities, or – in case of reckless drivers – also a ban on driving vehicles for three months to three years.[27] As it is clear, this is a specific precautionary measure with time-limited enforcement and is a relatively specified sanction.

---

[24] S. Tellenbach, *supra* n. 3, pp. 42–43.

[25] In compliance with Article 49.2 t.k.k., a short-term imprisonment punishment is understood as imprisonment up to one year. See S. Tellenbach, *supra* n. 3, p. 37.

[26] Article 52.1–2 t.k.k. provides that fines are imposed in daily amounts and – unless the law provides otherwise – the number of daily amounts may not be less than five and more than 720 with the one daily amount being from 20 to 100 Turkish lira. See S. Tellenbach, *supra* n. 3, p. 41.

[27] *Ibid.*, p. 44.

The precautionary measure discussed here – apart from the classic formula when it is imposed by a court – may also have the form of a legal effect of imposing an imprisonment punishment, which is clearly highlighted in Article 53.1 t.k.k.[28] As each effect of conviction, also a ban on using certain rights results straight from the law at the time the judgment becomes final. In such situation, the court would not rule about applying the precautionary measure with enforcement period ending with the end of the related punishment.[29] If the precautionary measure is to be imposed, the offender has to be convicted for an intentional offence with a punishment of imprisonment, while the length of the imprisonment is of no importance. Thus, the legal effect of conviction does not occur as an effect of imposing solely the punishment of a fine.[30]

It should be added that until 2015, the Turkish Criminal Code in Article 53.1.b provided for another precautionary measure, namely a ban on the right to vote and the right to stand for election; however, by a decision of the constitutional tribunal the ban was found to breach the principles of the Turkish Constitution and as a result was abolished.[31]

2.2. CONFISCATION OF ASSETS AND CONFISCATION OF FINANCIAL BENEFITS

Article 54 t.k.k. provides for confiscation of assets and Article 55 provides for confiscation of financial benefits.[32] However, the Turkish penal law does not apply confiscation of total assets: a ban on applying such sanctions was clearly highlighted in Article 38.10 of the Turkish Constitution.[33]

With respect to confiscation of assets, the core premises underlying its application are as follows:

– covering only tangible assets with the sanction;
– the confiscated assets may not be held by a person who has obtained and keeps such assets in good faith;[34]
– the asset to be confiscated has been used to prepare, attempt or perform only an intentional offence or has been obtained as a result of such deed;

---

[28] B. Öztürk, M.R. Erdem, *supra* n. 13, p. 506.

[29] M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 861; I. Özgenc, *supra* n. 13, p. 766; T. Demirbas, *supra* n. 13, p. 611; M. Koca, I. Üzülmez, *supra* n. 23, p. 521; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 362.

[30] S. Tellenbach, *supra* n. 3, pp. 42–44.

[31] See the judgment of the Turkish constitutional tribunal of 8 October 2015 (2014/140E, 2015/85K).

[32] F.S. Mahmutoğlu, *supra* n. 3, p. 47.

[33] K. Wojciechowska-Litwinek, D. Haftka-Isik, K. Stanek, Ö. Emiroğlu, *supra* n. 12, p. 77.

[34] In the justification to the Turkish criminal code bill, good faith was clarified as the situation of a person (owner or holder) who is not aware of any committed offence from which the asset to be confiscated originated; see V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 369. Cf. also B. Öztürk, M.R. Erdem, *supra* n. 13, p. 516; M. Koca, I. Üzülmez, *supra* n. 23, p. 532.

– Turkish penal law does not allow confiscation of assets that were used to commit an offence in the form of neglect of duties. However, it is not always possible to determine the essence of action or neglect of duty. For instance, a vehicle may be confiscated that was used to escape from a crime scene; however, in certain circumstances doubts may arise if the escape was an active deed or avoidance of criminal liability.[35] Additionally, an asset to be confiscated as a precautionary measure does not have to be used to commit an offence, it is sufficient that it is intended for the purpose.[36]

If an asset used to commit an offence is to be confiscated, the tool used in a punishable act must have features that pose danger to public health or social morality (e.g. when the offender uses harmful chemical substances that may generate mass poisoning).[37] Decisions on confiscation of assets may not generate higher losses than the punishable deed that has been planned or performed with the tool: an adequate proportion has to be kept in line with the principle of just criminal judgments. In other words, confiscation of assets must be commensurable to the damage that the punishable deed, in which the tool was used, caused or could have caused.[38] For instance, farmed animals (usually cows or horses) may not be confiscated when they are the only source of income and maintenance for a person.[39] When the criminal tool was lost, factually or pursuant to a legal operation handed over to another person by the offender, or was e.g. consumed, then the court may rule the confiscation of an amount of money from the offender's property equivalent to the value of the asset that should have been confiscated (confiscation of an equivalent of the value of assets).[40] In compliance with Article 54.4 t.k.k., confiscation may apply also to assets where the manufacturing, holding, use, purchase or sale in itself is a punishable deed.[41] In the Turkish penal law, such offence includes, e.g. holding of firearms without licence or holding of drugs that, in accordance with the quoted footnote, may be confiscated as a precautionary measure.

Contrary to confiscation of assets that has been present in the Turkish criminal law for long, confiscation of financial benefits is a relatively new regulation. Now, the scope of the offender's property that may be subject to confiscation of financial benefits has been extended.[42] The core premises underlying the measure include:

– the financial benefit generated as a result of a punishable deed, which is the subject of such deed, or anticipated by the offender, must represent profit in economic sense that can be financially transformed and appraised;
– the offence that generates such benefit must be intentional;[43]

---

[35] T. Demirbas, *supra* n. 13, p. 614; M. Koca, I. Üzülmez, *supra* n. 23, p. 531; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 370.

[36] F.S. Mahmutoğlu, *supra* n. 3, p. 47.

[37] S. Tellenbach, *supra* n. 3, p. 44.

[38] M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 876; T. Demirbas, *supra* n. 13, p. 615; B. Öztürk, M.R. Erdem, *supra* n. 13, p. 516; M. Koca, I. Üzülmez, *supra* n. 23, p. 532.

[39] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 371.

[40] M. Koca, I. Üzülmez, *supra* n. 23, p. 533; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 371.

[41] S. Tellenbach, *supra* n. 3, p. 45.

[42] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 372.

[43] I. Özgenc, *supra* n. 13, p. 781.

– the economic benefit is not returned to the person harmed by the offence.[44]

If the offender has disposed of the financial benefit resulting from the deed and obtained as a result thereof, and the offender's property has increased by a new financial benefit, also such value as equivalent to the financial benefit generated by the offence may be confiscated.[45]

2.3. PRECAUTIONARY MEASURES APPLIED TO MINORS

In compliance with the Turkish Criminal Code, minors under 12 years of age when they commit a punishable deed are not subject to criminal liability. Minors who committed a punishable deed with features of an offence when they were aged 12 to 15 are basically considered persons able to be guilty and subject to criminal liability. However, it is possible that a court may determine that a child who has committed a punishable deed at the age of 12 to 15 has not understood the meaning of such deed and is not liable criminally. Then, such child's situation in the sense of penal law is the same as the legal situation of a child who was under 12 years of age when committed a punishable deed. In both instances, both minors under 12 years of age and for minors aged 12 to 15 found not to be liable, the court may apply precautionary measures dedicated to that specific category of "offenders".[46]

Article 56 t.k.k. contains a clear phrase "Precautionary measures applied to children"; however, further provisions of the Criminal Code do not regulate the measures; the provision refers to a separate Act on children protection.[47] In Article 5.1 the Act identified precautionary measures that are aimed at protecting and supporting those minors who have been involved in committing punishable deeds by other people and, because of their insufficient development, such children are not able to understand guilt and be subject to criminal liability. Among the precautionary measures applied to minors, the Act on children protection identifies: (1) guidance, (2) education, (3) care, (4) therapy, and (5) support in obtaining accommodation.

Guidance applies not so much to support to minor offenders but rather to their parents and legal guardians. When this measure is applied, parents and guardians are provided with information on effective methods of solving problems related to incorrect development of children and correction of the situation, in particular

---

[44] S. Tellenbach, *supra* n. 3, p. 45.

[45] T. Demirbas, *supra* n. 13, p. 616; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 373. Cf. also A. Sőzűer, *supra* n. 3, pp. 114–115.

[46] Additionally, the Turkish Criminal Code identifies a category of minors who committed offences after 15 years of age and before they turned 18. For those offenders, courts should apply mitigated punishment due to their incomplete psychical and physical development. However, precautionary measures applicable to children may not be applied against them, only precautionary measures that apply to adult offenders. In accordance with the Turkish Criminal Code, adults are persons aged 18 or more at the time they commit a punishable deed. The issue of the age for criminal liability is provided for in Article 31 t.k.k. For more on the subject, cf. S. Tellenbach, *supra* n. 3, pp. 29–30; A. Sőzűer, *supra* n. 3, p. 101.

[47] Act on children protection No. 5395 of 3 July 2005, published in the official journal No. 25876 of 15 July 2006.

with reference to the educational process. The second measure (education) consists in referring minors to special institutions where education, vocational or artistic courses are offered so that after completion of such education minors can find a job or a specific vocation. If the child's legal guardian for whatever reason is not able to see to the child's correct development and as a result such minor commits a punishable deed, then the third measure, care, may be applied. Such minor is placed in a special care centre or a foster family. Therapy applies when periodic or even long-term medical treatment is required that may prove necessary to protect the child's psychic or physical health: this in particular applies to minors who are alcohol or drug addicts. Similarly, to the first measure, also the last measure listed in the Act on children protection applies to guardians of minor offenders. This consists in providing adequate accommodation to legal guardians of such children if those guardians are in a difficult life situation, particularly when they experience major living problems that may also pose a hazard to their life. In particular, that refers to pregnant women who already rear children.

2.4. PRECAUTIONARY MEASURES APPLIED TO MENTALLY SICK OFFENDERS AND ALCOHOL AND DRUG ADDICTS

Therapeutic precautionary measures are applied with respect to people who committed punishable deeds when they were mentally sick. Pursuant to Article 32.1 combined with Article 57.1–6 t.k.k., it can be stated that the Turkish legal regulations identify three types of offenders who have symptoms of mental sickness: offenders who are insane as a result of their sickness, persons with limited sanity in a high degree and offenders with limited sanity which is below a level that may be treated as high.[48] Completely insane offenders and those with limited sanity that is close to insanity, may be placed in dedicated closed institutions to be isolated from the society and to be treated.[49] The Turkish Criminal Code does not specify the time of placement in such psychiatric institutions: the measure is applied for as long as the mentally sick offender poses a hazard to the society and the hazard has not been mitigated to a material extent.[50] A sick person may be released from an isolating and treating institution only when specialists issue a positive opinion that would indicate at least a major mitigation of the danger posed by the offender.[51] When the offender leaves the institution, such person may be subject to special supervision in order to control their conduct. Such supervision is established by a prosecutor's office, while it is executed by health administration institutions. The duration

---

[48] According to Article 32.1 t.k.k., "Persons who due to a mental sickness are not able to understand the legal meaning and consequences of their deeds or whose ability to control their behaviour for those reasons is materially restricted shall not be punished. However, precautionary measures may be applied to such persons." See S. Tellenbach, *supra* n. 3, p. 30.

[49] *Ibid.*, p. 46.

[50] I. Özgenc, *supra* n. 13, p. 794.

[51] The opinion has the form of a report submitted to court by the Health Board of the psychiatric institution where the offender is detained. See S. Tellenbach, *supra* n. 3, p. 46.

of the non-isolation precautionary measures is not determined by law; however, experts in their opinion should specify the duration thereof. The supervision may be ended by court on the basis of a written expert's opinion if it finds that the offender is no longer dangerous to the society or that the danger has been materially mitigated.[52] In compliance with Article 57.5 t.k.k., the offender who, having left a psychiatric institution, during the enforcement of a non-isolation measure (that is medical control of behaviour) manifests indications of a growing hazard to the society, such person may again be placed in a psychiatric institution in compliance with Article 57.1 t.k.k.[53]

If an offender is found to be a perpetrator who at the time of the deed manifested symptoms of limited sanity (however, without reaching the degree of material reduction to sanity), both punishment and precautionary measures may be applied that are dedicated to insane, mentally sick offenders. In that situation, the applied precautionary measure is as follows: the imposed imprisonment is served in part or in whole in therapeutic conditions as far as possible similar to detention of insane offenders, as stipulated in Article 57.6 t.k.k.[54]

Article 57.7 t.k.k. contains quite a controversial regulation referring to offenders who commit offences under the influence of alcohol or drugs. They may be subjected to treatment for additions in social isolation and the treatment lasts until they get rid of their addiction. When an expert opinion states an improved health condition of the offender, they may be released from the closed drug addiction treatment institution.[55] The controversy is that offenders are released from addiction treatment when their health condition improves yet who were found to be sane when committing the offence; thus they do not serve a punishment adequate to the committed offence, irrespective of the precautionary measure: they are only treated for their addiction as part of such precautionary measure.[56]

---

[52] The non-isolating therapeutic measure is applied on the basis of Articles 57.3–4 t.k.k. that provide: Article 57.3 "The report of the Health Board shall contain a statement if in connection with the mental sickness and the punishable deed committed by the offender, further medical control continues to be required (when such person leaves the psychiatric institution – added by the author) with a view to protect the society. When such need exists, the duration of the control shall be specified." Art. 57.4: "Medical control for the time specified in the report of the Health Board shall be established by the prosecutor's office. In the period, the person subject to medical control shall also be subject to supervision exercised with special technical devices and shall remain at the disposal of competent specialists." See S. Tellenbach, *supra* n. 3, p. 46. Cf. A. Sőzűer, *supra* n. 3, p. 115.

[53] S. Tellenbach, *supra* n. 3, p. 47.

[54] The regulation stipulates: "Persons who at the time of committing an offence had limited ability to control their behaviour due to a mental sickness may be placed in a therapeutic institution with high security measures. Such persons are placed in such institutions on the basis of a report of the Health Board of the institution where such persons sentenced for imprisonment will be detained. The imposed punishment shall be served in the therapeutic institution in whole or in part. The duration of the precautionary measures shall be equivalent to the imprisonment punishment administered to the offender." S. Tellenbach, *supra* n. 3, p. 47. Cf. A. Sőzűer, *supra* n. 3, p. 102.

[55] S. Tellenbach, *supra* n. 3, p. 47.

[56] B. Öztürk, M.R. Erdem, *supra* n. 13, p. 518.

2.5. PRECAUTIONARY MEASURES APPLIED TO RECIDIVISTS AND ESPECIALLY DANGEROUS OFFENDERS

The Turkish Criminal Code provides for the application of only one non-isolating precautionary measure for sane offenders who pose hazard to the society because they keep relapsing and commit punishable acts – thus they can be viewed as sort of addicted in that respect and as professional criminals – therefore, such persons may be termed "especially dangerous offenders".[57]

Relapse into crime (recidivism) means that the offender commits another offence after some time from having been sentenced.[58] The determination if the offender is a recidivist in the statutory sense of Turkish penal law generates three material effects:

– firstly, it is not – contrary to other legislative systems – a legal basis to apply stricter punishment;[59] the relapsing offender is subject to special rules of serving the punishment of imprisonment:[60] in particular, the time when the recidivist may apply for premature release from prison is extended versus other offenders;[61]
– secondly, if alternative punishments are possible for the second committed offence: a fine or imprisonment, in case of a recidivist the court is obliged to sentence the offender to imprisonment (Article 58.3 t.k.k.);[62]
– thirdly, the state exercises a specific type of control with respect to relapsing offenders in the form of a precautionary measure once they leave prison. The Act is quite laconic in describing the measure: however, Articles 58.6–7 t.k.k. specify only that the measure may be imposed in the convicting sentence and has

---

[57] Article 58.1–9 t.k.k. regulating that precautionary measure is entitled "Recidivism and especially dangerous offenders" and, in compliance with the title the regulation, is not restricted solely to specifying the precautionary measure: it also contains the statutory definition of recidivism. Article 58.9 t.k.k. requires the application of regulations concerning recidivists with respect to members of organised criminal groups and addicted offenders and professional offenders. See S. Tellenbach, *supra* n. 3, p. 48.

[58] B. Öztürk, M.R. Erdem, *supra* n. 13, p. 520; M. Koca, I. Üzülmez, *supra* n. 23, p. 541; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 376.

[59] Until 2005, under the previous Turkish Criminal Code of 1926, recidivism was a reason to make the punishment stricter. See S. Tellenbach, *supra* n. 5, p. 62.

[60] M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 881; I. Özgenc, *supra* n. 13, p. 795; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 376. Cf. the judgment of the Turkish Cassation Court of 6 March 2012 (2011/13-384E, 2012/82 K).

[61] In accordance with Articles 107–108 of the Turkish Code of Criminal Procedure (Act of 4 December 2004, No. 5271, official journal of 17 December 2004, effective on 1 June 2005), recidivists could apply for conditional release from the punishment of term imprisonment after serving three-fourths of their imposed punishment (to compare: "ordinary" convicts had such right after serving two-thirds of their punishment). A relapsing criminal sentenced to life imprisonment may apply to shorten the punishment after three years (other convicts after 24 years of serving the punishment). If a recidivist has been sentenced to a strict punishment of life imprisonment, then he/she is entitled to apply for premature release after having served minimum 39 years of the punishment (a non-recidivist convict may apply to have the punishment shortened after having served minimum 30 years in prison). See A. Sőzűer, *supra* n. 3, p. 111.

[62] S. Tellenbach, *supra* n. 3, p. 48.

the form of "controlled liberty" enforced when the sentence has been served.[63] Article 58.8 t.k.k. refers to the detailed description of the measure in a dedicated Act: the Code of Criminal Procedure which will be discussed further below.

In order to find that an offender is a recidivist, he/she must have committed minimum two offences after turning 18; the institution of recidivism does not apply to people under 18. The first conviction has to be with a legally final judgment; it is of no importance if the imposed punishment had an isolating nature or not. Thus, in order to identify a recidivist, it is sufficient that the first legally valid conviction resulted in a fine imposed on the offender.[64] The other committed offence may have the form of an attempt or actual performance of a prohibited act.[65] The second punishable act must be committed before the expiry of a specified period from the sentence for the first offence: namely, if the first offence carried a potential sentence of imprisonment over five years, the next offence must be committed before the expiry of five years of the end of the imprisonment for the first offence; however, if the first offence carried a potential sentence of a fine or imprisonment of up to five years, the next offence has to be committed before the expiry of three years of the end of the imprisonment for the first offence (Articles 58.2.a and 58.2.b t.k.k.).[66]

The term of an "especially dangerous offender" embraces offenders committing punishable acts resulting from a chronic habit of pursuing criminal activity (addicted offenders), those who are professionally involved in criminal activity (professional criminals) and members of organised criminal organisations whose objective is to commit crime (organised criminals).[67] Those three categories of offenders are treated as especially dangerous representatives of the criminal world since, on the one hand, they usually display a permanent tendency to breach the law and, on the other hand, they have a higher potential in that respect compared to other "ordinary" categories of offenders.[68] Similarly to recidivists, the determination if a person may be classified as an especially dangerous offender does not generate stricter punishment: such offenders serve their imprisonment punishment in a special regime. In compliance with Article 58.9 t.k.k., also for this category of offenders there is a similar control of their behaviour after serving the sentence as a non-isolating type of precautionary measure like the one applicable to recidivists. The said precautionary measure, in compliance with Article 108.4 of the Turkish Code of Criminal Procedure, may not last less than one year. Afterwards, the court may extend the time of the supervision over recidivists or

---

[63] *Ibid*.

[64] M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 892; M. Koca, I. Üzülmez, *supra* n. 23, p. 544; I. Özgenc, *supra* n. 13, p. 796; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 376.

[65] M. Koca, I. Üzülmez, *supra* n. 23, p. 548; M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 895; I. Özgenc, *supra* n. 13, p. 798; T. Demirbas, *supra* n. 13, p. 630; B. Öztürk, M.R. Erdem, *supra* n. 13, p. 527; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 378.

[66] S. Tellenbach, *supra* n. 3, p. 48.

[67] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 380. The Turkish Criminal Code identified two types of such organisations; Article 220 of the Act covers punishment for membership in an ("ordinary") organised criminal group, while Article 314 t.k.k. covers punishment for membership in a military organised criminal group that poses danger to state security or constitutional order; see S. Tellenbach, *supra* n. 3, pp. 141–144 and 199.

[68] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 380.

persons categorised as especially dangerous offenders with the subsequent extensions up to five years maximum (Article 108.6 of the Turkish Code of Criminal Procedure). In the time of supervision over recidivists and especially dangerous offenders, courts may impose various requirements as to behaviour, specified in applicable laws. If a recidivist (or an especially dangerous offender) fails to comply with the requirements, courts may impose a punishment of 15 days to three months of imprisonment.

The Turkish Criminal Code contains statutory definitions of the criminal types. An addicted offender is a person who within one year commits minimum twice an intentional offence of the same type; it is sufficient to attribute both acts to the offender who does not have to be sentenced for both (Article 6.1.h t.k.k.).[69] In accordance with Article 6.1.i t.k.k., a professional criminal is a person who permanently – displaying a habit – gains funds for living from punishable acts, treating such life style of as a profession and thus – as the Act specifies – his/her criminal activity is professional.[70] In order to ascertain facts, first it is necessary to monitor the life style and criminal activity of such person.[71]

The third category of especially dangerous offenders covers members of organised criminal groups. In accordance with Article 6.1.j t.k.k., members of a criminal group are those persons who set up such an organisation, manage it or on their own or with other members of the organisation commit offences within its activity.[72]

2.6. EXPULSION OF FOREIGNERS FROM TURKEY

If a foreign national commits an offence in Turkey,[73] such person – having served a sentence of imprisonment or after conditional release – may be expulsed from this country.[74] The Act fails to specify the time after the expiry of which the ban on entering Turkey will be lifted so a conclusion can be drawn that it is perpetual. In accordance with Article 59 t.k.k., such judgment requires a positive opinion of the Ministry of the Interior.[75] Therefore, sometimes the doctrine treats the expulsion of foreign nationals as a kind of administrative sanction.[76] The decision is based on the citizenship held by the offender when the prohibited act was committed. However, the precautionary measure does not apply to persons holding Turkish citizenship: this is highlighted in Article 23.5 of the Turkish Constitution stipulating: "No citizen

---

[69] *Ibid.*, p. 381; S. Tellenbach, *supra* n. 3, pp. 15–16.

[70] S. Tellenbach, *supra* n. 3, p. 16.

[71] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 382; T. Demirbas, *supra* n. 13, p. 623.

[72] S. Tellenbach, *supra* n. 3, p. 16.

[73] Such act could be an active performance or an omission, but beyond any doubt it has to be intentional. See B. Öztürk, M.R. Erdem, *supra* n. 13, p. 536; M. Koca, I. Üzülmez, *supra* n. 23, p. 557.

[74] The measure does not apply when the offender has been sentenced solely to a fine; see B. Öztürk, M.R. Erdem, *supra* n. 13, p. 536; M. Koca, I. Üzülmez, *supra* n. 23, p. 556; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 383.

[75] S. Tellenbach, *supra* n. 3, p. 49.

[76] I. Özgenc, *supra* n. 13, p. 809.

may be expulsed or deprived of the right to enter the country".[77] Therefore, if an offender obtained Turkish citizenship having committed an offence and before being sentenced, the precautionary measure may not be administered and enforced.

2.7. PRECAUTIONARY MEASURES APPLICABLE TO LEGAL PERSONS

The Turkish penal law does not provide for punishments for legal persons since the basis of punishment (otherwise than in case of precautionary measures) is the idea of liability on the basis of personal guilt, appropriate solely to natural persons.[78] Similarly to the Polish law, also Turkish regulations do not contain a structure of crimes committed by natural persons. However, precautionary measures may be applied as provided for in Article 60.1–4 t.k.k., which include: revocation of permits related to their business or confiscation of assets and confiscation of financial benefits.[79] In order to apply a precautionary measure to a legal person, it is necessary that a natural person commits an intentional offence for such legal person or in its interest: an unintentional prohibited act is not sufficient.[80] The consequences of such act by a natural person may be twofold: namely, if the legal person pursues its business on the basis of a permit issued by a public institution, the commitment of an offence by its representative is treated as an abuse of the permit which may be revoked.[81] It is also possible that an act by a natural person committed in the interest of a legal person will generate an unlawful financial benefit: then the court should apply confiscation of assets or confiscation of the financial benefits obtained as a result of breaching the law. Precautionary measures may also be applied to state-owned enterprises or organisational entities in private hands, however, this is possible only when a specific provision in the detailed part of the Turkish Criminal Code stipulates that precautionary measures may be applied in the case of the offence specified in such regulation. It should be stressed that a court decision to impose a precautionary measure upon a legal person may not generate serious consequences for such organisational unit, in excess of the damage caused by the relevant punishable act that underlay the application of a precautionary measure.[82] The assumption in the doctrine is termed as the principle of commensurability of the application of precautionary measures to legal persons.[83]

---

[77] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 383; K. Wojciechowska-Litwinek, D. Haftka-Isik, K. Stanek, Ö. Emiroğlu, *supra* n. 12, p. 68.

[78] S. Tellenbach, *supra* n. 6, p. 83.

[79] S. Tellenbach, *supra* n. 3, p. 49.

[80] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 385.

[81] M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 898; T. Demirbas, *supra* n. 13, p. 635; B. Öztürk, M.R. Erdem, *supra* n. 13, p. 535; V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 384.

[82] V.Ö. Özbek, K. Doğan, P. Bacaksiz, I. Tepe, *supra* n. 13, p. 386.

[83] M.E. Artuk, A. Gökcen, C. Yenidünya, *supra* n. 13, p. 899. In particular, when imposing a precautionary measure against a legal person, the court must take into account whether the decision to revoke permits concerning the business of such entity may result of lay-offs and unemployment of a large group of people; see T. Demirbas, *supra* n. 13, p. 635; M. Koca, I. Üzülmez, *supra* n. 23, p. 558.

3. CONCLUSIONS

The following general comments and conclusions may be formulated on the basis of the presentation above.

First, it is necessary to note that the (relatively) new Turkish Criminal Code of 2004 not only preserved specific forms of precautionary measures contained in the previous Criminal Code of 1926 but additionally extended their scope, inter alia, with respect to recidivists and especially dangerous offenders. That was accompanied by abolition of capital punishment and deleting recidivism from the catalogue of circumstances supporting stricter punishments.[84] The precautionary measures are of various nature: most of them are imposed by courts, e.g. a ban on enjoying certain rights becomes a legal effect of conviction, some of them include isolation, some do not include isolation, the duration of certain categories is not pre-determined, while the duration of some other is subject to the length of the punishment imposed or is defined by an administrative body (expert team). Under certain circumstances, such measures are applied to offenders and sometimes replace punishment. A characteristic of the Turkish law is the fact that such measures may not be imposed when a punishment of another precautionary measure are being served; in that respect Turkish regulations are much more transparent and seem less complicated than the equivalent provisions in the Polish Criminal Code.

The structure of precautionary measures in the Turkish law is syncretic: the authors of the regulation relied on various solutions of a number of European legislations. For instance, the treatment of measures applied to minors who are criminally not liable for punishable acts as precautionary measures, and also inclusion to the category of confiscation of assets and confiscation of financial benefits applicable to sane offenders, are typical of both Italian and French law.[85] In the Italian Criminal Code of 1930 there is a precautionary measure of expulsion of foreign nationals from the country of offence.[86] While the existence of non-isolating post-penal precautionary measures against recidivists in the form of special supervision (*Führungsaufsicht*) is envisaged in the German criminal law.[87] However, it is specific for Turkish law that sanctions imposed by courts on legal persons are treated as precautionary measures: such structure should be treated as more correct than a similar institution of punishments provided in the Polish Act on liability of collective entities:[88] the

---

[84] The situation should be specifically considered by those (relatively few) representatives of the Polish criminal law doctrine who are of the opinion that precautionary measures should be excluded from criminal law.

[85] Cf. P. Chrzczonowicz, *Francuskie prawo karne*, [in:] A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyń, *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej*, Toruń 2007, pp. 92–93; M. Filar, *Włoskie prawo karne*, [in:] A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyń, *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej*, Toruń 2007, pp. 185–190.

[86] M. Filar, *supra* n. 85, p. 186.

[87] See, e.g. § 67d paras 3 and 4 of the German Criminal Code. Cf. G. Kett-Straub, H. Kudlich, *Sanktionenrecht*, München 2017, p. 238.

[88] Act of 28 October 2002 on liability of collective entities for prohibited acts, Dz.U. 2002, No. 197, item 1661.

essence of the punishment – as is rightly noted in the Turkish criminal law science – consists in determining the individual guilt of a person, and therefore criminal punishment should not be imposed on organisational entities. Perhaps, the treatment of the sanctions imposed on collective entities as punishments in Polish law is due to functional reasons: in this context, more important are severe financial penalties that may be applied versus legal persons and that are hard to classify as forms of precautionary measures. The dilemma is unknown to Turkish legislation, which among the precautionary measures applied to legal persons includes solely the revocation of certain rights (concessions) or confiscation of assets and financial benefits.

The application of precautionary measures in compliance with the Turkish law is subject to major restrictions. Measures in the form of a ban on exercising certain rights, confiscation of assets and financial benefits, expulsion of foreign nationals from Turkey and the measures applicable solely to legal persons may be imposed solely when offenders have committed intentional offences. Additionally, only therapeutic measures may be applied to insane offenders – both isolating and non-isolating punishment – while the Turkish Criminal Code does not use any equivalents to Polish administrative precautionary measures. The therapeutic measures imposed against insane people and those with limited sanity are applied only when mental sickness was the reason preventing or restricting understanding of the act or restricted control of behaviour. Therefore, as may be claimed, such measures may not be applied to those persons whose exclusion or restriction of sanity was due, for instance, to mental retardation or a severe disorder of sexual preferences.

Note should also be taken of the lack of general principles concerning implementation of precautionary measures in the Turkish Criminal Code. Practically two general principles apply: the principle of legalism (a precautionary measure – at the time an offence is committed – has to be provided for in an appropriate legal regulation, at least in a Parliamentary Act) and the principle of proportionality (the applied precautionary measure may not result in broadly larger damage than the punishable act subject to the applicable measure). However, it may come as a surprise that the new Turkish Criminal Code does not regulate a number of important issues that have been discussed for years by representatives of the criminal law doctrine in many European countries, namely: the reference of the *lex retro non agit* principle to precautionary measures or the institution of amnesty, pardon or the statutes of limitation applicable to offences. The situation is similar to equally laconic regulations in that respect in the Polish Criminal Code of 1997.

BIBLIOGRAPHY

Artuk M.E., *Sicherungsmaßnahmen*, Gazi Üniversitesi Hukuk Fakultesi Dergisi Vol. XIV, No. 2, 2010, www.gazi.edu.tr/hukuk/dergi/14_2_8 pdf.

Artuk M.E., Gökcen A., Yenidünya C., *Ceza Hukuku Genel Hükümler*, 8th edn, Adalet, Ankara 2014.

Chrzczonowicz P., *Francuskie prawo karne*, [in:] A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyń, *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej*, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu, Toruń 2007.

Dağasan Z., *Von der Sünde zur Strafrecht – Strafrechtstheorie in der türkischen Rezeptions – und Kodifikationsgeschichte*, Inönü Üniversitesi Hukuk Fakültesi Dergisi Cilt:3 Sayı:1 Yıl 2012, www. dergipark.gov.tr/download/article-file/ 208413.

Demirbaş T., *Ceza Hukuku Genel Hükümler*, 9th edn, Seckin, Ankara 2013.

Filar M., *Prawo karne we Włoszech*, [in:] S. Frankowski (ed.), *Prawo karne niektórych państw Europy Zachodniej*, Wydawnictwo Prawnicze, Warszawa 1982.

Filar M., *Włoskie prawo karne*, [in:] A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyń, *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej*, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu, Toruń 2007.

Huntington S.P., *Zderzenie cywilizacji*, Warszawskie Wydawnictwo Literackie Muza S.A., Warszawa 2006.

Kett-Straub G., Kudlich H., *Sanktionenrecht*, C.H. Beck, München 2017.

Koca M., Üzülmez İ., *Türk Ceza Hukuku Genel Hükümler*, 2nd edn, Seckin, Ankara 2009.

Mahmutoğlu F.S., *Das neue türkische Strafgesetzbuch*, Allgemeiner Teil, Annales Vol. XXXVIII, No. 55, 2006, www.dergipark.gov.tr/download/article-file/6964.

Özbek V.Ö., Doğan K., Bacaksız P., Tepe İ., *Ceza Genel Hukuku Temel* Bilgiler, 8th edn, Seckin, Ankara 2017.

Özgenç İ., *Türk Ceza Hukuku Genel Hükümler*, 10th edn, Seckin, Ankara 2014.

Öztürk B., Erdem M.R., *Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku*, 16th edn, Seckin, Ankara 2016.

Sőzűer A., *Die Reform des türkischen Strafrechts*, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) No. 3, 2007.

Tellenbach S., *Einführung in das türkische Strafrecht*, Iuscrim, Freiburg im Breisgau 2003, www. mpicc.de/files/pdf1.

Tellenbach S., *Zum neuen türkischen Strafgesetzbuch*, Konrad Adenauer Stiftung – Auslandsinformation (KAS) No. 4, 2005, www. kas.de/wf/doc/kas_6625-544-1-30 pdf.

Tellenbach S., *Das türkische Strafgesetzbuch*, Deutsche Übersetzung und Einführung, Duncker & Humblot, Berlin 2008.

Wojciechowska-Litwinek K., Haftka-Isik D., Stanek K., Emiroğlu Ö. (transl.), Leżański T. (preface), *Konstytucja Republiki Tureckiej (Türkiye Cumhuriyeti Anayasasi)*, Wydawnictwo Sejmowe, Warszawa 2013.

PRECAUTIONARY MEASURES IN TURKISH CRIMINAL LAW

Summary

This article discusses the general normative structure and analyses the regulations concerning particular precautionary measures against the background of other provisions on particular sanctions included in the currently applicable Turkish Criminal Code of 26 September 2004. Reference is made also to other Turkish legal acts, including the Turkish Constitution of 1982, the previous Criminal Code of 1926 and the Act on children protection of 2005. The publication indicates criminal legislation of other countries which, indirectly, served as reference for the Turkish regulations concerning precautionary measures, and presents general rules of administering such measures under the Turkish Criminal Code. The differences between punishments and precautionary measures have been presented, along with the interpretation of particular sanctions and the resulting conclusions that can be crucial to the Polish criminal law studies.

Keywords: precautionary measures, punishments, Turkish law

ŚRODKI ZABEZPIECZAJĄCE W TURECKIM PRAWIE KARNYM

Streszczenie

Niniejszy artykuł omawia zarówno ogólną konstrukcje normatywną, jak i poddaje analizie przepisy odnoszące się do poszczególnych postaci środków zabezpieczających na tle regulacji pozostałych sankcji zawartych w obowiązującym, tureckim kodeksie karnym z dnia 26 września 2004 r. Odwołano się w tym zakresie również do innych tureckich aktów prawnych, w tym do konstytucji tego państwa z 1982 r., poprzednio obowiązującego kodeksu karnego z 1926 r. oraz ustawy o ochronie dzieci z 2005 r. Publikacja zawiera także wskazanie uregulowań karnych innych państw, na których pośrednio wzorowano się, tworząc tureckie przepisy o środkach zabezpieczających, i porusza zagadnienie ogólnych zasad, którym podporządkowane jest orzekanie środków zabezpieczających w tureckim kodeksie karnym. Przedstawione zostały różnice pomiędzy karami a środkami zabezpieczającymi oraz interpretacja poszczególnych uregulowań poświęconych tym sankcjom i kształtujące się na tej podstawie wnioski, które mogą mieć istotne znaczenie dla polskiej nauki prawa karnego w omawianym zakresie.

Słowa kluczowe: środki zabezpieczające, kary, prawo tureckie

MEDIDAS DE SEGURIDAD EN EL DERECHO PENAL TURCO

Resumen

El presente artículo contiene el análisis de construcción normativa general y de preceptos relativos a formas de medidas de seguridad a la luz de las demás sanciones en el código penal turco vigente de 26 de septiembre de 2004. Se invocan también otros actos turcos, incluyendo la constitución de dicho país de 1982, el código penal anterior de 1926 y ley de protección de niños de 2005. La publicación contiene también indicación de regulación penal de otros países en los cuales se inspiró indirectamente el legislador turco, las reglas generales para imponer medidas de seguridad en el código penal turco, diferencias entre penas y medidas de seguridad, interpretación de regulaciones dedicadas a dichas sanciones y conclusiones que puedan ser importantes para la ciencia penal polaca en cuanto a esta materia.

Palabras claves: medidas de seguridad, penas, derecho turco

ПРЕДУПРЕДИТЕЛЬНЫЕ МЕРЫ В УГОЛОВНОМ ПРАВЕ ТУРЦИИ

Резюме

В настоящей статье рассматривается общая нормативная структура предупредительных мер, а также анализируются положения, касающиеся конкретных типов предупредительных мер, на фоне иных санкций, предусмотренных Уголовным кодексом Турции от 26 сентября 2004 года. В этой связи авторы ссылаются и на другие законодательные акты, включая Конституцию Турции 1982 г., предыдущий Уголовный кодекс 1926 г. и Закон О защите детей 2005 года. В работе также содержится информация об уголовно-правовых нормах других стран, которые косвенно служили образцом при разработке турецких нормативных актов о предупредительных мерах, обсуждаются общие принципы, регулирующие в турецком Уголовном кодексе назначение предупредительных

мер, излагаются отличия между мерами наказания и предупредительными мерами, приводятся толкования отдельных положений, регулирующих этот вид санкций. Выводы, сделанные в завершение статьи, могут иметь важное значение для польского правоведения в рассматриваемой области уголовного права.

Ключевые слова: предупредительные меры, наказание, турецкое законодательство

SICHERUNGSMASSNAHMEN, D.H. MASSREGELN DER SICHERUNG UND BESSERUNG IM TÜRKISCHEN STRAFRECHT

Zusammenfassung

Der Artikel befasst sich mit der allgemeinen normativen Struktur und beinhaltet eine Analyse der Vorschriften zu einzelnen Formen von Sicherungsmaßnahmen, d.h. Maßregeln der Sicherung und Besserung vor dem Hintergrund sonstiger Regelungen zu Sanktionen im geltenden türkischen Strafgesetzbuch vom 26. September 2004. In diesem Zusammenhang wird auch auf andere türkische Rechtsakte, darunter die Verfassung des Landes von 1982, das frühere Strafgesetzbuch von 1926 und das Kinderschutzgesetz von 2005 verwiesen. Die Veröffentlichung enthält einen Hinweis auf die strafrechtlichen Vorschriften anderer Länder, an die sich die Türkei bei der Gestaltung der Sicherungsmaßnahmen indirekt angelehnt hat, die Frage der allgemeinen Grundsätze, denen die Verhängung von Maßregeln der Sicherung und Besserung im türkischen Strafgesetzbuch folgt, die Darstellung der Unterschiede zwischen Strafen und Sicherungsmaßnahmen, die Auslegung der einzelnen Vorschriften über diese Sanktionen und die auf dieser Grundlage gezogenen Schlussfolgerungen, die für die polnische Strafrechtswissenschaft in dem besprochenen Bereich relevant sein können.

Schlüsselwörter: Sicherungsmaßnahmen, Maßregeln der Sicherung und Besserung, Strafen, türkisches Recht

MESURES PRÉVENTIVES EN DROIT PÉNAL TURC

Résumé

Cet article examine à la fois la structure normative générale et l'analyse des dispositions relatives aux différentes formes de mesures préventives dans le contexte d'autres sanctions contenues dans l'actuel Code pénal turc du 26 septembre 2004. À cet égard, il a également été fait référence à d'autres actes juridiques turcs, notamment la constitution du pays de 1982, l'ancien code pénal de 1926 et la loi de 2005 sur la protection de l'enfance. La publication contient également une indication des dispositions pénales d'autres pays, qui ont indirectement modelé les dispositions turques en matière de mesures préventives; la question des principes généraux auxquels est subordonné le jugement des mesures préventives dans le code pénal turc; la présentation des différences entre les sanctions et les mesures préventives; l'interprétation des différents règlements consacrés à ces sanctions et conclusions fondées sur cette base, qui pourraient revêtir une importance considérable pour la science polonaise du droit pénal dans le domaine traité.

Mots-clés: mesures préventives, sanctions, loi turque

LE MISURE DI SICUREZZA NEL DIRITTO PENALE TURCO

Sintesi

Il presente articolo contiene una sia descrizione della struttura normativa generale che un'analisi delle norme che fanno riferimento alle singole forme di misure di sicurezza sullo sfondo delle norme delle altre sanzioni contenute nel vigente codice penale turco del 26 settembre 2004. Si è fatto riferimento in tale ambito anche ad altri atti legislativi turchi, tra cui la costituzione di questo stato del 1982, il codice penale precedentemente in vigore del 1926 e la legge sulla tutela dei bambini del 2005. La pubblicazione contiene anche l'indicazione delle norme penali di altri stati a cui si è indirettamente fatto riferimento creando le norme turche sulle misure di sicurezza, la questione delle norme generali a cui è subordinata l'applicazione delle misure di sicurezza nel codice penale turco, la presentazione delle differenze tra le pene e le misure di sicurezza, l'interpretazione di singole norme dedicate a tali sanzioni nonché le conclusioni che prendono forma su tale base, che possono avere importanza essenziale per la dottrina polacca del diritto penale nell'ambito descritto.

Parole chiave: misure di sicurezza, pene, diritto turco

Cytuj jako:

Inci Ö., Góralski P., *Środki zabezpieczające w tureckim prawie karnym [Precautionary measures in Turkish criminal law]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 221–240. DOI: 10.26399/iusnovum.v13.1.2019.11/o.inci/p.goralski

Cite as:

Inci, Ö., Góralski, P. (2019) 'Precautionary measures in Turkish criminal law'. *Ius Novum* (Vol. 13) 1, 221–240. DOI: 10.26399/iusnovum.v13.1.2019.11/o.inci/p.goralski

GRAND JURY AND INVOLVEMENT OF CITIZENS IN CRIMINAL PROCEEDINGS IN THE LIGHT OF *U.S. V. P. MANAFORT AND R. GATES*

KAROLINA KREMENS*

DOI: 10.26399/iusnovum.v13.1.2019.12/k.kremens

1. INTRODUCTION[1]

The jury is the best-known form of social involvement in adjudication in the U.S. penal proceedings.[2] The role of the jury is to rule solely on the guilt of the accused, while leaving all procedural decisions, including admissibility of evidence in the proceedings or the punishment to courts. However, the institution of a jury is not characteristic solely of the U.S. proceedings. Its beginnings date back to the English common law and the jury can be found in Anglo-Saxon proceedings all over the world, starting from England and Wales to Canada and Australia, also to a limited extent in continental law countries, like for instance Spain and Italy.[3] The original purpose of the involvement of a jury in criminal proceedings, which remains its

* PhD, LL.M., Assistant Professor, Department of Criminal Procedure, Faculty of Law, Administration and Economics of the University of Wrocław; e-mail: karolina.kremens@uwr.edu.pl; ORCID: 0000-0002-2132-2645

[1] The work is the effect of the research project number 2014/15/D/HS5/00658 financed by the National Science Centre.

[2] The right to a trial by jury is provided for at the federal level by the Sixth Amendment to the U.S. Constitution, not at state level. In the states, the applicability of the standard was extended under the Fourteenth Amendment, which is also reflected in judgments of the U.S. Supreme Court (see e.g. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d. 491 (1968)).

[3] However, it should be admitted that statistics show that in each of those countries – due to the high costs of a trial by jury and the long time required – the trial by jury is being replaced with other methods to complete criminal trials, in particular a consensual closing of trials, known in the U.S. system as plea bargaining. See a report by Fair Trials discussing the statistics and analysing the hazards resulting from excessive use of the institution of consensual closing of criminal proceedings in the U.S. and 89 other countries: *The Disappearing Trial. Towards a Rights-Based Approach to Trial Waivers System*, https://www.fairtrials.org/wp-content/uploads/2017/04/Report-The-Disappearing-Trial.pdf (downloaded 24.11.2017).

immanent element until today, was the participation of a social factor in adjudicating in criminal cases along with the idea of being tried by peers.

It is seldom that the issue of occurrence of other forms of social factor involvement in the U.S. system is mentioned, in particular in continental legal literature. One such institution is grand jury. This is a procedural body that is composed of citizens without legal background, selected in a way similar to the selection of a jury deciding about guilt. The name refers to its size, contrary to the classical ordinary jury sometimes referred to as petit jury. While an ordinary jury deciding about guilt is traditionally composed of twelve jurors,[4] the grand jury includes sixteen to twenty-three jurors.

The core task of the grand jury is to take decisions on admissibility of an indictment by a prosecutor to be submitted to court. It is to constitute a barrier to unjustified indictments submitted by prosecutors. Thus, the task of the grand jury is to prevent abuse of power by prosecutors and protect citizens against excessive interference of authorities in situations when in social understanding an indictment would be ungrounded. Additionally, the grand jury is provided with very broad investigating competencies as a result of which prosecutors may carry out before the grand jury preparatory proceedings and present evidence in a manner usually not available to law enforcement authorities during normal investigation. The two competencies of the grand jury will be presented in detail further below.

This article was directly triggered by the opening of criminal proceedings against former collaborators of the U.S. President Donald Trump, Paul Manafort and Richard Gates; the proceedings are in the focus of interest in the U.S. and abroad. On 27 October 2017, upon a motion of special counsel Robert S. Mueller,[5] the grand jury of the District of Columbia submitted an indictment to the federal court against Paul Manafort and Richard Gates in which both persons were accused of conspiracy in committing twelve acts, including conspiracy against the United States (18 United States Code § 371), conspiracy to launder money (18 U.S.C. § 1956(h)), or false statements (18 U.S.C. §§ 2, § 1001(a)).[6] As a result of such actions taken against the

---

[4] Twelve jurors decide about the guilt of the accused in the federal legal system, although the accused may request in writing that the number is reduced (Rule 23(b) FRCP). Most of the states require such number in trials for most serious crimes, while in trials of other crimes, the number may be reduced even to six.

[5] Just additionally to this presentation – as obviously there is no room for a detailed analysis of the issue – it should be noted that the U.S. federal law provides for a possibility to appoint special counsels who are entrusted with proceedings of special nature. Such special counsel enjoys much independence and freedom of action. The counsels may also be appointed according to state laws. On 17 May 2017, Acting Attorney General appointed Robert S. Mueller as special counsel and entrusted him with an investigation of the information disclosed on 20 March 2017 in the Senate commission by the then-FBI Director James Comey, and that referred to the interference of the government of the Russian Federation in the 2016 U.S. presidential election. Additionally, R.S. Mueller was authorised to prosecute all federal offences if he finds it necessary and appropriate; see the order on the appointment of R.S. Mueller, https://www.justice.gov/opa/press-release/file/967231/download (accessed 24.11.2017).

[6] The indictment is available at the site of the U.S. Department of Justice, https://www.justice.gov/file/1007271/download (accessed 24.11.2017).

accused Manafort and Gates, the institution of grand jury aroused some interest in Poland where it is hardly known and hardly ever described.

Proceedings involving grand jury are not infrequent in the practice of the U.S. federal courts. Due to the fact that the procedure involving the grand jury is required by federal law each time when a prosecutor intends to submit an indictment to court for crimes punishable with more than one year of imprisonment, the institution is resorted to relatively often. Additionally, due to the specific nature of criminal proceedings for acts that are federal offences, usually such cases arouse much interest among the U.S. public opinion. Another, equally frequently commented case with the involvement of the grand jury was the case initiated in 1998 on the initiative of another special counsel, Kenneth Starr, against former U.S. President Bill Clinton, inter alia, in connection with the allegation of sexual harassment and illegal sale of properties. Soon proceedings are expected to be initiated before the grand jury by New York prosecutors in the well-known case of sexual offences where Harvey Weinstein, Hollywood producer, is the infamous hero.

2. CONTEXTUAL AND TERMINOLOGICAL COMMENTS

It is worth devoting some space to the terminology that along with the discussion on the pending proceedings in case *U.S. v. P. Manafort and R. Gates*[7] has been brought to the attention of the Polish public. As soon as the grand jury made a decision in the case, most press reports in Poland contained a statement that the "charges were pressed" in the proceedings.[8] Even where titles of press articles referred to an "indictment",[9] the publications mostly discussed the "charges" pressed by the grand jury. The inaccuracy is of special importance since from the viewpoint of Poland's criminal procedure, pressing of charges is regulated in Article 313 of the Criminal Procedure Code (CPC) refers to transfer from the *in rem* phase to the *ad personam* phase in preparatory proceedings for which prosecutors are responsible (during inquiry) and the police and other bodies carrying out preparatory proceedings (during investigation), while indictment is the domain of public prosecutors (Article 45 § 1 CPC), with immaterial exceptions (Article 45 § 2 CPC) and means a step forward from preparatory proceedings to legal proceedings.[10]

---

[7] 1:17-cr-201.

[8] See e.g. M. Orłowski, *CNN: Są pierwsze zarzuty w „rosyjskim śledztwie" przeciwko ludziom Trumpa*, Gazeta Wyborcza, 28 October 2017 (http://wyborcza.pl/7,75399,22576168,cnn-sa-pierwsze-zarzuty-w-sledztwie-przeciwko-ludziom-donalda.html); and P. Malinowski, *USA: Zarzuty dla byłego szefa sztabu wyborczego Donalda Trumpa*, Rzeczpospolita, 30 October 2017 (http://www.rp.pl/Prezydent--USA/171039903-USA-Zarzuty-dla-bylego-szefa-sztabu-wyborczego-Donalda-Trumpa.html).

[9] K. Sikorski, *USA: Paul Manafort, były człowiek Trumpa, oskarżony o „spisek przeciwko USA"*, Polska Times, 30 October 2017 (http://www.polskatimes.pl/fakty/swiat/a/usa-paul-manafort-byly-czlowiek-trumpa-oskarzony-o-spisek-przeciwko-usa,12628638/).

[10] Such situation is based directly on the CPC provisions, although in a linguistic sense the term of "indictment" may also cover the phrase of pressing charges against a person.

Here it seems necessary to explain clearly whether the decision taken by the grand jury in the discussed case consisted in pressing charges or was a decision to prosecute. It seems that the proper answer will be that the decision involving the grand jury covers in fact both decisions. The U.S. (or more broadly Anglo-Saxon) system does not provide for lengthy and formal preparatory proceedings in which a separate decision is taken to press charges so that when that stage is finished, a formal indictment can be submitted to court against the person identified therein. The decision is called charging[11] and, in fact, it is made when the prosecutor decides whether the person is to be prosecuted. At this time, the U.S. preparatory proceedings are theoretically closed, although the law allows – contrary to Poland – that law enforcement bodies and prosecutors may take other discovery actions; however, such actions are not treated as evidence like in a formalised inquiry or investigation in Poland. However, it should be remembered that such discovery is never treated as evidence in the U.S. system: it may become evidence when accepted by court after admitted by court for presentation. The fact that the decision by the grand jury is not only a "presentation of charges" as it is understood in Poland is reflected in the next judicial stage of the criminal proceedings being commenced as a result thereof. It is proved also by the fact that the decision is a kind of an action and it is named indictment, thus no procedural decision is taken afterwards to initiate court proceedings.

It should further be noted that the decision to prosecute actually has to be treated as an internal deed by the prosecutor's office with the prosecutor taking the decision independently. The fact that it is the prosecutor that takes the decision is an essential foundation of U.S. criminal proceedings.[12] For the decision to be effective so that formally the court stage can be initiated, the decision has to be confirmed with indictment formulated by the grand jury. The law obviously provides – which is a rule in case of less important offences – that it is the prosecutor who decides on submitting a case to court (information). Then it is the court that decides whether the action is admissible at a special meeting (preliminary examination), although there are numerous exceptions to the rule.

In view of the above, it seems that the decision taken by the grand jury in the *Manafort and Gates* case consisted not only in presenting charges to the suspects but also in submitting the indictment to the federal court competent for the District of Columbia. Thus, criminal proceedings against both accused entered the court phase, which however does not mean that the case will be finally resolved in a hearing soon or at all. The step of criminal proceedings from submission of an indictment to court until a hearing starts is usually quite long in U.S. criminal proceedings, which is a legal battle for *a priori* evidence rejection (suppression of evidence); finally, the majority of the accused plead guilty before the hearing starts and thus voluntarily submit to punishment as a result of which judgments are not passed at hearings at all.

---

[11] Which is commonly and not fully accurately translated as "pressing of charges".

[12] See more on decisions on prosecution in the EU criminal proceedings: F.W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime*, Boston 1969.

3. HISTORIC DEVELOPMENT OF GRAND JURY

Firstly, not fully clear sources concerning the existence of the grand jury can be found in the time before the Norman invasion of England.[13] In a form similar to the one known today, the grand jury has been functioning in legal sources since 1166 when the king of England decided to set up a body composed of twelve knights or other free men whose role was to accuse those who, according to public knowledge, have committed crimes in a local community.[14] The reason underlying the establishment of the institution was the need to implement – in the centrally managed judgment system in criminal cases by king's envoys – an element of local knowledge that could be provided by members of the local community.[15] At the time, the body combined the duties of a grand jury and an ordinary jury, which in practice meant that the criminal proceedings were rather an inquisition and not a prosecution since the same body prosecuted and decided about guilt. With time, about 1368, the authority of both juries was separated, and the grand jury gained the form that has practically not been changed until today.[16] The work of the grand jury always resulted in an indictment submitted to court to initiate court proceedings that was also traditionally named (also today) as a true bill.

Parallel to the development as specified above, an indictment procedure without the involvement of the grand jury was evolving in the English historic system.[17] The other system, which with time became dominant in the Anglo-Saxon criminal proceedings, consisted in initiating proceedings against the accused in court by filing information to court by the victim – termed as criminal information – which with time, when preparatory proceedings were implemented by state law enforcement bodies, was replaced with an indictment of the same name (information). The grand jury was with time abolished in the British Empire, including in England and Wales (in 1933).[18] Until today, it exists solely in the United States of America.

The functioning of the grand jury in the U.S. system is sanctioned by incorporating the institution to the U.S. Constitution. In accordance with the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"[19].[20] The use of a grand jury in federal investigations – although not present in each situation – is termed as

---

[13] H.W. Kennedy, J.W. Briggs, *Historical and Legal Aspects of the California Grand Jury System*, California Law Review No. 43, 1955, p. 251.

[14] H.W. Goldstein, S.M. Witzel, *Grand Jury Practice*, New York 2016, pp. 2–4.

[15] R.P. Alexander, S. Portman, *Grand Jury Indictment Versus Prosecution by Information – An Equal Protection-Due Process Issue*, Hastings Law Journal No. 25, 1974, p. 999.

[16] W. Morse, *A Survey of the Grand Jury System*, Oregon Law Review No. 10, 1931, p. 118.

[17] *Ibid*.

[18] J. Dressler, G.C. Thomas, *Criminal Procedure. Principles, Policies and Perspectives*, 6th edn, St. Paul 2017, p. 919.

[19] More on the presentment below.

[20] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

"omnipresent".[21] The functioning of the grand jury was codified in the *Federal Rules of Criminal Procedure*.[22] The Rules provide that in any proceedings relating to a crime with a potential capital penalty or a penalty in excess of one year of imprisonment, the decision to submit an indictment to court is taken by the grand jury (Rule 7(a)(1) FRCP). However, the accused has the right to waive the right to trial as a result of an indictment submitted by the grand jury – only in the cases of offences with a maximum penalty of one year of imprisonment – thus, this does not apply to crimes where the capital penalty may be applied (Rule 7(b) FRCP). In case of minor offences, the federal law stipulates that an indictment may be submitted to court both by the grand jury and a prosecutor (Rule 58(b)(1) FRCP).

It is worth remembering that in the United States of America there is a two-way prosecution system in a criminal case: federal and state ones. In fact, those are 52 separate and independent legal systems (federal system, systems of 50 states and the system of the District of Columbia).[23] The rules applicable to the federal system, even those rooted in the U.S. Constitution, are not always directly transposed to the rules applicable in individual states and the "statehood" and institutional and legal distinctiveness of the federal government are very strongly rooted in the minds of the citizens. One aspect of the distinctiveness is the independence of federal solutions that may be even incorporated in the Constitution. An example is no necessity to apply the grand jury procedure by states, although the Fifth Amendment explicitly requires that the institution should be used to submit indictments to courts. It is true that, according to the Fourteenth Amendment, the states have to respect the law set forth in the Constitution; however, the judgment in case *Hurtado v. California* confirmed that this does not apply to the Fifth Amendment which requires the application of the grand jury institution.[24] Nevertheless, over one half of the U.S. states contain in their constitutions regulations that provide for the functioning of the grand jury to various extent, as a minimum in the case of certain most severe crimes; however, sometimes the choice is left to the prosecutor.[25] Only eighteen states, the federal system and the District of Columbia provide for the duty to resort to the grand jury to formulate an indictment in the case of any crime.[26] In those states which resort to the grand jury, most often investigation is closed when the prosecutor submits a proposal to the grand jury to submit an

---

or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[21] Y. Kamisar, W.R. LaFave, J.H. Israel et al., *Modern Criminal Procedure. Cases, Comments, and Questions*, 14th edn, St. Paul 2015, p. 750.

[22] Federal Rules of Criminal Procedure (hereinafter FRCP) in the version of 16 December 2016. The FRCP are a binding legal act issued pursuant to § 2072 of the United States Code (U.S.C.) by the U.S. Supreme Court and amended by the Congress (lower chamber of the U.S. Parliament), regulating the procedures in district courts and courts of appeal at the federal level. Approval of legal rules concerning court proceedings is characteristic for the U.S. system also at the state level.

[23] For more detail, see in K. Kremens, *Przesłuchanie świadka w prawie amerykańskim*, Prokuratura i Prawo No. 5, 2006, p. 93.

[24] 110 U.S. 516, 4 S.Ct. 111, 28 L. Ed. 232 (1884).

[25] J.M. Scheb, J.M. Schebb II, *Criminal Procedure*, Belmont 1999, p. 134.

[26] Y. Kamisar, W.R. LaFave, J.H. Israel et al., *supra* n. 21, p. 13.

indictment; less frequently, the grand jury is used to conduct an investigation, and it is extremely seldom that the investigation is fully conducted with the involvement of the grand jury.[27]

4. ROLE OF THE GRAND JURY IN U.S. CRIMINAL PROCEEDINGS

The core purpose for which the grand jury was formed was to set up an effective barrier against over-zealousness of prosecutors to prevent ungrounded indictments. The grand jury is neither a body of the judicial, executive nor legislative power, and it is to act as a "buffer or mediator between the government and persons accused of crimes".[28] The grand jury was set up and evolved over years as an idea which introduces elements of decency and justice to criminal proceedings.[29] The original purpose for the existence of the grand jury was formulated by judge Harlan in his dissenting opinion in case *Hurtado v. California* of 1884 where he stated as follows:

> in the secrecy of investigations carried out by the grand jury, the weak and defenceless – the outlaws, perhaps because of their race, or prosecuted with the ungrounded clamour of the society – have found and should continue finding protection against formal oppression, cruelty of the crowd, schemes of false accusations and hostility of people who use law in order to ruin their personal enemies.[30]

Indeed, the reasons underlying the setting up and maintenance of the operation of the grand jury seem to be very commendable. Especially when one considers the stigmatising which is generated – also in our Polish criminal procedure – not only by an indictment of a person in court but even by the formulation of charges against suspects in compliance with Article 313 CPC. With its secrecy, proceedings before the grand jury allow the affected persons to avoid leaks to the public opinion of information that the case indeed is related to them. Sometimes this works efficiently, sometimes not. In the *P. Manafort and R. Gates* case, until the end the identity of the persons against whom an indictment was sent to court on 27 October 2017 remained secret and was a source of common press speculation. However, it often happens that the future accused is known officially even before the grand jury starts proceedings. For instance, President Bill Clinton was a commonly known suspect, as mentioned earlier. It is also common knowledge who Harvey Weinstein is. So, the rule does not exist.

The role of the grand jury may be perceived from two perspectives. It can operate as an investigating body or a "prosecuting" body. As a rule, the grand jury may conduct investigations during which it can examine all evidence, including hearing of witnesses and the future accused to whom the proceedings relate (it is

---

27 *Ibid*., p. 749.

28 *United States v. Williams*, 504 U.S. 36 (1992).

29 S.W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, Virginia Journal of Social Policy & Law 1995 No. 67, p. 130.

30 110 U.S. 516, para. 554-555, 4 S.Ct. 111, 28 L. Ed. 232 (1884).

then said to act as a "sword").[31] In the other dimension, the grand jury submits an indictment to court, or more precisely, verifies the grounds of the indictment that a prosecutor would like to submit to court (it is then said to act as a "shield"[32] protecting the accused). However, those roles may not be treated separately as most often the grand jury fulfils both of them at the same time; in certain states, the law or practice restrict the possibility to perform the investigating function.

5. PROCEEDINGS WITH INVOLVEMENT OF THE GRAND JURY

The grand jury is composed of 16 to 23 jurors (Rule 6 (a)(1) FRCP).[33] Their term of office is as a matter of principle longer than it takes to review the admissibility of an indictment just in one case. Jurors are appointed for terms during which they may be called to assemble to review several proceedings. This prevents the need to nominate separate juries for each case separately, which may be extremely time consuming.[34] The imprecise identification of the number of members in the grand jury (16 to 23) is due to the fact that usually a larger number of jurors are appointed (23), while decisions are taken by a quorum of 16. Jurors are selected as a rule in a manner similar to the method applied to select an ordinary jury, e.g. from among holders of driving licences or voters registered in a specific territory. Special attention is paid that the selection procedure of jurors to the grand jury does not exclude certain social groups.[35] Contrary to unanimous decisions on guilt taken by an ordinary jury, decisions by the grand jury on forwarding the indictment to court requires a majority of votes: minimum 12 (Rule 7(f) FRCP).

Proceedings before the grand jury are devoted to examining evidence so that jurors could take a decision to admit submission of an indictment to court. In fact, the grand jury answers a question if the prosecutor's office has collected sufficient evidence to justify court proceedings; the standard of evidence to be complied with is probable cause, lower than required to sentence the accused: beyond reasonable

---

[31] Y. Kamisar, W.R. LaFave, J.H. Israel et al., *supra* n. 21, p. 747.

[32] *Ibid*.

[33] Most states set the number of jurors in the grand jury at a similar level. For instance, in Alaska there are 12 to 18 (§ 12.40.020 Alaska Statutes) and in Utah – 9 to 15 (§ 77–10a-4 Utah Code Annotated).

[34] In particular, in the states that apply the procedure of individual *voire dire* – hearing of candidates for jurors individually for each volunteering person. This is contrary to the ordinary *voire dire* procedure which permits the examination of qualifications of candidates for jurors by asking questions to several persons at the same time. In both cases, depending on the seriousness of the case, it may take from several hours to several weeks to select the jurors; however, in the first case it will last much longer beyond any doubt.

[35] For instance, in case *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the U.S. Supreme Court annulled the conviction as a fact transpired that persons of the same origin were not adequately represented in the grand jury that forwarded the indictment against the accused person of Mexican-U.S. origin. The Supreme Court ruled similarly in the case *Vasquez v. Hillery*, 474 U.S. 254 (1986).

doubt.[36] As a rule, the grand jury proceeds upon a request of prosecutor's office and the outcome is that an indictment is submitted or not.[37] The core feature of such proceedings is **unrestricted control exercised by the prosecutor over the actions of the jurors**. They usually remain passive and all actions during such proceedings are taken by the prosecutor who only watches the actions of the grand jury. However, commentators note that no legal regulation authorises the jurors to obtain any additional assistance related to the proceedings at hand and they have to rely solely on the prosecutor.[38] Apart from the prosecutor, the grand jury contacts solely the judge who takes the oath from the jurors, provides them with instructions and supports in situations when they decide to summon witnesses for testimony, however, the judge is not involved in the proceedings.[39] It is the prosecutor who convenes meetings of the grand jury, manages the course of the proceedings, examines evidence, asks questions to the summoned witnesses, and finally drafts the indictment. It is true that no obstacles exist to the jurors getting involved in such activities, but this happens very rarely. The prosecutor's domination over the proceedings seems obvious: be it due to the prosecutor's legal know-how that the jurors do not have.

Proceedings before the grand jury are confidential. The right to participate in proceedings before the grand jury is accorded solely to prosecutors, interrogated witnesses, translators, if required, and a minute taker (Rule 6(d)(1) FRCP). The proceedings before the grand jury remain confidential (Rule 6(e)(2) FRCP), all minutes from the meetings of the jury and orders and summons issued by the grand jury may never be disclosed (Rule 6(e)(6) FRCP). The reason is the need to ensure protection to a person against whom the proceedings are carried out.[40] Should the grand jury fail to decide to submit an indictment to court, then the stigma of being a suspect would cling to such person. Theoretically, the activity of the grand jury results in submitting an indictment to court but in practice it is a decision if the prosecutor has collected sufficient convincing evidence to sentence

---

[36] See more on the standard of evidence examination in U.S. legal proceedings: K. Kremens, *Ciężar dowodu w procesie karnym państw common law*, [in:] W. Jasiński, J. Skorupka (eds), *Ciężar dowodu i obowiązek dowodzenia w procesie karnym*, Warszawa 2017, pp. 216–224.

[37] The Fifth Amendment further provides that the grand jury may also proceed by force of law, without a prosecutor being involved and, as a result, submit another type of conclusions referred to as a presentment. Such possibility used to be applied in the past; however, now the term of presentment is referred only to specific reports issued by the grand jury in situations when after a completed investigation the grand jury concludes that a basis exists to submit an indictment, and thus obliges the prosecutor to submit one to court, although it is the prosecutor who takes a final decision in that situation. Such procedures apply in few states that have departed from the concept of indictment submitted by the grand jury, while retaining the body to a limited extent. See Y. Kamisar, W.R. LaFave, J.H. Israel et al., *supra* n. 21, footnote b, p. 747.

[38] S.M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury*, Catholic University Law Review No. 43, 1993, p. 332.

[39] M.L. Miller, R.F. Wright, *Criminal Procedures: The Police*, New York 2007, p. 725.

[40] S.C. Moak, R.L. Carlson, *Criminal Justice Procedure*, 8th edn, Waltham 2013, p. 169. See the judgment in the case *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), in which the Supreme Court comprehensively refers to the objectives underlying the confidentiality of proceedings involving the grand jury.

the accused; thus, this is an act that may ruin the suspect's career and reputation.[41] The confidentiality of the proceedings is also to protect the jurors against attacks from the public opinion as it sometimes occurs in the case of ordinary jurors who sentence and acquit, which is not welcome by the public or they even face retaliation from other people interested in the outcome of proceedings.[42]

On the other hand, the duty to keep confidence of the content and course of proceedings before the grand jury applies to all the participants apart from witnesses (Rule 6(e)(2)(b) FRCP). This means that witnesses may speak publicly of the interviews they were subjected to. A regulation to the contrary, in the opinion of the Supreme Court, would be contradictory to the First Amendment of the U.S. Constitution ensuring freedom of speech,[43] although in effect this could result in disclosure of sensitive information on the accused who is expected to be protected by the institution of the grand jury. In practice, witnesses sometimes share their impressions from interviews quite willingly; for instance, information provided to the press on the steps to the federal court by witnesses testifying in proceedings before the grand jury against President Bill Clinton in the *Monika Lewinsky* case.[44] Additionally, Bill Clinton himself, having testified before the grand jury, on the same day delivered a TV address to the nation and reported in detail on the interview.

Apart from the functions underlying the establishment of the grand jury to take decisions on admissibility of indictment in court, mechanisms have been developed in proceedings before the grand jury so that it could conduct an investigation. Additionally, when the grand jury acts as a "sword", this is a sole opportunity for the prosecutor to obtain evidence that otherwise would not be obtainable. The mechanisms that the grand jury may resort to include the right to formally summon witnesses to be interviewed as early as during the preparatory proceedings (*subpoena ad testificandum*).[45] At the same time, the grand jury is entitled to summon witnesses to hand over objects (*subpoena duces tecum*), e.g. documents.[46] The grand jury is also authorised to apply other coercive measures; for instance, in the case *United States v. Dionisio*, the right of the grand jury was confirmed to oblige 20 witnesses to provide their voice samples in order to make a comparative study with the material obtained as a result of conversation control ordered by the court.[47]

The right of the grand jury to summon witnesses to testify is very advantageous for the conducted investigation. The Anglo-Saxon law (not just U.S. law) applies an assumption which is right, in the author's opinion, that freedom of individuals may

---

41 D. Heilbroner, *Rough Justice*, New York 1990, p. 197.

42 *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).

43 *Butterworth v. Smith*, 110 S.Ct. 1376 (1990).

44 S.C. Moak, R.L. Carlson, *supra* n. 40, p. 173.

45 Y. Kamisar, W.R. LaFave, J.H. Israel et al., *supra* n. 21, p. 750.

46 It is true that obtaining testimony in the form of private documents in that manner is not obvious as it is covered with the Fifth Amendment and the right of non-self-incrimination, as specified further below, and this does not cover documents of legal persons, e.g. companies. See *Braswell v. United States*, 487 U.S. 99 (1988). Similarly, in the case *Doe v. United States*, 487 U.S. 201 (1988), when the duty to hand over documents was also extended to foreign banks having offices in Bermuda and in the Cayman Islands.

47 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed. 2d 67 (1973).

not be restricted by actions of law enforcement bodies to force turning up to testify. In particular, as an obligation of an individual – subject to a fine – to turn up and testify during preparatory proceedings that are confidential may be treated as a harassment and the witness has no means to counteract to such activities of law enforcement bodies. If such right were accorded to investigating bodies it would indeed be against freedoms of individuals, which as such should be protected in a special way and in particular be subject to court control. For those reasons, it is only courts that are entitled to summon individuals to turn up and testify (subpoena), while the right is not accorded to law enforcement bodies or prosecutors who as a rule are not actively involved in preparatory proceedings. Before penal proceedings enter the judicial phase, law enforcement bodies may only interview witnesses subject to their consent, at a place of their whereabouts or invite them to a police station. Thus, the presence of witnesses is voluntary and the interview – even if registered in any way – may be interrupted by the witness at any moment. Any enforcement of a witness to stay at the police station would mean that he/she is held in custody, he/she should be instructed on their rights using the famous *Miranda*[48] warning, and as a result such witness would be accorded special rights. It is worth remembering that if a witness is held in custody that would mean that he/she has been found to be a suspect, and thus he/she would not be willing to testify exercising the right to remain silent. The system does restrict the evidence provision potential of law enforcement bodies as not all potential witnesses would be willing to share their knowledge voluntarily.

From the viewpoint of effectiveness of the investigation, the institution of grand jury is very advantageous and, that is why, its popularity as an instrument in the hands of prosecutors remains high. In fact, witnesses can be forced to turn up and testify as if they were testifying in court. It is interesting that literature notes that testimonies before the grand jury exert a certain psychological pressure on witnesses making them willing to testify, even if they remained silent in contacts with law enforcement bodies.[49] That is supposedly due to a sense of moral coercion to be honest in a situation when information is to be disclosed not to a law enforcement body but to equal citizens.[50] In the opinion of commentators, the sense of identity of witnesses with jurors supports openness and failure to provide true testimony is perceived as a waste of time in a situation when jurors took up the obligation to participate in the grand jury despite their professional, family and social duties. Although, on the other hand, there are opinions that a situation when a witness testifies in confidential proceedings in the presence of 23 jurors and a prosecutor representing a law enforcement body with whom the witness refused to cooperate without the involvement of a court that provides a sense of safety at the hearing and also without support of a legal counsel, creates a predominating sense of solitude, in particular sometimes the witness may not be aware why he has been summoned and what the proceedings are about.[51] It is also for that reason that the developed tension may make witnesses more willing to testify.

---

[48] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[49] Y. Kamisar, W.R. LaFave, J.H. Israel et al., *supra* n. 21, p. 751.

[50] J. Keeney, P. Walsh, *The American Bar Association's Grand Jury Principles: A Critique From a Federal Criminal Justice Perspective*, Idaho Law Review No. 14, 1978, p. 579.

[51] Y. Kamisar, W.R. LaFave, J.H. Israel et al., *supra* n. 21, p. 752.

In any case, failure to submit to the summons of the grand jury to testify or to hand over evidence is treated as criminal contempt and may be subject to a penalty of deprivation of liberty. If the requested information is incriminatory, the witness may refuse to give testimony referring to their rights under the Fifth Amendment; however, witnesses who refused to cooperate with the police, when they stand before the grand jury change their minds and disclose information that has been disclosed in an interview[52] (more on the subject further below).

Another issue in the context of reviewing evidence by the grand jury is the **aspect of evidence admissibility** at that stage of proceedings. As stemming from a fundamental judgment in the case *Costello v. United States*,[53] many evidence-related rules that apply during hearings in the U.S. penal law system do not apply to proceedings before the jury. A fundamental rule of the process (although subject to multiple exclusions), i.e. non-admissibility of hearsay evidence[54] in proceedings before the grand jury, does not apply.[55] Such evidence that is dismissed in the proceedings as contradictory to the Fourth[56] or Fifth[57] Amendments to the Constitution is admissible in proceedings before the grand jury, although subject to certain conditions and restrictions.

The issue of existence (or not) of the privilege against self-incrimination remains one of the most problematic issues of the grand jury proceedings. Witnesses summoned by the grand jury are often members of organised criminal groups with proceedings pending against them and, that is why, they may be afraid that their testimony made in the presence of a prosecutor may result in their incrimination. The right to refuse to answer questions (as set forth in the Fifth Amendment to the Constitution) when such answer could expose the witness to penal liability is also applicable to the grand jury proceedings in the opinion of the Supreme Court.[58] However, a major authority of the grand jury is to provide immunity to witnesses who refer to the amendment – this may refer to matters on which testimony is to be provided and thus witnesses are forced to provide their testimony. The above was confirmed in the judgment in the case *Kastigar v. United States*,[59] which was not unanimous, and which changed the previous stance of the Supreme Court in that matter.[60]

Persons appearing before the grand jury are not entitled to be represented by a counsel or to be provided with assistance.[61] However, in certain jurisdictions,

---

[52] *Ibid.*, p. 751.

[53] 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

[54] In federal law, the inadmissibility of hearsay evidence is based on Rule 802 Federal Rules of Evidence, although the subsequent provisions (Rules 803 and 804) offer a number of exceptions to admit such evidence by court.

[55] However, certain states have rejected the judgment in the *Costello* case and find also hearsay evidence as inadmissible in proceedings before the grand jury (see S.C. Moak, R.L. Carlson, *supra* n. 40, p. 170).

[56] This refers primarily to evidence that is not admissible due to an incorrect search (exclusionary rule).

[57] In particular, evidence obtained with a breach of the privilege against self-incrimination.

[58] *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973).

[59] 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

[60] See in particular *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

[61] *In re Groban's Petition*, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957).

witnesses may consult a counsel who, however, has to stay outside the court room. The same applies to interviewed persons who are actually suspects: they cannot resort to the support of their counsels.[62]

In that context, a fundamental issue is the **scope of evidence submitted to the grand jury**. The proceedings are not contradictory, or they are not a "small trial" resembling one with the ordinary jury.[63] They are based solely on evidence submitted by the prosecutor and the suspect and his/her counsel are not entitled to participate in such proceedings or present their evidence.[64] The general principle is that the prosecutor is not obliged to submit evidence in favour of the accused. In the case *United States v. Williams*, the Supreme Court held that imposing such obligation on the prosecutor would be contrary to the role of the grand jury is to play in the U.S. penal proceedings system.[65] However, the principle is not absolute and the law of a number of states provides for other regulations requiring the prosecutor to disclose evidence in favour of the suspect in certain circumstances. In one case a requirement was set that it was the prosecutor's duty to submit evidence "rejecting the accusation" to the grand jury; however, the prosecutor does not have to clarify the significance of the evidence for the case.[66] On the other hand, various codes of ethics and instructions for prosecutors require prosecutors to disclose evidence in favour of the accused, also in proceedings before the grand jury. The duty was specified explicitly in *U.S. Attorney's Manual* (§ 9–11.233).[67]

Proceedings before the grand jury end with voting in which the jurors with a majority of twelve votes (Rule 6(f) FRCP) decide if an indictment is to be submitted to court. Such decision forwards proceedings to the judicial stage. However, the defence may place a motion to dismiss the indictment also at the stage between instances.[68]

6. CRITICISM OF THE GRAND JURY

For many years, in literature there have been calls for abandoning the grand jury institution in favour of indictments by prosecutors.[69] The arguments used in such discussions are of various nature. First, it is noted that it is a morally ambiguous procedure, which has no features of contradictory proceedings and that it practically deprives the suspects of any power during the proceedings. Another argument is

---

[62] *United States v. Mandujano*, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976).

[63] M.L. Miller, R.F. Wright, *Criminal Procedure. Prosecution and Adjudication. Cases, Statutes and Executive Materials*, New York 2011, p. 217.

[64] J.M. Scheb, J.M. Schebb II, *supra* n. 25, p. 134.

[65] *United States v. Williams*, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed. 2d 352 (1992)

[66] *Schuster v. Eighth Judicial District Court*, 160 P.3d 873 (Nevada 2007).

[67] A similar regulation was provided in Rule 3–3.6 (b) – American Bar Association Standards for Criminal Justice, Prosecution Function Standards.

[68] S.C. Moak, R.L. Carlson, *supra* n. 40, p. 171.

[69] See e.g. G. Lawyer, *Should the Grand Jury System be Abolished?*, Yale Law Journal No. 15, 1906, pp. 178–187, or more contemporary: B.E. Brogan, *Criminal Procedure – Should the Grand Jury System be Abolished?*, Kentucky Law Journal No. 45, 1956, p. 158; and A.D. Leipold, *Why Grand Juries do not (and Cannot) Protect the Accused*, Cornell Law Review No. 80, 1995, p. 260 et seq. In Polish literature, see a brief and negative assessment of grand jury in: R. Tokarczyk, *Etyka prokuratora – zarys przedmiotu*, Prokuratura i Prawo No. 6, 2004, p. 28.

that proceedings before the grand jury are expensive, lengthy and problematic in terms of logistics. The very establishment of the grand jury by selecting jurors takes a lot of time. The most problematic aspect is to provide the jurors – especially in proceedings that are of great interest to the public – with protection and comfort so that they can take an independent decision. The comments may be accepted as accurate, although the ethical rules applicable to lawyers should even partly marginalise behaviour that is not explicitly moral.

However, the criticism against that institution is mostly focused on the instrumentalisation of the institution by prosecutors. The fact that perhaps the grand jury does not perform its roles in the best possible way is proven with one of the most often quoted statements assessing the institutions indicating that the "grand jury would accuse a ham sandwich if only the prosecutor so requested the jurors".[70] In a less illustrative way, the U.S. Supreme Court in the case *United States v. Dionisio* also expressed a view that the "grand jury not always may comply with its function of a protective bastion in a stable standing between an average citizen and an overzealous prosecutor".[71] Even Judges Marshall and Douglas, who presented their dissenting opinions in the case, indicated that the grand jury – instead of complying with its actual function – has become a "tool in the hands of the executive" with time.[72]

Statistically, the grand jury very rarely takes decisions that are different from the prosecutor's intention. As the official statistics tell us, prosecutors obtain indictments in 99.6% cases in which they so request the grand jury.[73] Literature mainly refers to examples when indictments are submitted to court always when the prosecutor so demanded. However, the grand jury takes decisions compliant with the prosecutors' intentions also when they do not demand an indictment. Prosecutors may happen not to be convinced that the perpetrator has to be accused but – not willing to present any explanation to their decision to the victims or family of the victims – they may use the grand jury as a shield against any allegations against the prosecutor.[74] Sometimes, prosecutors decide to use the institution of the grand jury also in political cases so that the responsibility for forwarding an indictment to court is blurred between the prosecutor and the jurors.[75]

---

[70] Such opinion is quoted, for instance, by R.M. Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, Georgetown Journal of Legal Ethics No. 13, 2000, p. 361; and S. Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, Yale Law Journal No. 110, 2001, p. 1171 (footnote 403). In another version, the sentence is worded as follows: "if you give the grand jury a napkin, they will sign it" (for instance, R.L. Braun, *The Grand Jury – Spirit of the Community?*, Arizona Law Review No. 15, 1974, pp. 914–915 (n 144).

[71] 410 U.S. 1 [1973] para. 17.

[72] 410 U.S. 1 [1973] para. 23.

[73] J. Dressler, G.C.Thomas, *Criminal Procedure. Principles, Policies and Perspectives*, 6th edn, St. Paul 2017, p. 918. Similarly, also J.M. Scheb, J.M. Schebb II, *supra* n. 25, p. 134.

[74] J. Dressler, G.C.Thomas, *supra* n. 73, p. 919. As an example, the authors refer to proceedings in which the prosecutor submitted a case to the grand jury where a 30-year old woman was suspected of sexual relations with a 16-year old student with his consent (statutory rape). After the proceedings, the grand jury did not decide to submit an indictment to court as demanded by the prosecutor.

[75] M.L. Miller, R.F. Wright, *supra* n. 63, p. 216.

There are comments in literature that excessive power of the prosecutor over the jurors in the grand jury is a core hazard to its correct functioning. Therefore, proposals can be found to restrict the prosecutor's advisory role in proceedings before the grand jury.[76] Instead, for instance following the system applied in Hawaii, there is a proposal to nominate a grand jury counsel, independent of the prosecutor, who would have to advise the jurors in proceedings before the grand jury (2016 Hawaii Revised Statutes §§ 612–51 to 612–60).[77] In such a situation, it is not the prosecutor but the counsel who participates in proceedings before the grand jury. In that context, no wonder that prosecutors are reluctant to incorporate such institution in the legal systems of the states.

However, the chances of abandoning the institution of the grand jury are to be seen as unrealistic. As stated by Andrew D. Leipold, the fact that the institution originates from constitutional provisions practically makes it impossible to abandon since an amendment to the Constitution would be required which always generates political resistance.[78] On the other hand, the institution of the grand jury may not be denied certain advantages. Those include for instance: a possibility to present evidence to the extent that is normally unavailable to law enforcement agencies, which improves investigation competencies and effectiveness of preparatory proceedings. It provides for a more extensive inclusion of the society in the operation of justice. Finally, opinions are heard that explicitly call for a closer relationship of jurors to the cases in which they take decisions by selecting jurors solely from among people who live in an area with the same postal code where the offence has been committed/ where the case is examined.[79] Even if the advantages are largely a façade, they still speak in favour of maintaining the grand jury, in particular in view of the fact that it is the accused and their lawyers who are the most zealous critics and this in a natural way raises some concerns in the society.[80] Sometimes opinions can be found that explicitly speak in favour of the institution. Roger A. Fairfax argues that the grand jury is a specific control mechanism of all state authorities – the judiciary to the executive and even to the legislative – by ensuring communication between the society and state institutions.[81] Although it is necessary to admit that such opinions are few and far between, and there are more arguments against than in favour of maintaining the institution, the position of the grand jury in the U.S. penal system seems to be unthreatened.

---

[76] S.W. Brenner, *supra* no. 29, p. 124.

[77] The institution of a grand jury counsel who is not a prosecutor is provided for in Article 11 of the Hawaiian Constitution.

[78] A.D. Leipold, *supra* n. 69, p. 314.

[79] K.K. Washburn, *Restoring the Grand Jury*, Fordham Law Review No. 76, 2008, pp. 2378–2383.

[80] A.D. Leipold, *supra* n. 69, pp. 314–317.

[81] R.A. Fairfax Jr., *Grand Jury Discretion and Constitutional Design*, Cornell Law Review No. 93, 2008, p. 762.

7. IF NOT GRAND JURY, THEN WHAT?

However, it is worth remembering that decision by the grand jury of the admissibility of indictments is only one form of their decisions and it is hardly the most popular. Many common law countries have never practised the grand jury concept or departed from it long time ago. Also, a large group of U.S. states that even originally accepted the institution have abandoned it with time. In those states that have abandoned the institution of the grand jury, a procedure was accepted of court control over the admissibility of indictments that is referred to as preliminary examination or preliminary hearing. Additionally, in the federal system and also in those states that make indictments subject to decisions of the grand jury, there is a parallel procedure of preliminary hearing. This is the procedure that dominates in the U.S. penal system.

The preliminary hearing procedure in federal law applies to cases concerning certain offences (Rule 5.1(a) FRCP). Similar regulations are provided in the state legal systems. The objective of the procedure is to determine if the collected evidence justifies a review of the case by court. The preliminary examination procedure is carried out before a judge[82] who – having reviewed the evidence provided by the prosecutor in the presence of the accused and his/her counsel – takes a decision who is in a justified manner suspected of a crime (probable cause), which is sufficient to hold a hearing on the case. The preliminary hearing procedure is contradictory: the accused is entitled to be represented by a counsel and the defence is entitled to submit evidence advantageous for the accused.[83] In that respect, the proceedings guarantee all rights to the accused that proceedings before the grand jury do not provide for at all.

From the technical viewpoint, the activity – contrary to decisions taken by the grand jury – is a part of proceedings between instances, also referred to as pre-trial proceedings since the complaint (here referred to as information and not indictment) has already been submitted by the prosecutor. However, in practice the procedure has an identical function as the proceedings before the grand jury in its accusatory function: it ensures an independent assessment if the prosecutor's accusation is justified.[84] On the other hand, the preliminary hearing procedure does not provide for taking an investigative action such as summoning witnesses to testify or handover of documents, and in that sense has nothing in common with the investigative function exercised by the grand jury as detailed above.

However, it is necessary to remember that it is not always that the preliminary hearing procedure will be used to verify whether grounds exist to submit an indictment to court. Many states accept that in the case of relatively petty offences such verification is not carried out. This is also the case in matters where the accused

---

[82] Usually, this covers a magistrate court or a justice of peace who does not necessarily have to have legal educational background.

[83] Although, in practice this is most often restricted to hearing a witness of the prosecution. Y. Kamisar, W.R. LaFave, J.H. Israel et al., *supra* n. 21, p. 13.

[84] *Hurtado v. California*, 110 U.S. 516, 536-38 (1884).

is subject to punishment in a plea-bargaining procedure, which covers a vast majority of cases tried in the U.S. courts.

It is a peculiar aspect that the U.S. system may also provide for certain variations of the grand jury system. For instance, in Connecticut the institution of the grand jury in the form described above does not exist. The state law provides for a possibility of a one-man investigative grand jury to be appointed upon a proposal of the prosecutor.[85] However, it is not a juror without any legal background like in a classical grand jury but a judge active in Connecticut who is nominated in a special quite complex procedure (§ 54–47b Connecticut General Statutes). Although that type of grand jury is established in statutes[86] and it is practically a contradiction to the original idea of the grand jury – a voice of citizens serving as a barrier against the oppression by the state – in view of the function it performs, it continues to be called the same name.[87] Such one-man grand jury has only an investigative function and the decision to submit an indictment to court is taken then by the prosecutor who verifies it in a preliminary examination (with another judge involved). The proceedings with one-man investigative grand jury resemble proceedings with the involvement of its classical equivalent. Although in that situation the prosecutor cooperates with the judge and not with citizens, and the prosecutor takes similar actions requesting to review evidence that it not available outside the procedure (summoning a witness to testify or handover of documents, etc.). In practice, the judge will cooperate with the prosecutor with more freedom as the judge has much more legal knowledge than jurors and additionally some evidence-related and investigative initiatives on the part of the judge may be expected. However, statistics show that only a very limited number of proceedings are run in that way, only one annually.[88] Although the institution provides for vast investigative opportunities, the underlying reasons include, inter alia: a multi-level very complicated and time-consuming appointment procedure of a judge to such one-person grand jury, which delays investigative activities and thus may result in evidence being lost.[89] For that reason, prosecutors much more often submit indictments to courts only on the basis of evidence collected by the police, taking a risk that such material may prove insufficient to sentence the accused.

---

[85] The term has not been incorporated to state law but it is commonly used in judgments, for instance, in the case *Connelly v. Doe*, 213 Conn. 66, 70 (1989).

[86] The overall structure of the institution is set forth in § 54–47a – § 54–47h of Connecticut General Statutes.

[87] *State v. Menillo*, 159 Conn. 264, 273 (1970).

[88] Between 1985 and 2015 prosecutors requested the establishment of a grand jury only 43 times, which was granted only in 27 cases (M. Kirby, *Connecticut's Investigatory Grand Jury*, Office of Legislative Research (2016-R-210), September 2016, https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0210.pdf (downloaded 15.11.2017).

[89] M.A. Gailor, *Grand Jury, Arraignment, Transfers from Juvenile Court, Bail and Probable Cause Hearings*, [in:] C.J. Schuman, *Connecticut Criminal Procedure*, Hartford 2015, p. 135.

8. CONCLUSIONS

The history of the grand jury over centuries from a story of an institution blocking unjustified decisions of prosecutors has become a story of prosecutors who take over control of citizens' voice in a subtle way.[90] As studies show, the grand jury has become rather a "stamp of prosecutors" than a critical verification of prosecutors' actions as it should be as assumed originally.[91] The original idea underlying the establishment of the grand jury – the aim to obtain reliable information on offences committed in a local community, formulated in a complaint to court initiating the judicial phase of penal proceedings – has not been applied for long. The jurors who are now members of the grand jury do not have any prior knowledge of offences committed in their neighbourhood that they have to decide on. The secondary role assumed by the grand jury – verification of the prosecutor's information in order to protect people against ungrounded accusation and the possibility to obtain evidence that could not be collected otherwise – has been preserved until today, although with certain essential deficits.

However, looking at the functions of the grand jury that have survived until today, a question should be asked: is that a mechanism which effectively controls prosecutors' activities, also in the 21st century? Having the above reservations and arguments in mind, the answer is clear: no. On the one hand, the prosecutor directs the operations of the grand jury, relying on the authority of the grand jury and summoning non-cooperative witnesses to testify and demanding access to information that would normally be inaccessible to law enforcement bodies. On the other hand, relying on their knowledge and using their position, prosecutors in a soft way push the jurors to a decision to forward the indictment to court. If statistics show that a chance for the grand jury to reject prosecutors' proposals is indeed very low, the institution fails to perform the function it was expected to fulfil. It fails to constitute a barrier to preserving social control over abuse by prosecutors in formulating their indictments and, in fact, it has been transformed solely into an instrument for prosecutors to attain their objectives.

It seems that the question about the significance of the grand jury should be somewhat broader. It is a fundamental issue whether the use of the grand jury in penal proceedings secures all the rights of the accused in an appropriate way. One may claim that with the grand jury, the U.S. prosecutors obtain access to information that could not be obtained in any other way, for instance, a testimony of witnesses non-cooperating with law enforcement bodies, and find it a correct mechanism. In the eyes of continental lawyers, principally some of the actions taken by the grand jury should not raise any objections. Summoning witnesses (also suspects) to testify (to be interrogated) and taking decisions to handover objects, is daily prosecutors' work in terms of continental law. However – if in compliance with continental penal proceedings – an assumption were made that such actions are legitimate, doubts would be raised by the fact that the institution is used instrumentally by prosecutors as a tool to fight against suspects, while basically it is expected to protect suspects.

---

[90] S.W. Brenner, *supra* no. 29, p. 130.
[91] R.P. Alexander, S. Portman, *supra* n. 15, p. 998.

Perhaps this is why one should consider it whether an institution established with most noble objectives – to protect citizens against ungrounded accusations by prosecutors – does not serve other purposes, in fact, violating the rights of individuals.

This generates another finding that the possibility for prosecutors to manipulate the grand jury members is practically unrestricted, due to the mere lack of legal background of jurors and basic knowledge on the mechanisms and rules applicable to criminal proceedings. The same to some extent applies to the ordinary jury; however, that is materially affected by the fact that proceedings before the ordinary jury are open and all evidence is reviewed at hearings, in a contradictory formula and under the guidance of a judge: their closed sessions are not attended by anyone else but the jurors. Referring once again to the ostentatiously contemptuous opinions that the grand jury may accuse even sandwiches or napkins, the discussion on the subject may be closed here.

However, one more critical remark may be formulated against the grand jury as it is today. Any hope that the involvement of citizens in the operations of justice will materially improve the system and its functioning is a false hope. In such proceedings involving people without any knowledge of the legal intricacies, a potential hazard occurs that they will give in to an opinion of a better educated lawyer who knows the rules and regulations and that they will remain under such lawyer's major influence, perhaps even contrary to his/her actual intentions. This becomes the easier the more the institution is susceptible to pressure, even soft pressure. Following the trail, the institution of jurors is becoming an addition to actions taken by lawyers, and thus only contributes to diluting the responsibility for any decisions taken. In particular, no initiative and susceptibility of jurors to external influence is manifested when the activities in which jurors are involved become highly complicated. Assuming that the ordinary jury may be independent when decisions are taken that relate solely to "facts", i.e. when the prosecutor has proven the guilt of the accused with the collected evidence, in the case of the grand jury the situation is more complex: the investigative methodologies, including the subtleties related to the required witness testimony or obtaining certain material evidence indeed are beyond the perception of ordinary citizens who are members of the grand jury. In such situation, it seems obvious that jurors will look up to prosecutors and rely on their opinion, looking forward to a suggestion what decision should be taken in the case. It is worth repeating that even the best intentions underlying a mechanism may finally become corrupted, and proceedings before the grand jury are an excellent example.

BIBLIOGRAPHY

Alexander R.P., Portman S., *Grand Jury Indictment Versus Prosecution by Information – An Equal Protection-Due Process Issue*, Hastings Law Journal No. 25, 1974.

Bibas S., *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, Yale Law Journal No. 110, 2001.

Braun R.L., *The Grand Jury – Spirit of the Community?*, Arizona Law Review No. 15, 1974.

Brenner S.W., *The Voice of the Community: A Case for Grand Jury Independence*, Virginia Journal of Social Policy & Law No. 67, 1995.

Brogan B.E., *Criminal Procedure – Should the Grand Jury System be Abolished?*, Kentucky Law Journal No. 45, 1956.
Cassidy R.M., *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, Georgetown Journal of Legal Ethics No. 13, 2000.
Dressler J., Thomas G.C., *Criminal Procedure. Principles, Policies and Perspectives*, 6th edn, St. Paul 2017.
Fairfax Jr. R.A., *Grand Jury Discretion and Constitutional Design*, Cornell Law Review No. 93, 2008.
Gailor M.A., *Grand Jury, Arraignment, Transfers from Juvenile Court, Bail and Probable Cause Hearings*, [in:] C.J. Schuman, *Connecticut Criminal Procedure*, Hartford 2015.
Goldstein H.W., Witzel S.M., *Grand Jury Practice*, New York 2016.
Heilbroner D., *Rough Justice*, New York 1990.
Kamisar Y., LaFave W.R., Israel J.H. et al., *Modern Criminal Procedure. Cases, Comments, and Questions*, 14th edn, St. Paul 2015.
Keeney J., Walsh P., *The American Bar Association's Grand Jury Principles: A Critique From a Federal Criminal Justice Perspective*, Idaho Law Review No. 14, 1978.
Kennedy H.W., Briggs, J.W., *Historical and Legal Aspects of the California Grand Jury System*, California Law Review No. 43, 1955.
Kremens K., *Przesłuchanie świadka w prawie amerykańskim*, Prokuratura i Prawo No. 15, 2006.
Kremens K., *Ciężar dowodu w procesie karnym państw common law*, [in:] W. Jasiński, J. Skorupka (eds), *Ciężar dowodu i obowiązek dowodzenia w procesie karnym*, Warszawa 2017.
Lawyer G., *Should the Grand Jury System be Abolished?*, Yale Law Journal No. 15, 1906.
Leipold A.D., *Why Grand Juries do not (and Cannot) Protect the Accused*, Cornell Law Review No. 80, 1995.
Miller F.W., *Prosecution: The Decision to Charge a Suspect with a Crime*, Boston 1969.
Miller M.L., Wright R.F., *Criminal Procedures: The Police*, New York 2007.
Miller M.L., Wright R.F., *Criminal Procedure. Prosecution and Adjudication. Cases, Statutes and Executive Materials*, New York 2011.
Moak S.C., Carlson R.L., *Criminal Justice Procedure*, 8th edn, Waltham 2013.
Morse W., *A Survey of the Grand Jury System*, Oregon Law Review No. 10, 1931.
Scheb J.M., Schebb II J.M., *Criminal Procedure*, Belmont 1999.
Schiappa S.M., *Preserving the Autonomy and Function of the Grand Jury*, Catholic University Law Review No. 43, 1993.
Tokarczyk R., *Etyka prokuratora – zarys przedmiotu*, Prokuratura i Prawo No. 6, 2004.
Washburn K.K., *Restoring the Grand Jury*, Fordham Law Review No. 76, 2008.

GRAND JURY AND INVOLVEMENT OF CITIZENS IN CRIMINAL PROCEEDINGS IN THE LIGHT OF *U.S. V. P. MANAFORT AND R. GATES*

Summary

The article aims at presenting the grand jury, a body widely used in the American criminal procedure and not known outside of the U.S. The dual function of the grand jury has been described, its role to indict the individual when the prosecutor seeks such decision and the investigative powers vested with grand jury. It is argued that the initial role associated with the grand jury, which is protection of suspects from wrongful accusations, has vanished and nowadays the grand jury is a tool in prosecutor's hands. The recent grand jury indictment issued on 27 Octo-

ber 2017 to federal court against Paul Manafort and Richard Gates, Donald Trump's former associates, became a direct reason to write this piece. Nonetheless, this article aims at joining the discussion on the participation of citizens in criminal proceedings. This remains important in the light of proposals introducing adjudication of citizens in cases before the Supreme Court.

Keywords: grand jury, Supreme Court, juror, the participation of citizens, common law

GRAND JURY (WIELKA ŁAWA PRZYSIĘGŁYCH) A UDZIAŁ CZYNNIKA SPOŁECZNEGO W POSTĘPOWANIU KARNYM NA TLE SPRAWY *U.S. V. P. MANAFORT AND R. GATES*

Streszczenie

Celem artykułu jest przedstawienie instytucji *grand jury* (wielkiej ławy przysięgłych) szeroko wykorzystywanej w amerykańskiej procedurze karnej i nieznanej poza tym krajem. W opracowaniu zaprezentowano jej podwójną funkcję, która obejmuje decydowanie o dopuszczalności skargi kierowanej przez prokuratora do sądu oraz podejmowanie działań o charakterze śledczym. Przedstawiono argumenty wskazujące, iż pomimo tego że w swoim założeniu miała pełnić rolę ochronną, przeciwdziałając nadużywaniu władzy przez prokuratora, stała się narzędziem w jego rękach. Do powstania tego artykułu bezpośrednio przyczyniło się skierowanie w dniu 27 października 2017 roku przez grand jury aktu oskarżenia do sądu federalnego przeciwko byłym współpracownikom Donalda Trumpa, Paulowi Manafortowi oraz Richardowi Gatesowi. Jednocześnie jednak celem opracowania jest włączenie się do dyskusji o roli czynnika społecznego w procesie karnym w kontekście procedowanych w chwili obecnej projektów uprawniających ławników do orzekania w postępowaniach przed Sądem Najwyższym.

Słowa kluczowe: wielka ława przysięgłych, Sąd Najwyższy, ławnik, czynnik społeczny, *common law*

GRAND JURY (GRAN JURADO) Y PARTICIPACIÓN DE FACTOR SOCIAL EN EL PROCESO PENAL EN EL CASO *U.S. V. P. MANAFORT AND R. GATES*

Resumen

El artículo presenta la institución de *grand jury* (gran jurado) utilizado mucho en el proceso penal americano y desconocido fuera de este país. Se explica su doble función que incluye la decisión sobre admisibilidad de recurso dirigido por el fiscal al tribunal y actuaciones de carácter instructor. Se alega que a pesar de que su función era protectora, evitando el abuso de poder por el fiscal, en realidad se convirtió en su herramienta. La razón de este artículo fue el escrito de acusación dirigido el 27 de octubre de 2017 por grand jury al tribunal federal contra ex colaboradores de Donald Trump: Paul Manafort y Richard Gates. Al mismo tiempo se pretende abrir el debate sobre el papel de factor social en el proceso penal en el contexto de proceso legislativo en curso que admite la participación de miembros de jurado en los procesos ante el Tribunal Supremo.

Palabras claves: gran jurado, Tribunal Supremo, miembro de jurado, factor social, *common law*

БОЛЬШОЕ ЖЮРИ (РАСШИРЕННАЯ КОЛЛЕГИЯ ПРИСЯЖНЫХ) И РОЛЬ ОБЩЕСТВЕННОГО ФАКТОРА В УГОЛОВНОМ ПРОЦЕССЕ ПО ДЕЛУ «США ПРОТИВ П. МАНАФОРТА И Р. ГЕЙТСА»

Резюме

Статья призвана представить читателю институт Большого жюри (расширенной коллегии присяжных), который широко применяется в американском уголовном судопроизводстве, но неизвестен за пределами США. На институт Большого жюри возложены две функции: принятие решения о приемлемости обвинительного заключения, направленного прокурором в суд, и осуществление действий следственного характера. Автор приводит доводы, свидетельствующие о том, что, хотя первоначально институт Большого жюри выполнял функцию защиты и был призван предотвращать злоупотребление властью со стороны прокурора, к настоящему времени он превратился в инструмент в его руках. Непосредственным поводом для написания данной статьи стала передача Большим жюри в федеральный суд обвинительного заключения против бывших сотрудников Дональда Трампа, Пола Манафорта и Ричарда Гейтса, которая состоялась 27 октября 2017 года. Работая над статьей, автор стремилась внести вклад в обсуждение роли общественного фактора в уголовном процессе в контексте находящихся на стадии осуждения законопроектов, предоставляющих присяжным право выносить решения в Верховном суде.

Ключевые слова: Большое жюри, Верховный суд, присяжный, общественный фактор, общее право

DIE GRAND JURY UND DER ANTEIL GESELLSCHAFTLICHER FAKTOREN IM STRAFVERFAHREN VOR DEM HINTERGRUND DER RECHTSSACHE *U.S. VS. P. MANAFORT UND R. GATES*

Zusammenfassung

Mit diesem Artikel soll die im amerikanischen Strafverfahren fest verankerte, außerhalb der US-amerikanischen Grenzen aber unbekannte Institution der *Grand Jury* vorgestellt werden. In der Studie wird ihre Doppelfunktion dargestellt: Die Grand Jury entscheidet, ob die von der Staatsanwaltschaft vorgelegten Beweise eine Anklage rechtfertigen und stellt außerdem eigene Ermittlungen an. Es wird argumentiert, dass die Grand Jury trotz der ihr zugewiesenen grundlegenden Schutzrolle und der Aufgabe, einen Amtsmissbrauch durch den Staatsanwalt zu verhindern, heute zu einem Werkzeug in den Händen der Staatsanwaltschaft geworden ist. Zur Entstehung dieses Artikels hat das Einreichen der Anklageschrift gegen die ehemaligen Mitarbeiter von Donald Trump: Paul Manafort und Richard Gates durch die Grand Jury am 27. Oktober 2017 beim Bundesgericht direkt beigetragen. Gleichzeitig ist es aber auch Ziel der Studie, sich an der Diskussion über die Rolle gesellschaftlicher Faktoren im Strafverfahren im Rahmen der derzeit geprüften Gesetzgebungsentwürfe zu beteiligen, nach denen Geschworene berechtigt wären, in Verfahren vor dem Obersten Gerichtshof zu entscheiden.

Schlüsselwörter: Grand Jury, Supreme Court, Geschworene, gesellschaftliche Faktoren, *Common Law*

LE GRAND JURY ET LA PARTICIPATION DU REPRÉSENTANT DE LA COLLECTIVITÉ À UNE PROCÉDURE PÉNALE DANS LE CONTEXTE DE L'AFFAIRE *U.S. V. P. MANAFORT ET R. GATES*

Résumé

Le but de cet article est de présenter l'institution du *grand jury* largement utilisée dans la procédure pénale américaine et inconnue en dehors de ce pays. L'étude présente sa double fonction, qui consiste à décider de l'admissibilité d'une plainte soumise par le procureur au tribunal et à prendre des mesures d'enquête. Des arguments ont été présentés, indiquant que, malgré le fait qu'il était censé jouer un rôle protecteur, en prévenant l'abus de pouvoir par le procureur, il devenait un outil entre ses mains. Cet article a été directement initié par le fait d'envoyer le 27 octobre 2017 par le grand jury à une cour fédérale un acte d'accusation contre les anciens associés de Donald Trump: Paul Manafort et Richard Gates. Dans le même temps, toutefois, l'objet de l'étude est de participer à la discussion sur le rôle du facteur social (représentants de la collectivité) dans le procès pénal dans le contexte des projets en cours d'examen autorisant les juges non professionnels à se prononcer devant la Cour suprême.

Mots-clés: grand jury, Cour suprême, juge non professionnel, facteur social, *common law*

IL GRAND JURY E LA PARTECIPAZIONE DEL FATTORE SOCIALE NEL PROCEDIMENTO PENALE, SULLA SFONDO DELLA CAUSA *U.S. V. P. MANAFORT ET R. GATES*

Sintesi

Lo scopo dell'articolo è la presentazione dell'istituzione del *grand jury* (gran giuria) largamente utilizzata nella procedura penale americana e sconosciuta al di fuori di questo paese. Nell'elaborato è stata presentata la sua doppia funzione, che comprende la decisione sull'ammissibilità delle accuse rivolte al tribunale dalla procura e sull'avvio di attività di carattere investigativo. Sono stati presentati argomenti che indicano che sebbene nella sua impostazione il grand jury avrebbe dovuto svolgere un ruolo di tutela, contrastando l'abuso di potere da parte della procura, è divenuto uno strumento nelle sue mani. Ha contribuito direttamente alla stesura di questo articolo il rinvio a giudizio del 27 ottobre 2017 al tribunale federale, da parte del grand jury, dell'atto d'accusa contro gli ex collaboratori di Donald Trump, Paul Manafort e Rich Gates. Allo stesso tempo tuttavia lo scopo dell'elaborato è anche l'inserimento nella discussione sul ruolo del fattore sociale nel processo penale, nel contesto dei progetti attualmente in corso, che autorizzano i giurati a sentenziare nei procedimenti di fronte alla Corte Suprema.

Parole chiave: grand jury, Corte Suprema, giurato, fattore sociale, *common law*

Cytuj jako:

Kremens K., *Grand jury (wielka ława przysięgłych) a udział czynnika społecznego w postępowaniu karnym na tle sprawy U.S. v. P. Manafort and R. Gates [Grand jury and involvement of citizens in criminal proceedings in the light of U.S. v. P. Manafort and R. Gates]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 241–264. DOI: 10.26399/iusnovum.v13.1.2019.12/k.kremens

Cite as:

Kremens, K. (2019) 'Grand jury and involvement of citizens in criminal proceedings in the light of *U.S. v. P. Manafort and R. Gates*'. *Ius Novum* (Vol. 13) 1, 241–264. DOI: 10.26399/iusnovum.v13.1.2019.12/k.kremens

PRIVACY IN THE AGE OF BIG BROTHER: GROUNDS FOR MASS SURVEILLANCE SCHEMES IN THE UNITED STATES LEGAL SYSTEM

MARCIN ROJSZCZAK*

DOI: 10.26399/iusnovum.v13.1.2019.13/m.rojszczak

1. INTRODUCTION[1]

In several recent decades, protection of privacy, in its legal dimension, has been mainly associated with negative obligations imposed on states for their public authorities to respect privacy of citizens. As a result, when it comes to discussing legal aspects of privacy protection the legislators as well as authors dealing with the issue in question refer to vertical versus horizontal threats, tending to approach these two areas separately. Thus, vertical threats – those related to activities of states – usually appear in the form of amassing excessive and illegitimate information on individuals, not infrequently resulting from extensive surveillance schemes. Horizontal treats, for a change, are related to infringements in relations between individuals, mostly affecting entrepreneurs pursuing large-scale data processing operations or their business.

The legal framework and output of international organisations – particularly, the Council of Europe and the European Union – have been of key importance to the shaping of the European privacy protection concept. The submittal for approval, in 1950, of the European Convention on Human Rights (ECHR)[2] and, in particular, the sphere of privacy taken into account in the catalogue of protected goods (Article 8), contributed to the enhancement of the standards of legal protection of privacy among the Treaty signatory-states. The abundant case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has grounded

* PhD, Institute of Administrative Law, Faculty of Law and Administration of the University of Warsaw; e-mail: marcin.rojszczak@gmail.com; ORCID: 0000-0003-2037-4301

1 The legal framework concerned and the web references herein are valid as at 14 January 2019.

2 Convention on the Protection of Human Rights and Basic Freedoms of 4 November 1950, Dz.U. 1993, No. 61, item 284.

and reinforced the perception of privacy as a basic right. With the evolution of the European Communities – and, especially, with the growing understanding that the building of a common internal market and tightening of economic ties cannot progress with negligence of respect and observance of the same basic values and human rights – the Community legislation has been elaborated meant to lead to strengthened rights and extended obligations related to privacy protection in the cyberspace. With over twenty years having passed since the first such regulations were adopted (Directive 95/46 of 1995[3]), the EU institutions have agreed upon, and adopted, a new general piece of legislation on data protection (i.e. Regulation 2016/679[4]). This marked the world's first-ever supranational legal act imposing binding requirements regarding protection of privacy and personal data in both vertical and horizontal relations.[5] The European data protection model is presently regarded as the most mature one the world over, and a pattern to be followed by other legislators.[6]

Given this context, a comparative legal analysis of the regulations binding in the European Union against the legislation of the United States can be interesting. Historically, right to privacy was first defined on the grounds of American law: in their famous *Right to Privacy*, published in 1890, Samuel Warren and Louis Brandeis postulated that protection be extended to the right to respect one's individuality and any intervention in an individual's private sphere prevented (the "right to be let alone").[7]

The American legislator has not resolved to impose homogenous principles in respect of processing of personal data on public- and private-sector entities: fragmentary sectoral regulations tend to be launched instead (such as those regarding telecommunications operators or consumer protection), along with those related to processing of specified groups of information (such as medical or financial data). Contrary to what is the case in the European model, no central office has been established in the U.S. that would take responsibility for oversight of personal data protection area. This difference in the approach toward privacy protection in cyberspace results in frequently juxtaposing the American privacy protection model and the approach elaborated on the grounds of European science as the two contrasting or opposing models.[8]

---

[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EC No. L 281, 3.11.1995, p. 31.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ EC No. L 119, 4.05.2016.

[5] For a broader discussion of the general regulation, see M. Krzysztofek, *Ochrona danych osobowych w Unii Europejskiej po reformie. Komentarz do rozporządzenia Parlamentu Europejskiego i Rady (UE) 2016/679*, Warszawa 2016; D. Lubasz, E. Bielak-Jomaa (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa 2017.

[6] P. Schwartz, *The EU–U.S. Privacy Collision: A Turn to Institutions and Procedures*, Harvard Law Review Vol. 126, 2013, p. 1968.

[7] S. Warren, L. Brandeis, *The Right to Privacy*, Harvard Law Review No. 5, 1890, pp. 193–220. This article comes second among the most frequently quoted legal publications ever, and is regarded as the one whose impact on the legal science has proved to be the strongest; see F. Shapiro, M. Pearse, *The Most-Cited Law Review Articles of all Times*, Michigan Law Review Vol. 110, 2012, p. 1503.

[8] P. Schwartz, *supra* n. 6, p. 2008; also, see the view of the EU and the U.S. legislation from a third-country (Canadian) perspective in A. Levin, M. Nicholson, *Privacy Law in the*

Also the judicial decisions passed in the U.S. (the local judicature) are referred to in most studies discussing the sources of legal protection of privacy. However, the U.S. Constitution provides for no express warranty related to the right to privacy, whereas the codified/statutory law supplies different definitions of rights of individuals and obligations of data processors. The United States is nevertheless one of the European Union's main partners, including in the field of information society services. The global data protection market causes that introduction of efficient privacy protection rules may be limited to national or regional regulations. Hence, the practical aspect of the legislative differences between the U.S. and the EU, as they intend to determine the common rules for amassing/collection, provision/sharing, and processing of personal data. The issue is gaining in importance, especially that a significant majority of Europe's most popular web services and data protection services are rendered accessible by businesses having their registered offices in the United States and operating under the local laws.

Therefore – as aptly noted by Joseph Cannataci, Special Rapporteur on the Right to Privacy, appointed by the United Nations Human Rights Council – efficient protection of privacy in cyberspace implies application of "protection without borders and privacy remedies across borders".[9] The problem of EU–U.S. cooperation for exchange and protection of data is multi-faceted, as it concerns exchange of data for commercial purposes and as part of cooperation between state authorities, for instance, between judicatures or in connection with criminal cases.

One of the aspects is of key importance to a successful outcome of the project of constructing a supra-regional data protection space, free of limitations and barriers that would obstruct the development of digital services. No shared data protection principles in place, ones that would be acceptable by both the EU and the U.S., may pose an essential limitation to further unrestrained development of services provided via the web. How real such a scenario is can be attested by the CJEU's verdict passed in 2014 in the *DRI* case[10], which deemed that the European Commission's decision that formed the basis for the Safe Harbour scheme was invalid. The Safe Harbour framework was fundamental for a significant portion of transatlantic flows of data and for a series of e-services provided by U.S. entrepreneurs to users within the EU. Hence, the Commission and the U.S. Department of Commerce agreed upon new principles of exchange of data, taking into account (in the Commission's perception) of the Court's objections. This, in turn, provided the basis for the Commission's Decision 2016/1250 and approval of the Privacy Shield programme.[11] Taking into account the ECJ's arguments put forth in the *DRI* case and extended in more recent

---

United States, the EU and Canada: The Allure of the Middle Ground, University of Ottawa Law & Technology Journal Vol. 2, 2005, pp. 357–395.

[9] The UN Human Rights Council, *Report of the Special Rapporteur on the Right to Privacy*, Joseph A. Cannataci, 27 February 2017, A/HRC/34/60, p. 34.

[10] The ECJ judgment of 8 April 2014, case *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others*, C-293/12 and C-594/12.

[11] Executive Decision of the Commission (EU) 2016/1250 of 12 July 2016, adopted pursuant to Directive 95/46/EC of the European Parliament and Council on the adequacy of protection provided by the EU-U.S. Privacy Shield, OJ EU (2016) No. L 207, p. 1 (CELEX: 32016D1250).

judgments (as in the *Tele2* case, or in Opinion 1/15 re. the U.S.-Canadian agreement), it seems doubtful whether the Court will deem the protection standard laid down by Decision 2016/1250 and applied by American entrepreneurs compliant with the EU laws, especially with the norms determined by the Charter of Fundamental Rights.

Furthermore, cooperation and collaboration of public authorities – in particular, in respect of judicature and criminal cases – is an area of buoyant scientific discourse. The result of an attempt at a compromise is the 2016 agreement on protection of personal information relating to the prevention, preparatory proceedings (investigation), detection, and prosecution of criminal illicit acts (offences), referred to in the literature as the "Umbrella Agreement".[12] The Agreement determines the rules of collecting, exchanging and processing of data, while in itself forming no basis for transfer of any data whatsoever. It instead aims at working out a common standard that might subsequently be referred to as a point-of-reference in other detailed agreements. The EU–U.S. cooperation in the exchange of personal data is also covered by the agreement of 14 December 2011,[13] regarding the sharing by European airlines of the data of passengers (called Passenger Name Record [PNR]) making transatlantic trips. Compliance of this agreement with the EU laws may soon be efficiently challenged as well, since the ECJ has already taken a negative position against a projected agreement with Canada which was meant, in many an area, to include provisions and regulations analogous to those provided by the agreement with the U.S.

As a result, the careful observer of EU-U.S. cooperation can easily notice the serious difficulties faced by the parties when agreeing on the terms under which data from the EU could be freely transferred to the U.S. to be processed therein. One essential difficulty is elaboration of legally binding mechanisms to regulate the sharing and processing of data in line with the EU laws, especially such that would enable observance of high standards in protection of the rights of persons whose data are to be processed.

Understanding of the reasons why elaboration of such common regulations is very difficult, if possible at all, calls for in-depth discussion of the legislation binding in the United States, the constitutional foundations and key doctrines forming the framework for protection of privacy.

The area for understanding of which such analysis may prove particularly helpful is vertical relations connected with protection of individuals against breach of privacy by public authorities. Presentation and discussion of the major regulations pertinent to legal protection of privacy can be helpful in understanding the essential differences that result in the diverse approaches toward the possibility for public authorities to pursue surveillance schemes based on directionless, "en-mass"

---

[12] Agreement between the United States of America and the European Union of 2 June 2016 on protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences, OJ EU (2016) No. L 336, p. 3 (CELEX: 22016A1210(01)).

[13] Agreement between the United States of America and the European Union of 14 December 2011 on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ EU (2012) No. 215, p. 5 (CELEX: 22012A0811 (01)).

interception of data. In 2014, on examining the admissibility of transatlantic provision of data and efficiency of the legal mechanisms established to protect privacy, the CJEU ruled that U.S.'s legislation was inadequate to the norms established in the EU. The question thenceforth arises whether the standards elaborated in the EU cannot indeed be reconciled with, or aligned to, the U.S. legal system, as different as it is. Is it so that the EU has too rigorous regulations in place or, perhaps, it is the U.S. legislation that scantily protects the fundamental rights? Or, maybe it *is*, in any case, possible to identify a common middle ground that would link the two legal systems, rather than emphasise the differences.

This article does not seek to discuss the problem of mass surveillance from the standpoint of European regulations, especially the EU laws, the CJEU or the ECtHR judicial output; these issues have been discussed in my previous publications.[14] Hence, references to the concepts elaborated on the grounds of European science will herein below be used on an auxiliary basis in order to depict the most important differences and the reasons for their appearance.

2. MASS SURVEILLANCE SCHEMES IN THE UNITED STATES

There is no doubt that the significant increase in public opinion's interest in the potential involved in mass surveillance programmes carried out by the U.S. secret services is connected to the revelations of Edward Snowden, former associate of the Central Intelligence Agency (CIA) and the National Security Agency (NSA).[15] In fact, the actions of the NSA and its predecessor, the AFSA,[16] as far as supranational electronic intelligence (called signal intelligence, SIGINT) schemes are concerned, date back to the agreement of 5 March 1946 between the United Kingdom and the United States.[17] Joined in the later years by Australia, Canada, and New Zealand, the agreement was several times supplemented with annexes and amended, remaining valid to this date. The literature and the revealed pieces of information concerning the cooperation concerned name the alliance the "Five Eyes" (FVEY).[18]

The Five Eyes has always been based on intelligence collaboration. Acquisition of information from electronic intelligence was meant to support national security tasks, particularly, increase of the defence potential. With the increase of technical/technological potentials, the scope of monitored activities has evolved and the scale

---

[14] See, in particular, M. Rojszczak, *Prawne podstawy prowadzenia masowej inwigilacji obywateli opartej na hurtowym i nieukierunkowanym przechwytywaniu danych w UE z uwzględnieniem dorobku orzeczniczego TSUE i ETPC*, Studia Prawa Publicznego No. 2, 2017, No. 2, pp. 159–188.

[15] For a broader discussion of Edward Snowden, the man and the scope of documents he has revealed, see G. Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*, New York, NY 2014.

[16] For more on the NSA's earlier history, see Center for Cryptologic History National Security Agency, *The Origins of NSA*, https://goo.gl/KFz2Bj.

[17] For the (declassified) content of the agreement, see the NSA's official website at: http://cli.re/GrJobx.

[18] The documentation on FVEY partnership, as declassified by the NSA: https://www.nsa.gov/news-features/declassified-documents/ukusa/.

of prospective surveillance programmes changed. Electronic intelligence was initially orientated toward amassing information from radio- and telecommunications; by the 1980s, it became possible to develop a scheme for global monitoring of communications (known as the ECHELON);[19] beginning with the nineties, the possibilities of taking over and storing of electronic communications were developed and expanded. Also, the circle of persons under monitoring has altered. The increase in the technical/technological capabilities has made it possible to collect and further analyse bulk quantities of data. Thus, surveillance did not have to be focused on a specified circle of individuals, while the measures taken did not have to assume, on a legitimate suspicion basis, that the activity being monitored should be interesting due to the intelligence action pursued. It can be assumed that the moment electronic intelligence schemes enabled, in technical terms, the monitoring of any sort of communications and storing bulk amounts of data, marked the turning point for further development of mass surveillance measures. As a result, the programmes launched ceased to be useful strictly for purposes of intelligence activities, thus coinciding and being correlated with the legitimate interest of the state, becoming instead an instrument that could, with no lesser efficiency, be used for monitoring and influencing the behaviour of large groups of people, if not entire communities or societies. Thereby, they could pose a potential threat in terms of protection of fundamental rights, particularly the right to respect one's private life.

Therefore, prior to analysing the legal basis behind mass surveillance programmes, the existing technological possibilities related to the surveillance actions presently carried out, and known to the public basically from the revealed intelligence materials, need to be discussed. For one thing, this knowledge will be used in our further considerations in order to demonstrate how an overly liberal legislation might be used by an intelligence community to broaden the scope of the actions that may resultantly affect the fundamental principles of a democratic state. For another, the scale and comprehensiveness of the implemented schemes points to the necessity to verify the efficiency of supranational human rights protection systems. Moreover, it provides an important argument in the discussion on the need to elaborate new and more efficient international agreements to regulate the scope of admissible intervention of a state in its citizens' activities taking place in cyberspace.

The NSA pursues several separate schemes involving the amassing of data and has an extensive capacity to further analyse and process them. Albeit individual schemes or programmes may involve similar possibilities of acquiring large sets of data, they are oftentimes pursued based upon different laws or regulations. Also the geographical scopes of such schemes may vary; in particular, it may be related to data mining done on one's own, outside the limits one's jurisdiction, and/or in cooperation with third-country intelligence services. For the purpose of our further analysis, the classification by information scope of amassed data and method of their mining may prove useful. As to the former, we can refer to schemes enabling the amassing of

[19] For more on ECHELON scheme, see L. Sloan, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, Duke Law Journal Vol. 50, 2001, pp. 1467–1510; in fact, such systems were the first means of implementation of mass surveillance schemes, in this particular case, those related to telecommunications.

data accompanying electronic communications, so-called metadata[20] (code names MAINWAY and MARINA), as well as those involving interception of the substantial content of messages (for instance, PRISM).[21] Classification by data gathering method differentiates between actions related to eavesdropping on telecommunications connections (UPSTREAM group programmes) and those involving direct access to IT systems of leading web providers (PRISM, MUSCULAR). To illustrate the potential related to the surveillance schemes pursued in the United States, we need to briefly discuss the major ones.

As part of PRISM, the NSA has permanent access to data processing centres of top global web service providers situated within the U.S. As per the data revealed in 2012, PRISM enabled access to data stored in the server rooms of Microsoft, Yahoo, Google, Facebook, PalTalk, YouTube, Skype, AOL, and Apple.[22] Very importantly, the NSA had direct access to information gathered by the service providers, which means that the data did not come from interception of electronic communications. Thus, the NSA had access to complete contents of information amassed by hundreds of millions of users, including users of electronic mail services (provided by Gmail, Yahoo, Office 365, and more), file repositories (e.g. Google Drive, Microsoft OneDrive), electronic communications services (e.g. Skype) or contents published on social media portals. Any type of information could have been acquired as part of PRISM, with no possibility for the providers to control such flows, or for the users to be aware of what was happening. This also translates into no association between communication monitoring means and the appearance of a premise related to suspected grave crime or, in general, no association between an individual and the activities of interest to secret services. What is more, the user has no possibility whatsoever to find, even if consequently, that he/she has been subjected to a surveillance action and, resultantly, is given no chance to have his/her rights protected in court. A separate problem is the evaluation whether the web providers concerned had consciously joined the PRISM scheme. This aspect is quite essential in that rendering the data entrusted by users, including sensitive data (such as regarding one's health condition, private life details, political preferences, and so on), contrary to the agreed contractual obligations (based on the agreement/contract concluded with the provider), may become the basis for responsibility for the harm caused. The law applicable or governing would be one with the place of data processing (the law(s) of the United States, in this particular case) and the law applicable to with the contractual relationship between the user and the service provider, which in many cases may be indicative of the law(s) of the European Union. It is doubtless that provision of all the entrusted data to the state services, with no judicial review or option to supervise the correctness (and legality) of

---

[20] For a definition of metadata, see the Harvard Law School Web: http://hls.harvard.edu/dept/its/what-is-metadata/.

[21] A description of technological capacities related to the specified surveillance schemes can be found in the NSA documents revealed by E. Snowden, incl. *Special Source Operation overview*, https://goo.gl/2uQFBQ.

[22] The Washington Post, *NSA Slides Explain the PRISM Data-Collection Program*, http://cli.re/61YMw6.

the actions having been taken leads to no increase in trust towards the providers involved. Therefore, shortly after Edward Snowden published his materials, some of the entrepreneurs published declarations denying their cooperation with the NSA, namely, stating that they had never given the Agency access to the users' data.[23]

PRISM is one of the best-recognised secret mass surveillance programmes conducted by the NSA, though not the only one. From the standpoint of users from the EU territory, the UPSTREAM scheme group may be of no less importance. Interception of electronic communications, usually transmitted along international fibre-optic links, is the common feature of these programmes. Such actions are carried out within the United States (FAIRVIEW, STORMVIEW, OAKSTAR and other schemes) as well as in third countries (RAMPART-A) as part of cooperation with foreign intelligence services as well as telecoms operators. Within a given scheme, various types of electronic communications can be intercepted: metadata in particular, but substantial content (e-mail messages, for instance) as well. Based on what has been revealed, communications transmitted with use of Deutsche Telekom fibre-optic channels was once intercepted within the RAMPART-A framework (code name EIKANOL)[24] in the areas of Germany and Denmark. The cryptonym ORANGECRUSH (part of OAKSTAR scheme) was used to cover interception of communications within Poland, initially metadata only (since 3 March 2009) and, later on, complete messages (from 25 March 2009 onwards).[25] No details regarding the NSA's cooperation with Polish secret services are known, though.

The RAMPART-A scheme is designed to enable cooperation with third countries as partners not being members of FVEY. The alliance's member countries pursue additional common actions related to interception of electronic communications. TEMPORA and MUSCULAR, conducted by the NSA and the Government Communications Headquarters (GCHQ), the latter being the British equivalent of the former, are typical examples of such a scheme. As part of MUSCULAR, communications exchanged between Google's and Yahoo's data processing centres are eavesdropped. TEMPORA, in turn, is a scheme for eavesdropping of communications transmitted via fibre-optic links set across the UK territory.

The NSA gathers and amasses enormous amounts of data it acquires simultaneously from a number of sources. This enables the NSA to pursue global surveillance programmes targeted at communities or, in extreme cases, whole countries, rather than specified individuals. One such surveillance scheme is MYSTIC: according to what has been revealed, this scheme allows interception of entire electronic communications (voice calls, messages e-mailed and sent via communicators, etc.) coming from selected countries, in order to further analyse them.[26]

---

[23] See, for instance, Google Inc.'s declaration issued by L. Page, CEO, and D. Drummond, CLO, denying that any government agency would have direct access to the data amassed on Google servers and that Google might have ever taken part in PRISM; after https://googleblog.blogspot.com/2013/06/what.html.

[24] *The German Operation Eikonal as Part of the NSA's RAMPART-Aprogram*, https://goo.gl/4NMLPu.

[25] Based on: https://edwardsnowden.com/2014/06/13/orange-crush/.

[26] The Washington Post, *NSA Surveillance Program Reaches "Into the Past" to Retrieve, Replay Phone Calls*, https://goo.gl/h1XpNx.

Quite an obvious question follows whether, and in what ways, pursuance of programmes such as PRISM or UPSTREAM is anchored in the U.S. legislative framework. Is the existing and unceasingly expanding potential of the NSA duly overseen, in line with the rule-of-law principles, with the appropriate and independent supervisory authorities involved?

Quite plainly, actions of intelligence services all over the world are, for the most part, classified and secret; observance of secrecy often conditions the efficiency of an action being taken. On the other hand, lack of any supervision, combined with the possibility to gather data on any individuals, triggers a serious risk of abuse of power. In his testimony submitted before a special European Parliament committee, Edward Snowden stated, referring to the NSA analysts' broad rights in respect of access to information: "I could be reading private messages of any member of this Committee, or of any other citizen, not even moving from my armchair."[27]

No doubt, the NSA's competences and actions go beyond the limits of public authority's intervention in citizens' fundamental rights admissible in the EU. Again, there is no doubt that schemes such as PRISM or MUSCULAR (related to direct access to any user's data), and UPSTREAM (related to interception of electronic communications), led to breach of the proportionality principle which is referred to in the ECtHR and the CJEU judicial decisions as a conditioning option for applying restrictions in the right to privacy.[28]

An attempt at creating a model for intercepting the web traffic in its entirety and submitting it to further, non-transparent, analysis based on unknown algorithms must trigger well-informed concern about observance of the democratic governance, rule of law and constitutionality principles. As the European Parliament's resolution aptly points out:

> (…) the surveillance programmes [are seen] as yet another step towards the establishment of a fully-fledged preventive state, changing the established paradigm of criminal law in democratic societies whereby any interference with suspects' fundamental rights has to be authorised by a judge or prosecutor on the basis of a reasonable suspicion and must be regulated by law, promoting instead a mix of law enforcement and intelligence activities with blurred and weakened legal safeguards, often not in line with democratic checks and balances and fundamental rights, especially the presumption of innocence.[29]

The analysis of the U.S. legislation that forms the basis for such schemes seems, therefore, all the more interesting.

---

[27] Edward Snowden's testimony of 8 April 2014 before the European Parliament's Committee for Civic Freedoms, Judiciary and Internal Affairs, https://goo.gl/ZPksqs, p. 2.

[28] For a broader discussion, see M. Rojszczak, *supra* n. 14, pp. 172–174 (for the CJEU judgments) and p. 181 (for the ECtHR judgments).

[29] Resolution of the European Parliament of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, 2013/2188(INI), no. P7_TA(2014)0230, p. 12.

3. CONSTITUTIONAL FRAMEWORK FOR PROTECTION OF PRIVACY

One of the basic differences between the American and the European privacy protection models lies in the fact that the right to privacy is not listed among the fundamental rights in the United States. In European countries, constitutionalisation of the protection of privacy not only consists in the national standards taking account of the issue but also results from the functioning of these countries in supranational human rights protection systems.

The U.S. Constitution imposes no express warranty related to protection of privacy. The Fourth Amendment, which concerns personal and material integrity, and bans unjustified search or detention, forms the basis for formulation of this right. By way of precedent-setting rulings or verdicts by the U.S. Supreme Court, existence of constitutional warranties related to protection of individuals against illicit intervention into their privacy has been derived based upon the Fourth Amendment. It is worth noting that although lower-instance state and federal courts had dealt with the issue earlier on, it was only in 1965 that the Supreme Court, in its *Griswold v. Connecticut* case ruling, confirmed that the Fourth Amendment does extend to the individual's right to have his or her privacy protected.[30]

In line with the standard set by the Fourth Amendment, infringement of the sphere of privacy by a public authority or body may take place with the following two premises met jointly: (1) a probable cause is occurring; and, (2) a relevant warrant has been issued. It is important, though, that such a warrant can only be issued in a case that the applying body has indicated the circumstances making it plausible that carrying out the demanded action(s) would provide evidence of the specified type which is required for purposes of the proceedings pursued. The U.S. doctrine offers a few models for evaluation of the probable-cause premise (Andrzej Kiełtyka has pointed to the fact that the term "probable cause" has different renderings and definitions in the Polish literature[31]). The term can be briefly defined as the requirement to have a well-informed conviction that a search may lead to revealing evidence of a committed crime.[32] As per the standard based on the Fourth Amendment, the search must not be preventive and must be supported by a legitimate expectation that the site to be searched may provide certain evidence.

Due to lack of material regulations, especially constitutional norms, the scope and content of the right to privacy was subject to further clarification by way of subsequent rulings of the Supreme Court. This process lasted a number of years; as a matter of fact, a number of aspects related to protection of privacy, particularly as regards new data processing techniques, have not been precisely explained or clarified on the grounds of American judicature.

---

[30] U.S. Supreme Court ruling of 7 June 1965, case *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[31] A. Kiełtyka, *Podstawa faktyczna zatrzymania i przeszukania według Czwartej Poprawki do Konstytucji Stanów Zjednoczonych Ameryki*, Prokuratura i Prawo No. 2, 2006, pp. 91–106.

[32] C. Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, Mississippi Law Journal Vol. 81, 2012, p. 2.

Taking into account the issues in question, which concern the legal basis for mass surveillance programmes, two legal doctrines elaborated based upon the existing Supreme Court's judicial decisions are of crucial importance. One concerns "reasonable expectation of privacy" test,[33] as first defined in the *Katz v. United States* case.[34] The two-stage test requires, in its step one, to evaluate whether the event under analysis has, in the subjective perception of the individual concerned, infringed his/her sphere of privacy. Only if the answer is "yes", the court ought to consider whether the expectation has been objectively justified, or reasonable, in other words, whether "the society is ready to consider it [objectively] reasonable".[35] Since the area of an individual's subjective feelings is subject to no simple evaluation or assessment, it is assumed in the U.S. judicature that the basic element of the test concerned is to balance what can objectively be considered "reasonable".[36]

The other doctrine of importance, which enables one to set the limits for application of the Fourth Amendment, is called the third party doctrine. While the reasonable-expectation-of-privacy test allows extending the scope of protection with regards to the circumstances that, in common perception, are connected with protection of the privacy sphere, the third-party doctrine is devised to exclude from protection such events in which the individual has by himself/herself contributed to disclosure of information. The principle in question has it that in the case that an individual has voluntarily and on his/her own shared information with a third-party entity, he/she cannot expect that disclosure of such information would be protected against being revealed to a public authority. The scope of contractual obligations or of any other agreements between the parties is of no relevance for the possibility for a public authority to acquire such information without observing the procedure ensuing from the Fourth Amendment. Namely, it is assumed that the information has been voluntarily made accessible and *de facto* no more belongs to the sphere of one's privacy. Sharing information with a third party thus leads to no possibility of recognising that the individual has a justified or reasonable expectation of privacy related to the content of the information provided. This doctrine was first introduced in the case *Hoffa v. United States*.[37] In line with the Supreme Court rulings, the third-party principle has been applied with banking data[38] (access to bank statements) or telecommunications data[39] (access to billing data): in general, wherever data has been voluntarily provided/shared/made accessible and processed by a third-party entity in connection with the business operations it pursues. As a result, in the

---

[33] Also, see a discussion of the case *Katz v. United States* and a test of justified expectation of privacy in A. Czubik, *Prawo do prywatności. Wpływ amerykańskich koncepcji i rozwiązań prawnych na prawo międzynarodowe*, Kraków 2013, pp. 155–156.

[34] U.S. Supreme Court ruling of 18 December 1967 in *Katz v. United States*, no. 389 U.S. 347 (1967).

[35] *Ibid*., p. 361.

[36] O. Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create a Reasonable Expectation of Privacy?*, Connecticut Law Review Vol. 33, 2001, p. 507.

[37] U.S. Supreme Court ruling of 12 December 1966 in *Hoffa v. United States*, no. 385 U.S. 293 (1966).

[38] U.S. Supreme Court ruling of 21 April 1976 in *United States v. Miller*, no. 425 U.S. 435 (1976).

[39] U.S. Supreme Court ruling of 20 June 1979 in *Smith v. Maryland*, no. 442 U.S. 735 (1979).

cases under discussion, the law-enforcement and judicial authorities may acquire the information they demand based on a ruling or decision issued by the applying authority or body (subpoena), rather than based on a warrant, that is, under the procedure implied by the Fourth Amendment. The conditions for use of the third-party doctrine are synthetically laid down in the *Couch v. United States*,[40] where the Supreme Court points to three premises to be jointly met: (1) information has to be voluntarily provided (2) to a third party that (3) has used it as part of the business it pursues.

The possibility of applying the third-party principle to electronically processed data has for years now been causing multiple ambiguities. The problem became particularly important in reference to telecommunications entrepreneurs who can acquire extensive knowledge on their subscribers' activities thanks to increasing technological capacities. The assumption that the third-party doctrine is applicable to all metadata related to electronic communications generated by the user would lead to a conviction that public authorities can acquire not only billing data but also, for instance, location data by circumventing the procedure under the Fourth Amendment. This problem was resolved by means of a precedent-setting ruling of the Supreme Court regarding the *Carpenter v. United States* case, wherein the Court indicated that the third-party doctrine is not applicable to user location data.[41] Importantly, the verdict exclusively concerns the geolocation of subscriber equipment and sets no limits upon the third-party principle in other cases; in particular, it does not alter the limits of its use as set in the preceding case law.[42]

In the practice of the U.S. legal system, when considering the constitutional foundations of protection of privacy, it is necessary to refer to the First Amendment which forms the basis for freedom of expression; namely it states that "Congress shall make no law (…) abridging the freedom of speech, or the press". This norm essentially poses an obstacle to introduction of broader warranties related to privacy protection, particularly in all the areas where an introduced law would impose new obligations connected with regulation of contents being published. In the European model, privacy protection is often expressed by means of the individual's informative autonomy, which is freedom in deciding about the scope of information (on this particular individual) disclosed and the circle of persons to whom such information is provided. The First Amendment poses an obstacle to introducing such a solution in the American legal system. The authors of the Constitution foresaw on exception whatsoever in barring the establishment of statutory regulations that would imply restricted freedom of speech. This means that the norm defines freedom of expression as unconditional law which cannot be limited even if it would lead to a breach of rights and freedoms of others.

---

[40] U.S. Supreme Court ruling of 9 January 1973 in *Couch v. United States*, no. 409 U.S. 322 (1973).

[41] U.S. Supreme Court ruling of 24 July 2018 in *Carpenter v. United States*, no. 16-402, 585 U.S. (2018).

[42] J. Blanke, *Carpenter v. United States Begs for Action*, University of Illinois Law Review 2018, pp. 260–261, http://cli.re/gzEb5Y.

As to the Fourth Amendment, it is applicable, as a rule, in respect of citizens and residents of the United States.[43] It was already in 1972 that the Supreme Court, in a precedent-setting ruling in the *Keith* case, resolved that any electronic monitoring of domestic communications within the U.S. must observe the Fourth Amendment.[44] However, in the ruling passed in the case *United States v. Verdugo-Urquidez*, the Supreme Court pointed out that Fourth Amendment is not applicable to searching carried out by federal agents done in respect of a foreigner's property situated outside the U.S. What this verdict means is that actions of secret services involving interception of electronic communications and carried out outside the U.S. do not have to respect the constitutional standards stemming from the Fourth Amendment. As the Court observed on that occasion, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."[45] This statement expresses the conviction functioning in the American judicature whereby the actual reason behind the Fourth Amendment was to protect the rights of individuals, rather than restrict public authorities' powers or abilities. Understood in this way, the protective function of law must be correlated with the possibility to apply the law. Adoption of a different approach – one that would emphasise a negative obligation of public authorities – might lead to elaboration of sentencing guidelines that would point to lawlessness of action of the authority that fails to apply outside the state the legal norms whose application is otherwise obligatory for them within their territory.

Even in regard of the U.S. citizens and residents, not every instance of breach of the privacy sphere leads to the necessity to take account of protection under the Fourth Amendment. What is crucial at this point is the option to use the third-party principle, with the resulting exclusion of constitutional protection in cases where information has been voluntarily provided by an individual to another entity. The *Smith v. Maryland* ruling has become the basis for recognising that metadata connected with telecommunication services – in line with the third-party principle – cannot use a constitutional protection. Although as per the ruling in *Carpenter v. United States*, use of this particular principle cannot be extended to user location data, in a number of other cases state authorities have possibilities to acquire information related to electronic communications, neglecting judicial supervision as otherwise stemming from the Fourth Amendment. Hence, the practical significance of the protective function under the Fourth Amendment is limited to a situation when the object of surveillance is a US residentand the actions taken extend to getting access to the substantial content of the message (i.e. the communication contents: calls, e-mail messages, and so on).

---

[43] Protection under the Fourth Amendment applies to citizens regardless of their actual place of residence or whereabouts, and to all who legally stay within the United States (foreigners included). See E. Corradino, *The Fourth Amendment Overseas: Is Extraterritorial Protection of Foreign Nationals Going Too Far?*, Fordham Law Review Vol. 57, 1989, pp. 618–619.

[44] U.S. Supreme Court ruling of 19 July 1972 in *United States v. U.S. District Court*, no. 407 U.S. 297 (1972).

[45] E. Corradino, *supra* n. 43, note 36.

Summing up the above discussion, although the Fourth Amendment does introduce mechanisms of protection against unjustified actions of public authorities, including in amassing of information related to the sphere of private life, the practical application of such protection is strongly limited, in terms of objective as well as subjective scope.

4. FOREIGN INTELLIGENCE SURVEILLANCE ACT[46]

The basic statutory act that sanctions the U.S. secret electronic surveillance programmes, including those involving unlimited collection of data in bulk, is the Federal Act of 25 October 1978, named the Foreign Intelligence Surveillance Act (FISA).[47] The main purpose behind the adoption of these regulations was to determine the rules for intelligence actions related to foreigners: such actions were thenceforth to be done in a way that would prevent the option to use the same means and techniques in monitoring the activities of the U.S. citizens. The FISA was submitted and adopted as direct consequence of legally dubious actions of American secret services connected, inter alia, with surveillance of the opposition and political competitors (as in the notorious cases of Martin Luther King or the Watergate scandal).[48]

The FISA has been repeatedly amended and modified. To understand the regulations it imposes, it is necessary to explain the major concepts and legal constructs whereupon the Act is based. The main purpose behind the Act was to determine the rights of law-enforcement authorities (intelligence services included) in pursuing electronic surveillance in respect of representatives of foreign intelligence services. To this end, the Act defines the term "foreign power(s)", which denotes third-state governments or their members/representatives, organisations controlled by them (regardless of their formal status) as well as groups involved in international terrorist actions and those having to do with proliferation of mass destruction weapons. Thus, the term was not limited to alien intelligence activities. The scope of persons who could be subjected to surveillance techniques was delimited by the phrase "agent of a foreign power", whereas the proposed definition differentiates between entities not liable to the laws of the United States and those subject to the U.S. jurisdiction. The latter group (as "United States person(s)") is defined as including the U.S. citizens, holders of permanent residence permit, associations and individuals without legal personality, the latter including, "in significant numbers", the U.S. citizens and residents, entities operating under the commercial law and

---

[46] The literature and legal acts use various foreign-language versions of the Act's title, incl. Foreign Intelligence Surveillance Act (as in European Parliament's Resolution of 14 March 2014, OJ EU 2017, No. C 378, p. 14); Alien Intelligence Surveillance Act (PE's Resolution of 4 July 2013, OJ EU 2016, No. C 75, p. 105); Foreign Intelligence Activity Act, in Polish: *ustawa o działalności obcych wywiadów* (cf. J. Larecki, *Wielki Leksykon Tajnych Służb Świata*, Warszawa 2017, p. 288).

[47] U.S. Federal Act of 25 October 1978: the Foreign Intelligence Surveillance Act, no. 95–511, published: 50 U.S.C. § 1801.

[48] J. McAdams, *Foreign Intelligence Surveillance Act (FISA): An Overview*, https://goo.gl/VbfTd8, p. 2.

registered in the United States. These definitions were meant to adopt different rules of surveillance actions towards entities and persons protected under the Fourth Amendment and other persons for which no need to observe constitutional standards existed.

As a result, the FISA introduced two procedures for amassing electronic data. One, carried out pursuant to Article 102, may only be taken advantage of in the case of electronic surveillance between foreign powers, whilst in parallel meeting the premise of no substantial likelihood that resulting from the action taken to this end, the communication of the U.S. persons would be mined. In such a case, surveillance actions may be approved by the Attorney General, without the need to apply for a warrant. It is worth emphasising that, in such a case, ordering a surveillance action does not imply the need to demonstrate that a probable cause actually exists as a premise that would condition issuance of a warrant under the Fourth Amendment.

The procedure implied by Article 102 may only be applied in certain limited cases; in particular, it cannot be used for surveillance of terrorist organisations, foreign political parties, or entities managed/controlled by a foreign government (Article 102, in conjunction with Article 101, clause (a), items 4–6 FISA).

Alternatively, in each case there is a possibility to carry out electronic surveillance based on a warrant issued by the United States Foreign Intelligence Surveillance Court (FISC) especially appointed for the purpose under the Act. Set up under Article 103 FISA, the judicial authority initially consisted of seven (presently, eleven) judges, one for each of the then-functioning federal judicial circuits, elected by the head of the U.S. Supreme Court. Three additional federal judges are moreover elected to form the case of the United States Foreign Intelligence Surveillance Court of Review (FISCR). The latter is a second-instance court which only considers complaints against refusals to issue a warrant approving the implementation of surveillance actions. Together, both bodies have exclusive competence in approving applications submitted based on the FISA, which in particular means that the decisions issued by them are not to be appealed against before any other federal court, and their legality cannot be called into question with use of any other legal procedure. The only exception is the option to submit an annulment to the Supreme Court against the ruling passed by the Court of Review;[49] in practice, however, this right is only vested in the governmental party, since, as it has been mentioned earlier, appeals to the FISCR are only submitted against refusal decisions made by the FISC.[50] Activities of the courts are inherently secret, which should be understood to mean the statutory abolishment of openness of meetings, requests submitted and warrants issued (Article 103, clause 3 FISA). What is more, the entities at which warrants are targeted (such as telecoms operators) are bound, by the power of law, to keep secret all the actions connected with the execution of the decision received, as well as the very fact that a warrant has been issued.[51]

---

49 See 28 USC § 2106.
50 See 50 USC § 1881a(h)(6)(B).
51 See 50 USC § 1861(d).

As assumed earlier, the Act was originally adopted in its initial wording in order to minimise the risk of carrying out legally questionable surveillance actions within the United States; thus, the Act sought to increase the individuals' rights, rather than to limit or restrict them. The secrecy of judicial authorities' actions is understandable, especially when taking into consideration that warrants issued by them were meant to directly concern the state security area, particularly, protection against actions of foreign intelligence services. As the Act was adopted in the 1970s, the electronic surveillance techniques it dealt with concerned telecommunications (eavesdropping of voice calls); due to lack of satisfactory technical possibilities, no risks related to surveillances possibly covering undefined numbers of persons were not analysed at that point.

The initial wording of the Act has several times been amended, and the modifications made are of key importance to the issues under analysis. The first important amendment was made in 2001, in connection with the adoption of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001), more colloquially referred to in the literature as the Patriot Act (PA). The Act was adopted resulting from the 9/11 events, as an element of legal actions leading to reinforced competencies of state authorities in the struggle against terrorist organisations. Chapter II PA made a number of amendments to the FISA provisions, with the resulting extension of the authorities'/bodies' rights and alleviation of formal requirements related to the use of surveillance. One example is the modification of the requirement related to the purpose of surveillance actions: initially, Article 104, clause (a), item 7 FISA required that the only purpose of a surveillance action be to acquire information on the activities of foreign intelligence services. The amended version refers to an "essential purpose", which paved the way for warrants being issued to authorise intelligence actions targeted not only at the activities of alien secret services.

From the standpoint of the research area in question, Article 215 of the amending act, which modified the content of Article 501 FISA, was quite crucial. As per the amended phrasing, the Director of the Federal Bureau of Investigation, or his duly authorised representatives, could demand upon any entrepreneur that he or she made available records of material importance, referred to as the "tangible things", as necessary for the pending investigation regarding international terrorism or intelligence actions. Surveillance actions could also cover residents and legal persons/corporate bodies in the territory of the United States ("United States persons"), but this under the condition that the only basis for such actions was other than the actions protected under the First Amendment. The requirement was to be understood in the way that the information a U.S. citizen published on his/her own, making use of freedom of expression vested in him/her, could not be the only justification of surveillance targeted at him or her. Applications submitted based on the amended version of Article 501 FISA could be considered by the appointed judicial authority (FISC) or by any federal judge, regardless of his/her jurisdiction circuit.

In practice, Article 215 PA became the basis for surveillance schemes based on mass collection of metadata concerning electronic communications. Although the competent authorities would obtain under the said article no access to information related to the

content of the communication, the possibility to collect and further process large sets of data describing the method of use of data communications services (telephone calls, e-mail messages) enables, with use of advanced Big Data algorithms, to discover models of behaviour and identify relations between persons. In practice, any and all information telecoms, financial, or even health services operators processed in connection with the services they provided could be mined under the procedure stemming from Article 215. Lack of any restriction in terms of indicating the objective scope of the required data enabled the authorised bodies to apply for being provided the entire information possessed by the obligated entrepreneur and connected with the services he/she rendered. The fact that the wording of Article 215 did not refer to a necessity to meet the "probable cause" premise, pointing instead to a much less restrictive condition (and deeming it satisfactory) that any demanded piece of information be "in connection" with the pending investigation, was not unimportant.

Warrants issued under Article 215 doubtlessly did not allow one to intercept the contents of telephone calls. Such talks were not information generated by telecommunications operators, while the provision being referred to *de facto* enabled to mine information held by entrepreneurs and related to their operations. The procedure under Article 215 has therefore to do with the above-discussed third-party doctrine (principle) which results in exclusion of information voluntarily provided to entrepreneurs from the protection under the Fourth Amendment. It is not clear, though, whether and to what extent it was possible under the aforesaid provision to obtain access to electronic e-mails stored by e-mail service operators. While in telephone calls recording the communication is not a necessary element of the provision of a service, the contents of e-mail messages should, quite obviously, be recorded and stored on mail servers in order to be passed on to the user. As a result, depending on interpretation, it was possible to recognise that the substantial contents of electronic messages could be rendered available under Article 215 PA.[52]

One example of application of the procedure under Article 215 is the FISC's ruling dated 25 April 2013, disclosed in the public domain, instructing member entities of the Verizon capital group (one of the U.S. major telecoms operators)[53] to provide metadata regarding all domestic and all foreign calls made by all the users of this operator. The injunction indicated that the data to be shared would primarily include the numbers of the calling station and the called station, the IMSI and IMEI identifiers, and the durations of calls. It has to be remarked that the scope of data to be provided by no means ensued from a necessity to acquire such information in connection with a pending criminal proceedings: instead, the demanded data were related to all the calls of each of the subscribers concerned. This is, therefore, an

---

[52] Asked about this issue, in the course of a hearing before a U.S. Senate commission, General Keith B. Alexander, the then-head of the NSA, testified that Article 215 forms the basis only for a collection of metadata; in the event the need arises to intercept the communication content, obtaining consent from the court prior thereto is a must. For a more detailed account, see *NSA Chief Drops Hint about ISP Web, E-mail Surveillance*, https://www.cnet.com/news/nsa-chief-drops-hint-about-isp-web-e-mail-surveillance/.

[53] It should be stressed that, apart from international calls, handled by MCI Networks, Verizon runs a considerable part of the internet's backbone network within the United States (called "tier 1").

example of intervention in one's right to privacy, one that ignores the proportionality principle and, as a result, cannot be regarded as compliant with the ECHR or the EU laws. The FISC did not verify the legitimacy of the required data, limiting itself to assessing the submission's compliance with the relevant legal basis, specifically, Article 501 FISA.

The adjuration regarding Verizon is nowise an exception. According to mass media, similar decisions were passed with regard to the other two leading telecoms operators.[54] Moreover, based on the published FISC statistics, it is apparent that between 2004 and 2013 (prior to Edward Snowden's disclosure of information on the scale of the NSA's schemes) the FISC accepted, without modification, 99% of the applications submitted,[55] the corresponding 2015 figure being 96% (five modified against 142 submitted).[56]

As a result, Article 215 became the basis for the launch of a system recording the data related to most (if not all) of the telephone calls made between subscribers within the United States and in foreign communications. Such a scale of surveillance was previously unknown to any democratic country, and it quite clearly led to increased risk of power abuse. The intelligence services have acquired detailed information not only on the communications between individuals who were or could have been suspected of committing or planning a serious crime but also between hundreds of millions of citizens who had never undertaken any criminal action whatsoever, along with attorneys, journalists, politicians, and other social groups whose communication should never be monitored by any public authorities, unless under an important and real premise.

More changes related to extensive mass-scale surveillance schemes have to do with the Foreign Intelligence Surveillance Act of 1978 Amendments Act (FAA), adopted in 2008.[57] As per its Article 101, the previous content of Chapter VII FISA was replaced with new regulations regarding additional procedures applicable to persons staying outside the United States. The amended wording of Article 702 FISA had it that the Attorney General and the Director of National Intelligence (DNI), acting together, were authorised to extend surveillance actions to individuals in regard of whom there had been reasonable basis for recognising them residing outside the U.S. The measures applied were meant to acquire information on the activities of foreign intelligence services. The provision did not provide for the necessary consent from a court, nor did it impose any limitations regarding the scope of information collected. In line with Article 702, clause 2, the consent to be passed could not purposefully extend to persons as to whom:

---

[54] The Wall Street Journal, *U.S. Collects Vast Data Trove*, http://cli.re/LJnAAn.

[55] J. Mornin, *NSA Metadata Collection and the Fourth Amendment*, Berkeley Technology Law Journal Vol. 29, 2014, p. 986.

[56] Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Court Orders 1979–2016*, https://epic.org/privacy/surveillance/fisa/stats/default.html.

[57] U.S. Federal Act of 10 July 2008: Foreign Intelligence Surveillance Act of 1978 Amendments Act, no. 110–261, publication 50 U.S.C. § 1801, official version: https://goo.gl/deFnBE.

– it was known that at they stayed within the U.S. at the moment the data was collected;
– it was known that they were the U.S. nationals (citizens) or residents staying abroad;
– the purpose behind the surveillance was to acquire information on the U.S. nationals/residents who stayed in touch with the persons under surveillance.

All these limitations led to exclusion from the possibility of extending the authorisation issued under Article 702 FISA natural and legal persons of the U.S., regardless of their actual location as well as all and any persons staying within the U.S. territory. As pointed out earlier, the Supreme Court's jurisprudence resolved that with each of the described situations the Fourth Amendment was applicable, which means that any surveillance action had to be preceded by obtaining a warrant issued after the probable cause was verified. Hence, item (5) was added to Article 702, clause (b), which stipulated that actions carried out based on the issued consent "shall be conducted in a manner consistent with the Fourth Amendment to the Constitution of the United States".

The procedure laid down by Article 702 implies no verification of administrative decisions by the court. The legislator has envisioned for the judicial authority a function of periodical reviewer and certifier of the conditions for implementation of the schemes (in particular, the method of determining the circle of persons subjected to surveillance and the so-called minimisation procedures).[58] The court is not expected to evaluate the legitimacy of surveillance applied to specific individuals, its cognition being limited to verifying the rules/procedures according to which the analysts of duly authorised bodies or authorities select the surveillance targets. This implies that the actual role of the judicial authority is limited to analysis of the declarations submitted by authorised bodies, without checking how such declarations have been applied in practice.

While Article 215 PA provided the basis for mass metadata collection programmes, Article 702 FISA enabled one to implement extensive surveillance actions which extended to access to the substantive content of communications (including voice calls, e-mail messages, contents exchanged via web communicators). Although both these legal bases directly influenced the sphere of privacy of electronic communications users, they provided, in formal terms, the basis for implementation of other surveillance schemes. Those based on Article 215 PA covered all the users of defined means of communication. The schemes based upon Article 702 FISA were less global, yet owing to the possibility of access to user data, their impact on the sphere of privacy was larger.

Since both groups of programmes are administered by the same federal agency, i.e. the NSA, it should be expected that the methods of their implementation are strictly correlated, thus enabling one to gain more detailed and precise information on the individual concerned and his/her relation(ship)s with the others.

The last of the essential amendments to the FISA is connected with the "Act to reform the authorities of the Federal Government to require the production of certain

[58] 50 USC § 1881a (d–e)(2).

business records, conduct electronic surveillance, use pen registers and trap and trace devices, and use other forms of information gathering for foreign intelligence, counterterrorism, and criminal purposes, and for other purposes", also known in the literature as the Freedom Act (FA), adopted in 2015.[59] The Act imposed a series of material alterations, two key ones among them: those related to the above-discussed Article 501 FISA (the wording set by Article 215 PA) and Article 702 FISA (the wording set by Article 101 FAA). In a series of the Act's detailed provisions, a direct ban is introduced on mass (undirected) collection of data. To this end, the legislator indicated that the applications and prescripts issued pursuant to Article 501 FISA had to be complemented with information on selectors (terms searched) forming the basis for indicating the scope of information to be rendered available. The phrasing of Article 501 has been replaced by the one binding prior to putting into effect of the Patriot Act, thereby causing the cessation of validity of the legally dubious legal basis for mass surveillance schemes. In parallel, an exclusionary rule was introduced under Article 301 for information acquired under Article 702, clause 1 FISA, but with infringement of the restrictions stemming from Article 702, clause 2 FISA. Apart from certain exceptions, such information must not be used in the course of cases considered before judicial and administrative authorities, used otherwise, or provided to any other organisation or agency whatsoever.

As per Article 403, clause (b) FFA, in the event that no further legislative action is taken, the authority ensuing from Article 702 FISA was due to expire on 31 December 2017. Hence, discussion began in the United States in early 2017 on the need and scope of further extension of the validity period of Article 702 FISA. Representatives of the executive power, the Director of National Intelligence among them, recommended that the validity of the provisions be extended without changing their scope, in particular, without adopting the regulations reinforcing civil rights at the expense of freedom of running intelligence schemes.[60] On the other hand, human rights protection organisations emphasised the need to remodel the regulation of Article 702 so that the possibility of abuse of rights, which occurred in the past, be restricted. It was postulated, inter alia, that the ban on collection of data other than directly concerning the surveillance objects be taken into account; or, following the solutions under the Fourth Amendment, that a "probable cause" test be introduced as a premise conditioning the application of surveillance techniques.[61] Finally, in line with the adopted version of the Act's text, the period of application by the authorities under Article 702 FISA was extended until the end of 2023.[62]

---

[59] U.S. Federal Act of 2 July 2015: the Freedom Act of 2015, no. 114–23, official version: https://www.congress.gov/114/bills/hr2048/BILLS-114hr2048enr.pdf.

[60] Reuters, *White House Supports Renewal of Spy Law Without Reforms: Official*, https://goo.gl/LfRcbF.

[61] L. Donohue, *The Case for Reforming Section 702 of U.S. Foreign Intelligence Surveillance Law*, https://goo.gl/7h5irH.

[62] See Article 201(a)(1)(A) of Federal Act of 19 January 2018: "an Act to amend the Foreign Intelligence Surveillance Act of 1978 to improve foreign intelligence collection and the safeguards, accountability, and oversight of acquisitions of foreign intelligence, to extend Title VII of such Act, and for other purposes" (FISA Amendments Reauthorization Act of 2017); no. 115–118; official version: http://cli.re/LjQp4V.

At the same time, the scope communication that could be covered by surveillance measures was extended. The provisions which were in force earlier on provided no basis for collection of so-called about-data, as the data exchanged by third parties, whose contents might have indicated to a reference to the surveillance object. Human rights protection organisations claim that the possibility to collect such about-data may be a means of circumventing by intelligence services of the legal limitations related to recording of communications.[63] The new Act introduced a procedure allowing legalisation of about-data collection.

The two procedures laid down in the FISA for conducting electronic surveillance schemes, namely Article 501 (metadata) and Article 702 (the very content of the communication), provided the basis for a variety of intelligence programmes carried out by the NSA. In particular, following the writs issued under Article 501, the schemes MAINWAY and MARINA were conducted, which consisted in collection of metadata regarding the entire electronic communication associated with voice calls (MAINWAY) and web communications (MARINA) and done within the United States. In turn, the programmes PRISM and UPSTREAM were carried out based on the writs issued under Article 702. Due to the different legal basis, not only the substantive scope of information to be gathered but also the circle of persons subjected to surveillance is different. For Article 702, restrictions related to the U.S. residents apply; with Article 501 – taking into consideration the above-discussed third-party principle – metadata are not subject to constitutional protection under the Fourth Amendment. Consequently, metadata can be collected and processed by public authorities also with respect to communications between the U.S. residents, with no other legal restrictions or limitations whatsoever.

With the reform related to the adoption of the Freedom Act that resulted in reinstatement of Article 501 FISA in its pre-2001 wording, some of the schemes (if still conducted) require being founded on a different legal basis. It is not without a reason that the literature notes that the manner in which this amendment was made, i.e. by waiver of the norm's content and replacing it with the phrasing that was in force more than fifteen years earlier (before 2001), results in incoherent regulations and, eventually, in a potential legal loophole which might be used in subsequent secret surveillance schemes.

Due to lack of transparency of the NSA's actions, it is impossible to indicate at present to what extent the launch of the Freedom Act has contributed to meeting the intended objectives, namely prevention of unlimited collection of data, and to render it compulsory for the secret/intelligence services to gain access to the required data, once it has been verified that such information is actually required in the course of investigation, rather than being exclusively used in preventive analytics.

---

63 *All About "About" Collection*, Electronic Frontier Foundation, http://cli.re/gzWJM5.

5. EXECUTIVE ORDER 12333 OF 1981

The Constitution of the United States lays down the competencies of the legislative and executive powers in a deferent way than what is customary in European countries. In particular, a number of actions, particularly those related to the security of the state, are among the prerogatives of the president of the United States. Implementation of these special rights, which assumes the form of regulations or decrees referred to as "executive orders", does not require for its validity to be additionally delegated by means of the acts or laws made by the Congress. Moreover, a series of legislative regulations grant to the U.S. President special authorisations and competencies that introduce extensive legal regulations, which in the European legislative system usually need to be regulated in a statutory form.

Executive Order 12333 of the President of the United States[64] is an exemplary act of this sort. Apart from the Foreign Intelligence Surveillance Act, it forms the other essential foundation for electronic surveillance programmes. As a rule, the document in question discusses the competencies and authorisations of secret services in pursuance of intelligence actions. The Act is of special importance for schemes carried out outside the U.S. territory, as in such cases the restrictions laid down by the FISA do not apply. Since its passing in 1981, Executive Order 12333 has been modified thrice,[65] each such amendment having led to alleviated requirements and extended competencies of intelligence community authorities.

The Executive Order determines the conditions for electronic surveillance actions, including in regard of the U.S. residents. The Fourth Amendment also defines less restrictive requirements than those ensuing from the procedures put forth by the FISA. Its item 2.3 indicates a catalogue of nine premises allowing collection of such information, which altogether form quite a broad framework for legal gathering of data. Moreover, even if none of the conditions has been met, an additional basis allowing "incidental" collection of data, accompanying the actions taken based on the other specified premises, was also introduced. Since the legislator outlined no limits or restrictions related to "incidental collection of data", the literature notices that data sets of even extremely large volumes can be gathered based on this provision that are associated, even if distantly, with information in which the services take due interest. According to the available information, a considerable part of actions pursued within the UPSTREAM scheme group are founded upon item 2.3(c) Executive Order which allows collecting of data in connection with legal intelligence/counterintelligence actions, investigations related to international drug trafficking and terrorism.[66]

---

[64] Executive Order 12333: United States Intelligence Activities of 4 December 1981, official version: 46 FR 59941, http://cdn.loc.gov/service/ll/fedreg/fr046/fr046235/fr046235.pdf; uniform text: https://goo.gl/DZTui7.

[65] The amendments were made based upon Executive Order 13284 of 23 January 2003, Executive Order 13355 of 27 August 2004, and Executive Order 13470 of 30 July 2008.

[66] Ars Technica, *The Executive Order that Led to Mass Spying, as Told by NSA Alumni*, https://goo.gl/TJsNvH.

In contrast to the FISA, actions taken pursuant to the Executive Order 12333 require no consent from the court, nor are they subject to periodical review by judicial authorities. The Order imposes no limitations regarding the scope of information acquired, particularly if leading to preventing the pursuance, based thereupon, of mass surveillance schemes that assume bulk and limitless gathering of data. A document declassified by the NSA in 2014 tells us that the Agency carries out most of its electronic recognition actions exclusively based upon the Executive Order 12333.[67]

Given the character of the internet where the transfer of information is associated with no geographic borders, the schemes based on the Executive Order 12333 can *de facto* support interception of any sort of content. An e-mail message whose sender as well as recipient are within one country can be sent by telecommunications links set across the areas of third countries. Hence, setting lower standards for interception of communications made outside the United States leads, in reality, to the possibility of intercepting on this basis any communications or messages, including those concerning the U.S. citizens. The press have described situations suggesting that the NSA purposefully applies techniques to redirect the specified web traffic into other jurisdictions so that it can thereby intercept communications by omitting the restrictions established by the national regulations.[68] This example is indicative of a limited efficiency of statutory regulations made in the United States, which are meant to support the respect for human rights in cyberspace, the right to privacy in the first place. Presently, the scope of admitted intervention in the fundamental rights is conditional upon the technical procedure applied by the public authority concerned. The same data, carrying identical informative value and owned by the same person can be diversely protected against the state's intervention, depending on their place of storage. Such a solution is doubtlessly unknown to the European data protection model, and it quite obviously proves to be incompliant with the standards imposed by the EU laws (in particular, Articles 7 and Article 8 para.1, in conjunction with Article 52 para. 1 of the Charter of Fundamental Rights) and the European Convention on Human Rights (Article 8 para. 2 ECHR).

While resulting from the FISA reform of 2015, a considerable portion of the most controversial regulations providing the basis for pursuance of extensive surveillance schemes has been altered or repealed, this particular amendment in no way affected the schemes carried out based on the Executive Order 12333. As a result, the rights of secret services under the said Order pose a more serious threat to privacy of internet users compared to the FISA regulations as they stand at present.

---

[67] NSA, *Legal Fact Sheet: Executive Order 12333*, https://goo.gl/N6D9k1.

[68] The New York Times, *NSA Gets More Latitude to Share Intercepted Communications*, https://goo.gl/iKBuba.

6. CONCLUSIONS

These above discussion allows one to outline a few key differences between the U.S. legislation and the regulations ensuing from the ECHR and binding in the EU territory, in relation to the possibilities, scope and legal foundation for mass surveillance programmes.

In the first place, rather than being constitutionalised, the main assumptions of the right to privacy are based on the case law (adjudications of the U.S. Supreme Court), which results in a fragmentary and partly incoherent protection model in place. Public authorities are obligated to apply the Fourth Amendment only with respect to residents (regardless of their actual whereabouts) and persons legally staying in the United States. Aliens are granted no rights under the Fourth Amendment, even if their data are stored and processed within the U.S. Such diverse approach to different groups of individuals in terms of constitutional standards is further reflected in statutory and executive regulations.

In parallel, erosion of the necessary terms identifiable in sub-constitutional regulations is observable, making legitimate surveillance actions targeted also at the U.S. residents. While at the Fourth Amendment level it is required that the "probable cause" premise be satisfied, as confirmed by a warrant, for taking of action with an identical de-facto effect (electronic surveillance), using special procedures pursuant to the FISA, it suffices that there is the "essential" purpose of surveillance to acquire intelligence information. In some cases, meeting this premise does not even have to be independently verified by the court. The instatement of a separate judicial authority dedicated to consider electronic surveillance cases – an institution whose activities remained clandestine for a number of years, its rulings were not to be challenged by any other federal court, whilst its procedures never admitted attendance of any representative of the citizens' interests – clearly increased the risk of non-transparency of the judiciary's actions. The FISC's decisions have never offered a possibility, be it consequent, for those whose privacy has been infringed to have their rights protected, and nothing has changed in this respect to date. The very fact of a privy court issuing a blank ruling admitting preventive surveillance of a few hundred millions of people makes the legislative model functioning in the United States resemble the one described in Franz Kafka's *The Trial* rather than any of those known from any European democratic country.

The U.S. intelligence services can conduct extensive surveillance actions founded upon at least three legal bases, i.e.: Article 501 FISA (access to electronic communications services metadata); Article 702 FISA (access to entire message); and, Article 2.3 of the Executive Order 12333 (actions taken outside the U.S.). Each of these procedures can be applied as the legal basis for schemes assuming limitless mass collection of data. The procedures laid down by the specific regulations can be applied interchangeably and result in a different degree of intervention in the fundamental rights. Interception and processing of the content of a given e-mail message may require:

a) consent from the court and satisfaction of the terms set forth by the Fourth Amendment; or

b) consent from the court without examining the terms set forth by the Fourth Amendment (Article 702 FISA); or
c) no consent from the court; instead, authorisation would be given by a duly authorised executive power representative (Executive Order 12333),

whereas the choice of the formal basis is not an objective substantive premise (such as sensitivity of the piece of information or probative value) but depends on the place and method of interception of the message or communication.

Quite obviously, this model is different than that stemming from the judicial output of the ECtHR. The jurisprudence elaborated by the European Court implies that application of surveillance techniques should be restricted having regard to the:[69]

– categories of crimes with which authorisation of application of surveillance measures may be associated;
– categories of persons who may be subjected to such surveillance;
– procedure determining the rules for examination, storage and use of collected data;
– precautions applied in the provision of the collected data to other entities;
– criteria according to which the collected data should be removed or destroyed.

The legislation binding in the United States quite clearly does not meet most of the minimal conditions indicated. What is described in the ECtHR judicial decisions as lack of regulatory predictability, with its resulting unsatisfactory protection against arbitrariness of decisions, comes as a consequence of the lack of transparency and accountability of actions of the intelligence services as well as the established judicial authorities.[70]

The different legal framework in which the EU and the U.S. secret/intelligence services can pursue their mass surveillance actions results from a different balancing of the individual fundamental rights, particularly the right to privacy and the right to safety and security (with its directly related public security area). The scope of admissible surveillance of citizens is, essentially, not only a legal but also a sociological and cultural issue which informs and affects the shape of a society.

These objections with respect to the law-making and legislation in the United States have been discussed by local law scientists as well. This ongoing discourse features views indicative of the need for a reform of the existing regulations so that the right to privacy be reinforced after the European model, along those noting that the constitutional norms in effect preclude the introduction of a different protective system.

Moreover, it is of importance that some respected exponents of the judicature see no need for a systemic change whatsoever. One example is Richard A. Posner,[71] a judge with the Federal Court of Appeals, whose publications rank among the most

---

69 ECtHR judgment of 29 June 2006, case *Weber and Saravia v. Germany*, No. 54934/00, § 95.

70 ECtHR judgment of 2 August 2984, case *Malone v. the United Kingdom*, No. 8891/79, § 67.

71 For a broader discussion of R.A. Posner's views, see J. Kuisz, *Konstytucja w sytuacjach zagrożenia bezpieczeństwa państwa na tle teorii R.A. Posnera*, Prokuratura i Prawo No. 12, 2013, pp. 46–59.

cited ones in American law science.[72] Judge Posner argues that the right to privacy must not by breached by the NSA resulting from mass collection of data, since the processing of such data is largely done automatically, whilst computers, being appliances without legal capacity, cannot infringe or breach one's privacy.[73] This argument is erroneous, though, as it completely ignores the fact that informative autonomy, expressed through the option for the individual to resolve who and under what conditions would be given access to any information perceived by such individual as sensitive, is an essential constituent of privacy protection.

Conducting mass surveillance schemes leads to a distortion of this idea; consequently, the individual is deprived of his/her freedom to decide. The opponents of the concept to extend the protective scope related to the right to privacy often point to the unavoidable collision of such a solution and the First Amendment. This argument is important, all the more than any proposition that would for its efficiency require certain constitutional norms to be amended is unreal in the American conditions. Eugene Volokh has proposed an interesting view of this issue, calling the European privacy standards "a right to stop others from talking about you".[74] Making use of this paraphrase, the above-named author argues that implementation of this right boils down to equipping the public authority with tools or instruments with which it may restrict the others' freedom of expression, which in an obvious way is not reconcilable with the First Amendment. Paul Schwartz rejects this argument by pointing to numerous other regulations that already at present allow the executive power to influence the contents or form of information appearing in public space.[75] Regardless of the varied views in this respect, there is no doubt about the fact that the First Amendment may be considered to be limiting the scope of the right to privacy, but this in horizontal, rather than vertical, relations. One would rather not admit that mass surveillance programmes conducted by public authorities and covering hundreds of millions of individuals could use a protection related to freedom of expression (which forms the substantive scope of the First Amendment).

N. Young, in turn, defined four major postulates that, according to him, ought to be taken into consideration in further discussions on the scope of the demanded reform of surveillance regulations in the United States:

– ban on secret surveillance schemes: such of whose existence the public opinion is unaware;
– illegality of mass surveillance schemes which allow the authorities to record the information transmitted in the internet in its entirety;

---

[72] The 2000 statistics show that Richard Posner was the most cited author of law articles in the U.S.; see F. Shapiro, M. Pearse, *supra* n. 7, p. 1506, note 42.

[73] R. Posner, *Privacy, Surveillance, and Law*, The University of Chicago Law Review Vol. 75, 2008, p. 254.

[74] E. Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, Stanford Law Review Vol. 52, 2000, pp. 1050–1051.

[75] P. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, Stanford Law Review Vol. 52, 2000, pp. 1559–1572.

– possibility to seek redress for the harm caused by individuals unduly engaged into surveillance actions;
– rejection in the laws in force of the categorisation into surveillance and activity monitoring techniques conditional upon the entity that makes use of them, i.e. without differentiating between private and public entities.[76]

The discussion herein leads to the conclusion that the present legislation and laws of the United States define the scope and possibilities of using mass surveillance measures by public authorities in a manner that is considerably different from the European counterpart solutions. This issue already poses difficulties to developing an EU–U.S. common data processing market. Taking into account the conclusions based on the CJEU case law, it can be expected that attempts at homogenising the privacy protection rules on the level of national solutions is a complicated challenge, possibly a mission impossible, regarding the U.S. realities. Considering the existing differences and concepts of construction of modern societies, a reasonable alternative solution seems to be a legally binding international agreement as the foundation for the EU–U.S. relations, including in respect of admissible actions related to application of mass surveillance measures. This would render it feasible to institute efficient warranties related to the admissible scope of use of the EU users' data provided to the United States for processing. Waiting till the U.S. regulations eventually get reformed seems to be groundless. Albeit the FISA was repeatedly amended in the recent years and the scope of surveillance authorities defined by it modified, no effort has been made in view of restricting the freedom of applying the measures under the Executive Order 12333. All in all, it has to be accepted that in a foreseeable future the American legislation will continue defining the scope of fundamental rights, the right to privacy included, in a significantly different manner compared to the regulations in force in the European Union.

BIBLIOGRAPHY

Bielak-Jomaa E., Lubasz D. (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa 2017.

Corradino E., *The Fourth Amendment Overseas: Is Extraterritorial Protection of Foreign Nationals Going Too Far?*, Fordham Law Review Vol. 57, 1989, pp. 617–635.

Czubik A., *Prawo do prywatności. Wpływ amerykańskich koncepcji i rozwiązań prawnych na prawo międzynarodowe*, Kraków 2013.

Greenwald G., *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*, New York, NY 2014 (Polish version: *idem*, *Snowden. Nigdzie się nie ukryjesz*, Warszawa 2014).

Jaskiernia J., *Ustawodawstwo a sądowa kreacja prawa w Stanach Zjednoczonych Ameryki*, Prokuratura i Prawo No. 9, 1994, pp. 28–38.

Kerr O., *The Fourth Amendment in Cyberspace: Can Encryption Create a Reasonable Expectation of Privacy?*, Connecticut Law Review Vol. 33, 2001, pp. 503–533.

Kiełtyka A., *Podstawa faktyczna zatrzymania i przeszukania według Czwartej Poprawki do Konstytucji Stanów Zjednoczonych Ameryki*, Prokuratura i Prawo No. 2, 2006, pp. 91–106.

[76] N. Richards, *The Dangers of Surveillance*, Harvard Law Review Vol. 126, 2013, pp. 1958–1964.

Kowalik-Bańczyk K., *Prawo do prywatności w Internecie – kolizja między amerykańskim i europejskim modelem ochrony*, [in:] J. Jaskiernia (ed.), *Amerykański system ochrony praw człowieka*, Toruń 2015.

Krzysztofek M., *Ochrona danych osobowych w Unii Europejskiej po reformie. Komentarz do rozporządzenia Parlamentu Europejskiego i Rady (UE) 2016/679*, Warszawa 2016.

Kuisz J., *Konstytucja w sytuacjach zagrożenia bezpieczeństwa państwa na tle teorii R.A. Posnera*, Prokuratura i Prawo No. 12, 2013, pp. 46–59.

Lee C., *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, Mississippi Law Journal Vol. 81, 2012, pp. 1–50.

Levin A., Nicholson M., *Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground*, University of Ottawa Law & Technology Journal Vol. 2, 2005, pp. 357–395.

Makarzec P., *Amerykańska koncepcja prawa do „prywatności" jako fundament prawnej ochrony danych osobowych*, [in:] J. Jaskiernia (ed.), *Amerykański system ochrony praw człowieka*, Toruń 2015.

Mornin J., *NSA Metadata Collection and the Fourth Amendment*, Berkeley Technology Law Journal Vol. 29, 2014, pp. 985–1006.

Motyka K., *Prawo do prywatności i dylematy współczesnej ochrony praw człowieka na przykładzie Stanów Zjednoczonych*, Lublin 2006.

Mucha B., *Data mining a współczesny kształt prawa do prywatności w Stanach Zjednoczonych Ameryki*, [in:] J. Jaskiernia (ed.), *Efektywność europejskiego systemu ochrony praw człowieka. Ewolucja i uwarunkowania europejskiego systemu ochrony praw człowieka*, Toruń 2012.

Posner R., *Privacy, Surveillance, and Law*, The University of Chicago Law Review Vol. 75, 2008, pp. 245–260.

Richards N., *The Dangers of Surveillance*, Harvard Law Review Vol. 126, 2013, pp. 1958–1964.

Rojszczak M., *Prawne podstawy prowadzenia masowej inwigilacji obywateli opartej na hurtowym i nieukierunkowanym przechwytywaniu danych w UE z uwzględnieniem dorobku orzeczniczego TSUE i ETPC*, Studia Prawa Publicznego No. 2, 2017, pp. 159–188.

Schwartz P., *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, Stanford Law Review Vol. 52, 2000, pp. 1559–1572.

Schwartz P., *The EU–U.S. Privacy Collision: A Turn to Institutions and Procedures*, Harvard Law Review Vol. 126, 2013, pp. 1966–2009.

Sloan L., *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, Duke Law Journal Vol. 50, 2001, pp. 1467–1510.

Volokh E., *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, Stanford Law Review Vol. 52, 2000, pp. 1049–1124.

Warren S., Brandeis L., *The Right to Privacy*, Harvard Law Review No. 5, 1890, pp. 193–220.

PRIVACY IN THE AGE OF BIG BROTHER: GROUNDS FOR MASS SURVEILLANCE SCHEMES IN THE UNITED STATES LEGAL SYSTEM

Summary

For several years the attention of the public has been focused on information concerning extensive electronic surveillance schemes conducted by public authorities. The activities involve amassing excessive data connected with telecoms operations. Due to the continuous technological development, the implementation of solutions allowing interception of data across the whole country has become not only technically possible but also financially achievable for most states.

The manner and scale of the surveillance activities require reference to existing regulations. In the European legal science, mainly owing to the precedent case law of the Court of Justice of the European Union and the European Court of Human Rights, mass surveillance is more and more often perceived as illegal interference of public authorities in the sphere of fundamental rights. At the same time, the legislation of the United States has become the grounds for extensive surveillance programmes within which various types of electronic communications and data, also of the EU citizens, can be intercepted. The issue is increasingly regarded as a barrier in further stronger cooperation between the EU and the U.S. in developing the information society. The purpose of the article is to discuss the problem of extensive electronic surveillance programmes from the point of view of the U.S. legislation, including constitutional and federal law as well as federal court case law. Reference to the EU legal framework has been made to indicate the sources of differences between the EU and the U.S. regulations and to identify a potential common ground for developing uniform legal standards combining the high level of protection of fundamental rights required by the EU and the proper basis for measures ensuring the security of the state that are key from the point of view of the U.S. partner.

Keywords: privacy, data protection, mass surveillance, proportionality principle, FISA

PRYWATNOŚĆ W EPOCE WIELKIEGO BRATA: PODSTAWY PROWADZENIA PROGRAMÓW MASOWEJ INWIGILACJI W SYSTEMIE PRAWNYM STANÓW ZJEDNOCZONYCH

Streszczenie

Od kilku lat uwaga opinii publicznej coraz częściej koncentruje się na informacjach dotyczących rozbudowanych programów inwigilacji elektronicznej, prowadzonych przez organy władzy publicznej. Działania te są zorientowane na pozyskiwanie dużych zbiorów danych związanych z łącznością elektroniczną. W związku z ciągłym rozwojem możliwości technicznych, wdrożenie rozwiązań pozwalających na przechwytywanie łączności z całego kraju stało się zadaniem nie tylko wykonalnym pod kątem technicznym, ale również osiągalnym finansowo dla władz większości państw. Sposób i zakres prowadzonych działań inwigilacyjnych wymaga odniesienia do obowiązujących norm prawnych. W nauce europejskiej, głównie dzięki precedensowym orzeczeniom TSUE i ETPC, masowa inwigilacja coraz częściej postrzegana jest jako przykład niedozwolonej ingerencji organów władzy publicznej w obszar praw podstawowych. Jednocześnie jednak prawodawstwo obowiązujące w Stanach Zjednoczonych stało się podstawą dla opracowania bardzo rozbudowanych programów inwigilacyjnych, w ramach których przechwytywana jest także łączność i dane obywateli Unii Europejskiej. Problem ten coraz częściej jest postrzegany jako bariera dalszego zacieśniania współpracy UE i USA na płaszczyźnie budowy społeczeństwa opartego na informacji. Celem artykułu jest omówienie problematyki prowadzenia masowych programów inwigilacyjnych z perspektywy prawodawstwa Stanów Zjednoczonych, z uwzględnieniem norm konstytucyjnych, prawa stanowionego oraz dorobku judykatury. Przeprowadzona na tle norm europejskich analiza pozwoli na wskazanie przyczyn niezgodności regulacji UE i USA oraz określenie ewentualnej przestrzeni na wypracowanie wspólnych mechanizmów prawnych, łączących wysoki poziom ochrony praw podstawowych konieczny z perspektywy UE oraz odpowiednie umocowanie środków służących ochronie bezpieczeństwa narodowego, kluczowych z punktu widzenia oczekiwań partnera amerykańskiego.

Słowa kluczowe: prywatność, ochrona danych, masowa inwigilacja, zasada proporcjonalności, FISA

PRIVACIDAD EN LA ÉPOCA DEL GRAN HERMANO: FUNDAMENTOS DE PROGRAMAS DE VIGILANCIA EN MASA EN EL SISTEMA LEGAL DE LOS ESTADOS UNIDOS

Resumen

Desde hace varios años la atención de la opinión pública se centra cada vez más en la información relativa a programas de vigilancia electrónica llevadas por órganos de autoridad pública. Estas actividades tienden a recaudar muchos datos relativos a la conexión electrónica. Dado el desarrollo continuo de posibilidades técnicas, la introducción de medidas que permitan la interceptación de conexión de todo el país se convirtió en una tarea técnicamente posible y también accesible económicamente para autoridades de la mayoría de los países. La forma y el ámbito de actividades de vigilancia ha de ser contrastado con la normativa legal vigente. En la ciencia europea, mayoritariamente gracias a las sentencias precedentes del Tribunal de Justicia de la Unión Europea y del Tribunal Europeo de Derechos Humanos, la vigilancia en masa es cada vez más considerada como ejemplo de intromisión prohibida de órganos de autoridad pública en el área de derechos fundamentales. Al mismo tiempo, la normativa vigente en los Estados Unidos sirvió de base para la elaboración de programas muy complejos de vigilancia, los que interceptan también la conexión y datos de ciudadanos de la UE. Este problema es cada vez más visto como barrera para la colaboración entre la UE y los EE.UU. en cuando a la construcción de sociedad de la información. El artículo tiene por fin relatar la problemática de programas de vigilancia en masa desde la perspectiva jurídica de los Estados Unidos – teniendo en cuenta la constitución, leyes y jurisprudencia. El análisis desde la perspectiva de la normativa europea permite señalar las causas de discrepancias de la regulación de la UE y los EE.UU. y determinar el ámbito eventual para mecanismos legales comunes que presenten alto nivel de protección de derechos fundamentales necesario desde la perspectiva de la UE y medidas que sirvan para la protección de seguridad nacional, que es vital desde el punto de vista de socio americano.

Palabras claves: privacidad, protección de datos, vigilancia en masa, principio de proporcionalidad, FISA

НЕПРИКОСНОВЕННОСТЬ ЧАСТНОЙ ЖИЗНИ В ЭПОХУ БОЛЬШОГО БРАТА: ОСНОВАНИЯ ДЛЯ РЕАЛИЗАЦИИ ПРОГРАММ МАССОВОЙ СЛЕЖКИ В ПРАВОВОЙ СИСТЕМЕ СОЕДИНЕННЫХ ШТАТОВ

Резюме

В последнее время внимание общественности все чаще обращается к сообщениям о широкомасштабных программах электронной слежки, осуществляемых органами государственной власти. Эти мероприятия направлены на извлечение из электронных коммуникаций больших массивов данных. Благодаря постоянному развитию технических возможностей перехват сообщений, передаваемых средствами связи, является теперь не только технически осуществимым, но и вполне доступным в финансовом отношении для властей большинства стран. Естественно, методы и объем соответствующих мероприятий по негласному наблюдению должны находиться в соответствии с действующими нормами законодательства. В европейской юриспруденции благодаря, главным образом, прецедентным решениям Суда ЕС и ЕСПЧ, массовая слежка все чаще рассматривается как пример незаконного вмешательства государственных органов в область основных прав человека. При этом законодательство США позволило создать широкомасштабные программы элек-

тронной слежки, в рамках которых перехватываются также сообщения и данные граждан ЕС. Эта проблема все чаще рассматривается как препятствие для дальнейшего укрепления сотрудничества между ЕС и США по построению информационного общества. Целью статьи является обсуждение программ массовой слежки с точки зрения законодательства США, включая конституционные нормы, законодательство штатов и прецедентное право. Анализ, проведенный на фоне законодательства Евросоюза, позволит указать причины несовместимости нормативных актов ЕС и США, а также определить возможности для разработки общих правовых механизмов, сочетающих высокий уровень защиты основных прав, что необходимо с точки зрения ЕС, с необходимым усилением мер, направленных на защиту национальной безопасности, что имеет решающее значение с точки зрения американской стороны.

Ключевые слова: неприкосновенность частной жизни, защита данных, массовая слежка, принцип соразмерности, Акт о негласном наблюдении в целях внешней разведки (FISA)

SCHUTZ DER PRIVATSPHÄRE IM ZEITALTER VON BIG BROTHER: DIE GRUNDLAGEN FÜR PROGRAMME ZUR MASSENÜBERWACHUNG IM US-RECHTSSYSTEM

Zusammenfassung

Seit einigen Jahren richtet sich die öffentliche Aufmerksamkeit zunehmend auf Informationen über groß angelegte elektronische Überwachungsprogramme, die von öffentlichen Behörden betrieben werden. Die Aktivitäten konzentrieren sich dabei auf die Beschaffung großer Datenmengen im Zusammenhang mit der elektronischen Kommunikation. Im Zuge der ständigen Weiterentwicklung der technischen Möglichkeiten ist die Umsetzung von Lösungen zum Überwachung der Kommunikation und Fernmeldeverkehrs aus dem ganzen Land heute nicht nur technisch machbar, sondern für die Behörden der meisten Länder auch finanziell durchführbar. Die Art und Weise und der Umfang der Überwachungsmaßnahmen machen es notwendig, dass diese mit den geltenden gesetzlichen Normen in Bezug gesetzt werden. In der europäischen Rechtswissenschaft wird die Massenüberwachung, vor allem durch Präzedenzfälle des EuGH und des EGMR, zunehmend als Beispiel für den rechtswidrigen Eingriff der Behörden in die Grundrechte betrachtet. Gleichzeitig wird aber die US-Gesetzgebung zur Grundlage für die Entwicklung sehr weitreichender Überwachungsprogramme genutzt, in deren Rahmen auch der Fernmeldeverkehr und Daten von EU-Bürgern abgefangen und erfasst werden. Dieses Problem wird folglich zunehmend als Hindernis für die weitere Stärkung der Zusammenarbeit zwischen der EU und den USA beim Aufbau der Informationsgesellschaft angesehen. Ziel des Artikels ist die Erörterung von Fragen der Durchführung von Massenüberwachungsprogrammen aus Sicht der in den Vereinigten Staaten geltenden Rechtsvorschriften – unter Berücksichtigung der verfassungsrechtlichen Normen, des bundestaatlichen Rechts und des Besitzstands der Rechtsprechung. Durch die vor dem Hintergrund der europäischen Normen vorgenommene Analyse werden die Gründe für die Unvereinbarkeit der in Rede stehenden europäischen Regelungen mit den US-Bestimmungen aufgezeigt und der mögliche Spielraums zur Entwicklung gemeinsamer rechtlicher Mechanismen ermittelt, die ein hohes Maß des Schutzes der Grundrechte aus EU-Sicht und eine angemessene Verankerung von Maßnahmen zum Schutz der nationalen Sicherheit verbinden, denen aus Sicht des amerikanischen Partners entscheidende Bedeutung zukommen.

Schlüsselwörter: Privatsphäre, Datenschutz, Massenüberwachung, Verhältnismäßigkeit, FISA

LA PROTECTION DE LA VIE PRIVÉE À L'ÉPOQUE DE BIG BROTHER: LES BASES DE LA CONDUITE DE PROGRAMMES DE SURVEILLANCE DE MASSE DANS LE SYSTÈME JURIDIQUE DES ÉTATS-UNIS

Résumé

Depuis plusieurs années, l'attention du public se porte de plus en plus sur les informations relatives aux vastes programmes de surveillance électronique menés par les autorités publiques. Ces activités sont centrées sur l'obtention de grands ensembles de données relatives aux communications électroniques. En raison du développement continu des capacités techniques, la mise en œuvre de solutions permettant l'interception de communications en provenance de tout le pays est devenue une tâche non seulement techniquement réalisable, mais également financièrement disponible pour les autorités de la plupart des pays. La méthode et la portée des activités de surveillance nécessitent clairement une référence aux normes juridiques applicables. Dans la science européenne, principalement grâce aux décisions précédentes de la CJUE et de la CEDH, la surveillance de masse est de plus en plus considérée comme un exemple d'ingérence illégale des autorités publiques dans le domaine des droits fondamentaux. Dans le même temps, toutefois, la législation américaine est devenue la base du développement de très vastes programmes de surveillance qui capturent également les communications et les données des citoyens de l'UE. Ce problème est de plus en plus considéré comme un obstacle au renforcement de la coopération entre l'UE et les États-Unis au niveau de la construction d'une société fondée sur l'information. Le but de cet article est de discuter des problèmes liés à la mise en œuvre de programmes de surveillance de masse du point de vue de la législation américaine – en tenant compe des normes constitutionnelles, du droit positif et des acquis de la jurisprudence. L'analyse effectuée dans le contexte des normes européennes permettra d'indiquer les raisons de la non-conformité des réglementations européennes et américaines et de déterminer l'espace possible pour le développement de mécanismes juridiques communs combinant un niveau élevé de protection des droits fondamentaux nécessaire du point de vue de l'UE et une légitimisation appropriée des mesures de protection de la sécurité nationale, qui sont essentielles pour les attentes du partenaire américain.

Mots-clés: vie privée, protection des données, surveillance de masse, principe de proportionnalité, FISA

PRIVACY NELL'ERA DEL GRANDE FRATELLO: BASI PER LA CONDUZIONE DI PROGRAMMI DI SORVEGLIANZA DI MASSA NEL SISTEMA GIURIDICO DEGLI STATI UNITI

Sintesi

Da alcuni anni l'attenzione dell'opinione pubblica si concentra sempre di più sulle informazioni riguardanti estesi programmi di sorveglianza elettronica, condotti dalle autorità pubbliche. Tali azioni sono orientate a ottenere grandi raccolte di dati, legati alle comunicazioni elettroniche. A motivo del continuo sviluppo delle possibilità tecniche, l'implementazione di soluzioni che permattono di intercettare le comunicazioni di un intero paese è divenuto un compito non solo realizzabile dal punto di vista tecnico, ma anche finanziariamente possibile per le autorità della maggior parte dei paesi del mondo. Le modalità e l'ambito delle attività di sorveglianza

condotte in modo evidente richiedono un riferimento alle norme giuridiche in vigore. Nella dottrina europea, grazie soprattutto alle sentenze della Corte di giustizia dell'Unione europea e della Corte europea dei diritti dell'uomo, sorveglianza di massa è sempre più percepita come esempio di inammissibile ingerenza delle autorità pubbliche nel settore dei diritti fondamentali. Allo stesso tempo tuttavia la legislazione in vigore negli Stati Uniti è divenuta la base per l'elaborazione di programmi di sorveglianza molto estesi, nell'ambito dei quali vengono intercettate anche le comunicazioni e i dati di cittadini dell'UE. Tale problema è percepito sempre più come barriera per l'ulteriore rafforzamento della cooperazione UE-USA sul piano dell'edificazione di una società basata sull'informazione. Lo scopo dell'articolo è descrivere la problematica della conduzione di programmi di sorveglianza di massa nella prospettiva della legislazione degli Stati Uniti, considerando le norme costituzionali, il diritto costituito e il patrimonio giurisprudenziale. L'analisi condotta sullo sfondo delle norme europee permette di indicare i motivi della difformità delle regolamentazioni di UE e USA e di stabilire l'eventuale spazio per l'elaborazione di meccanismi giuridici comuni, che congiungano ad alto livello la tutela dei diritti fondamentali necessari secondo la prospettiva dell'UE con l'adeguata legittimazione dei mezzi finalizzati alla difesa della sicurezza nazionale, mezzi chiave dal punto di vista delle aspettative del partner americano.

Parole chiave: privacy, protezione dei dati, sorveglianza di massa, criterio di proporzionalità, FISA

Cytuj jako:

Rojszczak M., *Prywatność w epoce Wielkiego Brata: podstawy prowadzenia programów masowej inwigilacji w systemie prawnym Stanów Zjednoczonych [Privacy in the age of Big Brother: grounds for mass surveillance schemes in the United States legal system]*, „Ius Novum" 2019 (Vol. 13) nr 1, s. 265–297. DOI: 10.26399/iusnovum.v13.1.2019.13/m.rojszczak

Cite as:

Rojszczak, M. (2019) 'Privacy in the age of Big Brother: grounds for mass surveillance schemes in the United States legal system'. *Ius Novum* (Vol. 13) 1, 265–297. DOI: 10.26399/iusnovum.v13.1.2019.13/m.rojszczak

NOTES ON THE AUTHORS

Jacek Kosonoga	PhD hab., Associate Professor of Lazarski University in Warsaw, Department of Criminal Law, Faculty of Law and Administration
Radosław Koper	PhD hab., Professor of the University of Silesia in Katowice, Department of Criminal Procedure, Faculty of Law and Administration
Jan Kluza	MA, PhD student at the Department of Criminal Procedure, Faculty of Law and Administration of the Jagiellonian University in Kraków
Ryszard A. Stefański	Professor, PhD hab., Head of the Department of Criminal Law, Faculty of Law and Administration of Lazarski University in Warsaw
Blanka Julita Stefańska	PhD, Assistant Professor, Department of Commercial Law, Faculty of Law and Administration of Lazarski University in Warsaw
Łukasz Buczek	MA, Assistant Lecturer, Department of Criminal Law, Faculty of Law and Administration of the University of Szczecin
Michał Hara	MA, advocate, District Bar Association in Warsaw, Sworn Translator of English
Artur Kuś	Professor, PhD hab., Faculty of Law and Administration of Lazarski University in Warsaw
Piotr Witkowski	PhD hab., Assistant Professor, Laboratory of Business Practice, Faculty of Economics of Maria Curie-Skłodowska University in Lublin
Łukasz Kasprowicz	PhD, attorney-at-law, Toruń Bar Association of Attorneys-at-Law
Robert Talaga	PhD, senior judicial clerk, Voivodeship Administrative Court in Poznań
Özen Inci	PhD, Assistant Professor, Department of Criminal Law and Criminal Procedure of Istanbul Aydın University

Piotr Góralski — PhD hab., Assistant Professor, Department of Substantive Criminal Law, Faculty of Law, Administration and Economics of the University of Wrocław

Karolina Kremens — PhD, LL.M., Assistant Professor, Department of Criminal Procedure, Faculty of Law, Administration and Economics of the University of Wrocław

Marcin Rojszczak — PhD, Institute of Administrative Law, Faculty of Law and Administration of the University of Warsaw

NOTY O AUTORACH

Jacek Kosonoga	dr hab., profesor Uczelni Łazarskiego w Warszawie, Katedra Prawa Karnego na Wydziale Prawa i Administracji
Radosław Koper	dr hab., profesor Uniwersytetu Śląskiego, Wydział Prawa i Administracji, Katedra Prawa Karnego Procesowego
Jan Kluza	mgr, doktorant w Katedrze Postępowania Karnego, Wydział Prawa i Administracji Uniwersytetu Jagiellońskiego w Krakowie
Ryszard A. Stefański	prof. dr hab., Kierownik Katedry Prawa Karnego na Wydziale Prawa i Administracji Uczelni Łazarskiego w Warszawie
Blanka Julita Stefańska	dr, adiunkt w Katedrze Prawa Handlowego na Wydziale Prawa i Administracji Uczelni Łazarskiego w Warszawie
Łukasz Buczek	mgr, asystent w Katedrze Prawa Karnego na Wydziale Prawa i Administracji Uniwersytetu Szczecińskiego
Michał Hara	mgr, adwokat w Okręgowej Izbie Adwokackiej w Warszawie, tłumacz przysięgły języka angielskiego
Artur Kuś	prof. dr hab., Wydział Prawa i Administracji Uczelni Łazarskiego w Warszawie
Piotr Witkowski	dr hab., adiunkt w Laboratorium Praktyki Biznesu, Wydział Ekonomiczny Uniwersytetu Marii Curie-Skłodowskiej w Lublinie
Łukasz Kasprowicz	dr, radca prawny w Okręgowej Izbie Radców Prawnych w Toruniu
Robert Talaga	dr, starszy referendarz sądowy w Wojewódzkim Sądzie Administracyjnym w Poznaniu

Özen Inci — dr, asystentka, Katedra Prawa Karnego oraz Prawa Karnego Procesowego Uniwersytetu Aydin w Stambule

Piotr Góralski — dr hab., adiunkt, Katedra Prawa Karnego Materialnego na Wydziale Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego

Karolina Kremens — dr, LL.M., adiunkt w Katedrze Postępowania Karnego na Wydziale Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego

Marcin Rojszczak — dr, Instytut Nauk Prawno-Administracyjnych na Wydziale Prawa i Administracji Uniwersytetu Warszawskiego

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 e-mailed 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 e-mail 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, e-mail 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.

DODATKOWE INFORMACJE

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.

ADDITIONAL INFORMATION

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.

REGULAR REVIEWERS

1. Prof. Zbigniew Czarnik, PhD hab., WSPIA University in Rzeszów
2. Prof. Katarzyna Dudka, PhD hab., Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin
3. Prof. Jolanta Jakubowska-Hara, PhD hab., Criminal Law Department of the Institute for Legal Studies at Polish Academy of Sciences
4. Prof. Jerzy Jaskiernia, PhD hab., Faculty of Law, Administration and Management of Jan Kochanowski University in Kielce
5. Prof. Katarzyna Kaczmarczyk-Kłak, PhD hab., Faculty of Law and Administration of the WSPIA University in Rzeszów
6. Dariusz Kala, PhD, Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
7. Prof. Tomasz Kalisz, PhD hab., Faculty of Law, Administration and Economics of the University of Wrocław
8. Prof. Czesław Kłak, PhD hab., Faculty of Law and Administration of the WSPIA University in Rzeszów
9. Prof. Violetta Konarska-Wrzosek, PhD hab., Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
10. Prof. Zbigniew Kwiatkowski, PhD hab., Faculty of Law and Administration of the University of Opole
11. Jerzy Lachowski, PhD hab., Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
12. Maria Jeż-Ludwichowska, PhD, Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
13. Aneta Łazarska, PhD, Faculty of Law and Administration of Lazarski University in Warsaw
14. Prof. Mirosława Melezini, PhD hab., Faculty of Social Sciences and Humanities of Łomża State University of Applied Sciences
15. Prof. Marek Mozgawa, PhD hab., Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin
16. Prof. Hanna Paluszkiewicz, PhD hab., Faculty of Law and Administration of the University of Zielona Góra
17. Mateusz Pilich, PhD, Faculty of Law and Administration of the University of Warsaw
18. Piotr Rączka, PhD hab., Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
19. Prof. Maciej Rogalski, PhD hab., Faculty of Law and Administration of Lazarski University in Warsaw
20. Andrzej Sakowicz, PhD, Faculty of Law of the University of Białystok
21. Prof. Jerzy Skorupka, PhD hab., Faculty of Law, Administration and Economics of the University of Wrocław
22. Prof. Jacek Sobczak, PhD hab., Faculty of Law of the SWPS University of Social Sciences and Humanities in Warsaw
23. Prof. Sławomir Steinborn, PhD hab., Faculty of Law and Administration of the University of Gdańsk
24. Prof. Krzysztof Ślebzak, PhD hab., Faculty of Law and Administration of Adam Mickiewicz University in Poznań
25. Marek Świerczyński, PhD hab., Faculty of Law and Administration of Cardinal Stefan Wyszyński University in Warsaw (UKSW)
26. Monika Wałachowska, PhD hab., Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
27. Prof. Małgorzata Wąsek-Wiaderek, PhD hab., Faculty of Law, Canon Law and Administration of John Paul II Catholic University of Lublin
28. Sławomir Żółtek, PhD hab., Faculty of Law and Administration of the University of Warsaw

FOREIGN REVIEWERS

1. Prof. Regina Hučková, Faculty of Law of Pavol Jozef Šafárik University in Košice, Slovakia
2. Prof. Maciej Małolepszy, PhD hab., Faculty of Law of the European University Viadrina Frankfurt (Oder), Germany
3. Prof. Rodrigo Ochoa Figueroa, attorney, Department of Administrative Law of the Michoacan University of Saint Nicholas of Hidalgo, Mexico
4. Prof. Alembert Vera Rivera, Catholic University of Santiago de Guayaquil, Ecuador; attorney of the President of the Republic of Ecuador
5. Katarzyna Krzysztyniak, PhD, attorney, Czech Republic
6. Miguel Bustos Rubio, PhD, Faculty of Law of the University of Salamanca, Spain

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.

Lazarski University Press
offers the following new publications:

1. Krystyna Regina Bąk (red.), *Statystyka wspomagana Excelem 2007*, Warszawa 2010.
2. Maria Biegniewicz-Steyer, O powstańczych dniach trochę inaczej, Warszawa 2018.
3. Wojciech Bieńkowski, Krzysztof Szczygielski, *Rozważania o rozwoju gospodarczym Polski*, Warszawa 2009.
4. Wojciech Bieńkowski, Adam K. Prokopowicz, Anna Dąbrowska, *The Transatlantic Trade and Investment Partnership. The 21st Century Agreement*, Warsaw 2015.
5. Remigiusz Bierzanek, *Przez wiek XX. Wspomnienia i refleksje*, Warszawa 2006.
6. Jacek Brdulak, Ewelina Florczak, *Uwarunkowania działalności przedsiębiorstw społecznych w Polsce*, Warszawa 2016.
7. Piotr Brzeziński, Zbigniew Czarnik, Zuzanna Łaganowska, Arwid Mednis, Stanisław Piątek, Maciej Rogalski, Marlena Wach, *Nowela listopadowa prawa telekomunikacyjnego*, Warszawa 2014.
8. Hans Ephraimson-Abt, Anna Konert, *New Progress and Challenges in The Air Law*, Warszawa 2014.
9. Janusz Filipczuk, *Adaptacyjność polskich przedsiębiorstw w warunkach transformacji systemowej*, wyd. II, Warszawa 2007.
10. Jerzy A. Gawinecki (red. nauk.), *Ekonometria w zadaniach*, praca zbiorowa, Warszawa 2008.
11. Jerzy A. Gawinecki, *Matematyka dla ekonomistów*, Warszawa 2010.
12. Grażyna Gierszewska, Jerzy Kisielnicki (red. nauk.), *Zarządzanie międzynarodowe. Konkurencyjność polskich przedsiębiorstw*, Warszawa 2010.
13. Tomasz G. Grosse (red. nauk.), *Między polityką a rynkiem. Kryzys Unii Europejskiej w analizie ekonomistów i politologów*, praca zbiorowa, Warszawa 2013.
14. Jan Grzymski, *Powrót do Europy – polski dyskurs. Wyznaczanie perspektywy krytycznej*, Warszawa 2016.
15. Marian Guzek, *Makroekonomia i polityka po neoliberalizmie. Eseje i polemiki*, Warszawa 2011.
16. Marian Guzek (red. nauk.), *Ekonomia i polityka w kryzysie. Kierunki zmian w teoriach*, praca zbiorowa, Warszawa 2012.
17. Marian Guzek, *Teorie ekonomii a instrumenty antykryzysowe*, Warszawa 2013.
18. Marian Guzek, *Kapitalizm na krawędzi*, Warszawa 2014.
19. Marian Guzek, *Doktryny ustrojowe. Od liberalizmu do libertarianizmu*, Warszawa 2015.
20. Marian Guzek, *Przyszłość kapitalizmu – cesjonalizm?*, Warszawa 2016.
21. Marian Guzek, Świat zachodu po nieudanym wejściu w erę postindustrialną, Warszawa 2018.
22. Anna Harasiewicz-Mordasewicz, *Word 2007*, Warszawa 2009.
23. Anna Harasiewicz-Mordasewicz, *Excel 2007*, Warszawa 2010.
24. Dominika E. Harasimiuk, Marcin Olszówka, Andrzej Zinkiewicz (red. nauk.), *Prawo UE i porządek konstytucyjny państw członkowskich. Problem konkurencji i wzajemnych relacji*, Warszawa 2014.

25. Stanisław Hoc, *Prawo administracyjne gospodarcze. Wybrane zagadnienia*, Warszawa 2013.
26. „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, 4/2017, 1/2018, 2/2018, 3/2018, 4/2018.
27. Andrzej Jagiełło, *Polityka akcyzowa w odniesieniu do wyrobów tytoniowych w Polsce w latach 2000–2010 i jej skutki ekonomiczne*, Warszawa 2012.
28. Sylwia Kaczyńska, Anna Konert, Katarzyna Łuczak, *Regulacje hiszpańskie na tle obowiązujących przepisów międzynarodowego i europejskiego prawa lotniczego*, Warszawa 2016.
29. Anna Konert (red.), *Aspekty prawne badania zdarzeń lotniczych w świetle Rozporządzenia 996/2010*, Warszawa 2013.
30. Anna Konert, *A European Vision for Air Passengers*, Warszawa 2014.
31. Anna Konert (red.), *Internacjonalizacja i europeizacja prawa lotniczego. Księga pamiątkowa ku czci Profesora Marka Żylicza*, Warszawa 2015.
32. Łukasz Konopielko, Michał Wołoszyn, Jacek Wytrębowicz, *Handel elektroniczny. Ewolucja i perspektywy*, Warszawa 2016.
33. Dariusz A. Kosior, Marek Postuła, Marek Rosiak (red.), *Doustne leki przeciwkrzepliwe. Od badań klinicznych do praktyki*, Warszawa 2013.
34. Dariusz A. Kosior, Marek Rosiak, Marek Postuła (red.), *Doustne leki przeciwpłytkowe w leczeniu chorób układu sercowo-naczyniowego. Okiem kardiologa i farmakologa*, Warszawa 2014.
35. Jerzy Kowalski, *Państwo prawa. Demokratyczne państwo prawne. Antologia*, Warszawa 2008.
36. Stanisław Koziej, *Rozmowy o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wywiadach i komentarzach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
37. Stanisław Koziej, *Rozważania o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wystąpieniach i referatach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
38. Stanisław Koziej, *Studia o bezpieczeństwie. O bezpieczeństwie narodowym i międzynarodowym w latach 2010–2015 w publikacjach i analizach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2017.
39. Rafał Krawczyk, *Islam jako system społeczno-gospodarczy*, Warszawa 2013.
40. Rafał Krawczyk, *Podstawy cywilizacji europejskiej*, Warszawa 2006.
41. Rafał Krawczyk, *Zachód jako system społeczno-gospodarczy*, Warszawa 2016.
42. Maria Kruk-Jarosz (red. nauk.), *System organów ochrony prawnej w Polsce. Podstawowe instytucje*, wyd. II zm. i popr., Warszawa 2008.
43. Maciej Krzak, *Kontrowersje wokół antycyklicznej polityki fiskalnej a niedawny kryzys globalny*, Warszawa 2012.
44. Michał Kuź, *Alexis de Tocqueville's Theory of Democracy and Revolutions*, Warsaw 2016.

45. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe w XXI wieku. Księga pamiątkowa profesor Renaty Szafarz*, Warszawa 2007.
46. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa profesor Renaty Sonnenfeld-Tomporek*, Warszawa 2006.
47. Jerzy Menkes (red. nauk.), *Wybór kazusów z prawa międzynarodowego. Zagadnienia ogólne*, zeszyt 1, Warszawa 2008.
48. Aleksandra Mężykowska, *Interwencja humanitarna w świetle prawa międzynarodowego*, Warszawa 2008.
49. Mariusz Muszyński (red. nauk.), Dominika E. Harasimiuk, Małgorzata Kozak, *Unia Europejska. Instytucje, polityki, prawo*, Warszawa 2012.
50. „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, 4(59)2017, 1(60)2018, 2(61)2018, 3(62)2018, 4(63)2018.
51. Edward Nieznański, *Logika dla prawników*, Warszawa 2006.
52. Marcin Olszówka, *Konstytucja PRL a system źródeł prawa wyznaniowego do roku 1989*, Warszawa 2016.
53. Marcin Olszówka, *Wpływ Konstytucji RP z 1997 roku na system źródeł prawa wyznaniowego*, Warszawa 2016.
54. Bartłomiej Opaliński, *Rola Prezydenta Rzeczypospolitej Polskiej w procesie stanowienia ustaw na tle praktyki ustrojowej Konstytucji III RP*, Warszawa 2014.
55. Bartłomiej Opaliński (red. nauk.), *Prawo administracyjne w ujęciu interdyscyplinarnym*, Warszawa 2014.
56. Bartłomiej Opaliński, Maciej Rogalski (red. nauk.), *Kontrola korespondencji. Zagadnienia wybrane*, Warszawa 2018.
57. Bartłomiej Opaliński, Maciej Rogalski, Przemysław Szustakiewicz, *Służby specjalne w systemie administracyjnym Rzeczypospolitej Polskiej*, Warszawa 2016.
58. Bartłomiej Opaliński, Przemysław Szustakiewicz, *Policja. Studium administracyjno-prawne*, Warszawa 2013.
59. Bartłomiej Opaliński, Przemysław Szustakiewicz (red. nauk.), *Funkcjonowanie służb mundurowych i żołnierzy zawodowych w polskim systemie prawnym. Zagadnienia wybrane*, Warszawa 2015.
60. Leokadia Oręziak, *Konkurencja podatkowa i harmonizacja podatków w ramach Unii Europejskiej*, Warszawa 2007.
61. Leokadia Oręziak (red. nauk.), *Finansowanie rozwoju regionalnego w Polsce*, Warszawa 2008.
62. Leokadia Oręziak, Dariusz K. Rosati (red. nauk.), *Kryzys finansów publicznych*, Warszawa 2013.
63. Iryna Polets, Merlin's Faces. From Medieval Literature to Film, Warsaw 2018.
64. Maciej Rogalski, *Odpowiedzialność karna a odpowiedzialność administracyjna w prawie telekomunikacyjnym, pocztowym i konkurencji*, Warszawa 2015.
65. Maciej Rogalski, *Świadczenie usług telekomunikacyjnych*, Warszawa 2014.

66. Maciej Rogalski (red. nauk.), Wymiar wolności w prawie administracyjnym, Warszawa 2018.
67. Dariusz Rosati (red. nauk.), *Gospodarka oparta na wiedzy. Aspekty międzynarodowe*, Warszawa 2007.
68. Dariusz Rosati (red. nauk.), *Euro – ekonomia i polityka*, Warszawa 2009.
69. Grzegorz Rydlewski, Przemysław Szustakiewicz, Katarzyna Golat, *Udzielanie informacji przez administrację publiczną – teoria i praktyka*, Warszawa 2012.
70. Jacek Szymanderski, *Schyłek komunizmu i polskie przemiany w odbiorze społecznym*, Warszawa 2011.
71. 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.
72. 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.
73. Karol Sławik, *Zagrożenia życia i zdrowia ludzkiego w Polsce. Aspekty prawno-kryminologiczne i medyczne*, Warszawa 2015.
74. Jerzy Wojtczak-Szyszkowski, *O obowiązkach osób świeckich i ich sprawach. Część szesnasta Dekretu przypisywanego Iwonowi z Chartres* (tłum. z jęz. łac.), Warszawa 2009.
75. Janusz Żarnowski, *Współczesne systemy polityczne. Zarys problematyki*, Warszawa 2012.

Lazarski University Press
02-662 Warsaw, ul. Świeradowska 43
tel.: (22) 54 35 450
fax: (22) 54 35 392
e-mail: wydawnictwo@lazarski.edu.pl
www.lazarski.pl