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FORENSIC SOCIOLOGY: CONCEPT AND SCOPE

BRUNON HOŁYST*

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Forensic sociology is a new field of applied sociology with its own area of research and close links with customarily distinguished branches of sociology. Following Jan Szczepański, sociology is understood here to mean the study of human collectives, covering phenomena and processes of creating various forms of collective life of people, collective structures, phenomena and processes occurring in collectives as a result of interactions between individuals, collective-gathering and collective-smashing forces, as well as changes and transformations within collectives.[1]

The specificity of forensic sociology is largely due to the specificity of forensics itself. The scope of forensic sociology includes social aspects of forensics or the study of methods for determining a criminal fact and a manner in which crime has been committed, as well as for detecting perpetrators and preventing crimes and other adverse social phenomena.[2]

It is well known that forensics is mostly an applied science, clearly dominated by practical needs. However, forensics is not merely a generalisation of investigative practice as it covers many theoretical issues. These include, for example, certain general trends, such as empirically identified phenomena of an individual nature of human fingerprints, handwriting or voice, that make human identification tests possible. The motive for every intentional crime remains also relevant, allowing directional selection of suspected individuals. Within the focus of forensic sociology, there are also issues, such as statistical analysis, that go beyond strictly psychological problems.

The determination of the subject matter of forensic sociology is necessary for it to be considered a separate discipline of knowledge. It is, therefore, essential to

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1 J. Szczepański, *Elementarne pojęcia socjologii*, Warszawa 1980, p. 5; see also A. Giddnas, *Socjologia*, Poznań 1998; J. Polakowska-Kujawa, *Socjologia ogólna*, Warszawa 2005.

2 B. Hołyst, *Kryminalistyka*, Warszawa 2018, p. 43.

distinguish elements within sociology which may be useful for professionals dealing with criminal prosecution or administration of justice, as well as to determine scholarly objectives specific to forensic sociology. These objectives should by no means be isolated from research activities undertaken in related disciplines, such as social psychology. Knowledge gathered within forensic sociology should serve a broader social practice, including efforts of researchers from other disciplinary backgrounds. In the case of forensic sociology, interdisciplinary collaboration is considered extremely desirable.

Defining the specifics of the subject matter of forensic sociology comprises also the analysis of interrelationships among and of separateness of forensic sociology, and other related disciplines. It is sociology of law and justice that has a special place among specific sociological disciplines. The relationship between the aforesaid discipline and forensic sociology is largely dependent on how the scopes of both these branches are understood.

Sociology of law is defined as a branch of sociology that explores the impact of social factors and processes on the formation and formalisation of law, problems pertaining to observance and violations of law, as well as relations developed between legal systems and other spheres of social life.[3]

The relationship between forensic sociology and such branches of sociology as sociology of culture, clinical sociology, sociology of education, as well as sociological theory of humans is essential. It is an attempt to describe and explain the essence of a human being treated as a social personality whose fundamental aspects are shaped through the process of socialisation by an external socio-cultural reality.[4] In terms of its applied aspect, forensic sociology uses sociological knowledge to solve various problems relating to questions such as determination of a criminal fact, or crime detection and prevention methods.

More broadly, forensic sociology includes sociological aspects of crime and a perpetrator, of the enforcement of the penalty of deprivation of liberty, and of criminal and other proceedings. Forensic sociology can be considered a multidisciplinary science in the sense that it uses achievements of other disciplines without integrating or absorbing knowledge acquired within those disciplines. Forensic sociology thus creates general concepts within its basic matter of interest and drives detailed research only into certain areas that are particularly important for it, though not necessarily for other sciences.

The scope of forensics includes issues related to criminal prosecution and crime prevention. In view of these tasks, forensics uses both inductive and deductive methods. Any science, which is understood to mean the sum of experimentally tested information that makes it possible to formulate the subject matter for research

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[3] K. Olechnicki, P. Załęcki, *Słownik socjologiczny*, Toruń 1997; see also J. Grotowska-Leder (ed.), *Nowe aspekty współczesnych problemów społecznych*, Seria Acta Universitatis Lodziensis. Folia Sociologica No. 62, Łódź 2017; A. Śliz, *Wielokulturowość: schemat współczesnego świata? Próba analizy socjologicznej*, Opole 2017.

[4] H. Januszek, J. Sikora, *Podstawy socjologii*, Poznań 2000, p. 33; see also A. Manterys, *Wielość rzeczywistości w teoriach socjologicznych*, Warszawa 1997; R.K. Merton, *Teoria socjologiczna i struktura społeczna*, Warszawa 1982.

and detect laws underpinning certain phenomena, begins with induction yet it cannot end therewith. It would be pointless to create laws from which no deductive conclusions for all phenomena or for a certain group thereof could be drawn. Although things such as criminal methods can be learnt through empirical studies, many assumptions being part of investigative tactics are the result of identified patterns or of a deductive reasoning process.

Progress in technical and natural sciences has a great impact on the development of new research opportunities as far as forensics is concerned. Computers open up prospects for more effective processing of information and reconnaissance service. Although computers are made by electronics engineers, they have to be programmed by forensic experts for investigative uses.

Understood as a scientific discipline, forensics is relatively young. It not only uses cutting-edge methodologies of technical and natural sciences, but also has recourse to expertise in sciences such as psychology and sociology. Strong links between forensics and the above-mentioned sciences foster the trend towards formation of new disciplines bordering on sciences, such as criminal psychology or forensic sociology. Rapid assimilation of scientific achievements for the newly emerging discipline to grow is essential. According to scholars who adopt a sociological approach to the problem of crime, roots of crime can be traced to social factors. Any responsibility for criminal acts, as well as for pathological phenomena, such as domestic violence, is with the society or the social environment of an individual.

In their observations, supporters of the sociological concept go far beyond the sphere of the nearest environment or personality traits of family members of a given individual, trying to find some macro-social patterns. Behaviour types are thus claimed to be primarily determined by culturally defined model attitudes towards violence, as well as by the social structure, system of norms in place in the social environment, and the nature of institutions.[5]

The issue of selecting proper investigative tactics is quite widely addressed by the scholarly literature on the subject. Investigative tactics selection criteria are insufficiently clear. This issue which is crucial from the perspective of both forensic theory and practice is undoubtedly methodological in its nature and should be considered at a methodological level. The investigative methodology is deemed to be a separate problematic area within the investigation process. That area is superior to investigative tactics in the sense that the knowledge contained therein determines the selection of particular investigative tactics as well as all and any consequences of the selection so made. The investigative methodology covers a very wide breadth of general knowledge as well as a system of universal rules and mental operations relating to decision-making. This specific approach to the problematic area within the investigative methodology is close to contemporary views on the subject matter and tasks of forensics. As far as forensic sociology is concerned, these are relationships, interactions and relations between people that constitute the subject matter.

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[5] For more detailed discussion, see B. Hołyst, *Socjologia kryminalistyczna*, Vol. 1, PWN, Warszawa 2007, p. 29.

Forensics is seen as the application of many scientific disciplines in one jointly organized sequence of activities, which follows the principles of proving and is focused on determination of innocence or guilt of the accused. The investigative methodology of any investigation would thus include general and expert knowledge on the basis of which appropriate decisions as to the selection of optimal investigative tactics would be made.

The knowledge necessary to make right choices should include a wide range of information also from forensic sociology. In addition, data from fields such as psychology, victimology, symptomatology and etiology of crime are very important in this context. Within the investigative methodology, an essential role is played by decision-making that manifests itself in practical selection of optimal investigative tactics. Decision-making consists in choosing a specific type of action from a set of possible actions.[6]

Given our focus on the investigative methodology, consideration of an activity, whereby a risky decision is taken, i.e. a decision which entails uncertainty as to the achievability of desired outcome, is particularly important. Decisions taken in the presence of risks are determined by usefulness of the outcome and by subjective likelihood of the desired outcome. In any risk situation, there are two or more risk actions that can be chosen. Each of them produces several results, whose usefulness and subjective likelihood are precisely determined.

Risk assessment in any specific situation also depends on contextual social factors, the behaviour of members of various social groups, including the largest ones, as well as on behaviour of individuals. The issue of social relations concerns mechanisms and dynamics of various social relations and covers such specific aspects as: determinants and mechanisms of liking and disliking other people, determinants of prosocial and egoistic behaviour, and conduct in conflict situations.[7]

The specific nature of the subject matter and methods of forensic sociology seem to be an extremely complex problem to which an unambiguous solution, which would be widely accepted by all authors, cannot be easily found. This issue is associated with more general doubts as to whether the division of sociology into theoretical sociology and applied sociology is reasonable at all. Applied sociology is sometimes referred to as sociotechnics or social engineering. On the one hand, it is a theoretical discipline dealing with the analysis of and research into various types of social behaviour; on the other hand, it covers all conscious, individual or group applications of scientific knowledge, including specifically sociological and psychological knowledge, to achieve an intended transformation of the reality or desired behaviour of a group or an individual.[8]

As far as forensic sociology is concerned, it is noted that psychological factors, despite being autonomous, should be considered in a context of a particular situation. This context, however, is determined by institutional factors that are always

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[6] H. Sęk, *Psychologia kliniczna*, [in:] W. Szewczuk (ed.), *Encyklopedia psychologii*, Warszawa 1998, p. 561.

[7] R.B. Felson, J. Tedeschi, *Aggression and Violence. Social Interactionist Perspectives*, Washington 1995, p. 25.

[8] K. Olechnicki, P. Załęcki, *Słownik*, *op. cit.*, p. 196.

embedded in a broader social system and in a sense constitute an exponent of such system. However, this does not mean that no problems or patterns exist that are general enough to make their content truly independent of the broad and narrow social context. However, there are psychological processes and phenomena that are closely related to the social context and cannot be explained without it.

To understand the subject matter of forensic sociology, consideration must be given to fundamental assumptions made in sociology itself. Sociology assumes that humans are part of nature and conditions they live in impact the organization of human collectives. Sociology does not try to explain the impact of nature as no sociologist has sufficient competence with this very type of research that is a focus of natural sciences. And the question about reasons why human collectives are formed continues to remain valid. An important role is played by the concept of a social bond, i.e. those ties between individuals that cause people to live in collectives, in groups or in larger teams, such as territorial collectives, in large religious groups and other groups. The concept of the social bond allows one to look for an answer to the question of how society as a team of people differs from the plain sum of individuals. Sociology seeks to define the subject matter of its research, which would be clearly different from studying human individuals.

Spatial contact, i.e. contact between specific people in a specific space, is crucial. The problem is how this space should be defined as this is social space and, as such, it is not purely physical. Given contemporary possibilities of communication among people, the concept of social space is significantly expanding to an extent that is often very difficult to define precisely. Interactions taking place in this space are, on the one hand, very specific or "face to face", e.g. regularly, in the morning, on one's way to work, or in a large office building with the same people in the lift. On the other hand, what one deals with are interactions that arise during internet communication with a specific group of people who live even in distant countries. As the possibilities for free remote communication are increasing, interactions can occur among people who live far away from each other. Not every physical contact of at least two people in a space is already an initial stage of a social bond formation process.

Mental contact is a social phenomenon that can result from spatial contact, in which people or larger groups of people establish emotional relationships with each other. Of course, it is by no means easy to clearly define the content and intensity of these relationships. They may as well relate to a person himself or herself as well as to some of his/her non-personal traits, e.g. a dress type or a cultural feature, or merely a social position. The most important thing is, however, that such a trait gives rise to emotions that result from contact, and that either these emotions keep repeating or particular individuals seek to make them repeat. As a result of spatial and mental contact, particular individuals clearly stand out, repeat and strive to consolidate interactions. And that is when the interactions get institutionalised or social norms are formed that transform that contact into lasting social relations. As effects of various activities overlap, a social bond is created, from which a structure can be formed that becomes part of what is called a civil society.

It is in social interactions that sometimes purely personal aspects prevail, emotions are mutual, and a desire to continue contact just for emotional reasons is

built. It is typical of a social group or a group of friends that these interactions are repeated.

Therefore, on the one hand, there are bonds, which, leading to institutionalisation, ultimately require rational goal setting for a joint activity, a specific division of roles, and a division of tasks. On the other hand, however, a collective does not have to set any specific goal, formalise itself or divide social roles. This differentiation between ties is accepted in sociology and forms the basis for the division of human collectives into communities and societies.

Through technical progress and easy remote communication, the modern world becomes open to extensive contacts. Globalisation is a fact that results from economic, political and technical changes that facilitate interpersonal contacts. One should be aware that this is an ongoing process that cannot be stopped. In this situation, an increase in indirect contacts, which will occur indirectly through technical measures, is to be expected. It is likely that a very large portion of these spatial interactions will not lead to any further stage of a bond formation process. So one would wonder what the society will be like in the future, as it will have such a large number of spatial contacts that do not lead to mental interactions. Perhaps it will turn out that these mental contacts will appear after some time, taking a new form. Another thing is concern that bonds will be fading and that human life, especially in large cities, will be like life of an individual in a crowd. Currently, the anonymity in life has increased in large cities but, at the same time, the role of contacts and, subsequently, of local ties have increased.

People live in organized collectives, connected by various forms of social bonds. Although having a very different nature, such an organisation always, although in a very different proportion in different collectives, consists of social bonds, social norms, social institutions, and social control. It is the functioning of social values, which are sometimes consciously chosen and accepted by people but sometimes remain subconscious, that underlies all these factors. This creates a social order or a system in which there are regulators of human behaviour that give a sense of security to both an individual and collectives.

The concept of social norms is important for the analysis of social phenomena that is carried out also as part of forensic sociology. Among many different types of norms that make up the organization of social life, the legal norms play a particularly important role, however, these norms are neither the only nor the most important ones in all life situations.[9]

As indicated by the author cited above, there is a great variety of social norms and these have various origin. Having a supra-individual nature, norms organise interpersonal interactions in relation to the behavioural patterns contained therein. This is how norms impact interactions that later form bonds. The bonds impact norms as they strengthen them by confirming their validity through their observance. This is the case for societies in which newly emerging social bonds are built

[9] J. Wódz, *Socjologia dla prawników i politologów*, Warszawa 2000; see also F. Znebejánek, *Sociologie konfliktu*, Sociologické Nakladatelství (SLON), Praha 2015, p. 172.

on the basis of interactions that occur in an internally organized collective. Interactions are rarely the case for totally chaotic collectives that lack any norms.

Sociology distinguishes many types of norms, e.g. social, customary, aesthetic, religious and other. Three fundamental types of norms that indicate model behaviour types, i.e. legal, religious and moral norms, are very often identical or very similar in terms of fundamental basic model behaviour. This is what happens when one talks about models contained in the Decalogue, as well as criminal law or fundamental moral norms, such as "thou shalt not steal", "thou shalt not kill", "thou shalt not commit adultery", etc. It is thus obvious that these norms strengthen each other, and their differentiation most often results from to the primary source of their validity, sometimes also from their structure or sanctions they refer to. Certainly, there are also very significant differences between legal, religious and moral norms that can lead to serious social conflicts, e.g. conflicts over the right to terminate pregnancy.

Norms constitute an important factor in social order that is built on the basis of social bonds. However, social institutions are also necessary to ensure such order as bonds would last for less time and norms could not function efficiently without social institutions. As pointed out by Jacek Wódz, the term "social institution" is not totally unambiguous in sociology.

A normally functioning society requires social control as periods of rapid social changes or conflict make it clear. During such periods, social control becomes considerably weaker and social chaos takes its place with no proper sanctions for any violation of norms. From the perspective of an average person, security becomes threatened on a permanent basis, while from the perspective of a collective, disorganization occurs. Noticeable lack of social control offers an opportunity to actualise positive effects of the proper operation of social control.

From the perspective of forensic sociology, the issues of social thinking, social impact and social relations are those particularly important problem categories.[10] All these are relevant because of cognitive and application-related dimensions of forensic sociology. Social thinking involves perception and interpretation of one's own behaviour as well as the behaviour of other people in social situations. A social impact includes issues relating to the manner in which pressure exerted by a group can affect an individual's behaviour and vice versa, i.e. how and to what extent an individual can influence his/her social environment.

According to forensic sociology, it is extremely important that if certain behaviour, especially that of smaller groups of people, can be the subject of comprehensive observational judgments, then properties that are attributed to social phenomena and the meaning that is attributed to names for those phenomena – irrespective of a level at which these phenomena occur – are almost always defined by reference to certain human traits and behaviour types. This is due to the fact that one wants to not only observe but also understand social phenomena, and this means making reference to what is happening at the level of a collective, as well as to experiences

[10] N. Goodman, *Wstęp do socjologii*, Poznań 1999, pp. 68–69; see also H. Januszek, J. Sikora, *Podstawy socjologii*, *op. cit.*, p. 33.

and behaviour of particular people. By saying, for example, that "a criminal group is desperate", a certain state is defined and attributed to the group, which state is described by reference to the condition of its members.

In forensic sociology, the problem of understanding people, their conditions, behaviour or situations faced by them consists in attributing a specific set of psychological experiences and attitudes to a particular individual; the experiences and attitudes make up such individual's psychological attributes or are components of his/her action or situation that is subjectively defined. However, the scope of this approach may be extended to include almost all areas of sociological reflection as the vast majority of social phenomena, including those occurring at the level of human groups and collectives, are more or less involved in human behaviour and related traits and psychological experiences of people who are actors in these events. Certain attributes of any person, both externally observable and mental, can be included in the description of the relative attributes of other people who are somehow related with such person. When a criminal is said to have high prestige, it means that other criminals value him/her.

In forensic sociology, special importance is attached to types of human relative traits. One of the types consists in being entangled in specific relations, such as social ones. Understanding the essence of any attribute assigned to a person is tantamount to understanding experiences and firm attitudes not only of such person, but also of other people with whom such person comes into contact or interacts socially. Human experiences, including specifically certain permanent mental attitudes that people have towards each other, are entangled in specific ways in which human groups and collectives operate. Many traits of human collectives and social systems actually consist in specific configurations of their members' mental traits or certain behaviour types.

A statement that, for example, a certain criminal group is integrated equals a statement that members of the group like or value each other very much, and are less friendly towards people outside their group. When one says that there is a certain system of values within a group, one means that members of the group value phenomena in a specific way. Particular configurations of human mental attitudes also co-define the nature of social relations connecting members of groups or of larger collectives.

Sociological forensics is a form of practical application of sociology and, as such, is expected to resolve a certain category of social problems. It is very important for an investigator to use sociological knowledge at the initial stage of any investigation. However, an optimal situation would be to use sociological knowledge in forensics to the maximum possible extent at all stages of the investigation.

In forensic sociology, phenomena observed in social life are analysed, including specifically phenomena which are social problems that underlie social pathologies, and social pathology itself in its various forms. Among the first category of factors, unemployment is noteworthy. As a social problem, unemployment takes several forms, such as youth unemployment, female unemployment, unemployment resulting from reorganisation of old industries, and rural unemployment. From the perspective of forensic sociology, the phenomenon of youth unemployment is of particular importance.

There is regionalisation of unemployment in Poland, i.e. particular forms of unemployment are concentrated in specific regions, cities or communities that have their social characteristics.[11] In Poland, unemployment in some regions is just a part of a wider phenomenon marked by the feeling that certain regions or agglomerations offer no social development prospects. Thus, what one observes is not only the regional or subregional concentration of unemployment, but a set of social phenomena with unemployment adding to the existing social problems.

Discrimination against minorities is a social phenomenon that is important from the perspective of forensic sociology. In societies in which the majority imposes certain solutions that are considered to be the only ones that are available, collectives or groups are formed that cannot achieve all of their life ambitions. In sociological terms, the most important feature of minorities is the fact that they are clearly a group that is socially discriminated against. In a sense, this problem is similar to exclusion. In the case of exclusion, deprivation of opportunities occurs due to systemic reasons, while in the case of discrimination, the same is due to social practices which largely rely on a system of values and norms.

Scientific research based on knowledge in the field of forensic sociology concerns in particular: development of crime-preventing planning systems, planning framework for preventive activities, and planning as a strategic instrument for operative combating crime. Planning is required for the police activities, including in particular aspects such as personnel (e.g. further education), finance (planning independent of a programme), tangibles (e.g. creation of a laboratory to combat computer-oriented crime), etc.

For a long time now, forensic practice has been described by resorting to what is called perseveration hypothesis (repetitive model of criminal activity), adopted on the basis of filed data when searching for perpetrators and examining crimes. All existing variants of the criminal police information service are based on this hypothesis. For years, however, there have been doubts about the relevance of the perseveration theory. In verifying the said hypothesis, the following two concepts can serve as a starting point: examination of the perseveration theory as such, subject to appropriate practical operationalisation, and examination of the perseveration theory with the view to its use in the criminal police information service. Only with the first option, reliable information required to plan information services can be gathered. It has been established on the basis of the current state of affairs that, so far, the criminal police information services have been insufficiently used for strategic purposes (e.g. to investigate internet crime and a structure of circumstances of an act).

As an instrument of strategic and operational fight against crime, planning consists of the following phases: obtaining information, seeking and choosing implementation options, evaluation, and control. Target planning to prevent crime is a task to be completed by the police. The police planning is always included in global target structures of a criminal policy. Prevention bodies are largely focused on active collection of information that can be helpful in preventive planning. Sci-

[11] J. Wódz, *Socjologia dla prawników*, *op. cit*.

entifically preserved questionnaires completed by perpetrators could significantly increase the knowledge and experience of the police and judicial authorities.[12] Forecasts based on a scientific basis, including forensic sociology data, contribute to a reasonable, strategic criminal policy. New programmes and projects provide an alternative to traditional response patterns. Combined with scarce resources, statutory conditional programmes hinder the development of innovative crime-prevention concepts. Domestic and foreign ideas as well as scientific and technical programmes would also help the police.

Being neglected in practice for various reasons, a systematic evaluation of programmes and catalogues of projects and measures (e.g. those regarding the fight against terrorism) constitutes a problem. In addition to auditing prerequisites for any police action, audits of complex systems for combating drug-related crime are of particular importance. In practice, effectiveness of the police is usually measured using statistical data (cases, perpetrators, quantities of seized drugs, etc.). Studies show, however, that as few as 3-5% of cases known to the police have been detected solely through its forensic efforts. For this reason alone, a detection rate cannot be a reliable indicator of the effectiveness of law enforcement agencies.

As a matter of principle, it is fear of crime that should be taken into account by prevention programmes. Fear, including particularly local fear of victimisation, is a phenomenon that worsens the quality of life more than real threats do. Fear leads to isolation of citizens, restricts movements in time and space, especially among older people. Despite a difficult starting point, communes should create and test such prevention programmes as part of their reasonable communal criminal policy. Any preventive programme for a built-up housing estate should take into account potential victims and their environment. The goal of the programme should be both quantitative and qualitative reduction of crime and related fear of victimisation, and public satisfaction with the police work as well as mutual trust, which all can guarantee public safety and order. Relevant projects may include without limitation any improvement of street lighting and all and any other investment to reduce the opportunity for crime to occur.

Given the analysis above, I suggest that forensic sociology should be defined to mean a science exploring social aspects of activities relating to: establishment of a criminal fact and a manner in which the crime has been committed, detection of perpetrators, and prevention of crime and other pathological phenomena that condition criminal behaviour, either directly or indirectly.

To make it possible for self-defence against a criminal to be used, as well as to discourage potential offenders from committing any criminal act, a certain amount of relevant knowledge should be made available to the public. Thus, it is crime prevention that also remains the focus for forensic sociology.

Dissemination of knowledge in sociology among employees of the police bodies, prosecutors, judges and attorneys-at-law is one of important determinants of effective criminal prosecution and execution of judiciary tasks. The current level of awareness of even the basic aspects of forensic sociology is still insufficient among

[12] E. Kube, *Systemowe zapobieganie przestępczości*, Warszawa 1992, p. 17.

lawyers. Having just basic knowledge in the field at issue, lawyers are totally dependent upon expert opinions. And the point is not that a lawyer should replace an expert sociologist but that a lawyer should be able to properly use any material prepared by experts and to appropriately assess evidentiary value thereof.

Police officers, including specifically those of criminal investigation departments and criminal service, should have the broadest knowledge related to forensic sociology. For judges, prosecutors, attorneys-at-law, general competence may be sufficient, while the police officers need detailed knowledge, including that specifically applicative. The education system for police forces should, therefore, be particularly focused on passing on the knowledge and training in forensic sociology skills.

BIBLIOGRAPHY

Felson R.B., Tedeschi J., *Aggression and Violence. Social Interactionist Perspectives*, Washington 1995.
Giddnas A., *Socjologia*, Poznań 1998.
Goodman N., *Wstęp do socjologii*, Poznań 1999.
Grotowska-Leder J. (ed.), *Nowe aspekty współczesnych problemów społecznych*, Seria Acta Universitatis Lodziensis. Folia Sociologica No. 62, Łódź 2017.
Hołyst B., *Socjologia kryminalistyczna*, Vol. 1, Warszawa 2007.
Hołyst B., *Kryminalistyka*, Warszawa 2018.
Januszek H., Sikora J., *Podstawy socjologii*, Poznań 2000.
Kube E., *Systemowe zapobieganie przestępczości*, Warszawa 1992.
Manterys A., *Wielość rzeczywistości w teoriach socjologicznych*, Warszawa 1997.
Merton R.K., *Teoria socjologiczna i struktura społeczna*, Warszawa 1982.
Olechnicki K., Załęcki P., *Słownik socjologiczny*, Toruń 1997.
Polakowska-Kujawa J., *Socjologia ogólna*, Warszawa 2005.
Sęk H., *Psychologia kliniczna*, [in:] W. Szewczyk (ed.), *Encyklopedia psychologii*, Warszawa 1998.
Szczepański J., *Elementarne pojęcia socjologii*, Warszawa 1980.
Śliz A., *Wielokulturowość: schemat współczesnego świata? Próba analizy socjologicznej*, Opole 2017.
Wódz J., *Socjologia dla prawników i politologów*, Warszawa 2000.
Znebejánek F., *Sociologie konfliktu*, Sociologické Nakladatelstiví (SLON), Praha 2015.

FORENSIC SOCIOLOGY: CONCEPT AND SCOPE

Summary

The specificity of forensic sociology is largely due to the specificity of forensics itself. Determination of the subject matter of forensic sociology is necessary for it to be treated as a separate discipline of knowledge. To this end, these elements of sociology that may be useful for professionals dealing with criminal prosecution or administration of justice must be identified, and scholarly objectives specific to forensic sociology must be set. Defining the specifics of the subject matter of forensic sociology includes also the analysis of interrelations and separateness of the discipline at issue and of other related disciplines. Sociology of law

and justice has a special place among particular sociological disciplines. The relationship between forensic sociology and the said discipline largely depends on how the scope of both these fields are understood. More broadly, forensic sociology includes sociological aspects of crime and a perpetrator, of the enforcement of the penalty of deprivation of liberty, and of criminal and other proceedings. Forensic sociology can be considered multidisciplinary science in the sense that it uses achievements of other disciplines without integrating or absorbing the knowledge acquired within them. Forensic sociology thus creates general concepts as part of its basic matter of interest and inspires detailed research only into certain areas that are particularly important for it, though not necessarily for other sciences.

Keywords: sociology, forensics, spatial and mental contact, social interactions

POJĘCIE I ZAKRES SOCJOLOGII KRYMINALISTYCZNEJ

Streszczenie

Specyfika socjologii kryminalistycznej wynika w znacznej mierze ze specyfiki samej kryminalistyki. Wyznaczenie zakresu przedmiotowego socjologii kryminalistycznej jest niezbędne dla traktowania jej jako odrębnej dyscypliny wiedzy. W tym celu konieczne jest wyodrębnienie w ramach socjologii tego, co może być przydatne w zawodach związanych ze ściganiem karnym oraz z wymiarem sprawiedliwości, a także określenie specyficznych dla socjologii kryminalistycznej celów poznawczych. Wyznaczenie specyfiki przedmiotu socjologii kryminalistycznej obejmuje również analizy wzajemnych związków i odrębności omawianej dyscypliny oraz innych, pokrewnych dyscyplin. Wśród szczegółowych dyscyplin socjologicznych szczególne miejsce zajmuje socjologia prawa i wymiaru sprawiedliwości. Relacja pomiędzy socjologią kryminalistyczną a tą dyscypliną będzie w znacznym stopniu zależała właśnie od tego, jak będzie się ujmowało zakresy obu tych dziedzin. W szerokim ujęciu w obrębie socjologii kryminalistycznej można zlokalizować problematykę socjologiczną przestępstwa i przestępcy, wykonania kary pozbawienia wolności, postępowania karnego i innych postępowań. Można stwierdzić, iż socjologia kryminalistyczna jest nauką multidyscyplinarną w tym sensie, że korzysta z dorobku innych dyscyplin nauki, nie integrując ani nie wchłaniając zdobytej w ich obrębie wiedzy. Tak więc nauka ta tworzy ogólne koncepcje w zakresie podstawowego przedmiotu swoich zainteresowań oraz stymuluje badania szczegółowe tylko w pewnych obszarach, które dla kryminalistyki są szczególnie ważne, chociaż niekoniecznie istotne dla innych nauk.

Słowa kluczowe: socjologia, kryminalistyka, styczność przestrzenna i psychiczna, interakcje społeczne

EL CONCEPTO Y ALCANCE DE LA SOCIOLOGÍA CRIMINAL

Resumen

La especifica de la sociología criminal resulta en gran parte de la especifica de la criminalística en sí. La determinación de ámbito objetivo de la sociología criminal es imprescindible para considerarla como disciplina separada. Por lo tanto, hay que escoger de la sociología

los elementos que puedan ser útiles en las profesiones relacionadas con la persecución penal y administración de justicia, así como determinar fines específicos de la sociología criminal. La determinación de la especifica de objeto de sociología criminal comprende también el análisis de relaciones mutuas y diferencias entre esta disciplina en cuestión y otras disciplinas afines. Dentro de las disciplinas sociológicas especiales, la sociología de derecho y de administración de justicia ocupa un lugar particular. La relación entre la sociología criminal y dicha disciplina depende en gran parte de la determinación de ámbito de estas ambas ramas. El ámbito amplio de la sociología criminal incluye la problemática sociológica de delito y de delincuente, la ejecución de pena de privación de libertad, proceso penal y otros procesos. Se puede decir que la sociología criminal es una ciencia multidisciplinar, ya que se aprovecha de otras ramas de ciencia sin integrar ni absorberlas. Por lo tanto, dicha ciencia crea conceptos generales en cuanto al objeto básico de su campo de intereses y estimula investigaciones especiales sólo en ciertos ámbitos, que son particularmente importantes para la criminalística, aunque no sean importantes para otras ramas de la ciencia.

Palabras claves: sociología, criminalística, contacto espacial y psíquico, interacciones sociales

КОНЦЕПЦИЯ И ОБЛАСТЬ ИССЛЕДОВАНИЙ КРИМИНАЛИСТИЧЕСКОЙ СОЦИОЛОГИИ

Резюме

Специфика криминалистической социологии во многом обусловлена спецификой самой криминалистики. Для того, чтобы криминалистическая социология могла считаться отдельной дисциплиной, следует определить предмет ее исследований. С этой целью необходимо выделить из общей социологии ту тематику, которая может быть интересна работникам системы уголовного розыска и правосудия, а также определить научные цели, присущие криминалистической социологии. Определение специфической области исследований криминалистической социологии также предусматривает анализ ее отличий и взаимосвязей со смежными дисциплинами. Среди таких дисциплин особое место занимает социология права и правосудия. Отношение между этой дисциплиной и криминалистической социологией будет в значительной степени зависеть от определения областей исследований, охватываемых обеими дисциплинами. При широком подходе в сферу исследований криминалистической социологии можно включить социологическую проблематику преступности и лиц, совершающих преступления, а также проблематику исполнения наказания в виде лишения свободы, уголовного судопроизводства и других процессуальных вопросов. Криминалистическую социологию можно считать междисциплинарной наукой в том смысле, что она использует достижения других дисциплин, не поглощая и не интегрируя знаний, приобретенных в рамках этих дисциплин. Таким образом, криминалистическая социология создает общие концепции в рамках присущей ей области исследований, а также стимулирует детальное изучение только тех вопросов, которые представляют особый интерес для криминалистики, в отличие от других научных дисциплин.

Ключевые слова: социология, криминалистика, пространственный и психологический контакт, социальное взаимодействие

BEGRIFF UND ABGRENZUNG DER KRIMINALSOZIOLOGIE

Zusammenfassung

Die Spezifik der Kriminalsoziologie liegt in hohem Maße in der Besonderheit der Kriminalistik selbst begründet. Eine Abgrenzung der behandelten Kriminalsoziologie ist unerlässlich, um diese als eigene Disziplin betrachten zu können. Dazu ist es erforderlich, all das innerhalb der Soziologie abzutrennen, was sich für mit Strafverfolgung und Justiz verbundene Berufe als nützlich erweisen kann und die für die Kriminalsoziologie spezifischen kognitiven Zwecke zu bestimmen. Die Bestimmung der für die Kriminalsoziologie besonderen Merkmale schließt auch eine Analyse der Wechselbeziehungen und Besonderheiten des besprochenen Fachgebiets und anderer verwandter Disziplinen ein. Unter den verschiedenen soziologischen Teilgebieten nimmt die Rechts- und Justizsoziologie eine besondere Stellung ein. Das Verhältnis zwischen der Kriminalsoziologie und diesem Gebiet wird in erheblichem Maße davon abhängen, wie diese beiden Arbeitsdisziplinen voneinander abgegrenzt werden. Ganz allgemein lassen sich innerhalb der Kriminalsoziologie die soziologische Problematik von Straftat und Täter, die Vollstreckung von Freiheitsstrafe, das Strafverfahren und andere Verfahren verorten. Es kann argumentiert werden, dass die Kriminalsoziologie in dem Sinn eine interdisziplinäre Disziplin ist, dass sie sich Erkenntnisse anderer wissenschaftlicher Fachrichtungen zunutze macht, dabei aber die in diesen Wissenschaftsdisziplinen erzielten Erkenntnisse weder integriert noch absorbiert. So entwickelt sie allgemeine Konzepte für den Hauptgegenstand ihrer Interessen und regt nur in bestimmten, für die Kriminalistik besonders wichtigen Bereichen spezifische Untersuchungen an, denen für andere wissenschaftliche Disziplinen nicht zwingend eine große Bedeutung zukommt.

Schlüsselwörter: Soziologie, Kriminalistik, räumliche und psychische Berührungspunkte, soziale Interaktionen

LE CONCEPT ET LA PORTÉE DE LA SOCIOLOGIE CRIMINELLE

Résumé

La spécificité de la sociologie criminelle est largement due aux spécificités de la criminalistique elle-même. La détermination de la portée objective de la sociologie criminelle est nécessaire pour la traiter comme une discipline distincte de la connaissance. À cette fin, il est nécessaire de distinguer au sein de la sociologie ce qui peut être utile dans les professions liées aux poursuites pénales et à la justice, ainsi que de définir des objectifs cognitifs spécifiques pour la sociologie criminelle. La détermination de la spécificité du sujet de la sociologie criminelle comprend également des analyses des relations mutuelles et de la particularité de la discipline discutée et d'autres disciplines connexes. Parmi les disciplines sociologiques détaillées, la sociologie du droit et du pouvoir judiciaire occupe une place particulière. La relation entre la sociologie criminelle et cette discipline dépendra dans une large mesure de la portée de ces deux domaines. En termes généraux, dans la sociologie criminelle, on peut localiser les problèmes sociologiques des crimes et des criminels, de l'exécution de l'emprisonnement, des procédures pénales et autres. On peut dire que la sociologie criminelle est une science multidisciplinaire dans le sens où elle utilise les réalisations d'autres disciplines scientifiques sans intégrer ni absorber les connaissances acquises au sein de ces disciplines. Ainsi, cette

science crée des concepts généraux dans le champ de son sujet d'intérêt de base et ne stimule la recherche spécifique que dans certains domaines, ceux qui sont particulièrement importants pour la criminalistique, bien qu'ils ne le soient pas nécessairement pour d'autres sciences.

Mots-clés: sociologie, criminalistique, contact spatial et psychique, interactions sociales

CONCETTO E AMBITO DELLA SOCIOLOGIA CRIMINALE

Sintesi

La caratteristica della sociologia criminale deriva in gran parte dalla caratteristica della criminologia. La determinazione dell'ambito tematico della sociologia criminale è necessario per poterla considerare una distinta disciplina scientifica. A tal scopo è necessario identificare cosa nell'ambito della sociologia possa essere utile nelle professioni legate ai procedimenti penali e al sistema giudiziario, e anche stabilire gli obiettivi cognitivi specifici della sociologia criminale. La determinazione delle caratteristiche della materia sociologia criminale comprende anche l'analisi dei reciproci legami e differenze tra la disciplina richiamata e altre discipline connesse. Tra le distinte discipline sociologiche un posto particolare occupa la sociologia del diritto e della giustizia. La relazione tra la sociologia criminale e tale disciplina dipenderà in grande misura proprio da ciò che si inserirà nell'ambito di ognuno di questi due settori. In senso largo nell'ambito della sociologia criminale è possibile localizzare la problematica sociologica del crimine e dei criminali, dell'esecuzione della pena detentiva, del procedimento penale e di altri procedimenti. Si può affermare che la sociologia criminale è una scienza interdisciplinare nel senso che beneficia dei risultati di altre discipline scientifiche, senza integrare o assorbire la conoscenza ottenuta nell'ambito di tali discipline. Quindi tale disciplina scientifica crea un concetto generale nell'ambito dell'oggetto fondamentale dei suoi interessi e stimola studi dettagliati solo in determinati settori, quelli che per la criminologia sono particolarmente importanti, sebbene non lo siano necessariamente per altre discipline scientifiche.

Parole chiave: sociologia, criminologia, contatto materiale e psichico, interazioni sociali

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AGGRAVATION OF CRIMES AGAINST PROPERTY DUE TO FEATURES OF THE SUBJECT OF COMMITTED ACT

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1. INTRODUCTION

A characteristic feature of an aggravated crime is that additional or modified constituent elements of the crime determining its consequences (called consequence-aggravated crimes) or other circumstances (called circumstance-aggravated crimes) are added to the constituent elements of the crime resulting in possible aggravation of penalty. A separate and independent penal sanction or a modified sanction are envisaged for such crimes.[1] One of the aggravating constituent elements are features of the subject of the committed act. According to the Polish Criminal Code,[2] subjects of an act committed resulting in aggravation of the crime include: a conceived child who achieved the ability to live by itself outside the pregnant woman's body (Article 152 § 3, Article 153 § 2), a helpless person due to his/her age, mental or physical condition (Article 189 § 2, Article 207 § 1a), a minor younger than 15 (Article 197 § 3(2)), an ancestor, descendant, adopted or adopting person, brother or sister (Article 197 § 3(3)), a minor (Article 199 § 2), an invoice or invoices stating

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1 S. Śliwiński, *Polskie prawo karne*, Warszawa 1946, p. 82; K. Buchała, *Odpowiedzialność za przestępstwa kwalifikowane przez następstwa czynu*, Wojskowy Przegląd Prawniczy No. 1, 1972, p. 22; J. Kochanowski, *Przestępstwa kwalifikowane przez następstwa w kodeksie karnym*, Państwo i Prawo No. 1, 1972, pp. 62–64; W. Wolter, *Z rozważań nad kwalifikowanymi typami przestępstw*, Państwo i Prawo No. 8–9, 1972, p. 25; T. Bojarski, *Odmiany podstawowych typów przestępstw w polskim prawie karnym*, Warszawa 1982, p. 155; P. Konieczniak, *Uwagi o pojmowaniu typów zmodyfikowanych*, [in:] J. Giezek, J. Brzezińska (eds), *Zmodyfikowane typy przestępstw w teorii i praktyce sądowej*, Warszawa 2017, p. 41.

2 Act of 6 June 1997: Criminal Code, Dz.U. 1997, No. 88, item 553, as amended; hereinafter Criminal Code.

a total amount due the value or the total value of which exceeds five times the value of an amount defined as property of great value (Article 270a § 2, Article 271a § 2), an entrusted movable object (Article 284 § 2), property of substantial value (Article 289 § 2, Article 294 § 1) and objects of special importance for culture (Article 294 § 2).

2. CRIMES AGAINST PROPERTY AGGRAVATED DUE TO THE SUBJECT OF THE COMMITTED ACT

Under the Criminal Code, the circumstances concerning a subject of an act committed resulting in aggravation of crimes against property are: an entrusted movable object (Article 284 § 2), property of substantial value (Article 289 § 2, Article 294 § 1) and objects of special importance for culture (Article 294 § 2).

An aggravating circumstance in the case of the crime defined as misappropriation of another person's movable object (Article 284 § 1 Criminal Code) is committing this act against entrusted property (Article 284 § 2 Criminal Code).

Property of substantial value – pursuant to Article 294 § 1 Criminal Code – is an aggravating constituent element of some crimes against property, namely: theft of another person's movable object (Article 278 § 1), theft of computer software (Article 278 § 2), misappropriation of another person's movable object or property right (Article 284 § 1), misappropriation (Article 284 § 2), switching into a telecommunication device (Article 285 § 1), fraud (Article 286 § 1), computer fraud (Article 287 § 1), destroying, damaging or making useless another person's property (Article 288 § 1), breaking or damaging a submarine cable or violating regulations applicable in the case of laying or repairing such cables (Article 288 § 3) and intentional handling stolen goods (Article 291 § 1).

These crimes are also aggravated when the subjects of the act committed are objects of special importance for culture (Article 294 § 2 Criminal Code).

Misappropriating another person's movable object (Article 284 § 1 Criminal Code) is an aggravated crime if it concerns a movable object which has been entrusted to the perpetrator and can also be aggravated if the object is of substantial value or special importance for culture; thus it may be a doubly aggravated crime. Misappropriating another person's property right is an aggravated crime only if the right is of substantial value.

While misappropriation is classified as an aggravated crime due to entrusted property involved in the same basic regulation (Article 284 § 2 Criminal Code), the qualification of the aforementioned crimes as aggravated ones due to substantial value of the property or objects of special importance for culture involved is provided for in a separate basic regulation which refers to regulations determining the basic crime (Article 294 § 1 and § 2 Criminal Code).

The specification of the regulations determining basic types of crimes provided for in Article 294 § 1 of the Criminal Code is exhaustive (*numerus clausus*), and this regulation cannot be applied to other crimes against property. It is aptly emphasised in the judicial decisions that: "A closed catalogue of ten crimes are qualified as aggravated crimes under Article 294 § 1 of the Criminal Code where committing

a crime with regard to property of substantial value is a circumstance resulting in stricter liability."[3] It has been pointed out in the judicature that this catalogue does not include such crimes as theft and burglary (Article 279 § 1 Criminal Code), racketeering and extortion (Article 282 Criminal Code)[4] and robbery (Article 280 § 1 and § 2 Criminal Code)[5]. The assumption that, apart from the offences specified in Article 294 § 1 of the Criminal Code, other crimes can also be qualified as aggravated under this regulation leads to violation of the fundamental principle of penal law: *nullum crimen sine lege*.[6] It might appear that it is questionable whether this regulation also covers handling stolen computer software. This crime is defined in Article 293 of the Criminal Code through making a reference that the provisions under Articles 291 and 292 of the Criminal Code, which provide definitions of intentional and unintentional handling stolen goods, respectively also apply to computer software. Article 291 § 1 of the Criminal Code is quoted in Article 294 § 1, and therefore, handling stolen computer software is also covered by this provision through this multilayered reference. Therefore, one should disagree with the view that the Criminal Code does not include any rule under which the regulation provided in Article 294 § 1 of the Criminal Code would refer to handling stolen computer software, and thus there are no grounds for aggravation of the crime of handling stolen computer software considering the value of the software, where it is argued that Article 294 § 1 of the Criminal Code could be applied *per analogiam*, which is inadmissible in penal law.[7]

Given the reference in Article 278 § 5 of the Criminal Code to § 1 of this regulation, there are no obstacles to qualifying theft of energy or a card authorising to withdraw money from an ATM as an aggravated crime under Article 294 § 1 of the Criminal Code due to substantial value of the property, but it would be difficult to assume that objects of special importance for culture could be a qualifying circumstance.[8] The situation is different in the case of illegal forest logging (Article 290 § 1 Criminal Code). Constituent elements of this crime are defined in Article 290 § 1 of the Criminal Code, and the reference to the envisaged sanction for theft is only made regarding the scope of liability. Therefore, it is unreasonably assumed that Article 294 § 1 or § 2 of the Criminal Code is applicable to the offence defined in Article 290 § 1.[9]

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[3] Judgment of the Court of Appeal in Wrocław of 7 March 2016, II AKa 292/15, LEX No. 2023604.

[4] *Ibid*.; judgment of the Court of Appeal in Katowice of 23 April 2009, II AKa 57/09, LEX No. 563083.

[5] Judgment of the Supreme Court of 29 June 2006, V KK 391/05, Prokuratura i Prawo – insert 2007, No. 1, item 9.

[6] Judgment of the Supreme Court of 22 August 2006, IV KK 4/06 OSNwSK 2006, No. 1, item 1583.

[7] P. Kardas, *Prawnokarna ochrona informacji w polskim prawie karnym z perspektywy przestępstw komputerowych. Analiza dogmatyczna i strukturalna w świetle aktualnie obowiązującego stanu prawnego*, Czasopismo Prawa Karnego i Nauk Penalnych No. 1, 2000, pp. 117–118.

[8] B. Michalski, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny. Część szczególna. Komentarz do art. 222–316*, Vol. II, Warszawa 2010, p. 1261.

[9] *Ibid*., pp. 1260–1261.

3. AGGRAVATING CIRCUMSTANCES IN CRIMES AGAINST PROPERTY

The circumstances that characterise the subject of the act committed that cause qualifying the crime as aggravated are: entrusting the object, substantial value of the property and its special importance for culture.

3.1. ENTRUSTED PROPERTY

The qualifying constituent element of misappropriation of movable object (Article 284 § 2 Criminal Code) is committing this act with regard to movable object which has been entrusted to the perpetrator. This crime is defined as embezzlement.[10] A stricter penalty is imposed for this act because it involves abuse of trust offered by the owner of the object to the perpetrator by vesting them with the power of disposal of the object linked with the manner of handling it as determined in a civil-law contract, and additionally combined with the proviso that it must be returned to the owner in the future.[11]

The word "to entrust" means "to put something or someone at someone's disposal"[12]. In linguistic terms, an entrusted movable object is the property which has been left at another person's disposal. This concerns a movable object that has

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[10] E. Pływaczewski, [in:] A. Marek (ed.), *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1986, p. 395; J. Śliwowski, *Prawo karne*, Warszawa 1975, p. 447; I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa 1989, p. 433; W. Świda, *Prawo karne*, Warszawa 1989, p. 484; M. Surkont, *Prawo karne*, Bydgoszcz–Gdynia 2001, p. 251; D. Pleńska, O. Górniok, [in:] I. Andrejew, L. Kubicki, J. Waszczyński (eds), *System prawa karnego. O przestępstwach w szczególności*, Vol. IV, part II, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1989, p. 412; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2006, p. 572; R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 2007, p. 491; A. Marek, *Prawo karne*, Warszawa 2009, p. 550; *idem*, *Kodeks karny. Komentarz*, Warszawa 2010, p. 605; R.A. Stefański, *Prawo karne materialne. Część szczególna*, Warszawa 2009, p. 560; M. Bojarski, [in:] M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2010, p. 585; A. Marek, J. Lachowski, *Prawo karne. Zarys problematyki*, Warszawa 2011, p. 288; D. Mocarska, *Wybrane zagadnienia prawa karnego materialnego*, Szczytno 2013, p. 176; D. Jagiełło, *Prawo karne materialne*, Skierniewice 2013, p. 156; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny. Komentarz*, Vol. III, Warszawa 2013, p. 217; L. Wilk, [in:] T. Dukiet-Nagórska (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warszawa 2014, p. 517; L. Gardocki, *Prawo karne*, Warszawa 2017, p. 341; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz. Art. 222–316*, Warszawa 2017, p. 712; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 880; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1734; J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1272; M. Gałązka, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1349.

[11] Judgment of the Court of Appeal in Wrocław of 22 December 2015, II AKa 310/15, LEX No. 1993083; judgment of the Court of Appeal in Szczecin of 12 June 2014, II AKa 101/14, LEX No. 1506290; judgment of the Court of Appeal in Szczecin of 27 February 2014, II AKa 15/14, LEX No. 1438217; O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego*, *op. cit.*, p. 413; E. Pływaczewski, [in:] A. Marek (ed.), *Prawo karne*, *op. cit.*, p. 395; J. Śliwowski, *Prawo karne*, *op. cit.*, p. 447; A. Marek, *Prawo karne*, *op. cit.*, p. 550; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit.*, 217; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit.*, p. 713.

[12] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 31, Poznań 2001, p. 349.

been received and possessed legally.[13] This means vesting someone with the power of disposal of an object, subject to the obligation to return it.[14] Entrusting an object entails the transfer of power of disposal of the object to a person other than the owner connected with determining a certain manner of handling the object by the person receiving it.[15] As has been aptly emphasised in judicial decisions, this concerns the temporary transfer of the power of disposal of the object to the perpetrator, with the proviso that they are not becoming its owner or sole authorised user excluding the rightful owner but only its depositary who has a certain scope of rights, for example, to use the object or derive benefits from it.[16] The object must be possessed by the perpetrator before it is misappropriated.[17]

The Supreme Court also aptly notes that this must be another person's movable object because the perpetrator must have the intention to deprive the entrusting person of the object owned by that person.[18]

The legal title of the transfer does not matter, unless this is a legal title transferring ownership. This can be a loan for use,[19] storage,[20] rent,[21] leasing[22] or con-

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[13] Judgment of the Court of Appeal in Wrocław of 21 March 2018, II AKa 44/18, LEX No. 2486463.

[14] Decision of the Supreme Court of 12 February 2009, OSNKW 2009, No. 6, item 47; D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego*, *op. cit*., p. 413; O. Górniok, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. II, Gdańsk 2005, p. 401; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit*., p. 417.

[15] Judgment of the Court of Appeal in Warsaw of 13 August 2014, II AKa 213/14, LEX No. 1504518; judgment of the Court of Appeal in Warsaw of 8 April 2014, II AKa 81/14, LEX No. 2274006; D. Mocarska, *Wybrane zagadnienia*, *op. cit*., p. 177.

[16] Judgment of the Supreme Court of 11 January 2017, IV KK 283/16, LEX No. 2200603; decision of the Supreme Court of 17 September 2008, III KK 131/08 OSNwSK 2008, No. 1, item 1860; judgment of the Court of Appeal in Gdańsk of 21 September 2017, II AKa 269/17, II AKa 403/16, LEX No. 2433296; judgment of the Court of Appeal in Rzeszów of 6 June 2013, II AKa 38/13, LEX No. 1322041; judgment of the Court of Appeal in Łódź of 28 January 2013, II AKa 293/12, LEX No. 1282760; judgment of the Court of Appeal in Katowice of 28 November 2012, II AKa 288/12, LEX No. 1236413; J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1938, p. 600; W. Świda, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warszawa 1973, p. 617.

[17] Judgment of the Court of Appeal in Warsaw of 14 December 2016, II AKa 403/16, LEX No. 2249972.

[18] Decision of the Supreme Court of 21 September 2017, IV KK 281/17, LEX No. 2401780.

[19] Judgment of the Supreme Court of 28 June 1979, Rw 208/79, OSNKW 1979, No. 10, item 103; judgment of the Supreme Court of 18 September 1936, II K 838/36, OSNK 1937, No. 2, item 54; W. Świda, [in:] I. Andrejew et al., *Kodeks karny*, *op. cit*., p. 617; A. Marek, *Prawo karne*, *op. cit*., p. 550; *idem*, *Kodeks karny*, *op. cit*., p. 605; D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego*, *op. cit*., p.413; A. Marek, J. Lachowski, *Prawo karne*, *op. cit*., p. 288; E.W. Pływaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 1518; L. Gardocki, *Prawo karne*, *op. cit*., p. 341.

[20] K. Buchała, *Prawo karne materialne*, Warszawa 1989, p. 657; M. Gałązka, [in:] A. Grześkowiak (ed.), *Prawo karne*, Warszawa 2009, p. 377; A. Marek, *Prawo karne*, *op. cit*., p. 550; *idem*, *Kodeks karny*, *op. cit*., p. 605; B. Michalski, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny*, *op. cit*., p. 1101; A. Marek, J. Lachowski, *Prawo karne*, *op. cit*., p. 288; E.W. Pływaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny*, *op. cit*., p. 1518; L. Gardocki, *Prawo karne*, *op. cit*., p. 341.

[21] Judgment of the Court of Appeal in Katowice of 5 June 2014, II AKa 144/14, LEX No. 1480412.

[22] Judgment of the Court of Appeal in Katowice of 26 February 2016, II AKa 546/15, LEX No. 2087707; judgment of the Court of Appeal in Katowice of 12 November 2015, II AKa 420/15,

signment[23] agreement, pledge,[24] deposit,[25] authorisation to receive remuneration for work,[26] holding,[27] deposit,[28] handing over of an object in order to make copies or prints,[29] giving money to be paid into a specific bank account,[30] etc. This can also be a collateral to a bank or any other entity which is the perpetrator's creditor and being a form of debt security.[31] The Supreme Court reasonably deemed that: "A collateral agreement is a so-called fiduciary transfer of ownership involving securing debts by transferring upon the creditor the ownership title to the movable object, and at the same time imposing the obligation on the creditor to enable the debtor to use the ownership title within the boundaries agreed by the parties. The transfer of ownership is admissible under such an agreement on the grounds of the regulations provided in Articles 155 and 156 of the Polish Civil Code and, in the light of the judicial decisions of the Supreme Court and the views expressed in the doctrine, agreements of this kind are a very effective form of securing loans."[32] It is assumed that a an illicit disposal by members of the management board by means of transferring funds from their company's bank account is misappropriation of funds entrusted to them, i.e. the offence under Article 284 § 2 of the Criminal Code.[33]

LEX No. 1934419; judgment of the Court of Appeal in Katowice of 16 May 2013, II AKa 124/13, LEX No. 1378230; judgment of the Court of Appeal in Gdańsk of 9 January 2013, II AKa 446/12, LEX No. 1280023; judgment of the Court of Appeal in Wrocław of 22 February 2012, II AKa 30/12, LEX No. 1120041; judgment of the Court of Appeal in Kraków of 30 September 1998, II AKa 190/98, LEX No. 35254.

[23] Judgment of the Supreme Court of 26 August 1981, Rw 254/81, LEX No. 17441; judgment of the Supreme Court of 4 November 1936, III K 1765/36, OSNK 1937, No. 5, item 132; A. Marek, *Prawo karne*, *op. cit.*, p. 550; *idem*, *Kodeks karny*, *op. cit.*, p. 605; A. Marek, J. Lachowski, *Prawo karne*, *op. cit.*, p. 288; L. Gardocki, *Prawo karne*, *op. cit.*, p. 341.

[24] W. Świda, [in:] I. Andrejew et al., *Kodeks karny*, *op. cit.*, p. 617; E. Pływaczewski, [in:] A. Marek (ed.), *Prawo karne*, *op. cit.*, p. 395; D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego*, *op. cit.*, p. 413; A. Marek, *Prawo karne*, *op. cit.*, p. 550; *idem*, *Kodeks karny*, *op. cit.*, p. 605; A. Marek, J. Lachowski, *Prawo karne*, *op. cit.*, p. 288; E.W. Pływaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny*, *op. cit.*, p. 1518.

[25] D. Pleńska, O. Górniok, [in:] I. Andrejew et al. (eds), *System prawa karnego*, *op. cit.*, p. 413; E.W. Pływaczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny*, *op. cit.*, p. 1518; J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny*, *op. cit.*, p. 1772.

[26] Judgment of the Supreme Court of 26 June 1978, II KR 134/78, OSNKW 1978, No. 10, item 116.

[27] Judgments of the Supreme Court: of 20 May 1946, K 332/46, OSNK 1947, No. 1, item 13; of 4 January 1937, II K 561/36, OSNK 1937, No. 6, item 164.

[28] Judgment of the Supreme Court of 19 December 1934, I K 987/34, OSNK 1935, No. 7, item 287; J. Makarewicz, *Kodeks karny*, *op. cit.*, p. 601.

[29] Judgment of the Supreme Court of 26 August 1981, Rw 254/81,OSN PG 1982, No. 12, item 159.

[30] L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit.*, p. 713.

[31] Decision of the Supreme Court of 17 January 2013, II KK 69/12, LEX No. 1254673; judgment of the Court of Appeal in Rzeszów of 20 May 2014, II AKa 36/14, LEX No. 1474772; judgment of the Court of Appeal in Rzeszów of 11 June 2013, II AKa 38/13, LEX No. 1730676; judgment of the Court of Appeal in Poznań of 22 June 1995, II AKr 178/95, LEX No. 24210; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit.*, pp. 713–714; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny*, *op. cit.*, pp. 1734–1735.

[32] Judgment of the Supreme Court of 10 January 1997, III KKN 56/96, LEX No. 29517.

[33] Judgment of the Court of Appeal in Wrocław of 19 December 2013, II AKa 368/13, LEX No. 1416465.

The property does not necessarily need to be entrusted to the perpetrator directly by the owner; it can be entrusted to the perpetrator by a third party.[34] It is not required that the legal relationship between the parties be precisely determined. It is sufficient that property has been entrusted for keeping in the general sense which is a manifestation of trust in the keeper.[35] The goal of entrusting the object does not matter; it can also be illegal, for example, performed in order to bribe an official.[36]

A movable object which has been entrusted to the perpetrator on the grounds of an agreement transferring its ownership title upon the perpetrator cannot be a subject of embezzlement.[37] A deposit agreement the subject of which is an amount of money does not provide such grounds because it causes transfer of ownership of this amount of money upon the person accepting the deposit.[38] Money which is the subject of so-called irregular deposit, i.e. advance payment, prepayment or loan, cannot be the subject of misappropriation.[39] Borrowed money is not another person's asset, it is one's own asset. A person who receives money as part of a loan or credit becomes its owner, and the creditor only is entitled to a claim of obligatory nature to be paid back the same amount of money (Article 720 § 1 Civil Code[40]). However, an illicit order to withdraw money from an account by a person who has been entrusted with the right to dispose of the money kept on the bank account is a crime known as embezzlement.[41]

The Supreme Court is right when claiming that: "A movable object which has been entrusted to the perpetrator in a situation where the provisions of the agreement under which the property has been handed over indicate that the ownership title to this property has been transferred upon the perpetrator is not a subject of embezzlement."[42] While misappropriating a movable object, the perpetrator must

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[34] Judgment of the Supreme Court of 28 April 1949, K 228/49, OSNK 1949, No. 2, item 55; judgment of the Supreme Court of 14 March 1934, III K 1281/33, OSNK 1934, No. 9, item 19; W. Świda, [in:] I. Andrejew et al., *Kodeks karny*, *op. cit*., p. 617; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit*., p. 713; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny*, *op. cit*., p. 1734.

[35] Judgments of the Supreme Court: of 26 September 1946, K 1052/46, OSNK 1947, No. 4, item 92; of 26 August 1981, Rw 254/81,OSN PG 1982, No. 12, item 159; W. Świda, [in:] I. Andrejew et al., *Kodeks karny*, *op. cit*., p. 618; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit*., p. 713.

[36] J. Makarewicz, *Kodeks karny*, *op. cit*., p. 601; W. Świda, [in:] I. Andrejew et al., *Kodeks karny*, *op. cit*., p. 617.

[37] Judgment of the Court of Appeal in Lublin of 2 April 2014, II AKa 122/13, LEX No. 1474565.

[38] Decision of the Supreme Court of 6 November 2015, V KK 304/15, LEX No. 1849096.

[39] Judgment of the Court of Appeal in Białystok of 30 March 2016, II AKa 8/16, LEX No. 2136974; judgment of the Court of Appeal in Białystok of 30 March 2016, II AKa 27/16, LEX No. 2039695; judgment of the Court of Appeal in Katowice of 1 August 2012, II AKa 264/12, LEX No. 1258294; judgment of the Supreme Court of 4 May 1937, II K 114/37, OSNK 1937, No. 11, item 314; W. Świda, [in:] I. Andrejew et al., *Kodeks karny*, *op. cit*., p. 618.

[40] Act of 23 April 1964, Dz.U. 1964, No. 16, item 93, as amended.

[41] Judgment of the Court of Appeal in Warsaw of 19 September 2012, II AKa 227/12, LEX No. 1238266; judgment of the Court of Appeal in Wrocław of 9 June 2006, II AKa 143/06, LEX No. 190485.

[42] Decision of the Supreme Court of 17 September 2008, III KK 131/08, LEX No. 464973; judgment of the Court of Appeal in Wrocław of 5 December 2013, II AKa 388/13, LEX No. 2097459.

be acting with the intention of *res sibi habendi*, i.e. of depriving the entrusting person of their ownership. Another person's property, according to Article 284 § 2 of the Criminal Code – as is aptly claimed in the judicature – is the share capital of a limited liability company; it is property separate from the personal property of the company's shareholders.[43] This can be property of a limited liability company because for shareholders the company's property is another person's property.[44]

The perpetrator must be aware of the fact that the property being misappropriated being in their possession is owned by someone else.[45]

It is wrongly claimed in the legal doctrine that entrusted property is not an object handed over to carry out certain activities with it, for example, leaving a suit with a tailor for fitting, or utilising it for carrying out certain activities or to transport it, by pointing out that in these cases the perpetrator does not have the power of disposal of the object.[46] It is aptly noted in the doctrine that in such situations the perpetrator possesses the object and does not remove it from the authorised person's power of disposal, and thus does not abuse the person's trust.[47]

3.2. PROPERTY OF SUBSTANTIAL VALUE

A circumstance that qualifies the crimes specified in Article 294 § 1 of the Criminal Code as aggravated is substantial value of property against which the prohibited act is committed. This is an economic term determining the value of such property.[48] The term property is used in this provision, while the subject of the committed act is referred to as an object in the regulations mentioned therein. This gives rise to the question about the link between these two terms. It is pointed out in the reasons for the bill of Criminal Code that the code "Also uses civil-law terminology to determine the subject of the crime, for the sake of linguistic and semantic accuracy, using where possible the word 'object' and not 'property' to determine the ownership right."[49] The use of the word "object" instead of "property" has been criticised in literature, recognising that the development of the Polish contemporary grammar, lexicology and law and penal law literature provide no grounds

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[43] Judgment of the Court of Appeal in Białystok of 29 May 2014, II AKa 70/14, LEX No. 1480393.

[44] Resolution of the Supreme Court of 20 May 1993, I KZP 10/93, OSNKW 1993, No. 7–8, item 44 with a critical gloss by S. Łagodziński, Państwo i Prawo No. 1, 1994, pp. 112–115 and comments from R.A. Stefański, *A review of resolutions of the Criminal Chamber of the Supreme Court concerning material penal law for 1991–1993*, Wojskowy Przegląd Prawniczy No. 3–4, 1994, pp. 87–88; judgment of the Court of Appeal in Białystok of 20 November 2012, II AKa 138/12, LEX No. 1278079; judgment of the Court of Appeal in Wrocław of 23 October 2006, II AKa 224/06, OSAW 2008, No. 2, item 85.

[45] Judgment of the Court of Appeal in Gdańsk of 20 October 2015, II AKa 309/15, LEX No. 2006020.

[46] I. Andrejew, *Polskie prawo karne*, *op. cit*., p. 433; L. Gardocki, *Prawo karne*, *op. cit*., p. 341.

[47] L. Gardocki, *Prawo karne*, *op. cit*., p. 341.

[48] Judgment of the Court of Appeal in Wrocław of 24 May 2000, II AKa 149/00, OSA 2000, No. 11–12, item 78.

[49] I. Fredrich-Michalska, B. Stachurska-Marcińczak (eds), *Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warszawa 1997, p. 206.

for such use.[50] Given the fact that these terms are not synonymous, it is assumed in writings that the legislator, using the term "property" in Article 294 § 1 of the Criminal Code changed an object into property as the subject of the act committed envisaged in the regulations mentioned therein.[51] This is not a correct view because it is expressly provided in Article 294 § 1 of the Criminal Code that this concerns the crimes determined in the regulations specified therein, and thus covering all the subjects of the acts committed as determined in the regulations specified. This is a collective term covering under the Criminal Code a movable object (Article 278 § 1, Article 284 § 1 or § 2, Article 288 § 1 and Article 291 § 1), an immovable object (Article 288 § 1, Article 291 § 1), computer software (Article 278 § 2), telephone call units (Article 285 § 1), property (Article 286 § 1 and Article 187 § 1) and submarine cable (Article 288 § 3).

Therefore, it needs to be understood that Article 294 § 1 of the Criminal Code refers to objects the value of which exceeds PLN 200,000; it is not the size of the damage incurred but the value of the act committed that matters.[52] In cases where a constituent element is a damage (Article 288 § 1 or § 3, Articles 285 and 287 Criminal Code), this concerns the value of the damage exceeding this amount.[53]

This constituent element is not controversial because it has been defined in Article 115 § 5 of the Criminal Code.[54] Pursuant to this provision, property of substantial value is property the value of which at the time of committing of the prohibited act exceeds PLN 200,000. The value of the property being the subject of the prohibited act should be calculated as at the time of committing the act and not at the time of passing the judgment.[55] A contrary view, where it is argued that this concerns a legal category and therefore it should be evaluated according to the time of passing the judgment and not the time of committing the crime, cannot be approved of.[56] This interpretation contradicts Article 115 § 5 of the Criminal Code which expressly concerns property value *verba legis* "at the time of committing of the prohibited act".

The value of the crime subject in each case is the value the aggrieved has really incurred to bring back the previously existing condition and remove effects of

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[50] A. Dermont, *Ustawowa zamiana „mienia" na „rzecz" w kodeksie karnym*, Prokuratura i Prawo No. 9, 2003, pp. 76–93.

[51] A. Sośnicka, *Przestępstwo i wykroczenie przywłaszczenia w polskim prawie karnym*, Warszawa 2013, p. 115.

[52] Judgment of the Court of Appeal in Białystok of 31 August 2016, II AKa 130/16, LEX No. 2208324.

[53] M. Gałązka, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny*, *op. cit*., p. 1375.

[54] It has been pointed out in literature that defining notions with the use of terms expressed in monetary nominal values violates one of the key functions of the criminal law, i.e. the guarantee function (P.M. Dudek, *Inflacja pieniądza a prawo karne*, Państwo i Prawo No. 10, 2014, pp. 68–84).

[55] Decision of the Court of Appeal in Lublin of 22 December 1998, II AKz 118/98, LEX No. 62576; judgment of the Court of Appeal in Warsaw of 21 June 2013, II AKa 180/13, LEX No. 1342393; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit*., p. 448; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit*., p. 787; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit*., p. 900; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1300; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny*, *op. cit*., p. 1748.

[56] Judgment of the Court of Appeal in Katowice of 30 August 2011, II AKa 295/11, LEX No. 1102916.

the crime. At the same time, this is the value of the subject agreed by the parties in the agreements binding on them, provided that such agreements have been concluded. It is unreasonable to increase this value, for example, by adding VAT to it in case of professional trade between entities that are engaged in business activity and are VAT payers.[57]

In the case of a continuous offence, the values of the property affected by subsequent conduct are added together.[58] In case the crime has been committed in the form of complicity, the total value of the property is taken into account, and is not divided into the number of accomplices.[59]

3.3. OBJECTS OF SPECIAL IMPORTANCE FOR CULTURE

An object of special importance for culture as the subject of committed act – pursuant to Article 294 § 2 of the Criminal Code – is a circumstance that qualifies for aggravation of the crimes specified in § 1 of this regulation. This is a discretionary constituent element, and it is not surprising that it provokes disputes in the legal doctrine. To identify this constituent element, it is necessary in the first place to identify cultural property. As it has been rightly noted in the judicial decisions: "To decide whether a given behaviour constitutes the crime defined in Article 278 § 1 of the Criminal Code in conjunction with Article 294 § 2 of the Criminal Code, it is necessary in the first place to identify whether the subject of the act committed is 'cultural property', and if the answer is positive, whether the object taken with the intention to misappropriate has been of a special qualified value for culture in the meaning used in Article 294 § 2 of the Criminal Code. The term 'objects of special importance for culture' used by the legislator in Article 294 § 2 of the Criminal Code indicates that there is a certain 'hierarchy' of cultural property objects only some of which are of special importance for culture, while other – regardless of their unquestioned significance for culture – do not have such a special feature. In this case the interpretive problem amounts to identifying the prerequisites that make a given object of 'special importance' for culture."[60]

In the legal doctrine, cultural property is defined, for example, as objects, means and values contributing to the material and spiritual heritage of the nation[61] or movable and immovable objects of great significance for the nation's cultural heritage, such as monuments, archaeological sites, constructions, works of art, manuscripts, books, buildings in which cultural property of the nation is stored or exhibited, and

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[57] Judgment of the Court of Appeal in Katowice of 16 January 2014, II AKa 462/13, LEX No. 1455145.

[58] M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit.*, p. 900.

[59] Judgment of the Supreme Court of 2 September 1955, I K 526/55, OSNCK 1956, No. 1, item 7; judgment of the Court of Appeal in Wrocław of 13 August 2013, II AKa 366/12, LEX No. 1369281; A. Sośnicka, *Przestępstwo i wykroczenie*, *op. cit.*, p. 117; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit.*, p. 900.

[60] Judgment of the Court of Appeal in Kraków of 27 June 2018, II AKa 90/18, LEX No. 2524972.

[61] B. Banaszak, *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, Warszawa 2009, p. 55.

centres covering a significant amount of cultural property.[62] This term is defined in Article 2(1) of the Act of 25 May 2017 on the restoration of national cultural property,[63] according to which it is "a monument as defined in Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments, a movable object which is not a monument, and also elements or components thereof the preservation of which is in the public interest, considering their artistic, historical or scientific value or their significance for cultural heritage and development." In turn, a monument – pursuant to Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments[64] – is a real estate or movable object, their elements or components, manmade or related to human activity and being proof of a past epoch or event, the preservation of which is in public interest, considering their historical, artistic or scientific value. Moreover, according to Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention and Protocol on the Protection of Cultural Property in the Event of Armed Conflict signed in the Hague on 14 May 1954,[65] cultural property is "irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above (…)." The latter definition is recognised as a model[66] and is suggested to be taken into account during the interpretation of cultural property referred to in Article 294 § 1 of the Criminal Code.[67]

This is reasonable above all because it allows covering with legal protection a wide range of property which deserves this. The fact that it has been constructed for other needs does not impede its use. As it is rightly noted in the doctrine, although the scope of the legal definition covers the area of an act in which it is included, it is also applicable in pursuance of other legal acts, provided that it is included in an act which is recognised as fundamental in a given area,[68] and this convention is viewed as such.

It is reasonably recognised in the doctrine that cultural property comprises not only material cultural objects but also intangible achievements of humanity as

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[62] G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014, p. 1145.

[63] Dz.U. 2017, item 1086, as amended.

[64] Dz.U. 2018, item 2067, as amended.

[65] Dz.U. 1957, No. 46, item 212.

[66] A. Gerecka-Żołyńska, *W kwestii definicji dobra kultury i dzieła sztuki*, Prokuratura i Prawo No. 9, 1999, p. 106; A. Księżopolska-Kukulska, *Dobra kultury jako przedmiot ochrony w prawie karnym*, Prokurator No. 2, 2007, p. 113.

[67] M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit*., p. 901; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny*, *op. cit*., p. 1300.

[68] M. Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2010, p. 212.

a value originating from the world of culture and belonging to it.[69] This can be both property of great economic value and one that has no material value.[70]

Defining the special importance of such property is more complicated. Doubtlessly, objects of special importance for culture form qualified cultural property as compared to ordinary cultural property.[71] This is property of great significance not only for Polish but also other cultures.[72] It is rightly assumed in the doctrine that this concerns property of exceptional, unique, special meaning for culture, which has exceptional value, special meaning and unique nature.[73] It is pointed out that the special nature of cultural property results from its being covered with a form of legal protection linked to listing in the register of monuments or recognition as a historic monument, or adding a given object to the world cultural heritage list.[74] However, not every monument is an object of special importance for culture, while property which is not a monument,[75] has no historic monument status, is not registered in museum stock or is not part of a library collection[76] can be recognised as such an object. It does not have to be of substantial financial value and represent a high artistic level. What is essential is that its importance for culture results from the historical or cultural role of a given object.[77] Adding the monument to the UNESCO World Cultural Heritage List can be an additional criterion.[78]

It is claimed in literature that it is practically impossible to define what an object of special importance for culture is because importance for culture cannot be defined at all, and qualifying special importance versus normal importance is infeasible.[79] Therefore, it is believed that regulations which cannot be precisely formulated by the legislator should not be in force because a citizen cannot be required to be aware of the scope of criminal prohibition and to comply with it if they are unable to determine its boundaries on their own.[80]

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[69] A. Przyborowska-Klimczak, *Dobro kultury*, [in:] K. Zeidler (ed.), *Leksykon prawa ochrony zabytków*, Warszawa 2010, p. 31.

[70] B. Michalski, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny*, *op. cit.*, p. 1272; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit.*, p. 790.

[71] G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny*, *op. cit.*, p. 1145.

[72] W. Radecki, *Ochrona dóbr kultury w nowym kodeksie karnym*, Prokuratura i Prawo No. 2, 1998, p. 17.

[73] M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit.*, p. 450; A. Marek, *Kodeks karny*, *op. cit.*, p. 622; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit.*, p. 901.

[74] M. Trzciński, *Przestępczość przeciwko zabytkom*, Prokuratura i Prawo No. 6, 2011, p. 44.

[75] M. Trzciński, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna*, Warszawa 2010, p. 19; K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Warszawa 2007, pp. 42–58; W. Sieroszewski, *Ochrona prawna dóbr kultury w Polsce*, Warszawa 1971, p. 17.

[76] M. Kulik, *Przestępstwo i wykroczenia uszkodzenia rzeczy*, Lublin 2005, pp. 204–205.

[77] E.W. Pływawczewski, E.M. Guzik-Makaruk, [in:] M. Filar (ed.), *Kodeks karny*, *op. cit.*, p. 1544; L. Wilk, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny*, *op. cit.*, p. 788.

[78] Judgment of the Court of Appeal in Kraków of 27 June 2018, II AKa 90/18, LEX No. 2524972; G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny*, *op. cit.*, p. 1145.

[79] J. Pruszyński, *Dziedzictwo kultury Polski: jego straty i ochrona prawna*, Vol. 2, Kraków, 2001, pp. 604–605; a critical view on this issue is also presented in J. Kaczmarek, M. Kierszka, *Pojęcia „mienie w wielkich rozmiarach", „zniszczenie w świecie roślinnym lub zwierzęcym w znacznych rozmiarach" oraz „dobra o szczególnym znaczeniu dla kultury" w kodeksie karnym*, Prokuratura i Prawo No. 3, 2000, pp. 116–119.

[80] W. Radecki, *Ochrona dóbr kultury*, *op. cit.*, p. 17.

Given this constituent element, the question arises as to whether in the case where the value of the property of special importance for culture does not exceed the value which sets the boundary between a crime and an offence, i.e. PLN 500, as regards theft (Article 278 § 1 or § 3 Criminal Code, Article 119 § 1 Polish Code of Petty Offences[81]), misappropriation (Article 284 § 1 Criminal Code and Article 119 § 1 Code of Petty Offences) and object damaging (Article 288 § 1 or § 3 Criminal Code, Article 124 § 1 Code of Petty Offences), Article 294 § 2 of the Criminal Code is applicable. Different standpoints on this issue have been presented in literature.

There is a view that stricter liability concerns each of the crimes specified in Article 294 § 2 in conjunction with § 1 of the Criminal Code if the subject of the prohibited act is an object of special importance for culture, regardless of its financial value.[82]

It is also assumed that in the case of acts which can be classified as both crimes and petty offences the qualification under Article 294 § 2 of the Criminal Code may only take place when the value of the object or damage exceeds the threshold separating the crime from the petty offence.[83] It is argued that Article 294 § 2 of the Criminal Code is only applicable when an act has all the constituent elements of the crime defined under Article 278 § 1 or Article 284 § 1 or Article 288 § 1 or § 3 of the Criminal Code and not of the petty offence defined under Article 119 § 1 or Article 124 § 1 of the Code of Petty Offences, respectively. Article 294 § 2 of the Criminal Code, due to its being linked to § 1, concerns only the crimes specified in the latter regulation. It is rightly emphasised that what decides on the aggravation under Article 294 § 2 of the Criminal Code is not the fact that a theft of an object of special importance for culture has been committed but that this theft is aggravated under Article 278 § 1 of the Criminal Code.[84] An act which is not a basic crime cannot be qualified as an aggravated crime.[85] Therefore, it is rightly argued in judicial decisions that: "Theft of an object of importance for culture which has no special nature the value of which exceeds the contraventionalisation threshold shall be a petty offence as defined under Article 278 § 1 of the Criminal Code, considering the value of the property. Thus, only the actions covering objects of importance for culture but not of special importance for culture and whose value does not exceed the value which determines the contraventionalisation threshold are petty offences."[86]

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[81] Act of 20 May 1971, Dz.U. 1971, No. 12, item 114, as amended.

[82] J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998, p. 509; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit.*, p. 449.

[83] M. Kulik, *Przestępstwo i wykroczenie*, *op. cit.*, p. 160.

[84] W. Radecki, *Ochrona zabytków w polskim, czeskim i słowackim prawie karnym*, Prokuratura i Prawo No. 4, 2012, p. 24.

[85] B. Gadecki, *Kontrowersje wokół odpowiedzialności za zniszczenie lub uszkodzenie dobra o szczególnym znaczeniu dla kultury*, Ius Novum No. 4, 2013, p. 23.

[86] Judgment of the Court of Appeal in Kraków of 27 June 2018, II AKa 90/18, LEX No. 2524972.

4. LEGAL QUALIFICATION OF AN ACT

The manner in which aggravated types of crimes are construed in Article 294 § 1 and § 2 of the Criminal Code also affects the legal qualification of criminal acts. It is insufficient to refer only to Article 294 § 1 or § 2 of the Criminal Code because this provision does not determine the constituent elements of any type of a prohibited act as this is defined in the regulation to which reference is made. It is rightly indicated in the judicature that: "The provision of Article 294 § 1 of the Criminal Code does not determine itself the constituent elements of any type of a prohibited act, and therefore a crime cannot be qualified solely on the grounds of Article 294 § 1 of the Criminal Code without linking this provision to a defined basic type of crime against property."[87] Article 294 § 1 of the Criminal Code is linked to any of the regulations specified in it determining the basic type of crime. The description of an aggravated type is provided for in two provisions which should be considered jointly during the interpretation of its constituent elements. Therefore, a complex legal qualification is necessary based on the regulation which determines the basic type of a given crime and Article 294 of the Criminal Code.[88] The Supreme Court rightly argues that it is impossible to qualify a crime solely on the grounds of Article 294 § 1 of the Criminal Code without linking this provision to a certain basic type of crime against property.[89] In the legal qualification of the crime known as theft of an object of substantial value, reference should be made to Article 278 § 1 in conjunction with Article 294 § 1 of the Criminal Code. When additionally this is an object of special importance for culture, the legal qualification should be as follows: Article 278 § 1 in conjunction with Article 294 § 1 and § 2 of the Criminal Code. In case when the perpetrator commits the crime specified in Article 294 § 1 with regard to property of substantial value which is an object of special importance for culture, the cumulative qualification under Article 294 § 1 and § 2 of the Criminal Code[90] is applied.

The regulation provided in Article 294 § 1 of the Criminal Code containing an aggravating constituent element with regard to the crime specified therein cannot be in cumulative concurrence with the basic provision determining the statutory constituent

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[87] Judgment of the Court of Appeal in Wrocław of 22 August 2018, II AKa 229/18, LEX No. 2556682; judgment of the Court of Appeal in Wrocław of 23 September 2016, II AKa 274/16, LEX No. 2171230; judgment of the Court of Appeal in Warsaw of 21 September 2016, II AKa 210/16, LEX No. 2171261; judgment of the Court of Appeal in Warsaw of 13 July 2016, II AKa 196/16, LEX No. 2171262; judgment of the Court of Appeal in Warsaw of 30 June 2016, II AKa 177/16, LEX No. 2171258; judgment of the Court of Appeal in Warsaw of 19 April 2016, II AKa 262/15, LEX No. 2112343; judgment of the Court of Appeal in Wrocław of 27 March 2013, II AKa 72/13, LEX No. 1313479; judgment of the Court of Appeal in Kraków of 7 June 2001, II AKa 107/01, KZS 2001, No. 7–8, item 46; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit*., p. 479; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny*, *op. cit*., p. 1299.

[88] Judgment of the Court of Appeal in Katowice of 29 June 1999, II AKa 179/99, OSA 2000, No. 7–8, item 52; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit*., p. 479; G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny*, *op. cit*., p. 1145.

[89] Judgment of the Supreme Court of 23 January 2002, V KKN 497/99, Prokuratura i Prawo – insert 2002, No. 5, item 2.

[90] G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny*, *op. cit*., p. 1145.

elements of a given crime.[91] It is aptly emphasised in the jurisprudence that cumulative qualification may never concern cases of complex qualification when constituent elements of one type of a prohibited act are determined in two or more regulations.[92]

Article 294 § 1 of the Criminal Code can be applied in the legal qualification pertaining to a sequence of crimes and be used as grounds for sentencing and imposing a penalty in case when each of the crimes concerns property of substantial value.[93] The aggregate value of the property against which the crimes have been committed exceeding the substantial value threshold is not sufficient to apply this regulation in the case of a sequence of crimes.[94] A sequence of crimes does not take place in the case of committing crimes which have the constituent elements of the basic and aggravated types of the crime because the identical legal qualification is required under Article 91 § 1 of the Criminal Code.[95]

In the case of sentencing for a crime specified in Article 294 § 1 of the Criminal Code concerning property of substantial value, the penalty is imposed solely on the grounds of the regulation provided in Article 294 § 1 of the Criminal Code.[96]

To qualify the crime as aggravated under Article 294 § 1 of the Criminal Code, it is required that the accomplice also has acted intentionally and that the value of the financial benefit achieved exceeds PLN 200,000.[97]

The perpetrator's direct intention concerns illegal obtaining of the property *per se* (Article 278 § 1 Criminal Code), while the substantial value of the property (Article 294 § 1 Criminal Code) can be part of the possible intention.[98]

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[91] Judgment of the Court of Appeal in Warsaw of 13 August 2014, II AKa 213/14, LEX No. 1504518; judgment of the Court of Appeal in Wrocław of 27 March 2013, II AKa 72/13, LEX No. 1313479; judgment of the Court of Appeal in Katowice of 3 March 2011, II AKa 42/11, LEX No. 846484; judgment of the Court of Appeal in Katowice of 19 October 2006, II AKa 145/06, Prokuratura i Prawo – insert 2007, No. 6, item 35; judgment of the Court of Appeal in Kraków of 7 June 2001, II AKa 107/01, LEX No. 49489; judgment of the Court of Appeal in Kraków of 7 June 2001, II AKa 107/01, Prokuratura i Prawo – insert 2002, No. 5, item 19.

[92] M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit*., p. 489.

[93] Judgment of the Supreme Court of 11 March 2008, III KK 523/07, Prokuratura i Prawo – insert 2008, No. 6, item 10; judgment of the Supreme Court of 2 February 2007, V KK 133/06, OSNKW 2007, No. 3, item 27 with an approving gloss by J. Potulski, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa, 2007, No. 4, pp. 143–148; M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny*, *op. cit*., p. 483; M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny*, *op. cit*., p. 900; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny*, *op. cit*., p. 1299; T. Oczkowski, [in:] R.A. Stefański (ed.), *Kodeks karny*, *op. cit*., p. 1748.

[94] Judgment of the Court of Appeal in Kraków of 8 April 1999, II AKa 34/99, KZS 1999, No. 5, item 32.

[95] M. Dąbrowska-Kardas, P. Kardas, *Czyn ciągły i ciąg przestępstw: komentarz do art. 12 i 91 Kodeksu karnego*, Kraków 1999, p. 92; M. Gajewski, *Glosa do uchwały SN z dnia 11 sierpnia 2000 r., I KZP 17/2000*, OSP 2001, No. 9, item 123; *idem*, *W sprawie tożsamości kwalifikacji prawnej jako koniecznej przesłanki uznania, że przestępstwa zostały popełnione w warunkach ciągu przestępstw*, Przegląd Sądowy No. 11–12, 2000, p. 115 et seq.; J. Lachowski, *Glosa do uchwały SN z dnia 11 sierpnia 2000 r., I KZP 17/2000*, Monitor Prawniczy No. 16, 2001, p. 845 et seq.

[96] Judgment of the Court of Appeal in Katowice of 3 February 2011, II AKa 457/10, LEX No. 846490; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny*, *op. cit*., p. 1299.

[97] Judgment of the Court of Appeal in Warsaw of 18 November 2015, II AKa 315/15, LEX No. 2009533.

[98] Judgment of the Court of Appeal in Warsaw of 29 October 2014, II AKa 213/14, LEX No. 1713034.

5. CONCLUSIONS

1) The circumstances which under the Criminal Code cause aggravation of crimes against property as regards the subject of the act committed are: an entrusted movable object (Article 284 § 2), property of substantial value (Article 289 § 2, Article 294 § 1) and objects of special importance for culture (Article 294 § 2).
2) An entrusted object is an aggravating circumstance in the case of the crime defined as misappropriation of property (Article 284 § 2 Criminal Code). An entrusted object is one which has been handed over to the perpetrator with the power of disposal, subject to the obligation to return it. It is in the perpetrator's possession before being misappropriated.
3) Property of substantial value or an object of special importance for culture – pursuant to Article 294 § 1 and § 2 of the Criminal Code – is a constituent element aggravating some crimes against property under the Criminal Code listed in Article 294 § 1, namely: theft of another person's movable object (Article 278 § 1), theft of computer software (Article 278 § 2), misappropriation of another person's movable object or property right (Article 284 § 1), misappropriation (Article 284 § 2), switching into a telecommunication device (Article 285 § 1), fraud (Article 286 § 1), computer fraud (Article 287 § 1), destroying, damaging or making useless another person's property (Article 288 § 1), breaking or damaging a submarine cable or violating regulations applicable in the case of laying or repairing such cables (Article 288 § 3) and intentional handling stolen goods (Article 291 § 1). The list of the regulations defining the basic types of the crimes is exhaustive (*numerus clausus*), and this regulation may not be applied to other crimes against property.
4) Property of substantial value is property the value of which at the time of committing of the prohibited act exceeds PLN 200,000 (Article 115 § 5 Criminal Code). The value of the property being the subject of the prohibited act should be calculated as of the time of committing the act and not at the time of passing the judgment.
5) Cultural property as referred to in Article 294 § 2 of the Criminal Code has the same meaning as in the definition provided in Article 2(1) of the Act of 25 May 2017 on the restoration of national cultural property, pursuant to which this is "a monument as defined in Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments, a movable object which is not a monument, and also elements or components thereof the preservation of which is in the public interest, considering their artistic, historical or scientific value or their significance for cultural heritage and development." One argument for giving it this meaning is the fact that it is determined in an act which is recognised as fundamental as regards cultural property.
6) When performing the legal qualification of an aggravated crime due to substantial value of the property or its being an object of special importance for culture, it is insufficient to refer to Article 294 § 1 or § 2 of the Criminal Code alone because this regulation does not define the constituent elements of any prohibited act, and it is necessary to also indicate the regulation defining the basic type.

BIBLIOGRAPHY

Andrejew I., *Polskie prawo karne w zarysie*, Warszawa 1989.
Andrejew I., Świda W., Wolter W., *Kodeks karny z komentarzem*, Warszawa 1973.
Banaszak B., *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, Warszawa 2009.
Bojarski A. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2010.
Bojarski T., *Odmiany podstawowych typów przestępstw w polskim prawie karnym*, Warszawa 1982.
Buchała K., *Odpowiedzialność za przestępstwa kwalifikowane przez następstwa czynu*, Wojskowy Przegląd Prawniczy No. 1, 1972.
Buchała K., *Prawo karne materialne*, Warszawa 1989.
Dąbrowska-Kardas M., Kardas P., *Czyn ciągły i ciąg przestępstw: komentarz do art. 12 i 91 Kodeksu karnego*, Kraków 1999.
Dąbrowska-Kardas M., Kardas P., [in:] A. Zoll (ed.), *Kodeks karny. Komentarz*, Vol. III, Warszawa 2013.
Dermont A., *Ustawowa zamiana „mienia" na „rzecz" w kodeksie karnym*, Prokuratura i Prawo No. 9, 2003.
Dudek P.M., *Inflacja pieniądza a prawo karne*, Państwo i Prawo No. 10, 2014.
Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2016.
Fredrich-Michalska I., Stachurska-Marcińczak B. (eds), *Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warszawa 1997.
Gadecki B., *Kontrowersje wokół odpowiedzialności za zniszczenie lub uszkodzenie dobra o szczególnym znaczeniu dla kultury*, Ius Novum No. 4, 2013.
Gajewski M., *W sprawie tożsamości kwalifikacji prawnej jako koniecznej przesłanki uznania, że przestępstwa zostały popełnione w warunkach ciągu przestępstw*, Przegląd Sądowy No. 11–12, 2000.
Gajewski M., *Glosa do uchwały SN z dnia 11 sierpnia 2000 r., I KZP 17/2000*, OSP No. 9, 2001.
Gardocki L., *Prawo karne*, Warszawa 2017.
Gerecka-Żołyńska A., *W kwestii definicji dobra kultury i dzieła sztuki*, Prokuratura i Prawo No. 9, 1999.
Góral R., *Kodeks karny. Praktyczny komentarz*, Warszawa 2007.
Górniok O., Hoc S., Kalitowski M., Przyjemski S.M., Sienkiewicz Z., Szumski J., Tyszkiewicz L., Wąsek A., *Kodeks karny. Komentarz*, Vol. II, Gdańsk 2005.
Grześkowiak A. (ed.), *Prawo karne*, Warszawa 2009.
Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, Warszawa 2018.
Jagiełło D., *Prawo karne materialne*, Skierniewice 2013.
Kaczmarek J., Kierszka M., *Pojęcia „mienie w wielkich rozmiarach", „zniszczenie w świecie roślinnym lub zwierzęcym w znacznych rozmiarach" oraz „dobra o szczególnym znaczeniu dla kultury" w kodeksie karnym*, Prokuratura i Prawo No. 3, 2000.
Kardas P., *Prawnokarna ochrona informacji w polskim prawie karnym z perspektywy przestępstw komputerowych. Analiza dogmatyczna i strukturalna w świetle aktualnie obowiązującego stanu prawnego*, Czasopismo Prawa Karnego i Nauk Penalnych No. 1, 2000.
Kochanowski J., *Przestępstwa kwalifikowane przez następstwa w kodeksie karnym*, Państwo i Prawo No. 1, 1972.
Konieczniak K., *Uwagi o pojmowaniu typów zmodyfikowanych*, [in:] J. Giezek, J. Brzezińska (eds), *Zmodyfikowane typy przestępstw w teorii i praktyce sądowej*, Warszawa 2017.
Księżopolska-Kukulska A., *Dobra kultury jako przedmiot ochrony w prawie karnym*, Prokurator No. 2, 2007.
Kulik M., *Przestępstwo i wykroczenia uszkodzenia rzeczy*, Lublin 2005.
Kulik M., [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2017.

Lachowski J., *Glosa do uchwały SN z dnia 11 sierpnia 2000 r., I KZP 17/2000*, Monitor Prawniczy No. 6, 2001.
Lachowski J., [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
Łabuda G., [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014.
Makarewicz J., *Kodeks karny z komentarzem*, Lwów 1938.
Marek A., *Prawo karne*, Warszawa 2009.
Marek A., *Kodeks karny. Komentarz*, Warszawa 2010.
Marek A., Lachowski J., *Prawo karne. Zarys problematyki*, Warszawa 2011.
Michalski B., [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny. Część szczególna. Komentarz do art. 222–316*, Vol. II, Warszawa 2010.
Mocarska D., *Wybrane zagadnienia prawa karnego materialnego*, Szczytno 2013.
Mozgawa M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2017.
Oczkowski T., [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
Pleńska D., Górniok O., [in:] I. Andrejew, L. Kubicki, J. Waszczyński (eds), *System prawa karnego. O przestępstwach w szczególności*, Vol. IV, part II, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1989.
Pływaczewski E., [in:] A. Marek (ed.), *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1986.
Pruszyński J., *Dziedzictwo kultury Polski: jego straty i ochrona prawna*, Vol. 2, Kraków 2001.
Przyborowska-Klimczak A., *Dobro kultury*, [in:] K. Zeidler (ed.), *Leksykon prawa ochrony zabytków*, Warszawa 2010.
Radecki W., *Ochrona dóbr kultury w nowym kodeksie karnym*, Prokuratura i Prawo No. 2, 1998.
Radecki W., *Ochrona zabytków w polskim, czeskim i słowackim prawie karnym*, Prokuratura i Prawo No. 4, 2012.
Sieroszewski W., *Ochrona prawna dóbr kultury w Polsce*, Warszawa 1971.
Sośnicka A., *Przestępstwo i wykroczenie przywłaszczenia w polskim prawie karnym*, Warszawa 2013.
Stefański R.A., *A review of resolutions of the Criminal Chamber of the Supreme Court concerning material penal law for 1991–1993*, Wojskowy Przegląd Prawniczy No. 3–4, 1994.
Stefański R.A., *Prawo karne materialne. Część szczególna*, Warszawa 2009.
Surkont M., *Prawo karne*, Bydgoszcz–Gdynia 2001.
Szwarczyk M., [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2006.
Śliwiński S., *Polskie prawo karne*, Warszawa 1946.
Śliwowski J., *Prawo karne*, Warszawa 1975.
Świda W., *Prawo karne*, Warszawa 1989.
Trzciński M., *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna*, Warszawa 2010.
Trzciński M., *Przestępczość przeciwko zabytkom*, Prokuratura i Prawo No. 6, 2011.
Wilk L., [in:] T. Dukiet-Nagórska (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warszawa 2014.
Wilk L., [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz. Art. 222–316*, Warszawa 2017.
Wojciechowski J., *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998.
Wolter W., *Z rozważań nad kwalifikowanymi typami przestępstw*, Państwo i Prawo No. 8–9, 1972.
Zeidler K., *Prawo ochrony dziedzictwa kultury*, Warszawa 2007.
Zgoliński, I., [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018.
Zgółkowa H. (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 31, Poznań 2001.
Zieliński M., *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2010.

AGGRAVATION OF CRIMES AGAINST PROPERTY DUE TO FEATURES OF THE SUBJECT OF COMMITTED ACT

Summary

This article discusses aggravated types of crime against property considering the features of the act committed. This concerns an entrusted movable object (Article 284 § 2 of the Polish Criminal Code), property of substantial value (Article 289 § 2, Article 294 § 1 Criminal Code) and objects of special importance for culture (Article 294 § 2 Criminal Code). Interpretation of these constituent elements has been provided by making references to views presented by the representatives of the legal doctrine and in case law. The author assumes that an entrusted object is one which has been handed over to the perpetrator with the power of disposal, subject to the obligation to return it. It is in the perpetrator's possession before being misappropriated. Property of substantial value or an object of special importance for culture – pursuant to Article 294 § 1 and § 2 of the Criminal Code – is a constituent element aggravating some crimes against property under the Criminal Code listed in Article 294 § 1, namely: theft of another person's movable object (Article 278 § 1), theft of computer software (Article 278 § 2), misappropriation of another person's movable object or property right (Article 284 § 1), misappropriation (Article 284 § 2), switching into a telecommunication device (Article 285 § 1), fraud (Article 286 § 1), computer fraud (Article 287 § 1), destroying, damaging or making useless of another person's property (Article 288 § 1), breaking or damaging a submarine cable or violating regulations applicable in the case of laying or repairing such cables (Article 288 § 3) and intentional handling stolen goods (Article 291 § 1). The list of the regulations defining the basic types of the crimes is exhaustive (*numerus clausus*), and this regulation may not be applied to other crimes against property. Property of substantial value is property the value of which at the time of committing of the prohibited act exceeds PLN 200,000 (Article 115 § 5 Criminal Code). The value of the property being the subject of the prohibited act should be calculated as of the time of committing the act and not the time of passing the judgment. In the author's opinion, cultural property has the same meaning as in the definition provided in Article 2(1) of the Act of 25 May 2017 on the restoration of national cultural property, pursuant to which this is "a monument as defined in Article 3(1) of the Act of 23 July 2003 on the protection and care of monuments, a movable object which is not a monument, and also elements or components thereof the preservation of which is in the public interest, considering their artistic, historical or scientific value or their significance for cultural heritage and development." One argument for giving it this meaning is the fact that it is determined in the act which is recognised as fundamental as regards cultural property.

Keywords: object of special importance for culture, property of substantial value, subject of the act committed, aggravated crime, entrusted object, basic type of crime, aggravating constituent element

TYPY KWALIFIKOWANE PRZESTĘPSTW PRZECIWKO MIENIU ZE WZGLĘDU NA WŁAŚCIWOŚCI PRZEDMIOTU CZYNNOŚCI WYKONAWCZEJ

Streszczenie

Przedmiotem artykułu są typy kwalifikowane przestępstw przeciwko mieniu ze względu na właściwości przedmiotu czynności wykonawczej. Chodzi o powierzoną rzecz ruchomą (art. 284 § 2 k.k.), mienie znacznej wartości (art. 289 § 2, art. 294 § 1 k.k.) oraz dobro o szcze-

gólnym znaczeniu dla kultury (art. 294 § 2 k.k.). Została dokonana wykładnia tych znamion z odwołaniem do wypowiedzi w doktrynie i judykaturze. Autorka przyjmuje, że rzeczą powierzoną jest ta, która została przekazana sprawcy we władanie z obowiązkiem zwrotu. Znajduje się ona w posiadaniu sprawcy przed dokonaniem jej przywłaszczenia. Mienie znacznej wartości lub dobro o szczególnym znaczeniu dla kultury – zgodnie z art. 294 § 1 i 2 k.k. – jest znamieniem kwalifikującym niektórych przestępstw przeciwko mieniu, enumeratywnie wymienionych w art. 294 § 1 k.k., a mianowicie: kradzieży cudzej rzeczy ruchomej (art. 278 § 1 k.k.), kradzieży programu komputerowego (art. 278 § 2 k.k.), przywłaszczenia cudzej rzeczy ruchomej lub prawa majątkowego (art. 284 § 1 k.k.), sprzeniewierzenia (art. 284 § 2 k.k.), włączenia się do urządzenia telekomunikacyjnego (art. 285 § 1 k.k.), oszustwa (art. 286 § 1 k.k.), oszustwa komputerowego (art. 287 § 1 k.k.), zniszczenia cudzej rzeczy, uszkodzenia lub uczynienia jej niezdatną do użytku (art. 288 § 1 k.k.), przerwania lub uszkodzenia kabla podmorskiego albo naruszenia przepisów obowiązujących przy zakładaniu lub naprawie takiego kabla (art. 288 § 3 k.k.) i umyślnego paserstwa (art. 291 § 1 k.k.). Wyliczenie przepisów określających podstawowe typy przestępstw jest wyczerpujące (*numerus clausus*) i przepis ten nie może być zastosowany do innych przestępstw przeciwko mieniu. Mieniem znacznej wartości jest mienie, którego wartość w czasie popełnienia czynu zabronionego przekracza 200 000 zł (art. 115 § 5 k.k.). Wartość mienia stanowiącego przedmiot czynu winna być liczona w odniesieniu do czasu popełnienia czynu, a nie odniesiona do czasu orzekania. Dobro kultury, zdaniem autorki, ma takie samo znaczenie, jakie nadano mu w definicji zawartej w art. 2 pkt 1 ustawy z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury, w myśl której oznacza ono „zabytek w rozumieniu art. 3 pkt 1 ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami, rzecz ruchomą niebędącą zabytkiem, a także ich części składowe lub zespoły, których zachowanie leży w interesie społecznym ze względu na ich wartość artystyczną, historyczną lub naukową, lub ze względu na ich znaczenie dla dziedzictwa i rozwoju kulturalnego". Za nadaniem takiego znaczenia przemawia zamieszczenie definicji w ustawie uważanej za podstawową w dziedzinie dóbr kultury.

Słowa kluczowe: dobro o szczególnym znaczeniu dla kultury, mienie znacznej wartości, przedmiot czynności wykonawczej, przestępstwo kwalifikowane, rzecz powierzona, typ podstawowy przestępstwa, znamię kwalifikujące

TIPOS AGRAVADOS DE DELITOS CONTRA EL PATRIMONIO DEBIDO A LAS CARACTERÍSTICAS DE SUJETO PASIVO

Resumen

El artículo versa sobre tipos agravados de delitos contra el patrimonio debido a las características de sujeto pasivo. Se trata de bien mueble depositado (art. 284 § 2 del código penal), bien de valor importante (art. 289 § 2, art. 294 § 1 del código penal) y bien de una importancia especial para la cultura (art. 294 § 2 del código penal). Se presenta la interpretación de elementos citando la doctrina y jurisprudencia. La autora entiende que el bien depositado es un bien entregado al autor de delito para su dominio, con la obligación de devolverlo. Se encuentra en la posesión del autor de delito antes de su usurpación. El bien de valor importante o y bien de una importancia especial para la cultura – de acuerdo con el art. 294 § 1 y 2 del código penal – es elemento agravante de algunos delitos contra el patrimonio, enumerados en el art. 294 § 1 del código penal, o sea: hurto de bien mueble ajeno (art. 278 § 1 del código penal), hurto de programa de ordenador (art. 278 § 2 del código penal), usurpación de bien mueble ajeno

o de derecho real (art. 284 § 1 del código penal), malversación (art. 284 § 2 del código penal), conexión al dispositivo de telecomunicación (art. 285 § 1 del código penal), fraude (art. 286 § 1 del código penal), fraude informático (art. 287 § 1 del código penal), destrucción de bien ajeno, deterioro o su inutilidad (art. 288 § 1 del código penal), corte o deterioro de cable submarino o infracción de regulación aplicable a la hora de su instalación o reparación (art. 288 § 3 del código penal) y encubrimiento doloso (art. 291 § 1 del código penal). La enumeración de preceptos que prescriben tipos básicos es exhaustiva (numerus clausus) y este elemento agravante no puede aplicarse a otros delitos contra el patrimonio. El bien de valor importante es un bien cuyo valor a la hora de la comisión de delito no excede 200 000 PLN (art. 115 § 5 del código penal). El valor de bien – objeto de delito – ha de calcularse teniendo en cuenta el momento de la comisión de delito y no el momento de la sentencia. El bien cultural, según la autora, tiene el mismo significado que su definición contenida en el art. 2 punto 1 de la ley de 25 de mayo de 2017 sobre restitución de bienes culturales nacionales, según la cual es "el monumento definido en art. 3 punto 1 de la ley de protección de monumentos y su cuidado, bien mueble que no sea monumento, sus partes integrantes o complejos cuya preservación está en interés social, debido a su valor artístico, histórico o científico o debido a su importancia para el patrimonio y desarrollo cultural". Este significado es fundado, ya que la definición está en la ley primordial en cuanto a los bienes culturales.

Palabras claves: bien de una importancia especial para la cultura, bien de valor importante, sujeto pasivo, tipo agravado, bien depositado, tipo básico de delito, elemento agravante

ВИДЫ КВАЛИФИЦИРОВАННЫХ ПРЕСТУПЛЕНИЙ ПРОТИВ СОБСТВЕННОСТИ ПО СВОЙСТВАМ ПРЕДМЕТА ИСПОЛНИТЕЛЬНОГО ПРОИЗВОДСТВА

Резюме

В статье рассмотрены виды квалифицированных преступлений против собственности по свойствам предмета исполнительного производства. Речь идет о доверенном предмете движимого имущества (ст. 284 § 2 УК), об имуществе, представляющем значительную ценность (ст. 289 § 2, ст. 294 § 1 УК), а также о предметах, имеющих особое культурное значение (ст. 294 § 2 УК). Предложено толкование этих квалифицирующих признаков со ссылками на высказывания по данному вопросу, имеющиеся в правовой доктрине и судебной практике. Автор исходит из того, что доверенным имуществом является такое имущество, которое было передано во владение обвиняемому с обязательством возврата. Таким образом, до момента незаконного присвоения имущество находится в распоряжении обвиняемого. Согласно ст. 294 § 1 и 2 УК, имущество, представляющее значительную ценность и предметы, имеющие особое культурное значение, являются квалифицирующим признаком некоторых преступлений против собственности, перечисленных в ст. 294 § 1 УК, а именно: кража чужого движимого имущества (ст. 278 § 1 УК), кража компьютерной программы (ст. 278 § 2 УК), незаконное присвоение чужого движимого имущества или имущественного права (ст. 284 § 1 УК), растрата (ст. 284 § 2 УК), незаконное подключение к телекоммуникационному устройству (ст. 285 § 1 УК), мошенничество (ст. 286 § 1 УК), компьютерное мошенничество (ст. 287 § 1 УК), уничтожение, повреждение или приведение в негодность предмета, принадлежащего другому лицу (ст. 288 § 1 УК), обрыв или повреждение подводного кабеля или нарушение правил прокладки или ремонта такого кабеля (ст. 288 § 3 УК), умышленный оборот краденым (ст. 291 § 1 УК). Данный перечень неквалифицированных видов преступлений является исчерпывающим (*numerus clausus*), поэтому

рассматриваемые квалифицирующие признаки не могут применяться к другим преступлениям против собственности. Имуществом, представляющим значительную ценность, считается такое имущество, стоимость которого на момент совершения запрещенного действия превышает 200 000 злотых (ст. 115 § 5 УК). Стоимость имущества, являющегося объектом преступления, должна исчисляться на момент совершения запрещенного действия, а не на момент вынесения приговора. По мнению автора, предмет, представляющий особое культурное значение, должен пониматься в соответствии с определением, содержащимся в ст. 2 п. 1 Закона О реституции национальных культурных ценностей, согласно которому он определяется как «памятник культуры в значении ст. 3 п. 1 Закона О защите и сохранении памятников старины, движимый объект, не являющийся памятником, а также их составные части или комплексы, сохранение которых отвечает общественным интересам в силу их художественной, исторической или научной ценности либо ввиду их значения для культурного наследия и развития». В пользу использования данного определения говорит тот факт, что оно содержится в законе, который считается основополагающим в области охраны культурных ценностей.

Ключевые слова: предметы имеющие особое культурное значение, имущество представляющее значительную ценность, предмет исполнительного производства, квалифицированное преступление, доверенное имущество, неквалифицированное преступление, квалифицирующий признак

DIE STRAFTATBESTÄNDE DER EIGENTUMS- ODER VERMÖGENSDELIKTE IM HINBLICK AUF DIE MERKMALE DES GEGENSTANDS DER STRAFBAREN HANDLUNG

Zusammenfassung

Gegenstand des Artikels sind die Straftatbestände des Eigentums- oder Vermögensdelikts im Hinblick auf die Merkmale des Gegenstands der Tat. Dabei geht es um anvertraute beweglichen Sachen (Artikel 284 § 2 des polnischen Strafgesetzbuches), Eigentum von erheblichem Wert (Artikel 289 § 2, Artikel 294 § 1 des polnischen Strafgesetzbuches) und Güter von besonderer Bedeutung für die Kultur (Artikel 294 § 2 des polnischen Strafgesetzbuches). Es wurde eine Auslegung dieser Tatbestandsmerkmale mit Verweis auf die Rechtsprechung und das rechtswissenschaftliche Schrifttum vorgenommen. Die Autorin geht davon aus, dass die anvertraute Sache dem Täter mit der Pflicht zur Rückgabe zum Besitz übertragen wird. Diese Sache befindet sich also in seinem Besitz, bevor der Täter sie sich widerrechtlich aneignet. Eigentum von erheblichem Wert oder besonders wertvolles Kulturgut, d.h. Güter von besonderer Bedeutung für die Kultur sind – gemäß Artikel 294 § 1 und 2 des polnischen Strafgesetzbuches – Tatmerkmal mehrerer in Artikel 294 § 1 des polnischen Strafgesetzbuches abschließend aufgezählter Eigentums- oder Vermögensdelikte und zwar von: Diebstahl einer fremden beweglichen Sache (Artikel 278 § 1 des polnischen Strafgesetzbuches), Diebstahl von Computersoftware (Artikel278 § 2 des polnischen Strafgesetzbuches), widerrechtliche Aneignung einer fremden beweglichen Sache oder von fremdem Eigentum (Artikel 284 § 1 des polnischen Strafgesetzbuches), Unterschlagung (Artikel 284 § 2 des polnischen Strafgesetzbuches), Anschluss an ein fremdes Telekommunikationsgerät – Telekommunikationsbetrug (Artikel 285 § 1 des polnischen Strafgesetzbuches), Betrug (Artikel 286 § 1 des polnischen Strafgesetzbuches), Computerbetrug (Artikel 287 § 1 des polnischen Strafgesetzbuches), Zerstörung fremden Eigentums, Beschädigung oder Unbrauchbarmachung von fremdem Eigentum (Artikel 288 § 1 des polnischen Strafgesetzbuches), Durchtrennen oder Beschädigung eines Seekabels oder Verstoß gegen die bei der Verlegung oder Instandsetzung eines solchen Kabels geltenden Vorschriften

(Artikel 288 § 3 des polnischen Strafgesetzbuches) und vorsätzliche Hehlerei (Artikel 291 § 1 des polnischen Strafgesetzbuches). Die Aufzählung der Vorschriften zu den Basisstraftaten ist abschließend (*numerus clausus*), das heißt diese Vorschrift kann nicht auf andere Vermögensdelikte angewendet werden. Eigentum von erheblichem Wert ist Vermögen mit einem Wert, der zum Zeitpunkt der Verübung der strafbaren Handlung 200.000 PLN übersteigt (Artikel 115 § 5 des polnischen Strafgesetzbuches). Der Wert des Eigentums, das Gegenstand der Zuwiderhandlung ist, wird für den Zeitpunkt der Straftatverübung, nicht aber den Zeitpunkt des Ergehens des Urteils berechnet. Kulturgüter haben nach Auffassung der Autorin die gleiche Bedeutung, wie in der Begriffsbestimmung von Artikel 2 Punkt 1 des polnischen Gesetzes vom 25. Mai 2017 über die Rückgabe von Kulturgütern (Ustawa z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury) zugewiesen. Danach handelt es sich bei Kulturgut um ein „Denkmale im Sinne von Artikel 3 Punkt 1 des polnischen Gesetzes über den Denkmalschutz und die Denkmalpflege (Ustawa o ochronie zabytków i opiece nad zabytkami), eine bewegliche Sache, die kein Denkmal ist, sowie auch deren Teile oder Zusammenfassungen von Teilen, deren Bewahrung mit Rücksicht auf ihren künstlerischen, historischen oder wissenschaftlichen Wert oder aufgrund ihrer Bedeutung für das kulturelle Erbe und die kulturelle Entwicklung im gesellschaftlichen Interesse liegt". Dafür, dass ihm eine solche Bedeutung verliehen wird, spricht, dass sie in das Gesetz aufgenommen wurden, das als grundlegend im Bereich der Kulturgüter gelten muss.

Schlüsselwörter**:** Güter von besonderer Bedeutung für die Kultur, Eigentum von erheblichem Wert, Gegenstand der Zuwiderhandlung, Straftatbestand, anvertraute Sache, Basisstraftat, Tatmerkmal

TYPES QUALIFIÉS DE CRIMES CONTRE LA PROPRIÉTÉ EN RAISON DES PARTICULARITÉES DE L'OBJET DE L'ACTE EXÉCUTIF

Résumé

Le sujet de l'article sont les types qualifiés de crimes contre la propriété en raison des particularitées de l'objet de l'acte exécutif. Il s'agit d'une chose mobilière qui nous est confiée (l'article 284 § 2 du code pénal), un bien de valeur considérable (l'article 289 § 2, l'article 294 § 1 du code pénal) et un bien revêtant une importance particulière pour la culture (l'article 294 § 2 du code pénal). Une interprétation de ces signes a été faite en référence à des déclarations en doctrine et en jurisprudence. L'auteur suppose que la chose confiée est celle qui a été remise à l'auteur en possession, avec l'obligation de la rendre. Elle est en possession de l'auteur avant qu'elle ne soit appropriée. Propriété de valeur considérable ou bien d'une importance particulière pour la culture – conformément à l'article 294 § 1 et 2 du code pénal – est un élément qualificatif de certains crimes contre la propriété, énumérés à l'article 294 § 1 du code pénal, à savoir: vol d'une chose mobilière d'autrui (l'article 278 § 1 du code pénal), vol d'un programme d'ordinateur (l'article 278 § 2 du code pénal), appropriation illicite d'une chose mobilière d'autrui ou d'un droit de la propriété (l'article 284 § 1 du code pénal), détournement (l'article 284 § 2 du code pénal), connexion à un appareil de télécommunication (l'article 285 § 1 du code pénal), fraude (l'article 286 § 1 du code pénal), fraude informatique (l'article 287 § 1 du code pénal), destruction de la propriété de quelqu'un d'autre, l'endommagement ou la rendant inutilisable (l'article 288 § 1 du code pénal), rupture ou endommagement du câble sous-marin ou violation de la réglementation en vigueur lors de la mise en place ou de la réparation d'un tel câble (l'article 288 § 3 du code pénal) et recel intentionnel (l'article 291 § 1

du code pénal). L'énumération des règles définissant les principaux types d'infractions est exhaustive (numerus clausus) et cette disposition ne peut pas être appliquée à d'autres crimes contre la propriété. Un bien de valeur considérable est un bien dont la valeur au moment de commettre un acte prohibé dépasse 200 000 PLN (l'article 115 § 5 du code pénal). La valeur des biens constituant l'objet de l'acte devrait être calculée en fonction du moment où l'infraction a été commise et non en fonction du moment où la décision a été rendue. Selon l'auteur, le bien de la culture a le même sens que dans la définition donnée à l'article 2 point 1 de la loi du 25 mai 2017 sur la restitution de biens culturels nationaux, selon laquelle c'est «un monument au sens de l'article 3 point 1 de la loi sur la protection des monuments et le soin des monuments, une chose mobilière qui n'est pas un monument, ainsi que leurs éléments constitutifs ou assemblées dont la préservation est dans l'intérêt public du fait de sa valeur artistique, historique ou scientifique, ou de sa valeur pour le patrimoine et développement culturel». Le fait qu'elle ait été inscrite dans l'acte considéré comme fondamental dans le domaine des biens culturels parle pour lui donner un tel sens.

Mots-clés: bien revêtant une importance particulière pour la culture, bien d'une valeur considérable, objet de l'acte exécutif, crime qualifié, bien confié, type de crime de base, élément qualificatif

TIPI CLASSIFICATI DI REATI CONTRO IL PATRIMONIO A MOTIVO DELLE CARATTERISTICHE DELL'OGGETTO DEL REATO

Sintesi

Oggetto dell'articolo sono i tipi classificati di reati contro il patrimonio a motivo delle caratteristiche dell'oggetto del reato. Si tratta beni mobili affidati (art. 284 § 2 del codice penale), di beni di notevole valore (art. 289 § 2, art. 294 § 1 del codice penale) o di beni culturali di particolare importanza (art. 294 § 2 del codice penale). È stata eseguita l'interpretazione di queste fattispecie con riferimento alla dottrina e alla giurisprudenza. L'autrice assume che la cosa affidata sia quella che è stata consegnata in possesso all'autore del reato, con obbligo di restituzione. Si trova in possesso dell'autore del reato prima della sua appropriazione indebita. Il bene di notevole valore o il bene culturale di particolare importanza, secondo l'art. 294 § 1 e 2 del codice penale, sono una fattispecie che comprende alcuni reati contro il patrimonio, espressamente elencati nell'art. 294 § 1 del codice penale, e in particolare: furto di un bene mobile altrui (art. 278 § 1 del codice penale), furto di un programma informatico (art. 278 § 2 del codice penale), appropriazione indebita di un bene mobile o di un diritto patrimoniale altrui (art. 284 § 1 del codice penale), appropriazione indebita di beni affidati (art. 284 § 2 del codice penale), inserimento in un dispositivo di telecomunicazioni (art. 285 § 1 del codice penale), truffa (art. 286 § 1 del codice penale), truffa informatica (art. 287 § 1 del codice penale), distruzione, danneggiamento dei beni altrui o azione di renderli inutilizzabili (art. 288 § 1 del codice penale), interruzione o danneggiamento di cavo sottomarino o violazione delle norme in vigore durante la posa e la riparazione di tale cavo (art. 288 § 3 del codice penale) e ricettazione dolosa (art. 291 § 1 del codice penale). L'elenco delle norme di legge che stabiliscono i tipi fondamentali di reati è esaustivo (*numerus clausus*) e tale norma di legge non può essere applicata ad altri reati contro il patrimonio. Bene di notevole valore è un bene il cui valore al momento del compimento del reato supera i 200 000 PLN (art. 115 § 5 del codice penale). Il valore del bene che costituisce l'oggetto del reato deve essere calcolato in riferimento al momento del compimento del reato, e non al momento della sentenza. L'espressione "bene

culturale" secondo l'autrice ha il significato che gli è stato attribuito nella definizione contenuta nell'art. 2 punto 1 della legge del 25 maggio 2017 sulla restituzione dei beni culturali nazionali, ai sensi dei quali si tratta di "un monumento ai sensi dell'art. 3 punto 1 della legge sulla tutela e la cura dei monumenti, un bene mobile che non è un monumento, e anche le sue parti o unità componenti, la cui conservazione è di interesse sociale a motivo del loro valore artistico, storico o culturale, o a motivo del loro significato per il patrimonio e lo sviluppo culturale". Depone a favore dell'attribuzione di tale significato il suo inserimento nella legge considerata fondamentale nel settore dei beni culturali.

Parole chiave: bene culturale di particolare importanza, bene di notevole valore, oggetto del reato, reato particolare, cosa affidata, tipo fondamentale di reato, fattispecie di classificazione

Cytuj jako:

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CRIMINAL-LAW QUALIFICATION OF FAILURE TO PAY SOCIAL INSURANCE CONTRIBUTIONS

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An interesting article was published in Ius Novum, Number 3 of 2016 by Krzysztof Ślebzak and Jacek Kosonoga, *Liability of a social security contribution payer for calculation, deduction and submission of social security contributions*, which covers issues that are important from theoretical and practical points of view.[1] The authors faced a very difficult task of presenting in a short paper the essence of a liability of social insurance payers who fail to comply with the obligations highlighted in the title of the study, against the background of broadly understood criminal law (Article 98 para. 1(1a) Act on social security system,[2] Article 218 § 1a Criminal Code[3]).

There is no doubt that the issue of criminal liability for failure to pay social insurance contributions is disputable and deserves to be discussed in many aspects, in particular covering legal qualification of the act of failure to pay social insurance payments. The value of the article by Krzysztof Ślebzak and Jacek Kosonoga consists in the presentation of unambiguous standpoints relating to the controversial issues. In my opinion, some of the views expressed by the authors could be argued, i.e. those relating to criminal effects of failure to pay social insurance contributions. Additionally, with respect to qualification as an offence of the behaviour of a contribution payer or a person acting on the payer's behalf consisting in failure to pay social insurance contributions, it is *de lege lata* justified to offer other interpretations. I will try to prove the above further in my study.[4]

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1 K. Ślebzak, J. Kosonoga, *Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne*, Ius Novum Vol. 10, No. 3, 2016.

2 Act of 13 October 1998 on the social security system, Dz.U. 1998, No. 137, item 887, as amended; hereinafter also Social Security Act or SSA.

3 Act of 6 June 1997: Criminal Code, Dz.U. 1997, No. 88, item 553, as amended; hereinafter Criminal Code.

4 Due to the fact that this is a polemical article, I will limit further discussion to disputing certain arguments presented by the authors, yet without focusing on the entire complex issues of criminal liability for failure to pay social insurance contributions.

1. CALCULATION, DEDUCTION AND TRANSFER OF SOCIAL INSURANCE CONTRIBUTIONS VERSUS FAILURE TO PAY SOCIAL INSURANCE

Writing about the liability of contribution payers in relation to calculating, deducting and transferring of social insurance contributions in the context of criminal liability, it should be noted that in the definition of the offence of failure to pay social insurance contributions the legislator uses the following phrase "failure to pay contributions".

In literature an assumption is made that the contribution is the price of insurance guarantee. Zakład Ubezpieczeń Społecznych (ZUS Social Insurance Institution in Poland) guarantees payment of benefits in case of occurrence of factual and legal circumstances as stipulated in the applicable Act.[5] The contribution is neither a deposit with a bank nor an investment fund but the insured's contribution to the development of a general fund covering specific risk; if an assumption is made that the risk will not affect every contributor, the individual contribution is calculated at a certain average level, distributing the burden to provide funds to cover future expenditure to members of each specific risk group.[6] Thus, the operations of ZUS are subject to certain payments to specified accounts, including payments of social insurance contributions.[7] The contributions understood as specified above are cash benefits that are mandatory, specific, payable and non-refundable.[8]

The fact that contribution payers have an obligation to calculate, settle and transfer social insurance contributions is specified in Article 17 para. 1 SSA. It should be further noted that the concept of a contribution payer under the Social Security Act is not identical to the concept of a remitter under the tax law[9] to which the legislator refers in the Social Security Act both explicitly[10] and also when establishing certain legal institutions.[11] In accordance with the Tax Ordinance,[12] tax remitters are natural persons, legal persons or unincorporated bodies, obliged in accordance with tax regulations to calculate tax and collect it from taxpayers and transfer it at the right time to the relevant tax authority.[13] The characteristic aspect of the legal structure is that the whole is charged to funds owed to taxpayers, for instance: advance payments

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[5] K. Antonów, [in:] K. Baran (ed.), *Prawo pracy i ubezpieczeń społecznych*, Warszawa 2017, p. 751; compare I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2018, p. 49.

[6] K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 751.

[7] See Article 52 para. 1 SSA and Article 54(1) SSA.

[8] I. Jędrasik-Jankowska, *Pojęcia*, *op. cit.*, pp. 53–55; T. Sowiński, *Finanse ubezpieczeń emerytalnych*, Warszawa 2008, p. 246.

[9] Cf. R. Pacud, *Zobowiązania składkowe w ubezpieczeniach społecznych a zobowiązania podatkowe*, Studia z Zakresu Prawa Pracy i Polityki Społecznej, 2012, pp. 477–488.

[10] See, in particular, Article 31 SSA.

[11] See, for instance, Article 26 SSA.

[12] Act of 29 August 1997: Tax Ordinance, Dz.U. 1997, No. 137, item 926, as amended; hereinafter Tax Ordinance.

[13] Article 8 Tax Ordinance. Naturally, social insurance contributions may not be treated as identical to taxes, see more in K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 752, and T. Sowiński, *Finanse*, *op. cit.*, pp. 248–249.

for employees' income tax are fully deducted from their remuneration for work. The situation with social insurance contributions is different. Such payments transferred by contribution payers are usually total amounts covering a portion funded by the insured and a portion funded by the contribution payer.[14] The first portion is an amount of correctly calculated retirement and disability insurance premiums and sickness insurance premiums funded by the insured, and deducted from the funds owed to the insured. The other portion is an amount covering properly calculated retirement and disability insurance premiums and occupational accident insurance premiums financed with funds that are not owed to the insured and it is the contribution payers that are obliged by law to provide these funds and transfer them to the account of ZUS.[15] The premiums are paid by transfer of an appropriate amount to the account of ZUS, i.e. a sum that is the entire contribution for each insured.[16] Failure to pay social insurance contributions within the statutory time limit is an offence under Article 98 para. 1(1a) SSA, being an offence – as rightly emphasized by K. Ślebzak and J. Kosonoga – against correct ZUS operations.[17] Thus, the operations of ZUS are primarily dependent on timely payment of social insurance contributions to specified accounts.[18] In the context of liability for the offence under the Social Security Act, it is not so much about failure to calculate, deduct or transfer the contribution but about failure to make social insurance payments; this is how the legislator identifies the subject of the obligation in Article 98 para. 1(1a) SSA.

The features of the prohibited act as defined in Article 98 para. 1(1a) SSA are complied with at the time of failure to pay even a part of social insurance contribution concerning a specific insured for a month or payment thereof after the statutory deadline.[19] The offence may be committed intentionally and unintentionally. The conduct by the offender may relate both to premiums for employees and also for other insured.[20]

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[14] If the insured pay their full contribution, they are also contribution payers within the meaning of the Social Security Act (Article 4(2)(d) SSA), but obviously they do not deduct the premiums but only calculate and transfer the contributions to ZUS (Article 17 para. 3 SSA).

[15] See Article 16 paras 1, 1b, 2 and 3 SSA.

[16] The contribution as a rule is a sum of the part funded by the contribution payer and the part funded by the insured.

[17] K. Ślebzak, J. Kosonoga, *Odpowiedzialność*, *op. cit.*, p. 286.

[18] See Article 52 para. 1 SSA and Article 54 para. 1 SSA.

[19] Cf. Supreme Court ruling of 25 May 2010, I KZP 4/10, OSNKW 2010, No. 7, item 57 with comments by T. Snarski, *Wykroczenie trwałe a wykroczenie z zaniechania. Niedopuszczalność kierowania do SN pytań prawnych o charakterze pozornym. Glosa do postanowienia SN z dnia 25 maja 2010 r., I KZP 4/10*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 1, 2011, pp. 147–152; S. Kowalski, *Wykroczenie nieterminowego opłacania składek*, Służba Pracownicza No. 3, 2009, p. 4.

[20] Except contribution payers who are sole proprietors and who are obliged to pay social insurance contributions only for themselves. In the light of Article 40 para. 1(2) SSA, the account of such persons records contributions actually paid, and thus failing to pay the contributions the insured harm themselves. Compare J. Lachowski, *Odpowiedzialność karna płatnika składek – wybrane zagadnienia*, Praca i Zabezpieczenie Społeczne No. 12, 2004, p. 30.

2. FAILURE TO PAY CONTRIBUTIONS AS AN OFFENCE BREACHING EMPLOYEE RIGHTS

The authors of the article mentioned above proposed a stand that persistent or intentional failure to pay social insurance contributions may constitute a breach of employee rights related to social insurance, and thus may meet the statutory features of a prohibited act as set forth in Article 218 § 1a Criminal Code.[21] The stand is quite common in Polish jurisprudence[22] and finds acceptance in part of the legal doctrine,[23] however, in my opinion it is incorrect, also after amendments introduced in the Act of 10 May 2012 amending the Criminal Code and the Act on the social security system[24] which resulted in the ascertainment by the Constitutional Tribunal in its judgment of 18 November 2010[25] that Article 218 § 1 Criminal Code[26] and Article 98 para. 1(1) and Article 98 para. 2 and Article 24 para. 1 SSA are incompliant with Article 2 of the Polish Constitution due to the fact that they allow, in relation to the same natural person and for the same act, criminal liability (for a crime) or liability for an offence as well as an additional fee.

The issue of criminal liability under Article 218 § 1a Criminal Code in relation to a person who fails to pay social insurance contributions for employees is treated as exceptionally difficult and disputable in the legal doctrine.[27] However, in the

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[21] K. Ślebzak, J. Kosonoga, *Odpowiedzialność*, *op. cit.*, p. 293.

[22] Compare, e.g. judgment of the District Court in Opole of 10 April 2013, VIII Ka 97/13, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018); judgment of the District Court in Olsztyn of 29 June 2017, VII K 574/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018); judgment of the District Court in Gorzów Wielkopolski of 8 June 2016, IV Ka 188/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018).

[23] For instance, see: J. Marciniak, *Odpowiedzialność karna pracodawcy*, Warszawa 2010, p. 118; K. Makowski, *Niektóre aspekty odpowiedzialności płatnika składek z tytułu popełnienia przestępstwa lub wykroczenia*, Przegląd Ubezpieczeń Społecznych No. 5, 2000, p. 7. Otherwise: S. Kowalski, *Ochrona praw pracownika w Kodeksie karnym. Zagadnienia teoretyczne i praktyczne*, Toruń 2014, pp. 182–184; J. Lachowski, *Odpowiedzialność*, *op. cit.*, p. 30; commentary on the Constitutional Tribunal judgment of 18 November 2010, P 29/09K in K. Woźniewski, *Reguła ne bis in idem w kontekście prawidłowej legislacji. Glosa do wyroku TK z dnia 18 listopada 2010 r., P 29/09*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 2, 2011, pp. 157–158. Discussing the institution of criminal liability resulting from a breach of employee rights related to social insurance (Article 218 § 1a Criminal Code), the following authors do not mention any right related to the obligation to pay contributions by social insurance contribution payers among the rights that may be breached by perpetrators: U. Kalina-Prasznic, *Odpowiedzialność karna płatnika składek na ubezpieczenie społeczne*, [in:] J. Sawicki, K. Łucarz (eds), *Na styku prawa karnego i prawa o wykroczeniach: Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu*, Vol. I, Wrocław 2016. Additionally, J. Unterschűtz in her monograph entitled *Karnoprawna ochrona praw osób wykonujących pracę zarobkową* (Warszawa 2010) writes first that employees' rights resulting from social insurance include inter alia the right that "the contribution in the appropriate amount should be paid by the employer" (p. 94), and afterwards that "Article 98 para. 1(1) SSA does not infringe the right of persons performing gainful work to benefits under social insurance but it is breach of the payers' obligations to ZUS" (p. 249).

[24] Dz.U. 2012, item 611.

[25] P 29/09, OTK-A 2012, No. 1, item 10.

[26] The wording of Article 218 § 1a Criminal Code corresponds to the wording of its predecessor, i.e. Article 218 § 1 Criminal Code.

[27] Further on in the study I will present only some statements that treat differently the same issues relating to criminal effects of failure to pay social insurance contributions. I admit

judgments of criminal courts concerning sanctions for failure to pay social insurance contributions often a number of simplifications are made that not only introduce confusion as to notions but also result in quite surprising rulings. The above applies primarily to an incorrect classification of certain premiums (in particular for health insurance and for the Labour Fund) as social insurance contributions.[28] It is worth noting that the established view in the judgments of criminal courts that persistent or intentional failure to pay social insurance contributions could constitute a crime of violation of employee rights related to social insurance to a large extent resulted from the judgment of the Constitutional Tribunal of 18 November 2010 referred to above.[29] This partly incorrect, not only in my opinion,[30] judgment has led to a change in the legal status as the legislator *expressis verbis* accepted that it is indeed possible to convict a contribution payer who is a natural person for the crime of "failure to pay contributions or underpay such contributions" (Article 24 paras 1b–1d SSA). Since that time, *de lege lata*, a statement has been invalid that failure to pay social insurance contributions would not have features of a prohibited act as defined in Article 218 § 1a Criminal Code.[31] However, that does not mean there is a simple correlation of the provisions of Article 98 para. 1(1a) SSA and Article 218 § 1a Criminal Code resulting in a situation when indeed failure to pay social insurance contributions for employees is a breach of the Social Security Act and may be an offence pursuant to Article 98 para. 1(1a) SSA, and persistent and intentional failure to pay social insurance contributions constitutes a violation of employee rights related to social insurance. Such relationship does not exist by the mere fact that there is a completely different direct subject of protection against prohibited acts defined in those penal regulations.

The crime of intentional or malicious violation of employee rights, defined in Article 218 § 1a Criminal Code may consist in violating employee eights related

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that I also once accepted that statement that failure to pay social insurance contributions was a violation of employee rights relating to social insurance within the meaning of the former Article 218 § 1 Criminal Code; however, when I conducted research for my PhD thesis, I found that *de lege lata* it is an incorrect view.

[28] See, for instance, the judgment of the District Court in Olsztyn of 3 November 2014, VII K 254/14, http://www.orzeczenia.ms.gov.pl (accessed on 10.02.2018); judgment of the District Court in Opole of 10 April 2013, VII Ka 97/13, http://www.orzeczenia.ms.gov.pl (accessed on 10.02.2018); and judgment of the District Court in Gorzów Wielkopolski of 8 June 2016, IV Ka 188/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018); judgment of the Court of Appeal in Gdańsk of 30 March 2017, II AKa 256/16, LEX No. 2383361; in those judgments the courts convicting for offences under Article 218 § 1a Criminal Code or identifying the basis for such rulings, incorporated as the features of a prohibited act conduct that constitutes a violation of employee rights related to social insurance and consisting in failure to pay health insurance premiums, premiums for the Labour Fund or the Guaranteed Employee Benefits Fund, although the coverage of social insurance is explicitly specified in Article 1 SSA.

[29] P 29/09, Dz.U. 2010, No. 225, item 1474.

[30] See critical comments on the judgment by J. Unterschűtz published in Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 1, 2012, pp. 56–64 and K. Woźniewski published in Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 2, 2011, No. 2, pp. 151–158.

[31] The District Court in Gorzów Wielkopolski rightly noted in the justification to the judgment of 8 June 2016, IV Ka 188/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018).

to social insurance.[32] It is symptomatic that supporters of the view of violation of employee rights relating to social insurance by failure to pay social insurance contributions avoid an explicit statement what employee rights were to be violated as a result of such conduct.[33] Often criminal courts fail to specify the above in describing the acts attributed to people convicted pursuant to Article 218 § 1a Criminal Code for failure to pay social insurance contributions, although as it seems a reference of the recently modified provision of Article 413 § 2(1) of the Criminal Procedure Code[34] makes it mandatory to specify in the description of the attributed act which specific employee right was *in concreto* violated by the perpetrator.[35] In my opinion, such omission should not be surprising since even persistent failure to pay social insurance contributions does not violate any employee rights related to social insurance that are subject to protection pursuant to Article 218 § 1a Criminal Code. However – with respect to the portion of the premium deducted from a salary – it may constitute a violation of employee rights relating to employment relationship: the right to remuneration for work.[36]

As a rule, employees are subject to mandatory social insurance due to: retirement, disability, sickness and accident.[37] Retirement insurance premiums are funded in equal parts by employees and employers,[38] disability insurance are covered partly by employees and partly by employers,[39] sickness insurance premiums are funded by employees[40] and occupational accident insurance premiums by employers.[41] Employers are obliged to calculate and deduct from the remuneration for work the part of the premiums that are funded by employees.[42] As judgments cor-

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[32] See more in S. Kowalski, *Ochrona*, *op. cit.*, p. 194 et seq.

[33] Similarly, K. Ślebzak and J. Kosonoga fail to identify the employee rights related to social insurance that could be violated by such conduct (*Odpowiedzialność*, *op. cit.*, p. 293). It is worth noting that J. Wantoch-Rekowski in the book entitled *Składki na ubezpieczenie emerytalne – konstrukcja i charakter prawny* (Toruń 2005), when listing the obligations of contribution payers, first identifies contribution payment (p. 138), yet while listing the rights of the insured he fails to identify any right of the insured related to contribution payment by contribution payers (p. 124).

[34] Act of 6 June 1997: Criminal Procedure Code, Dz.U. 1997, No. 89, item 555, as amended.

[35] Compare: judgment of Supreme Court of 9 February 2006, III KK 164/05, OSN PiP 2006, No. 9, item 12; ruling of the Supreme Court of 30 September 2015, I KZP 6/15, OSNKW 2015, No. 12, item 99 and comments by R.A. Stefański in his article entitled: *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie postępowania karnego za 2015 r.*, Ius Novum Vol. 11, No. 1, 2017; judgment of the Court of Appeal in Szczecin of 7 July 2016, II AKa 32/16, Legalis No. 1532915; judgment of the Court of Appeal in Kraków of 12 May 2009, II AKa 66/09, Legalis No. 216814.

[36] However, it is worth noting that even the above causes controversies in the doctrine; for instance, J. Jędrasik-Jankowska explicitly notes that an increase of salaries by premiums in 1999 was only a socio-technical procedure. Indeed, in her opinion, social insurance contributions do not even constitute an element of remuneration for work (*Pojęcia*, *op. cit.*, pp. 52–53). However, in my opinion, those views are contradicted by the wording of the quoted Article 87 § 1 LC.

[37] An exception to this rule is an employee who is a cooperating person in compliance with the Social Security Act (Article 8 para. 2 and Article 8 para. 11, Article 11 para. 2 SSA).

[38] Article 16 para. 1 SSA.

[39] Such employer's part is several times larger, cf. Article 16 para. 1b SSA.

[40] Article 16 para. 2 SSA.

[41] Article 16 para. 1 SSA.

[42] J. Jończyk, *Rekonstrukcja zatrudnienia i zabezpieczenia społecznego: podstawowe pojęcia prawne*, Praca i Zabezpieczenie Społeczne No. 1, 2014, p. 5.

rectly provide, remuneration for work as a notion of labour law means the entire amount of remuneration for work due in compliance with regulations on salaries and employment contracts, including also the part that the employer deducts for social insurance contributions. As a result, the employer is a debtor vis-a-vis the employee, obliged to pay the remuneration due if full amount and the amounts that the employer transfers as the income taxpayer and advances for insurance premiums are a part of the employee's remuneration.[43] The fact that such amounts are not physically disbursed to the employee but transferred to the relevant bodies as advances and premiums is the legally required method of complying with the obligation to pay a part of the remuneration to the employee. Therefore, the entire remuneration for work constitutes the employee's receivables from the employer as a salary for work (Article 22 § 1 of the Labour Code[44]). The salary understood like this is the subject of determining remuneration for work in compliance with Article 78 LC and is due to the employee in compliance with Article 80 LC. The remuneration defined as above should be – in compliance with Article 29 § 1(3) and § 2 LC – specified in writing in the employment contract.[45]

The employer, as an entity obliged to pay remuneration for work, is obliged to provide the entire remuneration for work on the payment date and disburse to the employee only the part left after deductions for social insurance premiums and advances for income tax.[46] A portion of the social insurance contribution deducted from the disbursed remuneration should be added by the employer to the part of the contribution that it funds and the employer should pay the amount being the sum of both parts. Failure to pay the entire contribution may be evidence that the employer has not provided sufficient funds for remuneration for work. Considering that the deadline to pay contributions for employees falls on the 15th day of the month following the month for which the premium is due,[47] it should be noted that to determine whether the employer has indeed failed to provide funds for remuneration for work, it is crucial to make an *in concreto* assessment of its activities between the disbursement date of the remuneration for work to the employee and the due day for the contribution payment. Long-term and repeated failure to pay contributions in the part constituting the amount deducted from remuneration for work may be evidence of persistent breach by the employer or a person representing the employer of employees' right to remuneration for work.[48]

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[43] Supreme Court judgment of 9 July 2014, I PK 250/13, OSNP 2015, No. 12, item 161. Otherwise in I. Jankowska-Jędrasik, *Pojęcia*, *op. cit.*, pp. 52–54.

[44] Act of 26 June 1974: Labour Code, Dz.U. 1974, No. 24, item 141, as amended; hereinafter LC.

[45] Supreme Court judgment of 9 July 2014, I PK 250/13, OSNP 2015, No. 12, item 161.

[46] Cf. K. Antonów, *Sprawy z zakresu ubezpieczeń społecznych*, Warszawa 2012, p. 61.

[47] Article 47 para. 1(3) SSA.

[48] On the subject of the features of persistency, see inter alia: O. Górniok, [in:] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny. Komentarz*, Vol. III (art. 117–363), Gdańsk 1999, p. 220; S. Kowalski, *Ochrona*, *op. cit.*, p. 281 et seq.; W. Radecki, *Przestępstwa przeciwko prawom osób wykonujących pracę zarobkową: rozdział XXVIII Kodeksu karnego. Komentarz*, [in:] *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, book No. 18, Warszawa 1998, pp. 154–155; Z. Siwik, *Przestępstwo niealimentacji ze stanowiska polityku kryminalnej*, Wrocław 1974, pp. 99–101.

Failure to pay employees' social insurance contributions in the part funded by the employer means failure to comply with the employer's duties (as social contribution payer) pursuant to the provisions of the Social Security Act. However, this is not a breach of employee rights resulting from social insurance in the meaning used by the legislator in Article 218 § 1a Criminal Code. In the doctrine of criminal law, it is rightly noted that the term "breach of law" used in Article 218 § 1a Criminal Code refers only to such conduct that is contrary to the relevant regulations and either fully deprives the employee of the right or reduces the use of such right (irrespective of the fact if finally the employee becomes harmed).[49] However, failure to pay social insurance contributions by the contribution payer who is the employer basically is of no importance to benefits under social insurance due to the employed personnel.[50]

The offence of failure to pay social insurance contributions is stipulated among the provisions of the chapter entitled "Liability for offences against the provisions of the Act". Thus, the legislator specifies that the protection provided in the regulation covers correct operations of the social insurance system and not protection of the rights of the insured (although the correct functioning of the social insurance system is in the interest of a large proportion of the insured). Further, the crime of breach of employee rights related to social insurance can be found in the chapter of the Criminal Code entitled "Crimes against the rights of people performing gainful work". Article 218 § 1a Criminal Code explicitly identifies employees as the harmed and not as the insured. This is not accidental. Criminal law protection of employee rights is a specific "extension" of the protection awarded under labour law, in particular resulting from offences against employee rights defined in Articles 281–282 LC.[51] Such more extensive protection of employees, contrary to people providing work under other types of contracts, in particular civil-law contracts, is justified inter alia with the fact that employees providing work to generate income to maintain themselves and their closest ones, being directed by the employer or persons representing the employer and being generally a financially weaker party to the employment relationship, have a specific position vis-a-vis that guaranteed by provisions of substantial labour law. The position guaranteed for employees is translated into their rights to social insurance benefits, being substitute benefits under employment relationship and the performance of such benefits is partly assumed by the employer (e.g. disbursement of a sickness benefit).

Additionally, the situation of an employee as the insured whose social contributions are partly funded with monies due to the employee and partly by the contribution payer, is not different in any way from the situation of the other insured who are in the same situation.[52] There is no justification for extending criminal-law

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[49] O. Górniok, [in:] O. Górniok et al., *Kodeks karny*, *op. cit.*, pp. 220–221.

[50] The situation of those persons who have the status of cooperating persons as stipulated in the Social Security Act is specific, cf. Article 40 para. 1(2) SSA.

[51] Compare W. Radecki, *Kryteria rozgraniczenia wykroczeń i przestępstw przeciwko prawom pracownika*, Monitor Prawa Pracy No. 9, 2005, *passim.*

[52] With only one reservation which applies to employees with the status of cooperating persons under the Social Security Act, see Article 8 para. 11 and Article 50 para. 1a(3) SSA.

protection to the insured in this respect. So, even if we were to interpret, based on the Social Security Act, a right of the insured (including employees) to have a portion of the contribution paid by the contribution payer (including the employer), this is not a public right since the contributions are the core resources of the Social Insurance Fund.[53] The right is not due to employees as such but to each insured person and is not related to an employee relationship and the resultant participation of the insured in the establishment of a general risk fund.[54] In other words, such understood right is the right of the insured and not of employees who are only some of the entities subject to social insurance whose social insurance contributions are partly funded by the contribution payers. Thus, this is not a right resulting from social insurance as specified in Article 218 § 1a Criminal Code.

In summary, persistent or wilful failure to pay the social contribution is not a breach of employee rights resulting from social insurance within the meaning of Article 218 § 1a Criminal Code. Articles 16–17 SSA show that the funding of the contributions is the obligation imposed simultaneously on employees and employers. This is a duty requiring a deduction of a part of remuneration for work due to the employee, and an obligation imposed on the employer to provide monies to fund its part of the contribution. Performance of the employer's obligations in that respect is sanctioned by the authority awarded to ZUS and specified in Articles 23–24 SSA and Articles 26–27 SSA.[55] With reference to the portion of the contribution deducted from remuneration for work (or employee's other income), failure to pay the premiums may be *de lege lata* evidence of a beach of employee rights to remuneration for work. Persons performing activities required by labour law or social insurance who persistently fail to pay the portion of the contributions deducted from remuneration for work may be held liable for a persistent breach of the employee right to remuneration for work.

3. FAILURE TO PAY CONTRIBUTIONS AS THE CRIME OF MISAPPROPRIATION

Views can be found both in the legal doctrine and in court judgments that failure to pay social contributions constitutes the crime of misappropriation (Article 284 § 1 Criminal Code).[56] Such opinions were also expressed by K. Ślebzak and J. Kosonoga with reference to the portion of the contributions funded by the insured that is left

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[53] See: Z. Ofiarski, *Prawno-finansowa specyfika podsektora ubezpieczeń społecznych*, [in:] E. Ruśkowski (ed.), *System prawa finansowego. Prawo finansowe sektora finansów publicznych*, Vol. II, Warszawa 2010, p. 330; M. Bosak, P. Majka, *Umarzanie należności z tytułu składek na ubezpieczenia społeczne w świetle orzecznictwa sądów administracyjnych*, Prawo Budżetowe Państwa i Samorządu Vol. 2, No. 4, 2014, pp. 33–34.

[54] K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 751.

[55] See more in S. Kowalski, *Ochrona*, *op. cit.*, pp. 178–179 and 182–184.

[56] Possibly, as a crime under Article 284 § 1 or § 2 Criminal Code in conjunction with Article 294 § 1 Criminal Code or as an offence under Article 119 § 1 Code of Petty Offences, due to the amount of the contribution. Compare the justification to the judgment of the Court of Appeal in Gdańsk of 30 March 2017, II AKa 256/16, LEX No. 2383361.

at the "payers' disposal".[57] The authors further noted it is correctly stated that the "legislator recommends only specific application of the funds that are held by the employer and which are owned by the insured, and have to be invested in a prescribed manner".[58] However, the authors do not refer to issues that are crucial: (1) what is misappropriated?, and (2) at what time does the thing to be misappropriated become third-party property for the perpetrator?

It seems that an explicit statement on a potential crime under Article 284 § 1 Criminal Code as a result of payment of social insurance contributions is based on an incorrect, somewhat hasty interpretation of the Social Security Act, identifying the entity funding the premium. In compliance with those regulations, the premium is funded with the insured's "own funds".[59] However, in my opinion, such regulatory provision does not specify that the Social Security Act contains particular rules for transfer of the title to funds that are a surrogate of the contribution or a part thereof.

The Social Security Act is not a statute regulating the aspects of acquisition, loss or transfer of title to assets, in particular money. That is due to the nature of the act and its wording, in particular the provisions defining the subject of the regulation (Articles 1–2 SSA). The legislator – using well-known institutions of civil law in the Social Security Act – explicitly changes their meaning only when this indeed is required. For instance, mandate work within the meaning of the Social Security Act is a contract regulated in Article 627 et seq. Civil Code, but additionally Article 8 para. 2 SSA regulates the specific status of certain people accepting the commission who are treated as employees in line with the Social Security Act. Stipulation in this regulation that a portion of the insurance contribution is partly funded by the insured with their own funds and partly by the contribution payer does not constitute a specific legal basis to determine the title to the funds held by the contribution payer but only the rules of splitting the funding of the contribution. However, it should be remembered that the Social Security Act has implemented a revolutionary solution as compared to the previous regulation: both the contribution payer and the insured fund the contribution. The legal structure reflects the differentiation of insurance contributions in terms of the subject.[60]

It is symptomatic that when they write about misappropriation in case of failure to pay social insurance contributions, K. Ślebzak and J. Kosonoga fail to identify the object of the misappropriation, while Article 284 § 1 Criminal Code clearly refers to misappropriation of a "third-party movable or property right". The context in which the authors refer to misappropriation manifests that they mean misappropriation of things: money, being a portion of contributions funded with the insured's funds. However, it is hard to misappropriate the contribution itself or a part thereof if such is an individual contribution of each of the insured to the general risk fund whose

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[57] K. Ślebzak, J. Kosonoga, *Odpowiedzialność*, *op. cit.*, p. 294.

[58] *Ibid*., pp. 294–295 with reference to J. Lachowski – comment No. 55 in the quoted article.

[59] See, for instance, Article 16 para. 1 SSA.

[60] W. Sanetra, *O genezie i ewolucji składki na ubezpieczenie społeczne*, [in:] K. Ślebzak (ed.), *Składki na ubezpieczenie społeczne*, Warszawaa–Poznań 2015, pp. 27–28.

resources are used to compensate for "losses" to members of risk groups constituting components of the social insurance system that have suffered such losses.[61]

Money is an object specified by type. Transfer of the title to money basically requires transfer of holding thereof (Article 155 § 2 Civil Code).[62] In this manner it is easy to identify the moment of acquisition and loss of the title to the objects. Employees, entities providing services or other persons paid for the work they provide, become owners of the money disbursed to them at the moment their bank accounts are credited or when they are provided with physical cash as compliance with the disbursement of remuneration by the employer. It is only at that time that the disbursed money can be misappropriated by other persons to their detriment. However, no such operation is provided for by the legislator with reference to the portion of the contribution funded by the insured. It does provide either for any other moment of transfer of the title to a portion of the insured's income to be calculated, deducted and transferred to ZUS.[63] The employee's receivable in the form of remuneration for work in compliance with the Social Security Act is burdened with the ZUS claim (subject to public law) and therefore the employer, which in compliance with the Social Security Act calculates, deducts and transfers the contribution to ZUS to contribute to the Social Insurance Fund, is released from its debt to the employee in the part in which the employer complies with the obligation.[64] Thus, there is no ground for a statement that any funds are left at the disposal of the contribution payer even if the wording were to be referred solely to the deduction of a portion of the contribution from the income to be disbursed to the insured. The obligation to disburse remuneration is a duty resulting from the existing civil-law relationship under which the insured is the creditor to the social contribution payer (debtor).[65] Therefore, failure by the employer or a person representing the employer to disburse the remuneration for work on time is an offence under Article 282 § 1(1) LC, and sometimes it may be a crime of breaching employee rights under employment relationship – the right to remuneration for work if such conduct is characterised by persistence or wilfulness – however, in such case it is not a misappropriation of funds due to the employee. The time to disburse remuneration for work does not result in the separation of any part in the employer's assets the title to which is *ex lege* transferred to the employee on that date.

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[61] K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 751; see more in U. Kalina-Prasznic, *O kontrowersjach w finansowaniu ubezpieczenia emerytalnego*, [in:] *Problemy emerytur, rent i opieki zdrowotnej. Materiały na IV Konferencję Polskiego Stowarzyszenia Ubezpieczeń Społecznych*, Warszawa–Wrocław 1992, pp. 36–37.

[62] Compare the judgment of the Supreme Court of 29 May 2015, V CSK 448/14, Legalis No. 1331221 and resolution of the Supreme Court of 4 January 1995, III CZP 164/94, OSNC 1995, No. 4, item 62.

[63] Nota bene, there is similarly no other moment for the transfer of the title to the part of income that is due to the competent tax office as an advance for income tax or to a court bailiff when such receivables are seized.

[64] Cf. justification to the resolution of the Supreme Court of 7 August 2001, III ZP 13/01, OSNP 2002, No. 2, item 35.

[65] Cf. justification to the judgment of the Supreme Court of 9 July 2014, I PK 250/13, OSNP 2015, No. 12, item 161.

The portion of employee social insurance contribution funded by the insured is a part of remuneration for work.[66] However, failure to pay contributions is not a misappropriation of a part of the right to remuneration for work. The conduct of the perpetrator who fails to transfer appropriate amounts to ZUS consists in failing to comply with their public law obligation and is not a disposal of a part of the employee's remuneration. The person who fails to pay social insurance contributions being part of remuneration for work does not question the employee's right to that part of it, neither uses nor tranfers it to anybody else. Beyond any doubt, such conduct is not misappropriation of the right to remuneration for work.

It should be added that references to judgments of criminal courts passed in cases on fiscal crimes or fiscal offences as an argument supporting the view that failure to pay social insurance contributions or the part deducted from remuneration for work constitutes misappropriation of money are incorrect.[67] Moreover, the reference of those judgments to the provisions of the Fiscal Penal Code unavoidably leads to quite contrary conclusions to assumed by those applying this solution. Articles 77–78 Fiscal Penal Code define fiscal crimes and fiscal offences consisting in failure to pay tax deducted by the tax remitter or collector or failure to collect tax by the tax remitter. The articles refer to activities similar to calculation, deduction and transfer of social insurance contributions by social contribution payers, yet which have nothing in common with an increase of the remitters' property as a result of misappropriating third-party objects or rights.[68] Therefore, such fiscal crimes and fiscal offences may also be committed by even those who *tempore criminis* have no property rights, while one cannot imagine such misappropriation of third-party objects or rights as a result of which the perpetrators' assets are not increased.[69]

4. INSTEAD OF A SUMMARY

As a matter of fact, in compliance with regulations, performance of the duty to pay social insurance contributions and other forms of social security is a condition for the state to ensure the citizens' right to social security that is based on the Constitution (Articles 67–68).[70] The basic form of criminal liability for failure to pay social insurance contributions and other forms of social security is liability for offences. The criminal law protection in that case is insufficient for two reasons. Firstly, the statutory penalty for the offence of failure to pay social insurance contributions

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[66] O. Górniok, [in:] O. Górniok et al., *Kodeks karny*, *op. cit.*, p. 357; B. Michalski, *Przestępstwa przeciwko mieniu. Przestępstwa przeciwko mieniu. Rozdział XXXV Kodeksu karnego. Komentarz*, Warszawa 1999, p. 170.

[67] For instance, the District Court in Rzeszów in the justification to the judgment of 5 September 2013, II Ka 322/13, http://www.orzeczenia.ms.gov.pl (accessed on 10.02.2018).

[68] S. Kowalski, O. Włodkowski, *Kodeks karny skarbowy. praktyczny komentarz z orzecznictwem*, Warszawa 2016, pp. 221–224 and the judgments quoted therein.

[69] Compare, e.g. judgment of the Court of Appeal in Katowice of 29 July 2016, II AKa 479/15, Legalis No. 1522802.

[70] Cf. M. Zieleniecki, *Prawo do zabezpieczenia społecznego*, Gdańskie Studia Prawnicze Vol. XIII, 2005, pp. 580–582.

(Article 98 para. 1(1a) SSA) is much too low. Secondly, it is necessary to define the crime of failure to pay the contributions.

The offence of failure to pay social insurance contributions is subject to a fine of up to PLN 5,000. However, it covers behaviour that may generate very high losses, even up to tens of thousands of zlotys as well as the conduct that is unintentional and intentional, characterised by willingness on the part of perpetrators to generate financial benefits. There is no doubt that the offence of failure to pay social insurance contributions often causes much higher losses than offences against employee rights defined in Articles 281–283 LC and offences defined in Article 120 paras 1–4 APLMI,[71] however, those regulations set forth much more severe statutory penalties. Therefore, irrespective of the need for a comprehensive reform of the regulations concerning the offence, I find it necessary to raise the lower and upper limits of the statutory penalty for the offence of failure to pay social insurance contributions and other forms of social security to a level corresponding to sanctions set forth for offences against employee rights defined in the Labour Code.[72]

Certain behaviour types consisting in failure to pay social insurance contributions and other forms of social security deserve a much more severe penalty, more definite stigmatisation than may be applied in proceedings in case of offences. Thus, if the failure to pay the contributions is regular, this applies to premiums of a high amount and thus the perpetrator gets enriched at the expense of the Social Insurance Fund, and the extent of social harms is much higher than for many other crimes defined in the Criminal Code.[73] This is an encouragement for an institutional search for grounds to support a view that there is a legal basis to raise criminal liability of perpetrators of acts consisting in failure to pay social insurance contributions and other forms of social insurance, pursuant to Article 218 § 1a Criminal Code or Article 284 § 1 or § 2 Criminal Code. However, the possibility to attribute criminal liability *sensu stricto* to perpetrators of such acts is very limited. Only Article 218 § 1a Criminal Code may constitute such legal basis which restricts the scope of criminal recognition only to behaviour concerning employment relationship and to the part of the social insurance contribution that is remuneration for work.

The legislator defines the crime of failure to report data to social insurance (Article 219 Criminal Code); this does not cover solely the negligence of obligations relating to hiring employees, being a reinforcement to the criminal-law protection of the duty to report data to social insurance as set forth in Article 98 para. 1(2) SSA. Therefore, the legislator should also ensure that certain behaviour that consists in failure to pay social insurance contributions due also under titles other than employment relationship should be treated as crime. In my opinion, a reasonable solution would be to introduce a new type of crime into the Criminal Code defined

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[71] Act of 20 April 2004 on promotion of employment and labour market institutions, consolidated text, Dz.U. 2017, item 1065, as amended; hereinafter APLMI.

[72] This may be easily done with appropriate modifications to the provisions of Article 98 SSA with a simultaneous repeal of the provisions of Article 122 para. 1(1) and Article 122 para. 2 APLMI and Article 193(3) of the Act of 27 August 2004 on publicly funded health benefits (consolidated text, Dz.U. 2017, item 1938, as amended).

[73] Including, for instance, acts that are treated as crimes under Article 218 Criminal Code.

as persistent[74] failure to pay social insurance contributions or other premiums statutorily collectable by ZUS from contribution payers or other persons obliged to act on their behalf, to be subject to a fine, a penalty of limitation of liberty or deprivation of liberty for up to two years. The solution would significantly simplify the problem of qualifying the behaviour that would deserve such penalty, like the penalty provided for crimes under Article 218 § 1a Criminal Code. *In concreto* the concepts of a continuous series of acts, combined penalty and a series of crimes could be applicable and courts would have access to a wider range of penalty instruments than in case of offences. More importantly, an appropriate identification of statutory penalty limits would, on the one hand, provide for a possibility to apply measures mitigating liability of persons who have committed a prohibited act due to the lack of adequate skills, while on the other hand, more severe punishment of perpetrators of socially harmful acts and those committed intentionally.

However, it would be incorrect to place such crime in Chapter XXVIII of the Criminal Code, among crimes against persons performing gainful work. The protection would be extended to appropriate forms of social security and not to individual interests. It seems that such type of crimes should be rather included in Chapter XXXV or Chapter XXVI of the Criminal Code since beyond any doubts failure to pay contributions is most often connected to generating financial benefits or involvement of the perpetrator in broadly understood business transactions.[75]

5. CONCLUSIONS

1) The legislator does not provide for *sensu stricto* criminal liability for offences consisting in incorrect calculation, deduction and transfer of contributions but liability for the offence of failure to make social insurance contributions. A criminal law protection is thus extended solely to the obligation of transferring of the appropriate amount of premiums to the ZUS bank account.
2) The offence of failure to pay social insurance contributions, defined in Article 98 para. 1(1a) SSA, applies to all insurance titles that are subject to the obligation to pay premiums, i.e. not only employee insurance.
3) Failure to pay social insurance contributions for employees does not breach any employee right related to social insurance that would be protected under Article 218 § 1a Criminal Code. However – with respect to the portion of the premium deducted from remuneration for work – failure to pay constitutes a violation of employee rights relating to employment relationship: the right to

[74] The sanctions for failure to pay contributions in other cases, as specified in the Social Security Act, are in my opinion sufficiently severe for contribution payers. As a rule, they are obliged to pay interest for delay and additionally an additional fee may be charged, especially when such failure to pay contributions is due to gross negligence on the part of the payer.

[75] It is also worth adding that in the legal doctrine and case law the notion of business transaction as an activity protected with the provisions of Chapter XXXVI of the Criminal Code is often understood broadly; compare the Supreme Court ruling of 24 January 2013, I KZP 22/12, OSNKW 2013, No. 3, item 18; the Supreme Court resolution of 26 November 2003, I KZP 32/03, OSNKW 2004, No. 1, item 3 with comments by O. Górniok, OSP 2004, No. 7–8, item 103.

remuneration for work. With reference to the portion of unpaid social insurance contribution, the crime under Article 218 § 1a Criminal Code may be committed.

4) Social insurance contributions in the portion in which they are deducted from the insured's income may not be misappropriated since they are not objects, property rights as referred to in Article 284 § 1 Criminal Code.
5) The monies that have not been disbursed to employees due to deduction from the remuneration for work, funded by the insured, may not be misappropriated to the detriment of the employee since – in the light of Article 155 § 2 Civil Code – such resources are not owned by the employee.
6) The conduct consisting in failure to pay social insurance contributions *de lege lata* may not be qualified either on the basis of Article 284 § 1 Criminal Code or even under Article 284 § 2 Criminal Code, unless this refers to misappropriation of money that has been provided to a specific person who should have transferred it to the account of ZUS as social insurance contributions and who has misappropriated the funds. Then the crime affects the entity whose money has been misappropriated by such person.
7) It is necessary to propose the introduction of a type of crime to the Criminal Code that would consist in failure to pay social insurance contributions or premiums for other forms of social security that are by law collected by ZUS.

BIBLIOGRAPHY

Antonów K., *Sprawy z zakresu ubezpieczeń społecznych*, Warszawa 2012.

Baran K. (ed.), *Prawo pracy i ubezpieczeń społecznych*, Warszawa 2017.

Bosak M., Majka P., *Umarzanie należności z tytułu składek na ubezpieczenia społeczne w świetle orzecznictwa sądów administracyjnych*, Prawo Budżetowe Państwa i Samorządu Vol. 2, No. 4, 2014.

Górniok O., *Glosa do uchwały Sądu Najwyższego z 26 listopada 2003 r., I KZP 32/03*, OSP No. 7–8, 2004.

Górniok O., Hoc S., Przyjemski S.M., *Kodeks karny. Komentarz*, Vol. III (art. 117–363), Gdańsk 1999.

Jędrasik-Jankowska I., *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2018.

Jończyk J., *Rekonstrukcja zatrudnienia i zabezpieczenia społecznego: podstawowe pojęcia prawne*, Praca i Zabezpieczenie Społeczne No. 1, 2014.

Kalina-Prasznic U., *O kontrowersjach w finansowaniu ubezpieczenia emerytalnego*, [in:] *Problemy emerytur, rent i opieki zdrowotnej. Materiały na IV Konferencję Polskiego Stowarzyszenia Ubezpieczeń Społecznych*, Warszawa–Wrocław 1992.

Kalina-Prasznic U., *Odpowiedzialność karna płatnika składek na ubezpieczenie społeczne,* [in:] J. Sawicki, K. Łucarz (eds), *Na styku prawa karnego i prawa o wykroczeniach: Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu*, Vol. I, Wrocław 2016.

Kowalski S., *Wykroczenie nieterminowego opłacania składek*, Służba Pracownicza No. 3, 2009.

Kowalski S., *Ochrona praw pracownika w Kodeksie karnym. Zagadnienia teoretyczne i praktyczne*, Toruń 2014.

Kowalski S., Włodkowski O., *Kodeks karny skarbowy. Praktyczny komentarz z orzecznictwem*, Warszawa 2016.

Lachowski J., *Odpowiedzialność karna płatnika składek – wybrane zagadnienia*, Praca i Zabezpieczenie Społeczne No. 12, 2004.

Makowski K., *Niektóre aspekty odpowiedzialności płatnika składek z tytułu popełnienia przestępstwa lub wykroczenia*, Przegląd Ubezpieczeń Społecznych No. 5, 2000.

Marciniak J., *Odpowiedzialność karna pracodawcy*, Warszawa 2010.

Michalski B., *Przestępstwa przeciwko mieniu. Rozdział XXXV Kodeksu karnego. Komentarz*, Warszawa 1999.

Ofiarski Z., *Prawno-finansowa specyfika podsektora ubezpieczeń społecznych*, [in:] E. Ruśkowski (ed.), *System prawa finansowego. Prawo finansowe sektora finansów publicznych*, Vol. II, Warszawa 2010.

Pacud R., *Zobowiązania składkowe w ubezpieczeniach społecznych a zobowiązania podatkowe*, Studia z Zakresu Prawa Pracy i Polityki Społecznej, 2012.

Radecki W., *Przestępstwa przeciwko prawom osób wykonujących pracę zarobkową: rozdział XXVIII Kodeksu karnego. Komentarz*, [in:] *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, book No. 18, Warszawa 1998.

Radecki W., *Kryteria rozgraniczenia wykroczeń i przestępstw przeciwko prawom pracownika*, Monitor Prawa Pracy No. 9, 2005.

Sanetra W., *O genezie i ewolucji składki na ubezpieczenie społeczne*, [in:] K. Ślebzak (ed.), *Składki na ubezpieczenie społeczne*, Warszawa–Poznań 2015.

Siwik Z. *Przestępstwo niealimentacji ze stanowiska polityki kryminalnej*, Wrocław 1974.

Snarski T., *Wykroczenie trwałe a wykroczenie z zaniechania. Niedopuszczalność kierowania do SN pytań prawnych o charakterze pozornym. Glosa do postanowienia SN z dnia 25 maja 2010 r., I KZP 4/10*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 1, 2011.

Sowiński T., *Finanse ubezpieczeń emerytalnych*, Warszawa 2008.

Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie postępowania karnego za 2015 r.* [Overview of the Supreme Court Criminal Chamber resolutions of 2015 on criminal procedure], Ius Novum Vol. 11, No. 1, 2017.

Ślebzak K. (ed.), *Składki na ubezpieczenie społeczne*, Warszawa–Poznań 2015.

Ślebzak K., Kosonoga J., *Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne* [Liability of a social security contribution payer for calculation, deduction and submission of social security contributions], Ius Novum Vol. 10, No. 3, 2016.

Unterschűtz J., *Karnoprawna ochrona praw osób wykonujących pracę zarobkową*, Warszawa 2010.

Unterschűtz J., *Konsekwencje naruszenia obowiązku opłacania składek przez płatnika składek w świetle przepisów ustawy systemowej oraz art. 218 § 1 k.k. Glosa do wyroku TK z dnia 18 listopada 2010 r., P 29/09*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 1, 2012.

Wantoch-Rekowski J., *Składki na ubezpieczenie emerytalne – konstrukcja i charakter prawny*, Toruń 2005.

Woźniewski K., *Reguła ne bis in idem w kontekście prawidłowej legislacji. Glosa do wyroku TK z dnia 18 listopada 2010 r., P 29/09*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 2, 2011.

Zieleniecki M., *Prawo do zabezpieczenia społecznego*, Gdańskie Studia Prawnicze Vol. XIII, 2005.

CRIMINAL-LAW QUALIFICATION OF FAILURE TO PAY SOCIAL INSURANCE CONTRIBUTIONS

Summary

This article is a polemic against some views expressed by Krzysztof Ślebzak and Jacek Kosonoga in their paper entitled *Liability of a social security contribution payer for calculation, deduction and submission of social security contributions* [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne], published in Ius Novum No. 3 of 2016. Appreciating the value of the views presented in the above study, the author disputes some of them concerning criminal-law qualification of a conduct consisting in failure to pay social insurance contributions. In the view of the author of this polemic, failing to pay social insurance contributions for an employee does not violate any of the employee rights in the area of social insurance that would be subject to protection by virtue of Article 218 § 1a Criminal Code. However, if the due contributions were deducted from the salary, failure to pay them may constitute the violation of an employee right resulting from employment, i.e. the right to remuneration for work. Only with reference to that part of unpaid contribution, is it possible to commit a crime under Article 218 § 1a Criminal Code. Furthermore, social insurance contributions in the part deducted from the salary of the insured person cannot be misappropriated, because they are neither material things nor a property right provided for in Article 284 § 1 Criminal Code. The author also suggests that a crime consisting in failure to pay social insurance contributions or other forms of social security premiums which are statutorily due to the ZUS Social Insurance Institution should be introduced to the Criminal Code.

Keywords: contributions, social insurance, criminal liability, offence, social insurance contribution payer

O KARNOPRAWNEJ KWALIFIKACJI ZACHOWANIA POLEGAJĄCEGO NA NIEOPŁACANIU SKŁADEK NA UBEZPIECZENIA SPOŁECZNE

Streszczenie

Artykuł jest polemiką z niektórymi poglądami wyrażonymi przez Krzysztofa Ślebzaka i Jacka Kosonogę w opracowaniu pt. „Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne", opublikowanym w trzecim numerze „Ius Novum" z 2016 roku. Doceniając wartość rozważań zawartych w wymienionej publikacji, autor polemizuje jednak z częścią z nich, dotyczącą karnoprawnych kwalifikacji zachowań, polegających na nieopłacaniu składek na ubezpieczenia społeczne. Zdaniem autora polemiki, nieopłacanie składek na ubezpieczenia społeczne pracownika nie narusza żadnego z praw pracownika z zakresu ubezpieczeń społecznych, które podlegałoby ochronie na podstawie art. 218 § 1a k.k. W części, w jakiej składki podlegające opłaceniu zostały potrącone z wynagrodzenia za pracę, ich nieopłacenie stanowić może jednak naruszenie prawa pracownika, wynikającego ze stosunku pracy – prawa do wynagrodzenia za pracę. W odniesieniu do tej tylko części nieopłaconej składki na ubezpieczenia społeczne możliwe jest popełnienie przestępstwa z art. 218 § 1a k.k. Ponadto składki na ubezpieczenia społeczne w części, w jakiej zostały potrącone z przychodu ubezpieczonego, nie mogą zostać przywłaszczone, ponieważ nie są one ani rzeczami, ani prawem majątkowym, o którym mowa w art. 284 § 1 k.k. Dodat-

kowo, autor postuluje wprowadzenie do Kodeksu karnego typu przestępstwa polegającego na nieopłacaniu składek na ubezpieczenia społeczne lub składek na inne formy zabezpieczenia społecznego, do których poboru z mocy ustawy zobowiązany jest Zakład Ubezpieczeń Społecznych.

Słowa kluczowe: składki, ubezpieczenia społeczne, odpowiedzialność karna, wykroczenie, płatnik składek

SOBRE LA CALIFICACIÓN JURÍDICO-PENAL DE LA CONDUCTA QUE CONSISTE EN OMISIÓN DE DEBER DE COTIZAR A LA SEGURIDAD SOCIAL

Resumen

El artículo es una polémica con algunas posturas presentadas por Krzysztof Ślebzak y Jacek Kosonoga en la obra titulada "La responsabilidad de sujeto obligado por el cálculo, deducción y remisión de la cuotas a la Seguridad Social" [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] publicada en el tercer número de Ius Novum de 2016. Apreciando el valor de consideraciones presentadas en la citada publicación, el Autor no concuerda con una parte de ellas, relativas a la calificación jurídico-penal de la conducta que consiste en omisión de deber de cotizar a la Seguridad Social. Según el Autor del presente artículo, la falta de pago de cuotas a la Seguridad Social no infringe ninguno de los derechos de trabajadores en cuanto a la Seguridad Social, que sea protegido en virtud del art. 218 § 1a del código penal. Sin embargo, en caso las cuotas sujetas a pago hayan sido deducidas de la remuneración, pero no pagadas, estamos ante posible infracción de derecho de trabajador resultante de su contrato laboral – el derecho a recibir remuneración por el trabajo. Sólo en cuanto a la cuota no pagada a la Seguridad Social existe la posibilidad de la comisión de delito del art. 218 § 1a del código penal. Además, las cuotas a la Seguridad Social deducidas del ingreso, no pueden ser objeto de apropiación, porque no se consideran bienes ni derechos reales a los que se refiere el art. 284 § 1 del código penal. Adicionalmente, el Autor propone introducir al código penal el delito consistente en falta de pago de cuotas a la Seguridad Social o cuotas a otras formas de seguros sociales para cuyo cobro la Seguridad Social queda autorizada por ley.

Palabras claves: cuotas, seguridad social, responsabilidad penal, falta, contribuyente

ОБ УГОЛОВНО-ПРАВОВОЙ КВАЛИФИКАЦИИ НЕУПЛАТЫ ВЗНОСОВ НА СОЦИАЛЬНОЕ СТРАХОВАНИЕ

Резюме

В статье автор полемизирует с некоторыми взглядами, выраженными Кшиштофом Сьлебзаком и Яцеком Косоногой в работе «Ответственность плательщика взносов за расчет, удержание и перечисление взносов на социальное страхование» [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne], опубликованной в третьем выпуске журнала «Ius Novum» за 2016 год. Признавая обоснованность большинства соображений, содержащихся в вышеупомянутой публикации, автор, однако, полемизирует с ними в той части, которая касается уголовно-правовой квалификации неуплаты взносов на социальное страхование. По мнению автора, неуплата взносов на социальное страхование работника не нарушает тех его прав, которые подлежат защите в соответствии со ст. 218 § 1a УК. Однако, в той части, в которой подлежащие выплате взносы на социальное страхование были удержаны из оплаты труда, их неуплата может представлять собой нарушение права работника, вытекающего из трудовых отношений, а именно, права на оплату труда. Таким образом, совершение преступления, предусмотренного ст. 218 § 1a УК, возможно только по отношению к этой части неуплаченных взносов на социальное страхование. Кроме того, взносы на социальное страхование в той части, в которой они были вычтены из дохода застрахованного лица, не могут быть присвоены, поскольку они не являются ни предметами имущества, ни имущественным правом, о которых идет речь в ст. 284 § 1 УК. В завершение автор предлагает ввести в Уголовный кодекс состав преступления, заключающийся в неуплате взносов на социальное страхование либо других взносов на социальное обеспечение, сбор которых возложен по закону на Управление социального страхования.

Ключевые слова: страховые взносы, социальное страхование, уголовная ответственность, правонарушение, плательщик взносов

ÜBER DIE STRAFRECHTLICHE BEURTEILUNG DER NICHTABFÜHRUNG VON SOZIALVERSICHERUNGSBEITRÄGEN

Zusammenfassung

Der Artikel ist als polemische Antwort auf einige von Krzysztof Ślebzak und Jacek Kosonoga in dem in der dritten Nummer der Vierteljahresschrift Ius Novum von 2016 erschienenen Beitrag „Die Verantwortlichkeit des Beitragszahlers für die Berechnung, den Abzug und die Überweisung der Beiträge zur Sozialversicherung" [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] zum Ausdruck gebrachte Positionen gedacht. Die in der genannten Veröffentlichung enthaltenen Überlegungen werden durchaus vom Autor geschätzt, doch kann er dem Teil der Erwägungen, der sich auf die strafrechtliche Qualifikation der Nichtabführung von Sozialversicherungsbeiträgen bezieht, nicht zustimmen. Nach Auffassung des Autors verstößt die Nichtabführung von Sozialversicherungsbeiträgen eines Arbeitnehmers nicht gegen Arbeitnehmerrechte im Bereich der sozialen Sicherheit, die gemäß Artikel 218 § 1a des polnischen Strafgesetzbuches dem Schutz unterliegen würden. In Bezug auf abzuführende Beiträge, die vom Arbeitsentgelt einbehalten werden, kann ihre Nichtabführung dagegen eine Verletzung der Arbeitnehmerrechte aus dem Arbeitsverhältnis, und zwar des Rechts auf Arbeitsvergütung darstellen. In Bezug auf solche nicht abgeführten Sozialversicherungsbeiträge ist es möglich, dass eine Straftat

gemäß Artikel 218 § 1a des polnischen Strafgesetzbuches vorliegt. Darüber hinaus können sich Sozialversicherungsbeiträge, soweit sie von der Arbeitsvergütung des Versicherten einbehalten wurden, nicht widerrechtlich angeeignet werden, da es sich bei ihnen weder um in Artikel 284 § 1 des polnischen Strafgesetzbuches angeführte Sachen, noch um dort genanntes Eigentum handelt. Außerdem spricht sich der Autor dafür aus, den Straftatbestand der Nichtabführung von Sozialversicherungsbeiträgen und Beiträgen für andere Formen der sozialen Absicherung, zu deren Erhebung die staatliche Sozialversicherung in Polen (ZUS) laut Gesetz verpflichtet ist, in das polnische Strafgesetzbuch aufzunehmen.

Schlüsselwörter: Beiträge, Sozialversicherungen, strafrechtliche Verantwortlichkeit, Vergehen, Beitragszahler

SUR LA QUALIFICATION JURIDIQUE PÉNALE DU COMPORTEMENT CONSISTANT EN LE NON-PAIEMENT DE COTISATIONS DE SÉCURITÉ SOCIALE

Résumé

L'article est une polémique avec certaines opinions exprimées par Krzysztof Ślebzak et Jacek Kosonoga dans l'étude intitulée «Responsabilité du payeur de cotisations pour le calcul, la déduction et le transfert de cotisations de sécurité sociale» [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] publiée dans le troisième numéro de Ius Novum de 2016. Tout en reconnaissant la valeur des considérations contenues dans la publication susmentionnée, l'auteur conteste certaines d'entre elles en ce qui concerne la qualification juridique pénale du comportement consistant en le non-paiement de cotisations de sécurité sociale. Selon l'auteur de la polémique, le non-paiement des cotisations de sécurité sociale des employés ne porte atteinte aux droits d'aucun employé dans le domaine de la sécurité sociale, qui ferait l'objet d'une protection en vertu de l'article 218 § 1bis du code pénal. Toutefois, dans la partie dans laquelle les cotisations à payer ont été déduites de la rémunération du travail, leur non-paiement peut constituer une violation du droit du salarié découlant de la relation de travail – le droit à une rémunération pour le travail. En ce qui concerne cette partie des cotisations de sécurité sociale impayées, il est possible de commettre une infraction au sens de l'article 218 § 1bis du code pénal. En outre, les cotisations de sécurité sociale dans la partie dans laquelle elles ont été déduites du revenu de l'assuré ne peuvent être détournées, car elles ne sont ni un bien ni un droit de propriété au sens de l'article 284 § 1 du code pénal. En outre, l'auteur propose d'introduire dans le code pénal un type de délit consistant en le non-paiement de cotisations de sécurité sociale ou de contributions à d'autres formes de sécurité sociale, que l'institution de sécurité sociale est tenue de percevoir en vertu de la loi.

Mots-clés: cotisations, assurance sociale, responsabilité pénale, infraction, payeur de cotisations

SULLA CLASSIFICAZIONE TRIBUTARIO PENALE DEL COMPORTAMENTO CONSISTENTE NEL MANCATO PAGAMENTO DEI CONTRIBUTI PREVIDENZIALI

Sintesi

L'articolo è una polemica nei confronti di alcune opinioni espresse da Krzysztof Ślebzak e Jacek Kosonoga nell'elaborato intitolato "Responsabilità del soggetto pagatore dei contributi previdenziali per il calcolo, la deduzione e il versamento dei contributi previdenziali" [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] pubblicato nel terzo numero di Ius Novum nel 2016. Apprezzando il valore delle riflessioni contenute nella pubblicazione richiamata, l'autore polemizza tuttavia con parte di esse, riguardante la classificazione tributario penale dei comportamenti consistenti nel mancato pagamento dei contributi previdenziali. Secondo l'autore della polemica, il mancato pagamento dei contributi previdenziali del dipendente non viola alcun diritto del dipendente nell'ambito della previdenza sociale, soggetto a tutela sulla base dell'art. 218 § 1a del codice penale. Invece per quanto riguarda la parte di contributi soggetti a versamento dedotta dallo stipendio, il loro mancato pagamento può costituire una violazione di un diritto del dipendente derivante dal rapporto di lavoro: il diritto della retribuzione per il lavoro. Solo in riferimento a questa parte di contributi previdenziali non pagata è possibile ravvisare il reato dell'art. 218 § 1a del codice penale. Inoltre i contributi previdenziali, nella parte in cui sono stati dedotti dal reddito dell'assicurato, non possono essere oggetto di appropriazione indebita, in quanto non sono né cose, né diritti patrimoniali, di cui all'art. 284 § 1 del codice penale. Inoltre l'autore propone l'introduzione nel codice penale di un tipo di reato consistente nel mancato pagamento dei contributi previdenziali o di contributi per altre forme di assicurazione sociale, alla cui esazione è tenuto in virtù di legge il Zakład Ubezpieczeń Społecznych (Ente di Previdenza Sociale).

Parole chiave: contributi, previdenza sociale, responsabilità penale, contravvenzione, soggetto pagatore dei contributi previdenziali

Cytuj jako:

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER FOR 2017 CONCERNING CRIMINAL PROCEDURE LAW

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CRIMINAL PROCEDURE CODE

1. ADMISSIBILITY OF APPEAL AGAINST A COURT'S RULING ON INCOMPETENCE (ARTICLE 35 § 3 CPC)

A court, in accordance with Article 35 § 1 CPC, examines its competence/jurisdiction *ex officio*, and in case it finds out it is incompetent, it should refer a case to a competent court or another body. A court's decision is issued in the form of a ruling, in which the court states it is incompetent or rejects a motion to recognise its competence.[1] The ruling on incompetence can be appealed against (Article 3 § 3 CPC). The provision does not determine the type of competence but its general definition indicates that it concerns every type of competence, i.e. the competence in terms of the subject matter, place and function as well as the first-instance and second-instance courts. What can raise doubts is the fact that the provision covers rulings of a court of appeal. The issue has already been analysed by the Supreme Court, which directly stated that:

– "A court's obligation to examine its competence laid down in Article 35 § 1 CPC covers (*lege non distinguente nec nostrum est distinguere*) the competence as to the

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[1] Supreme Court ruling of 20 September 2007, I KZP 25/07, OSNKW 2007, No. 11, item 78 with comments of approval by W. Grzeszczyk, *Przegląd uchwał Izby Karnej Sądu Najwyższego (prawo karne procesowe – 2007 r.)*, Prokuratura i Prawo No. 4, 2008, p. 62 and partially critical ones by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2007 r.*, Wojskowy Przegląd Prawniczy No. 2, 2008, pp. 87–88.

place, matter and function. The obligation is imposed on every court, thus also a court to which an appellate measure has been referred to be heard."[2]

– "The ruling on the competence of a court to which an appellate measure was referred (Article 35 § 1 CPC) can be appealed against (Article 35 § 3 CPC)."[3]
– "Referring a case to a competent court results from the recognition of lack of competence stated in the same ruling (Article 35 § 1 CPC) that is subject to appeal (Article 35 § 3 CPC), unless the Supreme Court has ruled in the matter (Article 426 § 2 CPC)."[4]

Regardless of such a clear stance of the institution, the Supreme Court was asked a prejudicial question: "Can a ruling of a regional court on its lack of competence and referring a case to a competent court issued in conjunction with a prosecutor's complaint about the Customs' decision concerning material evidence be appealed against?" In the ruling of 26 April 2017, I KZP 19/16,[5] the Supreme Court rightly stated that: "**The ruling on competence issued by a regional court (Article 35 § 1 CPC), to which an appellate measure against a decision issued in preparatory proceedings has been referred, can be appealed against (Article 35 § 3 CPC); in such a case, the restrictions laid down in Article 426 § 1 CPC are not applicable**." In the justification, it is indicated that Article 426 CPC is not applicable to rulings on competence issued by a court to which a complaint has been filed because it does not have the feature of a court of appeal. In the court's opinion, these are rulings, referred to in Article 425 § 1 CPC, which under Article 459 § 2 *in fine* CPC in conjunction with Article 35 § 3 CPC can be appealed against. It is indicated that the opinion is strongly supported by the principle banning broadening interpretation of exceptions (*exceptiones non sunt extendendae*) because of the general right to appeal against rulings (Article 425 § 1 CPC) and an exception of Article 426 § 1 CPC. Such an incidental court judgment that was appealed against with respect to the decision on its competence should be treated as a judgment referred to in Article 425 § 1 CPC, issued only in conjunction with appeal. It is rightly assumed in the legal doctrine that the feature of "a court of appeal" within the meaning of Article 426

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[2] Supreme Court ruling of 28 April 2008, I KZP 4/08, OSNwSK 2008, No. 1, item 968; ruling of the Court of Appeal in Warsaw of 12 July 2005, II AKz 325/05, Biuletyn SA w Warszawie No. 4, 2005, item 14; ruling of the Court of Appeal in Gdańsk of 13 January 1999, II AKo 216/98, [in:] W. Cieślak, T. Kopoczyński, W. Wolański, *Zestawienie orzecznictwa Sądu Najwyższego i sądów apelacyjnych dotyczącego k.k. i k.p.k. z 1997 r. za okres: wrzesień 1998–luty 1999*, Palestra No. 7–9, Warszawa 1999, p. 24.

[3] Supreme Court ruling of 20 April 2005, I KZP 9/05, OSNKW 2005, No. 4, item 41 with comments of approval by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2005 r.*, Wojskowy Przegląd Prawniczy No. 2, 2006, pp. 91–92; J. Kosonoga, [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz do art. 1–166*, Vol. I, Warszawa 2017, p. 508.

[4] Supreme Court ruling of 28 April 2008, I KZP 5/08, OSNKW 2008, No. 6, item 41 with comments of approval by W. Grzeszczyk, *Przegląd uchwał i postanowień Izby Karnej Sądu Najwyższego w kwestiach prawnych (prawo karne procesowe – 2008 r.)*, Prokuratura i Prawo No. 4, 2009, pp. 53–52; R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2008 r.*, Wojskowy Przegląd Prawniczy No. 2, 2009, pp. 96–97; Supreme Court ruling of 28 April 2008, I KZP 2/08, OSNwSK 2008, No. 1, item 966; Supreme Court ruling of 28 April 2008, I KZP 3/08, OSNwSK 2008, No. 1, item 967.

[5] OSNKW 2017, No. 7, item 39.

§ 1 CPC cannot be granted or imposed by the fact that an appellate measure is filed to it; although filing an appellate measure indeed results in the instigation of appellate proceedings, this does not decide the question of the competence of a body authorised to hear an appeal only because it has been indicated as an addressee of the measure.[6] Filing an appellate measure to a court does not define its competence.[7]

2. PREJUDICIAL QUESTIONS TO THE SUPREME COURT (ARTICLE 441 § 1 CPC)

Before answering a prejudicial question, the Supreme Court assesses the reasons why a court of appeal has asked it and, at the same time, interprets Article 441 § 1 CPC and indicates what the reasons will be and how they should be interpreted.

In the ruling of 14 September 2017, I KZP 8/17,[8] the Supreme Court rightly explained that: "In accordance with the opinion established in the judicial decisions and the legal doctrine, an appeal court's effective prejudicial question to the Supreme Court under Article 441 § 1 CPC can be asked only when the following requirements are jointly met:

1) appellate proceedings reveal 'a legal issue', i.e. an important interpretive problem concerning a provision (provisions) discordantly interpreted in court practice or a provision erroneously edited, or unclearly formulated and allowing different interpretation. The subject matter of a prejudicial question can include a particular statutory provision as well as a group of mutually connected provisions laid down in separate statutes if only the problem based on them requires fundamental interpretation of statute;
2) a prejudicial issue requires 'fundamental interpretation of statute', i.e. interpretation that goes beyond standard operational interpretation and prevents interpretive discrepancies that have already taken place or can take place in judicial decisions due to important discordant opinions in the legal doctrine, which is disadvantageous for the proper functioning of the law in practice;
3) a prejudicial issue appeared 'in the course of hearing of an appellate measure', i.e. it is connected with a particular case and in such a way that the judgment in the case depends on the answer to the prejudicial question. Thus, it does not involve the Supreme Court in taking a stance on an abstract issue even if it were significant in practice;
4) before asking a prejudicial question, a court of appeal has made attempts to clarify doubts that arose and, having found it cannot solve the problem, asked the prejudicial question to the Supreme Court."

This is what the Supreme Court stated in the ruling of 19 January 2017, I KZP 13/16.[9]

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[6] D. Świecki, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2013, p. 206.

[7] Supreme Court ruling of 4 March 2019, IV KZ 13/19, LEX No. 2630606.

[8] OSNKW 2018, No. 1, item 1.

[9] OSNKW 2017, No. 2, item 9.

Similarly, in the ruling of 26 April 2017, I KZP 18/16,[10] the Supreme Court explained: "In accordance with Article 44 § 1 CPC, the grounds for asking the Supreme Court a prejudicial question include the joint fulfilment of the following requirements:

– appellate proceedings reveal 'a legal issue', i.e. an important interpretive problem concerning a provision or provisions discordantly interpreted in court practice or a provision erroneously edited, or unclearly formulated and allowing different interpretation;
– the issue requires 'fundamental interpretation of statute', i.e. preventing interpretive discrepancies that have already taken place or can take place in in judicial decisions due to important discordant opinions in the legal doctrine, which is disadvantageous for the proper functioning of the law in practice;
– a prejudicial issue appeared 'in the course of hearing of an appellate measure', i.e. is connected with a particular case and in such a way that the judgment in the case depends on the answer to the prejudicial question (see T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2014, pp. 1503–1504; R.A. Stefański, *Instytucja pytań prawnych do Sądu Najwyższego w sprawach karnych*, Kraków 2001, pp. 264–299 and case law and literature referred to therein)."

The Supreme Court stated the same in the ruling of 19 January 2017, I KZP 15/16[11] and the ruling of 19 January 2017, I KZP 12/16[12].

In the ruling of 26 April 2017, I KZP 19/16,[13] the Supreme Court rightly stated that: "An appeal court's effective prejudicial question to the Supreme Court based on Article 441 § 1 CPC requires joint fulfilment of the following requirements: appellate proceedings must reveal 'a prejudicial issue', i.e. an important interpretive problem concerning a provision or provisions discordantly interpreted in court practice or a provision erroneously edited, or unclearly formulated and allowing different interpretation; the issue requires 'fundamental interpretation of statute', i.e. preventing interpretive discrepancies that have already taken place or can take place in judicial decisions due to important discordant opinions in the legal doctrine, which is disadvantageous for the proper functioning of the law in practice; it appeared 'in the course of hearing of an appellate measure', i.e. is connected with a particular case and in such a way that the judgment in the case depends on the answer to the prejudicial question."

According to the Supreme Court's opinion expressed in the ruling of 14 September 2017, I KZP 7/17,[14] "The Appeal Court's statement that the prejudicial issue appeared 'in connection with the charges raised in the appeal' made in the introduction to the decision and that 'the question arose in the course of hearing the appeal' made in the first sentence of the justification, which are not substantiated in any other way, do not reflect reality and do not meet the preliminary requirement laid down in Article 441 § 1 *in principio* CPC for asking the Supreme Court a prejudicial question."

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[10] OSNKW 2017, No. 7, item 38.
[11] OSNKW 2017, No. 3, item 14.
[12] OSNKW 2017, No. 2, item 8.
[13] OSNKW 2017, No. 7, item 39.
[14] OSNKW 2017, No. 11, item 63.

3. SCOPE OF THE POWER OF PARDON (ARTICLE 139 CONSTITUTION OF THE REPUBLIC OF POLAND, ARTICLE 560 ET SEQ. CPC)

In accordance with Article 139 of the Constitution of the Republic of Poland, the President of the Republic of Poland shall have the power of pardon and it may not be extended to individuals convicted by the Tribunal of State. The provision does not determine the objective scope of the power of pardon and the issue is left to the legal doctrine and the judicature, just as the practice of its application. Undoubtedly, the act of pardon can concern the results of a valid sentence because it involves the mitigation of penal consequences of a crime committed, which are imposed on a perpetrator based on a valid sentence. It is rightly indicated in literature that the President shall apply the power of pardon to a definite legal being that is created the moment a judgment becomes valid.[15]

According to literature, it is controversial to apply the President's prerogative laid down in Article 139 Constitution towards a person who is not subject to criminal proceedings or who is subject to criminal proceedings not concluded with a valid judgment imposing penal measures on him/her. The last case is referred to as what is called individual abolition consisting in forgiveness and consigning a crime into oblivion, which results in a ban on instigating criminal proceedings or obligation to discontinue an already instigated one.

According to the legal doctrine, such a way of applying the power of pardon is admissible.[16] It is indicated that an act of abolition may be general and concern some types of cases, or individual and include abandoning or discontinuation of a particular process.[17] It is argued that Article 139 Constitution does not contain any objective restrictions to the power of pardon and the legislator could have introduced them as in the case of persons convicted by the Tribunal of State. In

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[15] K. Kozłowski, *Prawo łaski Prezydenta RP. Historia, regulacja, praktyka*, Warszawa 2013, pp. 235–236.

[16] J. Aker, [in:] W. Makowski (ed.), *Encyklopedia podręczna prawa karnego*, Warszawa, no release date, p. 860; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Warszawa 2008, p. 1184; A. Murzynowski, *Refleksje na temat instytucji ułaskawienia w świetle aktualnego stanu prawnego*, [in:] A. Łopatka et al. (eds), *Państwo. Społeczeństwo. Jednostka. Księga jubileuszowa dedykowana Profesorowi Leszkowi Kubickiemu*, Warszawa 2003, p. 490; Z. Sienkiewicz, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne*, Warszawa 2010, p. 411; M. Jeż-Ludwichowska, [in:] A. Bulsiewicz, M. Jeż-Ludwichowska, D. Kala, D. Osowska, A. Lach, *Przebieg procesu karnego*, Toruń 2003, p. 263; R. Piotrowski, *Stosowanie prawa łaski w Konstytucji RP*, Studia Iuridica No. 45, 2006, pp. 165–166; B. Banaszak, *Prezydenckie prawo łaski w Polsce*, Acta Uniwersitatis Wratislaviensis. Przegląd Prawa i Administracji No. 50, 2002, p. 34; *idem*, *Prawo konstytucyjne*, Warszawa 2008, p. 619; B. Baran, *Prawo łaski w polskim systemie prawnym na tle powszechnym*, Sosnowiec 2011, p. 308; S. Stachowiak, [in:] W. Daszkiewicz, T. Nowak, S. Stachowiak, *Proces karny. Część szczególna*, Poznań 1996, p. 158; R. Kmiecik, *Jeszcze raz w sprawie abolicji indywidualnej*, Prokuratura i Prawo No. 12, 2017, pp. 5–11; *idem*, *Karnoprocesowe aspekty ułaskawienia abolicyjnego*, Ius et Administratio No. 3, 2016, pp. 2–10; P. Kruszyński, *Ułaskawienie a prawo łaski – pojęcia tożsame czy różne?* [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. 197.

[17] S. Śliwiński, *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warszawa 1959, p. 110.

addition, it is emphasised that historical interpretation is for this approach because the pre-war constitutions (of 1921 and 1935) clearly excluded the possibility of individual abolition.[18]

This possibility is also negated.[19] It is indicated that such an act "obstructs the provisions regulating the rules of abandoning the prosecution of acts that do not

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[18] K. Kaczmarczyk-Klak, *Prawo łaski w Polsce na tle porównawczym. Dawniej i współcześnie*, Rzeszów 2013, pp. 432–433.

[19] W. Blutstein, *Dwa prawa łaski*, Głos Sądownictwa No. 2, 1934, p. 136; J. Łukaszczuk, *Postępowanie ułaskawieniowe. Niektóre zagadnienia*, Problemy Praworządności No. 8–9, 1978, p. 46; R.A. Stefański, *Ułaskawienie w nowych uregulowaniach*, Prokuratura i Prawo No. 9, 1997, pp. 26–27; *idem*, [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz*, Vol. III, Warszawa 2004, p. 790; R. Balicki, *Uprawnienia prezydenta w nowej Konstytucji Rzeczypospolitej Polskiej. Zagadnienia podstawowe*, Acta Universitas Wratislaviensis. Przegląd Prawa i Administracji Vol. 40, 1998, p. 36; P. Sarnecki, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, Warszawa 1999, p. 2; J. Sobczak, *Nowy kształt instytucji ułaskawienia*, [in:] A. Szwarc (ed.), *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999, p. 253; W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Zakamycze 1999, p. 143; *idem*, *Polskie prawo konstytucyjne*, Lublin 2005, p. 181; P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2000, p. 184; *idem*, *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warszawa 2003, pp. 222–223; A. Szmyt, *Opinia w sprawie prezydenckiego prawa łaski*, Przegląd Sejmowy No. 6, 2000, pp. 73–74; P. Niedzielak, K. Petryna, [in:] A. Kryże, P. Niedzielak, K. Petryna, T.E. Wirzman, *Kodeks postępowania karnego. Praktyczny komentarz z orzecznictwem*, Warszawa 2001, p. 997; T. Bojarski, *Polskie prawo karne. Zarys części ogólnej*, Warszawa 2002, p. 287; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2009, pp. 259–260; P. Czarny, *Realizacja konstytucyjnych kompetencji Prezydenta RP w odniesieniu do sądów i Krajowej Rady Sądownictwa*, [in:] M. Grzybowski (ed.), *System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa*, Warszawa 2006, p. 87; E. Popławska, *Prawo łaski*, [in:] W. Skrzydło, S. Grabowska, R. Grabowski (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, Warszawa 2009, pp. 431-432; B.J. Stefańska, *Zatarcie skazania*, Warszawa 2014, p. 346; E. Skrętowicz, *Z problematyki ułaskawienia w polskim procesie karnym*, [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warszawa 2007, p. 274; J. Grajewski, *Przebieg procesu karnego*, Warszawa 2012, p. 415; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, Vol. III, Warszawa 2012, p. 514; L. Wilk, *O instytucji ułaskawienia (uwagi de lege ferenda)*, Państwo i Prawo No. 5, 1997, pp. 58–59; K. Marszał, [in:] K. Marszał, S. Stachowiak, K. Zgryzek, *Proces karny*, Katowice 2005, p. 643; M. Snitko-Pleszko, *Instytucja ułaskawienia (uwagi de lege lata i postulaty de lege ferenda)*, Państwo i Prawo No. 1, 2007, p. 46; M. Rogalski, *Res iudicata jako przesłanka procesu karnego*, Rzeszów 2004, p. 155; K. Sychta, [in:] K. Marszał, S. Stachowiak, K. Sychta, J. Zagrodnik, K. Zgryzek, *Proces karny. Przebieg postępowania*, Katowice 2008, p. 273; J. Skorupka, [in:] Z. Świda, J. Skorupka (ed.), R. Ponikowski, W. Posnow, *Postępowanie karne. Część szczególna*, Warszawa 2013, pp. 356–358; J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2005, pp. 434–435; P. Rogoziński, [in:] J. Grajewski (ed.), *Kodeks postępowania karnego (art. 425–673)*, Vol. II, Zakamycze 2005, p. 280; *idem*, *Instytucja ułaskawienia w prawie polskim*, Warszawa 2009, pp. 99–105; K. Kozłowski, *Prawo łaski*, *op. cit.*, p. 239; D. Świecki, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 2013, p. 91; K. Dudka, *Przedmiot ułaskawienia – zagadnienia wybrane*, [in:] P. Hofmański (ed.) in cooperation with P. Kardas, P. Wiliński, *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej*, Warszawa 2014, pp. 107–108; P. Kardas, J. Giezek, *Konstytucyjne podstawy prezydenckiego prawa łaski a możliwość stosowania tzw. abolicji indywidualnej*, Palestra No. 1–2, 2016, pp. 21–39; J. Kędzierski, *Prawo łaski a tzw. abolicja indywidualna – rozważania pro publico bono*, Palestra No. 1–2, 2016, pp. 43–45; J. Kluza, *Postępowanie ułaskawieniowe czy jego brak?*, Internetowy Przegląd Prawniczy TBSP UJ No. 2, 2016, pp. 109–119; K. Nowicki, [in:] J. Skorupka (ed.), *Proces karny*, Warszawa 2017, p. 782; I. Hayduk-Hawrylak, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego, Komentarz*,

have the material features of a crime or do not deserve punishment, although they formally infringe the law".[20] It is argued that the power of pardon may be applied when the functions of the administration of justice have been totally completed,[21] infringes the principle of equal justice under law, arbitrarily excludes the possibility of establishing facts, is in conflict with the principle of material truth and directly infringes the principle of legalism,[22] constitutes excessive interference into administration of justice, which is in conflict with the separation of powers and undermines trust in the state[23]. It is believed that it is hard to reconcile it with the principles of a democratic state ruled by law and implementing social justice expressed in Article 2 Constitution, which states that the Republic of Poland is a democratic state ruled by law and implementing the principles of social justice.[24] The principle expressed in Article 2 Constitution is "a key to reading other legal provisions"[25] and is a significant interpretational directive of almost universal importance and application. It is rightly emphasised in the legal doctrine that individual abolition is only typical of absolutism,[26] it is "a means of far-reaching interference of one of the highest bodies of state authority into the field of justice administration competences and is hard to approve of in a democratic state ruled by law", and in addition it would be "a means of granting privileges to some individuals not understandable to society (…), breaking a democratic principle of equal justice under law for all citizens".[27] The application of the power of pardon before a valid conclusion of a case would constitute premature interference into the administration of justice.[28] It is rightly emphasised that an act of pardon does not consist in the remission of or consigning a crime into oblivion but in the remission or mitigation of a penalty with the simultaneous maintenance of other decisions of the sentence, including the establishment of guilt, in validity.[29] Other arguments for rejecting individual abolition include the provisions regulating the pardon procedure, where a term "a convict" is used to refer to a person who may be subject to pardon (Article 560 § 1, Article 563 CPC); thus, it concerns a person convicted in a valid sentence. Moreover, the content of the provisions indicates that the proceedings cover situations after the issue of a valid sentence.[30]

Warszawa 2018, p. 1303; S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2018, p. 590.

[20] L. Wilk, *O instytucji ułaskawienia*, *op. cit*., p. 61.

[21] L. Lernell, *Wykład prawa karnego. Część ogólna*, Vol. II, Warszawa 1971, p. 198.

[22] P. Rogoziński, *Instytucja ułaskawienia*, *op. cit*., pp. 103–104.

[23] P. Kuczma, *Prawo łaski bez uzasadnienia*, Rzeczpospolita No. 3, 2011, p. 26.

[24] A. Pułło, *Sprawiedliwość społeczna w systemie zasad naczelnych Konstytucji RP*, Państwo i Prawo No. 7, 2001, p. 5.

[25] J. Jaskiernia, *Rozumienie niektórych norm o charakterze klauzul generalnych w świetle prac konstytucyjnych*, Gdańskie Studia Prawnicze No. 3, 1998, p. 10.

[26] W. Makowski, *Prawo karne. Część ogólna*, Warszawa 1920, p. 420.

[27] A. Murzynowski, *Ułaskawienie w Polsce Ludowej*, Warszawa 1965, p. 127.

[28] R.A. Stefański, *Ułaskawienie*, *op. cit*., p. 27.

[29] M. Olszewski, [in:] M. Siewierski, J. Tylman, M. Olszewski, *Postępowanie karne w zarysie*, Warszawa 1971, p. 295.

[30] J. Grajewski, [in:] J. Grajewski, E. Skrętowicz, *Kodeks postępowania karnego z komentarzem*, Gdańsk 1996, p. 395.

Thus, it is not surprising that the extended bench of the Supreme Court dealt with the prejudicial question: "Does the scope of the norm of the phrase 'the power of pardon' laid down in the first sentence of Article 139 of the Constitution of the Republic of Poland also cover the competence norm to apply individual abolition?" The bench modified the question because it believed it meant: "May the power of pardon regulated in the first sentence of Article 139 of the Constitution of the Republic of Poland, which is individual in nature (refers to a particular person specified with individual personal data), be applied before a sentence becomes final, i.e. it states guilt?" It is rightly indicated in literature that the act of pardon applied by the President of the Republic of Poland is an individual act the essence of which consists in the abrogation or modification of a specific legal burden imposed on a particular person.[31]

In the resolution adopted by the bench of seven judges on 31 May 2017, I KZP 4/17,[32] the Supreme Court assumed that: **"The power of pardon as the power of the President of the Republic of Poland laid down in Article 139 first sentence of the Constitution of the Republic of Poland may be applied only to persons whose guilt has been stated in a final court sentence (to convicted persons). Only in such an approach to the scope of this provision, the infringement of the rules expressed in Article 10 in conjunction with Article 7, Article 42 para. 3, Article 45 para. 1, Article 175 para. 1 and Article 177 of the Constitution of the Republic of Poland does not occur. Application of the power of pardon before the date a sentence becomes final does not take legal effect."** It is a right resolution, although it met with both positive[33] and negative[34] assessment of legal commentators as well as a critical attitude to arguments included therein.[35] According to the Supreme Court, the arguments supporting its stance are as follows:

– the second sentence of Article 139 Constitution rules out the application of pardon to individuals convicted by the Tribunal of State, which means that pardon is not applicable to persons who are subject to proceedings before the Tribunal of State as well as those who are still non-finally convicted by this body;
– the internal coherence of the provisions of the Constitution of the Republic of Poland in which a convicted person (Article 139; Article 99 para. 3) is differentiated from a person against whom criminal proceedings have been brought (Article 42 para. 2) and having the status of an innocent person (Article 42 para. 3);
– inapplicability of the power of pardon in practice to persons non-finally convicted;

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[31] R. Zawłocki, *Glosa polemiczna do uchwały Sądu Najwyższego dotyczącej prezydenckiego prawa łaski z dnia 31 maja 2017 r., sygn. akt I KZP 4/17*, Wojskowy Przegląd Prawniczy No. 2, 2018, p. 119.

[32] OSNKW 2017, No. 7, item 37.

[33] Approving gloss on this resolution by J. Kluza, *Glosa aprobująca do uchwały Sądu Najwyższego z dnia 31 maja 2017 r., I KZP 4/17*, Młoda Palestra No. 4, 2017, pp. 26–35.

[34] Gloss on this resolution by M. Masternak-Kubiak, *Glosa do uchwały składu 7 sędziów Sądu Najwyższego z dnia 31 maja 2017 r. (sygn. akt I KZP 4/17)*, Przegląd Sejmowy No. 6, 2017, pp. 238–246.

[35] R. Zawłocki, *Glosa*, *op. cit*., pp. 127–132.

– granting pardon before the issue of a final sentence reflects the unwarranted extension of the executive power at the cost of the judicial power, which is in conflict with Articles 7, 10 and 175 Constitution;
– if a person is innocent based on Article 42 para. 3 Constitution, no executive power can state he or she is guilty;
– the act of pardon granted to person non-finally convicted infringes Article 45 para. 1 Constitution, which determines the right to a court because it precludes subsidiary prosecutors from exercising their procedural rights, i.e. the hearing of an appellate measure.

These are arguments that, if taken into account separately, can be not fully convincing but analysed entirely, in spite of some weaknesses, make it possible to recognise the theses of the Supreme Court as justified. What is also important, there are more and more serious arguments against pardon in such a situation than those in support thereof.[36] In order to exclude this type of pardon that causes justified controversies, it is right to put forward a proposal *de lege ferenda* to clearly formulate Article 139 Constitution in such a way that the power of pardon should be applicable only to final judgments. It would be too narrow, what is proposed in literature, to limit it to penalties finally adjudicated[37] because it would omit other legal burdens, e.g. penal measures or forfeiture.

Regardless of the rightness of arguments for one or the other stance, the President of the Republic of Poland should not be governed by political reasons when taking a decision on granting pardon because, as it is rightly highlighted in literature, based on the Constitution, he is the highest representative of common good: a democratic state ruled by law, and he should safeguard due observance of constitutional regulations, and thus should not take arbitrary decisions that break the social sense of justice by the application of the power of pardon.[38] Regardless of such diverse interpretation of Article 139 Constitution, the President of the Republic of Poland issued a decision of 16 November 2015 No. PU.117.45.2015 based on Article 139 Constitution and applied the power of pardon to K.B., M.K., G.P. and M.W., who had been non-finally convicted, "by forgiveness and oblivion as well as discontinuation of proceedings". The decision was politically motivated because, as it is rightly emphasised in the legal writings, "the political context was really significant when the President of the Republic of Poland decided to use the power of pardon. Two circumstances indicate this. Firstly, the decision, unlike any other decisions of this type, was not given any legal justification ('Statistical information' or 'Motives'). Secondly, on the same day the President of the Republic of Poland issued a decision appointing one of the persons granted pardon to the office of a minister (a member of the Council of Ministers)".[39] Moreover, the decision on granting pardon included one on the discontinuation of proceedings, which interfered into a court's jurisdic-

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[36] *Ibid*., p. 133.
[37] *Ibid*.
[38] I. Hayduk-Hawrylak, *Rzetelny proces karny a ułaskawienie*, [in:] J. Skorupka, W. Jasiński (eds), *Rzetelny proces karny. Materiały konferencji naukowej, Trzebieszowice 17–19 września 2009 r.*, Warszawa 2010, pp. 216–217.
[39] R. Zawłocki, *Glosa*, *op. cit*., p. 118.

tion, and flagrantly infringed Article 175 para. 1 Constitution pursuant to which the administration of justice is implemented in the Republic of Poland by the Supreme Court, common courts, administrative courts and military courts. In such a situation, Article 17 § 1(11) CPC constitutes legal grounds for discontinuance of criminal proceedings and only a body carrying out the proceedings, not the President of the Republic of Poland, who is not given the competence in Article 139 Constitution, can take this decision.

ACT OF 6 JULY 1982 ON ATTORNEYS-AT-LAW

4. SCOPE OF APPLICATION OF CRIMINAL PROCEDURE CODE IN DISCIPLINARY PROCEEDINGS AGAINST ATTORNEY-AT-LAW (ARTICLE 741 PARA. 1)

The regulation of disciplinary liability in Chapter 6 of the Act of 6 July 1982 on attorneys-at-law[40] does not cover all the issues concerning liability or the procedure. In matters that are not regulated in this Act, Article 74^1 refers to the provisions of the Criminal Procedure Code applied by analogy and Chapters I–III Criminal Code regulating *mutatis mutandis* the rules of disciplinary liability, forms of disciplinary offences and exemptions from disciplinary liability. Referring to the application of other statutory provisions by analogy always raises doubts which provisions of the statute referred to are applicable. This also concerns this case, which indeed has led to discrepancies even in the judgments of the Supreme Court itself. The body stated that: "In the face of the lack of at least partial regulation of a complaint about the judgment of a court of appeal in the Act of 1982 on attorneys-at-law, taking into account the specificity of disciplinary proceedings and the nature of the institution laid down in Chapter 55a CPC, it should be assumed that there are no grounds for applying it to second-instance disciplinary courts' judgments; all the more so as the institution is restricted for judgments issued in the form of sentences by courts on behalf of the Republic of Poland and not in relation to judgments issued on behalf of a particular professional corporation."[41] Further on the Court stated that: "Act of 1982 on attorneys-at-law does not contain separate regulations concerning an extraordinary appellate measure, i.e. the institution of a complaint about the cassation sentence of the court of appeal introduced to criminal procedure by the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts (Dz.U. item 437). However, due to the fact that Article 74^1 para. 1 ALA laid down the principle pursuant to which in matters that are not regulated in statute the provisions of Criminal Procedure Code are applied by analogy in disciplinary proceedings, there are no doubts that the regulations of Chapter 55a CPC are applicable in disciplinary proceedings against attorneys-at-law, in the same way as the

[40] Consolidated text, Dz.U. 2018, item 2115, as amended; hereinafter Attorneys-at-Law Act or ALA.

[41] Supreme Court ruling of 21 April 2017, VI KS 1/17, LEX No. 2281284.

provisions regulating another extraordinary appellate measure, i.e. reopening of finally concluded proceedings, which is not directly regulated in the Act on attorneys-at-law, and cassation (Articles 622–625 and Article 741 para. 1 ALA)."[42]

Solving the problem in the resolution of seven judges of 14 September 2017, I KZP 9/17,[43] the Supreme Court explained that: **"The provisions of Chapter 55a Criminal Procedure Code concerning a complaint about a judgment of a court of appeal overruling the judgment of a first-instance court and referring the case to be reheard shall be applied by analogy (Article 74[1] para. 1 Act of 6 July 1982 on attorneys-at-law – consolidated text, Dz.U. of 2016, item 233, as amended) in disciplinary proceedings regulated in the provisions of the Act on attorneys-at-law, and the Supreme Court shall hear a complaint filed."** It is a right opinion. Justifying it, the court rightly noticed that it concerns reference to external provisions that are dynamic in nature, which means that the reference contained in Article 74[1] para. 1 ALA relates to the provisions of Criminal Procedure Code in their actual wording each time they are referred to during the time the referring provision is in force.[44] Therefore, it is not important that the provisions laid down in Chapter 55a CPC entered into force later than the provision of Article 741 para. 1 ALA and theoretically the provisions concerning a complaint about a judgment of a court of appeal may be applicable in disciplinary proceedings against an attorney-at-law by analogy. On the other hand, the application of provisions by analogy means that they can be applied directly, with no change in their content, with modification or not applied at all.[45] The Supreme Court referred to the motives for introducing a complaint about an appeal court's judgment. In the justification for the governmental bill amending the Act: Criminal Procedure Code and some other acts,[46] which introduced Chapter 55a to the Criminal Procedure Code, it was indicated that "The appellate-reformist model of appellate proceedings adopted in the bill requires,

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[42] Supreme Court ruling of 8 June 2017, VI KS 2/17, LEX No. 2334903.

[43] OSNKW 2017, No. 10, item 59.

[44] A. Malinowski, [in:] A. Malinowski (ed.), *Zarys metodyki pracy legislatora. Ustawy. Akty wykonawcze. Prawo miejscowe*, Warszawa 2009, pp. 334–335; and S. Wronkowska, [in:] S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej*, Warszawa 2004, pp. 309–311.

[45] J. Nowacki, *„Odpowiednie" stosowanie przepisów prawa*, Państwo i Prawo No. 3, 1964; M. Hauser, *Odpowiednie stosowanie przepisów prawa – uwagi porządkujące*, Acta Uniwersitatis Wratislaviensis. Przegląd Prawa i Administracji Vol. 65, Wrocław 2005; A. Błachnio-Parzych, *Przepisy odsyłające systemowo (wybrane zagadnienia)*, Państwo i Prawo No. 1, 2003, and in relation to the application of the Criminal Procedure Code by analogy to disciplinary proceedings, e.g. W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Warszawa 2016, p. 70; A. Korzeniewska-Lasota, *Odpowiednie stosowanie przepisów Kodeksu postępowania karnego w postępowaniu w sprawach odpowiedzialności dyscyplinarnej adwokatów. Część I. Zagadnienia ogólne*, Palestra No. 9–10, 2013, pp. 74–75; K. Dudka, *Stosowanie przepisów kodeksu postępowania karnego w postępowaniach dyscyplinarnych uregulowanych w prawie o adwokaturze oraz ustawie o radcach prawnych*, [in:] M. Mozgawa (ed.), *Prawo w działaniu. Sprawy karne*, Vol. 18, Warszawa 2014, p. 48; P. Czarnecki, *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego*, Warszawa 2013, Chapter VI, *passim*; Supreme Court judgment of 5 November 2003, SNO 67/03, LEX No. 471880.

[46] Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw (the Sejm print no. 207) http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=207 (accessed on 2.04.2019).

however, that an institutional mechanism serving the protection of reformist adjudication be introduced. What has fulfilled the function in civil-law proceedings for some time now is the possibility of filing a complaint to the Supreme Court about an appeal court's judgment overruling the first-instance court sentence and referring the case to that court to be reheard (see Article 394^1 § 11 CPC). The solution is useful mainly because of practical benefits resulting from it, i.e. inter alia the elimination of groundless sentence overruling, which undoubtedly affects the acceleration of the proceedings. It also plays a preventive role as it stops appeal courts from hasty adjudication on cassation."

Due to the fact that Attorneys-at-Law Act lacks a regulation that would shape a model of appellate proceedings in disciplinary cases in a way different from criminal proceedings, the Supreme Court decided that the provisions of the Criminal Procedure Code should determine this model completely. Since the legislator decided that the appellate-reformist proceeding model requires additional protection with the use of a special appellate measure, this need is updated based on both the criminal procedure and disciplinary proceeding. In the Supreme Court's opinion, the reasons are also present in disciplinary proceedings. Especially groundless, hasty sentence overruling takes place not only in common courts but also in disciplinary courts. The need to introduce solutions aimed at accelerating proceedings emphasised by the legislator occurs in the criminal procedure as well as disciplinary proceedings. Disciplinary proceedings are also a type of repressive ones and a penalty imposed a long time after the commission of an offence loses its feature from the point of view of individual as well as general prevention. Moreover, the limitation periods for disciplinary offences are shorter than for crimes and the need to ensure efficient proceedings seems to be more significant than in case of the criminal procedure.

The Supreme Court broadly and convincingly substantiated its opinion that the Supreme Court and not the Supreme Disciplinary Court is a body competent to hear a complaint about an appeal court's judgment.

BIBLIOGRAPHY

Aker J., [in:] W. Makowski (ed.), *Encyklopedia podręczna prawa karnego*, Warszawa, no release date.

Balicki R., *Uprawnienia Prezydenta w nowej Konstytucji Rzeczypospolitej Polskiej. Zagadnienia podstawowe*, Acta Universitas Wratislaviensis. Przegląd Prawa i Administracji Vol. 40, 1998.

Banaszak B., *Prezydenckie prawo łaski w Polsce*, Acta Uniwersitatis Wratislaviensis. Przegląd Prawa i Administracji Vol. 50, 2002.

Banaszak B., *Prawo konstytucyjne*, Warszawa 2008.

Baran B., *Prawo łaski w polskim systemie prawnym na tle powszechnym*, Sosnowiec 2011.

Blutstein W., *Dwa prawa łaski*, Głos Sądownictwa No. 2, 1934.

Błachnio-Parzych A., *Przepisy odsyłające systemowo (wybrane zagadnienia)*, Państwo i Prawo No. 1, 2003.

Bojarski T., *Polskie prawo karne. Zarys części ogólnej*, Warszawa 2002.

Cieślak W., Kopoczyński T., Wolański W., *Zestawienie orzecznictwa Sądu Najwyższego i sądów apelacyjnych dotyczącego k.k. i k.p.k. z 1997 r. za okres: wrzesień 1998–luty 1999*, Palestra No. 7–8, Warszawa 1999.

Czarnecki P., *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego*, Warszawa 2013.

Czarny P., *Realizacja konstytucyjnych kompetencji Prezydenta RP w odniesieniu do sądów i Krajowej Rady Sądownictwa*, [in:] M. Grzybowski (ed.), *System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa*, Warszawa 2006.

Dudka K., *Przedmiot ułaskawienia – zagadnienia wybrane*, [in:] P. Hofmański (ed.) in cooperation with P. Kardas, P. Wiliński, *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej*, Warszawa 2014.

Dudka K., *Stosowanie przepisów kodeksu postępowania karnego w postępowaniach dyscyplinarnych uregulowanych w prawie o adwokaturze oraz ustawie o radcach prawnych*, [in:] M. Mozgawa (ed.), *Prawo w działaniu. Sprawy karne*, Vol. 18, Warszawa 2014.

Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2009.

Grajewski J., [in:] J. Grajewski, E. Skrętowicz, *Kodeks postępowania karnego z komentarzem*, Gdańsk 1996.

Grajewski J., *Przebieg procesu karnego*, Warszawa 2012.

Grzegorczyk T., *Kodeks postępowania karnego. Komentarz*, Warszawa 2008.

Grzeszczyk W., *Przegląd uchwał Izby Karnej Sądu Najwyższego (prawo karne procesowe – 2007 r.)*, Prokuratura i Prawo No. 4, 2008.

Grzeszczyk W., *Przegląd uchwał i postanowień Izby Karnej Sądu Najwyższego w kwestiach prawnych (prawo karne procesowe – 2008 r.)*, Prokuratura i Prawo No. 4, 2009.

Hauser M., *Odpowiednie stosowanie przepisów prawa – uwagi porządkujące*, Acta Uniwersitatis Wratislaviensis. Przegląd Prawa i Administracji Vol. 65, Wrocław 2005.

Hayduk-Hawrylak I., *Rzetelny proces karny a ułaskawienie*, [in:] J. Skorupka, W. Jasiński (eds), *Rzetelny proces karny. Materiały konferencji naukowej, Trzebieszowice 17–19 września 2009 r.*, Warszawa 2010.

Hayduk-Hawrylak I., [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2018.

Hofmański P., Sadzik E., Zgryzek K., *Kodeks postępowania karnego. Komentarz*, Vol. III, Warszawa 2012.

Jaskiernia J., *Rozumienie niektórych norm o charakterze klauzul generalnych w świetle prac konstytucyjnych*, Gdańskie Studia Prawnicze No. 3, 1998.

Jeż-Ludwichowska M., [in:] A. Bulsiewicz, M. Jeż-Ludwichowska, D. Kala, D. Osowska, A. Lach, *Przebieg procesu karnego*, Toruń 2003.

Kaczmarczyk-Klak K., *Prawo łaski w Polsce na tle porównawczym. Dawniej i współcześnie*, Rzeszów 2013.

Kardas P., Giezek J., *Konstytucyjne podstawy prezydenckiego prawa łaski a możliwość stosowania tzw. abolicji indywidualnej*, Palestra No. 1–2, 2016.

Kędzierski J., *Prawo łaski a tzw. abolicja indywidualna – rozważania pro publico bono*, Palestra No. 1–2, 2016.

Kluza J., *Postępowanie ułaskawieniowe czy jego brak?*, Internetowy Przegląd Prawniczy TBSP UJ No. 2, 2016.

Kluza J., *Glosa aprobująca do uchwały Sądu Najwyższego z dnia 31 maja 2017 r., I KZP 4/17*, Młoda Palestra No. 4, 2017.

Kmiecik R., *Karnoprocesowe aspekty ułaskawienia abolicyjnego*, Ius et Administratio No. 3, 2016.

Kmiecik R., *Jeszcze raz w sprawie abolicji indywidualnej*, Prokuratura i Prawo No. 12, 2017.

Korzeniewska-Lasota A., *Odpowiednie stosowanie przepisów Kodeksu postępowania karnego w postępowaniu w sprawach odpowiedzialności dyscyplinarnej adwokatów. Część I. Zagadnienia ogólne*, Palestra No. 9–10, 2013.

Kosonoga J., [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz do art. 1–166*, Vol. I, Warszawa 2017.

Kozielewicz W., *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Warszawa 2016.

Kozłowski K., *Prawo łaski Prezydenta RP. Historia, regulacja, praktyka*, Warszawa 2013.

Kruszyński P., *Ułaskawienie a prawo łaski – pojęcia tożsame czy różne?* [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.

Kuczma P., *Prawo łaski bez uzasadnienia*, Rzeczpospolita No. 3, 2011.

Lernell L., *Wykład prawa karnego. Część ogólna*, Vol. II, Warszawa 1971.

Łukaszczuk J., *Postępowanie ułaskawieniowe. Niektóre zagadnienia*, Problemy Praworządności No. 8–9, 1978.

Makowski W., *Prawo karne. Część ogólna*, Warszawa 1920.

Malinowski A. (ed.), *Zarys metodyki pracy legislatora. Ustawy. Akty wykonawcze. Prawo miejscowe*, Warszawa 2009.

Marszał K., [in:] K. Marszał, S. Stachowiak, K. Zgryzek, *Proces karny*, Katowice 2005.

Masternak-Kubiak M., *Glosa do uchwały składu 7 sędziów Sądu Najwyższego z dnia 31 maja 2017 r. (sygn. akt I KZP 4/17)*, Przegląd Sejmowy No. 6, 2017.

Murzynowski A., *Ułaskawienie w Polsce Ludowej*, Warszawa 1965.

Murzynowski A., *Refleksje na temat instytucji ułaskawienia w świetle aktualnego stanu prawnego*, [in:] A. Łopatka et al. (eds), *Państwo. Społeczeństwo. Jednostka. Księga jubileuszowa dedykowana Profesorowi Leszkowi Kubickiemu*, Warszawa 2003.

Niedzielak P., Petryna K., [in:] A. Kryże, P. Niedzielak, K. Petryna, T.E. Wirzman, *Kodeks postępowania karnego. Praktyczny komentarz z orzecznictwem*, Warszawa 2001.

Nowacki J., *„Odpowiednie" stosowanie przepisów prawa*, Państwo i Prawo No. 3, 1964.

Nowicki K., [in:] J. Skorupka (ed.), *Proces karny*, Warszawa 2017.

Olszewski M., [in:] M. Siewierski, J. Tylman, M. Olszewski, *Postępowanie karne w zarysie*, Warszawa 1971.

Piotrowski R., *Stosowanie prawa łaski w Konstytucji RP*, Studia Iuridica No. 45, 2006.

Popławska E., *Prawo łaski*, [in:] W. Skrzydło, S. Grabowska, R. Grabowski (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, Warszawa 2009.

Pułło A., *Sprawiedliwość społeczna w systemie zasad naczelnych Konstytucji RP*, Państwo i Prawo No. 7, 2001.

Rogalski M., *Res iudicata jako przesłanka procesu karnego*, Rzeszów 2004.

Rogoziński P., [in:] J. Grajewski (ed.), *Kodeks postępowania karnego (art. 425–673)*, Vol. II, Zakamycze 2005.

Rogoziński P., *Instytucja ułaskawienia w prawie polskim*, Warszawa 2009.

Sarnecki P., [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, Warszawa 1999.

Sienkiewicz Z., [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne*, Warszawa 2010.

Skorupka J., [in:] Z. Świda, J. Skorupka (ed.), R. Ponikowski, W. Posnow, *Postępowanie karne. Część szczególna*, Warszawa 2013.

Skrętowicz E., *Z problematyki ułaskawienia w polskim procesie karnym*, [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warszawa 2007.

Skrzydło W., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Zakamycze, Kraków 1999.

Skrzydło W., *Polskie prawo konstytucyjne*, Lublin 2005.

Snitko-Pleszko M., *Instytucja ułaskawienia (uwagi de lege lata i postulaty de lege ferenda)*, Państwo i Prawo No. 1, 2007.

Sobczak J., *Nowy kształt instytucji ułaskawienia*, [in:] A. Szwarc (ed.), *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999.

Stachowiak S., [in:] W. Daszkiewicz, T. Nowak, S. Stachowiak, *Proces karny. Część szczególna*, Poznań 1996.

Stefańska B.J., *Zatarcie skazania*, Warszawa 2014.

Stefański R.A., *Ułaskawienie w nowych uregulowaniach*, Prokuratura i Prawo No. 9, 1997.

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

Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2005 r.*, Wojskowy Przegląd Prawniczy No. 2, 2006.

Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2007 r.*, Wojskowy Przegląd Prawniczy No. 2, 2008.

Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2008 r.*, Wojskowy Przegląd Prawniczy No. 2, 2009.

Sychta K., [in:] K. Marszał, S. Stachowiak, K. Sychta, J. Zagrodnik, K. Zgryzek, *Proces karny. Przebieg postępowania*, Katowice 2008.

Szmyt A., *Opinia w sprawie prezydenckiego prawa łaski*, Przegląd Sejmowy No. 6, 2000.

Śliwiński S., *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warszawa 1959.

Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I and II, Warszawa 2013.

Waltoś S., Hofmański P., *Proces karny. Zarys systemu*, Warszawa 2018.

Warylewski J., *Prawo karne. Część ogólna*, Warszawa 2005.

Wilk L., *O instytucji ułaskawienia (uwagi de lege ferenda)*, Państwo i Prawo No. 5, 1997.

Winczorek P., *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2000.

Winczorek P., *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warszawa 2003.

Wronkowska S., [in:] S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej*, Warszawa 2004.

Zawłocki R., *Glosa polemiczna do uchwały Sądu Najwyższego dotyczącej prezydenckiego prawa łaski z dnia 31 maja 2017 r., sygn. akt I KZP 4/17*, Wojskowy Przegląd Prawniczy No. 2, 2018.

REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER FOR 2017 CONCERNING CRIMINAL PROCEDURE LAW

Summary

The article presents resolutions and rulings of the Supreme Court Criminal Chamber adopted as a result of deciding prejudicial issues requiring fundamental interpretation of statutes, raising doubts concerning the interpretation of the provisions which are grounds for a judgment issued or which raised discrepancies in their interpretation. These concern: admissibility of a complaint about a court's ruling on lack of competence (Article 35 § 3 CPC); the requirements for appeal courts for asking the Supreme Court prejudicial questions concerning issues that need fundamental interpretation of a statute (Article 441 § 1 CPC); the scope of the power of pardon (Article 139 Constitution of the Republic of Poland and Article 560 CPC) and the scope of application of the Criminal Procedure Code in disciplinary proceedings against attorneys-at-law (Article 741 para. 1 Act on attorneys-at-law). Assessing the opinions expressed in those judgments, the author reviews statements made on those issues in the legal doctrine and judicature and adds his own thoughts to the quoted arguments.

Keywords: abolition, ruling, disciplinary proceedings, attorney-at-law, Supreme Court, complaint about an appeal court's judgment, resolution, pardon, court competence, prejudicial issue, complaint

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO PROCESOWEGO ZA 2017 R.

Streszczenie

Przedmiotem artykułu są uchwały i postanowienia Izby Karnej Sądu Najwyższego, podjęte w wyniku przedstawienia do rozstrzygnięcia zagadnień prawnych wymagających zasadniczej wykładni ustawy, budzących wątpliwości co do wykładni przepisów prawa będących podstawą wydanego rozstrzygnięcia lub które wywołały rozbieżności w ich wykładni. Dotyczyły one: dopuszczalności zażalenia na postanowienie sądu stwierdzające niewłaściwość (art. 35 § 3 k.p.k.); przesłanek występowania do Sądu Najwyższego przez sądy odwoławcze o rozstrzygnięcie zagadnień prawnych wymagających zasadniczej wykładni ustawy (art. 441 § 1 k.p.k.); zakresu prawa łaski (art. 139 Konstytucji RP i 560 k.p.k.) i zakresu stosowania kodeksu postępowania karnego w postępowaniu dyscyplinarnym radców prawnych (art. 741 pkt 1 ustawy o radcach prawnych). Autor, oceniając wyrażone w tych orzeczeniach poglądy, dokonał przeglądu wypowiedzi na te tematy w doktrynie i judykaturze, a przytoczoną argumentację wzbogacił własnymi przemyśleniami.

Słowa kluczowe: abolicja, postanowienie, postępowanie dyscyplinarne, radca prawny, Sąd Najwyższy, skarga na wyrok sądu odwoławczego, uchwała, ułaskawienie, właściwość sądu, zagadnienie prawne, zażalenie

REVISIÓN DE ACUERDOS DE LA SALA DE LO PENAL DEL TRIBUNAL SUPREMO EN CUANTO A DERECHO PENAL PROCESAL EN 2017

Resumen

El artículo versa sobre acuerdos y autos de la Sala de lo Penal del Tribunal Supremo, adoptados en virtud de: cuestiones legales que requieren la interpretación cardinal de la ley, ya que suscitan dudas sobre la interpretación de los preceptos de la ley que constituyen fundamentos de la sentencia o que presentan discrepancias en su interpretación (art. 35 § 3 del código de procedimiento penal); requisitos para solicitar por parte de tribunales regionales al Tribunal Supremo que se pronuncie sobre cuestiones legales que requieren la interpretación cardinal de la ley (art. 441 § 1 del código de procedimiento penal); ámbito de derecho de gracia (art. 139 de la Constitución de la República de Polonia y 560 del código de procedimiento penal) y ámbito de aplicación del código de procedimiento penal en proceso disciplinario de asesores jurídicos (art. 741 punto 1 de la ley de asesores jurídicos). El autor valora las posturas presentadas en estas resoluciones y revisa la doctrina y jurisprudencia, añadiendo su propia opinión.

Palabras claves: abolición, auto, proceso disciplinario, asesor jurídico, Tribunal Supremo, queja contra la sentencia de la segunda instancia, acuerdo, gracia, competencia de tribunal, cuestión legal, queja

ОБЗОР ПОСТАНОВЛЕНИЙ УГОЛОВНОЙ ПАЛАТЫ ВЕРХОВНОГО СУДА ЗА 2017 ГОД В ОБЛАСТИ УГОЛОВНО-ПРОЦЕССУАЛЬНОГО ПРАВА

Резюме

В статье рассматриваются постановления и решения Уголовной палаты Верховного суда, принятые в ходе рассмотрения правовых вопросов, требующих фундаментального толкования закона, вызывающих сомнения относительно толкования правовых норм, явившихся основанием для вынесенного решения, либо таких, которые вызвали расхождения в толковании. В частности, они касались: допустимости жалобы на постановление суда о ненадлежащей юрисдикции (ст. 35 § 3 УПК); предпосылок для обращения апелляционных судов в Верховный суд с целью разрешения правовых вопросов, требующих фундаментального толкования закона (ст. 441 § 1 УПК); область применения права на помилование (ст. 139 Конституции Республики Польша и ст. 560 УПК) и границы применения уголовно-процессуального кодекса в ходе дисциплинарного производства в отношении юрисконсультов (ст. 741 п. 1 Закона «О юридической консультации»). Давая оценку мнениям, выраженным в обсуждаемых судебных определениях, автор рассмотрел и прокомментировал высказывания по этим вопросам, уже имеющиеся в правовой доктрине и судебной практике.

Ключевые слова: аболиция, постановление суда, дисциплинарное производство, юрисконсульт, Верховный суд, жалоба на приговор суда апелляционной инстанции, резолюция, помилование, юрисдикция суда, правовой вопрос, жалоба

EIN ÜBERBLICK ÜBER DIE BESCHLÜSSE DER STRAFKAMMER DES SĄD NAJWYŻSZY IM BEREICH DES STRAFVERFAHRENSRECHTS FÜR 2017

Zusammenfassung

Der Artikel behandelt Beschlüsse und Entscheidungen der Strafkammer des polnischen Sąd Najwyższy, der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen, die im Ergebnis der Vorlage von Rechtsangelegenheiten zur Entscheidung ergangen sind, die eine grundsätzliche Auslegung des Gesetzes erforderten, die Zweifel in Bezug auf die Auslegung der der ergangenen Entscheidung zugrunde liegenden Rechtsvorschriften weckten oder die zu unterschiedlichen Auslegungen führten. Die Beschlüsse und Entscheidungen betrafen: die Zulässigkeit einer Unzuständigkeitsbeschwerde gegen einen Gerichtsbeschluss (Artikel 35 § 3 der polnischen Strafprozessordnung k.p.k.); die Voraussetzungen für die Beantragung der Entscheidung durch Berufungsgerichte beim Sąd Najwyższy in Rechtsangelegenheiten, die eine grundsätzliche Gesetzesauslegung erfordern, (Artikel 441 § 1 der polnischen Strafprozessordnung k.p.k.); den Anwendungsbereich des Gnadenakts (Artikel 139 der Verfassung der Republik Polen und 560 der polnischen Strafprozessordnung k.p.k.) und den Anwendungsbereich der polnischen Strafprozessordnung in Disziplinarverfahren gegen Rechtsanwälte (Artikel 741 Punkt 1 des polnischen Rechtsanwaltsgesetzes). Der Autor liefert, unter Bewertung der in diesen Gerichtsentscheidungen zum Ausdruck gebrachten Auffassungen, eine Übersicht über die Aussagen zu diesem Themenkomplex in der Rechtsprechung und im rechtswissenschaftlichen Schrifttum und hat die vorgetragene Argumentation mit eigenen Überlegungen angereichert.

Schlüsselwörter: Abolition, Entscheidung, Disziplinarverfahren, Rechtsanwalt, Sąd Najwyższy, Revision gegen das Urteil eines Berufungsgerichts, Beschluss, Begnadigung, Zuständigkeit des Gerichts, Rechtsangelegenheit, Beschwerde

REVUE DES RÉSOLUTIONS DE LA CHAMBRE CRIMINELLE DE LA COUR SUPRÊME DANS LE DOMAINE DU DROIT PROCEDURAL POUR 2017

Résumé

L'article porte sur les résolutions et décisions prises par la chambre criminelle de la Cour suprême à la suite de la présentation de questions juridiques nécessitant une interprétation fondamentale de la loi, suscitant des doutes quant à l'interprétation des dispositions juridiques qui sont à la base de la décision rendue ou qui ont entraîné des divergences dans leur interprétation. Elles concernaient: la recevabilité d'un recours contre une décision du tribunal constatant son incompétence (l'article 35 § 3 du code de procédure pénale); conditions permettant à des cours d'appel de saisir la Cour suprême afin de résoudre des problèmes juridiques nécessitant une interprétation fondamentale de la loi (l'article 441 § 1 du code de procédure pénale); l'étendue du droit de grâce (l'article 139 de la Constitution de la République de Pologne et aricle 560 du code de procédure pénale) et le champ d'application du code de procédure pénale dans les procédures disciplinaires des conseillers juridiques (l'article 741, point 1 de la loi sur les conseils juridiques). En évaluant les points de vue exprimés dans ces arrêts, l'auteur a examiné les déclarations sur ces sujets contenues dans la doctrine et la jurisprudence et a enrichi l'argumentation de ses propres pensées.

Mots-clés: abolition, ordonnance, procédure disciplinaire, conseil, Cour suprême, plainte contre le verdict de la cour d'appel, résolution, grâce, juridiction/compétence, question juridique, plainte

RASSEGNA DELLE DELIBERE DELLA CAMERA PENALE DELLA CORTE SUPREMA NELL'AMBITO DEL DIRITTO PENALE PROCESSUALE PER IL 2017

Sintesi

Oggetto dell'articolo sono le delibere e le ordinanze della Camera Penale della Corte Suprema assunte in risposta alle questioni giuridiche presentate, richiedenti una interpretazione fondamentale della legge, che suscitavano dubbi circa l'interpretazione delle norme di legge che costituivano la base della decisione emessa, o che suscitavano divergenze di interpretazione. Esse riguardavano: l'ammissibilità del ricorso avverso l'ordinanza del giudice che afferma la non competenza (art. 35 § 3 del Codice di procedura penale), la condizione di ricorso alla Corte Suprema da parte dei giudici d'appello per la risoluzione di questioni giuridiche che richiedono un'interpretazione fondamentale della legge (art. 441 § 1 del Codice di procedura penale), l'ambito di applicazione della grazia (art. 139 della Costituzione della Repubblica di Polonia e art. 560 del Codice di procedura penale) e l'ambito di applicazione del codice di procedura penale nei procedimenti disciplinari degli avvocati (art. 741 punto 1 della legge sugli avvocati). L'autore, valutando le opinioni espresse in queste sentenze ha effettuato una rassegna delle risposte su tali temi nella dottrina e nella giurisprudenza, e ha arricchito le argomentazioni riportate con riflessioni proprie.

Parole chiave: condono, ordinanza, provvedimento disciplinare, avvocato, Corte Suprema, ricorso avverso una sentenza del giudice d'appello, delibera, grazia, competenza del tribunale, questioni giuridiche, ricorso

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JUDGES' DISCIPLINARY LIABILITY FOR APPARENT AND FLAGRANT CONTEMPT OF PROVISIONS OF LAW VERSUS PRINCIPLE OF JUDICIAL INDEPENDENCE

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1. INTRODUCTION

Disciplinary liability is defined as a characteristic legal institution of discipline and self-control of organisationally and legally selected social groups with regard to the specificity of the aims they pursue and conditions of their operation as well as the resulting need to differentiate requirements concerning professional and ethical standards laid down for those groups. The specificity of disciplinary liability is looked for in the nature of relations that this type of legal liability concerns. It is indicated that the basis for disciplinary liability is formed by the conviction that it is reasonable to leave some issues connected with the activity of a particular milieu for this group to deal with on its own. Disciplinary offences concern the infringement of some rules of conduct in a given milieu and the state enforces appropriate bodies of the group to deal with them. What supports that is the conviction that representatives of a given milieu know its specificity better and, as a result, can apply sanctions that will be more effective and efficient.[1]

In accordance with Article 107 § 1 of the Act of 27 July 2001: Law on the common courts system[2] (hereinafter LCCS), a disciplinary offence can constitute a company-related misdeed, including apparent and flagrant contempt of the provisions of law

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1 W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Warszawa 2016, pp. 13–14.

2 Consolidated text, Dz.U. 2018, item 23.

or infringement of the authority's dignity. The division, actually inseparable,[3] in spite of what is stated in literature,[4] is practically significant because of guarantees, indicating, at least in a general way, the scope of disciplinary liability. It is necessary to take into account that there is no principle of statutorily determined features in disciplinary law.[5] Inter alia due to that, the judicial decisions indicate that Article 107 § 1 LCCS constitutes a material basis for judges' disciplinary liability that contains general features of a disciplinary tort, which are determined in a disciplinary court's judgment and should be in the form of an unambiguous specification of the tort as a company-related misdeed or infringement of the authority's dignity, and a precise indication of the norms of a particular legal act infringed by a judge or a detailed description of his/her conduct that infringes the authority's dignity, respectively.[6]

The above-mentioned provision clearly indicates that apparent and flagrant contempt of the provisions of law in the course of proceedings conducted by a judge is one of the forms of a company-related misdeed.[7] It is assumed in case law that contempt of law is apparent in nature when it is easy to confirm (one can apply an adequate provision without a deeper analysis), does not raise any doubts and results directly from the wording of the provisions. On the other hand, flagrant contempt of law means one that should be recognised as significant, large-scale and resulting in serious consequences for the interests of parties to or other participants of the proceedings (or at least it jeopardises the rights and important interests of the parties to the proceedings) or constitutes a serious threat to the system of justice administration.[8] In the context of the latter concept, the emphasis is placed on

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[3] There are situations when an act committed by the accused judge can constitute a company-related offence and infringement of the authority's dignity at the same time, see e.g. the judgment of the Supreme Court-Disciplinary Court of 7 July 2004, SNO 26/04, OSNSD 2004 No. 2, item 36 and judgment of the Supreme Court-Disciplinary Court of 24 May 2011, SNO 19/11, OSNSD 2011, item 3.

[4] J. Sawiński, [in:] A. Górski (ed.), *Prawo o ustroju sądów powszechnych. Komentarz*, Warszawa 2013, p. 550.

[5] See A. Siuchniński, Sz. Krajnik, *Analiza porównawcza węzłowych zagadnień prawa i postępowania dyscyplinarnego w sprawach należących do kognicji Sądu Najwyższego*, OSNSD 2011, pp. 326–328; W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów. Komentarz*, Warszawa 2005, p. 77.

[6] Judgment of the Supreme Court-Disciplinary Court of 23 January 2008, SNO 89/07, OSNSD 2008, item 2; also see judgments of the Supreme Court-Disciplinary Court: of 24 May 2011, SNO 19/11, OSNSD 2011, item 3; of the Supreme Court-Disciplinary Court of 18 July 2014, SNO 29/14, OSNSD 2014, item 45.

[7] This specific form of a company-related misdeed was exposed for the first time after the amendment to Article 80 of the Act of 20 June 1985: Law on the common courts system (consolidated text, Dz.U. 1994, No. 7, item 25), introduced by the Act of 15 May 1993 amending the Acts: Law on the common courts system, on Public Prosecution, on the Supreme Court, on the Constitutional Tribunal, on the National Council of the Judiciary and on the establishment of appellate courts (Dz.U. 1993, No. 47, item 213).

[8] Judgments of the Supreme Court-Disciplinary Court: of 28 October 2011, SNO 40/11, OSNSD 2011, item 49; of 27 June 2002, SNO 18/02, OSNSD 2002, No. 1–2, item 9; of 8 March 2018, SNO 3/18, LEX No. 2511520. A certain tip for the recognition of a feature of flagrant contempt of the law may be found in the cassation judgments of the Supreme Court, i.e. judgments in which flagrant contempt of the law was recognised and constituted grounds for cassation in accordance with Article 523 § 1 CPC. However, it should be remembered that not every case of flagrant contempt of the law is also apparent.

the negative consequences that result from the infringement of law. Thus, the loss of force or the correction of a wrong judgment as a result of an appeal can have impact on the occurrence of the reason for a judge's liability for a company-related misdeed.[9] It should be highlighted, however, that a judgment issued with flagrant infringement of law, to a smaller or bigger extent, will damage public opinion about the image of the system of justice administration and thus undermine its authority. Due to that, elimination of a judgment or its change in the course of the second-instance supervision can only sometimes limit negative consequences for the justice administration system but not eliminate them completely.

Judicial independence is one of the foundations of the right to a fair trial as well as the functioning of the court system at all as a separate power.[10] In accordance with Article 178 of the Constitution of the Republic of Poland, judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. The Constitutional Tribunal case law indicates that judges, within the exercise of their office, are not independent of statute. Quite the opposite, statute determines their action unconditionally and, in fact, judges are subordinated to the entire system of the sources of law in force. It is assumed that judicial independence consists of: (a) impartiality in the relations with the parties to the proceedings; (b) independence of non-judicial bodies; (c) autonomy in the relations with authorities and other judicial bodies; (d) independence of social factors; and (e) a judge's internal independence.[11]

It is worth highlighting the dual nature of the principle of judicial independence. On the one hand, it guarantees a judge certain systemic and institutional comfort within the exercise of his office and, on the other hand, it imposes an obligation on him, which is expressed in an order not to fall under whatever influence of both the representatives of public authorities' bodies and parties to the proceedings.[12] The regime of disciplinary liability safeguards inter alia this obligation.

In a model approach, disciplinary proceedings constitute a guarantee of judicial independence. It is indicated in literature that: "disciplinary proceedings protect a judge against unreasonable accusations, which are unavoidable consequences of taking independent procedural decisions. Disciplinary liability prevents missing supervision of a judge. Court administration bodies cannot impose any penalties

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[9] It is indicated in case law that there is a lack of a flagrant level of contempt of the law, e.g. when a defective judgment in the form of order was issued but reservation was filed and the judgment did not enter into force; see judgment of the Supreme Court-Disciplinary Court of 28 October 2011, SNO 40/11, OSNSD 2011, item 49.

[10] For more on the issue of judicial independence, see: A. Łazarska, *Niezawisłość sędziowska w sprawowaniu urzędu*, [in:] R. Piotrowski (ed.), *Pozycja ustrojowa sędziego*, Warszawa 2015, p. 84 et seq.; Z. Witkowski (ed.) et al., *Prawo konstytucyjne*, Toruń 2006, pp. 509–510.

[11] See P. Wiliński, *Prawo do sędziego – bezstronnego i niezawisłego*, [in:] C. Kulesza (ed.), *System prawa karnego procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa 2016, p. 684, and judgments of the Constitutional Tribunal referred to therein: of 24 June 1998, K 3/98, OTK 1998, No. 4, item 52; of 14 April 1999, K 8/99, OTK 1999, No. 3, item 41; of 27 January 1999, K 1/98, OTK 1999, No. 1, item 3; compare judgment the Supreme Court-Disciplinary Court of 13 April 2015, SNO 13/15, OSNSD 2015, item 22.

[12] See W. Sanetra, *Kilka refleksji na temat niezawisłości sędziów*, [in:] R. Piotrowski (ed.), *Pozycja ustrojowa sędziego*, Warszawa 2015, p. 189.

whatsoever on a judge".[13] Apart from that, disciplinary liability constitutes a legal instrument the function of which is to properly shape a judge's attitude both in the professional sphere and in private life. That is why, the scope of disciplinary liability does not only cover the strictly professional sphere connected with the performance of professional duties but also the appropriate moral attitude, which is reflected in the resistance to the influence of others when making judgments and avoidance of conduct that might constitute threats to his/her independence and objectivity.[14]

The principle of judicial independence is strictly connected with the principle of a court's jurisdictional autonomy. A court's independence in the field of establishing facts and interpreting law, and next making judgments based on facts and law, ensures that a judge feels responsible for the issued judgment,[15] which also constitutes an axiological justification for disciplinary liability for apparent and flagrant contempt of the provisions of law. Obviously, a judge of a court of appeal cannot be held disciplinarily liable based on, e.g. the fact of making use of prejudicial questions (Article 441 Criminal Procedure Code, Article 390 Code of Civil Procedure), which will result in the limitation of the independence of the court asking such question in case a resolution is passed. Similarly, a prejudicial question addressed to the Court of Justice of the European Union (CJEU) does not constitute a disciplinary tort because Article 267 TFEU[16], which lays down such a right of national courts, is part of the national legal order in the same way as Article 193 of the Constitution of the Republic of Poland concerning prejudicial questions to the Constitutional Tribunal. The use of prejudicial questions alone is connected with interpretational doubts of a court adjudicating in a particular case that are under the protection of judicial independence even if a court or tribunal to which a question is addressed does not share them.

As it is mentioned in the theory of law, the expression of values constituting legal (systemic) axiology by the principles of law is connected with allotting them particular structural and functional significance. The former (structural) is associated with attributing the feature of hierarchical supremacy to principles. The latter (functional) includes the role of principles in legal reasoning that first establishes directions of the processes of law creation and next the processes of law interpretation and application. However, the above-mentioned fundamental features do not eliminate controversial issues that are sometimes also noticed in dogmatic-legal dimensions. It can concern, e.g. the principles of law operating the "more or less" scheme, the fact that they are challengeable, and the mechanism of weighing principles correlated or not with the principle of proportionality.[17] The principle of

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[13] W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów. Komentarz*, *op. cit.*, p. 74; also see: L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2011, p. 348; B. Banaszak, *Prawo konstytucyjne*, Warszawa 2004, p. 670.

[14] See § § 9 and 10 *Zbiór Zasad Etyki Zawodowej Sędziów i Asesorów Sądowych*, adopted by a resolution of the National Council of the Judiciary of 13 January 2017, No. 25/2017.

[15] Resolution of 7 judges of the Supreme Court-Disciplinary Court of 11 October 2002, SNO 29/02, OSNSD 2002, item 36 and literature cited therein.

[16] Treaty on the Functioning of the European Union, Dz.U. 2004, No. 90, item 864/2.

[17] L. Leszczyński, *Zasady prawa – założenia podstawowe*, Studia Iuridica Lublinensia 2016, No. 1 (Vol. XXV), p. 13.

judicial independence, like other principles of law, does not have a clear scope of application. It is the assessment of the weight and significance of a given principle in a particular case that decides whether and to what extent it will be applied. Due to that, the principle of independence is binding, as Ronald Dworkin put it, following the more or less model, unlike in case of other standard legal principles that function following the either-or pattern.[18] This feature seems to be a basis for the issue of establishing the limits of judges' disciplinary liability, which constitutes one of the mechanisms protecting the principle of legalism.

As early as in the interwar period, it was indicated in literature that independence is not a synonym of irresponsibility and cannot justify a lazy or incompetent judge who is liable in accordance with the law on the common courts system.[19] The possibility of transferring, suspending and recalling a judge from office can occur only in situations prescribed in statute (Article 180 para. 2 Polish Constitution). The principle that a judge shall be non-removable is perceived as one of the fundamental guarantees of judicial independence.[20] Due to that, a properly developed model of disciplinary liability constitutes an inevitable component of non-removability of judges. Disciplinary proceedings should be a specific safety valve, a way to self-purification of the judiciary.[21] The catalogue of disciplinary penalties, especially the most severe ones, i.e. removal from office, transfer to another bench or removal from position (Article 109 § 1(3)–(5) LCCS) undoubtedly constitute measures considerably interfering in a judge's professional status. Because of that, their application should be close to the standards developed in criminal law as far as guarantees are concerned, which is safeguarded in particular by Article 128 LCCS, in accordance with which matters that are not regulated in Articles 107–127 LCCS should be dealt with in accordance with the provisions of the Criminal Procedure Code and the Criminal Code and take into account differences resulting from the nature of the disciplinary procedure.[22]

Apart from what type of law should be applied, it is not less important who applies it. The question about the limits of a judge's liability for a discussed company-related misdeed is connected with the model of disciplinary procedure, in particular the entitlements of bodies that do not belong to the judicial power. Indeed, it does not seem to be erroneous to state that the more independent of the executive power disciplinary proceedings are, the further the implementation of disciplinary law can reach; it can constitute a further reaching interference in the sphere of judicial independence without the infringement of that principle. The more independent a disciplinary court is and the greater guarantees of objectivity occur in

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[18] R. Dworkin, *The Model of Rules*, [in:] G. Hughes (ed.), *Law, Reason and Justice*, New York–London 1969, following: L. Morawski, *Zasady wykładni prawa*, Toruń 2014, pp. 132–133.

[19] S. Gołąb, *Organizacja sądów powszechnych*, Kraków 1938, p. 18. It is worth mentioning that in the course of negotiations concerning the Constitution of 1921, judicial independence was defined as "exemption of judges from whatever influence of external factors" (*ibid.*, p. 17).

[20] W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz do art. 180*, LEX 2013.

[21] G. Ławnikowicz, *Idea niezawisłości sędziowskiej w porządku prawnym i myśli prawniczej II Rzeczypospolitej*, Toruń 2009, p. 357.

[22] For more, see: A. Błachnio-Parzych, *Przepisy odsyłające systemowo. Wybrane zagadnienia*, Państwo i Prawo No. 1, 2003, pp. 43–54.

disciplinary proceedings, to a lesser extent the principle of judicial independence limits the scope of disciplinary bodies' cognition in the context of examination of the possibility of committing a company-related misdeed consisting in apparent and flagrant contempt of the provisions of law.

The amendments to the Law on the common courts system introduced by the Act of 8 December 2017 on the Supreme Court[23] and the Act of 20 July 2018 amending the Act: Law on the common courts system and some other acts[24] implemented a series of changes in the system of disciplinary bodies of justice administration and made them dependent on the Minister of Justice. It is not necessary to analyse all of the changes for the purpose of this paper. However, it is worth indicating the most significant ones that can have impact on disciplinary bodies' and disciplinary judges' independence. While in the former legal system in general all judges of a court of appeal were the first-instance disciplinary judges (with the exception of the "function holding judges") and a disciplinary bench members in a given disciplinary case were selected at random from all the judges of that group, as of 3 April 2018 the Minister of Justice, having consulted the National Council of the Judiciary of Poland, entrusts the duties of a judge of a disciplinary court (for a six-year term) operating within the court of appeal to a judge of a common court who has worked as a judge for at least ten years (Article 110a § § 1 and 3 LCCS). The Minister of Justice is also entitled to determine the number of judges in disciplinary courts within courts of appeal (Article 110c LCCS). Moreover, the Minister of Justice, not the National Council of the Judiciary as before, appoints a Disciplinary Representative of Common Courts Judges and his two Deputies for a four-year term (Article 112 § 3 LCCS), who can take over a case conducted by a disciplinary representative deputy of a district court as well as transfer a case to be conducted by this representative (Article 112a § 1a LCCS). Moreover, the Minister of Justice can appoint the Disciplinary Representative of the Ministry of Justice to conduct a particular case concerning a judge. The appointment of the Disciplinary Representative of the Ministry of Justice excludes another representative from taking action in a case. For the purpose of proceedings in a case concerning a disciplinary offence that matches the features of intentional offences prosecuted by Public Prosecution, the Disciplinary Representative of the Minister of Justice can also be appointed from among prosecutors nominated by the National Public Prosecutor (Article 112b § § 1 and 2 LCCS). Moreover, there is a new instrument that enables the Minister of Justice to interfere in a disciplinary case: it is an institution of objection to a representative's decision to refuse to initiate disciplinary proceedings. It means that there is an obligation to start disciplinary proceedings and the Minister of Justice's recommendations concerning the further course of disciplinary proceedings are binding for a disciplinary representative (Article 114 § 9 LCCS).

The adopted solutions increase considerably the influence of the executive power on the appointment of members of disciplinary bodies and the course of explanatory proceedings in disciplinary cases, which obviously does not create bet-

[23] Dz.U. 2018, item 5.
[24] Dz.U. 2018, item 1443.

ter conditions for objective hearing of a case by an impartial disciplinary court. To tell the truth, disciplinary cases are still heard within the structure of the judiciary, however, the competences of the Minister of Justice, especially those relating to the appointment of judges, must raise serious doubts as to independent functioning of disciplinary courts. As a result, this can lead to the so-called freezing effect among judges and misrepresent the protective function of disciplinary proceedings in relation to the principle of judicial independence.

2. IMPACT OF THE PRINCIPLE OF JUDICIAL INDEPENDENCE ON THE SCOPE OF DISCIPLINARY LIABILITY

According to an opinion expressed in literature, there is a characteristic justification of acting within the limits of judicial independence.[25] It seems, however, that judicial independence does not just lift disciplinary unlawfulness but limits the scope of disciplinary liability for a company-related misdeed in the form of apparent and flagrant contempt of the provisions of law at the level of the features of a disciplinary offence, i.e. a ban laid down in Article 107 § 1 LCCS, which is a condition for the recognition of this tort.[26]

The answer to the question where the borderline between the sphere of adjudication protected by judicial independence and the acts for which a judge should be held disciplinarily liable lies is an issue of fundamental significance. This is a task that disciplinary courts' judgments must deal with because, as it has already been mentioned above, the principle of statutory determination of a disciplinary offence is not binding in the Act: Law on the common courts system. According to the Constitutional Tribunal judgment of 27 February 2000, as far as disciplinary torts are concerned (unlike the types of offences determined in the Criminal Code), it is not possible to precisely classify prohibited acts. They are not statutorily determined because of objective inability to create a catalogue of conduct that jeopardises appropriate exercise of a company-related duties or the maintenance of professional dignity. Therefore, it is not possible to simply compare criminal and disciplinary proceedings within the aspect of guarantee-related norms. Disciplinary liability is connected with conduct that is in conflict with the rules of professional deontology, the authority and dignity of the profession, with acts violating the prestige of the profession. A disciplinary tort must be assessed not only from the normative point of view but also the professional, ethical and other ones.[27]

The content of Article 107 § 1 LCCS indicates that disciplinary liability for apparent and flagrant contempt of the provisions of law can concern, *lege non distinguente*, procedural as well as substantive law. At the same time, as it is indicated in case law, the interpretation of apparent and flagrant violation of the provisions of law

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[25] J.R. Kubiak, J. Kubiak, *Odpowiedzialność dyscyplinarna sędziów*, Przegląd Sądowy No. 4, 1994, p. 10.

[26] Compare W. Wolter, *Nauka o przestępstwie*, Warszawa 1973, p. 161.

[27] Judgment of the Constitutional Tribunal of 27 February 2000, K 22/00, Dz.U. No. 16, item 185.

should be carried out in a narrowing way. It results from the necessity to take into account the constitutional principle of judicial independence.[28]

Referring to the principle of judicial independence as a factor narrowing the scope of disciplinary liability seems to be clearer when the content of Article 107 LCCS is compared with Article 79 LCCS, pursuant to which a judge cannot refer to the principle of judicial independence and refuse to carry out orders within the scope of administrative activities if they belong to judicial duties based on statutory provisions as well as instructions concerning the efficiency of court proceedings; however, he/she can ask for the issue of an order in writing. This kind of a solution is approved of in case law and it is recognised as justified by the need to ensure efficient operation of courts.[29] It is emphasised, however, that administrative activities within the scope of judicial supervision cannot be extended to cover the sphere of adjudication or interpretation of the law,[30] although it is rightly emphasised in literature that the principle of judicial independence cannot be reconciled with administrative supervision of efficiency of proceedings.[31] Thus, if the legislator clearly excludes the admissibility of referring to the principle of judicial independence in Article 79 LCCS and does not make such a reservation in Article 107 LCCS, it means that judicial independence can constitute a circumstance limiting the scope of disciplinary liability.

There are no major controversies in case law over admissibility of disciplinary liability for apparent and flagrant contempt of the provisions of law that is not strictly connected with adjudication. Cases of violation of procedural norms meet with relatively common disciplinary response. Most often it concerns conduct consisting in lengthiness of proceedings or failure to meet deadlines for developing the justification of a judgment (Article 423 § 1 Criminal Procedure Code and Article 329 Code of Civil Procedure).[32]

A company-related offence can also include failure to fulfil an obligation to be acquainted with case files, which results in the adoption of erroneous factual assumptions in a given case and flagrant contempt of procedural law. It is possible, e.g. to recognise that it is a tort to groundlessly apply the mode prescribed in Article 335 Criminal Procedure Code (CPC) and accept a motion to issue a judgment without hearing as a result of the lack of thorough examination of the case files containing a psychiatric expert opinion indicating that the accused was insane at the moment of crime commission, which excluded admissibility of the application

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[28] Judgment of the Supreme Court-Disciplinary Court of 29 June 2015, SNO 39/15, OSNSD 2015, item 47.

[29] Judgment of the Supreme Court-Disciplinary Court of 7 September 2010, SNO 35/10, OSNSD 2010, item 46 (concerning an order of the head of department to hear the case by a substitute for a judge who got sick).

[30] See judgment of the Supreme Court-Disciplinary Court of 19 May 2004, SNO 19/04, OSNSD 2004 No. 1, item 23.

[31] For more, see: A. Łazarska, *Granice nadzoru administracyjnego w kontekście poleceń służbowych wydawanych sędziemu przez prezesa sądu co do liczby spraw wyznaczanych miesięcznie na wokandy. Glosa do wyroku SN z dnia 26 lutego 2015 r., SNO 3/15*, KRS 2015/3/8-12.

[32] For more, see T. Ereciński, J. Gudowski (ed.), J. Iwulski, P*rawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, Warszawa 2009, p. 467 et seq.

of the mode prescribed in Article 335 CPC and Article 343 CPC.[33] Similarly, the issue of a judgment in the form of an order can be a disciplinary tort in a situation when the case files indicate there are justified doubts concerning sanity of the accused or the counsel for the defence is a judge's wife, or in case of interpleader concerning objects subject to forfeiture, or when a court referred a case to the first-instance court to reinitiate the evidence-related proceedings because evidence collected does not allow univocal recognition of the guilt and perpetration of the accused.[34]

It is also admissible to hold a judge disciplinarily liable in particularly serious cases of contempt of the law resulting from its apparently and flagrantly erroneous interpretation. As it is indicated in case law, "a judge's right to his own independent interpretation of provisions does not provide him with grounds to arbitrarily develop the content of the provisions interpreted and does not free him from afterthought in case he recognises that the interpretation he has applied departs from the uniform interpretation provided by the Supreme Court and, moreover, it is not approved of in the course of the second-instance supervision".[35] It is also not eligible to reduce a judge's duties to reading unambiguous provisions expressed in a colloquial language. As the Supreme Court emphasised in one of its judgments, "it should be obvious to every lawyer that phrases used in system-related statute on the violation of or compliance with the law concern the norms reproduced from the provisions and take into account the adopted methods of interpretation and the output of court practice, especially the judgments of the Supreme Court, which is obliged to safeguard interpretation and application of the law, and take into account a judge's obligation to get acquainted with at least the basic doctrinal works such as handbooks, commentaries and scientific articles".[36]

Disciplinary liability for the infringement of the provisions of law strictly connected with adjudication, especially the norms of substantive law, raises most controversies. The judgment of the Supreme Court-Disciplinary Court of 7 November 2013[37] states that the interpretation of Article 107 § 1 LCCS and the concept of apparent and flagrant contempt of the provisions of law therein must be carried out in conformity with the Constitution, thus without the infringement of the principle of judicial independence. It does not mean that a judge is "independent" of the provisions of law but it must be taken into account that the essence of the exercise of a judge's office consists in the interpretation and application of law in the course of which errors can be made. This especially concerns the essence of the exercise of a judge's office alone, which consists in adjudicating. A judge trammelled by disciplinary liability for errors made in the course of issuing judgments, especially

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[33] See judgment of the Supreme Court-Disciplinary Court of 25 February 2009, SNO 4/09, OSNSD 2009, item 3.

[34] See judgment of the Supreme Court-Disciplinary Court of 8 March 2018, SNO 3/18, LEX No. 2511520.

[35] Judgment of the Supreme Court-Disciplinary Court of 13 April 2015, SNO 13/15, OSNSD 2015, item 22.

[36] Judgment of the Supreme Court-Disciplinary Court of 12 July 2007, SNO 17/07, OSNSD 2007, item 58.

[37] SNO 31/13, OSNSD 2013, item 42.

in case of indefinite features of the offence (apparent and flagrant contempt of the provisions of law) could not be independent.

The disciplinary judgments of the Supreme Court repeatedly indicated admissibility of a judge's error, which in general shall not result in liability for a tort under Article 107 § 1 LCCS. The judgment of the Supreme Court-Disciplinary Court of 29 June 2015 emphasises that "a judge excessively trammelled by the threat of disciplinary liability would not be fully independent. (…) A judge can be held disciplinarily liable for errors in independent adjudication only exceptionally: solely for apparent and flagrant violation of the law that is obvious immediately and for everyone without going into details of the case and the need to analyse the factual and legal state".[38] At the same time, the judgment highlights that "a disciplinary offence consisting in apparent and flagrant contempt of the provisions of law can concern only the provisions that are not connected with adjudication itself but aim to ensure appropriate and efficient course of proceedings."[39]

The resolution of seven judges of the Supreme Court-Disciplinary Court of 11 October 2002[40] supports the approval of the specific right to errors, which was derived from the right to a judge's own independent interpretation of the law resulting from the principle of jurisdictional independence. Attention is drawn therein that procedural provisions determine the method and mode of eliminating legal errors made by judges in the course of adjudicating. The second-instance supervision makes it possible to correct inappropriate and sometimes even erroneous judgments either by quashing them or by introducing adequate corrections. It is clearly seen from this perspective that there is a need to treat disciplinary liability as *ultima ratio* among the instruments that are aimed at ensuring appropriate functioning of administration of justice. Due to that, it seems justified to assume that disciplinary liability is not be possible in case the consequences of apparent and flagrant contempt of the provisions of law can be eliminated in the course of appeal-related supervision or in the course of extraordinary appellate measures. Within this scope, the principle of judicial independence limits disciplinary liability, e.g. based on a criminal procedure through the prism of relative appellate reasons (Article 438 CPC) and grounds for cassation (Article 523 CPC).

Moreover, it is not possible to recognise commission of a disciplinary tort in situations when there is a scope of a court's free decision in the area of examining the occurrence of positive and negative conditions for the application of a particular norm that constitutes grounds for issuing a procedural decision. The Supreme Court judgment of 7 November 2013[41] draws attention to the fact that there is a circumstance when a court's decision expressed in the form of a judgment depends on

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[38] SNO 39/15, OSNSD 2015, item 47; also see the Supreme Court-Disciplinary Court judgments cited therein: of 29 October 2003, SNO 48/03, OSNSD 2003, item 60 and of 7 May 2008, SNO 45/08, OSNSD 2008, item 11.

[39] *Ibid*.

[40] SNO 29/02, OSNSD 2002, item 36.

[41] SNO 31/13, OSNSD 2013, item 42. The case concerned the institution of exclusion of a matter for separate hearing. In accordance with Article 34 § 3 CPC, it can take place when there are circumstances hampering joint hearing of cases, which undoubtedly constitutes grounds for assessment characteristic of a broad scope of a court's discretion.

factors that are based on assessment, which are against the recognition of the occurrence of a disciplinary offence consisting in apparent and flagrant contempt of the provisions of law. Quite the opposite, the interpretation of the concept of "apparent and flagrant contempt of the provisions of law" would constitute limitation of judicial independence. Approving of that opinion, one should notice that what justifies it is first of all the fact that in case of application of the provisions granting a court a broad scope of discretion, except for special cases of intentional violation of the law, there will be no obvious reasons for the recognition of the contempt of law.

The dominating stance in the judicature is one according to which a disciplinary offence consisting in apparent and flagrant contempt of the provisions of law can in general result from the infringement of the procedural provisions, which are not directly connected with adjudication as such. A different approach to the issue would be difficult to reconcile with Article 178 para. 1 Constitution under which judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.[42] The constitutional law doctrine emphasises that judicial independence means, inter alia, that a judge cannot be held liable at all for the content of judgments he/she issues but, at the same time, it is highlighted that independence is limited by a judge's submission to the Constitution and statutes.[43] Therefore, although there is a principle of a judge's non-liability for a company-related misdeed consisting in contempt of the provisions of law that are not connected with adjudication alone, exceptions to the rule cannot be excluded. It seems that they concern situations in which a judge infringes the obligation to be subject to the Constitution and statutes in such a way that the principle of judicial independence does not protect him/her any longer.

Due to that, the opinion expressed in the Supreme Court-Disciplinary Court judgment of 16 June 2016,[44] in which it is emphasised that judicial independence unconditionally protects the sphere of adjudication (sentencing), seems to be too categorical. Not all adjudicating benches of the Supreme Court-Disciplinary Court have approved of this stance. For example, in the judgment of 18 April 2013,[45] it is highlighted that judicial independence should protect a judge against internal influence and attempts to affect the freedom of adjudication as well as ensure his/her independence in the process of establishing, analysing and assessing facts, and interpreting the law and applying it adequately to the established factual state. It is noticed, however, that all those aspects of judge's activities first of all must be implemented and next occur within the limits of the law in force. In case of

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[42] See judgment of the Supreme Court-Disciplinary Court of 13 December 2013, SNO 35/13, OSNSD 2013, item 46 and judgments referred to therein: resolution of 7 judges of the Supreme Court-Disciplinary Court of 11 October 2002, SNO 29/02, OSNSD 2002, item 36; judgments of the Supreme Court: of 29 October 2003, SNO 48/03, OSNSD 2003, item 60; of 29 June 2007, SNO 39/07, OSNSD 2007, item 56; of 27 June 2008, SNO 50/08, OSNSD 2008, item 64; of 7 May 2008, SNO 45/08, OSNSD 2008, item 11; of 17 June 2008, SNO 48/08, OSNSD 2008, item 14; of 15 November 2012, SNO 46/12, OSNSD 2012, item 42; and of 7 November 2013, SNO 31/13, OSNSD 2013, item 42; and the decision of the Supreme Court of 26 April 2005, SNO 18/05, OSNSD 2005, item 8.

[43] L. Garlicki, *Polskie prawo konstytucyjne*, *op. cit.*, p. 345.

[44] SNO 21/16, OSNSD 2016, item 31.

[45] SNO 6/13, OSNSD 2013, item 20.

exceeding the limits, not only "intervention" within the second-instance supervision is admissible but also disciplinary liability is possible, provided that the infringement of law by a judge at the same time also matches two criteria laid down in Article 107 § 1 LCCS, i.e. is apparent in nature and is flagrant. Because of that, the Supreme Court-Disciplinary Court adopted a stance in accordance with which covering the whole area of substantive law application with the principle of judicial independence would lead to a situation in which even intentional infringement of the provisions of that category would be unpunished, which forcibly convinces that such a conception should not be approved of.

The exercise of professional duties by a judge cannot go beyond the sphere of the empire attributed to the judiciary. It is indicated in case law that: "undoubtedly, interpretation remains within the sphere of normative phenomena, however, the function of interpretation cannot be transformed into a legislative function. In addition, an act of law interpretation performed by a judge cannot be only in conformity with his conscience. The right to creative interpretation undoubtedly does not constitute grounds for a judge to arbitrarily develop the content of provisions. A judge has the right and duty to identify the content of provisions but taking into account both basic principles of the law and well-known methods of interpretation, and those limits cannot be exceeded. Article 7 Constitution lays down the principle of legalism, i.e. the rule that the organs of public authority shall function on the basis of, and within the limits of, the law. The norm is also addressed to courts".[46]

It seems that in case of contempt of the provisions strictly connected with adjudication, where disciplinary liability is clearly in conflict with the principle of judicial independence, its scope would be close to the catalogue of conduct that would imply the need to hold a judge criminally liable for the offence of misuse of powers or failure to fulfil duties. There is a thesis approved of in literature, based on the interpretation of Article 231 CC and expressed in the resolution of the Supreme Court-Disciplinary Court of 18 November 2014,[47] pursuant to which the assessment of social harmfulness of an act taking into account both the subjective and objective aspects should be the criterion of delimiting a judge's disciplinary and criminal liability.[48] Due to the possibility of holding a judge criminally and disciplinarily liable for the same act, it is worth mentioning that the bottom level of social harmfulness setting the limit on recognising unlawfulness of an act should not constitute the limit being a condition for holding a judge disciplinarily liable at the same time. Thus, in any case, it should be considered whether the substantive content of an act, assessed through the prism of its quantifiers laid down in Article 115 § 2 CC, will justify – provided that an adequate assessment is made from the point of view of corporate harmfulness – the recognition of a disciplinary tort in the form of apparent and flagrant contempt of

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[46] Judgment of the Supreme Court-Disciplinary Court of 13 April 2015, SNO 13/15, OSNSD 2015, item 22.

[47] SNO 54/14, OSNSD 2014, item 63.

[48] See A. Barczak-Opustil, M. Iwański, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212–277d*, Warszawa 2017, thesis 12 to Article 231; E.M. Guzik-Makaruk, E.W. Pływaczewski, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, thesis 11 to Article 231 CC.

the provisions of law strictly connected with adjudication, thus especially the provisions of substantive law constituting defective judgment or omission of adjudicating in spite of the obligation existing in the light of the substantive provisions in force.

Discussing the framework of disciplinary liability, it is also worth taking into account a special approach to the substantive content of a disciplinary offence, which is defined as corporate harmfulness. To tell the truth, the term does not fit judges who, due to their office, do not make a corporation but, undoubtedly, emphasising harmfulness for the judicial corps focuses on assessment of the negative content of an act from the point of view of justice administration exercised by judges. As it is indicated in case law, the so-called corporate harmfulness that is a feature of a company-related misdeed laid down in Article 107 § 1 LCCS means social harmfulness within the meaning of criminal law supplemented by elements of harmfulness measured towards a professional milieu in which a judge operates, taking into account the protection of justice administration authority, the image of courts and judicial power as well as particular judges exercising it. The size of that harmfulness is also shaped by subjective factors concerning the accused, the size of damage, the method and circumstances of an act perpetration, and the type and significance of the rules infringed.[49] Thus, the difference between social harmfulness of an act in accordance with the Criminal Code and corporate harmfulness consists in the fact that the negative content of an act assessed within the regime of disciplinary liability should refer its objective measures to the interest of justice administration, e.g. which interest of justice administration a given act damages (its authority, court's prestige, efficiency of proceedings, etc.) and how significant the interest is for justice administration, to what extent it infringes or jeopardises it, and what the significance of the infringed judge's obligations is from the point of view of justice administration.

It seems that the high level of the negative content of an act can constitute a criterion indicating a need to initiate disciplinary proceedings against a judge and to abandon the protection resulting from the principle of judicial independence. It is obvious that it can only be an auxiliary criterion because it is not possible *in genere* to express a definite level of quantifiers of "corporate" harmfulness that would determine the need to initiate disciplinary proceedings and conclude them with a valid judgment issued by a disciplinary court recognising the commission of a disciplinary tort under Article 107 § 1 LCCS.

If holding a judge liable for the infringement of the provisions strictly connected with adjudication is controversial, the issue of a judge's liability for contempt of substantive law, belonging to this category of norms, containing norms that constitute grounds for adjudicating in a case, is even more controversial. The judgment of the Supreme Court-Disciplinary Court of 15 November 2012 reminds that: "a disciplinary offence defined in Article 107 § 1 LCCS consisting in apparent and flagrant contempt of the law can be committed by a judge only within the scope of court proceedings. In general, it can only consist in the infringement of such procedural provisions that are not connected with adjudication and are only aimed at ensuring efficient course

[49] Judgment of the Supreme Court-Disciplinary Court of 20 July 2011, SNO 31/11, OSNSD 2011, item 4.

of proceedings. It is so because the inclusion of the infringement of other provisions, especially substantive ones, in Article 107 § 1 LCCS cannot be in general reconciled with the principle of judicial independence".[50] However, as it has already been stated above, such an opinion seems to be too far-reaching. First of all, it is not justified in the light of the wording of Article 107 § 1 LCCS, where the legislator does not limit the scope of disciplinary liability for apparent and flagrant contempt of the provisions of law only to procedural provisions. Moreover, the Supreme Court-Disciplinary Court also drew attention to that in its judgment of 18 April 2013.[51]

Obviously, a broad scope of disciplinary liability for the infringement of substantive law would violate judicial independence, especially in view of the assessment-related nature of the criteria for establishing the level of apparent and flagrant infringement of the law. Apart from that, it would undermine the role of disciplinary proceedings, which in the relations within the judiciary, like in case of criminal law, should constitute *ultima ratio* instead of other instruments that are to ensure appropriate administration of justice, mainly standard and extraordinary appellate measures, which can lead to the correction of a defective judgment.

This is why, it is understandable that the recognition of a judge as guilty of apparent and flagrant contempt of the provisions of substantive law is rare and consists in extraordinary cases of intentional infringement of the law (in particular, the so-called judicial anarchy) or acts committed unintentionally but absolutely unambiguous, e.g. a case in which a judge sentences the accused for the offence under Article 178a § 1 CC but does not rule a penal measure in the form of a ban on driving motor vehicles, which is obligatory in the light of Article 42 § 2 CC.[52] It seems that one cannot exclude holding a judge disciplinarily liable for ruling a penalty, a penal measure, a compensatory measure or a security that is not prescribed in statute, especially if that offence results in the occurrence of absolute appellate grounds (Article 439 § 1(5) CPC) and damage to the authority of justice administration. Other cases are also mentioned in literature, e.g. the issue of a judgment without legal grounds whatsoever, flagrant infringement of the provisions of substantive and procedural law leading to depriving a party of the right to defence, and of course deprivation of liberty (arrest, temporary detention) that is factually groundless or not based on legal grounds.[53]

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[50] SNO 46/12, OSNSD 2012, item 42; also see: decision of the Supreme Court-Disciplinary Court of 26 April 2005, SNO 18/05, OSNSD 2005, item 8, and judgment of the Supreme Court-Disciplinary Court of 13 September 2011, SNO 34/11, OSNSD 2011, item 43 referred to therein.

[51] SNO 6/13, OSNSD 2013, item 20. In the case in which the judgment was issued, the unintentional company-related offence attributed to a judge consisted in giving permission to come to a court agreement in alimony proceedings between a defendant and minor plaintiffs represented by their mother, although the circumstances of the case indicated that the act was in conflict with the law and aimed at evading the law, which created a threat of hampering the enforcement of claims by entities that were the defendant's creditors (contempt of the provisions of Article 223 § 2 CCP in conjunction with Article 203 § 4 CCP and Article 135 § 1 Family and Guardianship Code).

[52] See judgment of the Supreme Court-Disciplinary Court of 3 February 2003, SNO 61/02, OSNSD 2003, No. 1, item 23.

[53] J.R. Kubiak, J. Kubiak, *Odpowiedzialność dyscyplinarna*, *op. cit.*, p. 11. There is another separate issue related to the matter, which can cause practical problems in the field of disciplinary

3. CONCLUSIONS

In the situation when the rule of law and order in a state and the separation of powers are endangered or have just been re-established, it is necessary to strengthen their guarantees; thus, the development of mechanisms ensuring judicial independence should also be more significant than in the states that have a stable legal system within the framework of the above-mentioned constitutional principles. It seems that *de lege lata* the statement concerning the occurrence of a threat to judicial independence is not groundless because it is connected with the already introduced or planned changes in the common courts system, including the Act on the Supreme Court, and the growing importance of populism in the public debate, which not only translates to penal populism as it happened before but also starts affecting the systemic sphere.

Such tendencies justify a more restrictive approach to the guarantees of the principle of judicial independence and, thus, a broader influence of that principle on the scope of a judge's disciplinary liability. In this context, it is worth quoting Ewa Łętowska's thought: "If we look at the contemporary legislations, crammed with various guarantees of judicial independence, actually concerning all spheres of the exercise of this office, we continually think that if they are necessary (and nobody negates it), it means that judicial independence is in fact fragile: for sure, it is constantly endangered from all sides and exposed to pressure. It is really meaningful".[54] In the light of this comment, it seems to be striking that there is a lack of a specific regulation demarcating the scope of disciplinary liability for apparent and flagrant contempt of the provisions of law from the sphere of conduct that is protected by the principle of judicial independence. Probably, it results from the fact that holding a judge disciplinarily liable used to be exercised within the framework of the judiciary structure,[55] which because of its nature was a direct addressee of the guarantees of judicial independence in the field of disciplinary substantive law. The disciplinary courts' entry into this sphere, as the presented case

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liability for a company-related offence. It concerns the fact that a court's adjudication is made collectively, which because of the secrecy of discussion makes it impossible to establish the course of voting, which could be considered to be apparent and flagrant infringement of the provisions of law. Due to that, it is rightly indicated in case law that "an offence consisting in participation in the issuing of a judgment, even a procedural one, by a court adjudicating collectively cannot be attributed to a judge because disciplinary liability is individual in nature (a judge is liable only for a tort he/she commits), a discussion is subject to full secrecy and an outvoted judge is not obliged to report a dissenting opinion" (judgment of the Supreme Court-Disciplinary Court of 7 November 2013, SNO 31/13, OSNSD 2013, item 42). In the judgment of the Supreme Court-Disciplinary Court of 13 December 2013 (SNO 35/13, OSNSD 2013, item 46) it was emphasised that as a rule a disciplinary offence consisting only in the participation in a procedural action undertaken by a court adjudicating collectively cannot be attributed to a judge. The only exceptions to the rule may concern the so-called judicial anarchy.

[54] E. Łętowska, *Dekalog dobrego sędziego*, Krajowa Rada Sądownictwa No. 1, 2016, p. 5.

[55] In the first instance at the appellate level, in the second instance by the Supreme Court-Disciplinary Court composed of all judges where a judge of the Criminal Chamber of the Supreme Court always presided over the adjudicating bench.

law shows, took place in extraordinary situations and constituted interference at the most and not the infringement of the principle of judicial independence.

The current regulation of disciplinary liability of judges laid down in Chapter II Section II LCCS has been considerably modified recently and extended the competence of the Minister of Justice, which constitutes only an element of far-reaching changes in the court system. The changes not only can undermine the protective function of disciplinary proceedings towards judicial independence but they can also constitute a real threat to it, especially because of instrumental use of the entitlements of the Minister of Justice. The problem forces us to attentively examine the issue of a borderline between a company-related misdeeds, which can be grounds for a judge's disciplinary liability, and a judge's actions connected with adjudication, which remain under the protection of the principle of judicial independence, although they are appropriate in the light of relevant norms.

The analysis of the judgments of the Supreme Court-Disciplinary Court indicates that it is not fully uniform. While there are no doubts concerning the recognition of the cases of the judicial anarchy and apparent and flagrant contempt of the provisions of law not strictly connected with adjudication as disciplinary torts, there is no agreement on the opinion that disciplinary liability should be applied to unintentional infringement of the provisions that constitute grounds for procedural decisions, especially the judgments bearing the merits of the matter. Regardless of the above-highlighted threats, in extraordinary situations it is also necessary to approve of the recognition of contempt of the provisions strictly connected with adjudication, including the norms of substantive law, as a disciplinary offence. Although judicial independence is indeed an interest of significant importance for justice administration, it would mean little if a judge infringing the law remained unpunished.[56] What would independent courts mean if judgments issued were unjust? It leads to a conclusion that in particularly justified circumstances of especially flagrant infringement of legal norms, not only intentional but also unintentional contempt of the law, it is admissible to use the mechanism of disciplinary liability of judges. In order to make it efficient, its application cannot be limited only to procedural provisions because those are norms substantive in nature and they constitute the main basis for the development of human rights and freedoms and, thus, also this area should be subject to disciplinary protection. It cannot be the case that an extremely incompetent judge uses the principle of judicial independence to avoid disciplinary liability. The argument of the principle of judicial independence cannot limit liability prescribed in Article 107 § 1 LCCS to such an extent.

The requirement that contempt of the law should be flagrant and apparent, to tell the truth, constitutes an unclear but possible to determine borderline between errors that should be just corrected in the course of the second-instance supervision or in the mode of extraordinary appellate measures and such errors for which a judge should be held professionally liable. In the context of the condition of appar-

[56] A judicial reproach (Article 40 LCCS) is a clearly admissible response to contempt of the law strictly connected with adjudication. Three reproaches result in the lengthening of a period necessary to be awarded higher remuneration (Article 91a § 6 in conjunction with § 3 LCCS).

ent infringement of the law, it is worth indicating the need to examine whether we deal with *lex clara*,[57] especially when it concerns the norms that are obligatory or where there is a lack of whatever decision-making discretion. It seems that apparentness will also occur in a situation in which a procedural decision is deprived of whatever legal grounds. As far as the criterion for a flagrant level of contempt of the law is concerned, it is necessary to consider whether, in the light of the consequences of an act, it is justified to interfere in the sphere that is subject to the principle of judicial independence, which might take the form of a repeatable rule in such or very similar situations. The assessment should be based on the principle of proportionality, also taking into account the necessity of such adjudication for the interest of administration of justice and the parties to proceedings, especially in view of a possible reversal of the legal consequences of a judge's defective procedural decision.

BIBLIOGRAPHY

Banaszak B., *Prawo konstytucyjne*, C.H. Beck, Warszawa 2004.

Barczak-Opustil A., Iwański M., [in:] M. Bielski, G. Bogdan, Z. Ćwiąkalski, J. Jodłowski, P. Kardas, M. Małecki, A. Pilch, J. Raglewski, M. Rams, T. Sroka, M. Szewczyk, A. Wojtaszczyk, W. Wróbel (ed.), D. Zając, A. Zoll (ed.), W. Zontek, *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212–277d*, Wolters Kluwer, Warszawa 2017.

Błachnio-Parzych A., *Przepisy odsyłające systemowo. Wybrane zagadnienia*, Państwo i Prawo No. 1, 2003, pp. 43–54.

Dworkin R., *The Model of Rules*, [in:] G. Hughes (ed.), *Law, Reason and Justice*, New York––London 1969.

Ereciński T., Gudowski J. (ed.), Iwulski J., *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, Lexis Nexis, Warszawa 2009.

Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Liber, Warszawa 2011.

Gołąb S., *Organizacja sądów powszechnych*, Kraków 1938.

Guzik-Makaruk E.M., [in:] M. Berent, J. Bojarski, M. Bojarski, P. Czarnecki, W. Filipkowski, O. Górniok, S. Hoc, P. Hofmański, M. Kalitowski, M. Kulik, L.K. Paprzycki, W. Radecki, A. Sakowicz, Z. Siwik, B.J. Stefańska, R.A. Stefański, L. Tyszkiewicz, A. Wąsek, L. Wilk, *Kodeks karny. Komentarz*, M. Filar (ed.), Wolters Kluwer, Warszawa 2016.

Kubiak J.R., Kubiak J., *Odpowiedzialność dyscyplinarna sędziów*, Przegląd Sądowy No. 4, 1994, pp. 3–27.

Kozielewicz W., *Odpowiedzialność dyscyplinarna sędziów. Komentarz*, Oficyna wydawnicza MS, Warszawa 2005.

Kozielewicz W., *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Wolters Kluwer, Warszawa 2016.

Leszczyński L., *Zasady prawa – założenia podstawowe*, Studia Iuridica Lublinensia 2016, No. 1 (Vol. XXV), pp. 11–16.

Ławnikowicz G., *Idea niezawisłości sędziowskiej w porządku prawnym i myśli prawniczej II Rzeczypospolitej*, Wyd. Adam Marszałek, Toruń 2009.

[57] See L. Morawski, *Zasady wykładni prawa*, *op. cit.*, pp. 57–58.

Łazarska A., *Granice nadzoru administracyjnego w kontekście poleceń służbowych wydawanych sędziemu przez prezesa sądu co do liczby spraw wyznaczanych miesięcznie na wokandy. Glosa do wyroku SN z dnia 26 lutego 2015 r., SNO 3/15*, Krajowa Rada Sądownictwa No. 3, 2015, pp. 8–12.

Łazarska A., *Niezawisłość sędziowska w sprawowaniu urzędu*, [in:] S. Dąbrowski, K. Gonera, A. Górski, M. Laskowski, E. Łętowska, Ł. Piebiak, W. Sanetra, M. Strączyński, *Pozycja ustrojowa sędziego*, R. Piotrowski (ed.), Wolters Kluwer, Warszawa 2015.

Łętowska E., *Dekalog dobrego sędziego*, Krajowa Rada Sądownictwa No. 1, 2016, pp. 5–8.

Morawski L., *Zasady wykładni prawa*, TNOiK, Toruń 2014.

Sanetra W., *Kilka refleksji na temat niezawisłości sędziów*, [in:] S. Dąbrowski, K. Gonera, A. Górski, M. Laskowski, A. Łazarska, E. Łętowska, Ł. Piebiak, M. Strączyński, *Pozycja ustrojowa sędziego*, R. Piotrowski (ed.), Wolters Kluwer, Warszawa 2015.

Sawiński J., [in:] K. Gonera, Z. Strus, B. Godlewska-Michalak, J. Kremer, A. Łazarska, G. Ott, A. Górski (ed.), *Prawo o ustroju sądów powszechnych. Komentarz*, Wolters Kluwer, Warszawa 2013.

Siuchniński A., Krajnik Sz., *Analiza porównawcza węzłowych zagadnień prawa i postępowania dyscyplinarnego w sprawach należących do kognicji Sądu Najwyższego*, OSNSD 2011, pp. 317–333.

Skrzydło W., *Konstytucja Rzeczypospolitej Polskiej. Komentarz do art. 180*, LEX/el 2013.

Wiliński P., *Prawo do sędziego – bezstronnego i niezawisłego*, [in:] C. Kulesza (ed.), *System prawa karnego procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Wolters Kluwer, Warszawa 2016.

Witkowski Z. (ed.), Galster J., Gronowska B., Szyszkowski W., Bień-Kacała A., Cieszyński A., Witkowska K.M., *Prawo konstytucyjne*, TNOiK, Toruń 2006.

Wolter W., *Nauka o przestępstwie*, PWN, Warszawa 1973.

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JUDGES' DISCIPLINARY LIABILITY FOR APPARENT AND FLAGRANT CONTEMPT OF PROVISIONS OF LAW VERSUS PRINCIPLE OF JUDICIAL INDEPENDENCE

Summary

The article aims to present the issue of the limits of a judge's disciplinary liability for a company-related misdeed in the form of apparent and flagrant contempt of the provisions of law limited by the principle of judicial independence. Due to the fact that the principle of statutory determination of an act is not applicable in disciplinary law, the sphere is shaped by disciplinary case law, in particular by the judgments of the Supreme Court-Disciplinary Court, which are thoroughly analysed. This makes it possible to indicate tendencies occurring in case law and develop the author's own stance taking into account the latest amendments to the Act: Law on the common courts system, which can be translated into the need to increase the protection of judicial independence and a more restrictive approach to the use of the instrument of disciplinary liability towards judges who commit apparent and flagrant contempt of the provisions of law in the sphere of adjudication.

Keywords: disciplinary liability, judicial independence, company-related misdeed, apparent and flagrant contempt of the provisions of law, disciplinary courts

ODPOWIEDZIALNOŚĆ DYSCYPLINARNA SĘDZIEGO ZA OCZYWISTĄ I RAŻĄCĄ OBRAZĘ PRZEPISÓW PRAWA A ZASADA NIEZAWISŁOŚCI SĘDZIOWSKIEJ

Streszczenie

Przedmiotem niniejszego artykułu jest przedstawienie problematyki granic odpowiedzialności dyscyplinarnej sędziego za przewinienie służbowe w postaci oczywistej i rażącej obrazy przepisów prawa limitowanych przez zasadę niezawisłości sędziowskiej. Ze względu na nieobowiązywanie w prawie dyscyplinarnym zasady ustawowej określoności czynu sfera ta kształtowana jest przez orzecznictwo dyscyplinarne, w szczególności judykaty Sądu Najwyższego-Sądu Dyscyplinarnego, które zostały poddane szczegółowej analizie. Pozwoliło to na wskazanie tendencji występujących w orzecznictwie oraz wypracowanie własnego stanowiska, uwzględniającego także najnowsze zmiany w ustawie Prawo o ustroju sądów powszechnych, przekładające się na potrzebę wzmożenia ochrony niezawisłości sędziowskiej, a tym samym bardziej restrykcyjnego podejścia do operowania instrumentem odpowiedzialności dyscyplinarnej wobec sędziów dopuszczających się oczywistej i rażącej obrazy przepisów prawa w sferze orzeczniczej.

Słowa kluczowe: odpowiedzialność dyscyplinarna, niezawisłość sędziowska, przewinienie służbowe, oczywista i rażąca obraza przepisów prawa, sądownictwo dyscyplinarne

RESPONSABILIDAD DISCIPLINARIA DE JUEZ POR VIOLACIÓN DESLUMBRADORA Y EVIDENTE DE PRECEPTOS DE LA LEY Y EL PRINCIPIO DE INDEPENDENCIA DE JUECES

Resumen

El artículo presenta la problemática de límites de la responsabilidad disciplinaria de juez por infracción profesional en forma de violación deslumbradora y evidente de preceptos de la ley que son impuestos por el principio de independencia de jueces. Debido a que en el derecho disciplinario no se aplica el principio de determinación legal de hecho, esta cuestión viene regulada por la jurisprudencia disciplinaria, en particular por la jurisprudencia del Tribunal Supremo-Tribunal Disciplinario que queda detalladamente analizada, lo que permite indicar la tendencia existente en la jurisprudencia y presentar su propia postura que comprende también las últimas modificaciones en la ley Derecho de régimen de tribunales comunes. Estas modificaciones indican que es necesario potenciar la protección de independencia de jueces y adoptar actitud restrictiva de uso de herramienta de responsabilidad disciplinaria de jueces que violan de forma deslumbradora y evidente los preceptos de la ley en procedimientos.

Palabras claves: responsabilidad disciplinaria, independencia de jueces, infracción profesional, violación deslumbradora y evidente de preceptos de la ley, jurisdicción disciplinaria

ДИСЦИПЛИНАРНАЯ ОТВЕТСТВЕННОСТЬ СУДЬИ ЗА ОЧЕВИДНОЕ И ВОПИЮЩЕЕ НАРУШЕНИЕ ЗАКОНА В СРАВНЕНИИ С ПРИНЦИПОМ НЕЗАВИСИМОСТИ СУДЕЙ

Резюме

Предметом этой статьи является представление вопроса о границах дисциплинарной ответственности судьи за должностные проступки в форме очевидного и вопиющего нарушения правовых положений, ограниченных принципом независимости судей. В связи с тем, что в дисциплинарном законе не действует принцип нормативной специфики деяния, эта сфера определяется дисциплинарными постановлениями, в частности решениями Верховного суда – Дисциплинарного суда, которые были подвергнуты детальному анализу, что позволило выявить тенденции в судебной практике и выработать собственную позицию, учитывающую также последние изменения в Законе о системе общих судов, что выражается в необходимости усилить защиту независимости судей и, следовательно, более ограничительного подхода к применению инструмента дисциплинарной ответственности в отношении судей, которые совершают очевидные и вопиющие нарушения правовых норм в области юриспруденции.

Ключевые слова: дисциплинарная ответственность, судебная независимость, должностной проступок, очевидное и вопиющее нарушение закона, дисциплинарное судебное присутствие

DIE DISZIPLINARISCHE HAFTUNG EINES RICHTERS FÜR EINE OFFENSICHTLICHE STRAFTAT GEGEN DAS GESETZ UND DEN GRUNDSATZ DER RICHTERLICHEN UNABHÄNGIGKEIT

Zusammenfassung

Gegenstand dieses Verfahrens ist die Darstellung der Grenzen der Disziplinarhaftung eines Richters für Fehlverhalten in Form einer offensichtlichen Überschreitung von Rechtsvorschriften, die durch den Grundsatz der richterlichen Unabhängigkeit begrenzt sind. Aufgrund der Tatsache, dass der gesetzliche Grundsatz der Besonderheit des Gesetzes im Disziplinarrecht nicht in Kraft ist, wird dieser Bereich durch Disziplinarentscheidungen, insbesondere die Richter des Obersten Disziplinargerichtshofs geprägt, die einer eingehenden Analyse unterzogen wurden, die es ermöglichte, Trends in der Rechtsprechung aufzuzeigen und eine eigene Position zu entwickeln, auch unter Berücksichtigung der neuesten Änderungen im Gesetz über das System der Gerichte, die sich in der Notwendigkeit niederschlagen, den Schutz der Unabhängigkeit der Gerichte und damit einen restriktiveren Ansatz bei der Anwendung des Instruments der Disziplinarhaftung gegenüber Richtern zu stärken, die offensichtliche Verstöße gegen das in der Gerichtsbarkeit geltende Recht begehen.

Schlüsselwörter: Disziplinarhaftung, richterliche Unabhängigkeit, Fehlverhalten, offensichtliche Straftat gegen das Gesetz, Disziplinargericht

RESPONSABILITÉ DISCIPLINAIRE D'UN JUGE POUR UNE INFRACTION MANIFESTE ET FLAGRANTE À LA LOI ET LE PRINCIPE DE L'INDÉPENDANCE DU JUGE

Résumé

L'objet de cet article est de présenter la question des limites de la responsabilité disciplinaire d'un juge pour faute professionnelle, sous la forme d'une violation évidente et flagrante des dispositions légales limitées par le principe de l'indépendance du juge. En raison du fait que le principe de la spécificité de l'acte, prévu par la loi, n'est pas applicable en droit disciplinaire, ce domaine est régi par des décisions disciplinaires, en particulier les décisions de la Cour suprême-Tribunal disciplinaire, qui ont fait l'objet d'une analyse détaillée, qui a permis d'indiquer les tendances de la jurisprudence et de développer sa propre position, en tenant également compte des dernières modifications apportées à la loi sur le système des tribunaux de droit commun, traduisant la nécessité de renforcer la protection de l'indépendance judiciaire et, partant, d'adopter une approche plus restrictive du fonctionnement de l'instrument de responsabilité disciplinaire à l'égard des juges qui commettent des violations évidentes et flagrantes des dispositions de la loi dans le domaine de la jurisprudence.

Mots-clés: responsabilité disciplinaire, indépendance du juge, faute professionnelle, violation manifeste et flagrante de dispositions légales, juridiction disciplinaire

LA RESPONSABILITÀ DISCIPLINARE DEL GIUDICE PER EVIDENTE E GRAVE VIOLAZIONE DELLE NORME DI LEGGE E IL PRINCIPIO DELL'INDIPENDENZA DEI GIUDICI

Sintesi

Oggetto del presente elaborato è la presentazione della problematica dei confini della responsabilità disciplinare del giudice per inadempimento professionale sotto forma di evidente e grave violazione delle norme di legge, limitati dal principio dell'indipendenza dei giudici. A motivo della mancata applicazione nel diritto disciplinare del principio di legalità del reato, tale ambito viene conformato dalla giurisprudenza disciplinare, in particolare dalle sentenze della sezione disciplinare della Corte Suprema, che sono state sottoposte ad analisi dettagliata, il che ha permesso di indicare la tendenza presente nella giurisprudenza e di elaborare una posizione propria, che considera anche l'ultima riforma della Legge sull'organizzazione dei tribunali ordinari, che si traduce nella necessità di rafforzare la tutela dell'indipendenza dei giudici, e quindi di un approccio più restrittivo all'utilizzo dello strumento della responsabilità disciplinare nei confronti dei giudici che hanno commesso un'evidente e grave violazione delle norme di legge nell'ambito giurisprudenziale.

Parole chiave: responsabilità disciplinare, indipendenza dei giudici, inadempimento professionale, evidente e grave violazione delle norme di legge, giustizia disciplinare

Cytuj jako:

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AVIATION ACCIDENTS INVOLVING BOEING 737 MAX: LEGAL CONSEQUENCES

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1. INTRODUCTION

A new type of Boeing 737, i.e. the Boeing 737 MAX, operated by the Indonesian Airlines Lion Air crashed in October 2018. A very similar accident took place on 10 March 2019. The aircraft belonged to the Ethiopian Airlines. In both cases, shortly after the take-off the aircraft suddenly gained and lost altitude. It might have been caused by the defectively working MCAS (Manoeuvring Characteristics Augmentation System), which is to prevent an aircraft from losing lift force. The system automatically pushes the airplane nose down if the angle of attack is excessive. It was introduced because of the use of new, more powerful engines on Boeing airplanes (very modern and efficient LEAP-1B engines produced by CFM International), which was a response to the development of the competing Airbus A320. The heavier engines and their new nacelles increase the risk of losing lift.

The systems in the 737 MAX series are operated similar to its predecessor 737 New Generation. The main aim was to limit crew training to the necessary minimum, i.e. a two hour-course on the iPad.

Most probably, in both cases one of MCAS sensors was defective and transmitted erroneous information to the engine control module, which continuously pushed down the airplane nose. In addition, the accidents might have resulted from the lack of supervision at the time Boeing obtained certification of the 737 MAX series, and insufficient pilot training. The aircraft accident investigation preliminary report indicates such causes.[1] It is necessary to wait for their confirmation until

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[1] Preliminary report on ET 302 crash, 4 April 2019: http://www.ecaa.gov.et/documents/20435/0/Preliminary+Report+B737-800MAX+%2C%28ET-AVJ%29.pdf; Preliminary Aircraft

the inquiry is finished and a final report is issued. However, civil liability may be examined, regardless of the final report.[2]

The article aims to present legal consequences of the two aviation accidents and indicate entities liable for damage caused by the accidents. The article in particular analyses the provisions concerning liability for passengers' death, destruction of airplanes and 737 MAX groundings.

Lawsuits have been already filed in the US (against the producer) as well as in other countries such as France, Indonesia, Kenya and Ethiopia (against airlines).

2. COMPENSATION FOR AIRPLANE GROUNDINGS

On 12 March 2019, the European Union Aviation Safety Agency (EASA) decided to suspend flight operations of all 737-8 MAX and 737-9 MAX aircraft in Europe. In addition, the EASA decided to suspend all commercial flights of those models performed by third-country operators into, out of or within the European Union. On 14 March 2019, the Federal Aviation Administration (FAA) issued a temporary grounding order for all 737 MAX operated by American airlines and foreign airlines in the American airspace. At present, the FAA and EASA are carrying out MCAS tests. The Executive Director of the EASA, Patrick Ky, stated that in order to return the MAX to service in Europe, the EASA must approve of all changes introduced by Boeing and perform an additional independent certification process of the design changes.[3]

China was one of the first countries to ground B737 MAX aircraft in March 2019. China Eastern Airlines (grounded 14 aircraft), Air China (15 aircraft) and China Southern Airlines (24 aircraft) announced that they demand compensation for groundings. The loss resulting from the suspension of one airplane's flights amounts to USD 1.5 m monthly.[4] Norwegian Air Shuttle grounded 18 aircraft and was the first to announce it would claim damages for the loss of income and additional costs incurred due to groundings.[5] LOT Polish airlines had ordered a total of 14 Boeing 737 MAX. It was forced to ground five 737 MAX aircraft and charter four older-type 737 airplanes. It will most probably claim compensation when the investigation into B737 MAX accidents causes is concluded. On the other hand, Enter

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Accident Investigation Report, Republic of Indonesia, 29 October 2018: https://www.skybrary.aero/bookshelf/books/4477.pdf.

[2] For the use of data and information provided in the Report in a trial, see A. Konert (ed.), *Aspekty prawne badania zdarzeń lotniczych w świetle Rozporządzenia 996/2010*, Wydawnictwo Uczelni Łazarskiego, Warszawa 2013, and M. Żylicz, *Prawo lotnicze. Komentarz*, Warszawa 2016.

[3] A. Domański, *EASA i ECA chcą sprawdzić MAX-y*, Rynek Lotniczy, published on 25 May 2019, https://www.rynek-lotniczy.pl/wiadomosci/easa-i-eca-chca-sprawdzic-maxy---6042.html (accessed on 18.07.2019).

[4] *Chińskie linie lotnicze chcą od Boeinga odszkodowań za uziemienie 737 MAX*, PAP: https://businessinsider.com.pl/wiadomosci/chinskie-linie-chca-od-boeinga-odszkodowan-za-uziemienie-737-max/6w8ej6f (accessed on 2.07.2019).

[5] P. Rudzki, *B737 MAX 8: dojdzie sprawa odszkodowań*, Rzeczpospolita, published on 13 March 2019, https://www.rp.pl/Lotnictwo/303139946-B737-MAX-8-dojdzie-sprawa-odszkodowan.html (accessed on 2.07.2019).

Air was the second airline in the world to claim damages for grounding aircraft.[6] American Airlines cancelled all flights starting on 3 September 2019 (115 flights daily). Southwest Airlines and United Airlines also stopped operating MAX aircraft.

Airlines may claim compensation for loss resulting from B737 MAX grounding pursuant to general rules of civil law based on evidence of losses, events causing loss and the causal relationship. The establishment of property loss (actual losses and lost profits) is not difficult in such a case. It will usually be connected with contractual liability for improper performance of contracts. The rules concerning liability depend on the law applicable in the jurisdiction, which is usually referred to in a contract between an airline and the manufacturer. Moreover, there can be clauses concerning liquidated damages in the contract. Thus, it may turn out that a contract lays down penalties for grounding aircraft, which may, although does not have to, substitute for compensation.

Aircraft grounding all over the world already took place as early as in 2013 when the FAA, which is an agency within the US Department of Transportation and supervises civil aviation in the country, took the decision. The entire B787 Dreamliner fleet was grounded worldwide for three months as a result of the JAL airplane accident caused by fire of lithium-ion batteries. There are no official data concerning compensation for airlines that lost several hundred million dollars. However, the matter was amicably settled. Thus, liquidated damages might have been paid or a discount price of successive airplanes could have been offered to the airlines concerned. However, the consequences of Boeing MAX grounding are much more serious.

3. AIRLINE LIABILITY

The issue of liability for passengers' losses has been uniformly regulated at the international level. In the case of international flights, an airline liability is mainly subject to the Warsaw Convention of 1929 and the Montreal Convention of 1999,[7] which compose the Warsaw-Montreal system, i.e. the Warsaw system supplemented by the Montreal Convention. In accordance with Article 1 para. 2 MC, international carriage means "any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated within the territories of two State Parties or the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if the State is not a State Party. Carriage between two points within the territory of a single State Party without

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[6] P. Otto, R. Hirsch, *Enter Air zażąda od Boeinga odszkodowania. Co zrobi LOT?*, Gazeta Prawna, published on 18 March 2019, https://serwisy.gazetaprawna.pl/transport/artykuly/1403524,enter-air-zazada-od-boeinga-odszkodowania-co-zrobi-lot.html (accessed on 2.07.2019).

[7] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 – Warsaw Convention 1929; hereinafter also WC; Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999; hereinafter also MC.

an agreed stopping place within the territory of another State is not international carriage for the purpose of this Convention."

The Ethiopian Airlines flight was from Addis Ababa (Ethiopia) to Nairobi (Kenya). Thus, within the meaning of the Convention, it was an international carriage. Both Ethiopia and Kenya ratified the Montreal Convention[8] so its provisions are applicable to airline liability for passengers' death.

However, in order to establish whether airline liability rules under the Warsaw-Montreal system are applicable to a particular passenger, the contractual carriage route, not the actual flight route, of the crashed aircraft should be taken into account. The will of the parties (a flight ticket indicating the carriage route) is of major importance in such a situation. Airline liability towards passengers is determined depending on the formerly specified, according to a contract between parties (an airline and a passenger), route. Thus, theoretically, each passenger can be subject to different rules of liability. If the Warsaw-Montreal system is applicable, the conditions for airline liability are as follows:

– the loss resulted from a passenger's death or bodily injury;
– the accident caused a passenger's death or bodily injury;
– the accident took place on board the aircraft or at the time of whatever activities connected with boarding or disembarking.

An airline incurs objective (strict) liability regardless of fault. Thus, it is not important what the reason of an accident was; an airline is obliged to pay damages to dead passengers' families and maintains the potential right to claim recourse against persons responsible for the accident (e.g. against the producer of an airplane). Such a liability rule concerns a situation when the aggrieved files claims not exceeding 113,100 SDRs.[9] In such a case an airline cannot exclude or limit its liability. It will defend itself only in case it proves that the damage was caused by negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he/she derives his/her rights (Article 20 MC).[10] However, if damage exceeds 113,100 SDRs, an airline liability is based on the principle of the presumption of fault.[11] An airline will defend itself from liability by indicating the fault of the person claiming compensation (Article 20 MC) as well as exculpating itself by indicating that the loss was not caused by negligence or other wrongful act

[8] See the list of State Parties to the Montreal Convention: https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf.

[9] Initially the limit was 100,000 SDRs, but in accordance with Article 24 MC, the limits of liability shall be reviewed by the Depositary at five-year intervals, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision.

[10] "If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger." (Article 20 MC).

[11] On the other hand, the Convention maintained limited liability of an airline for delays in the carriage of passengers and delays, damage and loss of baggage and cargo.

or omission of the carrier or its servants or agents, or that the loss was caused only by negligence or other wrongful act or omission of a third party.

In accordance with Article 28 MC, the carrier, Ethiopian Airlines, was obliged to make advance payments to family members of the dead passengers. Advance payments must be made without delay in order to meet immediate economic needs of such persons and may not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.[12]

It should be remembered that the Convention does not contain precise rules for recognising the group of the aggrieved, the existence, nature and assessment of damage or the way of claiming reparation, the amount of claims, causal relation, etc. Therefore, the issue of jurisdiction is important. The law applied by the competent court will usually be decisive in such cases. The issue of compensation for non-financial loss is even more important. The two conventions do not contain a definition of damage or the precise rules of liability. Therefore, the issues were left to national courts to deal with.[13] Such authorisation is laid down in Article 24 WC and Article 29 MC, which stipulate that in the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under the Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in the Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Analysing the case law based on the two Conventions, undoubtedly compensation is possible only when non-financial loss results from bodily injury. On the other hand, the Convention does not determine compensation for family members' death. Therefore, the law of a country adjudicating is extremely important because it not only provides for the possibility but also the amount of such compensation. Filing a lawsuit is most popular in the United States mainly thanks to experienced American lawyers representing the aggrieved, generosity of the jury when determining the amount of compensation, and mainly the possibility of obtaining compensation for non-financial loss as well as the so-called punitive damages.[14] This is the phenomenon of "forum shopping", i.e. the practice of litigants looking for a competent court more likely to hear their case favourably for them.[15] In common law countries, there is a solution to the problem of "forum shopping", which is the application of the doctrine of *forum non conveniens*. It is

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[12] For detailed discussion of the issue of advance payments, see A. Konert, H. Ephraimson-Abt, *New Progress and Challenges in the Air Law: Air Crash Victims Families Protection*, Wydawnictwo Uczelni Łazarskiego, Warszawa 2014, p. 20 et seq.

[13] *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 225 (1996).

[14] A. Konert, *Doktryna forum non conveniens w sprawach o odszkodowanie w wypadkach lotniczych*, [in:] E. Pływaczewski, J. Bryk (eds), *Meandry prawa – teoria i praktyka. Księga jubileuszowa prof. zw. dra hab. Mieczysława Goettela*, Białystok 2018.

[15] See B. Fuchs, *Ujednolicanie prawa na płaszczyźnie międzynarodowej a zagadnienie forum shopping*, [in:] W. Popiołek, L. Ogiegła, M. Szpunar (eds), *Rozprawy Prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków 2005; S.W. Brice, *Forum Shopping in International Air Accident Litigation: Disturbing the Plaintiff's Choice of an American Forum*, Boston College International and Comparative Law Review Vol. 7, issue 1, 1984; R.U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, Domestic and International*, Texas International Law Journal Vol. 37, 2002 p. 559 et seq.; F.K. Juenger, *Forum Shopping, Domestic and International*, Tulane Law

a principle that allows a court to acknowledge that it will be more appropriate to send a case to another court.[16]

In accordance with Article 33 MC, an action for damages must be brought, at the option of the plaintiff, in the territory of one of the State Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. And in respect of damage resulting from the death or injury of a passenger, the action is brought in the territory in which at the time of the accident the passenger has his/her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier itself conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

Among the five above-mentioned jurisdictions, the only possibility of filing a lawsuit in the US in the case analysed is the fact that at the time of the accident the passenger had his/her principal and permanent residence in the US. There were eight passengers on board Ethiopian Airlines 302 who had their principal and permanent residence in the US. Other passengers can claim damages before courts in Ethiopia or Kenya. The average amount of damages paid in the US for the death of a passenger accounts for ca. USD 2–3 million, while in African countries this is ca. USD 200,000.[17]

American courts jurisdiction envisaging higher damages is also possible, regardless of the application of the Montreal or Warsaw Convention, in relation to a carrier's liability due to the domicile of the manufacturer that contributed to the accident.

The limitation of claims period under the Convention is two years from the date of arrival at the destination or the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (Article 35 MC).[18]

The Lion Air aircraft, flight JT-610 from Jakarta (CGK) to Pangkal (PGK) Pinang (Indonesia), had 181 passengers and seven members of the crew. Thus, it was a domestic flight and national law is applicable. Families were offered a lump sum of USD 91,000 in damages on condition that they agree to drop their claims against Lion Air, Boeing and their business partners. All the aggrieved rejected the offer. At present, a class action against the manufacturer in the US is being prepared.

Review Vol. 63, 1989, p. 553; M.G. Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, Nebraska Law Review Vol. 78, issue 1, 1999.

[16] See more on the issue of FNC, see A. Konert, *Doktryna forum non conveniens*, *op. cit.*

[17] https://www.reuters.com/article/us-ethiopia-airplane-insurance/insurers-face-large-claims-after-second-boeing-737-max-crash-idUSKBN1QS1D8 (accessed on 2.07.2019).

[18] For more on the issue of airline liability for damage to a person, see A. Konert, *Odpowiedzialność cywilna przewoźnika lotniczego*, Warszawa 2010 and literature referred to therein.

4. AIRCRAFT MANUFACTURER'S LIABILITY

Civil liability for a faulty aviation product means liability for damage resulting from a faulty design or faulty production of aviation products, supply of faulty materials or the lack of warning about potential losses caused as a result of the use of aviation products. Liable entities include aviation products manufacturers, their sub-contractors and suppliers. Aviation products include aircraft, engines and propellers as well as the parts and devices for aircraft (instruments, mechanisms, equipment, software used in operation or to control an airplane).[19]

Almost in all the states at present, the aggrieved can sue a producer if they prove that a defect of the product has resulted in damage with no need to prove the producer's fault. Thus manufacturers' liability is objective.[20] In accordance with Section 402A of the American Law Institute's Restatement (Second) of Torts of 1965, anyone who sells any defective product "unreasonably dangerous" to the user or consumer or his property is subject to liability for physical harm thereby. He is also liable, although he has exercised all possible care in the preparation and sale of his product, and the user or consumer has not bought the product from or entered into any contractual relation with the seller.[21] Therefore, in order to be awarded damages, it is not required that fault or even just a warranty exist.[22]

Strict liability can result from:

– a design defect;[23]
– the "lemon product" (a manufacturing defect);[24]
– a lack of warning (a marketing defect/failure to warn)[25].[26]

A design defect (construction defect) is one in which the whole product line or every product of a given model is dangerously defective. The consumer expectation tests are often applied. If a manufacturer produces a product inappropriately, a production defect may occur. This means that the final product is worse than identical products of the same production line (e.g. because of the use of materials not matching the norms, faulty assembly, etc.). Somebody has been at fault (negligence) when making the product but a plaintiff does not have to prove the manufacturer's

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[19] A. Konert, *Odpowiedzialność producenta systemów antykolizyjnych za szkody spowodowane przez wypadek lotniczy nad Überlingen*, Ius Novum No. 3, 2015.

[20] Also see L.L. Haertlein, et al., *Applying a Federal Standard of Care in Aviation Product Liability Actions*, Journal of Air Law & Commerce Vol. 82, 2017, p. 743.

[21] In the past most courts denied the right to compensation when a plaintiff could not prove a legal relation to a defendant. A party could not get anything from the other, unless a product was bought directly from the defendant. Even when the relation existed, courts often refused to award damages due to the *caveat emptor* ("let the buyer beware") principle. Thus, it was necessary to prove that the warranty conditions were breached. For more, see P.S. Dempsey, *Aviation Liability Law*, 2nd edn LexisNexis, Markham, Ontario 2013, p. 2 et seq.

[22] A. Konert, *Odpowiedzialność producenta*, *op. cit*.

[23] *Barker v. Lull Engineering Co*., 20 Ca. 413, 573 P.2d 443, 143 Ca. Reptr. 225 (1978).

[24] *Pouncey v. Ford Motor Co.*, 464 F.2d 957 (5th Cir. 1972).

[25] *Jackson v. Coast Paint & Lacquer Co*., 499 F.2d 809 (9th Cir. 1974).

[26] P.J. Kolczynski, *Aviation Product Liability*, AvWeb, published on 19 October 2001, http://www.avweb.com/news/avlaw/181885-1.html?redirected=1; P.S. Dempsey, *Aviation Liability Law*, *op. cit*., pp. 15–16. Citation in A. Konert, *Odpowiedzialność producenta*, *op. cit.*

fault. It is sufficient that the product is worse than identical products of the same production line and this difference results in harm. Finally, the last type of liability concerns a situation in which manufacturers do not provide appropriate warnings and user manuals. These may be general instructions accompanying a product. If the instructions are ambiguous or insufficient, the product cannot be safely used. In addition, these can be special warnings about danger, i.e. special procedures in case of emergency, e.g. notices in the cockpit, the evacuation method, etc.[27]

Many lawsuits against manufacturers have already been filed (and consolidated) in the Federal Court of Chicago and King County Superior Court in Washington on behalf of the dead passengers' families.

In March 2019, the family (three children) of the Ethiopian Airlines' passenger Jackson Musoni (a Rwandan national) filed the first lawsuit against the manufacturer in a federal court in Illinois. The complaint alleged that Boeing defectively designed the flight control system and failed to warn the public, airlines and pilots about faulty sensors, which allegedly caused automatic and uncontrolled dive of the aircraft.[28]

The lawyer of Nadege Dubois-Seex (a French national), the plaintiff whose husband Jonathan Seex was the Ethiopian Airlines' passenger, during the trial against Boeing asked the jury, "after considering all of the evidence, after considering Boeing's reckless and wilful action in which it consciously disregarded the safety of its passengers, to award a minimum in the form of punishment to Boeing of 267 million dollars because it is one day's worth of gross receipts by Boeing. In 2018, Boeing grossed 101 billion dollars. When you take that figure and divide it by 365, you arrive at the figure of USD 276 million".[29]

On 21 June 2019, over 400 pilots brought class action lawsuit against Boeing in a court in Chicago stating that since groundings they have lost part of their earnings and they claim compensation for non-financial losses in the form of suffering caused by psychical problems. The pilots accuse Boeing of "unprecedented suppression of recognised construction defects" of machines that "probably resulted in catastrophes (...), and then the grounding of all those airplanes".[30]

In July 2019, Boeing set up a special fund for the families of passengers of Lion Air Flight 610 and Ethiopian Airlines Flight 302 accounting for USD 100 million, which is to be used to pay damages. According to the representatives of the aggrieved, the amount is insufficient to cover all the claims.[31]

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[27] *Ibid*.

[28] H. Leung, *A U.S. Lawsuit Targets Boeing Over the Deadly Ethiopian Airlines Crash*, Time, 29 March 2019, https://time.com/5561035/boeing-jackson-musoni-lawsuit-ethiopia-airlines-crash/ (accessed on 5.07.2019).

[29] B. Berteau, S. Vandoorne and E. Mackintosh, *French Widow Sues Boeing for $276 Million over Ethiopian Airlines Crash*, CNN, 22 May 2019: //edition.cnn.com/2019/05/21/europe/french-widow-sues-boeing-intl/index.html (accessed on 5.07.2019).

[30] S. Baker, *More than 400 737 Max Pilots are Suing Boeing over an "Unprecedented Cover-up" of Flaws in the Plane's Design*, Business Insider, 24 June 2019, https://www.businessinsider.com/737-max-pilots-sue-boeing-claim-unprecedented-cover-up-issues-2019-6?IR=T (accessed on 5.07.2019).

[31] S. O'Kane, *Boeing Announces $100 Million Fund for Families of 737 Max Crash Victims*, The Verge, 3 July 2019, https://www.theverge.com/2019/7/3/20681261/boeing-737-max-fund-families-crash-victims (accessed on 18.07.2019).

Shareholders also sued Boeing because their shares lost value. The company lost about USD 30 billion of its value on the stock market. The lawsuit was filed in District Court DN in Illinois by a shareholder Richard Seeks, who accused Boeing of securities fraud violation stating that it quickly introduced the 737 MAX model to compete with the European Airbus and omitted elements that could have prevented accidents. In addition, he claims that in order to make B737 MAX cost-effective, Boeing "put profitability and growth ahead of plane safety and honesty".[32]

5. OTHER LEGAL CONSEQUENCES OF ACCIDENTS INVOLVING B737 MAX

The FAA may also face the consequences of the Boeing MAX crashes. It is indicated that there was a potential conflict of interest between Boeing and the FAA, which allowed Boeing to extensively self-certify aircraft, in particular MCAS. The Justice Department opened an investigation into the certification process of Boeing aircraft.[33]

It is a puzzling fact that a passenger aircraft manufacturer can play a key role in the process of taking a decision whether its product is safe. In the course of the inquiry, it was indicated that the FAA, with the approval of the Congress, had delegated a large amount of certification authority and safety assessment to Boeing over the last years, mainly because of the lack of staff in the FAA.[34] The Seattle Times journalist, Dominic Gates, ran an investigation into the level of passengers' safety in the certification of aircraft and spoke to many Boeing employees and the FAA inspectors involved in the B737 MAX certification process. After the crash in Ethiopia, the journalist published a detailed article in which he accused Boeing and the FAA of ignoring the risk and failing to meet safety requirements necessary to obtain a certificate because of being under strong pressure of managers who wanted to launch B737 as soon as possible.[35]

The method of aircraft certification in the US requires that the issue of safety, which is a basic category in civil aviation, be focused on.[36] In the light of so

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[32] *Seeks v. The Boeing Company* (Case 1:19-cv-02394). The complaint content is available at: http://zhanginvestorlaw.com/wp-content/uploads/2019/04/The-Boeing-Company-Complaint.pdf (accessed on 18.07.2019).

[33] D. Slotnick, *The Justice Department is Looking Deeper into Boeing while the Company Scrambles to get its Troubled 737 Max Plane up and Running again*, Business Insider, https://www.businessinsider.com/boeing-justice-department-investigation-subpoena-787-dreamliner-records-2019-6?IR=T (accessed on 22.09.2019).

[34] P. Bożyk, *FAA i Boeing z poważnymi zarzutami o certyfikację B737 MAX*, Rynek Lotniczy, 22 March 2019, https://www.rynek-lotniczy.pl/wiadomosci/faa-i-boeing-z-powaznymi-zarzutami-o-certyfikacje-b737-5634.html (accessed on 18.07.2019).

[35] http://wiadomosci.gazeta.pl/wiadomosci/7,114881,24595778,jest-pierwszy-pozew-przeciwko-boeingowi-po-katastrofie-w-etiopii.html (accessed on 5.07.2019).

[36] For aviation safety, see P. Kasprzyk, *Odpowiedzialność a bezpieczeństwo transportu lotniczego. Kilka uwag o Just Culture*, [in:] A. Dańsko-Roesler, M. Leśniak, M. Skory, B. Sołtys (eds), *Ius Est Ars Boni et Aequi, Księga pamiątkowa dedykowana Profesorowi Józefowi Frąckowiakowi*, Wrocław 2018; P. Łaciński, A. Konert, P. Kasprzyk, *Podstawy prawne zarządzania bezpieczeństwem w lotnictwie*

dynamically developing air traffic and enormous competition, inter alia in aircraft production, the maintenance of the present safety level in air transport is the biggest challenge for the aviation sector. As Piotr Kasprzyk indicates in connection with matters concerning air transport safety, the public-legal regulations determining the requirements, rules or procedures in aviation aimed at maintaining or increasing the level of flight safety are of basic importance.[37] Administrative regulations, taking into account inter alia the experience and technological advancement, impose a series of requirements and obligations on entities involved in aviation, including in particular impartiality of entities taking decisions on an aviation product safety and certification.[38] This is the way to minimise risk and, as a result, to reduce the number of accidents to a minimum.[39]

6. CONCLUSIONS

B737 MAX aircraft accidents resulted in legal consequences of an unprecedented scale. Usually, when one of the reasons of an air crash is an aviation product's defect, apart from the airline liability towards the dead passengers' families, which is objectively liable (regardless of the lack of its fault), an aviation product manufacturer also bears liability. In the above-discussed cases, there are many more entities claiming damages from a manufacturer. These are the dead passengers' families, airlines and pilots who lost earnings as a result of B737 MAX grounding. In addition, shareholders brought a class action lawsuit due to the loss of Boeing shares' value. The company lost USD 30 billion in its market value.

As the article indicates, Boeing is the main liable entity. Although Ethiopian Airlines has strict liability for damage to a person in accordance with the Montreal Convention of 1999, the amount of damages is limited to 113,100 SDRs. Most of the aggrieved (the dead passengers' families) in the two flights are claiming or will claim high compensations (including redress) from the manufacturer. At present, class action complaints are being prepared against the producer in the US. American courts issue judgements in which they award very high damages to be paid by aviation manufacturers. Courts are even accused of leading to the extinction of industry.[40]

Having finished tests and prepared all corrections of the MCAS operation, the manufacturer will have to apply to the FAA and the EASA for certification. Moreover, airlines will have to introduce their own technical procedures of implementing those corrections in their fleets. However, it may turn out that the FAA will approve

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cywilnym, [in:] K. Łuczak (ed.), *Zarządzanie bepieczeństwem w lotnictwie cywilnym*, Katowice 2016; and E. Jasiuk, R. Wosiek, *Global Security and Safety Management in Civil Aviation in Light of Annex 19 to the Chicago Convention*, [in:] E. Jasiuk, R. Wosiek (eds), *Legal Conditions of International Cooperation for the Safety and Efficiency of Civil Aviation*, Uczelnia Łazarskiego, Warszawa 2019, p. 131 et seq.

37 P. Kasprzyk, *Odpowiedzialność a bezpieczeństwo*, *op. cit.*

38 See H. Schebesta, *Risk Regulation Through Liability Allocation: Transnational Product Liability and the Role of Certification*, Air and Space Law, Vol. 42, No. 2, 2017, pp. 107–136.

39 P. Kasprzyk, *Odpowiedzialność a bezpieczeństwo*, *op. cit*.

40 P.J. Kolczynski, *Aviation Product Liability*, *op. cit.*

of the manufacturer's corrections and the EASA will recognise them as insufficient. Then, airlines in the European Union will not be able to use B737 MAX in their operations and the European Union air space will remain closed to them. Undoubtedly, it would affect the amount of airlines' and pilots' losses discussed in the article.

Air crashes involving B737 MAX resulted in increased international control, the rise in mistrust of the American manufacturer, airlines responsible for training pilots and the method of aircraft certification in the US.

The competition of the two biggest aircraft manufacturers resulted in a situation where one again asks questions about actual safety of plane passengers.[41]

BIBLIOGRAPHY

Algero M.G., *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, Nebraska Law Review Vol. 78, issue 1, 1999.

Baker S., *More than 400 737 Max Pilots are Suing Boeing over an "Unprecedented Cover-up" of Flaws in the Plane's Design*, Business Insider, 24 June 2019, https://www.businessinsider.com/737-max-pilots-sue-boeing-claim-unprecedented-cover-up-issues-2019-6?IR=T (accessed on 5.07.2019).

Berteau B., Vandoorne S., Mackintosh E., *French Widow Sues Boeing for $276 Million over Ethiopian Airlines Crash*, CNN, 22 May 2019: //edition.cnn.com/2019/05/21/europe/french-widow-sues-boeing-intl/index.html (accessed on 5.07.2019).

Bożyk P., *FAA i Boeing z poważnymi zarzutami o certyfikację B737 MAX*, Rynek Lotniczy, 22 March 2019, https://www.rynek-lotniczy.pl/wiadomosci/faa-i-boeing-z-powaznymi-zarzutami-o-certyfikacje-b737-5634.html (accessed on 18.07.2019).

Brice S.W., *Forum Shopping in International Air Accident Litigation: Disturbing the Plaintiff 's Choice of an American Forum*, Boston College International and Comparative Law Review Vol. 7, issue 1, 1984.

Chińskie linie lotnicze chcą od Boeinga odszkodowań za uziemienie 737 MAX, PAP: https://businessinsider.com.pl/wiadomosci/chinskie-linie-chca-od-boeinga-odszkodowan-za-uziemienie-737-max/6w8ej6f (accessed on 2.07.2019).

Dempsey P.S., *Aviation Liability Law*, 2nd edn LexisNexis, Markham, Ontario 2013.

Domański A., *EASA i ECA chcą sprawdzić MAX-y*, Rynek Lotniczy, 25 May 2019, https://www.rynek-lotniczy.pl/wiadomosci/easa-i-eca-chca-sprawdzic-maxy---6042.html (accessed on 18.07.2019).

Fuchs B., *Ujednolicanie prawa na płaszczyźnie międzynarodowej a zagadnienie forum shopping*, [in:] W. Popiołek, L. Ogiegła, M. Szpunar (eds), *Rozprawy Prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków 2005.

Haertlein L.L. et al., *Applying a Federal Standard of Care in Aviation Product Liability Actions*, Journal of Air Law & Commerce Vol. 82, 2017.

Jasiuk E., Wosiek R., *Global Security and Safety Management in Civil Aviation in Light of Annex 19 to the Chicago Convention*, [in:] E. Jasiuk, R. Wosiek (eds), *Legal Conditions of International Cooperation for the Safety and Efficiency of Civil Aviation*, Uczelnia Łazarskiego, Warszawa 2019.

Juenger F.K., *Forum Shopping, Domestic and International*, Tulane Law Review Vol. 63, 1989.

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[41] "Boeing acted with cynicism. My husband was the collateral damage of a system, of a business strategy" – the words of the plaintiff in a trial against Boeing who lost her husband in the Ethiopian Airlines air crash.

Kasprzyk P., *Odpowiedzialność a bezpieczeństwo transportu lotniczego. Kilka uwag o Just Culture*, [in:] A. Dańsko-Roesler, M. Leśniak, M. Skory, B. Sołtys (eds), *Ius Est Ars Boni et Aequi, Księga pamiątkowa dedykowana Profesorowi Józefowi Frąckowiakowi*, Wrocław 2018.

Kolczynski P.J., *Aviation Product Liability*, AvWeb, 19 October 2001, http://www.avweb.com/news/avlaw/181885-1.html?redirected=1.

Konert A., *Odpowiedzialność cywilna przewoźnika lotniczego*, Warszawa 2010.

Konert A. (ed.), *Aspekty prawne badania zdarzeń lotniczych w świetle Rozporządzenia 996/2010*, Wydawnictwo Uczelni Łazarskiego, Warszawa 2013.

Konert A., *Odpowiedzialność producenta systemów antykolizyjnych za szkody spowodowane przez wypadek lotniczy nad Überlingen*, Ius Novum No. 3, 2015.

Konert A., *Doktryna forum non conveniens w sprawach o odszkodowanie w wypadkach lotniczych*, [in:] E. Pływaczewski, J. Bryk (eds), *Meandry prawa – teoria i praktyka. Księga jubileuszowa prof. zw. dra hab. Mieczysława Goettela*, Białystok 2018.

Konert A., Ephraimson-Abt H., *New Progress and Challenges in the Air Law: Air Crash Victims Families Protection*, Wydawnictwo Uczelni Łazarskiego, Warszawa 2014.

Leung H., *A U.S. Lawsuit Targets Boeing Over the Deadly Ethiopian Airlines Crash*, Time, 29 March 2019, https://time.com/5561035/boeing-jackson-musoni-lawsuit-ethiopia-airlines-crash/ (accessed on 5.07.2019).

Łaciński P., Konert A., Kasprzyk P., *Podstawy prawne zarządzania bezpieczeństwem w lotnictwie cywilnym*, [in:] K. Łuczak (ed.), *Zarządzanie bepieczeństwem w lotnictwie cywilnym*, Katowice 2016.

O'Kane S., *Boeing Announces $100 Million Fund for Families of 737 Max Crash Victims*, The Verge, 3 July 2019, https://www.theverge.com/2019/7/3/20681261/boeing-737-max-fund-families-crash-victims (accessed on 18.07.2019).

Otto P., Hirsch R., *Enter Air zażąda od Boeinga odszkodowania. Co zrobi LOT?*, Gazeta Prawna, 18 March 2019, https://serwisy.gazetaprawna.pl/transport/artykuly/1403524,enter-air-zazada-od-boeinga-odszkodowania-co-zrobi-lot.html (accessed on 2.07.2019).

Preliminary Aircraft Accident Investigation Report, Republic of Indonesia, 29 October 2018: https://www.skybrary.aero/bookshelf/books/4477.pdf.

Preliminary report on ET 302 crash, 4 April 2019: http://www.ecaa.gov.et/documents/20435/0/Preliminary+Report+B737-800MAX+%2C%28ET-AVJ%29.pdf.

Rudzki P., *B737 MAX 8: dojdzie sprawa odszkodowań*, Rzeczpospolita, 13 March 2019, https://www.rp.pl/Lotnictwo/303139946-B737-MAX-8-dojdzie-sprawa-odszkodowan.html (accessed on 2.07.2019).

Schebesta H., *Risk Regulation Through Liability Allocation: Transnational Product Liability and the Role of Certification*, Air and Space Law, Vol. 42, No. 2, 2017.

Slotnick D., *The Justice Department is Looking Deeper into Boeing while the Company Scrambles to get its Troubled 737 Max Plane up and Running again*, Business Insider, https://www.businessinsider.com/boeing-justice-department-investigation-subpoena-787-dreamliner-records-2019-6?IR=T (accessed on 22.09.2019).

Whitten R.U., *U.S. Conflict-of-Laws Doctrine and Forum Shopping, Domestic and Internationa*, Texas International Law Journal Vol. 37, 2002.

Żylicz M., *Prawo lotnicze. Komentarz*, Warszawa 2016.

AVIATION ACCIDENTS INVOLVING BOEING 737 MAX: LEGAL CONSEQUENCES

Summary

The article discusses the legal consequences of the two aviation accidents involving B737 MAX aircraft in which a total of 346 people were killed. Most probably, in both crashes, one of the MCAS sensors was defective and transmitted false information to the control module, which continuously pushed down the nose of the airplane. The article aims to indicate the entities liable for damage caused by the accidents, in particular the liability for passengers' death, the destruction of airplanes and aircraft grounding.

Keywords: aviation accidents, aviation manufacturer's liability, airline liability, Boeing 737 MAX, EASA, FAA

WYPADKI LOTNICZE Z UDZIAŁEM SAMOLOTU TYPU BOEING 737 MAX – KONSEKWENCJE PRAWNE

Streszczenie

W artykule zostały omówione konsekwencje prawne dwóch wypadków lotniczych z udziałem samolotu typu B737 MAX, w których zginęło łącznie 346 osób. Najprawdopodobniej w obu wypadkach jeden z czujników MCAS był niesprawny i przekazywał fałszywe informacje do modułu sterowania, który przez to nieustannie opuszczał dziób maszyny. Celem artykułu jest wskazanie podmiotów ponoszących odpowiedzialność za szkody spowodowane tymi wypadkami, w tym zwłaszcza analiza przepisów w zakresie odpowiedzialności za śmierć pasażerów, za zniszczenie samolotów oraz za ich uziemienie.

Słowa kluczowe: wypadki lotnicze, odpowiedzialność producenta lotniczego, odpowiedzialność przewoźnika lotniczego, Boeing 737 MAX, EASA, FAA

ACCIDENTES DE AVIÓN CON LA PARTICIPACIÓN DEL AVIÓN TIPO BOEING 737 MAX – CONSECUENCIAS LEGALES

Resumen

El artículo versa sobre las consecuencias legales de dos accidentes de avión con la participación del avión tipo B737 MAX, en los cuales murieron 346 personas en total. Lo más probable es que en ambos casos uno de los sensores MCAS estaba averiado y trasmitía información falsa al módulo de control que constantemente bajaba la proa del avión. El presente artículo tiene por objetivo identificar a sujetos responsables por daños ocasionados por dichos accidentes e incluye el análisis de la normativa relativa a la responsabilidad por la muerte de los pasajeros, por la destrucción de aviones y por su puesta a tierra.

Palabras claves: accidente de avión, responsabilidad de productor de aviación, responsabilidad de aerolíneas, Boeing 737 MAX, EASA, FAA

АВИАЦИОННЫЕ ПРОИСШЕСТВИЯ С УЧАСТИЕМ САМОЛЕТОВ BOEING 737 MAX – ПРАВОВЫЕ ПОСЛЕДСТВИЯ

Резюме

В статье рассматриваются правовые последствия двух авиакатастроф с участием самолета B737 MAX, в результате которых погибли 346 человек. Скорее всего, в обоих случаях один из датчиков MCAS вышел из строя и передавал ложную информацию в модуль управления, который в последствии постоянно опускал нос машины. Целью данной статьи является указание лиц, ответственных за ущерб, причиненный этими авариями, включая, в частности, анализ положений, касающихся ответственности за гибель пассажиров, за уничтожение воздушных судов и запрет на их эксплуатацию.

Ключевые слова: авиационные происшествия, ответственность авиационного производителя, ответственность авиаперевозчика, Boeing 737 MAX, Европейское агентство по безопасности полетов (EASA), Федеральная авиационная администрация (FAA)

LUFTFAHRZEUGUNFÄLLE UNTER BETEILIGUNG VON FLUGZEUGEN DES TYPS BOEING 737 MAX – RECHTSFOLGEN

Zusammenfassung

In dem Artikel werden die rechtlichen Folgen von zwei Unfällen im Luftverkehr unter Beteiligung eines Flugzeugs des Typs B737 MAX besprochen, bei denen insgesamt 346 Menschen zu Tode kamen. Aller Wahrscheinlichkeit nach war in beiden Fällen einer der Sensoren des MCAS-Stabilisierungssystems defekt, wodurch falsche Angaben an das Steuerungsmodul übermittelt wurden, das die Nase des Flugzeugs dadurch fortwährend nach unten drückte. Ziel des Artikels ist es, die Akteure zu bezeichnen, die für die durch diese Unfälle verursachten Schäden Verantwortung tragen und haften und insbesondere eine Analyse der Haftungsregeln bei Tötung von Reisenden, für die Zerstörung der Flugzeuge und das verhängte Flugverbot.

Schlüsselwörter: Flugzeugbetriebsunfälle, Haftung des Flugzeugherstellers, Haftung des Luftfahrtunternehmens, Boeing 737 MAX, Europäische Agentur für Flugsicherheit (EASA), Federal Aviation Administration (FAA)

ACCIDENTS AÉRIENS IMPLIQUANT DES AERONEFS AVEC L'AÉRONEF BOEING 737 MAX – CONSÉQUENCES JURIDIQUES

Résumé

L'article traite des conséquences juridiques de deux accidents aériens impliquant un avion B737 MAX, qui ont causé la mort de 346 personnes. Très probablement, dans les deux cas, l'un des capteurs d'incidence MCAS était hors service et transmettait de fausses informations au module de commande, qui mettait l'avion constamment en piqué. Cet article a pour but d'indiquer les entités responsables des dommages causés par ces accidents, y compris en particulier l'analyse des dispositions en matière de responsabilité du décès de passagers, de la destruction des aéronefs et de leur suspension de vol.

Mots-clés: accidents aériens, responsabilité d'un producteur aéronautique, responsabilité d'un transporteur aérien, Boeing 737 MAX, EASA, FAA

INCIDENTI AEREI CON AEREI DI TIPO BOEING 737 MAX – CONSEGUENZE LEGALI

Sintesi

Nell'articolo sono state descritte le conseguenze legali di due incidenti aerei con aerei di tipo B737 MAX, nei quali sono morte complessivamente 346 persone. Probabilmente in entrambi gli incidenti uno dei sensori MCAS non funzionava e inviava false informazioni al modulo di controllo, che per questo motivo continuava ad abbassare il muso della macchina. Obiettivo dell'articolo è mostrare i soggetti responsabili dei danni provocati da questi incidenti, con in particolare l'analisi delle norme di legge nell'ambito della responsabilità per la morte dei passeggeri, per la distruzione degli aerei e il loro ritiro dal servizio.

Parole chiave: incidenti aerei, responsabilità del produttore aereo, responsabilità del vettore aereo, Boeing 737 MAX, EASA, FAA

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LEGAL AND ECONOMIC ASPECTS OF HEALTHCARE SYSTEMS IN FRANCE AND UNITED KINGDOM

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1. INTRODUCTION

France and the United Kingdom are separated only by the 33.3 kilometers wide Strait of Dover, but they have completely different state and legal systems as well as many other determinants of their functioning. Their healthcare systems also differ, but according to the *Euro Health Consumer Index*,[1] the *Sustainability Index*[2] and the

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[1] A. Björnberg, A. Yung Phang, *Euro Health Consumer Index 2018*, Health Consumer Powerhouse 2019, pp. 24–25.

The Euro Health Consumer Index is considered the most significant healthcare systems evaluation tool in Europe. Among its criteria there are: patient rights and information (patient organizations involved in decision-making, the right to second medical opinion, access to own medical record, registry of bona fide doctors, access to web or twenty-four hour and seven-day telephone health consultant information, possibility of cross-border care seeking, catalogue of providers with quality ranking, e-accessible patient records, online booking of appointments and e-prescriptions); accessibility (family doctor same-day access, direct access to a specialist, major elective surgery in less than ninety days, cancer therapy in less than twenty-one days, CT scan in less than seven days, waiting time for pediatric psychiatry); outcome (thirty-day AMI case fatality, thirty-day stroke case fatality, infant deaths, cancer survival, deaths before sixty-five years of age, MRSA infections, abortion rates, suicide rates, diabetes patients with HbA1c higher than seven); range and reach of services provided (equity of healthcare systems, cataract operations per 100,000 people sixty-five and more years old, kidney transplants per million population, dental care including in public healthcare, informal payments to doctors, long-term care for the elderly people, percentage of dialysis done outside of the clinic, caesarean sections); prevention (infant eight-disease vaccination, blood pressure, smoking prevention, alcohol, physical activity, HPV vaccination, traffic deaths); and pharmaceuticals (Rx subsidy, novel cancer drugs deployment rate, access to new drugs, arthritis drugs, statin use, antibiotics per capita).

[2] *The Sustainability Index 2018*, Future Proofing Healthcare 2018, https://futureproofinghealthcare.com/sustainability-index (accessed on 17.06.2019).

Commonwealth Fund Comparison,[3] they both belong to the twelve most effective ones in Europe. The other operate in Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands, Norway, Sweden and Switzerland.

The life expectancy at birth in France is one of the highest among the European Union countries and reached 82.4 years in 2015, while the amenable mortality is one of the lowest and dropped to 78 people per 100,000 population in 2014. The unmet care needs amounted to 1.4% in 2015. The health condition of French people is high, but there are disparities among them resulting from gender and economic as well as social status. Some segments of the healthcare system of the country need improvement. These are: prevention and better serving the increasing number of chronically ill persons.[4]

In the case of the United Kingdom, the life expectancy at birth reached 81.0 years in 2015, the amenable mortality amounted to 116 people per 100,000 population in 2014 and the unmet care exceeded 3% in 2015. The health condition of the population of the United Kingdom is improving. Men and women live longer than before but not in good health during these additional years. The whole healthcare system consists of four delegated health subsystems in England, Northern Ireland, Scotland and Wales. The recent policy of the country is to achieve higher integration of them with "place-based" care, which will improve efficiency of the services.[5]

2. LEGAL REGULATION OF HEALTHCARE IN FRANCE

At the beginning, the healthcare system in France was based on a Bismarck model of payment for the medical care and supply of health services and products. Its first law was published in 1902.[6] Until 1930 more than 60% of citizens of the country were covered by the mutual insurance associations. During decades, however, the French healthcare has been gradually tending towards the Beveridge model and now it is the mixture of the both.[7]

The above models are defined as follows: "Bismarck healthcare systems: Systems based on social insurance, where there is a multitude of insurance organisations, Krankenkassen etc., who are organisationally independent of healthcare providers. Beveridge systems: Systems where financing and provision are handled within one

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[3] E.C. Schneider et al., *Mirror, Mirror on the Wall: How the Performance of the U.S. Health Care System Compares Internationally*, The Commonwealth Fund, New York 2017, https://www.commonwealthfund.org (accessed on 6.09.2019).

[4] OECD/European Observatory on Health Systems and Policies, State of Health in the EU. Country Health Profile 2017: France, OECD Publishing, https://ec.europa.eu/health/sites/health/files/state/docs/chp_fr_english.pdf, pp. 1–2.

[5] OECD/European Observatory on Health Systems and Policies, *State of Health in the EU. Country Health Profile 2017: United Kingdom*, OECD Publishing, https://ec.europa.eu/health/sites/health/files/state/docs/chp_uk_english.pdf, pp. 1–2.

[6] L. Chambaud, C. Hernández-Quevedo, *France*, [in:] B. Rechel et al. (eds), *Organization and Financing of Public Health Services in Europe: Country Reports*, Copenhagen 2018, p. 23.

[7] K. Chevreul, K. Berg Brigham, I. Durand-Zaleski, C. Hernández-Quevedo, *France: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition Vol. 17, No. 3, 2015, p. 19.

organisational system, i.e. financing bodies and providers are wholly or partially within one organisation, such as the NHS of the UK, counties of Nordic states, etc."[8]

The statutory organization of French healthcare system was introduced in 1930 under the Act on Social Insurance, which guaranteed health protection to employees with earnings lower than the fixed level. Payments for their healthcare were contributed by employers and covered illness, disability, maternity, advanced age and death. In 1945 the national social health insurance system (*l'assurance-maladie*, SHI) with many different schemes was launched. At the beginning, SHI was dedicated to workers and their families only. Year by year, it has been extended to the whole population.[9]

The next crucial step was made in 1999 along with the Universal Health Coverage Act (*Loi No. 99-641 du 27 juillet 1999 portant création d'une couverture maladie universelle*). It combined the privileges resulting from SHI with the residency of the insured persons and created the CMU Fund (*Fonds CMU*), which provides public coverage to the people with income lower than the certain limit. Citizens who earn more than that level and are not covered by SHI, pay part of the cost of their care. Foreigners who live in France three months and longer are entitled to state medical assistance (*l'aide médicale de l'État*, AME).

The health policy priorities in France are regulated by its parliament with the public health acts. The first Public Health Act was adopted in 2004 (*Loi No. 2004-806 du 9 août 2004 relative á la politique de santé publique*). In 2009 the Hospital, Patients, Health and Territories Act created twenty-seven Regional Health Agencies which were reduced to eighteen in 2016.

In 2014 the Interministerial Health Committee (*le Comité interministériel pour la santé*) was established, and subsequently the relations between the national and the regional levels of the system were introduced and 100 indicators (which illustrate the condition of health of the population and effectiveness of the health system) defined.[10]

The next regulation, the Law on Modernisation of Healthcare System, was announced in 2016. Its aim was to intensify prevention, amplify primary care and unwrap patient rights. It established the Public Health Agency (*l'agence nationale de santé publique*, called *Santé publique France*, SPF), which merged three former bodies, i.e. the French Institute for Public Health Surveillance (*l'institut national de veille sanitaire*, InVS), which was monitoring health condition of the nation and alerting; the National Institute for Prevention and Health Education (*l'institut national de prévention et d'éducation pour la santé*, INPES); and the Health Emergency Preparedness and Response Agency (*l'établissement de préparation et de réponse aux urgences sanitaires*, EPRUS), responsible for reacting to serious health crisis and dangers in France and elsewhere.[11]

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[8] A. Björnberg, A. Yung Phang, *Euro Health Consumer Index 2018*, *op. cit.*, p. 21.

[9] K. Chevreul et al., *France: Health System Review*, *op. cit.*, p. 22.

[10] L. Chambaud, C. Hernández-Quevedo, *France*, [in:] B. Rechel et al. (eds), *Organization*, *op. cit.*, pp. 23–24.

[11] *Ibid.*, p. 24.

The Ministry of Health and Solidarity (*le Ministère des Solidarités et de la Santé*) prepares periodically the National Strategy for Health (*la stratégie nationale de santé*). The last strategies and the present one (for 2018–2020) intended to minimise social and geographic health differences, to increase prevention and care for chronic illnesses, to improve efficiency and equity of the whole French health system, to empower patient rights, to increase patient participation in designing health policy and in managing of health agencies, and to reach other healthcare goals.

The French parliament votes on the annual Social Security Finance Acts. The following institutions participate in preparing them:

– the Auditors Office (*la Cours des comptes*), which monitors state and social organizations on proper use of public sources,
– the High Council for the Future of Health Insurance (*le Haut Conseil pour l'avenir de l'assurance maladie*, HCAAM),
– the High Council for Public Health (*le Haut Conseil de la santé publique*, HCSP),
– the National Health Conference (*la Conférence nationale de santé*, CNS).

The Ministry of Health and Solidarity is the highest authority of the French Administration of Health and Social Affairs (*l'administration sanitaire et sociale*). It comprises of the General Directorate of Health (*la Direction générale de la santé*) which oversees healthcare policy, the General Directorate of Healthcare Supply (*la Direction générale de l'organisation des soins*) which supervises capital and human assets, the Directorate of Social Security (*la Direction de la sécurité sociale*) which is responsible for the social security system and the General Directorate for Social Policy (*la Direction générale de la cohésion sociale*) which overseas health and social care for older, disabled and vulnerable people.[12]

The representatives of the ministry in charge of health, the ministries responsible for public accounts and for social security, the SHI and the National Solidarity Fund for Autonomy (*la Caisse nationale de solidarité pour l'autonomie*, CNSA) form the National Steering Council (*le Conseil national de pilotage*, CNP) which supervises Regional Health Agencies (*Agences régionales de santé*, ARS) representing the Administration of Health and Social Affairs at the regional level.

A significant role in the French healthcare system is played by the French National Health Authority (*la Haute Autorité de Santé*, HAS), which is an independent public body with a wide range of activities aiming to keep and constantly improve the quality and efficiency of healthcare. There are also other agencies and public bodies, dependent on the ministry or more or less independent. The most important among them are:

– the French Biomedicine Agency (*l'Agence de la biomédicine*) responsible for reproductive technologies, prenatal and genetic diagnosis, embryo and stem cell research, procurement and transplant of organs, tissues and cells,
– the French National Agency for Medicines and Health Products Safety (*l'Agence nationale de sécurité du médicament et des produits de santé*, ANSM) responsible for all safety decisions referring to health products,

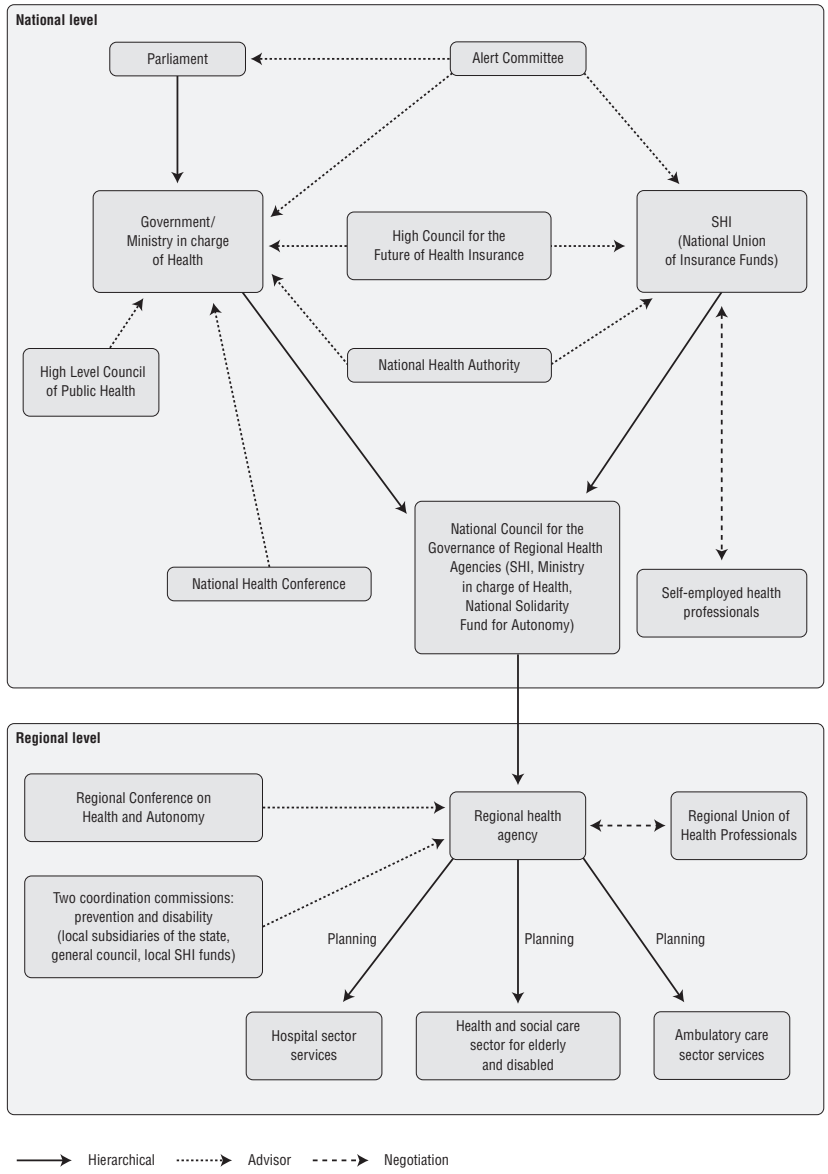
[12] K. Chevreul et al., *France: Health System Review*, *op. cit.*, pp. 23–24.

– the French Blood Agency (*l'Établissement français du sang*, EFS),
– the French Agency for Food, Environmental and Occupational Health Safety (*l'Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail*, ANSES),
– the Radioprotection and Nuclear Safety Institute (*l'Institut de radioprotection et de sûreté nucléaire*, IRSN),
– the Agency for Information on Hospital Care (*l'Agence technique de l'information sur l'hospitalisation*, ATIH),
– the National Agency to Support the Performance of Health and Health and Social Care Institutions (*l'Agence nationale d'appui à la performance des établissements de santé et médico-sociaux*, ANAP) which advises and helps entities providing health and social care and supports the Ministry and Regional Health Agencies,
– the National Agency for the Quality Assessment of Health and Social Care Organizations and Services (*l'Agence nationale de l'évaluation de la qualité des établissements et services sociaux et médico-sociaux*, ANESM),
– the Prudential Control and Resolution Authority (*l'Autorité de contrôle prudentiel et de résolution*, ACPR) which supervises voluntary health insurance suppliers,
– the National Union of Complementary Health Insurance Organizations (*l'Union nationale des organismes d'assurance maladie complémentaire*, UNOCAM),
– the School of Public Health (*l'École des hautes études en santé publique*, EHESP),
– the National Institute for Cancer (*l'Institut national du cancer*, INCa).[13]

In France there are also professional organizations associated with healthcare which may be divided into the two groups: professional associations or chambers (*conseils de l'ordre*) and trade unions. They are organized in the regional unions of health professionals (*Unions régionales des professionnels de santé*) and the National Union of Health Professionals (*l'Union nationale des professions de santé*).[14] Figure 1 presents the organizational overview of the French healthcare system.

[13] *Ibid.*, pp. 26–28.
[14] *Ibid.*, p. 30.

Figure 1. Overview of the health system in France, 2014



Source: K. Chevreul, K. Berg Brigham, I. Durand-Zaleski, C. Hernández-Quevedo, *France: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition Vol. 17, No. 3, 2015, p. 21.

3. ORGANIZATION AND ECONOMICS OF HEALTHCARE IN FRANCE

The general feature of the healthcare system in France is its social insurance based on the mix of Bismarckian and Beveridgean models (see Introduction).[15] The whole French social insurance is divided into the statutory one (SHI), which covers 99% of population, and the complementary one (VHI), which is used by about 95% of inhabitants.[16] In 2012 SHI financed 75.4% of the personal healthcare expenditure and 74.3% of the total national healthcare spending (74.7% in 2013).[17]

SHI acts through a number of schemes which depend on professions and place of work of their holders. It receives financial resources from employers and taxpayers, taxes on tobacco, on alcohol and from pharmaceutical firms. On the other hand, it offers benefits of two types (in-kind and in-cash) which are connected with the lists of medical procedures for physicians and other healthcare specialists, reimbursable medicines, medical devices and health materials. Since the moment of its creation, SHI has been financing the curative care connected with illnesses and accidents. Now it covers more and more preventive care. As distinct from SHI, the complementary social insurance finances approximately 14% of the total healthcare expenditure.[18]

The total publicly funded health expenditure in France amounts to 79%, and is among the highest shares in the European Union, while the out-of-pocket payments of patients account for 7% only, which makes the lowest percentage in the UE, much below the average amounting to 15%. The total health spending in France per capita in 2017 came to USD 4,931 (in 2018 estimated USD 4,965)[19] and ranked ninth in the European Union, however as the percentage of GDP allocated to health (11.3%) it was the second highest.[20] Figure 2 shows the financial flows in the French healthcare system.

Healthcare services in France are provided mostly by self-employed physicians, hospitals and other entities. Hospitals belong to the state, non-profit bodies owned by foundations, religious organizations and mutual-insurance associations and private profit-making units. The responsibility for planning their resources and activities as well as supervising them is shared between the Ministry of Health and Solidarity, and Regional Health Agencies.

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15 A. Björnberg, A. Yung Phang, *Euro Health Consumer Index 2018*, *op. cit.*, p. 21.

16 OECD/European Observatory on Health Systems and Policies, *State of Health in the EU. Country Health Profile 2017: France*, *op. cit.*, p. 6.

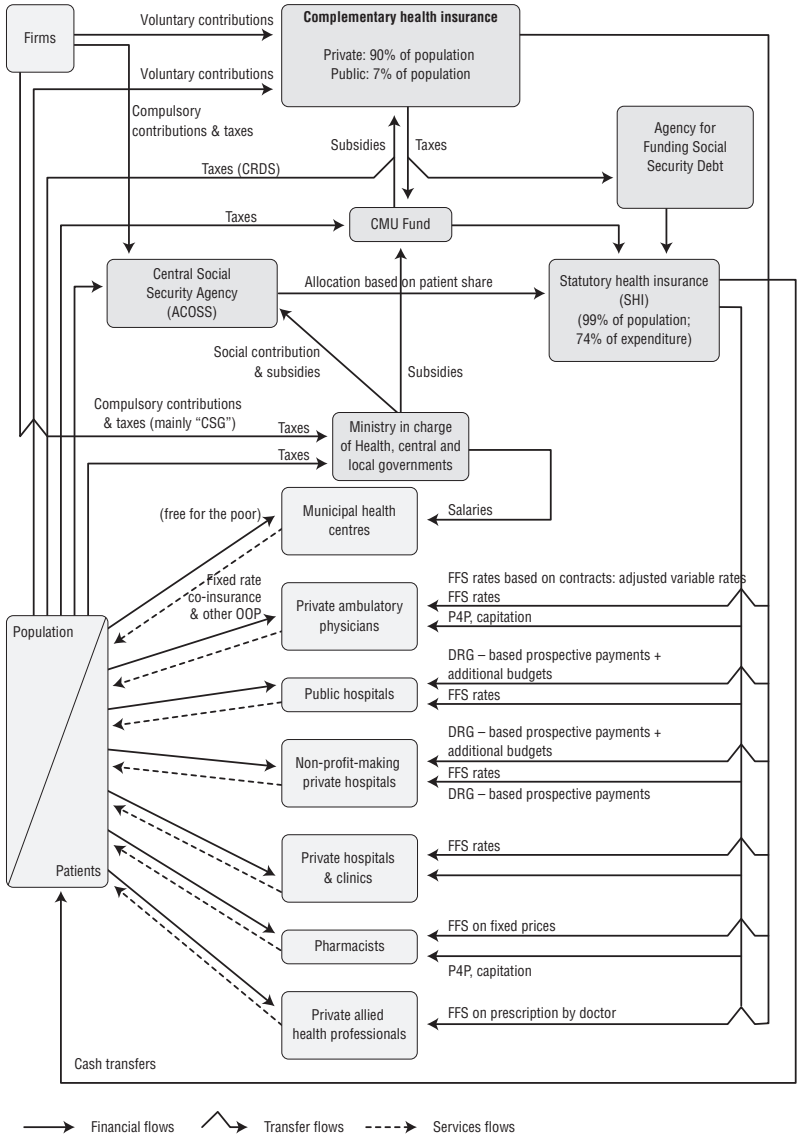
17 K. Chevreul et al., *France: Health System Review*, *op. cit.*, p. 68.

18 OECD/European Observatory on Health Systems and Policies, *State of Health in the EU. Country Health Profile 2017: France*, *op. cit.*, p. 6.

19 OECD, *Health Statistics 2017*.

20 *Ibid.*

Figure 2. Financial flows in the French healthcare system (excluding long-term care and prevention)



Source: K. Chevreul, K. Berg Brigham, I. Durand-Zaleski, C. Hernández-Quevedo, *France: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition Vol. 17, No. 3, 2015, p. 70.

4. LEGAL REGULATION OF HEALTHCARE IN THE UNITED KINGDOM

The contemporary healthcare system in the United Kingdom follows the Beveridge model.[21] It was inaugurated with the establishment of the National Health Service (NHS) in 1948. The NHS was dedicated to England, Scotland and Wales, while a semi-autonomous system operated in Northern Ireland. In the 1950s and 1960s, the NHS underwent the renewal of its properties and technologies. In 1972 Northern Ireland started to be governed directly by the United Kingdom government and its local healthcare system lost its autonomy.[22]

In 1974 the NHS in England and Scotland were modernised under the National Health Service Reorganisation Act 1973, which created regional and area health administration as well as Family Practitioner Committees. The new territorial bodies had to integrate acute, community and preventive services. Because they started to be seen as non-efficient, in 1980 they were converted from the area health authorities to the district ones. In 1990, with the National Health Service and Community Care Act, the government established the internal market which separated purchasing and delivery of medical services. The aim was to increase their quality, competitiveness and efficiency. The Act introduced GP fundholding which allowed general practitioners with 11,000 or more patients to ask for their own budget. The general practitioners together with district health administration became the most serious purchasers of services on behalf of their patients. Community services and hospitals (providers) were organized in semi-independent NHS trusts.[23]

In 1997 the healthcare system in the United Kingdom was reshuffled again in the connection of withdrawing a part of political power from the central parliament to the local administrations in Scotland, Wales and Northern Ireland. As a result, the four countries of the UK started to have more and more diversified healthcare systems. In England, GP fundholding was removed. Primary care trusts (PCTs), responsible for primary and community healthcare replaced local health authorities. Regional health authorities were replaced with strategic health authorities (SHAs). Whole country standards and targets as well as stronger regulation and supervising were introduced. To cope with the new duties, the National Institute for Health and Clinical Excellence, converted in 2012 into the National Institute for Health and Care Excellence (NICE), and the Commission for Health Improvement, which became the Care Quality Commission (CQC) in 2009, were established.[24]

Starting from 2002, the country health policy has been inspiring more strongly investors to increase private sector volume. It enforced the competition among suppliers of medical services and goods. The introduction of the Health and Social

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[21] A. Björnberg, A. Yung Phang, *Euro Health Consumer Index 2018*, *op. cit.*, p. 21.

[22] J. Cylus, E. Richardson, L. Findley, M. Longley, C. O'Neill, D. Steel, *United Kingdom: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition, Vol. 17, No. 5, 2015, p. 14.

[23] *Ibid.*, pp. 14, 16.

[24] *Ibid.*, p. 16.

Care Act in 2012 eliminated a bunch of the obstacles which existed in buying NHS-financed services from different suppliers, including the private or voluntary sectors. Starting from 2014, the initiatives to strengthen internal competition and supply of private medical services have been introduced dynamically.[25]

Over the time, some significant changes have been taking place in local English, Welsh, Scottish and Irish healthcare systems. For instance, Scotland limited the number of trusts which in 2004 were converted into the new health boards (LHBs). The separation between the buyer and the supplier in this part of the UK was eliminated in 2009 with a reduced number of bigger local health boards. In Northern Ireland such separation was continued, though the Health and Social Care (Reform) Act (NI) 2009 introduced substantial changes. Similar and various modifications have been done in all four countries composing the United Kingdom.[26]

"While care has never been delivered the same way across the United Kingdom, the health care system is now perhaps more divided than ever, as health policy decisions are made at the level of individual nations. Nevertheless, despite this diversity in the way the systems are organized, some aspects of the regulatory framework continue to operate on a United Kingdom-wide basis in line with European standards".[27]

The UK Treasury (ministry of finance) prepares the budget for all kinds of social services in England, Northern Ireland, Scotland and Wales. The budget is built in the way proportional to the number of inhabitants but with several weightings (according to the Barnett Formula[28]). The UK Department of Health (ministry of health) is responsible for the health system in England only, but also for national strategic policies, leadership and international cooperation of the whole United Kingdom. It cooperates with the health authorities of Northern Ireland, Scotland and Wales. Direct responsibility for the NHS and care services (except for England) was removed from it by the 2012 Health and Social Care Act.[29]

The health and social care system in Scotland is administered by the Scottish Cabinet Secretary for Health and Wellbeing, which at the same time has the position of the Chief Executive of NHS Scotland. The similar, but varying in details, duties belong to the Director General, Health and Social Services in the Welsh government and the head of the Department of Health, Social Services and Public Safety (DHSSPS) in Northern Ireland.[30]

The other important institutions of the UK healthcare system are the already mentioned National Institute for Health and Care Excellence (NICE) and the Medicines and Healthcare products Regulatory Agency (MHRA). The NICE is

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25 *Ibid*.

26 *Ibid*., p. 17.

27 *Ibid*.

28 M. Keep, *The Burnett Formula*, House of Commons Library, briefing paper No. 7386, 23 January 2018, https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7386 (accessed on 31.08.2019).

29 J. Cylus et al., *United Kingdom: Health System Review*, *op. cit*., pp. 17–18.

30 *Ibid*., pp. 20–21.

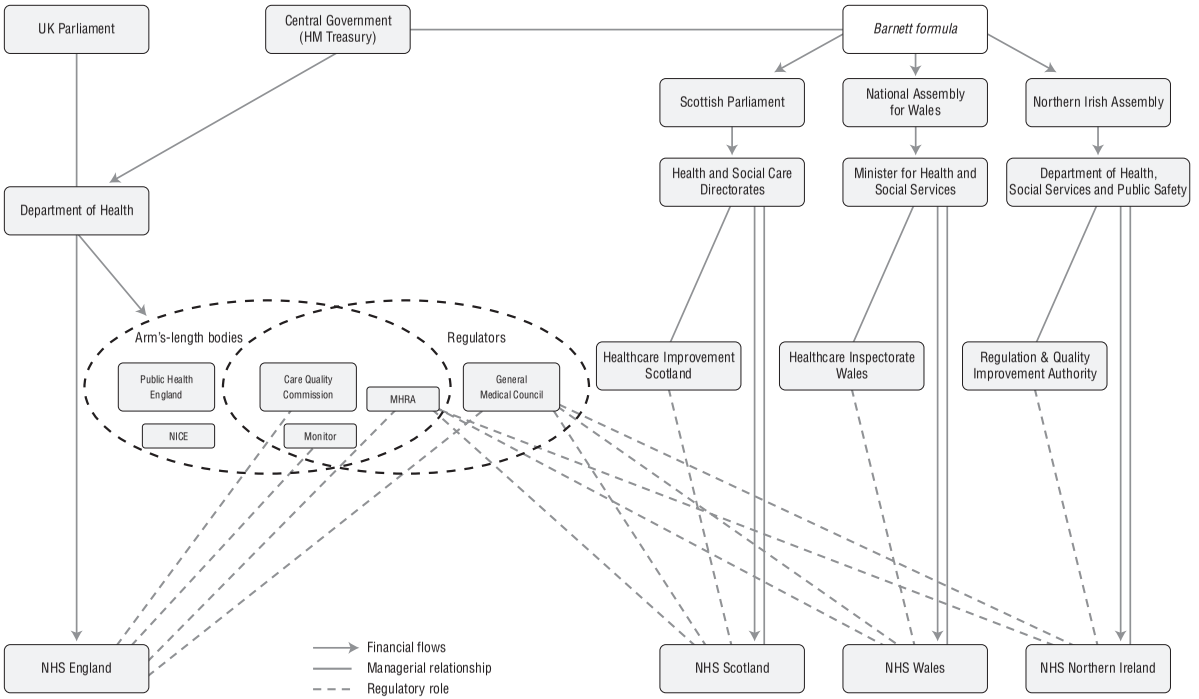
financed by the Department of Health but is independent in its activities. Its aim is to valuate efficacy and costs of the new drugs and treatments and to deliver main clinical instructions and managerial advice for all entities dealing with health and social services, whereas the MHRA controls whether medicines are safe enough.[31]

The other bodies are: the United Kingdom General Medical Council (GMC), which registers and disciplines doctors; the United Kingdom General Dental Council (GDC), which acts in the same scope for dentists; the United Kingdom Nursing and Midwifery Council (NMC), which is responsible for nurses and midwifes; and the Great Britain General Pharmaceutical Council. Apart from them, some number of trade unions care about collective and individual interests of the people working in the health and social care in the United Kingdom. The British Medical Association (BMA), established in 1832, is completely independent and associates more than 60% of physicians in the country. The others are the British Dental Association (BDA), UNISON, Unite the Union, GMB, the Hospital Consultants and Specialists Association, the Academy of the Medical Royal Colleges with the Royal Colleges of Physicians, the Royal Colleges of Surgeons, the Royal Colleges of Midwives, the Royal Colleges of Nursing, and a bunch of less significant ones.

Private and non-profit sectors, which play the supplementary role in the UK healthcare system, undergo the same national regulations as the NHS. The health employees in public and private sectors are registered and licensed in the same way. According to the 2012 Health and Social Care Act, the NHS may buy medical services from private suppliers to broaden their offer to the people. In Scotland private providers are used only to shorten the waiting time for treatments. Some NHS hospitals deliver services also to patients that pay for them. Dental and ophthalmic care is mostly private.[32] Figure 3 presents the organizational overview of the healthcare system in the United Kingdom.

[31] *Ibid.*, pp. 21–22.
[32] *Ibid.*, p. 23.

Figure 3. Overview of the health system in the United Kingdom



Source: J. Cylus, E. Richardson, L. Findley, M. Longley, C. O'Neill, D. Steel, *United Kingdom: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition, Vol. 17, No. 5, 2015, p. 15.

5. ORGANIZATION AND ECONOMICS OF HEALTHCARE IN THE UNITED KINGDOM

"Each of the United Kingdom countries has its own advisory, planning and monitoring framework for its health system and its own Public Health agencies to tackle health protection and inequalities."[33]

In 2017 the total health expenditure of the United Kingdom grew to 9.6% of its GDP (estimated 9.8% in 2018) and was equal to the average in the European Union. In terms of the purchasing power, it amounted to USD 3,943 (estimated USD 4,070 in 2018).[34] The 80% of the total health expenses was financed from public sources, while the average level in the European Union was 79% in the same time. The government distributed its money (mostly coming from general taxation) in England directly, and in Northern Ireland, Scotland and Wales through block grants. These grants were then distributed to local receivers and targets in the three countries on the basis of their own budgets, priorities and needs. Devolved administrations made decisions which services are preferred in the constrained budgetary limits. The out-of-pocket spending amounted to 15% of the national health expenses which was equal to the European Union level. The same spending as the share of domestic costs was the third lowest in the EU (1.5% against 2.3%).[35]

The estimates pointed that in 2021 the deficit in the public NHS financing will reach GBP 30 billion, and to avoid it, the additional money had to be invested into the health system. The number of hospital beds in 2015 was the third lowest in the European Union (similar to Ireland; 2.6 per 1,000 citizens versus 5.1 in the EU). The same situation referred to doctors (2.8 per 1,000 and 3.6 in the EU).[36]

In 2015 in the whole UK there were 155 acute and 56 mental NHS trusts in England, most of them with several hospitals, with proportionally lower numbers in the three remaining countries. Around 11% of the citizens of the United Kingdom had (in 2013) private health insurance of various kinds, what equaled to 4 million people. In this number, 18% of the insured people bought it individually and 82% were provided with it by their employers.[37] Figure 4 shows financial flows in the UK healthcare system.

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[33] OECD/European Observatory on Health Systems and Policies, *State of Health in the EU. Country Health Profile 2017: United Kingdom*, *op. cit*., p. 6.

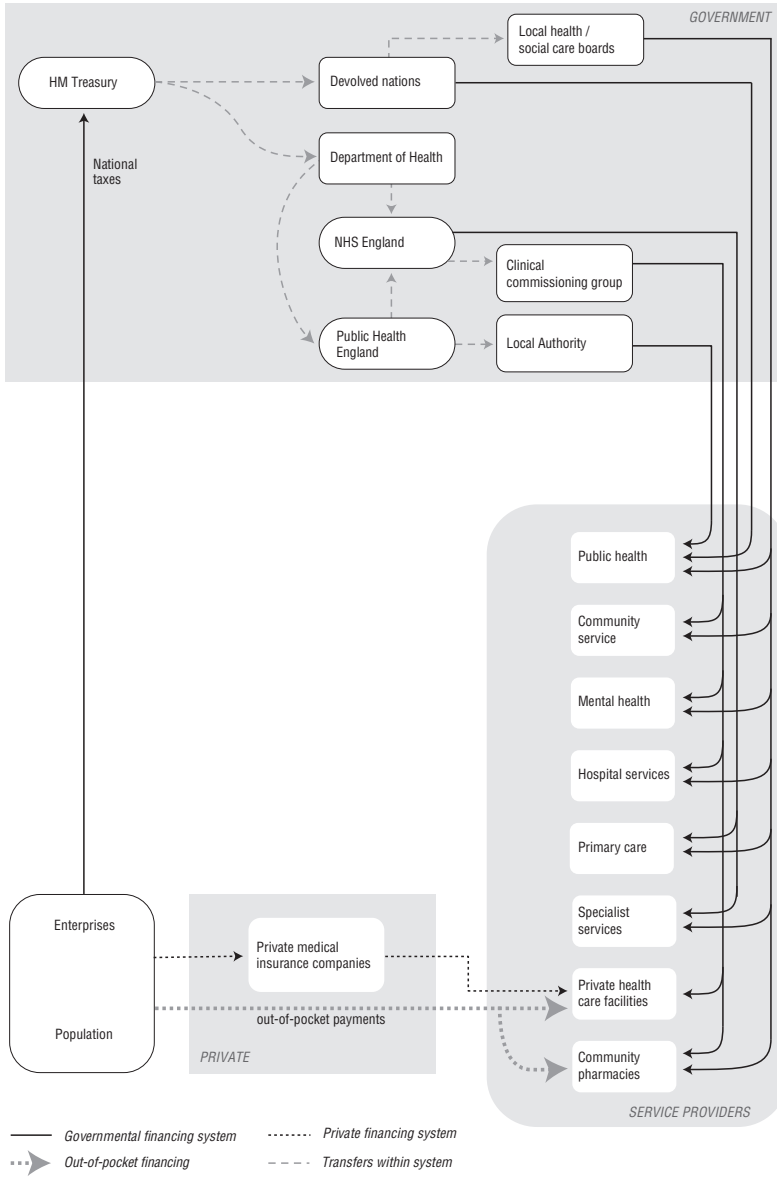
[34] OECD, *Health Statistics 2017*.

[35] OECD/European Observatory on Health Systems and Policies, *State of Health in the EU. Country Health Profile 2017: United Kingdom*, *op. cit*., p. 1.

[36] *Ibid*., p. 7.

[37] J. Cylus et al., *United Kingdom: Health System Review*, *op. cit*., p. 64.

Figure 4. Financial flows in the healthcare system of the United Kingdom



Source: J. Cylus, E. Richardson, L. Findley, M. Longley, C. O'Neill, D. Steel, *United Kingdom: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition, Vol. 17, No. 5, 2015, p. 49.

6. CONCLUSIONS

France and the United Kingdom are separated only by the sea strait, but the organization of their states and various internal systems differs to a large extent. This refers also to their healthcare systems. In France, the healthcare is administratively centralized but provided by many different entities. Over the decades, it has passed from the clear Bismarck model to the mixed one with the Beveridge influences. In the United Kingdom, it is split between its four inner countries (England, Northern Ireland, Scotland and Wales) which have worked out a significant amount of their own health competencies and decisions. The central government does not interfere too much in their local regulations. Apart from this, the national health institution, the NHS, is almost the monopolist insuring and providing institution on the health market. According to the European and U.S. health statistics, both systems belong to the twelve most efficient in the European Union. The American medical data (measuring more categories than the UE) show significant supremacy of the United Kingdom healthcare system in terms of performance over the French one,[38] but more European health statistics place the French system much ahead of the British one.

BIBLIOGRAPHY

Björnberg A., Yung Phang A., *Euro Health Consumer Index 2018*, Health Consumer Powerhouse 2019.

Chambaud L., Hernández-Quevedo C., *France*, [in:] B. Rechel et al. (eds), *Organization and Financing of Public Health Services in Europe: Country Reports*, Copenhagen 2018.

Chevreul K., Berg Brigham K., Durand-Zaleski I., Hernández-Quevedo C., *France: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition Vol. 17, No. 3, 2015.

Cylus J., Richardson E., Findley L., Longley M., O'Neill C., Steel D., *United Kingdom: Health System Review*, WHO/European Observatory on Health Systems and Policies: Health Systems in Transition, Vol. 17, No. 5, 2015.

European Database (2015), Eurostat, European Commission.

Exercice 2013 Decompte Annuel Global, Luxembourg, CNS.

Health at a Glance: Europe 2017, OECD Publishing.

Health at a Glance: Europe 2018, OECD Publishing.

Health at a Glance: Europe 2019, OECD Publishing.

Health Spending Indicator (2019), OECD.

Health Statistics: Health Status (2015), OECD.Stat.

Health Statistics 2017 (2018), WHO Global Health Expenditure Database.

Keep M., *The Burnett Formula,* House of Commons Library, briefing paper No. 7386, 23 January 2018, https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7386 (accessed on 31.08.2019).

Kringos D. et al., *The Strength of Primary Care in Europe: An International Comparative Study*, British Journal of General Practice 63(616), 2013.

[38] See E.C. Schneider et al., *Mirror, Mirror*, *op. cit.*

NHS Pay Review Body, *National Health Service Pay Review Body. 30th Report: 2017*, https://www.gov.uk/government/publications/national-health-service-pay-review-body-30th-report-2017 (accessed on 6.09.2019).

OECD/European Observatory on Health Systems and Policies, *State of Health in the EU. Country Health Profile 2017: France*, OECD Publishing, https://ec.europa.eu/health/sites/health/files/state/docs/chp_fr_english.pdf.

OECD/European Observatory on Health Systems and Policies, State of Health in the EU. Country Health Profile 2017: United Kingdom, OECD Publishing, https://ec.europa.eu/health/sites/health/files/state/docs/chp_uk_english.pdf.

OECD Health Policy Studies: *The Looming Crisis in the Health Workforce. How can OECD Countries Respond?* OECD 2008.

Public Health England, *Public Health Profiles*, 2017, https://fingertips.phe.org.uk (accessed on 6.09.2019).

Schäfer W.L.A., Boerma W.G.W., Murante A.M., Sixma H.J., Schellevis F.G., Groenewegen P.P., *Assessing the Potential for Improvement of Primary Care in 34 Countries: A Cross-Sectional Survey*, Bulletin of the World Health Organization 93(3), 2015.

Schneider E.C. et al., *Mirror, Mirror on the Wall: How the Performance of the U.S. Health Care System Compares Internationally*, The Commonwealth Fund, New York 2017, https://www.commonwealthfund.org (accessed on 6.09.2019).

Schoen C., Osborn R., Squires D., Doty M.M., *Access, Affordability and Insurance Complexity are often Worse in the United States Compared to ten Other Countries*, Health Affairs 32(12), 2013.

Siciliani L., Moran V., Borowitz M., *Measuring and Comparing Health Care Waiting Times in OECD Countries*, Health Policy 118(3), 2014.

Special Eurobarometer 425: *Patients' Rights in Cross-Border Healthcare in the European Union*, European Commission, Eurostat, 2015.

The Sustainability Index 2018, Future Proofing Healthcare 2018, https://futureproofinghealthcare.com/sustainability-index.

WHO Global Health Expenditure Database (2018), World Health Organization.

WHO Global Health Expenditure Database (2019), World Health Organization.

World Bank Open Data (2019), World Bank.

List of figures

LEGAL AND ECONOMIC ASPECTS OF HEALTHCARE SYSTEMS IN FRANCE AND UNITED KINGDOM

Summary

The article presents the essential legal regulations, organization and economics of the healthcare systems in France and the United Kingdom. In order to provide the bird's-eye view of these systems, the fundamental acts introducing them have been presented. Other most important regulations and principal bodies introducing, consulting and controlling them

have been enumerated. The principal economic conditions and organization of the health systems in both countries have been discussed. The organizational overviews of both systems and their financial flows have been included. The whole analysis aimed to deliver primary information on how one of the most centralised healthcare systems in the European Union with many providers (the French one), compared with one of the most devolved in the EU but based mainly on one NHS provider (the UK one), have nearly similar effectiveness, i.e. provide nearly equalized medical services to their citizens.

Keywords: legal aspects, economic aspects, healthcare systems, France, United Kingdom

PRAWNE I EKONOMICZNE ASPEKTY SYSTEMU OCHRONY ZDROWIA WE FRANCJI I W WIELKIEJ BRYTANII

Streszczenie

Artykuł przedstawia główne regulacje prawne, organizację i ekonomiczne uwarunkowania systemów ochrony zdrowia we Francji i w Wielkiej Brytanii. W celu przedstawienia widoku z lotu ptaka na oba te systemy, zostały wymienione najważniejsze akty prawne, przy pomocy których je wprowadzono. Zostały także wskazane inne znaczące uregulowania prawne, odnoszące się do obu systemów oraz główne instytucje tworzące, konsultujące i kontrolujące je. Pokazano również podstawowe warunki ekonomiczne i organizację obu systemów. W tekście znalazły się ich schematy organizacyjne oraz diagramy ukazujące przepływy finansowe pomiędzy najważniejszymi ich częściami składowymi. Artykuł ma na celu dostarczenie wstępnych informacji o tym, jak jeden z najbardziej scentralizowanych systemów ochrony zdrowia w Unii Europejskiej, oparty na dużej liczbie dostawców (francuski), porównany z jednym z najbardziej rozproszonych w UE, ale opartym głównie na jednym narodowym dostawcy pod nazwą NHS (brytyjskim), mają zbliżoną efektywność, a więc dostarczają niemal wyrównane produkty medyczne swoim mieszkańcom.

Słowa kluczowe: aspekty prawne, aspekty ekonomiczne, systemy ochrony zdrowia, Francja, Wielka Brytania

ASPECTOS LEGALES Y ECONÓMICOS DEL SISTEMA DE PROTECCIÓN DE LA SALUD EN FRANCIA Y EN GRAN BRETAÑA

Resumen

El artículo presenta la regulación principal, organización y condiciones económicas del sistema de protección de la salud en Francia y en Gran Bretaña. Para presentar estos dos sistemas se mencionan las leyes más importantes que los implementan y también otras regulaciones que afectan estos dos sistemas y las instituciones principales, que los crean, sirven de consulta y los supervisan. El artículo presenta también las condiciones económicas básicas y la organización de ambos sistemas. Incluye esquemas de organización y diagramas que demuestran flujos financieros entre las partes integrantes de los sistemas. El artículo pretende aportar información básica sobre uno de los sistemas de protección de la salud más centralizados en la Unión Europea, basado en número elevado de contribuyentes (el sistema francés) y lo compara con uno de los sistemas más dispersos en la UE, basado principalmente en un contribuyente

nacional denominado NHS (perteneciente al Reino Unido). El resultado de esta comparación demuestra que la efectividad de ambos sistemas es similar, suministran casi iguales productos médicos a sus ciudadanos.

Palabras claves: aspectos legales, aspectos económicos, sistema de protección de la salud, Francia, Reino Unido

ПРАВОВЫЕ И ЭКОНОМИЧЕСКИЕ АСПЕКТЫ СИСТЕМЫ ЗДРАВООХРАНЕНИЯ ВО ФРАНЦИИ И ВЕЛИКОБРИТАНИИ

Резюме

В статье представлены основные правовые нормы, организационные и экономические условия систем здравоохранения во Франции и Великобритании. Чтобы представить обе эти системы с высоты птичьего полета, были перечислены наиболее важные правовые акты, с которыми эти системы были введены. Указаны также другие важные правовые нормы, относящиеся к обеим системам, а также основные учреждения, создающие, консультирующие и контролирующие их. Также показаны основные экономические условия и организация обеих систем. Текст включает их организационные структуры и диаграммы, показывающие финансовые потоки между их наиболее важными компонентами. Целью статьи является предоставление предварительной информации о том, как одна из самых централизованных систем здравоохранения в Европейском Союзе, основанная на большом количестве поставщиков (французская), по сравнению с одной из самых рассредоточенных в ЕС, но базирующейся в основном на одном национальном поставщике под названием NHS (принадлежащая Соединенному Королевству), имеют аналогичную эффективность и, следовательно, предоставляют почти равные медицинские продукты своим жителям.

Ключевые слова: правовые аспекты, экономические аспекты, системы здравоохранения, Франция, Великобритания

RECHTLICHE UND WIRTSCHAFTLICHE ASPEKTE DES GESUNDHEITSSYSTEMS IN FRANKREICH UND GROSSBRITANNIEN

Zusammenfassung

In dem Artikel werden die wichtigsten gesetzlichen Regelungen, die Organisation und die wirtschaftlichen Rahmenbedingungen der Gesundheitssysteme in Frankreich und Großbritannien vorgestellt. Um dem Leser einen Überblick über beide Systeme zu verschaffen, werden die wichtigsten, den jeweiligen Gesundheitssystemen zugrunde liegenden Rechtsakte und die entsprechenden Durchführungsbestimmungen dargelegt. Es werden auch sonstige, auf beide Systeme anwendbare, wichtige gesetzliche Regelungen angeführt und die wichtigsten Institutionen benannt, von denen die Gesundheitssysteme ausarbeitet, konsultiert und kontrolliert werden. Dargestellt werden die wirtschaftlichen Rahmenbedingungen und die Gestaltung beider Systeme. Organigramme zeigen die Organisationsstruktur beider Gesundheitssysteme und in Diagrammen werden die Finanzströme zwischen den wichtigsten Elementen dargestellt. Der Artikel soll erste Informationen darüber liefern, wie eines der am stärksten zentralisierten Gesundheitssysteme der Europäischen Union, das sich auf eine große Anzahl von Anbietern von Gesundheitsdienstleitungen stützt (Frankreich) und eines der dezentralsten Systeme in der EU,

das im Wesentlichen auf einem einzigen nationalen Gesundheitsdienstleister, dem NHS beruht (Vereinigtes Königreich) eine etwa gleiche Effizienz aufweisen, das heißt wie beide Gesundheitssysteme den Bewohnern der jeweiligen Länder nahezu gleiche Medizinprodukte bereitstellen.

Schlüsselwörter: rechtliche Aspekte, wirtschaftliche Aspekte, Gesundheitssystem, Frankreich, Vereinigtes Königreich

ASPECTS JURIDIQUES ET ÉCONOMIQUES DU SYSTÈME DE SANTÉ EN FRANCE ET AU ROYAUME-UNI

Résumé

Cet article présente les principales réglementations légales, l'organisation et les conditions économiques des systèmes de santé en France et au Royaume-Uni. Afin de présenter une vue à vol d'oiseau de ces deux systèmes, les actes juridiques les plus importants avec lesquels ils ont été introduits ont été énumérés. D'autres réglementations juridiques importantes faisant référence aux deux systèmes et aux principales institutions qui les créent, les consultent et les contrôlent ont également été indiquées. Les conditions économiques de base et l'organisation des deux systèmes sont également présentées. Le texte inclut leurs organigrammes et diagrammes montrant les flux financiers entre leurs composants les plus importants. Cet article vise à fournir des informations préliminaires sur la manière dont l'un des systèmes de santé les plus centralisés de l'Union européenne, basé sur un grand nombre de fournisseurs (français), comparé à l'un des plus dispersés de l'UE, mais principalement basé sur un fournisseur national dénommé NHS (appartenant au Royaume-Uni), ont une efficacité similaire et fournissent donc des produits médicaux presque égaux à leurs résidents.

Mots-clés: aspects juridiques, aspects économiques, systèmes de santé, France, Royaume-Uni

ASPETTI GIURIDICI ED ECONOMICI DEL SISTEMA SANITARIO IN FRANCIA E NEL REGNO UNITO

Sintesi

L'articolo presenta le principali regolamentazioni, l'organizzazione e le condizioni economiche dei sistemi sanitari della Francia e del Regno Unito. Per fornire una visione generale di entrambi i sistemi sono stati elencati gli atti giuridici più importanti attraverso i quali sono stati costituiti. Sono state anche indicate altre significative regolamentazioni giuridiche che fanno riferimento a entrambi i sistemi, nonché le principali istituzioni responsabili della loro creazione, consultazione e autocontrollo. Sono state anche mostrate le condizioni economiche fondamentali e le organizzazioni di entrambi i sistemi. Nel testo vi sono i loro schemi organizzativi e i diagrammi che mostrano i flussi finanziari tra le loro componenti più importanti. L'articolo ha lo scopo di fornire informazioni preliminari su come uno dei sistemi sanitari più centralizzati dell'Unione Europea, basato su un grande numero di fornitori (quello francese), e uno dei più distribuiti dell'UE, ma basato principalmente su un unico fornitore denominato NHS (posseduto dal Regno Unito), hanno un'efficienza molto simile, e quindi forniscono prodotti medici praticamente allineati ai propri abitanti.

Parole chiave: aspetti giuridici, aspetti economici, sistema sanitario, Francia, Regno Unito

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VALUE ADDED TAX ON TRANSACTIONS BETWEEN A GENERAL PARTNERSHIP AND ITS PARTNERS

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The article does not aspire to comprehensively present the issue of tax-related consequences of transactions between partners within a general partnership. Indeed, the issue is too broad. Based on the author's experience, it can be stated that partners of a general partnership, to a great extent, in general appropriately recognise tax obligations in the area of income tax, tax on transactions based on civil law and VAT on transactions between a partnership and its contracting parties. However, in case of transactions between partners themselves, the obligations resulting from the Act on VAT are quite often ignored. Unfortunately, also accountants often have more or less serious problems with that issue.

I. From the point of view of the VAT obligations, setting up a general partnership and increasing its property later is tax-neutral. Contributions of capital (both at the moment of setting up a partnership and in the course of its functioning) cannot be recognised as business operations, which is one of the main conditions for tax obligations with respect to VAT.[1] Contribution of capital, provided it is in the pecuniary form, cannot be recognised as a delivery or provision of services.[2] The fact that, in accordance with Act on personal income tax,[3] the income of a partner of a general partnership is recognised as income from non-agricultural business

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1 Compare the CJEU judgment of 29 October 2009 in the case C-29/08, *AB SKF*; see the judgment of 2009, p. I-10413 concerning the interpretation of Article 2 para. 1(a) and (c) in conjunction with Article 9 Council Directive 2006/112/EC of 28 November 2006, OJ L 347 of 11 December 2006.

2 Within the meaning of Articles 7 and 8 of the Act of 11 March 2004 on tax on goods and services, consolidated text, Dz.U. 2017, item 1221, as amended; hereinafter Act on VAT.

3 Article 5b para. 2 of the Act of 26 July 1991 on personal income tax, consolidated text, Dz.U. 2016, item 2032, as amended; hereinafter Act on PIT.

operations does not have influence on determination of his/her (or a partnership's) obligation within VAT.[4] However, there are exceptions to the rule: (1) a partner making a contribution does business and, as a result, is a VAT payer – this is what most often occurs when a partner is a limited company;[5] (2) a partner makes a contribution in a non-pecuniary form (an in-kind contribution); (3) a partnership will use the object of an in-kind contribution in operations exempt from VAT.

Cases (1) and (2) should be analysed jointly. Theoretically, one can imagine that a taxpayer is involved in a business consisting only in setting up general partnerships or limited companies (for himself/herself). However, even then, contributions made to a partnership only in a pecuniary form cannot be recognised as a delivery (money is not goods[6]), and thus, all the more, it cannot constitute the provision of services[7].

In the first years when Act on VAT was in force, the issue did not cause any controversies. In 2004, nearly two months after Act on VAT was passed, the Minister of Finance issued the Regulation on the exercise of some provisions of the Act on tax on goods and services,[8] which inter alia laid down exemptions from the tax other than those referred to in Articles 43–81 Act on VAT and detailed conditions for the application of those exemptions. The Regulation clearly determined the VAT exemption of non-cash contributions to general partnerships and limited companies.[9] Since 2008, Regulation MF of 2004 has been recognised as repealed due to the fact that a successive regulation with the same title and a similar scope of subject matter was issued.[10] The lack of the exemption that was laid down in Regulation MF of 2004 started a discussion on the status of an in-kind contribution to a partnership from the point of view of the VAT obligation.

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[4] There are many arguments supporting such a stance but the leading one, which others refer to, is the fact that Act on VAT grants legal identity to general partnerships with respect to the VAT obligation, while Act on PIT recognises partners as subjects to tax. The mixed type of a partnership limited by shares and a public company, which is discussed below in the article, is an exception.

[5] It should be noticed, however, that there is an opinion that a partner making an in-kind contribution to a general partnership will be treated as a VAT payer because the act of making a contribution has the features of a business operation referred to in Article 15 para. 2 Act on VAT; individual interpretation of the Director of the Revenue Office in Katowice of 16 July 2016, IBPP2/443-380/14/KO, https://www.podatki.biz/interpretacje/0306549.txt (accessed on 30.11.2017).

[6] Goods means objects, their parts and all types of energy, Article 2(6) Act on VAT.

[7] Many provisions of the Act of 15 November 2000: Code of Commercial Partnerships and Companies (consolidated text, Dz.U. 2017, item 1577), hereinafter Code of Commercial Companies or CCC, indicate that the provision of labour or services is a classical example of an in-kind benefit provision and, moreover, it is not always a non-cash contribution. In accordance with tax law, nobody states it is otherwise. Exceptionally, crediting or giving loans within the scope of business operations is treated as a service, in accordance with Act on VAT. However, based on Article 43 para. 1(38) Act on VAT, it is a service exempt from tax.

[8] Regulation of the Minister of Finance of 27 April 2004 on the implementation of some provisions of the Act on tax on goods and services, Dz.U. 2004, No. 97, item 970; hereinafter Regulation MF of 2004.

[9] § 8 para. 1(6) Regulation MF of 2004.

[10] Regulation of the Minister of Finance of 28 November 2008 on the implementation of some provisions of the Act on tax on goods and services, Dz.U. 2008, No. 212, item 1336.

At the beginning of the next part of the discussion concerning making in-kind contributions to general partnerships, it is necessary to draw attention to two significant issues. It should also be indicated that controversies analysed in the article, in general, do not occur in case of limited companies and, that is why, it seems that conscious (or unconscious) application of an analogy to solutions adopted for limited companies distorts general partnerships' tax obligations resulting from Act on VAT.

II. The first issue is connected with the payment for a delivery and service provision. In general, deliveries paid for are subject to VAT; free deliveries are taxed exceptionally.[11] The taxation of free deliveries is limited under Article 7 para. 2 Act on VAT. According to the provision, although in-kind contributions are not included there, such an act should be taken into account because the provision constitutes an open catalogue.[12] In the case of limited companies, it can be said that a partner acquires specific ownership rights, a stake or shares, for his/her contribution. However, such a statement is a simplification because a partner acquires a stake making an adequate declaration of will and only then backs it with a contribution (or for pecuniary shares, pays the amount). Eventually, he/she acquires ownership rights of a certain nominal or subscription value.

In the case of general partnerships, with the exception of a mixed partnership: a partnership limited by shares and a public limited company, there are no shares within the above-mentioned meaning. Although a partner acquires all the rights and obligations, the concept means participation in a partnership and assumes the nature of a right.[13] A stake (in a limited company) or a share (in a public limited company) basically means the level of participation in a company capital but, in addition, it expresses all the rights and obligations of a partner.[14] Moreover, in general, these are transferable, while all the rights and obligations in a general partnership are not transferable.[15] Eventually, it is easier to approve of the statement that an in-kind contribution to a limited company or a public limited company is a delivery paid for but in the case of a general partnership it would be doubtful. Revenue authorities seem to adopt a similar stance.[16] That is why, the revenue authorities conclude that an in-kind contribution should be treated as a free delivery. However, it should be taken into account that if a partner does not have the right to reduce the amount of due tax by the amount of calculated tax as a result of acquisition or production of the object of an in-kind contribution, the act should be recognised

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[11] Article 7 paras 1 and 2 Act on VAT.

[12] The judgments that refer to the argument of definiteness of the object to tax with a conclusion that a catalogue of free deliveries is closed in nature are isolated; cf. judgment of the Voivodeship Administrative Court in Warsaw of 12 February 2013, III SA/Wa 1995/12, LEX No. 1378952.

[13] G. Kozieł, *Przeniesienie praw i obowiązków wspólników w handlowych spółkach osobowych. Uwagi na gruncie regulacji art. 10 k.s.h.*, Kraków 2006, p. 92.

[14] R. Pabis, [in:] J. Bieniak et al., *Kodeks spółek handlowych. Komentarz*, Warszawa 2014, p. 471.

[15] Articles 10, 180 and 182 CCC.

[16] Individual interpretation of the Director of the Revenue Office in Warsaw of 23 May 2014, IPPP3/443-179/14-2/KC, LEX No. 231709.

as a free delivery exempt from tax.[17] If the above-mentioned right concerns only a partial deduction of VAT, and this can happen in case of cars, which are often used as in-kind contributions, a delivery should nevertheless be subject to taxation of the whole value of the contribution. There is a possibility of compensating this to a limited extent by correcting the tax calculated at the time when a partner making an in-kind contribution has originally purchased the car.[18]

Thus, if we assume that an in-kind contribution to a limited company is a delivery paid for and to a general partnership is a free one, it is hard not to notice that in the case of a partnership limited by shares-a public company, this simple opposition does not seem to be satisfying. It is connected with a basically different status of partners: general partners and shareholders, which is a characteristic feature of this partnership. In fact, it is a partnership with a mixed personal and capital nature, which in the light of the national regulations, however, is more like limited by shares than a public limited one.[19] This mainly results from the fact that a general partner has a more important voice in matters significant for the partnership than the will of the majority of shareholders expressed in the resolutions of the annual general meeting.[20] General partners as well as shareholders are obliged to make contributions to their partnership,[21] however, the former make contributions in accordance with the rules for a general partnership and the latter in accordance with the rules for a public limited company.[22] In accordance with the Code of Commercial Companies, the status of partners is rather clear.[23]

Since 2008, a considerable increase in the interest in this legal form of business operations has been observed. The number of partnerships limited by shares accounted for 517 in 2008 (mainly in the construction sector and real estate management), which constituted an increase by 100% in comparison with the previous year. The number was 1,513 at the end of 2011, 2,816 at the end of 2012,[24] and over 6,000 at the end of 2013.[25] It is supposed that the increase in the interest in a partnership limited by shares-a public company was connected with the possibility of using its construction to optimise taxes especially in the field of shareholders' income tax. In 2013, the legislator extended the circle of entities classified as CIT payers by adding

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[17] Compare Article 7 para. 2 Act on VAT.

[18] The issue of partial deductions of VAT and the possibility of correcting a calculated tax are thoroughly regulated in Articles 90–91 Act on VAT.

[19] Compare A. Szumański, [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz*, Vol. I, Warszawa 2006, p. 812; A. Kidyba, *Kodeks spółek handlowych. Komentarz*, Vol. I, Kraków 2004, pp. 498–499; although an opposite opinion should be mentioned in T. Siemiątkowski, R. Potrzeszcz (eds), *Kodeks spółek handlowych. Komentarz*, Vol. 1, Warszawa 2010, p. 600.

[20] In particular, compare Article 146 § § 2 and 3 CCC.

[21] Compare Article 3 CCC.

[22] Compare Article 126 § 1(1) and (2) CCC.

[23] The expression "rather" takes into account the fact that many issues are regulated by analogous use (adequate application) of the provisions concerning both a general partnership (a civil one) and a limited company (a public limited one), under Article 126 § 1 CCC.

[24] M. Bieniak, [in:] J. Bieniak et al., *Kodeks*, *op. cit.*, p. 424.

[25] P. Pinior, [in:] J. Strzępka (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa, 2015, p. 282.

a partnership limited by shares to it.[26] The amendment entered into force on 1 January 2014. Until then, there was not uniform case law concerning tax on shareholders' income (dividend). The situation resulted, as the Supreme Administrative Court adjudicating benches indicated, from the discrepancy between tax regulations and the essence of the regulations concerning partnerships limited by shares-limited companies laid down in the Code of Commercial Companies.[27] It seems that the above-mentioned amendment restored consistency, which does not mean that all doubts were eliminated. Taking into account that the amendment mainly aimed to regulate the issues of shareholders' income tax, it is hard to conclude[28] how partners' in-kind contributions to a partnership should be interpreted based on Act on VAT, in particular what should constitute a tax base.

The issue, not discussed in this article so far, can be best exemplified by a partnership limited by shares-a public limited company. In accordance with the logic adopted, an in-kind contribution to a limited company is recognised as a delivery paid for and to a general partnership as a free delivery. A partnership limited by shares-a public limited company is not subject to autonomous regulations covering the discussed subject matter. That is why, it should be assumed that general partners' and shareholders' contributions should be treated differently.

In case of shareholders, in-kind contributions should be recognised as a delivery paid for and, in accordance with the provisions of Act on VAT,[29] everything that constitutes payment should constitute a tax base. In the case discussed, in general it can mean: (a) the value of the ownership right, i.e. the value of shares or a stake; or (b) the value of an in-kind contribution based on the market prices or ones determined in a different way. The latter possibility should be excluded because the provision making it possible was repealed.[30]

Thus, if it is assumed that the value of the right to a stake is the VAT base, it is necessary to establish what the payment for the acquisition of that right is, in particular whether it should be referred to the nominal value of the right to a stake, its subscription value or any other, e.g. the balance value (in case of the increase in the company's capital). The provisions of Act on VAT do not give a clear answer to those questions but in case law, according to the Supreme Administrative

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[26] Act of 8 November 2013 amending the Act on corporate income tax, the Act on personal income tax and the Act on tonnage tax, Dz.U. 2013, item 1387.

[27] Compare the resolution of the Supreme Administrative Court of 16 January 2012, II FPS 1/11, http://orzeczenia.nsa.gov.pl/doc/3447C0D267 (accessed on 30.11.2017); resolution of the Supreme Administrative Court of 20 May 2013, II FPS 6/12, http://orzeczenia.nsa.gov.pl/doc/F58F52D694 (accessed on 30.11.2017).

[28] The meaning derived from Article 1 para. 3(1) of the Act of 15 February 1992 on corporate income tax, Dz.U. 1992, No. 21, item 26, as amended; hereinafter Act on CIT.

[29] Article 29a para. 1 Act on VAT.

[30] In 2013 Article 29 Act on VAT, including para. 9, which stipulated that the market value of an activity that is subject to tax should be recognised as a tax base if its price is not determined, was repealed. Article 29a, which has been in force since 2014, does not lay down such a solution.

Court,[31] there are no discrepancies. The nominal value of the right to a stake should constitute a tax base.[32]

In case of general partners, an in-kind contribution should be recognised as a free delivery and, in accordance with general rules of Act on VAT, the price of purchase of a given good or a similar one or, in case there is no price of purchase, the cost of its production should be recognised as a tax base.[33] If the object of an in-kind contribution consists in services, these should be treated as free services and the cost of the provision of those services incurred by a taxpayer should be recognised as a tax base.[34]

Apart from a commitment to provide services for a general partnership, an object of an in-kind contribution can consist in the provision of labour.[35] In the literature on the law on partnerships, little attention is drawn to a comparative analysis of those two types of commitments. Eventually, the legislator treats them as in-kind contributions based on the same rules. The search for the criteria for differentiating those contributions from the point of view of VAT does not make it possible to state that, due to the aim of the legal regulation, they should be treated in a different way.[36] Moreover, it should be noticed that a commitment to provide labour for a partnership does not result in an employment relationship within the meaning of employment law, and a partnership agreement is the only basis of its provision.[37] A partner does not acquire any employment rights based on the provision of such a contribution. Social insurance and healthcare insurance contributions are calculated and paid in accordance with the rules for persons involved in business activities. Finally, a partner's income is subject to income tax on business operations[38] and not on income obtained based on an employment relationship. As a result, it should be recognised that the provision of labour for

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[31] Compare the decision of the Supreme Administrative Court of 31 March 2014, I FPS 6/13, LEX No. 1449602, which refused to adopt a resolution concerning the issue and justified its stance by pointing to the lack of considerable differences in case law and confirming the appropriateness of judgments ruling that the nominal value of the share right should be a tax base.

[32] Judgments of the Supreme Administrative Court: of 14 August 2012, I FSK 1405/11, LEX No. 1225141; and of 19 December 2012, I FSK 211/12, LEX No. 1278095.

[33] Article 29a para. 2 Act on VAT.

[34] Article 29a para. 5 Act on VAT, with a reservation that it only concerns services referred to in Article 8 para. 2 Act on VAT.

[35] In case of a partnership limited by shares, the commitment to provide labour as well as services by a general partner for a partnership is recognised as a contribution conditionally admissible. They can be recognised as a contribution to a partnership only in case the value of his/her other contributions is not lower than the amount to which the general partner is liable, cf. Article 107 § 2 CCC.

[36] The indication, with some carefulness, that the provision of labour is a commitment of a result and the provision of services is the commitment to act diligently, is not only doubtful but also useless in determination of the status of the obligation based on Act on VAT; compare J.P. Naworski, [in:] T. Siemiątkowski, R. Potrzeszcz (eds), *Kodeks*, *op. cit.*, p. 146.

[37] Compare Article 22 § 1 Act of 26 June 1974: Labour Code (consolidated text, Dz.U. 2016, item 1666), which indicates that an employer commits to pay remuneration for the provision of labour.

[38] Article 5b para. 2 Act on PIT, provided that a partnership is involved in business operations. A partner's income is determined in accordance with Article 8 Act on PIT.

a partnership (or rather a commitment to do this), from the point of view of Act on VAT, should be treated as a type of the provision of services, and from the point of view of the law on partnerships, in the context of the phrase "or the provision of services", downright as lexical contamination.

A contribution to a partnership can be made through a deduction of a partner's liability to a partnership from a partnership's liability to a partner.[39] In case of limited companies, it apparently seems that only a contractual deduction is admissible.[40] However, the obligation to obtain the other party's consent to a deduction is only imposed on a partner. A partnership can also make a statutory deduction, i.e. unilaterally.[41] From the point of view of a partnership, a deduction should be treated as a conversion of a debt into a company's capital, and from the point of view of a partner, it is a conversion of credit into a stake or shares. In case of general partnerships, due to the lack of corresponding restrictions, both contractual and statutory deductions are admissible. From the point of view of a partnership, the act should be recognised as a conversion of a debt into its own capital, and from a partner's point of view, a conversion of credit into a quasi-stake (the entirety of rights and obligations). In case of a partnership limited by shares-a public limited company, it should be assumed that general partners, provided they do not make contributions to cover a company's capital, should be subject to rules for general partnerships,[42] and in case of shareholders, the rules for limited companies (public limited companies).[43]

According to Artur Nowacki,[44] the consequences equal to a deduction can be obtained by the use of other institutions of civil law: a cession (an assignment) of credit[45] or *datio in solutum*,[46] i.e. an obligation to provide a benefit instead of settling a liability. In this case, a partner is obliged. His/her obligation to provide a benefit consists in the transferring of converted liability onto a partnership or releasing a partnership from a debt (in this case paid for). While A. Nowacki's opinion that the solution is theoretically admissible can be approved of, in practice it seems to be a profusion of form over content. Moreover, in case a partner's liability to a partnership is non-pecuniary in nature, A. Nowacki recognises the latter possibility as inadmissible while the former is admissible.

In order to evaluate the consequences of the conversion based on Act on VAT, it is necessary to establish whether it should be treated as a pecuniary or an in-kind contribution. Taking into account the provisions of civil law, a statutory deduction

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[39] The conversion of credit into shares is a commonly used solution in international practice of increasing a limited company's capital; J. Strzępka, E. Zielińska, [in:] J. Strzępka (ed.), *Kodeks*, *op. cit.*, pp. 73–74.

[40] Article 14 § 4 CCC.

[41] In accordance with Article 498 of the Act of 23 April 1964: Civil Code, consolidated text, Dz.U. 2017, item 459; hereinafter Civil Code; K. Oplustil, *Wierzytelność wobec spółki kapitałowej jako przedmiot potrącenia i konwersji*, Przegląd Prawa Handlowego No. 2, 2002, pp. 15–16.

[42] Article 126 § 1(1) CCC.

[43] Article 126 § 1(2) CCC.

[44] A. Nowacki, *Konwersja długu na kapitał*, Przegląd Prawa Handlowego No. 12, 2008, pp. 38–43; http://www.lex.pl/akt/-/akt/konwersja-dlugu-na-kapital (accessed on 30.11.2017).

[45] Articles 509–516 Civil Code.

[46] Article 453 Civil Code.

is possible only in relation to pecuniary liabilities. To tell the truth, it is also admissible to deduct liability in the form of an object of the same quality specified only with respect to a type,[47] but such a case should be treated as exceptional. In the case of the law on partnerships, attention is drawn to the phrase "based on a due payment",[48] which means that a partner is obliged to make a pecuniary contribution and does not prejudge whether the converted liability is pecuniary or in-kind in nature. It is assumed that Article 14 § 4 CCC aims to eliminate situations in which a partner undertakes to make a pecuniary contribution and then uses an institution of a deduction and asks for the so-called hidden in-kind contribution, i.e. non-cash liability.[49] Admissibility of a contractual deduction was intended to be a compromise between a complete ban and a full arbitrariness of compensation. Finally, an opinion was established that if partners adopt a resolution[50] to make pecuniary contributions, the converted liability should also be pecuniary, and if they decide to make non-cash contributions, the converted liability should be an in-kind one. Such a stance was adopted in most cases for a long time,[51] and departures from that were exceptional.[52] Recently, tax authorities have started questioning this approach. Moreover, the judicature does the same.[53] The key argument is that a pecuniary contribution can only take place in the case of cash payment or with the use of bank money. A deeper analysis of this argument referred to in tax authorities' interpellations and in case law seems to indicate that the difference between the nature of a contribution and the method of making it has been blurred. In addition, in case the argument is used instrumentally, it is enough that before a partner makes a contribution, a partnership settles its liabilities to him/her and a partner immediately uses the means to make his/her contribution to a partnership in cash or by money transfer. It is worth proposing a different solution here, one that is in concord with the aim of the regulation: if a partner's credit results from his/her provision of a benefit of a pecuniary nature (let us assume that a partner has provided a loan for a partnership), the liability converted into his/her stake should be treated as a pecuniary contribution. On the other hand, if a partner sells a car

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[47] Article 498 § 1 Civil Code.

[48] Article 14 § 4 first sentence CCC.

[49] M. Tofel, [in:] J. Bieniak et al., *Kodeks*, *op. cit.*, p. 82; J.P. Naworski, [in:] T. Siemiątkowski, R. Potrzeszcz (eds), *Kodeks*, *op. cit.*, p. 160; A. Szumański, [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz do artykułów 1–150*, Vol. I, Warszawa 2001, p. 164

[50] It usually concerns a resolution on the company capital increase because it is doubtful that a partnership is a partner's debtor at the stage of setting it up.

[51] Individual interpretations of: the Director of the Revenue Office in Łódź of 8 May 2014, IPTPB3/423-50/14-2/PM, https://www.podatki.biz/interpretacje/0288666.txt; of the Director of the Revenue Office in Poznań of 15 May 2013, ILPB3/423-78/13-2/EK, https://interpretacje-podatkowe.org/przychod/ilpb3-423-78-13-2-ek (accessed on 1.12. 2017).

[52] Judgment of the Supreme Administrative Court of 28 February 2005, FSK 1434/04, http://www.orzeczenia.com.pl/orzeczenie/l9qp7/nsa,FSK-1434-04,podatek_dochodowy_od_osob_prawnych/ (accessed on 1.12.2017).

[53] Judgments of the Supreme Administrative Court: of 25 June 2014, II FSK 1799/12, http://www.orzeczenia-nsa.pl/wyrok/ii-fsk-1799-12/podatek_dochodowy_od_osob_prawnych/25477b9.html; and of 3 February 2016, II FSK 2648/13, http://orzeczenia.nsa.gov.pl/doc/CC7D17EC57 (accessed on 1.12.2017).

to a partnership with the postponed date of payment (the provision of a benefit is non-cash in nature), the liability converted into his/her stake should be treated as an in-kind contribution. Partners' resolutions should not influence, at least with an effect on tax authorities, the pecuniary or non-cash nature of the converted liability.

Although the above-mentioned issue has been discussed mainly in connection with tax obligations based on Act on CIT, it should be assumed that the evaluation based on Act on VAT will be analogous.

Moreover, due to the exemption from the provisions of Act on VAT, an in-kind contribution to a partnership in the form of a company or its organised part will not be subject to taxation.[54]

The exclusion of the application of the provisions of Act on VAT to a transaction of selling a company or its organised part[55] is justified in various ways. It is mainly highlighted that it can be difficult to determine a tax base due to the complexity of this legal interest or to collect the due VAT from the seller (who usually disposes of his considerable property).[56] One can argue whether it is really a problem, especially as the collection of VAT from a seller has not been an absolute rule for a long time now. The procedure of inverted obligation introduced in 2011, at the beginning in relation to the supply of scrap metal, gradually extended to cover other goods and services,[57] can also be successfully applied to a company. However, in fact, the European Union regulations allow such exclusion.[58] In such a situation, the justification consists in granting a special characteristic feature to the act of selling a company (including a direct in-kind contribution to a partnership). Article 19 Directive on VAT stipulates exemption from tax provided that the person to whom the goods are transferred is the successor to the transferor. In accordance with the provisions of the Polish tax regulations,[59] this type of succession is not applicable. It should be added that in accordance with the above-mentioned regulations, any transformations of partnerships are not treated as legal successions, either, although they produce the same legal effects as in case of natural persons' legal succession.[60] That is why, it should be recognised that Act on VAT creates a special case of legal succession or, within the scope analysed, is in conflict with Directive on VAT.[61]

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[54] Article 6(1) Act on VAT. The delivery or provision of services cannot be taxed if they are not subject to a legally effective agreement: Article 6(2) Act on VAT. The other exemption is only signalled and is not analysed in the article. Its significance for the issue seems to be marginal and, in addition, the problem is so broad that it can be the subject matter of a separate analysis.

[55] Within the meaning of Article 2(27e) Act on VAT.

[56] A. Bartosiewicz, *VAT. Komentarz*, Warszawa 2017, p. 128.

[57] Article 17 para. 1(7) and (8) Act on VAT. The complete list of goods and services that are subject to the procedure of inverted obligation is contained in annexes to Act on VAT: Annex No. 11 (goods) and Annex No. 14 (services).

[58] Article 19 Council Directive 206/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, p. 1, as amended; hereinafter Directive on VAT.

[59] Articles 93–106 of the Act of 29 August 1997: Tax Ordinance, consolidated text, Dz.U. 17 January 2017, item 201.

[60] It results from the title of Chapter 14 of Tax Ordinance.

[61] Eventually, case law is for the first solution and sometimes an opinion is expressed that, within the scope analysed, the provisions of Directive on VAT should be applied directly; compare judgment of the Supreme Administrative Court of 28 October 2011, I FSK 1660/10, http://www.orzeczenia.com.pl/orzeczenie/e5y5d/nsa,I-FSK-1660-10,podatek_od_towarow_i_

In case of the provision of services, there are formally no free services envisaged. Even if such services took place, they should be treated as services paid for,[62] but the above-mentioned reservations also in this case are applicable to a great extent.

III. The second issue concerns a beneficiary of a delivery or service. It does not raise any doubts that a delivery or a service cannot be provided to a non-existent addressee. In case of limited companies, initially a limited company in organisation granted legal capacity, which after registration obtains legal identity, is the beneficiary of a contribution.[63]

In case of general partnerships, the situation is different. From the very moment the partnership agreement is entered into until its registration in KRS (National Court Registry), it is not clear what kind of entity it is. The legal doctrine representatives and commentators are not able to give it a name. Different terms are used, e.g. "a general pre-partnership",[64] "a partnership *in statu nascendi*", "a general partnership at the initial stage"[65] or "a partnership at the stage of organisation"[66]. There is also no consensus on what provisions should be applied towards such an entity. The use of the provisions applicable to a target company and a general partnership by analogy raises many reservations. The use of the provisions applicable to a limited company at the stage of organisation is even taken into consideration, although by means of careful analogy.[67] It is undoubtedly easier to approve of the stance that if a partnership is eventually registered, it is admissible to use the provisions applicable to a target partnership to it in the period before registration. However, the problem is that such a partnership can fail to be set up and then there are no normative grounds to use the provisions applicable to a target partnership to it.[68] Should the provisions applicable to a general partnership be used in such a case?

A civil partnership is a VAT payer based on Article 15 para. 1 Act on VAT. It is due to the fact that it is an organisational unit that is not a legal entity. General partnerships are also organisational units that are not legal entities, however, they are granted legal capacity.[69] Formally, these are two different types of organisational units, although it can be said that the latter term is contained in the former. However, one speaks about fully formed entities. An unformed partnership based on commercial partnerships law is not such an organisational unit as a formed civil partnership because entering into a partnership agreement based on commercial partnerships law is just a legal act, a *sine qua non* of the entity development

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uslug/ (accessed on 4.12.2017); judgment of the Voivodeship Administrative Court in Wrocław of 13 March 2012, I SA/Wr 1767/11, LEX No. 1126932.

62 Compare Article 8 para. 2(2) Act on VAT.

63 M. Trzebiatowski, *Spółka z o.o. w organizacji*, Lublin 2000, p. 477.

64 A. Kidyba, *Handlowe spółki osobowe*, Vol. I, Kraków 2005, p. 157.

65 S. Włodyka, *Problem osobowych spółek w organizacji,* Rejent No. 6, 2003, p. 262.

66 A. Szumański, [in:] W. Pyzioł, A. Szumański, I. Weis, *Prawo spółek*, Bydgoszcz–Kraków 2004, p. 169.

67 S. Sołtysiński, [in:] A. Szajkowski (ed.), *System Prawa Prywatnego*, Vol. 16: *Prawo spółek osobowych*, Warszawa 2008, pp. 793–794.

68 J. Strzępka, E. Zielińska, [in:] J. Strzępka (ed.), *Kodeks*, *op. cit.*, p. 104.

69 This way Article 33^1 Civil Code corresponds to Article 8 CCC.

process. Any attempts to determine the status of this transitional organisation aim to reasonably interpret Article 25[1] § 2 CCC (in relation to general partnerships), Article 109 § 2 CCC (in relation to partnerships limited by shares) and Article 134 § 2 CCC (in relation to a mixed type incorporating a partnership limited by shares and a public limited company),[70] the provisions of which lay down the principles of liability in the period between entering into an agreement and registration. It is hard to realise that no type of partnership exists in the above-mentioned period. The problem is that there is no "substitute" entity that may be subject to VAT imposition. It is indirectly confirmed in case law.[71]

The above comments concern only partners who are VAT payers and as such make an in-kind contribution to a general partnership. Thus, it should be assumed that it concerns a relatively small circle of entities. Unfortunately, also in such a case, there is a certain threat of the application of broadening interpretation. Following the judgments of the Court of Justice of the European Union,[72] it is possible to assume that a partner is not a VAT payer but due to the type of his/her in-kind contribution, in particular because of the fact that such a contribution, by its nature, can only serve business operations, such an activity will be subject to VAT. In the Polish case law, the indications of this stance can be observed, however, it should be highlighted that adjudicating benches carry out a thorough assessment of the entirety of circumstances of a given activity.[73]

Two aspects of making contributions to a general partnership have been discussed above, i.e. (1) the subjective one: whether a partner making a contribution acts as a VAT payer, and (2) an objective one: what the object of a contribution is (an in-kind contribution or money) with a brief mention of exemption from VAT in case of an act of contribution (a delivery) when a partner is not entitled to settle VAT on purchase, import or production of the in-kind contribution being made.

IV. The third aspect of an in-kind contribution to a general partnership is connected with the nature of the operation of the partnership being set up, i.e. whether a partnership is going to use the contribution made within its operations being subject to VAT or not. In general, the following possibilities should be

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[70] Although a mixed type of a partnership limited by shares-a public company is subject to CIT, it remains a general partnership even in accordance with tax law. In case of a general partnership, the legislator omitted an analogous, although unfortunate, provision.

[71] Compare judgment of the Supreme Administrative Court of 17 April 2013, I FSK 214/12, LEX No. 1366155. The Court decided that an excluded and organised unit within another entity (a healthcare institution within the structure of a general partnership) is not a VAT payer. However, in this case, there was another entity that could be recognised as a VAT payer, which was the general partnership.

[72] CJEU judgments of: 26 September 1996 in the case C-230/94, *Renate Enkler v. Finanzamt Homburg*, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0230; of 19 July 2012 in the case C-263/11, *Ainārs Rēdlihs v. Valsts ieņēmumu dienests*, http://curia.europa.eu/juris/liste.jsf?num=C-263/11&language=PL (accessed on 2.12.2017).

[73] Compare judgment of the Voivodeship Administrative Court in Szczecin of 26 February 2014, I SA/Sz 1335/13, LEX No. 1440453; judgment of the Voivodeship Administrative Court in Łódź of 18 August 2015, I SA/Łd 503/15, LEX No. 1992081.

considered: (a) whether a partnership is going to get involved in domestic operations referred to in Article 43 Act on VAT; (b) whether a partnership is going to import goods referred to in Articles 45–81 Act on VAT and in accordance with the rules laid down in the above-mentioned provisions; and (c) whether a partnership is going to make use of special exemptions granted by the Regulation issued based on Article 82 para. 3 Act on VAT.[74]

The analysis of the exemptions mentioned in the former paragraph goes beyond the framework of this article and undoubtedly it can be the subject matter of an extensive monograph. It is even hard to make generalisations because the exemptions are subjective, objective and since 2011 also subjective-objective in nature.[75] The reasons for introducing those exemptions are also varied. The most important ones include: (a) ethical and moral causes, for example, the delivery of blood, plasma or human organs;[76] (b) difficulties in the establishment of a tax base, for example, of financial services,[77] including financial intermediation;[78] (c) reference to public interest or the good of the public, in general when non-governmental organisations take steps that should be taken by the state, for example, services provided by independent groups of people to their members;[79] social aid[80] or care of people who need it.[81]

In general, all tax rebates or exemptions, not only applicable to VAT, constitute an exception to the rule of common taxation. However, in case of Act on VAT, which follows the logic "you consume, you pay", a big number of exemptions considerably defy it. Moreover, due to the specificity of VAT, the conception adopted is that the calculated tax on the delivery aimed at performing activities exempt from tax cannot be deducted from due tax. So, it increases the price of this service or delivery, which is, on the other hand, so useful socially.

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[74] It concerns the Regulation of the Minister of Finance of 20 December 2013 on exemptions from the tax on goods and services and conditions for the application of those exemptions, consolidated text, Dz.U. 2015, item 736.

[75] A. Bartosiewicz, *VAT*, *op. cit.*, p. 631.

[76] Article 43 para. 1(5) and (6) Act on VAT, but in general additional services accompanying the delivery of blood and organs, especially their transportation to laboratories and hospitals is not subject to exemptions; compare the CJEU judgment of 2 July 2015 in the case C-334/14, *État belge v. Nathalie De Fruytier*, http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:62014CJ0334 (accessed on 29.11.2017).

[77] Article 43 para. 1(37)–(41) Act on VAT.

[78] Compare judgment of the Supreme Administrative Court of 26 June 2013, I FSK 922/12, LEX No. 1383099, concerning the provision of services of intermediation in the acquisition of banking and insurance services via the internet; judgment of the Supreme Administrative Court of 3 March 2015, I FSK 2135/13, LEX No. 16493999, concerning online services of banking loans comparison; CJEU judgment of 22 October 2015 in the case C-264/14, *Skatteverket v. David Hedqvist*, http://curia.europa.eu/juris/document/document.jsf?docid=170305&doclang=PL (accessed on 29.11.2017).

[79] Article 43 para. 1(21) Act on VAT, with a reservation that an exemption cannot create a real probability of interfering in competition on a given goods and services market; compare judgment of the Supreme Administrative Court of 14 November 2013, I SA/Wr 1304/13, LEX No. 1710180.

[80] Article 23 para. 1(22) Act on VAT.

[81] Article 43 para. 1(23) and (24) Act on VAT.

V. Financing current operations of a general partnership by partners generally takes place in two ways: by making successive contributions (in-kind or pecuniary ones), discussed above, or by crediting it. Special forms of financing envisaged for other types of partnerships, especially extra contributions to limited liability companies, do not produce expected effects. Making extra contributions to a limited liability company and withdrawing them is neutral from the point of view of income tax[82] and VAT[83]. Extra contributions are only subject to tax on civil-law transactions.[84] Unfortunately, in case of general partnerships, there is also a term "extra contribution" used in Act on tax on civil law transactions[85]. In the Code of Commercial Companies, the term is used in relation to a mixed type of a partnership limited by shares-a public limited company,[86] which is treated as a limited company and is subject to CIT. However, in this case the meaning of the concept is different from a limited liability company.[87] Tax authorities, in some interpretations, go beyond the meaning established based on the Code of Commercial Companies and perceive extra contributions (or making them) as any pecuniary payments made to a partnership by its partners, which are not contributions or loans and which aim to increase a partnership's capital.[88] However, in other interpretations, tax authorities are more restrained and exclude money payments to a partnership from the meaning of an extra contribution if they are to cover losses, unless such steps are laid down in a partnership agreement.[89]

The broadly interpreted concept of "financing" a partnership and "increasing its capital" should also take into account partners' non-cash contributions, which at the same time constitute the provision of benefits not paid for, provided that they consist in the provision of goods or ownership rights (with the exception of the provision of services).[90] Such goods or rights can be contributed to a partnership as a fulfilment of the commitment to make a contribution as well as a fulfilment of another commitment. It will usually be a commitment resulting from a commodate

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[82] Article 12 para. 4(11) Act on PIT.

[83] Extra contributions can only be pecuniary in nature: Article 177 § 1 CCC; compare R. Pabis, [in:] J. Bieniak et al., *Kodeks*, *op. cit*., p. 548.

[84] Because they are considered to be a change in a partnership agreement: Article 1 para. 3(2) in conjunction with Article 1 para. 1(2) of the Act of 9 September 2000 on civil-law transactions tax, Dz.U. 2000, No. 86, item 959, as amended; hereinafter Act on CLTT.

[85] Article 1 para. 3(1) Act on CLTT.

[86] Article 396 § 3 in conjunction with Article 126 § 1(2) CCC.

[87] In case of a mixed type of a partnership limited by shares-a public limited company and only with regard to shareholders, an extra contribution is a specific remuneration for special rights granted to their shares.

[88] Individual interpretations of: the Director of the Revenue Office in Bydgoszcz of 11 December 2014, ITPB2/436-226/14/DSZ, https://www.podatki.biz/interpretacje/0320825.txt; of the Director of the Revenue Office in Bydgoszcz of 26 July 2013, ITPB2/436-81/13/TJ, https://www.podatki.biz/interpretacje/0255658.txt (accessed on 29.11.2017).

[89] Individual interpretations of: the Director of the Revenue Office in Bydgoszcz of 11 December 2014, ITPB2/436-226/14/DSZ; of the Director of the Revenue Office in Warsaw of 17 September 2014, IPPB2/436-389/14-2/MZ, https://interpretacje-podatkowe.org/podatek-od-czynnosci-cywilnoprawnych/ippb2-436-389-14-2-mz (accessed on 29.11.2017).

[90] Such differentiation takes into account the wording of Article 1 para. 3(2) *in fine* Act on CLTT.

agreement (in the case of movables)[91] or an indefinite contract similar to a commodate agreement (in the case of ownership rights).[92] Such performance for the benefit of a partnership is envisaged in the provisions of the Code of Commercial Companies.[93] As a matter of fact, it is assumed that such provision of benefits usually constitutes the fulfilment of a commitment to make a contribution but it is the will of the parties to a given legal act that decides what the legal title is.[94] All the above-mentioned partners' contributions will be in general treated as the change in a partnership agreement and subject to tax on civil-law transactions. However, the tax can be avoided when movables or ownership rights are provided to usufruct (not just use), i.e. with the right to earn profits.[95]

In the case of a civil partnership, while making a contribution is downright expected,[96] crediting a partnership by a partner can turn out to be controversial.[97] The controversy mainly results from the fact that a civil partnership is not a legal entity. It should be highlighted, however, that the argument of the lack of legal identity should also concern the contributions to a partnership,[98] and nobody raises any doubts in relation to those acts. It is true that a civil partnership has a very limited legal identity, nevertheless a certain property mass is distinguished and formally it constitutes the partners' collective property[99] subject to joint ownership, which results in fractional "indefiniteness" of shares[100]. It may happen that an initial capital will never be collected, however, it does not lose its potential characteristic features.[101] In business practice, it is admissible to finance the operation of a civil

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[91] Article 710 et seq. Civil Code.

[92] S. Bogucki, A. Dumas, W. Stachurski, K. Winiarski, *Podatek od czynności cywilnoprawnych. Komentarz dla praktyków*, Gdańsk 2014, p. 82.

[93] Compare Articles 48 and 49 CCC.

[94] It is necessary to highlight the judgment of the Voivodeship Administrative Court in Warsaw of 26 March 2013, III SA/Wa 2356/12, http://www.orzeczenia-nsa.pl/wyrok/iii-sa-wa-2356-12/podatek_od_czynnosci_cywilnoprawnych_oplata_skarbowa_oraz_inne_i_oplaty_interpretacje_podatkowe/1df0e38.html (accessed on 28.11.2017), which indicates that partners of a civil partnership tried to convince tax authorities that beside things and property rights, money can also be the object of use (that does not increase a partnership's property). However, in most cases, pecuniary benefits provisions with the similar characteristic features (whether they are finally recognised as an inappropriate deposit: Article 845 Civil Code, or inappropriate use: Article 264 Civil Code) will be treated as the provision of ownership, and thus increasing the property of the beneficiary.

[95] However, there is no full consensus; for the views for, see M. Waluga, *Ustawa o podatku od czynności cywilnoprawnych. Komentarz*, Warszawa 2009, pp. 99–100; against: A. Mariański, D. Strzelec, *Ustawa o podatku od czynności cywilnoprawnych. Ustawa o opłacie skarbowej. Komentarz*, Gdańsk 2005, p. 89.

[96] Article 860 § 1 Civil Code.

[97] M. Jamroży, P. Karwat, [in:] H. Litwińczuk (ed.), *Opodatkowanie spółek*, Warszawa 2016, p. 334.

[98] In accordance with Article 861 § 1 Civil Code.

[99] Compare Article 863 Civil Code.

[100] J. Jezioro, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2016, p. 1559.

[101] Partners' collective property will not be created if partners' contributions to the partnership aim to provide services or the right to use particular property components; K. Pietrzykowski, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, Vol. II, Warszawa 2013, p. 649. The admissibility of the existence of "contributionless" partnerships is another issue, usually

partnership with its partners' loans. Tax authorities do not question such a possibility, either. However, in such cases, some tax consequences should be taken into account, mainly in accordance with the Act on CLTT[102] and also Act on PIT[103].

Due to the fact that the increase in financing general partnerships operations, regardless of the method and legal title, almost always constitutes a change in a partnership agreement and results in a tax liability imposed on civil-law transactions,[104] it should be considered whether the burden of a civil-law transaction excludes the possibility of imposing VAT. Such a possibility seems to be natural in the light of the principle that tax burdens should not be cumulated.[105] Thus, if one of the parties acts as a VAT payer, civil-law transactions that he/she is a party to should not be subject to tax on civil-law transactions. However, in the area here analysed, the principle is limited because it does not apply to a partnership agreement and its change, even if a given transaction is subject to VAT or is made exempt from this tax (one of the parties is made exempt from tax).[106] Thus, in case of general partnerships, double taxation can occur: VAT and tax on civil-law transactions. However, it is only possible in the case extra financing is provided in a non-cash form. In case of limited companies, such problems most often do not arise.[107]

VI. Extra financing of partnerships usually results from the lack of resources to carry out current operations or investment. Excess resources usually result from profits earned. The distribution and payment of profits to partners, in accordance with the rules they have agreed upon, are, at least formally, neutral in relation to income tax, also for partners. As it has already been mentioned, a monthly income earned by each partner is tax-significant, regardless of the fact whether it has been paid to them or not. The attribution of such income to particular partners results in the necessity of paying income tax and does not result in any VAT consequences. However, there is an important exception to this rule, which is the provision of the so-called in-kind dividends in limited companies.

The basic doubt concerning the payment of in-kind dividends is connected with their admissibility. It can turn out to be doubtful in the light of the provisions of the

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discussed in connection with an unclear stance of Stefan Grzybowski, compare S. Grzybowski, [in:] S. Grzybowski (ed.), *System prawa cywilnego*, Vol. III, part 2, Wrocław 1976, p. 808.

[102] Compare individual interpretation of the Director of the Revenue Office in Łódź of 24 September 2012, IPTPB2/436-79/12-4/KK, https://interpretacje-podatkowe.org/wspolnik/iptpb2-436-79-12-4-kk (accessed on 29.11.2017), indicating that the provision of a loan to a civil partnership is recognised as the change in a partnership agreement and subject to 0.5% tax on the amount or value of the loan.

[103] Compare individual interpretation of the Director of the Revenue Office in Bydgoszcz of 23 March 2010, ITPB1/415-1006/09/TK, http://interpretacje24h.pl/page/read/219253 (accessed on 29.11.2017), indicating whether and to what extent interest on the loans can be recognised as the cost of earning a partnership's revenue.

[104] Compare Article 1 para. 3(1) Act on CLTT.

[105] A. Goettel, M. Goettel, *Podatek od czynności cywilnoprawnych. Komentarz*, Warszawa–Kraków 2007, p. 229.

[106] Article 2(4)(a) and (b) Act on CLTT.

[107] The expression "most often" used in this case means that the commonly used method of increasing the capital of a partnership by partners, i.e. a loan, is subject to exemption from CLTT; Article 9(10)(i) Act of CLTT.

Code of Commercial Companies, which regulate the "amounts",[108] "payment"[109] and "advance payment"[110]. However, neither the legal doctrine nor case law has confined itself to the linguistic interpretation of the provisions of the Code of Commercial Companies concerning dividends. An in-kind dividend has been recognised as a substitute for cash payment and it has been indicated that this form of participation in the profits of a partnership is not prohibited.[111] Coming back to the issue of VAT, it is necessary to notice that a partnership providing an in-kind dividend most often acts as a VAT payer because its assets assigned for a dividend are part of a company. Still, a question must be answered whether a partnership paying a dividend provides a free delivery or one paid for. The opinion dominating case law at present is that a partnership provides a free delivery of goods, or possibly provides a free service.[112] Such classification results from the rejection of arguments stating that a lack of VAT would be justified by the title of the payment and focusing on the meaning of the concept of "dividend" in the light of the provisions of commercial partnerships law. In-kind benefits provided in advance of the profits due to partners of a general partnership should be treated by analogy. In accordance with the established case law, they are classified as a free delivery (or possibly free provision of services, on condition that the provision of benefits is not in-kind in nature).[113]

Consequences similar to the payment of the profit in the in-kind form will occur in the case of the provision of other benefits for partners if they involve objects or consist in the provision of services. The legal title for the provision of such benefits may include, e.g. the remuneration for managing the affairs of a partnership.[114] If a partner managing the affairs of a partnership is paid a pecuniary remuneration, in general the service he/she provides is not subject to VAT. However, another partnership can be a partner and it is usually a limited company. Then, the pay for the service of managing the affairs of a partnership should be subject to VAT. This stance is confirmed in case law, especially with respect to a mixed type of a partnership limited by shares-a public limited company, where a public limited

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[108] Article 192 CCC.

[109] Article 193 § 4 CCC.

[110] Articles 194, 195 CCC.

[111] Compare judgments of the Supreme Administrative Court: of 8 February 2012, II FSK 1384/10, http://orzeczenia.nsa.gov.pl/doc/4613E28174; and of 22 February 2013, II FSK 1771/11, http://orzeczenia.nsa.gov.pl/doc/6BFA829D43 (accessed on 1.12.2017).

[112] Within the meaning of Article 7 para. 2 and Article 8 para. 2 Act on VAT. Compare judgments of the Supreme Administrative Court: of 23 October 2013, I FSK 1503/12, http://orzeczenia.nsa.gov.pl/doc/7C47534E34; of 23 January 2014, I FSK 202/13, http://www.orzeczenia-nsa.pl/wyrok/i-fsk-202-13/podatek_od_towarow_i_uslug_interpretacje_podatkowe/1889f53.html; of 3 June 2014, I FSK 956/13, http://www.lexlege.pl/orzeczenie/33010/i-fsk-956-13-wyrok-naczelny-sad-administracyjny/ (accessed on 2.12.2017).

[113] Some representatives and commentators of the legal doctrine express doubts concerning such classification, although they do not provide convincing arguments; compare A. Bartosiewicz, *VAT*, *op. cit.*, p. 151.

[114] As a matter of fact, Article 46 CCC excludes the possibility of getting remuneration for managing the affairs of a partnership but, due to the wording of Article 37 § 1 CCC, the regulation should be recognised as dispositive.

company is a general partner,[115] and for a partnership limited by shares, where a limited liability company is a general partner[116]. While in the above case there are no doubts that the service of managing the affairs of a partnership that is paid for should be subject to VAT, such doubts can occur in the case of a free service of managing the affairs of a partnership. In other words, the problem is whether free provision of the service of managing the affairs of a partnership can be recognised as a free service within the meaning of Article 8 para. 2 Act on VAT, and as a result be subject to VAT. Such a possibility exists but the subject-related criterion will be decisive. If a partner managing the affairs of a partnership is a VAT payer, which means that his/her operations consist in managing partnerships, usually for remuneration, although in one or some partnerships he/she does it without remuneration, his free service should be treated as an operation that is subject to VAT.[117]

VII. The legal existence of a general partnership ends the moment it is dissolved. The dissolution of a limited company takes place when it is struck off the registry.[118] In case of the dissolution of a general partnership, which usually takes place independently the moment a reason for that occurs, the non-share-based co-ownership of a partnership's property changes into fractional co-ownership.[119] On the other hand, if the reason for dissolving a limited company occurs, the rule is that liquidation proceedings must be started and, as a result, receivers[120] must be appointed, and the liquidation must be reported to the registry.[121] It is also possible to stop a partnership's operations (and to end its existence) without the need to carry out liquidation proceedings.[122]

From the point of view of Act on VAT, in general it does not matter whether the liquidation proceedings are carried out or not. What is important is the dissolution of a partnership, which is preceded by abandoning business operations.[123] However, just the fact that a partnership stops business operations is not essential. It is different in the case of natural persons for whom the institution of dissolution or self-dissolution would not make sense. In such a situation, withdrawing from business operations matters. If a natural person is registered as a VAT payer and stops operations that are subject to VAT, he/she should notify the head of the revenue

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[115] Judgment of the Supreme Administrative Court of 9 December 2014, I FSK 1908/13, http://orzeczenia.nsa.gov.pl/doc/A7CF336DA2 (accessed on 2.12.2017).

[116] Judgment of the Supreme Administrative Court of 6 March 2015, I FSK 40/14, http://orzeczenia.nsa.gov.pl/doc/1F69B70A1E (accessed on 2.12.2017).

[117] A similar stance in P. Karwat, [in:] H. Litwińczuk (ed.), *Opodatkowanie*, *op. cit.*, p. 363.

[118] Article 84 § 2 CCC in the case of a civil partnership. With respect to a partnership limited by shares, the same rule is in force in accordance with Article 103 CCC, and for a mixed type of a partnership limited by shares and a public company, partly also the provisions applicable to a public company, i.e. Article 150 CCC. In the case of a general partnership, exceptionally, the dissolution can take place in accordance with Article 98 § 2 CCC.

[119] Compare Article 875 § 1 Civil Code.

[120] Article 70 CCC.

[121] Article 74 § 1 CCC.

[122] Article 67 § 1 CCC.

[123] Article 14 para. 1(1) Act on VAT.

office, who shall strike the person off the VAT payers registry.[124] Coming back to the issue of general partnerships, it is necessary to add that if after the dissolution one or more partners continue business operations, the circumstance will not matter.[125] Although it will be unimportant to a partnership, it may be important to the former partner. If the partner delivers goods that were provided to him within 12 months from the date of the dissolution, the delivery will be exempt from VAT, provided that the partnership itself fulfils its VAT obligations.[126] The solution constitutes the manifestation of the principle of VAT neutrality.

While the dissolution of a limited company can be precisely determined as the day when it is struck off the registry, partners of a civil partnership are exposed to a greater risk. Regardless of the occurrence of the grounds for a partnership's dissolution, it will continue to exist upon all partners' agreement. Eventually, doubts can be raised whether a partnership continues to exist or not. The objection to the existence of a partnership should be clear and unambiguous but it does not require any particular form. On the other hand, agreement can be assumed based on partners' silence.[127]

The above comments will be unimportant if, having terminated business operations, partners have to divide money. However, the situation will be different in case a partnership fails to sell its property and decides to divide it between partners.

The grounds for VAT on non-cash components of a dissolved general partnership divided between partners are based on the principle of imposing tax on consumption (beside the principle of common taxation), which is correlated with another principle, i.e. of VAT neutrality.[128] It is connected with the assumption that the property components divided between partners stop serving operations that are subject to VAT (they are divided between partners and serve their needs and finally they will be "consumed"), so a partnership that has purchased the components and deducted due VAT should simply return the deducted VAT. Thus, as a result, if a partnership divides components purchased without the exemption from VAT, their transfer to partners should not be subject to VAT.[129]

The dissolution of a general partnership requires that physical inventory,[130] also known as liquidation inventory, be made. Goods are subject to that inventory. It should be highlighted that there are at least three scopes of the concept meaning: (1) only trade goods, i.e. those that have been purchased for the purpose of reselling them;[131] (2) other goods but with the exception of tangible assets;[132] and (3) any

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[124] Article 96 para. 6 Act on VAT.

[125] A. Bartosiewicz, *VAT*, *op. cit.*, p. 244.

[126] Article 14 para. 7 Act on VAT.

[127] J. Gudowski, [in:] G. Bieniek (ed.), *Komentarz do Kodeksu cywilnego. Księga trzecia. Zobowiązania*, Vol. II, Warszawa 2002, p. 631.

[128] J. Matarewicz, *Ustawa o podatku od towarów i usług*, Warszawa 2017, p. 190.

[129] The confirmation of this conclusion can be found in Article 14 para. 4 Act on VAT.

[130] Article 14 para. 5 Act on VAT.

[131] Compare T. Michalik, *Ustawa o VAT. Komentarz*, Warszawa 2003, p. 170.

[132] Compare C. Pieńkosz, *Środki trwałe a remanent likwidacyjny. Artykuł dyskusyjny*, Doradca Podatkowy No. 4, 2005, p. 11.

goods, including equipment and tangible assets[133]. The opinion of tax authorities is established. The physical inventory must also take into account tangible assets.[134] The CJEU judgments indirectly confirm the stance.[135]

Therefore, in general, the goods that are included in a physical inventory should be subject to VAT paid by a partnership. However, a former partner can "regain" the VAT paid by a partnership if he/she delivers the goods within his/her own business operations within the period of 12 months. Unfortunately, the possibility of "regaining VAT" constructed in this way eliminates automatic exemption from calculating the value of those goods as income that is subject to PIT. It is because such an exemption excludes the possibility of selling those goods within business operations.[136]

As far as the liquidation of a general partnership is concerned, the correlation between the provisions of Act on VAT and Act on PIT limits the possibility of tax optimisation but does not eliminate it. Partners should determine priorities in their future decision-making. If they want to do business separately, they should consider purchasing goods before they are listed in the physical inventory. The move involves a higher income tax and VAT paid by a partnership. On the other hand, the possibility of "regaining" VAT, in general without any restrictions, is an advantage. The value of the goods acquired by partners is not included in the income subject to tax. Just the opposite, the cost of purchasing them is the cost of earning income. And money that is divided between partners after the dissolution of a partnership does not constitute income that is subject to tax.[137]

BIBLIOGRAPHY

Bartosiewicz A., *VAT. Komentarz*, Warszawa 2017.

Bieniak J. et al., *Kodeks spółek handlowych. Komentarz*, Warszawa 2014.

Bogucki S., Dumas A., Stachurski W., Winiarski K., *Podatek od czynności cywilnoprawnych. Komentarz dla praktyków*, Gdańsk 2014.

Goettel A., Goettel M., *Podatek od czynności cywilnoprawnych. Komentarz*, Warszawa–Kraków 2007.

Grzybowski S. (ed.), *System prawa cywilnego*, Vol. III, part 2, Wrocław 1976.

Gudowski J., [in:] G. Bieniek (ed.), *Komentarz do Kodeksu cywilnego. Księga trzecia. Zobowiązania*, Vol. II, Warszawa 2002.

Jamroży M., Karwat P., [in:] H. Litwińczuk (ed.), *Opodatkowanie spółek*, Warszawa 2016.

Jezioro J., [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2016.

Kidyba A., *Kodeks spółek handlowych. Komentarz*, Vol. I, Kraków 2004.

Kidyba A., *Handlowe spółki osobowe*, Vol. I, Kraków 2005.

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[133] Compare J. Martini (ed.), *Ustawa o VAT. Komentarz*, Warszawa 2003, p. 110.

[134] Compare individual interpretation of the Director of the Revenue Office in Łódź of 10 April 2013, IPTPP1/443-50/13-2/MW, https://interpretacje-podatkowe.org/srodek-trwaly/iptpp1-443-50-13-2-mw (accessed on 3.12.2017).

[135] CJEU judgment of 16 June 2016 in the case C-229/15, *Minister of Finance v. Jan Mateusiak*, http://curia.europa.eu/juris/document/document.jsf?text=&docid=180321&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=464748 (accessed on 3.12.2017).

[136] Article 14 para. 3(12)(b) Act on PIT.

[137] Article 14 para. 3(10) Act on PIT.

Kozieł G., *Przeniesienie praw i obowiązków wspólników w handlowych spółkach osobowych. Uwagi na gruncie regulacji art. 10 k.s.h.*, Kraków 2006.
Mariański A., Strzelec D., *Ustawa o podatku od czynności cywilnoprawnych. Ustawa o opłacie skarbowej. Komentarz*, Gdańsk 2005.
Martini J. (ed.), *Ustawa o VAT. Komentarz*, Warszawa 2003.
Matarewicz J., *Ustawa o podatku od towarów i usług*, Warszawa 2017.
Michalik T., *Ustawa o VAT. Komentarz*, Warszawa 2003.
Nowacki A., *Konwersja długu na kapitał*, Przegląd Prawa Handlowego No. 12, 2008.
Oplustil K., *Wierzytelność wobec spółki kapitałowej jako przedmiot potrącenia i konwersji*, Przegląd Prawa Handlowego No. 2, 2002.
Pabis R., [in:] J. Bieniak et al., *Kodeks spółek handlowych. Komentarz*, Warszawa 2014.
Pieńkosz C., *Środki trwałe a remanent likwidacyjny. Artykuł dyskusyjny*, Doradca Podatkowy No. 4, 2005.
Pietrzykowski K. (ed.), *Kodeks cywilny. Komentarz*, Vol. II, Warszawa 2013.
Pinior P., [in:] J. Strzępka (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa, 2015.
Siemiątkowski T., Potrzeszcz R. (eds), *Kodeks spółek handlowych. Komentarz*, Vol. 1, Warszawa 2010.
Strzępka J. (ed.), *Kodeks spółek handlowych. Komentarz,* Warszawa, 2015.
Szajkowski A. (ed.), *System Prawa Prywatnego*, Vol. 16: *Prawo spółek osobowych,* Warszawa 2008.
Szumański A., [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz do artykułów 1–150*, Vol. I, Warszawa 2001.
Szumański A., [in:] W. Pyzioł, A. Szumański, I. Weis, *Prawo spółek,* Bydgoszcz–Kraków 2004.
Szumański A., [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz*, Vol. I, Warszawa 2006.
Tofel M., [in:] J. Bieniak et al., *Kodeks spółek handlowych. Komentarz*, Warszawa 2014.
Trzebiatowski M., *Spółka z o.o. w organizacji,* Lublin 2000.
Waluga M., *Ustawa o podatku od czynności cywilnoprawnych. Komentarz*, Warszawa 2009.
Włodyka S., *Problem osobowych spółek w organizacji*, Rejent No. 6, 2003.

VALUE ADDED TAX ON TRANSACTIONS BETWEEN A GENERAL PARTNERSHIP AND ITS PARTNERS

Summary

The article aims to present the tax-related consequences (with respect to VAT) of typical, and also less common, legal and physical transactions between partners of a partnership and a partnership itself. From the perspective of commercial partnerships and companies law or, in the broadest approach, civil law, these are in general activities that are very well defined by the representatives and commentators of the legal doctrine. However, the performance of the said activities quite often results in tax consequences, in particular in the sphere of income tax, tax on civil-law transactions as well as VAT. In the case of VAT, it seems, the consequences are the least predictable. Thus, the conclusion is obvious: in many situations, steps that partners take at the stage of setting up a partnership, in the course of its operations and liquidation can result in unsatisfactory effects if the obligation with regard to VAT is not properly recognised.

Keywords: general partnerships, VAT, non-cash contributions, in-kind benefits, dissolution of general partnership

OPODATKOWANIE VAT CZYNNOŚCI DOKONYWANYCH POMIĘDZY SPÓŁKĄ OSOBOWĄ I JEJ WSPÓLNIKAMI

Streszczenie

Celem niniejszego artykułu jest przedstawienie konsekwencji podatkowych (w zakresie podatku VAT) typowych, a także rzadziej spotykanych, czynności prawnych i faktycznych dokonywanych między wspólnikami spółki osobowej a samą spółką. Z perspektywy prawa spółek handlowych czy, w najszerszym ujęciu, prawa cywilnego są to czynności zazwyczaj bardzo dobrze zanalizowane przez przedstawicieli doktryny. Ich dokonywanie nierzadko jednak skutkuje konsekwencjami podatkowymi, w szczególności w sferze podatków dochodowych, podatku od czynności prawnych, a także podatku VAT. W tym ostatnim przypadku, jak się wydaje, skutki te jawią się jako najmniej spodziewane. Konkluzja jest zatem oczywista – w wielu przypadkach czynności wspólników, zarówno na etapie zakładania spółki, w toku jej działalności, jak i w fazie jej likwidacji, mogą nie przynieść satysfakcjonującego ich rezultatu, o ile obowiązek w zakresie podatku VAT nie zostanie prawidłowo rozpoznany.

Słowa kluczowe: spółki osobowe, podatek VAT, wkłady niepieniężne, świadczenia rzeczowe, rozwiązanie spółki osobowej

IMPOSICIÓN DEL IVA A ACTIVIDADES ENTRE SOCIEDAD PERSONAL Y SUS SOCIOS

Resumen

El presente artículo presenta las consecuencias fiscales (en cuanto al IVA) típicas, pero también poco recuentes de los actos jurídicos y de hecho entre los socios de una sociedad personal y la sociedad en sí. Desde la perspectiva de derecho de sociedades mercantiles, o bien – en el ámbito más amplio – derecho civil, son actos generalmente muy bien analizados por los representantes de la doctrina. Su práctica produce frecuentemente consecuencias fiscales, sobre todo en cuanto a los impuestos sobre la renta, impuesto de actos jurídicos documentados, y también – el IVA. En el último supuesto, las consecuencias parecen lo menos esperadas. La conclusión por tanto es obvia – en muchos casos los actos de los socios, tanto en la fase de constitución de la sociedad, durante su actividad o en la fase de liquidación pueden no traer resultado satisfecho para ellos, siempre que la obligación en cuanto al IVA no se cumpla correctamente.

Palabras claves: sociedades personales, IVA, aportaciones no dinerarias, prestaciones materiales, disolución de sociedad personal

НАЛОГООБЛОЖЕНИЕ НДС ПО СДЕЛКАМ МЕЖДУ ПАРТНЕРСТВОМ И ЕГО ПАРТНЕРАМИ

Резюме

Целью данной статьи является представление налоговых последствий (с точки зрения НДС) типичных, а также редких юридических и фактических сделок, совершаемых между партнерами по партнерству и самой компанией. С точки зрения права коммерческих компаний или, в широком смысле, гражданского права, эти действия обычно очень хорошо анализируются представителями

доктрины. Однако их осуществление часто приводит к налоговым последствиям, в частности в сфере подоходного налога, налога на юридические операции, а также НДС. В последнем случае кажется, что эти последствия являются наименее ожидаемыми. Следовательно, вывод очевиден – во многих случаях деятельность партнеров, как на этапе создания компании, так и в ходе ее деятельности, а также на этапе ее ликвидации, может не принести удовлетворительного результата, если обязательство по НДС не будет должным образом признано.

Ключевые слова: партнерства, НДС, взносы в натуральной форме, выплаты в натуральной форме, расторжение партнерства

BESTEUERUNG DER MEHRWERTSTEUER AUF TRANSAKTIONEN ZWISCHEN EINER PERSONENGESELLSCHAFT UND IHREN PARTNERN

Zusammenfassung

Ziel dieses Artikels ist es, die steuerlichen Konsequenzen (im Rahmen der Mehrwertsteuer) typischer sowie seltener rechtlicher und tatsächlicher Transaktionen darzustellen, die zwischen den Partnern einer Personengesellschaft und der Gesellschaft selbst durchgeführt werden. Aus Sicht des Handels- oder im weitesten Sinne des Zivilrechts werden diese Tätigkeiten von Vertretern der Doktrin in der Regel sehr gut analysiert. Wenn sie jedoch häufig eingeführt werden, ergeben sich steuerliche Konsequenzen, insbesondere im Bereich der Einkommenssteuern, der Steuer auf Rechtsgeschäfte sowie der Mehrwertsteuer. Im letzteren Fall scheinen diese Effekte am wenigsten zu erwarten zu sein. Die Schlussfolgerung liegt daher auf der Hand – in vielen Fällen können die Aktivitäten der Partner, sowohl in der Phase der Unternehmensgründung als auch in der Phase der Liquidation, nur dann zu einem zufriedenstellenden Ergebnis führen, wenn die Mehrwertsteuerpflicht ordnungsgemäß anerkannt wird.

Schlüsselwörter: Personengesellschaften, Mehrwertsteuer, Non-Cash Beiträge, Sachleistungen, Auflösung einer Personengesellschaft

TAXATION DE LA TVA SUR LES TRANSACTIONS ENTRE UN PARTENARIAT ET SES PARTENAIRES

Résumé

Cet article a pour but de présenter les conséquences fiscales (au sens de la TVA) des transactions juridiques et factuelles typiques mais aussi rares, effectuées entre les associés du partenariat et la société elle-même. Du point de vue du droit des sociétés commerciales ou, au sens le plus large, du droit civil, ces activités sont généralement très bien analysées par les représentants de la doctrine. Cependant, ces activités entraînent souvent des conséquences fiscales, en particulier dans le domaine des impôts sur le revenu, de la taxe sur les transactions juridiques, ainsi que de la TVA. Dans ce dernier cas, ces effets semblent être les moins attendus. La conclusion est donc évidente: dans de nombreux cas, les activités des partenaires, tant au stade de la création d'une société que dans le cadre de ses opérations, et au stade de sa liquidation, peuvent ne pas aboutir à un résultat satisfaisant, si l'obligation de TVA ne soit pas correctement reconnue.

Mots-clés: partenariats, TVA, contributions en nature, avantages en nature, dissolution d'un partenariat

ASSOGGETTAMENTO ALL'IVA DELLE OPERAZIONI TRA UNA SOCIETÀ DI PERSONE E I SUOI SOCI

Sintesi

L'obiettivo del presente articolo è la presentazione delle conseguenze tributarie (nell'ambito dell'IVA) delle tipiche operazioni giuridiche e materiali, e anche di quelle incontrate di rado, eseguite tra i soci di una società di persone e la società stessa. Nella prospettiva del diritto delle società commerciali, o in senso più largo del diritto civile, queste sono operazioni solitamente analizzate molto bene dai rappresentanti della dottrina. La loro esecuzione non di rado tuttavia genera conseguenze tributarie, in particolare nell'ambito delle imposte sul reddito, dell'imposta sui contratti e anche dell'IVA. In questo ultimo caso, sembrerebbe che tali conseguenze siano le meno attese. La conclusione è quindi evidente: in molti casi le operazioni dei soci, sia in fase di costituzione della società che durante la sua attività, così come nella fase della sua liquidazione, possono non condurre a un risultato soddisfacente se l'obbligo nell'ambito dell'IVA non viene correttamente individuato.

Parole chiave: società di persone, IVA, contributi in natura, prestazioni in natura, scioglimento di società di persone

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RIGHT TO REIMBURSEMENT OF EXCISE DUTY VERSUS TIGHTENING OF TAX SYSTEM THROUGH INTERPRETATION OF LAW

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1. INTRODUCTION

Reimbursement of excise duty is an essential element of an excise duty recovery process. Tax authorities refuse to comply with the obligation to reimburse excise duty within a statutory period, although the obligation is binding on them. Administrative courts play an important role in this respect as they eliminate those tax decisions from the course of law which are issued to ensure the tightness of the tax system. Courts may exert influence on tax authorities, which are obliged to reimburse excise duty in the event of incorrect implementation of the EU law. An important role in this respect is played by pro-EU interpretation by Polish administrative courts. Judgments given in tax matters play a major role in the legislative process as they enforce amendments to the Polish tax law in a manner consistent with the EU law. Through interpretation of directives in the light of their wording and purposes, the process of harmonising excise duty should be to eliminate irregularities arising on transposition of directives.

This study analyses some select decisions of administrative courts that rejected claims for duty reimbursement under the provisions of the Excise Duty Act[1] which are inconsistent with the European Union law. Addressed here, the topic is all the more important because, as a result of incorrect implementation, tax authorities ensured the tightness of the Polish tax system through interpretation of law.

Excise duty is a tax levied on the consumption of certain excise goods. By levying excise duty, the state taxes the consumption of those products in a particular

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[1] Act of 6 December 2008 on excise duty, consolidated text, Dz.U. 2019, item 864, as amended; hereinafter referred to as Excise Duty Act.

manner which are considered by the state to be excise goods. Excise duty is single-phase tax that increases, and becomes an integral part of a price for excise goods. Excise duty is indirect tax, which means that it is a consumer that ultimately bears the cost of excise duty, and not an entity that is formally obliged to calculate and pay excise duty to tax authorities (e.g. manufacturer, importer, distributor). Excise duty is also a selective tax, i.e. tax imposed by the legislator only on certain goods.[2]

These specific arrangements for excise duty in the EU law are confirmed by the Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty[3]. The provisions of the Horizontal Excise Directive clearly indicate that the EU tax law constitutes an independent autonomous legal system.[4] The EU Directive is a basic instrument for harmonising European law, yet it has no equivalent in Polish legislation. The EU Directive is binding in its entirety upon the member states as far as the result is concerned which is to be achieved by introducing the Directive into the legal system.

For the issue in question, it should be noted that reimbursement of excise duty constitutes a payment other than tax as reimbursement results from settlements between a taxpayer and a tax authority.[5] Legal academics and commentators assume that reimbursement is a specific type of entitlement available to a taxpayer that empowers such taxpayer to request a specific action from the tax authority, i.e. to obtain a certain payment from the tax authority, as reimbursement of excise duty already paid. To be eligible for reimbursement of excise duty on intra-Community supply (export) of excise goods, several criteria have to be met.[6] First, the legal basis for reimbursement of excise duty has be included in provisions of substantive tax law and the taxpayer requesting reimbursement has to satisfy conditions specified in the provisions of tax law.[7] Second, reimbursement of excise duty is an instrument directly related to duties already paid. Third, it is the taxpayer's entitlement and never an obligation to submit a request for reimbursement of excise duty. Fourth, a claim for reimbursement should be determined by the tax authority in a tax decision.

Given the above, it should be noted that one is eligible for reimbursement of excise duty if the Excise Duty Act, which regulates rights and obligations of an excise-duty payer, contains clear provisions making it possible for a tax claim to arise and be determined. Should this be the case, at a written request of an entity

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[2] A. Drozdek, *Przesłanki podmiotowe prawa do zwrotu podatku akcyzowego*, Studia Prawnoustrojowe No. 34, 2016, p. 114.

[3] OJ L 9, 14.01.2009, as amended; hereinafter referred to as Directive 2008/118/EC, the Horizontal Excise Directive, or the Directive.

[4] R. Biernat, *Wpływ dyrektyw i rozporządzeń Unii Europejskiej na polskie prawo podatkowe*, Zeszyty Prawnicze No. 14.4, 2014, p. 155.

[5] B. Brzeziński, A. Olesińska, *Glosa do wyroku NSA z dnia 27 listopada 2003 r. (sygn. III SA 2950/02)*, Przegląd Orzecznictwa Podatkowego No. 2, 2015, p. 118.

[6] See M. Popławski, *Charakter prawny instytucji zwrotu podatku*, Państwo i Prawo No. 9, 2007, pp. 86–88; M. Popławski, *Charakterystyka uprawnień podatkowych*, [in:] L. Etel (ed.), *System prawa finansowego*, Vol. III: *Prawo daninowe*, Warszawa 2010, pp. 632–633.

[7] For tax claims, the relationship valid for a tax obligation where the tax authority is a creditor and the taxpayer is a debtor is reversed. This means that the tax authority becomes a debtor, while the taxpayer becomes a creditor entitled to demand certain performance from the other party to the tax relationship; see M. Popławski, *Charakter prawny*, *op. cit.*, p. 78.

requesting reimbursement, the tax authority is obliged to issue a tax decision and determine a correct amount of reimbursement of excise duty on intra-Community supply (export) of excise goods based on such decision.

2. ENTITIES ELIGIBLE FOR REIMBURSEMENT OF EXCISE DUTY UNDER THE EXCISE DUTY ACT

It is Article 82 paras 1 and 2 of the Excise Duty Act where the legislator provided for reimbursement of excise duty. The aforesaid provisions stipulate the possibility of get excise duty reimbursed in Poland in the event of exporting excise goods outside the territory of the Republic of Poland within the meaning of the Act of 12 October 1990 on the state border protection[8]. Article 82 para. 1 provides for reimbursement in the event of intra-Community supply of excise goods, while Article 82 para. 2 is relating to the export of excise goods outside the European Union. In both cases, excise duty must be first paid in Poland.

The analysis of the provisions of the Excise Duty Act leads to interesting conclusions regarding a group of entities eligible for reimbursement of excise duty. Article 82 para. 1 of the Excise Duty Act points out that there are just two "entities" that are eligible for reimbursement, i.e. the taxpayer that made the intra-Community supply (export) of excise goods, or the entity that purchased those excise goods and made the intra-Community supply (export) thereof. Interpretation of the said provision also leads to significant practical problems, which are reflected in the judgment of the Supreme Administrative Court of 29 January 2014[9]. In its judgment, the Court indicated that there are only and exclusively two categories of entities that are eligible for reimbursement. The first category includes taxpayers that have paid relevant excise duty to an appropriate account of the tax authority (as excise-duty payers) and made intra-Community supply or export of excise goods. The second category includes taxpayers that have purchased from the taxpayer excise goods with excise duty already paid and then made an intra-Community supply or export thereof. This means that both the taxpayer that has made the intra-Community supply or export, and the entity other than the taxpayer that has purchased such goods from the taxpayer and subsequently exported them from the territory of Poland are eligible for reimbursement of excise duty. In this case, the exporting entity pays excise duty by settling the price for excise goods purchased from the excise-duty payer that has already paid excise duty to the account of the competent tax authority. In the ruling of 8 December 2015, the Voivodeship Administrative Court in Kraków[10] highlighted that the provisions of the Excise Duty Act entitle no one but the formal taxpayer or the first purchaser of goods following suspension of excise duty, i.e. the first intermediary in the excise goods distribution chain, to reimbursement of excise duty. With this specific interpretation of the Excise Duty Act provisions, neither the

[8] Consolidated text, Dz.U. 2018, item 1869, as amended.
[9] I FSK 284/13, LEX No. 1449673.
[10] I SA/Kr 1267/15, LEX No. 1968471.

second nor any subsequent intermediary trader in excise goods in Poland before such goods are exported to any other member state or outside the European Union customs territory is eligible for reimbursement of excise duty.

In the cases examined herein, the legislator requires a request for reimbursement of excise duty to be submitted. This procedure results from the provisions of the Excise Duty Act indicating that tax reimbursement in the case of an intra-Community supply of excise goods is possible on a written request submitted to a competent head of a tax office together with documents confirming that excise duty has been paid in Poland. In turn, in the case of export of excise goods, reimbursement of excise duty is possible upon a written request submitted to a competent head of the tax office within a year from the date of exporting excise goods, together with documents confirming that excise duty has been paid in Poland, or of documenting the fact of having exported excise goods from Poland outside the customs territory of the European Union in a manner consistent with customs legislation. As referred to herein above, the legal regulation thus indicates the optional nature of the right to reimbursement that may but does not have to be exercised by eligible entities.[11]

The findings above are thus relevant for the subject matter of this study and correspond to the research problem specified in the title hereof. The legal regulations referred to above include a dichotomous division of entities, actually narrowing down the group of entities eligible for reimbursement of excise duty, and, at the same time, indicating steps that should be taken to receive reimbursement of excise duty on intra-Community supply or export. It is, therefore, beyond doubt that the legislator included a exhaustive list of entities authorised to submit a request for reimbursement of excise duty in Article 82 para. 1 of the Excise Duty Act to ensure the tightness of the tax system. As a consequence, no interpretation is acceptable which would "extend" the group of persons that may claim reimbursement of excise duty, as the steps referred to in Article 82 para. 1 of the Excise Duty Act may only and exclusively be taken by entities expressly mentioned therein. When interpreting the provision of Article 82 para. 1, tax authorities primarily aim at ensuring the tightness of the tax system through interpretation of law.

3. RIGHT TO REIMBURSEMENT OF EXCUSE DUTY UNDER DIRECTIVE 2008/118/EC

Grounds for concluding that the Polish legislator ensures the tax system tightness through interpretation are found primarily in recitals of Council Directive 2008/118/EC. According to the recitals, it is necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all member states. Therefore, at the EU level, it has been clarified when excise goods are released for consumption and who is obliged to pay excise duty. Relevant clarification can be found, inter alia, in the provisions of Article 33(1) to (6)

[11] A. Drozdek, *Sądowa kontrola decyzji podatkowych w sprawie zwrotu podatku akcyzowego w przypadku wewnątrzwspólnotowej dostawy wyrobów akcyzowych*, forthcoming.

of the Directive, which set out the rules for reimbursement of excise duty already paid. Therefore, these provisions should be considered as a binding indication for tax authorities of the member states as to who is to be a taxpayer of excise duty tax, including specifically who may claim reimbursement on account of an intra-Community supply or export of excise goods, and in what situations.

It is also important that any supply, storage for the purpose of further supply, or supply to any business entity operating on the self-employed basis, which occurs in the member state other than the member state where the release for consumption takes place, results in excise duty chargeable in such other member state. The above-specified rule clearly indicates that the payment of excise duty in the member state where the release for consumption takes place has to result in reimbursement of excise duty in the case where the goods concerned have been exported to any other member state or outside the EU, whenever law is interpreted in accordance with the purpose of Directive 2008/118/EC. This means that the EU member state is obliged to reimburse excise duty paid in that member state if excise goods have been moved to another member state or exported outside the European Union. And this is how the principle of single tax at the place of consumption is implemented.

This view is shared by legal academics and commentators, and reflected in judicial decisions. As far as the judicial decisions are concerned, even the Supreme Administrative Court clearly emphasized in its justification to the judgment of 28 February 2017 that the comparison between Article 22(2) Directive 2008/118/EC and Article 82 para. 1 of the Excise Duty Act leads to the conclusion that the tax authority interprets the national provision that is inconsistent with the EU provision, and thereby tightens the tax system. The argument supporting this view is the fact that Article 82 para. 1 narrows down the group of entities eligible for reimbursement of excise duty to entities that have purchased excise goods from the excise-duty payer. In turn, it is clear from Article 22(1) and (2) of Directive 2008/118/EC that the reimbursement of excise duty in the situation described in (1) takes place if the goods subject to a dispatch to another country have been taxed in the country of dispatch, regardless of who traded in these excise goods in the country of dispatch, and how many times. Given the above-described unambiguous wording of Directive 2008/118/EC, subsequent traders in excise goods, who have purchased these goods from the first intermediary, should apply for reimbursement of excise duty because they are eligible for reimbursement under the EU regulations.[12] Although the provisions of the Directive authorise individual member states to introduce their own excise duty reimbursement procedures, these procedures cannot prevent certain categories of suppliers, including intermediaries trading in excise goods, from claiming reimbursement of excise duty. The provisions of the Horizontal Excise Directive neither restrict reimbursement of excise duty to any specific type(s) of entities from which taxed excise goods[13] have been purchased, nor do they authorise member states to introduce any such restriction. This view is

[12] Judgment of the Supreme Administrative Court of 28 February 2017, I GSK 1967/15, LEX No. 2274855.

[13] Judgment of the Supreme Administrative Court of 28 February 2017, I GSK 2029/15, LEX No. 2284713.

confirmed by Article 9 of Directive 2008/118/EC that does not entitle any member state to introduce any such restriction as to the entities eligible for reimbursement of excise duty. Evidence to support this claim can be found in Article 33(1) of Directive 2008/118/EC, which provides that "where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State". It is clear from the provision of Article 33 of Directive 2008/118/EC that excise duty should be reimbursed where excise goods, which are dispatched to another country, are subject to excise duty in the country of dispatch, and it does not matter who has traded in these goods in the country of dispatch, and how many times. The unambiguous wording of the Directive allows the conclusion that also further entities trading in excise goods first purchased from the first intermediary are entitled to reimbursement of excise duty. The above-mentioned provision of the Directive thus grants the right of reimbursement to all and any purchasers, i.e. not only to the first intermediary, but also to any further intermediaries in the process of trading in excise goods, provided, however, that they have necessary documents to prove that excise duty has been settled in Poland, and other documents required under excise tax regulations. Moreover, Article 33(6) of the Directive indicates that excise duty should be reimbursed or remitted in the member state where the release for consumption has taken place if competent authorities of the other member state find that excise duty has become chargeable and has been collected in that member state.

The excise duty reimbursement solutions adopted in the Polish Excise Duty Act violate rules arising from the EU law, and thus deprive the EU law of effectiveness. It is, therefore, clear that, by ensuring the tightness of the tax system through interpretation of law, the tax authorities prevent certain entities from getting reimbursement of excise duty paid in the territory of Poland. In this way, tax authorities allow the possibility of the same goods being subject to excise duty in two member states, which is contrary to the principle of taxation in the country of consumption or the principle of single excise duty. This principle results from recital 28 of Directive 2008/118/EC, which allows the possibility of excise goods being taxed in the country of their consumption, as well as the obligation to reimburse duty paid where goods were not consumed in the country but moved to another member state. This means that both the taxpayer that has made an intra-Community supply or export, and the entity that is not the taxpayer and has purchased such goods from the taxpayer and then exported them from the territory of Poland are eligible for reimbursement of excise duty. In this case, the exporting entity pays excise duty by settling the price for the excise goods purchased from the excise-duty payer who has first paid excise duty to the tax authority.[14]

When examining the legal issue of refusal to reimburse excise duty in order to ensure the tightness of the tax system through interpretation of law, it should be pointed out that any formulation of legal provisions that are inconsistent with

[14] A. Drozdek, *Przesłanki podmiotowe*, *op. cit*., p. 119; Judgment of the Supreme Administrative Court of 29 January 2014, I FSK 284/13, LEX No. 1449673.

the EU law makes persons dispatching excise goods to another member state or outside the territory of the Union feel insecure. Such insecurity may increase due to violation of the rules of the EU excise duty system, whose primary purpose is to effectively levy excise duty on excise goods in the country of their consumption, and to make excise goods subject to taxation only once.[15] As a consequence, taxpayers are eligible for reimbursement of any excise duty paid in situations where excise duty is paid in one member state and then the excise goods are exported to another member state or outside the EU. In these cases, the EU regulations require the introduction of the excise duty reimbursement procedure in case of entities that have incurred the cost of excise duty and have dispatched excise goods outside the territory of a given member state. The rule is that intra-Community supplies or exports of excise goods are not subject to excise duty in Poland. Assuming that intra-Community acquisitions or imports of excise goods is subject to excise duty in a supplier's country, any excise duty already paid in Poland should be reimbursed to the supplier. Therefore, if there is an intra-Community supply (export) of excise goods on which excise duty has been paid in Poland, such excise duty should be reimbursed both to the excise-duty payer that has made the intra-Community supply or export, and to other entities that have purchased these goods from the taxpayer and subsequently made intra-Community delivery or export.[16]

The use of the following terms in the provisions of the Excise Duty Act:

1) taxpayer who has made an intra-Community supply (export) of excise goods;
2) entity that has purchased excise goods from the taxpayer and made their intra-Community supply (export),

serves to tighten the tax system through interpretation of law. Following this view, the present Excise Duty Act, when read literally, leads to an erroneous conclusion and, consequently, to double taxation of the same excise goods, which is contrary to the principle whereby excise duty is a single-phase tax. Restriction as to the group of entities deemed eligible for reimbursement in the case of intra-Community supplies and exports of excise goods results in a situation where excise duty is paid by both the excise-duty payer in the country of dispatch and the excise-duty payer in the country of delivery (import). Double excise duty is clearly in contradiction with the basic principles governing this tax. Where excise goods with excise duty paid are held in the member state other than the one in which they have originally been admitted to trading, such duty is to be reimbursed or remitted. Therefore, the provisions of the Excise Duty Act should not be interpreted in a way that is inconsistent with the wording and purpose of the EU regulation. Furthermore, Article 33 of the Directive leaves no room for introduction of any additional regulations by member states that would undermine such reimbursement.[17]

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[15] See S. Parulski, *Akcyza. Komentarz*, Warszawa 2016, p. 886.

[16] See J. Matarewicz, *Ustawa o podatku akcyzowym. Komentarz*, Warszawa 2014, p. 473.

[17] A. Drozdek, *Zwrot podatku akcyzowego z tytułu eksportu towarów na podstawie przepisu krajowego niezgodnego z prawem unijnym w świetle orzecznictwa sądów administracyjnych*, Monitor Prawa Celnego i Podatkowego No. 10 (267), 2017, pp. 378–379.

4. OBLIGATION TO INTERPRET POLISH TAX LAW IN ACCORDANCE WITH EU LAW

The interpretation of the provisions of Directive 2008/118/EC adopted by the tax authority is actually the *contra legem* interpretation. This is because the tax authority assumes that there are preconditions contained in the herein analysed provisions that affect a tax base.

Acceptance of the interpretation of the disputed provisions of the Excise Duty Act is clearly inconsistent with the literal wording of Article 33 of Directive 2008/118/EC, as this, according to the tax authority, would lead to the tax base being established based on non-statutory criteria, which in turn would constitute a gross violation of Article 217 of the Constitution.[18] It should be noted here that, pursuant to Article 217 of the Constitution, the imposition of taxes, as well as other public imposts, the specification of those subject to tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, must be effected by means of statute. It is, therefore, beyond any doubt that this is actually the situation with reimbursement of excise duty in the event of intra-Community supplies or exports of excise goods outside Poland, and such situation is unfavourable for the taxpayer.[19]

Given the above-presented legal deliberations regarding the right to reimbursement of excise duty on an intra-Community supply (export), it should be noted that the tax authority should abandon any linguistic interpretation and primarily rely on constitutional values. Pursuant to the provision of Article 91 of the Constitution, directives are a source of law which is formally binding. Article 91 para. 3 of the Constitution confirms a multi-component structure of the Polish legal system and consequences thereof for the application of law, by entering the rule into the Constitution that European Union law shall have primacy where there is conflict between the EU law and national law.[20] The principle of primacy of the European law requires all rules of the EU law to be applied where there is any conflict between the EU law and any previous or subsequent national regulation of any member state. On the other hand, the principle of direct effect means that any rights conferred on individuals by the EU law can be directly invoked before national authorities for the purpose of exercising such rights, provided that the following conditions are met:

1) provisions of a directive are precise and unconditional;
2) rights of individuals against the state arise from the rules of the directive;
3) deadline for implementation of the directive by the member state has expired and rules contained therein have not been implemented or have been incorrectly implemented.

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[18] Constitution of the Republic of Poland of 2 April 1997, Dz.U. No. 78, item 483, as amended; hereinafter referred to as the Constitution.

[19] M. Zieliński, *Wyznaczniki reguł wykładni prawa*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 3–4, 1998, pp. 17–18.

[20] Judgments of the Supreme Administrative Court: of 5 December 2013, I GSK 280/12, LEX No. 1528821; of 28 February 2017, I GSK 1967/15, LEX No. 2274855.

The Court of Justice of the European Union also has repeatedly emphasized direct vertical effect of directives, i.e. the possibility for an individual to directly invoke effective rules of the Community law against the state, because no member state can derive benefits from its own unlawful conduct, *ex injuria non oritur ius*.[21] There is a statement that can be found in the literature and I share that the purpose of the Directive should be sought in the recitals of Directive 2008/118/EC. The recitals contain guiding principles for a given legal regulation, as well as declarations and rulings which play a directional role in the process of interpreting an operative part of the Directive.[22] As far as reimbursement of excise duty is concerned, when determining the significance of a national rule constituting a measure for implementing the Horizontal Excise Duty Directive, the tax authority should first refer to the EU law in which the implemented tax rule is embedded. At the same time, any regulation of tax law by way of a statute or directive requires simultaneous interpretation of the two texts, i.e. national law and the EU law. This, in turn, involves systemic interpretation of national law, which gains importance in the context of the EU law, especially when the national legislator has not properly fulfilled its obligation to implement the Directive. The Excise Duty Act must be thus understood in the specific context of the purpose and content of the provisions of Directive 2008/118/EC, which have been incorrectly implemented in so far as they relate to the taxpayer's right to reimbursement of excise duty on an intra-Community supply (export) of excise goods, and, as such, ensure the tightness of the tax system.

The obligation to interpret national law in accordance with the EU law was formulated by the Court of Justice of the European Union. Relevant rulings include but are not limited to the judgment of 13 November 1990, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, case C-106/89,[23] in which the Court emphasized that incorrect implementation of directives opens a possibility for systemic interpretation, thus allowing achievement of fundamental purposes of a horizontal directive. The case-law indicates that the result of linguistic interpretation basically determines which tax law rule, i.e. national or European, becomes the basis for settling a given case. The significance of any provision of national tax law in the light of Directive 2008/118/EC is to be interpreted as far as it is required to achieve the purpose set out in the Directive recitals.

It follows that, in applying national law, the tax authority is required to interpret provisions thereof, whether adopted before or after the Directive, as far as possible in the light of the wording and purpose of the Directive in order to achieve the

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[21] See the judgment of the European Court of Justice of 4 December 1974, case 41/74, *Y. van Duyn v. Home Office*, ECLI:EU:C:1974:133, LEX No. 84379, highlighting that the possibility to invoke direct effect of any provision of the directive is a right of an entity upon which such directive confers an entitlement that cannot be exercised due to fault on the side of the EU member state; and the CJEU judgment of the European Court of Justice of 8 October 1987, case 80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431, LEX No. 129563, highlighting that no member state can invoke against individuals any provision of the directive that has not been implemented or has been incorrectly implemented.

[22] D. Antonów, *Wykładnia prawa podatkowego po wstąpieniu Polski do Unii Europejskiej*, Warszawa 2009, p. 210.

[23] ECLI:EU:C:1990:395, LEX No. 124953, ECR 1990/10/I-4135.

result pursued by it, and thereby comply with the third paragraph of Article 189 of the Treaty[24]. This means that the primary purpose of systemic interpretation is to ensure compliance between rules that belong to separate legal systems (i.e. Polish law and the EU law) and to inspire an authority, which applies national law, to choose such result of interpretation that ensures the highest possible effectiveness of the EU law. Consequently, the tax authority should interpret existing internal law in such a way as to incorporate both the content and purpose of a relevant provision of European law. Member state authorities may neither invoke direct effect of any directive, nor correct defective or imprecisely implemented national provisions by applying pro-European Union interpretation of the latter in line with the purposes of such directive, if this would adversely affect the taxpayer's more favourable position guaranteed under national law.[25] In the tax relationship between the taxpayer and the tax authority, a directive has direct effect and can be the basis for a decision, provided that the deadline for its implementation by the member state expired, the directive was implemented after the deadline or not in accordance with its content, and, moreover, where the directive is clear, precise and unconditional. Directives are directly effective acts of the EU law as they can be used as the basis for reconstruction of an explicit legal rule. This view is supported by the argument that an act of the European Union law, whose provisions are directly effective, may constitute (and constitutes) a benchmark for controlling operations of public administration with regard to their compliance with law, including compliance with the EU law. This is connected with the obligation of the national authorities applying law to perform an integrating function consisting in the application of EU law. If a national provision does not comply with a provision of the Directive, the tax authority has the right to apply the EU provision directly. This power arises from both the principle of primacy and the principle of direct effect of the EU law. In this situation the obligations of tax authorities with regard to the application of the EU tax law should be primarily fulfilled through interpretation of law. The interpretation process is not only intended to understand the text of a legal act, but also, in a sense, guarantees the effectiveness of the EU law in the national legal system.

In the light of the above deliberations, it should be concluded that tax authorities should refrain from applying a national statutory rule pursuant to the principle of primacy of the EU law whenever there is any conflict between such rule of national law and the EU law. Then, a directly effective provision of Directive 2008/118/EC or any other national provision interpreted in accordance with the Directive should apply. This link between systemic interpretation and the principle of primacy of the EU law results in the refusal to apply national provisions that are inconsistent with the content of the EU provisions. The tax authority is under the obligation of correct interpretation, i.e. the tax authority must demonstrate that it has exercised care in selecting interpretation methods and has competence to use them. It should be noted that the fundamental objective of systemic interpretation is to guarantee

[24] Treaty on the Functioning of the European Union of 13 December 2007, consolidated version, OJ C 202, 7.6.2016, p. 47.

[25] Judgment of the Supreme Administrative Court of 10 March 2015, I FSK 100/14, LEX No. 1772571.

compliance between rules under Polish law and those of the EU law, and to indicate such result of interpretation to the authority applying national law which ensures the highest possible effectiveness of the EU law.

5. CONCLUSIONS

The discussion presented in this study makes it possible to formulate general conclusions.

When denying the right to reimbursement of excise tax in order to ensure tightness of the tax system, the tax authority should first compare the content of the transposed provision of Directive 2008/118/EC and the Excise Duty Act. In the event that the EU rules conflict with the wording of the national provision and the taxpayer requests that the EU rule be applied in the manner specified in the Directive, the tax authority should not apply the rule of national law resulting from the Excise Duty Act, and make it possible for the taxpayer to benefit from the EU regulation, i.e. Directive 2008/118/EC. It should be clearly emphasized that this principle follows from the provision of Article 120 of the Tax Ordinance[26] stipulating that tax authorities operate on the basis of legal provisions. Being a member of the European Union, Poland is obliged to give priority to the EU tax law.

Based on the analysis presented in this paper, it should be noted that as a general rule in most cases systemic and teleological interpretation should be followed when the provisions of Directive 2008/118/EC are to be applied. Interpretation by reference to recitals and to purposes of a regulation that are contained therein is a common method of interpreting law which should be employed by the tax authority. The tax authority's interpretation strategy should consist in making use of the systemic interpretation approach to refer to a specific fragment of the legal act being interpreted, i.e. recitals. The primary purpose of the systemic interpretation is to ensure compliance between provisions belonging to separate legal systems, i.e. of the Polish law and those of the EU law, and to indicate such result of interpretation to the authority applying national law that would ensure the highest possible effectiveness of the EU law. Consequently, the tax authority should interpret existing domestic law in such a way as to reflect both the content and purpose of the provision of the EU law. Then, through the teleological interpretation, the tax authority should retrieve the purpose of the regulation defined in recitals, by reconstructing the teleological context in which the interpreted provisions should be embedded. The teleological interpretation of the EU law requires that the purposes of specific legal solutions be taken into account rather than the literal wording of the provisions containing such solutions.

In addition, it should be emphasized that the pro-EU interpretation should be followed at the discretion of the authority applying law as far as possible to achieve the result set out in Directive 2008/118/EC. There is no obligation to interpret *contra*

[26] Act of 29 August 1997: Tax Ordinance, consolidated text, Dz.U. 2019, item 900, as amended.

legem or in a way that would undermine or reject national law. In relevant circumstances, the authorities have thus the obligation not to apply national law that is inconsistent with the EU law; consequently, the principle of primacy is followed to replace a national rule with an EU rule.

It should also be emphasized that the tax authority acting within its competence as an authority of a member state, is obliged to follow the principle of cooperation under Article 10 of the EC Treaty[27] and fully apply the directly applicable EU law, and ensure the protection of individuals' rights arising from such EU law by refusing to apply any provision of national law that would possibly conflict with such EU law, whether such national law is adopted before or after the provision of the EU law.

As a consequence, tax authorities should apply the Directive in a manner consistent with the provisions of the Constitution, specifically Article 217, as far as tax obligations are concerned. Article 217 of the Constitution referred to above, interpreted together with Articles 2 and 7 of the Constitution, sets fundamentals in the Polish tax system for protecting entities subject to fiscal provisions against steps taken by tax authorities to ensure the tax system tightness through interpretation of law.

Until 28 February 2017, case law presented diversified approaches. Some adjudication panels of administrative courts held the view that each entity was eligible for reimbursement of excise duty on intra-Community supplies of goods or exports of excise goods. According to a different adjudication method, however, which was followed in most administrative court decisions regarding reimbursement, it was only the taxpayer, i.e. a person who actually paid applicable excise duty to an account of a competent tax authority, who could submit a reimbursement request. After 28 February 2017, there was a significant shift in decisions issued by administrative courts. Case law established after that date confirmed that every entity that made intra-Community supply of goods or exported excise goods had the right to request reimbursement.

However, there is no doubt that the provisions of the Excise Duty Act are inconsistent with the EU law. When incorporating Directive 2008/118/EC into Polish law, the legislator tightened the tax system, thus depriving the EU law applied by tax authorities and administrative courts of full effectiveness and primacy.

Depriving an excise-duty payer of right to reimbursement of excise duty is by no means acceptable. It should be borne in mind that Directive 2008/118/EC constitutes a set of provisions for harmonisation of excise duty, and any incorrect implementation hinders business operations or even prevents honest taxpayers from conducting business activity by diminishing their feeling of legal security.

[27] Treaty of 25 March 1957 establishing the European Community, Dz.U. 2004, No. 90, item 864/2, as amended.

BIBLIOGRAPHY

Antonów D., *Wykładnia prawa podatkowego po wstąpieniu Polski do Unii Europejskiej*, Warszawa 2009.

Biernat R., *Wpływ dyrektyw i rozporządzeń Unii Europejskiej na polskie prawo podatkowe*, Zeszyty Prawnicze No. 14.4, 2014.

Brzeziński B., Olesińska A., *Glosa do wyroku NSA z dnia 27 listopada 2003 r. (sygn. III SA 2950/02)*, Przegląd Orzecznictwa Podatkowego No. 2, 2015.

Drozdek A., *Przesłanki podmiotowe prawa do zwrotu podatku akcyzowego*, Studia Prawnoustrojowe No. 34, 2016.

Drozdek A., *Zwrot podatku akcyzowego z tytułu eksportu towarów na podstawie przepisu krajowego niezgodnego z prawem unijnym w świetle orzecznictwa sądów administracyjnych*, Monitor Prawa Celnego i Podatkowego No. 10 (267), 2017.

Drozdek A., *Sądowa kontrola decyzji podatkowych w sprawie zwrotu podatku akcyzowego w przypadku wewnątrzwspólnotowej dostawy wyrobów akcyzowych*, forthcoming.

Matarewicz J., *Ustawa o podatku akcyzowym. Komentarz*, Warszawa 2014.

Parulski S., *Akcyza. Komentarz*, Warszawa 2016.

Popławski M., *Charakter prawny instytucji zwrotu podatku*, Państwo i Prawo No. 9, 2007.

Popławski M., *Charakterystyka uprawnień podatkowych*, [in:] L. Etel (ed.), *System prawa finansowego*, Vol. III: *Prawo daninowe*, Warszawa 2010.

Zieliński M., *Wyznaczniki reguł wykładni prawa*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 3–4, 1998.

RIGHT TO REIMBURSEMENT OF EXCISE DUTY VERSUS TIGHTENING OF TAX SYSTEM THROUGH INTERPRETATION OF LAW

Summary

Reimbursement of excise duty is an essential element of this tax recovery process. Tax authorities refuse to comply with the obligation to reimburse excise duty on an intra-Community supply (export) of excise goods within a statutory period, although the obligation is binding on them. When ensuring the tightness of the tax system, the tax authority should first compare the content of the transposed provision of Directive 2008/118/EC and the Excise Duty Act. In the event that the EU rules conflict with the wording of the national provision and the taxpayer requests that the EU rule be applied in the manner specified in the Directive, the tax authority should refuse to apply the rule of national law resulting from the Excise Duty Act, and make it possible for the taxpayer to benefit from the EU regulation. It should be borne in mind that the tax authority is under the obligation to interpret national law in compliance with the purpose of the Directive and such interpretation should be preceded by determination of that purpose. A method of interpretation must ensure that the purpose of the Directive is determined. The objective of the analysis offered herein is to explore issues pertaining to interpretation of the Directive concerning general arrangements for excise duty. Due to improper implementation, the arrangements ensured the tightness of the tax system through legal interpretation. Nevertheless, it is claimed that grounds for proper implementation of the Directive are provided by the obligation to follow a pro-EU interpretation that should be preceded with reconstruction of the purpose of the regulation as defined in the recitals, as far as possible in order to achieve the effect specified in the Directive 2008/118/EC.

Keywords: reimbursement of excise duty, tightness of the tax system, interpretation of law

PRAWO DO ZWROTU PODATKU AKCYZOWEGO A ZAPEWNIENIE SZCZELNOŚCI SYSTEMU PODATKOWEGO W DRODZE WYKŁADNI PRAWA

Streszczenie

Instytucja określenia zwrotu podatku akcyzowego stanowi istotny element odzyskania tego świadczenia. Organy podatkowe, pomimo istnienia obowiązku zwrotu podatku akcyzowego z tytułu wewnątrzwspólnotowej dostawy (eksportu) wyrobów akcyzowych w ustawowym terminie, odmawiają podatnikom prawa do zwrotu podatku akcyzowego. Organ podatkowy, zapewniając szczelność systemu podatkowego, w pierwszej kolejności powinien porównać treść transponowanego przepisu dyrektywy 2008/118/WE z ustawą o podatku akcyzowym. W przypadku gdy normy unijne prowadziłyby do sprzeczności z brzmieniem przepisu krajowego, organ podatkowy powinien – jeśli podatnik domaga się zastosowania tej normy w sposób określony w dyrektywie – odmówić zastosowania normy prawa krajowego wynikającej z ustawy o podatku akcyzowym i umożliwić mu skorzystanie z unormowania unijnego. Należy bowiem pamiętać, że na organie podatkowym ciąży obowiązek przeprowadzenia wykładni prawa krajowego z zgodnie z celem dyrektywy. Czynność ta niewątpliwie powinna być poprzedzona ustaleniem celu dyrektywy. Sposób przeprowadzenia wykładni musi zapewnić ustalenie celu tej regulacji. Niniejszy artykuł analizuje problematykę wykładni dyrektywy w sprawie ogólnych zasad dotyczących podatku akcyzowego, które w wyniku nieprawidłowej implantacji zapewniły w drodze wykładni prawa szczelność systemu podatkowego. Autor podnosi jednak, że podstawą do przeprowadzenia prawidłowej implementacji dyrektywy jest obowiązek dokonania wykładni prounijnej, która powinna być poprzedzona odtworzeniem zdefiniowanego w preambule celu regulacji tak dalece, jak jest to możliwe, aby osiągnąć rezultat określony w dyrektywie 2008/118/WE.

Słowa kluczowe: zwrot podatku akcyzowego, szczelność systemu podatkowego, wykładnia prawa

DERECHO DE DEVOLUCIÓN DE ACCISA Y LA SEGURIDAD DE HERMETICIDAD DEL SISTEMA TRIBUTARIO EN VIRTUD DE LA INTERPRETACIÓN DE LA LEY

Resumen

La institución de determinación de la devolución de accisa es un elemento importante para recibir esta prestación. Los órganos tributarios, a pesar de la existencia de la obligación de devolución de accisa en concepto de la entrega intracomunitaria (exportación) de productos sometidos a accisa en el plazo legalmente establecido, niegan su devolución a los tributarios. El órgano tributario, a la hora de asegurar la hermeticidad del sistema tributario, en primer lugar debería comparar el contenido del precepto de la directiva 2008/118/CE implementada, con la ley de accisa. En caso la normativa comunitaria sea contraria con el precepto nacional, el órgano tributario deberá – si el sujeto obligado quiere que se aplique la norma de la forma determinada en la directiva – negarse a aplicar la norma de derecho nacional resultante de la ley de accisa y permitirle al sujeto obligado el uso de la regulación comunitaria. Hay que recordar que el órgano tributario tiene la obligación de interpretar el derecho nacional de acuerdo con la finalidad de la directiva, la interpretación ha de ser precedida por la determinación de la finalidad de esta

regulación. La finalidad del presente artículo es un análisis de problemas de la interpretación de la directiva en cuanto a las reglas generales aplicables a accisa, que debido a la implementación incorrecta garantizaron, mediante su interpretación, la hermeticidad del sistema tributario. El autor, sin embargo sostiene que el fundamento para implementar correctamente la directiva consiste en la obligación de efectuar una interpretación pro comunitaria, que ha de ser precedida por la reproducción de la finalidad de la regulación definida en preámbulo, de la forma extensa posible, para conseguir el resultado determinado en la directiva 2008/118/CE.

Palabras claves: devolución de accisa, hermeticidad del sistema tributario, interpretación de derecho

ПРАВО НА ВОЗВРАТ АКЦИЗНОГО НАЛОГА В СВЕТЕ ОБЕСПЕЧЕНИЯ ЖЕСТКОСТИ НАЛОГОВОЙ СИСТЕМЫ ПУТЕМ ТОЛКОВАНИЯ ЗАКОНОДАТЕЛЬСТВА

Резюме

Определение размера акцизного налога, подлежащего возврату, является важным элементом акцизной процедуры. Однако, налоговые органы, несмотря на существовании обязанности возвратить акцизный налог в установленные сроки при поставках подакцизных товаров внутри Европейского Союза (экспорт в страны ЕС), отказывают налогоплательщикам в праве на возврат акцизного налога. При обеспечении жесткости налоговой системы налоговый орган обязан, прежде всего, сравнить содержание транспонированного положения Директивы 2008/118/ЕС с Законом «Об акцизном налоге». В случае, когда нормы ЕС находятся в противоречии с положениями национального законодательства, налоговый орган обязан (если налогоплательщик требует применения норм, установленных Директивой), отказаться от применения положений национального законодательства, вытекающих из Закона «Об акцизном налоге», предоставляя налогоплательщику возможность воспользоваться нормами ЕС. Имея в виду, что налоговый орган обязан толковать национальное законодательство в соответствии с целями Директивы, такому толкованию, безусловно, должно предшествовать определение целей Директивы. Толкование должно осуществляться таким образом, чтобы цели Директивы были определены и учтены. Автор статьи анализирует проблематику, связанную с толкованием Директивы в части общих правил акцизного налогообложения, в результате неправильной имплементации которых при толковании законодательства налоговая система приобретает чрезмерную жесткость. По утверждению автора, правильная имплементация Директивы 2008/118/ЕС требует проевропейского ее толкования. Такому толкованию Директивы должно предшествовать определение целей, установленных в ее преамбуле, с тем, чтобы эти цели были по мере возможности достигнуты.

Ключевые слова: возврат акцизного налога, жесткость налоговой системы, толкование законодательства

DER ANSPRUCH AUF VERBRAUCHSTEUERERSTATTUNG UND DIE GEWÄHRLEISTUNG EINER STRAFFUNG DES STEUERSYSTEMS IM WEGE DER RECHTSAUSLEGUNG

Zusammenfassung

Die Regelung der Verbrauchsteuererstattung ist ein wesentliches Element zur Einziehung dieser Leistung. Die Steuerbehörden verweigern Steuerpflichtigen aber, trotz Pflicht zur Rückerstattung der Verbrauchsteuer für die innergemeinschaftliche Lieferung (Ausfuhr) von verbrauchsteuerpflichtigen Waren innerhalb der gesetzlich vorgesehenen Frist, ihren Anspruch auf eine Verbrauchsteuererstattung. Die Steuerverwaltung hat, um eine Straffung des Steuersystems sicherzustellen, in erster Linie den Inhalt der umgesetzten Richtlinie 2008/118/EG mit dem polnischen Verbrauchsteuergesetz abzugleichen. Kollidieren die Unionsnormen mit dem Wortlaut der Vorschrift des nationalen Rechts, muss die Steuerverwaltung – wenn der Steuerpflichtige die Anwendung dieser Norm in der Form fordert, wie sie in der Richtlinie geregelt ist – die Anwendung der Vorschrift des nationalen Rechts gemäß dem polnischen Verbrauchsteuergesetz ablehnen und es ihm ermöglichen, die anwendbaren EU-Rechtsvorschriften in Anspruch zu nehmen. Es ist nämlich zu bedenken, dass die Steuerverwaltung zur Auslegung des nationalen Rechts im Einklang mit der Zielsetzung der Richtlinie verpflichtet ist und dem hat zweifellos die Feststellung vorauszugehen, welche Ziele die Richtlinie verfolgt. Die Art und Weise der Auslegung muss sicherstellen, dass die Zielsetzung dieser Vorschriften festgestellt wird. Ziel der im Artikel angestellten Überlegungen ist eine Analyse der Auslegung der europäischen Richtlinie über die allgemeinen Regelungen über die Verbrauchsteuer, die infolge der fehlerhaften Umsetzung im Wege der Rechtsauslegung zu einer Straffung des Steuersystems geführt haben. Der Autor argumentiert jedoch, dass Grundlage für eine korrekte Umsetzung der Richtlinie die Pflicht zu einer unionsrechtskonformen Auslegung ist, der – so weit wie möglich – die Wiedergabe der in der Präambel definierten Zielsetzung der Richtlinie voranzugehen hat, um das in der Richtlinie 2008/118/EG bezeichnete Ziel zu erreichen.

Schlüsselwörter: Verbrauchsteuererstattung, Straffung des Steuersystems, Rechtsauslegung

LE DROIT À UN REMBOURSEMENT DES DROITS D'ACCISES ET L'ASSURANCE DU RESSERREMENT DU SYSTÈME FISCAL PAR UNE INTERPRÉTATION DE LA LOI

Résumé

L'institution de la détermination du remboursement des droits d'accise est un élément important pour récupérer cet avantage. Les autorités fiscales, malgré l'obligation de rembourser les droits d'accise pour la livraison intracommunautaire (exportation) de produits soumis à accise dans les délais réglementaires, refusent aux contribuables le droit de remboursement des droits d'accises. Les autorités fiscales, qui veillent à la rigidité du système fiscal, devraient tout d'abord comparer le contenu de la disposition transposée de la directive 2008/118/CE à la loi sur les droits d'accise. Au cas où les normes de l'UE entraîneraient une contradiction avec le libellé d'une disposition nationale, l'autorité fiscale devrait – si le contribuable demande que la norme soit appliquée de la manière indiquée dans la directive – refuser d'appliquer la norme de droit national résultant de la loi sur les droits d'accise et lui permettre de bénéficier de la norme de l'UE. Il convient de rappeler que les autorités fiscales sont tenues d'interpréter le droit

national conformément à l'objectif de la directive, qui devrait sans aucun doute être précédé par l'établissement de l'objectif de la directive. La méthode d'interprétation doit garantir que l'objectif du règlement est établi. Le but de l'analyse entreprise dans cet l'article est d'analyser le problème de l'interprétation de la directive sur les règles générales en matière d'accises, qui, du fait d'une implantation irrégulière, garantissait de par la loi le resserrement du système fiscal. L'auteur affirme toutefois que la mise en œuvre correcte de la directive repose sur l'obligation d'interprétation pro-UE, qui devrait être précédée de la reproduction de l'objectif réglementaire défini dans le préambule, dans la mesure du possible afin d'obtenir le résultat spécifié dans la directive 2008/118/CE.

Mots-clés: remboursement des droits d'accise, resserrement du système fiscal, interprétation de la loi

DIRITTO AL RIMBORSO DELL'ACCISA E PREVENZIONE DELL'EVASIONE FISCALE ATTRAVERSO L'INTERPRETAZIONE DEL DIRITTO

Sintesi

L'istituzione del rimborso dell'accisa costituisce un elemento essenziale per recuperare tale prestazione. Le autorità tributarie, nonostante l'esistenza dell'obbligo di rimborso dell'accisa a titolo di cessione intracomunitaria (esportazione) di prodotti soggetti ad accisa entro il termine di legge, negano ai contribuenti il diritto al rimborso dell'accisa. L'autorità tributaria per prevenire l'evasione fiscale in primo luogo deve confrontare il contenuto della disposizione recepita della direttiva 2008/118/CE con la legge sull'accisa. Nel caso in cui le norme comunitarie fossero in contraddizione con le norme nazionali, l'autorità tributaria deve – se il contribuente richiede l'applicazione di tale norma nel modo stabilito nella direttiva – negare l'applicazione delle norme del diritto nazionale derivanti dalla legge sull'accisa e permettere al contribuente di beneficiare della regolamentazione comunitaria. Bisogna infatti ricordare che l'autorità tributaria ha l'obbligo di interpretare il diritto nazionale conformemente al fine della direttiva, e tale attività indubbiamente deve essere preceduta dalla determinazione del fine della direttiva. La modalità di interpretazione deve assicurare la determinazione del fine di tale regolamentazione. Obiettivo dell'analisi intrapresa nel presente articolo è l'analisi delle problematiche di interpretazione della direttiva sui principi generali riguardanti l'accisa, che in conseguenza di una scorretta implementazione garantiscano attraverso interpretazione del diritto la prevenzione dell'evasione fiscale. L'autore sostiene tuttavia che la base per la corretta implementazione della direttiva è l'obbligo di interpretazione conforme al diritto dell'Unione, che deve essere preceduta per quanto possibile dalla determinazione del fine della regolamentazione, definito nel preambolo, per poter ottenere il risultato stabilito nella direttiva 2008/118/CE.

Parole chiave: rimborso dell'accisa, prevenzione dell'evasione fiscale, interpretazione del diritto

Cytuj jako:

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BITCOIN VERSUS MONEY: CIVIL-LAW ANALYSIS OF THE CONCEPT

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"Bitcoin" (symbols: BLC, XBT) is a type of the so-called cryptocurrencies (virtual digital currency) and, in fact, it is the most popular of them all.[1] It attracts great interest, which has increased significantly, especially last year.[2] Up till now, bitcoin has been commonly used as a unit of account. At present, because of considerable fluctuation of its value, the function has been gradually losing its importance. Actually, bitcoin itself often becomes an object of transactions.[3]

Making an attempt to explain what bitcoin is, it is necessary to start with the description of its characteristic features. What draws attention is the fact that bitcoin (like other cryptocurrencies) is electronically generated. It is a unit without a central issuing bank and is created on the internet with the use of a special algorithm by users participating in a transaction, who mine particular bitcoins. Thus, it is not issued within a legal system of any country. A private nature of issuing within the network of users guarantees anonymity concerning the possession and transfer of the amount of bitcoin.

Also security within transaction authorisation is conducive to interest in the phenomenon. Bitcoin is based on the technology of decentralised database (block-

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1 The remaining ones are called "altcoin". These are, e.g.: Ethereum (ETHUSD), Litecoin (LTCUSD), Ripple (XRPUSD), Dash (DSHUSD).

2 Big interest in bitcoin and other virtual currencies resulted in the Announcement of Narodowy Bank Polski (Polish Central Bank) and the Polish Financial Supervision Authority (KNF) concerning virtual "currencies": https://www.knf.gov.pl/komunikat_mobilny?articleId=57363&p_id=18.

3 There are many bitcoin stock exchanges, which record its current exchange rate usually expressing it in a foreign currency (often in American dollar or euro). The website www.blockchain.info provides the exchange rate of bitcoin in USD together with a full history of its rate. The national stock exchanges record it in PLN. The examples of Polish stock exchanges are: Beatcoin.pl; Coinroom.com; BitMarket.pl; nevbit.com.

chain), which ensures security of its creation and then transactions with its use. It is connected with the fact that the currency generated with the use of cryptography[4] cannot be duplicated, i.e. it is not possible to be used again by the same person (double-spending), copied or falsified.[5] The production of bitcoin, i.e. its "mining", is based on complicated algorithms, and the use of appropriate computer software. It takes place within the peer-to-peer network and is performed by its users. In a similar way, the bitcoin system makes it possible to complete transactions between the users with no need for another entity (e.g. a bank) to participate. It is verified by nodes and registered in a decentralised public blockchain. The blockchain is a ledger listing transactions (carried out in a given currency, if designed for a given blockchain) and a transaction system at the same time.

The unquestionable circumstance of bitcoin functioning in civil-law transactions makes it necessary to ask a question whether the unit plays a function of money and if it matches this concept.

Money functions both as an economic term and a legal institution.[6] The economic meaning of the term is to a great extent shaped with taking into account the role played by money. In the doctrine,[7] it is indicated that money can be treated as a unit of measure referred to characteristic objects that are goods or services which appear in economic transactions. Its role as an instrument of developed economic relations is emphasised.

Simplifying, it can be stated that the basic functions of money include:[8]

1) the function of a common medium of exchange;
2) the function of a measure of economic value;
3) the function of a store of value.

It is assumed that money treated functionally is what fulfils its essential functions.[9] At the same time, in literature on economics,[10] it is emphasised that the possibility of fulfilling the above-mentioned functions is strictly connected with a guarantee of the value of money based on its common acceptance. Against this background, the concept of fiduciary (also described as fictitious) money is used and understood as such, that is based on trust in its value and not on commodities (e.g. noble metals).[11] The issuing entity (the state) is a guarantor of the value of money, which means that its acceptance results from the public confidence in it.[12]

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[4] That is via a digital data carrier.

[5] W.J. Kocot, *Kontrakty kreatywne – nowy rozdział w cyberewolucji prawa umów*, [in:] T. Targosz, P. Podrecki, P. Kostański (eds), *Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, Warszawa 2017, p. 946 et seq.

[6] Thus T. Dybowski, A. Pyrzyńska, [in:] E. Łętowska (ed.), *System Prawa Prywatnego*, Vol. 5: *Prawo zobowiązań – część ogólna*, Warszawa 2006, p. 217.

[7] Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warszawa 2008, p. 54.

[8] Compare *ibid*.; also compare T. Dybowski, A. Pyrzyńska, [in:] E. Łętowska (ed.), *System*, *op. cit*., Vol. 5, p. 217; W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania. Zarys wykładu*, Warszawa 2009, p. 72.

[9] G. Żmij, *Prawo waluty*, Warszawa 2002, p. 38.

[10] P. Schaal, *Pieniądz i polityka pieniężna*, Warszawa 1996, pp. 23–27.

[11] The term "fiduciary money" refers to trust; the Latin word *fides* means trust.

[12] Thus M. Michna, *Bitcoin jako przedmiot stosunków cywilnoprawnych*, Warszawa 2018, p. 10.

Prima facie, bitcoin shows the potential to fulfil all the functions of money.[13] Its role of a medium of payment is ensured, inter alia, by the easiness of portability, storage and acceptance as an instrument of exchange that it has gained so far. The unit is also able to function as a measure of value being a point of reference used to establish the value of goods and services. Finally, bitcoin can be used to store a value in time. Undoubtedly, it is not subject to expiration; acquired once, it can be theoretically retained timelessly.[14] It should be noticed, however, that the roles of bitcoin as a medium of exchange, a measure of value and a store of value have been decreasing recently. It results from the weakening acceptance of the unit.

It is worth highlighting that the value of bitcoin, like of fiduciary money, results from the market's trust in the issuer.[15] The above-mentioned acceptance of the unit is decreasing because of frequent and sudden changes in the value of this cryptocurrency. On the other hand, this circumstance is determined by the fact that the issuer is private and decentralised, and does not possess sufficient instruments to stabilise the value of the unit it generates.

At the same time, the lack of legal regulation[16] of the phenomenon, from which bitcoin emanates, is conducive to the occurrence of difficulties in the assessment of the legal consequences of actions involving the unit. The unidentified nature of bitcoin,[17] in conjunction with its functioning in the practice of transactions, raises a justified question whether it can be recognised as money or its type. Thus, there is a need to carry out a legal analysis of the phenomenon.

It is commonly assumed in the jurisprudence[18] that a monetary amount, a monetary unit and a monetary denotation are designations of money. Depending of whether all the three elements occur, one can speak about money *sensu stricto* or *sensu largo*.[19] A narrow meaning of money is referred to media of payment (legal tenders), which the state gives the power to discontinue liabilities (i.e. cash).[20] On the other hand, within the broad meaning, money refers to all traditionally recognised media of payment (national and foreign currency) as well as all forms of securities that amount to a certain sum of monetary units.

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[13] See T. Gruszecki, *Teoria pieniądza i polityka pieniężna. Rys historyczny i praktyka gospodarcza*, Kraków 2004, p. 70.

[14] Thus M. Michna, *Bitcoin*, *op. cit.*, pp. 8–14.

[15] Also see F. Zoll, [in:] A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6: *Prawo zobowiązań – część ogólna*, Warszawa 2018, pp. 1080–1082.

[16] The concept of digital currencies is defined in two bills: Bill concerning the Central Account Database (UD28) and Bill concerning the prevention of money laundering and terrorist financing (UC52), prepared by the Minister of Development and Finance.

[17] Bitcoin is not defined in a uniform way, i.e. it is described as e.g. digital currency, cryptocurrency and digital money. For more, see K. Zacharzewski, *Bitcoin jako przedmiot stosunków prawa prywatnego*, Monitor Prawniczy No. 21, 2014, pp. 1132–1133.

[18] A. Olejniczak, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Vol. III: *Zobowiązania. Część ogólna*, Warszawa 2014, p. 76; T. Dybowski, A. Pyrzyńska, [in:] E. Łętowska (ed.), *System*, *op. cit.*, Vol. 5, p. 217.

[19] For the issue of differentiation of money within its the broad and narrow meaning, see W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania*, *op. cit.*, p. 72.

[20] See T. Dybowski, A. Pyrzyńska, [in:] E. Łętowska (ed.), *System*, *op. cit.*, Vol. 5, p. 217; in their opinion, we cannot speak about money in case there is a lack of joint occurrence of a monetary unit, a monetary amount and a monetary denotation.

The category of a monetary unit has a considerable importance for the concept of money. The term is used to determine a normative unit of the measure of value.[21] It is always part of the foundation of the (national and foreign) monetary system. In the light of that, a bitcoin undoubtedly constitutes a unit of measure, which equals 100 million satoshi. However, unlike a monetary unit, bitcoin is not normative in nature. It is not a unit established by the law as a public unit of account playing the role of a common means of settlement of liabilities.

A monetary unit on which a national or supranational monetary system is based is a currency of a particular state. Thus, there is an inseparable relation between money and a (national, foreign or international) legal system that constitutes it. In accordance with Article 1 para. 2 of the Act of 7 July 1994 on złoty denomination,[22] złoty (PLN) is a Polish monetary unit, which is subdivided into a hundred grosz. Apart from a national currency, foreign currencies can be distinguished.[23] The differentiation is connected with the state where a currency is issued and its central bank, which is a public issuer. As a result, it is recognised as a legal medium of payment, i.e. such that has a common power to settle liabilities. In the light of the provisions of Article 2 paras 7 and 10 of the Act of 27 July 2002: Law on foreign currencies,[24] the concept of the Polish currency,[25] like in case of a foreign currency,[26] should be referred to monetary denominations that have the status of legal tenders. Therefore, it is clear that their issue has a public nature connected with the national payment system.

However, the above-mentioned features cannot be attributed to bitcoin. As a result of the private nature of its issue and functioning independent of the state payment systems, the unit goes beyond the framework of a national as well as international currency. Its private and decentralised issue does not allow for granting it a status of a guaranteed legal tender and common power to settle liabilities. Finally, bitcoin, unlike a (national or foreign) currency, cannot be related to a monetary denotation.

In turn, a monetary amount is recognised as a particular property value expressed in monetary units that constitute the measure of that value.[27] It is an amount expressed with the use of a monetary unit. Also in the light of that, there is

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[21] P. Machnikowski, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2014, p. 620.

[22] Dz.U. 1994, No. 84, item 386, as amended.

[23] See Z. Radwański, A. Olejniczak, *Zobowiązania*, *op. cit.*, pp. 56, 59. Beside a national and foreign currency, sometimes a category of a private currency is distinguished; M. Lemkowski, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz. Art. 1–449[11]*, Warszawa 2016, p. 1273.

[24] Consolidated text, Dz.U. 2017, item 679; hereinafter LFC.

[25] The monetary denotations (notes and coins) that are legal tenders in Poland as well as those which are withdrawn from the market but are subject to exchange constitute the Polish currency (Article 2 para. 1(7) LFC).

[26] Foreign currencies are monetary denotations (notes and coins) that are legal tenders abroad and those which are withdrawn from the market but are subject to exchange; the convertible monetary units used in international transactions settlement, especially the unit of account used by the International Monetary Fund, are treated equally to foreign currencies (Article 2 para. 1(10) LFC).

[27] A. Olejniczak, [in:] A. Kidyba (ed.), *Kodeks*, *op. cit.*, Vol. III, pp. 75–76.

no doubt that in the practice of transactions the value of parties' payments (i.e. the amount) is more and more often expressed in bitcoin.[28] Still, it is the sum of units other than monetary units.

Finally, a monetary denotation that is a designation of money is a special type of a movable object on which monetary units are expressed.[29] Polish monetary denotations include notes and coins accounting for złoty and grosz (Article 31 of the Act of 29 August 1997 on Narodowy Bank Polski [Central Bank of Poland])[30]. In case of bitcoin, there are no such physical carriers (i.e. notes or coins). Therefore, the category of a monetary denotation is not part of the bitcoin essence. It operates in the form of a digital entry in a decentralised encrypted database.

The analysis of bitcoin against the background of money designations does not allow one to recognise it as money, at least within the precise meaning of the term. It is not a legal tender in the form of cash, which the state grants the power to settle financial liabilities.[31] The essence of bitcoin is the fact that it functions in a dematerialised form. Finally, its private issue outside the public legal system of whatever country makes it able to settle only those liabilities that the parties to have agreed upon (Article 353^1 of the Act of 23 April 1964: Civil Code)[32].

As a result, there is still the issue of the position of bitcoin within the concept of money *sensu largo* to be discussed. The scope of this term, apart from cash, includes various securities (bills of exchange, cheques, mortgage bonds or bonds) accounting for certain sums of monetary units.[33] The above-mentioned group also includes elements of which a monetary denotation is not an obligatory designation. Thus, not every type of money *sensu largo* will have the common power to settle liabilities.

The admissibility of transferring amounts of money without the use of monetary denotations but with the use of dematerialised instruments (a surrogate for money) might prescribe referring bitcoin in particular to one of the two forms of non-cash money[34], i.e. electronic money[35]. In accordance with Article 2(21a) of the Act of 19 August 2011 on payment services,[36] electronic money is a monetary value stored electronically, including magnetically, issued with an obligation of its purchase in order to carry out payment transactions, accepted by entities other than the issuer

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[28] The possibility of using it as a mutual payment in contracts concerning an object or right is discussed in K. Zacharzewski, *Praktyczne znaczenie bitcoina na wybranych obszarach prawa prywatnego*, Monitor Prawniczy No. 4, 2015, p. 187.

[29] A. Olejniczak, [in:] A. Kidyba (ed.), *Kodeks*, *op. cit*., Vol. III, p. 76; P. Machnikowski, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks*, *op. cit*., p. 621.

[30] Consolidated text, Dz.U. 2017, item 1373.

[31] For more on money within its strict meaning, see A. Brzozowski, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz. Art. 1–449*^{10}, Warszawa 2015, p. 1133.

[32] Act of 23 April 1964: Civil Code, consolidated text, Dz.U. 2017, item 459.

[33] *Ibid*.; also see S. Grzybowski, [in:] S. Grzybowski (ed.), *System Prawa Cywilnego*, Vol. I: *Część ogólna*, Wrocław 1985, p. 444.

[34] The forms of non-cash money include bank money and electronic money. Electronic money is dematerialised, similarly to bank money but, unlike the latter, it does not have to be connected with a bank account; thus A. Olejniczak, [in:] A. Kidyba (ed.), *Kodeks*, *op. cit*., Vol. III, pp. 76–78; A. Olejniczak, Z. Radwański, *Zobowiązania*, *op. cit*., pp. 57–58.

[35] *Ibid*.

[36] Consolidated text, Dz.U. 2017, item 2003.

of electronic money. It is emphasised in literature,[37] however, that bitcoin does not match this definition. It is mainly due to reference made to money in its statutory form laid down by the legislator. The essence of electronic money includes, inter alia, the fact that on the request of the entity possessing electronic money, the issuer must exchange value expressed in it into cash. In case of bitcoin, the requirement cannot be met because there is no obligation of its purchase. Unlike electronic money, there is no issuer of bitcoin. Users create it in the peer-to-peer network with no superior entity present.

The exclusion of the possibility of recognising bitcoin as the equivalent of monetary denotations inspires considering its classification as another instrument that makes it possible to transfer monetary amounts (e.g. a security). It is rightly indicated,[38] however, that bitcoin cannot be recognised as a security in any of its forms (including dematerialised ones). This is because it does not meet the requirements laid down in Article 921[6] and the following of Civil Code or definitions of particular types of securities determined in special regulations. The recognition of bitcoin as a security in the light of the Act of 29 August 2005 on transactions in financial instruments[39] is excluded. It was not taken into account in the catalogue of securities laid down in Article 3(1a) ATFI[40] and it does not constitute another transferable property right referred to in Article 3(1b) ATFI[41] (i.e. a derivative right). Bitcoin does not incorporate the right to purchase or acquire securities and the nature of its issue differs from that of securities. A miner of bitcoin, i.e. a network user who has participated in its issue, acting within the framework of a peer-to-peer network, remains anonymous. That is why, it is not possible to speak about an issuer of bitcoin. All the network users are.

In the light of Article 2 para. 1(2) ATFI, the lack of possibility of identifying an issuer of bitcoin is an argument for inadmissibility of recognising it as a financial instrument. Thus, it is not possible to establish a legal relation between an issuer and a purchaser of bitcoin. Still, the existence of such a relation is a constructive feature of financial instruments.[42]

The common denominator in the form of dematerialisation or a possibility of its occurrence inspires an analysis of bitcoin in comparison with financial instruments. However, as it is rightly indicated in literature,[43] this dematerialisation is different in nature. In case of dematerialised financial instruments, the rights resulting from

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[37] K. Zacharzewski, *Praktyczne*, *op. cit*., p. 194.

[38] J. Dąbrowska, *Charakter prawny bitcoin*, Człowiek w cyberprzestrzeni No. 1, 2017, p. 64.

[39] Consolidated text, Dz.U. 2017, item 1768; hereinafter ATFI.

[40] In accordance with this provision, whenever there is reference made to securities, the term means: shares, rights offered within the meaning of the provisions of the Act of 15 September 2000: Commercial Companies Code, rights to shares, subscription warrants, depositary receipts, bonds, covered bonds, investment certificates and other transferable securities, including those incorporating property rights resulting from shares or debts, issued based on adequate provisions of the Polish or foreign law.

[41] In accordance with the provision, securities are also other transferrable property rights that result from the issue, incorporating rights to purchase or acquire securities determined in subsection (a) or carried out via pecuniary settlement.

[42] Thus K. Zacharzewski, *Praktyczne*, *op. cit*., p. 193.

[43] *Ibid*.

the issue related activities occur as an entry in a deposit account, while in case of bitcoin, it is a characteristic algorithm occurring as an entry in the internet cloud.

The presented deliberations do not allow recognising bitcoin as money *sensu stricto* or a security that is money *sensu largo*. It is not a financial instrument, either.[44]

At the same time, it should be taken into account that in practice it is a commonly used unit of account with the use of which the value of liability is determined. The parties to a contract, within their freedom of entering into contracts (Article 353^1 Civil Code) decide whether it will be used in this character. As a result, to the extent agreed upon by the parties and within the scope determined in advance, bitcoin is granted the power to settle liabilities. This way, the system that uses bitcoin is closed, which means it does not possess any value outside the circle in which it functions.

The above-presented features place bitcoin in the category of private money. This is so because of its essence, which includes the possibility of using it in private transactions between parties to a contract. This results from the fact that it does not have the status of a legal tender as it is not related to any state system of payment. It operates in the practice of turnover in a way similar to money. In the jurisprudence,[45] bitcoin is sometimes classified within the category of private currencies distinguished beside national and foreign currencies. What supports such classification is its decentralised system of issue implemented outside a legal system of whatever country. Approving of the above opinion, it is worth noticing that it seems more appropriate to place bitcoin in a broader (than a private currency) category of private money. The term "currency" should be associated with a monetary denotation, while the concept of money has a broader meaning. It also covers other instruments used to transfer amounts of money.

As private money, bitcoin represents the three categories of values typical of money.[46] Firstly, it is the face value of money. In case of money *sensu stricto*, it should be interpreted as a constant value given to a monetary denotation by the state and expressed in the form of an adequate inscription on a note or a coin. It results from legal regulations constituting the so-called currency system, which is a guarantee of durability. In case of bitcoin, we can only speak about a quasi-face value because the authority of the state does not back the private money analysed here. The creator of the bitcoin software has given value to particular units[47] and network users mining them, called miners, have created them. As far as the aspect of the value of bitcoin is concerned, it is constant.

Secondly, the exchange value can be distinguished. In case of both bitcoin and legal money, it is determined in relation to other currencies and it is interchangeable.

Thirdly, it is the purchasing power. It is expressed as the amount of goods and services that can be purchased for its unit in a given place and at a given time. The

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[44] Thus J. Dąbrowska, *Charakter*, *op. cit.*, pp. 64–67.

[45] See M. Lemkowski, [in:] M. Gutowski (ed.), *Kodeks*, *op. cit.*, Vol. I, p. 1273.

[46] For more, see W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania*, *op. cit.*, p. 72; T. Dybowski, A. Pyrzyńska, [in:] E. Łętowska (ed.), *System*, *op. cit.*, Vol. 5, p. 230.

[47] Satoshi Nakamoto is recognised as the creator of the system.

value can change over time. However, the scale of change differs in case of legal money and bitcoin. Unlike in case of money *sensu stricto*, frequent and sudden fluctuation of the purchasing power is typical of bitcoin.

Attribution of the status of private money to bitcoin is not against the possibility of placing it in the position of the measure of value different from that of money.[48] In accordance with Article 385[1] § 2 Civil Code, parties can make a reservation in a contract that the amount of payment will be determined in accordance with a non-monetary measure of value. The possibility is strictly connected with the exercise of the principle of the freedom of entering into contracts.[49] Thus, in such a case, the value of payment is determined by the indication of the number of monetary units (a nominal payment amount) but is described as a value of payment with the use of a non-monetary measure of value.[50] Statute does not stipulate any restrictions concerning the types of a measure of value that parties to a contract can use. In the practice of transactions, the most common compensatory clauses include currency, goods, gold and index related clauses.[51] As a result, the private money generated by a computer program that is recognised by the parties as a unit appropriate to express the value of a monetary payment can be a measure to be used for the contractual indexation.

The use of bitcoin to measure the value of a monetary payment, thus to its contractual indexation, raises a question whether it is admissible to apply the principle of nominalism towards the payment expressed in a unit of bitcoin. *Prima facie*, it might seem that in the light of no grounds to recognise bitcoin as money within the precise meaning of the term, the possibility should be excluded. In accordance with Article 358[1] § 1 Civil Code, if an amount of money is an object of liability at the moment of its occurrence, its settlement takes place when the nominal amount is paid, unless special provisions stipulate otherwise. The principle of minimalism expresses a rule that a monetary liability must be settled by payment of the monetary amount determined when the debt has occurred. At the same time, the scope of its application covers liabilities expressed in both Polish and foreign currency.[52] In the light of the above, the direct application of Article 358[1] § 1 Civil Code is excluded. On the other hand, it seems that, by careful analogy, the principle of minimalism can also be applied to private money.[53] Thus, in connection with its application, the settlement of a payment expressed in bitcoin takes place when the nominal amount is paid, provided that at the moment of the liability occurrence it was in bitcoin. The payment of the nominal amount expressed in private money settles liability in the same way as in case of any other currency (national or foreign

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48 Thus K. Zacharzewski, *Bitcoin*, *op. cit*., p. 1135 et seq.

49 See the Supreme Court judgment of 8 December 2006, V CSK 339/06, LEX No. 610102.

50 P. Machnikowski, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks*, *op. cit*., pp. 624–625.

51 For more, see A. Olejniczak, [in:] A. Kidyba (ed.), *Kodeks*, *op. cit*., Vol. III, p. 82.

52 P. Machnikowski, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks*, *op. cit*., p. 625.

53 The authors who believe that the principle of minimalism should cover a payment expressed in bitcoin are K. Zacharzewski, *Bitcoin*, *op. cit*., p. 1136; M. Lemkowski, [in:] M. Gutowski (ed.), *Kodeks*, *op. cit*., Vol. I, p. 1278; the author who is against that possibility is F. Zoll, [in:] A. Olejniczak (ed.), *System*, *op. cit*., Vol. 6, p. 1082.

one). The exclusion of the application of the principle would make the implementation of the function of money, which bitcoin plays in transactions, impossible.

The adoption of the principle of minimalism, within its broad meaning, towards the payment expressed in bitcoin results in the risk of considerable change in its value. Private money, which is analysed here, is subject to significant fluctuation of its value.[54] Therefore, it seems there is a justified need to include indexation clauses by parties in contracts (compare Article 358^1 § 2 Civil Code). It seems that, e.g. money or a noble metal (gold) can be a measure.

It is necessary to highlight the risk connected with the lack of a contractual indexation clause against the occurrence of the change in the bitcoin purchasing power. It seems that indexation of the payment expressed in bitcoin by a court is inadmissible. It might seem that the basic reason for this exclusion consists in the circumstance that the scope of application of indexation by a court has been narrowed to the payment expressed in money *sensu stricto*, and bitcoin cannot be recognised as such. However, the main reason why the possibility should be excluded is that the substantive legal requirement for indexation is, first of all, the change in the purchasing power of money that takes place after the liability has occurred (Article 385^1 § 3 Civil Code). Thus, the "significance" of the change, its considerable nature is required. The issue is important because the modification of value is always within the scope of a standard contractual risk, i.e. one that each party to a pecuniary liability should take into account. Finally, it is assumed that parties should predict certain fluctuation of the purchasing power of money.[55] In case of bitcoin, a considerable change in the purchasing power is an absolutely natural phenomenon. The substantial fluctuation of value is typical of its essence. For reasons similar to those under Article 358 § 4 Civil Code, the exclusion of admissibility of indexation by a court is justified. Parties, determining the value of a payment in a unit of bitcoin, should be aware of changes it is subject to. They can make a reservation concerning this circumstance in the form of a contractual indexation clause.

Perceiving bitcoin as a private currency also raises a question about admissibility of the application of the principle for the Polish currency use laid down in Article 358 Civil Code. The solution adopted in Article 358 § 1 Civil Code stipulates that in case a payment is determined in a foreign currency, a debtor can settle it in the Polish currency. The rules can be changed following a special statutory provision, a legal action creating or changing the content of the liability as well as a court judgment.

What weighs against the possibility of directly applying Article 358 Civil Code is, first of all, the lack of recognition of bitcoin as a foreign currency referred to in the analysed provision. As it results from the above discussion, bitcoin is not money. Thus, the central bank cannot determine its value, which excludes its cal-

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[54] The value of *bitcoin* is subject to considerable fluctuations throughout years, months and even days. According to Bitcoin BitStamp, the value of this private currency on 21 January 2018 accounted for USD 11,600. In the preceding three- and six-month periods it was USD 5,600 and 2,670, respectively. On the other hand, on 13 February 2018 its value was at the level of USD 8,698.

[55] P. Machnikowski, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks*, *op. cit*., p. 627.

culation in accordance with Article 358 § 2 Civil Code.[56] At the same time, there are no obstacles to incorporating a rule parallel to that laid down in Article 385 Civil Code in the content of a legal action in which a payment has been expressed in a private currency (e.g. bitcoin). When calculating the value of this private currency, one can take into account the exchange rate of this unit (e.g. the exchange rate of bitcoin announced at the Polish stock exchange) on the day when the payment is due, unless a legal action or a court judgment stipulate otherwise (compare Article 358 § 2 Civil Code). It is worth mentioning that there are no obstacles to choose a recalculation day indicated by the parties different from the one laid down in the above-mentioned provision. Thus, the regulation under Article 358 Civil Code can be applied to bitcoin by virtue of the parties' will at the most.

Eventually, there is a doubt concerning the way in which contracts where the payment is expressed in bitcoin should be dealt with. The assessment of a contract in which the exchange of the units of bitcoin into a determined pecuniary amount expressed in the Polish or foreign currency occurs does not cause serious problems. In the jurisprudence, it is uniformly classified as sale.[57] However, the assessment of a contract where bitcoin is a mutual liability consisting in the transfer of ownership of objects or rights is subject to debate.[58] It seems that there are no obstacles to recognise a contract as sale by virtue of which the ownership of objects or rights is transferred in exchange for a pecuniary payment expressed in the measure of value in the form of bitcoin (Article 358^1 § 2 Civil Code).[59] In such a case, an indexation clause constitutes the basis for establishing what the final price is, i.e. how many units of the Polish currency a buyer should pay.[60] What raises doubts is the situation when the payment is expressed directly in bitcoin. This is so because one should take into account that the obligation to pay a price belongs to *essentialia negotii* of the contract of sale. Moreover, the concept of a "price" characteristically describes pecuniary payments that must be expressed in money.[61] If the equivalent of the sold object is determined in a form different from a pecuniary payment, such a contract as a whole or in an adequate scope usually takes the form of an exchange agreement.[62] Thus, a contract in which one party declares to transfer the ownership of an object and the other undertakes to provide an amount of bitcoin should be classified as exchange (Article 603 Civil Code). By virtue of reference made in Article 604 Civil Code, the relation resulting from this contract is, by analogy, subject to regulations concerning sale.

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[56] Thus M. Lemkowski, [in:] M. Gutowski (ed.), *Kodeks*, *op. cit*., Vol. I, p. 1273.

[57] Thus K. Zacharzewski, *Praktyczne*, *op. cit*., p. 187, J. Dąbrowska, *Charakter*, *op. cit*., p. 59.

[58] See J. Dąbrowska, *ibid*., in whose opinion it is neither sale nor exchange.

[59] Thus K. Zacharzewski, *Praktyczne*, *op. cit*., p. 187.

[60] We can speak about the introduction of an indexation clause in case, interpreting the declarations of the parties' will, it is possible to establish that their unanimous intention was to express and lead to the payment of the price in the Polish money, as regards the value indicated in the contract (see the Supreme Court judgment of 20 December 1996, III CKU 14/96, OSP 1997, No. 4, item 90).

[61] Thus J. Jezioro, [in:] E. Gniewek, P. Machnikowski (eds), *Komentarz*, *op. cit*., p. 1071.

[62] Thus E. Habryn-Chojnacka, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. II: *Komentarz do art. 450–1088*, Warszawa 2016, p. 309.

The above-presented analysis makes it possible to assume that bitcoin neither matches the concept of money *sensu stricto* nor even *sensu largo*. It is not a financial instrument, either. However, due to its role played in transactions, it can be perceived as the category of private money. This subsequently creates the possibility of assessing the way in which the settlement of a liability expressed in bitcoin is made, partially through the prism of institutions typical of pecuniary payments. Such an approach is the only one that does not misinterpret the essence of bitcoin, which was intended to be an alternative to money. A different assessment of the phenomenon, denying it a feature of any form of money, would have to lead to a conclusion that a payment made in bitcoin is not a pecuniary one. Such an approach is not of little consequence.[63]

BIBLIOGRAPHY

Brzozowski A., [in:] K. Pietrzykowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz. Art. 1–449[10]*, Warszawa 2015.

Czachórski W., Brzozowski A., Safjan M., Skowrońska-Bocian E., *Zobowiązania. Zarys wykładu*, Warszawa 2009.

Dąbrowska J., *Charakter prawny bitcoin*, Człowiek w cyberprzestrzeni No. 1, 2017.

Dybowski T., Pyrzyńska A., [in:] Łętowska E. (ed.), *System Prawa Prywatnego*, Vol. 5: *Prawo zobowiązań – część ogólna*, Warszawa 2006.

Gruszecki T., *Teoria pieniądza i polityka pieniężna. Rys historyczny i praktyka gospodarcza*, Kraków 2004.

Grzybowski S., [in:] S. Grzybowski (ed.), *System Prawa Cywilnego*, Vol. I: *Część ogólna*, Wrocław 1985.

Habryn-Chojnacka E., [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. II: *Komentarz do art. 450–1088*, Warszawa 2016.

Kocot W.J., *Kontrakty kreatywne – nowy rozdział w cyberewolucji prawa umów*, [in:] T. Targosz, P. Podrecki, P. Kostański (eds), *Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, Warszawa 2017.

Lemkowski M., [in:], M. Gutowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz. Art. 1–449[11]*, Warszawa 2016.

Machnikowski P., [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2014.

Michna M., *Bitcoin jako przedmiot stosunków cywilnoprawnych*, Warszawa 2018.

Olejniczak A., [in:] Kidyba A. (ed.), *Kodeks cywilny*, Vol. III: *Zobowiązania. Część ogólna*, Warszawa 2014.

Piotrowska A., *Bitcoin a definicja i funkcje pieniądza*, Annales UMCS No. 3, 2014.

Radwański Z., Olejniczak A., *Zobowiązania – część ogólna*, Warszawa 2014.

Schaal P., *Pieniądz i polityka pieniężna*, Warszawa 1996.

Zacharzewski K., *Bitcoin jako przedmiot stosunków prawa prywatnego*, Monitor Prawniczy No. 21, 2014.

[63] For example, it can be indicated that recognition of bitcoin as private money, by analogy, carries a possibility of referring the institution of maximum interest to it. On the other hand, definite exclusion of the features of money creates a possibility of making reservations concerning penal damages, which are not subject to equivalent limits.

Zacharzewski K, *Praktyczne znaczenie bitcoina na wybranych obszarach prawa prywatnego*, Monitor Prawniczy No. 4, 2015.
Zoll F., [in:] A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6: *Prawo zobowiązań – część ogólna*, Warszawa 2018.
Żmij G., *Prawo waluty*, Warszawa 2002.

BITCOIN VERSUS MONEY: CIVIL-LAW ANALYSIS OF THE CONCEPT

Summary

The article attempts to conduct a civil-law based analysis of bitcoin, which is the most representative example of the so-called cryptocurrencies. The unit, like money, fulfils the payment and exchange functions, becoming an alternative to traditional currencies. This circumstance justifies the need to consider whether bitcoin can be recognised as money. Therefore, it has been analysed against the background of the concept of money. The presented study has made it possible to assume that bitcoin constitutes private money. This, in turn, opens the possibility of assessing the manner of settling a liability expressed in a bitcoin unit, e.g. partially through the prism of the institutions typical of pecuniary payments. Such an approach is the only one that does not distort the essence of bitcoin, which was originally intended to be an alternative to legal money.

Keywords: bitcoin, money, currency, legal tender, cryptocurrency, legal money, private money

BITCOIN A PIENIĄDZ – CYWILNOPRAWNA ANALIZA POJĘCIA

Streszczenie

W niniejszym artykule podjęto próbę cywilnoprawnej analizy *bitcoin*, stanowiącego najbardziej reprezentatywny przykład tzw. kryptowaluty. Jednostka ta – podobnie jak pieniądz – pełni funkcję płatniczą, wymiany, stając się alternatywą dla tradycyjnej waluty. Okoliczność ta uzasadniła potrzebę rozważania, czy bitcoin może być uznany za pieniądz. W związku z tym został on przeanalizowany na tle pojęcia pieniądza. Prowadzone rozważania pozwoliły przyjąć, że bitcoin stanowi pieniądz prywatny. To z kolei otwiera możliwość podjęcia próby oceny sposobu spełnienia świadczenia wyrażonego w jednostce bitcoin przez częściowy chociażby pryzmat instytucji właściwych dla świadczeń pieniężnych. Takie spojrzenie, jako jedyne, nie wypacza bowiem istoty bitcoin, które w swym założeniu stanowić miało alternatywę dla pieniądza legalnego.

Słowa kluczowe: bitcoin, pieniądz, waluta, środek płatniczy, kryptowaluta, pieniądz legalny, pieniądz prywatny

BITCOIN Y DINERO – EL ANÁLISIS CIVIL-JURÍDICO DEL CONCEPTO

Resumen

El presente artículo intenta analizar bitcoin desde el punto de vista civil-jurídico. Bitcoin es un ejemplo más representativo de la criptomoneda. Esta unidad – de forma similar como el dinero – desempeña función de pago, intercambio, convirtiéndose en una alternativa para monedas tradicionales. Esta circunstancia fundamenta la necesidad de valorar si bitcoin puede ser considerado una moneda. Por lo tanto, fue analizado en relación con el concepto de la moneda. El análisis lleva a la conclusión que bitcoin es una moneda privada. Esto abre la posibilidad de un intento de valorar el cumplimiento de la prestación expresada en unidad bitcoin desde la perspectiva de instituciones propias para prestaciones dinerarias. Tal punto de vista, como único, no vicia la naturaleza de bitcoin que fue creado como alternativa a la moneda legal.

Palabras claves: bitcoin, moneda, divisa, medio de pago, criptomoneda, moneda legal, moneda privada

БИТКОЙН И ДЕНЬГИ – ГРАЖДАНСКО-ПРАВОВОЙ АНАЛИЗ КОНЦЕПЦИИ

Резюме

В этой статье была предпринята попытка анализа биткойна в гражданском праве, который является наиболее представительным примером так называемой криптовалюты. Эта единица – так же, как и деньги – выполняет функцию оплаты, обмена, превращаясь в альтернативу традиционным валютам. Это обстоятельство оправдало необходимость рассмотреть вопрос о том, можно ли считать биткойн деньгами. Поэтому он был проанализирован на фоне понятия денег. Проведенные рассуждения позволили предположить, что биткойн – это частные деньги. Это, в свою очередь, открывает возможность попытаться оценить, по крайней мере частично, через призму учреждений, компетентных в предоставлении денежных услуг, каким образом должна быть выполнена услуга, выраженная в биткойн-единице. Такой взгляд, как единственный, не искажает сущность биткойна, который по своему предположению должен был стать альтернативой легальным деньгам.

Ключевые слова: биткойн, деньги, валюта, платежные средства, криптовалюта, легальные деньги, частные деньги

BITCOIN UND GELD – ZIVILRECHTLICHE ANALYSE DES KONZEPTS

Zusammenfassung

In diesem Artikel wurde ein Versuch zur zivilrechtlichen Analyse von Bitcoin unternommen, die das repräsentativste Beispiel für die sogenannte Kryptowährung ist. Diese Einheit übernimmt – genau wie das Geld – die Funktion des Zahlungsverkehrs, des Umtauschs und wird zu einer Alternative zu herkömmlichen Währungen. Dieser Umstand rechtfertigte die Notwendigkeit zu kontrollieren, ob Bitcoin als Geld betrachtet werden kann. Daher wurde es aus der Sicht des Geldbegriffs analysiert. Die durchgeführten Überlegungen ließen vermuten, dass Bitcoin Privatgeld ist. Dies eröffnet wiederum die Möglichkeit, selbst durch ein Teilprisma

der für Geldleistungen zuständigen Institution zu beurteilen, wie der in der Bitcoin-Einheit ausgedrückte Vorteil erreicht wird. Ausschließlich eine solche Sichtweise verzerrt nicht das Wesen von Bitcoin, das in seiner Annahme eine Alternative zum Geld sein sollte.

Schlüsselwörter: Bitcoin, Geld, Währung, Zahlungsmittel, Kryptowährung, legales Geld, Privatgeld

LE BITCOIN ET LA MONNAIE – ANALYSE DE DROIT CIVIL DU CONCEPT

Résumé

Dans cet article, l'auteur a tenté de faire une analyse de droit civil du bitcoin, qui est l'exemple le plus représentatif de la soi-disant cryptomonnaie. Tout comme la monnaie, cette unité remplit la fonction de moyen de paiement, d'échange, devenant une alternative aux devises traditionnelles. Cette circonstance justifiait la nécessité de déterminer si le bitcoin pouvait être considéré comme la monnaie. Par conséquent, il a été analysé dans le contexte du concept de la monnaie. Les considérations conduites ont permis de supposer que le bitcoin est une monnaie privée. Ceci, à son tour, offre la possibilité d'essayer d'évaluer la manière dont la prestation exprimée dans l'unité de bitcoin est réalisée, même à travers un prisme partiel de l'institution compétente pour les prestations en espèces. Ce point de vue ne déforme pas l'essence du bitcoin, qui, dans son hypothèse, devait être une alternative à la monnaie légale.

Mots-clés: bitcoin, monnaie, devise, moyen de paiement, cryptomonnaie, monnaie légale, monnaie privée

IL BITCOIN E LA MONETA: ANALISI DEL CONCETTO DAL PUNTO DI VISTA DEL DIRITTO CIVILE

Sintesi

Nel presente articolo si è intrapreso un tentativo di analisi del bitcoin, che costituisce l'esempio più rappresentativo delle cosiddette criptovalute, dal punto di vista del diritto civile. Il bitcoin, analogamente alla moneta, svolge una funzione di pagamento, di scambio, divenendo un'alternativa alle valute tradizionali. Tale circostanza ha motivato la necessità di valutare se il bitcoin possa essere considerato moneta. In relazione a ciò è stato analizzato sullo sfondo del concetto di moneta. Sono state condotte considerazioni che hanno permesso di assumere che il bitcoin costituisce una moneta privata. Questo a sua volta apre la possibilità di tentare di valutare la modalità di adempimento della prestazione espressa in unità bitcoin, da parte di un prisma almeno parziale di istituzioni competenti per le prestazioni in denaro. Solo tale punto di vista non distorce infatti l'essenza del bitcoin, che è nato per costituire un'alternativa alla moneta legale.

Parole chiave: bitcoin, moneta, valuta, mezzo di pagamento, criptovaluta, moneta legale, moneta privata

Cytuj jako:

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PRINCIPLE OF TRANSPARENCY IN PROCUREMENT PROCEEDINGS VERSUS PROTECTION OF THE RIGHT TO PRIVACY

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Public procurement proceedings are open.[1] In accordance with Article 3 LPP, the proceeding minutes and annexes to them (i.e. practically all the documents: offers, information, explanations, etc.) must be made available at everyone's request (with the exception of information that constitutes a company's secret). Transparency is to guarantee the maintenance of other rules of proceedings (equal treatment, fair competition and proportionality). The Court of Justice of the European Union (CJEU) consistently indicates that the obligation of transparency, from which the national principle of openness originates, aims to exclude a risk of favouritism and arbitrariness of the ordering institutions.[2]

The law on the protection of confidential information constitutes an exception to the principle of transparency and as such cannot be interpreted in a broadening scope. Confidentiality is applied to information concerning ordering institutions/buyers, which they have indicated as confidential in nature and laid down the rules of their protection (Article 8 para. 2 in conjunction with Article 37 para. 6 LPP). The principle of transparency is also limited in connection with the protection of the contracting company's secrets. Using the concept of a company's secret, the law on public procurement does not develop a separate definition but makes use of the definition contained in the Act on combating unfair competition. A company's secret means technical, technological and organisational information concerning a company or other information of economic value that has not been made public,

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1 Article 8 para. 1 of the Act of 29 January 2004: Law on public procurement, consolidated text, Dz.U. 2017, item 1579, as amended; hereinafter LPP.

2 CJEU judgments: of 5 December 2013 in the case C-561/12; of 29 March 2012 in the case C-599/10; of 6 November 2014 in the case C-42/13.

and in connection with which a company has undertaken necessary steps in order to keep it secret (Article 11 para. 4 of the Act of 16 April 1993 on combating unfair competition)[3]. Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure in fact contains a similar definition.

The Supreme Court case law stipulates that information that can be obtained in a lawful way cannot be recognised as secrets, e.g. information obtained from publicly available registers or publicly performed legal actions. The provision of Article 11 paras 1 and 4 ACUC excludes making information secret if a person concerned can obtain it in a standard and lawful way.[4] This means that it is not possible to protect data concerning information about other public procurement proceedings. Information that is publicly available, e.g. on the Internet, cannot be secret.[5] According to the Supreme Court, an inappropriate way of protecting information as a company's secret in case that information does not constitute one results in a buyer's obligation to disclose it.[6] The CJEU also takes a stance that a defective way of making information secret obliges a buyer to correct it.[7] Such interpretation of the provisions on the transparency of proceedings raises a question whether transparency in public procurement also covers the obligation to provide information about persons included in contractors' offers (persons seconded to deal with the order and members of the contractor's bodies). Thus, the principle of transparency must be confronted with the protection of the right to privacy.

It is necessary to decide which provision concerning transparency: the one laid down in the Act: Law on public procurement or a special provision protecting privacy should be a basis for activities performed by a buyer, i.e. which interest (transparency or privacy) should be predominant.

The provisions of common statutes interfering into this principle cannot reduce the right to privacy laid down in Article 47 of the Constitution of the Republic of Poland ("Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."). Moreover, an activity that constitutes the infringement of a legal act specifying the scope of the protection of privacy should be treated as especially blameworthy because it is connected with the infringement of a constitutional norm. With regard to the right to protect privacy and special rules of obtaining access to confidential personal data, there are sometimes doubts what kind of information about public procurement proceedings concerning persons dealing with an order or managing contractors buyers can demand and to what extent a buyer can make personal data available.

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[3] Dz.U. No. 47, item 211, as amended; hereinafter ACUC.

[4] Supreme Court judgment of 5 September 2001, I CKN 1159/00, OSNC 2002/5/67.

[5] E. Wojcieszko-Głuszko, *Tajemnica przedsiębiorstwa i jej cywilnoprawna ochrona na podstawie przepisów prawa nieuczciwej konkurencji*, Prace Instytutu Prawa Własności Intelektualnej UJ, 2005/86, p. 43.

[6] Supreme Court resolution of 21 October 2005, III CZP 74/05.

[7] CJEU judgment of 14 February 2008 in the case C-450/06.

Article 26 para. 1 and Article 26 para. 2f LPP and the provisions of the Regulation of the Minister of Development issued based on Article 25 para. 2 LPP, i.e. Regulation of 26 July 2016,[8] lay down the rules concerning requests for documents in public procurement proceedings.

Article 26 para. 1 imposes an obligation on a buyer, in case the value of an order exceeds the amounts laid down in the EU directives, to demand that a contractor whose offer has been assessed as the best one submit documents confirming the fulfilment of the requirements for participation in the proceedings (including the lack of grounds for excluding from the proceedings). Article 26 para. 2f LPP stipulates the entitlement to demand such documents from every contractor taking part in the proceedings if it is necessary in order to carry out the proceedings properly.

One of the requirements for participation in the proceedings that a buyer can formulate in accordance with Article 22 para. 1b(3) in conjunction with Article 22d para. 1 LPP is that persons who will make things to order should be at the buyer's disposal. The provision of § 2 para. 4(10) Regulation of 26 July 2016 stipulates that a list of persons with information about their education and qualifications constitutes a document that confirms one's disposal.

In turn, a contractor's managers (board members, directors, appointed agents, partners and sole trades) must have no previous convictions (within the scope specified in LPP), which is an obligatory requirement for participation in public procurement proceedings, resulting directly from LPP. Information provided by National Criminal Register (Krajowy Rejestr Karny, KRK) at a buyer's request (resulting from the fulfilment of a statutory obligation or the exercise of a statutory right) constitutes the confirmation of no criminal record. Apart from the given names, a surname and the confirmation of previous convictions or no record, the information contains other data: the date of birth, parents' names and the address.

The processing of data relating to criminal convictions, in accordance with Article 10 GDPR,[9] shall be carried out only under the control of official authority or when the processing is authorised by the Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.

The provisions that allow that are § 2 para. 4(1) and § 5(1) Regulation of 26 July 2016, which do not let buyers choose whether to demand or not a list of persons with their education and qualifications data from a contractor and information from KRK, i.e. a document concerning information resulting from the provisions of the Regulation of the Minister of Justice of 7 July 2015,[10] when they fulfil an obligation under Article 26 para. 1 LPP or exercise the right in accordance with Article 26 para. 2f LPP.

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[8] Regulation of the Minister of Development of 26 July 2016 concerning types of documents that a buyer can demand from a contractor in public procurement proceedings, Dz.U. 2016, item 1126; hereinafter Regulation of 26 July 2016.

[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1 of 4 May 2016.

[10] Regulation of the Minister of Justice of 7 July 2015 on the provision of information about persons and collective entities based on the data collected in the National Criminal Register (KRK), Dz.U. 2015, item 1025, as amended.

The provisions are formulated clearly and a buyer must demand a list of persons with such data (education and qualifications) and information from KRK containing all data in accordance with the above-mentioned Regulation.

The demand of data determined in the provisions of the law, including the specimen of the information from KRK, does not infringe the provisions of GDPR in any way. In accordance with Article 6 para. 1(e) GDPR, personal data processing is lawful when it is necessary for the performance of a task carried out in the exercise of official authority vested in the controller. The controller – a buyer within the meaning of LPP – must demand such data within the scope indicated in the provisions concerning public procurement. Demanding a document different from information from KRK and a list of persons with a different scope of data from the one laid down in the provisions of Regulation of 26 July 2016 would constitute the infringement of Article 26 para. 1 LPP in conjunction with § 5(1) of 26 July 2016.

However, should a contractor, regardless of a buyer's clear and obligatory demand of a document determined in the provisions of the law (information from KRK), limit (e.g. by covering) the scope of data in this document and leave only a given name and surname and data concerning conviction/no criminal record within the scope under examination in accordance with LPP, the statutory aim of the submission of this document would be obtained (no criminal record would be confirmed) and there would be no grounds to demand a document with all data. However, it is a contractor who can decide to limit the scope of data in the information from KRK and not a buyer who must demand a document indicated in the provisions. However, the possibility of covering some data does not exist in case of demanding information concerning qualifications. These constitute data concerning the subject matter, i.e. the fulfilment of a buyers' requirement that an order should be dealt with by persons with specified qualifications. Thus, the omission of this information would mean failure to meet a requirement for participation in the proceedings.

A controller (a buyer) must process personal data because he must retain and make them available. Personal data processing (in accordance with Article 4 para. 2 GDPR) means, inter alia, their collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making them available, alignment or combination, restriction, erasure or destruction. The obligation to store documents submitted by contractors (including personal data) results from Article 97 para. 1 in conjunction with Article 96 para. 2 LPP, which oblige a buyer to retain those documents as appendices to proceeding minutes for four years after the conclusion of the proceedings.

Making available of personal data contained in appendices to proceeding minutes, which in accordance with Article 96 para. 2 LPP include, inter alia, any documents submitted by contractors with the exception of company secrets, means the fulfilment of a statutory obligation. The proceeding minutes are not confidential (Article 8 para. 1 in conjunction with Article 96 para. 3 LPP) and are subject to availability at the request of anybody without the need to indicate the interest in obtaining access to information in accordance with the provisions of the Regula-

tion of the Minister of Development concerning a public procurement proceeding minutes.[11] The above-mentioned provisions do not allow whatever departure from the rule of disclosure of information contained in the proceeding documentation, with the exception of company's secrets. Thus, personal data is made available due to the fulfilment of a statutory obligation (resulting from Article 96 para. 3 LPP), i.e. in accordance with Article 6 para. 1(e) GDPR, without a data subject's consent.

Personal data that due to the provisions on transparency and access to information concerning public procurement proceedings will always be made available without any restrictions (also in case of a previously convicted person, provided that they are included in the information about criminal record) include a given name and a surname, the date of birth, parents' names, address, i.e. all data that do not contain information about criminal conviction. Such data also include information about education and qualifications of persons listed as those seconded to deal with an order.

Part of personal data that are in contractors' offers, however, can constitute data concerning conviction sentences in the information provided by KRK if a data subject is a person previously convicted. It is very rare in the practice of public procurement. In other cases, data concern the lack of previous conviction and thus do not concern criminal record so they constitute "standard" personal data.

The provisions of the Regulation concerning public procurement proceeding minutes as well as the provisions of LPP do not provide an exception to the principle of transparency in case of information about criminal record when the document confirms the fact of previous conviction as well as about the location data relating to privacy, e.g. an address or data concerning education and qualifications of persons listed in offers. In accordance with the literal interpretation of Article 96 para. 3 LPP, even in case the information from KRK contains information about conviction (but not about no criminal record), it should be disclosed. Thus, there is a conflict with the GDPR provisions. Common and unlimited availability of data concerning conviction or penalties does not match the obligation under Article 10 GDPR in accordance with which the processing of those data shall be carried out providing appropriate safeguards for the rights and freedoms of data subjects. The provision of information about persons' convictions and penalties, only because they take part in public procurement proceedings, does not meet any rational justification. The penalties most often do not eliminate persons from the proceedings (the exclusion occurs only with respect to a limited catalogue of crimes) and making data about convictions available to the public might constitute an unlawful instrument causing withdrawal from the market of public procurement. It would be in flagrant conflict with the principle of unlimited competition and, in addition, it would constitute a non-judicially imposed sanction of publicising a convicted person's data. Such a conflict would not occur if the national public procurement provisions were limited to the principle of transparency, i.e. informing about proceedings and decisions and not disclosing all information collected in the course of the proceedings.

[11] Regulation of the Minister of Development of 26 July 2016 concerning public procurement proceeding minutes, Dz.U. 2016, item 1128.

However, the legislator decided to extend public life openness by full transparency of information.

Therefore, it is necessary to look for a resolution of the conflict between the above-mentioned interests (transparency and privacy) in other legal acts. It might result from the provisions of the Act of 6 September 2001 on access to public information,[12] which stipulates that the principle of access to information is subject to limitation, inter alia, due to a natural person's privacy and a company's secrets (Article 5 para. 2). Unfortunately, the application of this statute in case of access to procurement proceeding minutes is recognised as inadmissible according to the dominant approach in case law.[13] Some representatives of the doctrine present a similar stand.[14] If we assume that AAPI and LPP cannot be applied in conjunction, we draw a conclusion that adopting the LPP provisions, the legislator decided that the protection of a company's secrets secured by AAPI must be strengthened and completely excluded the provision of this information in the norm of Article 8 para. 3 LPP. The legislator did not do that in relation to the protection of privacy.

However, one can refer to the judgments of administrative courts, which are less restrictive and indicate that, within the scope not covered by special provisions (Regulation concerning public procurement proceeding minutes), the general norms of the Act on access to public information might have supplementary application, i.e. when they are not in conflict with a special provision. Thus, pursuant to this stance, Article 5 para. 2 AAPI concerning access to privacy-related data would be applicable. This is what the Voivodeship Administrative Court in Poznań states in its judgment of 20 September 2017.[15] The stance, in my opinion, is right. Personal data, which as a rule shall be transparent in public procurement without whatever restrictions can be recognised as ones that are subject to disclosure limitation due to a natural person's privacy or a company's secrets (Article 5 para. 2 AAPI). In this context, taking into account the opinion of the Supreme Administrative Court,[16] privacy gives grounds to limiting access to public information but not to excluding access to public information. Therefore, it is necessary to establish the scope of this limitation. At the same time, one cannot ignore the fact that in case of procurement proceedings, natural persons' data that can be protected or made available are not, at least partially, "ordinary" people's data. These are data of authorities of entities that apply for contracts with the public sector. The scope of privacy subject to protection in case of pursuing a position of a party to a contract with the public sector should be less extensive. Thus, it is necessary to determine what this limitation should consist in. As it has been indicated above, it cannot mean the exclusion

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[12] Dz.U. 2001 No. 112 item 1198, as amended; hereinafter AAPI.

[13] Judgment of the Supreme Administrative Court of 18 January 2017, I OSK 2006/16, LEX No. 2290153; judgment of the Voivodeship Administrative Court in Olsztyn of 11 July 2017, II SAB/OI 29/17, LEX No. 2336880; judgment of the Voivodeship Administrative Court in Szczecin of 9 August 2017, II SAB/Sz68/17, LEX No. 2357827.

[14] M. Chmaj, [in:] M. Bidziński, M. Chmaj, P. Szustakiewicz, *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa 2010, pp. 31–32.

[15] Judgment of the Voivodeship Administrative Court in Poznań of 20 September 2017, SAB/Po 107/17.

[16] Judgment of the Supreme Administrative Court of 29 September 2017, I OSK 3046/15.

of transparency because there are no grounds for that in AAPI, nor LPP, nor in the systemic interpretation, i.e. the increase in the protection of a company's secret by excluding openness and the lack of such a move towards the protection of privacy, which means that there must be some scope of access to natural persons' data without the infringement of their privacy. The legislator determined the absolutely admissible scope of limitation of the principle of transparency of any data, including common personal data contained in the procurement proceeding documentation that is not confidential. It consists in the possibility of not giving consent to copy such data from contractors' offers.

Any further-reaching limitations are doubtful. A special legal act in relation to the Act on access to public information, i.e. the Act on public procurement, contains its own precise regulation concerning the protection of privacy so, as administrative courts indicate, supplementary application of the provisions on access to public information is not possible. The special provision concerned is Article 8 para. 4(1) LPP, which stipulates that if it is substantiated by the protection of privacy or public interest, a buyer can refuse to disclose personal data but only in case of procurement based on Article 67 para. 1(1)(b). Thus, if the information from KRK is submitted in any other mode than by private treaty (on this special basis under Article 67 para. 1(1)(b)), it is not subject to the protection of privacy.

Therefore, there are no grounds for the application of limitation of access to information referred to in Article 5 para. 2 AAPI in a broader scope than the legislator allowed in § 4 para. 4 Regulation of the Minister of Development concerning public procurement proceeding minutes, where the only restriction consists in the right to refuse to give consent to copy documents submitted by contractors. The provisions on access to public information are indeed applicable exclusively as supplementary ones in relation to special regulations (Regulation concerning public procurement proceeding minutes and Article 8 para. 4 and Article 96 para. 3 LPP).

The provisions of the Regulation as a norm of basic level cannot infringe the norms of the European Union legal acts. The interpretation of those provisions, the linguistic layer of which orders disclosure of information containing sensitive data, must be carried out in compliance with Article 10 GDPR.

When processing sensitive information, i.e. information concerning conviction and penalties imposed on a particular person, a buyer can process it within the scope safeguarding the protection of rights and freedoms. This means that the data can be stored in the minutes but making them available to the public in accordance with Article 96 para. 3 LPP (and all the more the provisions of a lower level) is not possible. It is so because Article 10 GDPR stipulates that only the law providing for appropriate safeguards for sensitive information allows its processing. If there is no provision guaranteeing protection, a particular form of processing (making information available) cannot be carried out.

No safeguards for the rights and freedoms of data subjects that are required in accordance with this provision can be traced in LPP. If anyone can obtain access to proceeding minutes, the protection of sensitive data is illusory. Thus, the entry into force of the GDPR provisions should result in the exclusion of the right to disclose data concerning convictions and penalties. At the same time, a complete lack of

access to those data might be in conflict with a successive constitutional norm: the right to a court and the right to appeal against every decision taken by a buyer guaranteed by appellate-related EU directives concerning public procurement. In order to exercise this right efficiently, it is necessary to have access to information about a buyer's activities.

A bill amending some acts in connection with ensuring the application of Regulation 2016/679[17] serves the implementation of the right. The amendment proposed in the bill adds para. 5 to Article 8 LPP, which limits the principle of transparency in public procurement in case of the processing of personal data concerning criminal convictions, but leaves a possibility of disclosing them only for the purpose of applying the measures of legal protection, i.e. when indicating the interest in filing an appeal and in the time limit for that appeal. At the same time, in accordance with Article 8a para. 6 LPP bill, a buyer will make available documents concerning convictions and sentences after they are pseudonymised.

Although the amendments proposed ensure the possibility of exercising the right to a court and comply with the ban on making available data concerning convictions and penalties imposed, they do not ensure efficient protection of convicts' data. The data in the offers submitted for the purpose of bidding concern persons disclosed in the National Criminal Register. If a buyer, providing data concerning a conviction or a penalty, pseudonymises the data of a particular person (a convict) and at the same time discloses, because of the obligation to do so, the data of all other board members, directors and authorised agents who have no criminal record, it will not be difficult to draw a conclusion which person is pseudonymised among those that the document concerns. Thus, the protection is fictitious and the legislator has not found a method to reconcile the essential interests (openness, the right to privacy and the right to a court).

BIBLIOGRAPHY

Bidziński M., Chmaj M., Szustakiewicz P., *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa 2010.

Wojcieszko-Głuszko E., *Tajemnica przedsiębiorstwa i jej cywilnoprawna ochrona na podstawie przepisów prawa nieuczciwej konkurencji*, Prace Instytutu Prawa Własności Intelektualnej UJ, 2005/86.

[17] Bill presented to the Standing Committee of the Council of Ministers for European Matters on 23 April 2018.

PRINCIPLE OF TRANSPARENCY IN PROCUREMENT PROCEEDINGS VERSUS PROTECTION OF THE RIGHT TO PRIVACY

Summary

Transparency of public procurement proceedings is to safeguard the compliance with the principles of equal treatment, fair competition and proportionality, and eliminate the risk of arbitrariness of a buyer's decisions. However, it is necessary to determine whether transparency covering the obligation to disclose information about people listed in contractors' offers is not in conflict with the right to privacy, which is guaranteed by Article 7 of the Constitution of the Republic of Poland. The principle of transparency cannot lead to the infringement of another interest protected by the constitutional provision. It must also be implemented in accordance with the provisions of Regulation (EU) 2016/697. This means that personal data processed (made available) in public procurement proceedings must be protected. While disclosing the data concerning their qualifications, functions and no criminal record does not infringe the rights and freedoms of data subjects, the provision of information about conviction and a penalty adjudicated without a court's ruling concerning making this information public would constitute a non-judicial sanction. The principle of transparency cannot result in sanctions that are not laid down in a sentence. It also cannot lead to discouraging persons from taking part in public procurement proceedings and, as a result, limiting competition. Therefore, it is necessary to protect information concerning the fact of conviction and a penalty imposed on persons whose data are listed in public procurement offers. At the same time, the data must be available to competitors of a contractor who provides the data of those people in an offer so that they can verify whether those persons' conviction should or should not constitute grounds for excluding from a tender process and protect their right to receive an order. However, the legislator has not provided a safeguard so that, after the disclosure to competitors, the data will not be available to a wide circle of people and used for the purpose that is in conflict with statute.

Keywords: public procurement, transparency, right to privacy, personal data, no criminal record/no conviction

ZASADA JAWNOŚCI W POSTĘPOWANIU O UDZIELENIE ZAMÓWIENIA A OCHRONA PRAWA DO PRYWATNOŚCI

Streszczenie

Jawność postępowania o udzielenie zamówienia publicznego ma gwarantować respektowanie zasad równego traktowania, uczciwej konkurencji, proporcjonalności oraz wyłączać ryzyko arbitralności rozstrzygnięć zamawiającego. Rozstrzygnięcia wymaga jednak kwestia, czy jawność obejmująca obowiązek ujawniania informacji o osobach zamieszczanych w ofertach wykonawców nie stoi w konflikcie z prawem do prywatności, którego respektowania wymaga art. 7 Konstytucji RP. Zasada jawności nie może prowadzić do naruszenia innego dobra chronionego przepisem konstytucji. Musi być także wykonywana w zgodzie z przepisami rozporządzenia 2016/697 UE. Oznacza to, że dane osobowe przetwarzane (udostępniane) w postępowaniu o udzielenie zamówienia publicznego muszą być chronione. O ile nie godzi w prawa i wolności osób, których dane są przetwarzane, ujawnianie danych o ich kwalifikacjach, pełnionej funkcji i niekaralności, to podanie informacji o fakcie skazania

i orzeczonej karze bez orzeczenia sądu o podaniu takiej informacji do wiadomości publicznej byłoby sankcją nieorzeczoną przez sąd. Zasada jawności nie może prowadzić do powstawania sankcji niewskazanej w wyroku skazującym. Nie może także prowadzić do odstręczania od udziału w postępowaniu o udzielenie zamówienia i w konsekwencji ograniczania konkurencji. Konieczna jest więc ochrona informacji o fakcie i rodzaju orzeczonej kary wobec osób, których dane podaje się w ofertach w przetargu publicznym. Jednocześnie dane te muszą być dostępne dla konkurentów wykonawcy, który dane tych osób podaje w ofercie, aby mogli zweryfikować, czy karalność tych osób nie powinna być podstawą wykluczenia z przetargu i chronić swe prawo do uzyskania zamówienia. Ustawodawca nie zapewnił jednak, że dane te po ujawnieniu konkurentom nie będą dostępne dla zbyt szerokiego kręgu osób i wykorzystywane w celu niezgodnym z ustawą.

Słowa kluczowe: zamówienia publiczne, jawność, prawo do prywatności, dane osobowe, niekaralność

EL PRINCIPIO DE PUBLICIDAD EN EL PROCESO DE ADJUDICACIÓN DE CONTRATACIÓN PÚBLICA Y LA PROTECCIÓN DE DERECHO A LA PRIVACIDAD

Resumen

La publicidad del proceso de adjudicación de contratación pública ha de garantizar el respeto de principios de igual trato, competencia honesta, proporcionalidad, así como excluir riesgo de arbitrariedad de decisiones del contratante. Sin embargo, hay que analizar si la publicidad que incluye la obligación de revelar la información sobre personas incluidas en las ofertas presentadas por contratistas no viola el derecho a privacidad, cuyo respeto requiere el art. 7 de la Constitución de la Republica de Polonia. El principio de la publicidad no puede infringir otro bien protegido por la Constitución. También ha de ser aplicado de acuerdo con el reglamento (UE) 2016/679. Esto significa que los datos tratados (facilitados) en el procedimiento de adjudicación de contratación pública han de ser protegidas. La revelación de datos de formación profesional, cargos y falta de antecedentes penales no viola derechos y libertades de personas cuyos datos son procesados, sin embargo la información sobre la condena y pena impuesta sin que el tribunal ordene la publicación de tal información, constituye una sanción no impuesta por un tribunal. El principio de publicidad no puede crear sanciones no indicadas por el tribunal sancionador. Tampoco puede desanimar a participar en el proceso de adjudicación de contratación pública y, como resultado, limitar la competencia. Por tanto, es necesario proteger la información sobre el hecho y tipo de la condena de las personas cuyos datos se publican en la ofertas en la contratación publica. Al mismo tiempo, estos datos han de ser accesibles para adversarios del contratista para que puedan verificar si los antecedentes penales de estas personas no constituye supuesto de su exclusión de la contratación y para que puedan proteger su derecho a conseguir la contratación. El legislador no ha previsto que estos datos, tras su relevación a los adversarios, no serán accesibles a un circulo amplio de personas y no serán utilizados para el fin contrario a la ley.

Palabras claves: contratación pública, publicidad, derecho a privacidad, datos personales, sin antecedentes penales

ПРИНЦИП ОТКРЫТОСТИ В ПРОЦЕДУРЕ ПРИСУЖДЕНИЯ КОНТРАКТА И ЗАЩИТА ПРАВА НА НЕПРИКОСНОВЕННОСТЬ ЧАСТНОЙ ЖИЗНИ

Резюме

Открытый характер процедуры государственных закупок заключается в том, чтобы гарантировать уважение принципов равного обращения, справедливой конкуренции, соразмерности и исключить риск произвольности решений присуждающей организации. Однако необходимо решить, не противоречит ли открытость, в том числе обязанность раскрывать информацию о лицах, включенных в предложения подрядчиков, праву на неприкосновенность частной жизни, которое должно соблюдаться согласно ст. 7 Конституции Польши. Принцип открытости не может вести к нарушению другого блага, охраняемого положениями конституции. Он также должен осуществляться в соответствии с положениями Регламента 697/2016 ЕС. Это означает, что персональные данные, обрабатываемые (предоставляемые) в ходе процедур государственных закупок, должны быть защищены. Если разглашение данных о квалификации, функциях и отсутствии судимости лиц, чьи данные обрабатываются, не нарушает их права и свободы, то предоставление информации о факте осуждения и вынесении приговора без вынесения судом решения о разглашении такой информации общественности будет санкцией, не предписанной судом. Принцип открытости не может вести к санкциям, не указанным в обвинительном приговоре. Это также не может вести к сдерживанию от участия в процедуре закупок и, как следствие, к ограничению конкуренции. Поэтому необходимо защищать информацию о факте и виде приговора, вынесенного в отношении лиц, чьи данные приведены в предложениях в открытом конкурсе. В то же время эти данные должны быть доступны конкурентам подрядчика, который предоставляет данные этих людей в предложении, чтобы они могли проверить, не должна ли быть их судимость основанием для исключения из тендера, и защитить свое право на получение контракта. Однако законодатель не обеспечил, чтобы эти данные после разглашения конкурентам не были доступны слишком большому количеству людей и использовались в целях, не соответствующих закону.

Ключевые слова: государственные закупки, открытость, право на неприкосновенность частной жизни, личные данные, отсутствие судимости

DER GRUNDSATZ DER OFFENHEIT IM VERFAHREN DER AUFTRAGSVERGABE UND DER SCHUTZ DES RECHTS AUF PRIVATSPHÄRE

Zusammenfassung

Die Offenheit der Auftragsvergabe besteht darin, die Einhaltung der Grundsätze der Gleichbehandlung, des fairen Wettbewerbs und der Verhältnismäßigkeit zu gewährleisten und das Risiko der Willkür der Entscheidungen der Vergabestelle auszuschließen. Es muss jedoch entschieden werden, ob Offenheit, einschließlich der Verpflichtung zur Offenlegung von Informationen über Personen, die in den Angeboten von Auftragnehmern enthalten sind, nicht dem Recht auf Privatsphäre zuwiderläuft, das auf Basis von Artikel 7 der polnischen Verfassung geachtet werden muss. Der Grundsatz der Offenheit darf nicht dazu führen, dass ein anderes durch die Bestimmungen der Verfassung geschütztes Gut verletzt wird. Es muss auch in Übereinstimmung mit den Bestimmungen der Verordnung 697/2016 EU durchgeführt sein. Dies bedeutet, dass personenbezogene Daten, die im Rahmen der Auftragsvergabe verarbeitet (verfügbar gemacht) werden, geschützt werden müssen. Sofern dies nicht die Rechte und Freiheiten von Personen verletzt, deren Daten verarbeitet werden, wäre die Offenlegung von

Daten zu deren Qualifikation, Funktion und Strafregister eine Sanktion, die das Gericht nicht anordnet, wenn Informationen über die Tatsache der Verurteilung und die verhängte Strafe zur Verfügung gestellt werden. Der Grundsatz der Offenheit darf nicht zu Sanktionen führen, die in der Verurteilung nicht vermerkt ist. Sie darf auch nicht zur Abschreckung von der Teilnahme an der Auftragsvergabe und damit zur Einschränkung des Wettbewerbs führen. Daher ist es erforderlich, Informationen über die Tatsache und die Art der Verurteilung von Personen zu schützen, deren Daten in Angeboten in einer öffentlichen Ausschreibung enthalten sind. Gleichzeitig müssen diese Daten der Konkurrenz des Auftragnehmers zur Verfügung stehen, der die Daten dieser Personen im Angebot angibt, damit diese nachprüfen können, dass ihr Strafregister nicht die Grundlage für einen Ausschluss vom Angebot sein sollte, und ihr Recht auf Erlangung des Auftrags schützen. Der Gesetzgeber hat jedoch nicht sichergestellt, dass diese Daten nach Offenlegung gegenüber der Konkurrenz nicht zu vielen Personen zur Verfügung stehen und für Zwecke verwendet werden, die nicht im Einklang mit dem Gesetz stehen.

Schlüsselwörter: Vergabe öffentlicher Aufträge, Offenheit, Recht auf Privatsphäre, persönliche Daten, Strafenregister

PRINCIPE DE TRANSPARENCE DANS LA PROCÉDURE DE PASSATION DE MARCHÉ ET PROTECTION DU DROIT À LA VIE PRIVÉE

Résumé

Le caractère ouvert de la procédure de marché public vise à garantir le respect des principes d'égalité de traitement, de concurrence loyale, de proportionnalité et à exclure le risque d'arbitraire des décisions de l'entité adjudicatrice. Cependant, il est nécessaire de décider si la transparence, y compris l'obligation de divulguer des informations sur les personnes incluses dans les offres des contractants, n'entre pas en conflit avec le droit à la vie privée, qui doit être respecté par l'art. 7 de la Constitution polonaise. Le principe d'ouverture ne doit pas conduire à la violation d'un autre bien protégé par les dispositions de la constitution. Il doit également être effectué conformément aux dispositions du règlement 697/2016 UE. Cela signifie que les données à caractère personnel traitées (mises à disposition) dans le cadre d'une procédure de marché public doivent être protégées. Si la divulgation de données sur les qualifications, les fonctions et casier judiciaire vierge des personnes dont les données sont traitées ne viole pas leur droits et libertés, le fait de fournir des informations sur leur condamnation et de la peine infligée sans décision de justice sur la divulgation de ces informations au public serait une sanction non ordonnée par le tribunal. Le principe de transparence ne peut conduire à une sanction non indiquée dans le jugeemtn de condamnation. Cela ne doit pas non plus dissuader de participer à une procédure de passation de marché et, en conséquence, de restreindre la concurrence. Par conséquent, il est nécessaire de protéger les informations sur le fait et le type de peine infligée aux personnes dont les données sont fournies dans des offres dans le cadre d'un appel d'offres public. Dans le même temps, ces données doivent être disponibles pour les concurrents du contractant, qui communique les données de ces personnes dans l'offre, afin qu'ils puissent vérifier que leur casier judiciaire ne doit pas servir de fondement à l'exclusion du marché et proteger leur droit d'obtenir le contrat. Cependant, le législateur n'a pas assuré que ces données, après avoir été communiquées à des concurrents, ne seraient pas accessibles à un trop grand nombre de personnes et utilisées à des fins non conformes à la Loi.

Mots-clés: marchés publics, transparence, droit à la vie privée, données personnelles, casier judiciaire vierge

IL PRINCIPIO DI TRASPARENZA NELLE PROCEDURE DI GARA DI APPALTO E LA TUTELA DEL DIRITTO ALLA PRIVACY

Sintesi

La trasparenza delle procedure di gara di appalto pubblico deve garantire il rispetto dei principi di pari opportunità, di concorrenza leale, di proporzionalità e deve escludere il rischio di arbitrarietà delle decisioni del committente. Bisogna tuttavia valutare se la trasparenza, che comprende l'obbligo di rivelare le informazioni sulle persone, contenute nelle offerte degli appaltatori, non sia in conflitto con il diritto alla privacy, la cui osservanza è richiesta dall'art. 7 della Costituzione della Repubblica di Polonia. Il principio di trasparenza non può portare alla violazione di un altro bene tutelato da una norma della costituzione. Deve essere inoltre attuato conformemente alle norme del regolamento (UE) 2016/679. Questo significa che i dati personali trattati (resi accessibili) nella procedura di gara di appalto pubblico devono essere tutelati. Sebbene la comunicazione di dati sulle qualifiche, sulla funzione svolta e sull'assenza di precedenti penali degli interessati non pregiudichi i loro diritti e libertà, tuttavia la comunicazione di informazioni sulla condanna e sulla pena comminata senza una sentenza del giudice di divulgazione al pubblico di tale informazione costituirebbe una sanzione non comminata dal giudice. Il principio di trasparenza non può generare una sanzione non indicata nella sentenza di condanna. Non può altresì portare a scoraggiare a partecipare alla gara d'appalto e in conseguenza a limitare la concorrenza. È quindi necessaria la tutela dell'informazione sulla condanna e sul tipo di pena comminata nei confronti delle persone i cui dati vengono pubblicati nelle offerte delle gare pubbliche. Allo stesso tempo questi dati devono essere accessibili ai concorrenti dell'appaltatore, che inserisce dati di queste persone nell'offerta, per potere verificare se i precedenti penali di tali persone non costituiscano una base di esclusione dalla gara e tutelare i proprio diritto di vincere l'appalto. Il legislatore non ha tuttavia garantito che i dati, dopo essere stati comunicati ai concorrenti, non diventino accessibili a un gruppo troppo esteso di persone e vengano utilizzati in modo non conforme alla legge.

Parole chiave: appalti pubblici, trasparenza, diritto alla privacy, dati personali, assenza di precedenti penali

Cytuj jako:

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ISSUE OF PRIVILEGES IN THE SOCIAL SECURITY SYSTEM PART 2

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The first part of the study presented the privileges that are most painful and burdening for the social security system in Poland. This part presents successive privileges of other professional groups and costs burdening the social security system.

1. PRIVILEGES OF CLERKS, PUBLIC OFFICIALS AND OTHER PERSONS

Some professional groups have formal[1] and financial privileges[2]:
- Members of Parliament based on the Act of 9 May 1996 on the exercise of the mandate of an MP and a senator;[3]
- Public prosecutors based on the Act of 28 January 2016: Law on Public Prosecution;[4]
- Judges based on the Act of 27 July 2001: Law on the common courts system.[5]

The institution called the state of retirement from active service is a special privilege of judges and prosecutors. It is hard to approve of the opinion of the Prosecutor

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1 Formal immunity means limitation of liability for prohibited acts. It is granted to senior officials and MPs. The immunity can be removed with the use of a special procedure and following the consent of specific bodies.

2 Financial immunity means a lack of possibility of prosecuting its holders for actions connected with the exercise of their office.

3 Consolidated text, Dz.U. 1996, No. 73, item 350, Chapter 2.

4 Consolidated text, Dz.U. 2016 item 177, Chapter 3.

5 Consolidated text, Dz.U. 2001, No. 98, item 1070, Chapter 3.

General that the recognition of the state of judges and prosecutors' retirement from active service as a privilege of those professional groups is not justified and the provisions protecting officers who started service before new solutions discussed here entered into force match those concerning the protection of acquired rights, legal security and the general principle of trust in the state and positive law resulting from Article 2 of the Constitution of the Republic of Poland.[6] The Constitutional Tribunal confirms the author's opinion as it ruled[7] that the state of retirement from active service belongs to the category of the judges' privileges that result from judicial independence and are based on the provisions of the Constitution (see Article 180 paras 3 and 4).

The Act of 28 August 1997 amending the Act: Law on the common courts system and some other acts[8] introduced an institution of the state of retirement from active service. In case of an obstacle in the exercise of their office (health, age, organisational changes), judges or public prosecutors can retire from active service. In such circumstances, the employment relationship is not terminated but continues for life, which means that they remain judges and public prosecutors although they do not hold office. Both prosecutors and judges in the state of retirement from active service cannot get involved in business activities or be employed but they can perform didactic and scientific functions.

The retirement security of judges and public prosecutors is implemented by the payment of a pension. Judges and public prosecutors receive it from a separate pension fund. Judges' remuneration is exempt from social insurance contributions, which should be recognised as inappropriate. According to the Constitutional Tribunal,[9] the introduction of a different, more favourable, remuneration for judges was aimed at ensuring their stable financial status that enables them to avoid failure to fulfil the obligation to adjudicate in an impartial way. Judicial independence is not a judges' privilege but their duty to society, and safeguarding it is the obligation of the state, which imposed a series of limitations on judges with regard to political and social activities and obtaining extra income.

The possibility of retiring at an earlier age than the common retirement age at the request of the person concerned as well as the method of calculating remuneration of extra leaves may be recognised as privileges. The institution of retirement from active service undoubtedly constitutes a privilege but is also justified in terms of judicial independence. However, the system of financing judges and public prosecutors' pensions seems to be inappropriate. The amount of payments that all judges, also those of military courts, are entitled to constitutes an unreasonable burden for the state budget.[10]

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[6] Source: http://www.senat.gov.pl/download/gfx/senat/pl/senatposiedzeniatematy/97/drukisejmowe/330-001.pdf (accessed on 20.09.2018).

[7] See Constitutional Tribunal judgment of 12 December 2001, SK 26/01.

[8] Dz.U. 1997, No. 124, item 782.

[9] Constitutional Tribunal judgment of 11 July 2000, K. 30/99.

[10] T. Bińczycka-Majewska, *Powszechność systemu ubezpieczeń społecznych – teoria i praktyka*, [in:] M. Żukowski (ed.), *Systemy ubezpieczeń społecznych – między solidaryzmem a indywidualizmem*, Zakład Ubezpieczeń Społecznych, Katolicki Uniwersytet Lubelski Jana Pawła II, Warszawa–Lublin, 2014, p. 97.

Apart from retirement rights, there are also many other privileges for selected professional groups, which are worth mentioning. Namely, the Act of 9 June 2016 on the rules of shaping remuneration for managers in some companies[11] determines the system of awarding redundancy compensation for members of managerial bodies, inter alia, in the entities of the State Treasury, local self-government, and state-owned and municipal legal entities. The institution of redundancy compensation enables selected persons, usually appointed in those entities in a way that is rather non-transparent, to obtain benefits, which can also be treated as a privilege.[12] Those companies incur costs of redundancy compensation regardless of their efficiency and profits they obtain, which can affect prices of basic goods and services. This means that the costs of those privileges burden the entire society.

Extra remuneration that is called the thirteenth salary is a clerks' privilege.[13] The provision of Article 1 para. 1 of the Act of 12 December 1997 on extra yearly remuneration for the employees of the state budget entities[14] determines the mode of acquiring the right to and the calculation and payment of the extra yearly remuneration for the employees of the state budget entities, hereinafter referred to as "yearly remuneration". In accordance with Article 2 para. 1, in order to be paid the bonus, an employee must work for a full calendar year for a given employer. The yearly remuneration is calculated as 8.5% of the sum (Article 4 para. 1). The thirteenth salary is justified in production and service-providing companies, where it can result from extra work or results obtained. The above comments aim to present the consequences of awarded privileges in a wider context.

According to the Constitutional Tribunal, the extra yearly remuneration (the so-called thirteenth salary) constitutes a component of remuneration for work as an element of employment relationship in the state budget entities.[15] The Constitutional Tribunal stated[16] that the thirteenth salary, due to its nature and scope, could not be treated in terms of a privilege. It is hard to approve of this argument because awards or bonuses are not components of remuneration within the meaning of employment law. An employer should determine components of remuneration in an employment contract.[17] An award and a bonus are declarative in nature. An award constitutes distinction and a bonus is an award or extra remuneration for doing something, which is hard to determine a priori. Dutiful fulfilment of tasks by clerks is an obligation that deserves remuneration but not necessarily an extra pay. In the author's opinion, the above arguments support the assumption that in the described circumstances we deal with privileges, which most labour do not have and which do not result from the provisions of employment law.

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[11] Consolidated text, Dz.U. 2016, item 1202.

[12] The change of the government each time results in the change of management in state-owned companies.

[13] It covers, inter alia, clerks working in the institutions of public administration, state control bodies, courts and local self-government entities, MPs and senators' offices.

[14] Consolidated text, Dz.U. 1997, No. 160 item 1080.

[15] Constitutional Tribunal judgment of 9 July 2012, P 59/11.

[16] Judgment of 21 February 2006, K 1/05.

[17] Act of 26 June 1974: Labour Code, consolidated text, Dz.U. 1974, No. 24, item 141, Article 29 § 1.

2. GENDER-RELATED PRIVILEGES

The privilege of an earlier retirement age for women is still a hot and controversial topic. The inter-war regulations granted both men and women the rights to retirement but differentiated the retirement age and working periods that entitled to retirement.[18]

The Act of 13 October 1998 on the social security system that was referred to in part 1 of this study reformed the retirement system based on insurance. The provisions of the Act allowed the differentiation of the retirement age of men and women.

The Act of 11 May 2012 amending the Act on old-age and disability pensions paid from the Social Insurance Fund (Fundusz Ubezpieczeń Społecznych) and some other acts[19] raised and equalised the retirement age of men and women. Thus, it abolished the different retirement age for men and women, which had earlier been recognised as the proper indication of a compensatory privilege. The assumptions of the retirement system reform prescribed equalised retirement age for men and women, inter alia, for the following reasons:

– The system should be uniform and equalise the insurance period (contributions) that entitles men and women to equal pensions;
– Statistically, life expectancy for females is longer than for men;
– Poland must respect the same status of men and women in the social security system because of the provisions of Council Directive 79/7/EEC of 19 December 1978 on progressive implementation of the principle of equal treatment for men and women in matters of social security.

The above change of raising and equalising the retirement age of men and women also aimed to balance the state of public finance. Organisations of employers in general supported the project to raise the retirement age but trade unions' opinions were negative, especially with respect to the idea to raise the retirement age of women.

According to the survey conducted by the CBOS Public Opinion Research Center (Centrum Badania Opinii Społecznej),[20] the majority of Poles are for an option to let women decide when they want to retire.[21] In many societies, including Poland, there are not many supporters of the idea of a raised retirement age.

The Constitutional Tribunal[22] indicated that the differentiation of the retirement age for men and women does not discriminate against women but is an indication

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[18] Compare Regulation of the President of the Republic of Poland of 24 November 1927, Dz.U. 1927, No. 106, item 911, Article 24 paras 1–2.

[19] Consolidated text, Dz.U. 2012, item 637.

[20] Centrum Badania Opinii Społecznej (CBOS), *Wiek emerytalny kobiet i mężczyzn*, reports on surveys: BS/192/2003, BS/205/2005, BS/155/2007, BS/49/2010, Warszawa 2003, 2005, 2007, 2010, http://www.bezuprzedzen.org/doc/04Wiek_emerytalny_kobiet_i_mezczyzn_2003_CBOS.pdf; http://www.cbos.pl/SPISKOM.POL/2005/K_205_05.PDF; http://www.cbos.pl/SPISKOM.POL/2007/K_155_07.PDF; http://www.cbos.pl/SPISKOM.POL/2010/K_049_10.PDF (accessed on 10.07.2017).

[21] Compare the Constitutional Tribunal judgment of 24 September 1991, Kw 5/91.

[22] Compare the Constitutional Tribunal judgment 7 May 2014, K 43/12; Constitutional Tribunal decision of 17 July 2014, S 3/14.

of a compensatory privilege justified by the fact that changes that cause that social position of the two genders is equalised have not finished and today we can still speak about social differences, although occurring to a smaller extent than in the past, which originate from the role played by women in a traditional family model. It also indicated that the differentiation of the retirement age for men and women is in compliance with the principle of social justice (Article 2 Polish Constitution), which with regard to the relations discussed recommends taking into account a different situation of women in society. A specific, in many ways, social position of women and objective biological differences contribute to constitutional justification for the introduction of special solutions concerning women in comparison with men. The dissenting opinions[23] expressed in the Constitutional Tribunal judgment of 7 May 2014 indicated that raising the retirement age for women and equalising it with men's one ruins a traditional family model and deprives women of the freedom to decide what role in a family they want to play.

The predominant opinions in Poland are against the increase in the retirement age, especially for women, and equalising it with the age for men, which is motivated by biological and social differences.[24] In the jurisprudence and Polish legislation, there is a deeply entrenched tradition of establishing the retirement age for women at the lower level than for men with the exception of the provisions of the Act of 11 May 2012 amending the Act on old-age and disability pensions paid from the Social Insurance Fund and some other acts equalising the retirement age for men and women and the above-mentioned provision of Article 24 Regulation of the President of the Republic of Poland of 24 November 1927.

The Constitutional Tribunal[25] has repeatedly indicated that the differentiated basic retirement age of men and women within the common retirement scheme that has been in force since 1 January 1999 does not discriminate against women. The differentiation is justified by the need to reduce the biological and social differences between women and men and constitutes a compensatory privilege substantiated in the light of constitutional norms. Under the European and international law, a compensatory privilege for females is admissible but is assumed to be transitional and temporary in nature. Article 7 para. 1 of the Council Directive 79/7/EEC of 19 December 1978[26] allows member states to maintain differentiated retirement age of men and women. The European Union law prescribes equalising the retirement age of women and men provided that women's development and career opportunities are also equalised. As far as the issue of the retirement age of women is concerned, Professor Ewa Łętowska[27] believes that raising it or equalising it for men and women cannot eliminate the differences in the level of pensions. She notices that the new law does not take into account the mechanisms concerning "equal rights to social security" for women and the influence of the capital collected on

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[23] To the Constitutional Tribunal judgment of 7 May 2014, K 43/12.

[24] G. Uścińska (ed.), *Zabezpieczenie społeczne w Polsce. Problemy do rozwiązania w najbliższej przyszłości*, Instytut Pracy i Spraw Socjalnych, Warszawa 2008, p. 110.

[25] Constitutional Tribunal judgments of 15 July 2010, S 2/10; and of 7 May 2014, K 43/12.

[26] OJ L 6/24, 10.1.1979.

[27] Dissenting opinion on the Constitutional Tribunal judgment of 15 July 2010, K 63/07.

the level of their pensions. The scientist also emphasises there is a lack of adequate compensatory mechanisms for women in the Act that changed the retirement age.

Referring to equality, biological, economic and social differences between women and men or the regulation of the retirement age of women in other countries does not make it possible to draw unequivocal conclusions. The principle of equal treatment regardless of sex constitutes one of the fundamental principles of the European Union law but the principle cannot be directly adopted without taking into account social, biological and economic aspects, traditions and motherhood, i.e. the aspects connected with the role and position of a woman in the family and social life.

The presently changing cultural and civilisational tendencies concerning the position of women in society indicate the need to take into account many aspects, including the right to choose for those who cannot or do not want to continue working due to their health or family circumstances, etc. The culturally established position of women in society reflected in biological aspects and unequal share of maternity and upbringing related functions indicate that women's privilege to retire at an earlier age is just.

3. PRIVILEGES RESULTING FROM WORK IN HARMFUL OR ARDUOUS CONDITIONS

The privilege that entitles people working in harmful or arduous conditions to retire at an earlier age should not raise doubts.

The provision of Article 53 of the Act of 14 December 1982 on retirement pensions for employees and their families[28] recognised, inter alia, the following persons as ones employed at special positions: employees of state control bodies, journalists, teachers and fire fighters. The catalogue of persons entitled to earlier retirement seems to be too broadly determined if one takes into account the privileged rights in comparison with most insured persons. The Regulation of the Council of Ministers of 7 February 1983 concerning the retirement age and increased retirement pensions and disability pensions for employees working in special conditions or at special positions[29] amended by the Regulation of the Council of Ministers of 21 May 1996,[30] based on Article 55 of the Act of 14 December 1982 on retirement pensions for employees and their families determines the types of work and jobs that entitle one to earlier retirement.

The above comments aim to illustrate the context of enacting and amending regulations concerning privileges that entitle employees to earlier retirement due to their employment in harmful and arduous conditions for health or by reason of working at special positions. The presently binding provisions of the Act of 17 December 1998 on old-age and disability pensions paid from the Social Insurance

[28] Consolidated text, Dz.U. 1982, No. 40, item 267.
[29] Dz.U. 1983, No. 8, item 43.
[30] Dz.U. 1996, No. 63, item 292.

Fund[31] also do not make a clear distinction between working at special positions and working in special conditions.

The Act of 19 December 2008 on bridging pensions defines the work in special conditions (Annex No. 1: List of jobs in special conditions) as work connected with risk factors which means there is a high probability that they can cause permanent damage to health at an old age, work done in special conditions of the working environment determined by natural forces or technological processes, which regardless of the applied preventive measures of technical, organisational and medical nature impose requirements that exceed the level of employees' capabilities, which is limited as a result of the process of aging before they reach the retirement age.[32]

The Supreme Court[33] differentiated between the employees working in special conditions and those holding special positions. According to this distinction, work in special conditions means work that is characterised by high harmfulness to health and a high level of arduousness, i.e. both elements (high harmfulness and high arduousness) must occur jointly. Thus, work in harmful conditions does not mean the same as work in special conditions because it must be characterised by a high level of arduousness at the same time. Employees working in special conditions are persons employed to do a job that is highly harmful to health and highly arduous.

The Act of 19 December 2008 on bridging pensions[34] also defines holding special positions (Annex No. 2: List of jobs at special positions) as work requiring special responsibility and special psycho-physical fitness, the possibility of which to be properly done in a way not endangering public security, including health and life of other people, decreases before the employees reach the retirement age as a result of the worsening of their psycho-physical fitness connected with the aging process.

The Constitutional Tribunal repeatedly discussed the issue of work in special conditions or at special positions,[35] however, it assessed the concepts of "in special conditions or at special positions" jointly. The concept of work "in special conditions" or "at special positions" should be redefined and clearly differentiated because of the fact that their meaning is different and in practice they result in different rights for different positions or professional groups. The provisions of the Act on bridging pensions referred to herein and of the Act of 17 December 1998 on old-age and disability pensions paid from the Social Insurance Fund are incoherent, and because of that open the way to interpretation. The list of jobs in special conditions, including positions exposed to conditions harmful and arduous to health, should result from specialist research and findings of social partners' consultation.

There is no shortage of people willing to get privileges (compensatory or bridging pensions); indeed, their number is growing, which has been mentioned above. Applicants often use devious arguments in order to substantiate their right to a bridging pension. This concerns both persons employed in especially harmful and

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31 Consolidated text, Dz.U. 1998, No. 162, item 1118.

32 Act of 19 December 2008 on bridging pensions, consolidated text, Dz.U. 2008, No. 237, item 1656, Article 3 para. 1.

33 Supreme Court judgment of 20 October 2015, III UK 31/15.

34 Dz.U. 2008, No. 237, item 1656, Article 3 para. 3.

35 See the Constitutional Tribunal judgment of 16 March 2010, K 17/09.

arduous conditions and persons whose job has been classified as one at a special position. The trade unions' arguments concerning taking away some privileges and the scope of bridging pensions, which in trade unions' opinion should be maintained as possibly broadest and an obligation to pay social insurance premiums for civil-law contracts[36] should be introduced, do not seem convincing in the context of the pension scheme inefficiency. The arguments that, e.g. an older train or car driver constitutes a threat to the security of traffic etc., do not seem convincing, either.

The Constitutional Tribunal indicated that the criterion for granting a bridging pension should not be a political or economic recommendation but a medical one. As a result, the persons entitled to a bridging pension include employees doing specific jobs and not the whole trade.[37]

Withdrawal of the former rules of retirement at an earlier age for people working in special conditions or at special positions made the legislator pass the Act on bridging pensions. The Bridging Pensions Fund is a state fund earmarked for financing bridging pensions. The right to a bridging pension is an entitlement of persons who worked in special conditions or at special positions for at least 15 years. The requirements for being granted or losing the right to a bridging pension and compensation are laid down in Article 4 of the Act on bridging pensions. The compensation means damages for the loss of the right to be granted retirement at an earlier age in connection with work in special conditions or at a special position for persons who are not granted the right to a bridging pension.

The Bridging Pensions Fund's resources are mainly provided by contributions paid by employers (1.5% of the contribution assessment base) and subsidies from the state budget. In the first years of its operation, the Fund's income was higher than its spending. It is predicted that in 2019 and the years to follow, the subsidy from the state budget will have to considerably increase in order to cover the cost of bridging pensions paid because of constantly growing number of pensioners entitled to them.

Table 1. Costs of bridging pensions

2017		2018		2019	
Quoted costs in thousand PLN	Number of people in thousand	Quoted costs in thousand PLN	Number of people in thousand	Quoted costs in thousand PLN	Number of people in thousand
727,422	22.8	847,960	24.3	1,093,495	31

Source: the author's own development based on the State budget acts for 2016–2018 and the State budget bill for 2019.

[36] It is also worth mentioning that the legislator followed the proposals to cover civil-law contracts with social insurance premiums, which resulted in the increase in costs of business operations.

[37] See Constitutional Tribunal judgments of 3 March 2011, K 23/09; and of 25 November 2010, K 27/09.

The provision of Article 41 para. 4 of the Act on bridging pensions has obliged social insurance premium payers to list jobs which are connected with working in special conditions or at special positions, and to make contributions to the Bridging Pensions Fund since 1 January 2010. The obligation to pay those premiums for an employee starts on the day they start working in special conditions or at a special position and ends when they stop doing the jobs. It is worth mentioning that the costs of contribution to the Bridging Pensions Fund incurred by employers undoubtedly increase the cost of business operation, and this way they affect the competitiveness of the economy.

The above-described costs of privileges as well as the exemption of some professional groups from the obligation to pay social insurance premiums or high labour costs constitute a negative factor having impact on the efficiency of the pension system in Poland. Any changes in the regulations that introduce new privileges for selected professional groups are unjust for the entirety of employees and have influence on the increase in costs and the efficiency of the system.

Bridging pensions are justified in relation to persons who have been exposed to special harmfulness or arduousness of the conditions of their work and objectively cannot continue working. It seems right to gradually withdraw from compensational and bridging pensions, and it should be the proper step towards rationalisation of the whole system of social security consisting in considerable limitation or elimination of the described privileges.

The right to retirement at an earlier age seems justified in relation to people employed in particularly harmful and arduous conditions for health adequately to the exposure of a profession to objectively harmful and arduous conditions of work. The pension rights for working at special positions may raise doubts. The opinion results from the constitutional principles of equality, solidarity and social justice. The lists of jobs done in special conditions and at special positions should be developed based on scientific criteria and in cooperation with social partners, based on expert research findings.

4. COST OF PRIVILEGES GRANTED AND MAINTAINED

Table 2. Amount and costs of privileges in the social security system

Specification	2005	2010	2015	2016
Population of Poland in million	38.20	38.5	38.4	38.4
Employees[a] in thousand	12,890.0	14,106.0	14,829.0	15,293.3
Employees in agriculture, in thousand	2,134.0	2,376.0	2,384.0	2,385.0
Total number of old-age and disability pensioners in thousand, including:	**9,168.6**	**9,243.4**	**8,879.6**	**8,908.9**

Table 2 – cintinuation

Specification	2005	2010	2015	2016
Social Insurance Institution (ZUS)	7,184.2	7,491.4	7,273.8	7,312.8
Ministry of Defence (MON)	153.3	160.5	164.9	163.5
Ministry of the Interior and Administration (MSWiA)	162.5	188.5	205.8	206.1
Ministry of Justice (MS)	24.0	28.4	32.0	32.2
Agricultural Social Insurance Institution (KRUS)	1,644.6	1,374.7	1,203.2	1,194.4
Total value of old-age and disability pensions paid in million PLN, including:	**120,666.0**	**170,879.0**	**205,804.0**	**210,095**
by ZUS	97,179.9	142,840.8	172,908.8	177,127.9
by MON	4,006.1	5,288.0	6,389.8	6,389.8
by MSWiA	3,919.2	6,047.5	8,157.3	8,281.9
by MS	598.6	954.8	1,316.8	1,341.7
by KRUS	14,962.0	15,748.0	17,031.0	16,954.0
Average old-age and disability pensions in PLN paid by:				
ZUS	1,127.23	1,588.95	1,980.96	2,018
MON	2,177.90	2,745.24	3,229.08	3,257
MSWiA	2,009.61	2,673.74	3,302.53	3,348
MS	2,080.67	2,802.12	3,434.15	3,476
KRUS	758.11	954.68	1,179.63	1,182

[a] People who are professionally active.

Source: the author's own development based on *Rocznik statystyczny RP*, GUS, 2017.

– In Poland only 15.2 million out of 38.4 million citizens (40%) are employees.
– At present, circa 9 million people, i.e. almost 60% of employees, are paid old-age and disability pensions. The number is growing.
– The value of old-age and disability pensions exceeded PLN 210 billion in 2016 and constitutes a considerable share (8.85%) in GDP. It is undoubtedly a big and significant burden for the state budget.

Table 3. Proportion of average gross monthly pension to average remuneration in the national economy in 2005–2016

2005		2010		2015		2016	
ZUS[a]	KRUS[b]	ZUS	KRUS	ZUS	KRUS	ZUS	KRUS
66.6	40.5	62.2	35.3	63.7	35.5	62.3	34.2

[a] The proportion of an average gross monthly pension from non-agricultural system of social insurance to average remuneration in the national economy in the period 2005–2016.

[b] The proportion of an average gross monthly pension paid from KRUS to average monthly remuneration in the national economy in the period 2005–2016.

Source: the author's own development based on *Rocznik statystyczny RP*, GUS, 2017.

– Farmers insured in the Agricultural Social Insurance Institution (KRUS) pay premiums at the level that is 10% lower than the premium paid for employees earning the minimum wages. An average pension paid by KRUS in the period under analysis accounts for 60% of a pension paid by ZUS. The above proportions indicate that farmers are in a privileged position, as far as both the level of premiums and pensions are concerned.

Table 4. Proportion of age and disability pensions to GDP

Specification	2005	2010	2015	2016
GDP value in million PLN	983,302.0	1,445,298.0	1,799,392.0	1,858,468.0
Total value of old-age and disability pensions in million PLN	120,666.0	170,879.0	205,804.0	210,095.0
Share of pensions cost in GDP, in %	8.15	8.46	8.74	8.85

Source: the author's own development based on *Rocznik statystyczny RP*, GUS, 2017.

– The share of pensions cost in GDP is high and growing, which in the context of demographic conditions, low rate of the Poles' professional activity and the consequences of the 500+ benefit scheme for the labour market should be a warning signal mobilising to rationalisation of the social security system.

Table 5. Average gross monthly remuneration in selected sectors

Specification	2005	2010	2015	2016
Total in PLN	2,360	3,324	3,907	4,052
Mining	4,342	5,817	6,837	5,830
Manufacturing	2,099	2,917	3,669	3,827
Education	2,469	3,381	4,133	4,175

Table 5 – cintinuation

Specification	2005	2010	2015	2016
Professional military service	3,229	4,048	4,334	4,215
Public security officers	2,906	4,202	4,557	4,789
Public administration	3,008	4,013	4,653	4,870
Public prosecutors			12,416	13,129
Common court judges			16,778	17,709

Source: the author's own development based on *Rocznik statystyczny RP*, GUS, 2017.

- The remuneration of people generating GDP (manufacturing) belongs to the lowest category among the presented ones, which should be recognised as a symptomatic rate.
- The level of remuneration presented in the table indicates that judges and public prosecutors belong to professional groups paid best salaries and at least for this reason they should pay appropriate social insurance premiums.
- People insured and paying premiums within the common social insurance system receive much lower pensions than privileged people who do not pay premiums or, like farmers, make symbolic contributions.
- Pensions are paid from the state budget.
- Uniformed service officers are entitled to both a pension and remuneration for work in accordance with privileged rules.
- Privileged groups (inter alia uniform services, judges, public prosecutors) not only benefit from the privilege to retire at an earlier age but also are exempt from social insurance premiums, which means they receive higher remuneration.

Table 6. Remuneration re-grossing

Specification	Gross remuneration in PLN	Net remuneration in PLN	Employer's cost in PLN
Professional military	4,215	3,003	5,083
Public security officers	6,750	4,769	8,141
Public prosecutors	18,700	13,095	22,554
Judges	25,000	17,485	30,152
Manufacturing employees	3,827	2,733	4,615
Miners	5,830	4,128	7,031

Source: the author's own development based on *Rocznik statystyczny RP*, GUS, 2017.

Inclusion of people who are paid salaries within the social security system and re-grossing their remuneration would demonstrate the size of costs incurred by the state budget at present. The statistics of salaries paid within the social security system do not take into account insurance premiums, which causes that a part of cost of the groups' remuneration is hidden. The lack of uniform and coherent social security system affects the level of social inequality, thus it also results in a lack of uniform supervision and standard organisational and financial rules, including the method of calculating pensions. Old-age pensions are calculated and paid by separate pension scheme institutions of particular ministries (MON, MSWiA, MS). The dispersed administration involved in the functioning of many ministerial systems, KRUS and FUS (Social Insurance Fund) undoubtedly also affects the costs incurred by the state budget. It is necessary to put effort into standardising the social security system by limiting privileges[38] to the necessary minimum but within the uniform common system covering all professional groups without exceptions.

Social insurance premiums for all periods of employment and with no exceptions should be collected on insurance accounts. It is hard to indicate a rational reason why, e.g. judges, public prosecutors and officers of uniformed services should be exempt from social insurance premiums for their future pensions. If we recognise the need to financially award particular professions or positions, we should adequately remunerate those professions and functions and pay insurance premiums regardless of the type of employers concerned. The issue of costs of the discussed privileges is also the subject matter of many publications[39] and scientific debates referred to earlier, which are similar to the opinions presented herein.

The issue of privileges is more far-reaching than it is signalled in this article. It includes a very broad catalogue of benefits: the so-called thirteenth or fourteenth salaries; free railway tickets; allowance for coal, energy, fuel, uniforms, house or flat refurbishing or painting; extra healthcare service in specialist healthcare institutions; extra holidays; different working time; and the right to retire at an earlier age. Some privileges also cover employees' family members. Linking the level of old-age pensions with the period of work and remuneration, and unclear criteria for granting disability pensions,[40] especially in case of unformed services, should be recognised as unjust.

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[38] See T.H. Bednarczyk, *Dostosowywanie systemów emerytalnych do zmieniających się warunków społeczno-ekonomicznych oraz kontrowersje z tym związane*, [in:] M. Żukowski (ed.), *Systemy ubezpieczeń społecznych – między solidaryzmem a indywidualizmem*, Zakład Ubezpieczeń Społecznych, Katolicki Uniwersytet Lubelski Jana Pawła II, Warszawa–Lublin, 2014, p. 162.

[39] 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. 176–178; M. Góra, [in:] A. Dąbrowska-Nowacka (ed.), *Reforma reformy emerytalnej?*, Instytut Badań nad Gospodarką Rynkową i AXA Powszechne Towarzystwo Emerytalne S.A., Warszawa 2011, p. 20; J. Hausner, *ibid.*, p. 25; online sources: https://www.money.pl/gospodarka/raporty/artykul/mundurowi;emeryci;przed;50;kosztuja;12;7;mld;zlotych,41,0,877609.html (accessed on 20.09.2018); http://www.bankier.pl/wiadomosc/Ile-kosztuja-emerytury-resortowe-7289487.html; http://serwisy.gazetaprawna.pl/emerytury-i-renty/artykuly/976945,reforma-emerytur-mundurowych.html (accessed on 28.09.2018).

[40] G. Szpor (ed.), *System ubezpieczeń społecznych. Zagadnienia podstawowe*, 3rd edn, Wydawnictwo Prawnicze, LexisNexis, Warszawa 2006, p. 30.

Professor Marek Góra believes that welfare consisting in spending the demographic and development related effects has been built on the foundations of economic growth and favourable economic conditions for years and not only in Poland. Public finance of all civilised countries is built on the principle of a financial pyramid, which functions efficiently until there is an inflow of money from economic effects, but due to cultural and demographic factors the tendency has been reversed.[41] The actions undertaken by politicians so far indicate that the change in economic or demographic conditions forces interim actions most often consisting in amendments to legal regulations but without public debate, dialogue and cooperation with social partners. Undertaken steps are usually inspired by political reasons and do not aim to introduce thorough reforms unifying the system of social security.

5. CONCLUSIONS

Regulations concerning privileges proved to be not only lasting but also having a negative influence on the financial situation of all pensioners in Poland in spite of systemic changes introduced in the 1980s and 1990s, and many reforms of the social security system. Over years, a continuous increase in privileges giving the right to retire at an earlier age or the exchange of abolished privileges for new ones (compensation benefits, bridging pensions) have been observed. The attempts to unify the system of social security initiated based on the Act of 13 October 1998 on the social security system did not take longer than five years.

All privileges should result from rationally justified factors, special reasons or achievements of given persons and they should never cover entire professional groups. The only exception should concern a situation when the insured loses health or life in, e.g. a military or rescue operation. Then, the state or the insurer should be obliged to protect their family and provide it with decent means to make a living; however, not the whole professional group but only the person who has suffered damage or their family. Especially arduous or harmful conditions of work that have considerable influence on health can justify a privilege in the form of the right to retirement at an earlier age. Such an approach would be in compliance with the principles of international law,[42] the provisions of the Constitution of he Republic of Poland and the principles of social coexistence in the context of such values as equality, justice, non-discrimination, etc.

The privileges that are maintained at present are not related to economic efficiency or special merits, they are granted regardless of the efficiency of the institution or company involved and achievements of the people rewarded. They also have their price and value but they indeed burden people who are employed and pay premiums for social insurance. Work that requires readiness to risk life (uniformed

[41] *Systemy emerytalne na świecie – porównanie*, http://wszechnica.org.pl/wyklad/systemy-emerytalne-na-swiecie-porownanie/ (accessed on 20.09.2018).

[42] Compare Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16–22, 2.12.2000; ILO Social Security (Minimum Standards) Convention of 28 June 1952 (ILO Convention No. 102).

services) should be adequately paid for but this remuneration should be the basis for calculating adequate premiums in accordance with general provisions.

The old-age pension level should be adequate to the insurance capital collected, the level of remuneration at a given period, the period of employment and age in accordance with standard and commonly binding criteria that are not arbitrary or based on privileges.

The provisions regulating the issues that are important for the public should be drafted based on consensus and the will of representatives expressed by the qualified majority of votes in the Parliament.

As the presented statistics demonstrate, the professional groups privileged are paid relatively high salaries and can pay premiums for their future pensions but the state made them exempt from that obligation.

At present, a big number of pensioners generate considerable costs that hamper the financing of the retirement system. In addition, demographic conditions affect the labour market, the increase in labour efficiency and the social security system. Therefore, it would be desirable to develop a programme of support for entrepreneurship that would rationalise labour costs and motivate to increase employment, especially of people in the pre-retirement age. The 500+ benefit scheme also has a negative consequence for the labour market because a phenomenon of quitting jobs by women whose remuneration is low was observed and in the future it can have an impact on their return to the labour market and old-age pensions.

Each society must resolve the problems related to the social security system on its own and in the right time if it does not want to lead to serious economic and social problems. As it has been demonstrated in this article, the present social security system is very expensive, inefficient, not transparent and unjust. There are not uniform and clear criteria concerning social insurance premiums, granting retirement rights and methods of pension calculation. The state arbitrarily rewards some professional groups with privileges and all employees paying appropriate insurance premiums are burdened with the costs thereof.

The efforts put into reforming the social security system so far have not abolished retirement privileges. What is more, whenever there is an attempt to limit privileges, the beneficiaries refer to the principle of acquired rights and the legislator apparently approves of the arguments and ignores the acquired rights of the people insured in the common system. No wonder that the representatives of privileged groups and trade unions defend their privileges and want to obtain the biggest possible benefits and rights for their members; we cannot blame them for that because this is their role. On the other hand, the role and obligation of the state is to actualise the constitutional principle of justice and social equality.[43]

The Constitutional Tribunal indicated[44] that the constitutional guarantees of social rights do not result in an absolute ban on such rationalisation of the system of benefits that would be connected with the limitation of their subjective scope,

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[43] See Articles 2 and 32 of the Constitution of the Republic of Poland of 2 April 1997, Dz.U. No. 78, item 483.

[44] Constitutional Tribunal judgment of 8 May 2000, SK 22/99.

the introduction of more restrictive requirements for granting them or a decrease in their level. While establishing the scope of those rights, the legislator should take into account the demand for maintaining the right and just proportions between the level of pension as a "deserved" benefit and the type of "merit" determined first of all based on the period of professional activity leading to the acquisition of the right to retire and the level of remuneration obtained during that professional activity, which results directly from social justice. This means that the legislator can and should rationalise the social security system taking into account the principles of equality and social justice as well as the principles of social coexistence in relation to all professional groups in the same way. The legislator is also obliged to treat pensioners who have the same important characteristic feature equally, which also results from the principle of equality. The necessary condition for introducing changes *in minus* in the situation of some insured persons is that the state authorities act in compliance with the principles of social justice, equal treatment and non-discrimination against beneficiaries, and a proportional decrease in the level of social benefits. The result of the fulfilment of the above requirements is that the persons entitled to social benefits are not protected against the deterioration resulting from the change of law on social security by arguments based on the constitutional principles of the protection of citizens' trust in the state and its positive law, the protection of acquired rights and the specific property-related nature of the right to social security.[45]

The fact that a constitution grants the right to social security at a determined level does not deprive member states' authorities of the right to modify it, also in a way unfavourable for the persons entitled, because the constitutional guarantee of the discussed entitlement does not grant it the status of a right that cannot be modified in a way unfavourable for the beneficiaries.[46] The state is obliged to rationalise the organisation and functioning of the social security system and, first of all, take into account the interests and good of the community, especially because of the contemporary demographic and economic problems.

The present social security system in Poland has a negative impact on the labour market, remuneration and benefits for insured people because of the cost of privileges of selected professional groups that benefit from the output and effects of the work of people insured and paying insurance premiums, which the statistical data presented herein demonstrate. It is also worth mentioning that the cost of the privileges presently offered from the state budget in fact means that the insured employees will have to pay higher premiums, higher taxes and fees for benefits for people who are exempt from those premiums or contributions. It should always be taken into account that what constitutes the source of capital and a nation's wealth resulting in privileges is work.

In accordance with the norms of international law and national legislation, the legislator is obliged to enact statutes modifying the provisions concerning the social

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[45] A.M. Świątkowski, *Traktatowe i konstytucyjne zabezpieczenia zachowania uprawnień do nabytych świadczeń socjalnych*, Z Zagadnień Zabezpieczenia Społecznego No. 3, 2011 (A. Wypych-Żywicka ed.), Wydawnictwo Uniwersytetu Gdańskiego, p. 118.

[46] *Ibid.*, p. 109.

security system, provided that burdens and obligations are imposed on all employees equally, regardless of their professional status and position. This also means that the principle of equal treatment and non-discrimination against employees is applied by public authorities. The social security system in Poland needs reorganisation and uniform legal regulations; it also requires abolishing of the right to retire at an earlier age with the exception of work in special conditions that cause a danger of losing one's health or life. This approach is in conformity with scientists' opinions.[47] The Constitutional Tribunal also approves of the solutions aimed at unifying the right to retire for all insured persons in compliance with constitutional values, especially equality and social justice.[48]

Persons that acquire the right to retire and can remain in the labour market should be motivated to continue working. Thus, there should be solutions developed to activate people to work so that their income from work and not privileges or benefits is their source of means to make a living. Young people, in particular, should be inspired to professional activity and earning their living. The 500+ scheme, in spite of its positive social functions, discourages from working. Employers also should be encouraged to employ people who are older and less efficient but more experienced.

As a result, it would be advisable to create a system based on additional and voluntary participation in insurance schemes and remaining in the labour market as long as possible for people who can and want to work provided that they gain real advantages. Persons at the pre-retirement age should be rationally convinced by adequate regulations[49] that longer work means higher pensions. The rate should be clearly and firmly determined by legal provisions with no possibility of political manipulations because this always harms the whole system.

The Polish legislator, like legislators in other countries, chose to raise the level of retirement age as the main correctional measure to improve the social insurance system. In the Constitutional Tribunal's opinion,[50] the state is obliged to take steps to improve the whole system covering various fields of life in order to increase efficiency of activities and create an opportunity of proportional division of the burdens resulting from the crisis. The Constitutional Tribunal also indicated that from the point of view of trust in the state and its law expressed in Article 2 of the

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[47] T. Liszcz, *Ubezpieczenia społeczne w orzecznictwie Trybunału Konstytucyjnego*, [in:] M. Żukowski (ed.), *Systemy ubezpieczeń społecznych – między solidaryzmem a indywidualizmem*, Zakład Ubezpieczeń Społecznych, Katolicki Uniwersytet Lubelski Jana Pawła II, Warszawa–Lublin, 2014, p. 48; J. Hausner, *Jerzy Hausner o emeryturach górniczych*, commentary: http://gornictwo.wnp.pl/jerzy-hausner-o-emeryturach-gorniczych,47521_1_0_0.html (accessed on 5.10.2018).

[48] Judgment of 3 March 2011, K 23/09.

[49] See the Act of 18 February 1994 on retirement pensions for officers of the Police, the Internal Security Agency, the Intelligence Service, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Marshal's Guard, the State Protection Service, the State Fire Brigade, the Customs and Revenue Service and the Prison Service and their families, consolidated text, Dz.U. 1994, No. 53, item 214, Article 15 et seq.; Act of 1 February 1983 on retirement pensions for miners and their families, consolidated text, Dz.U. 1983, No. 5, item 32, Article 10a.

[50] Constitutional Tribunal decision of 17 July 2014, S 3/14.

Polish Constitution, it is especially important that the measures undertaken by the legislator are systemic in nature, consistent and based on uniform and coherent assumptions. The idea that a rise in the retirement age will improve the system was erroneous and illogical. The method of just raising the retirement age does not solve the demographic problem nor does it increase the level of professional activity.

The rise in the retirement age can be considered only when the present social security system is re-organised and unified. Frequent changes in legal relations have negative consequences for the trust in the state and its retirement system, the stability of which to a great extent also depends on the existence or elimination of retirement privileges connected with age and employment within a privileged professional group. The above comments result from many incoherent regulations in this field constituting apparent differences in the retirement rights and privileges.

The comments herein indicate that it is reasonable to abolish all presently existing retirement schemes and unite them to form one common social security system based on a broad social consensus, which might be called the Social Security Code of the Republic of Poland. The retirement system should be uniform, coherent, transparent and understandable.

Everyone, regardless of membership of a particular professional group, should be able to obtain online information about the conditions and level of their future pension. There are already such possibilities in place in some countries.[51] Although Platforma Usług Elektronicznych (PUE), the electronic service platform run by ZUS, operates in Poland, its functionality and usefulness for the insured have a limited scope and significance. Access to PUE requires special formally granted authorisation tools and is available only to persons insured in the Social Insurance Institution.

There is also a need for public debate between social partners, scientists, specialists and citizens over the system and principles of the social security system in order to develop a coherent and stable model for dozens of years, instead of one parliamentary term and continual changes. It is also necessary to unify the premiums payment rules and level as well as the method of pension calculation. This opinion is based on the fact that particular professional groups benefit from the privilege of earlier retirement, which is a considerable burden for the state budget.

The Constitutional Tribunal repeatedly assessed the regulations of the retirement age and the issue of privileges but it usually did it in relation to a particular professional group. It has never analysed or made a complete assessment with respect to all professional groups, and due to that there is no uniform and complete evaluation of the social security system. It repeatedly referred to the principles of social solidarity.[52] It indicated that the change of the content of the requirements for being granted the right to retire in the period when it is acquired finds justification in such constitutional values as justice understood as the possibly equal share in costs of the fund to be incurred by the successive generations of the insured.

The Constitutional Tribunal recommended that also employers, inter alia, take steps in conformity with the assumptions of social solidarity leading to propor-

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[51] See https://www.ssa.gov/site/languages/en/ (accessed on 29.09.2018).

[52] Constitutional Tribunal judgment of 19 October 1993, K 14/92.

tional distribution of the consequences of the social security system crisis among the broadest possible circle of entities.[53] It indicated that all employees (who are professionally active) and not only those who belong to the pension scheme should share the burden of the introduced changes resulting from common circumstances (such as, e.g. demography). The judgment constitutes a clear but so far inactive imperative for the directions of legal regulations and a just division of burdens among the entirety of employees.

A lack of legislative culture is observed in Poland. The presented examples prove that each new political group does not always respect the principle of continuation and permanence of the state. Coming to power, it gives up the implementation of reforms started earlier or undertakes new initiatives that do not result from the party's manifesto or actual social needs without social consultation, which constitutes the violation of the binding legislative principles.[54] This is partly a consequence of an arbitrary model of law development, without participation of and consultation and cooperation with social partners, and the lack of legal mechanisms limiting politicians' freedom to choose the model of law development and application, especially in relation to regulations covering the issues that are fundamental for the public (social security system). Considerable legislative freedom of the parliamentary majority allows the legislator to freely create privileges or limit rights, which should be disapproved of.

The promotion of the models of legal culture and education at all levels of the social ladder, also within the social security system, can produce positive results and social benefits because of the fact that the present educational system does not cover legal, social and economic issues that constitute an important element of the discussed problems. It is one of the methods leading to the construction of civil society and such a legal system that would be able to develop a civil organisation of the state treating all citizens in the same way in the context of privileges, including the right to retire, without differentiating or granting privileges based on the membership of a particular professional group. Establishing privileges in the interwar period and maintaining them later left its stamp on the whole social security system and labour market.

The article shows that:

– There are no reasonable grounds for privileged retirement rights for selected professional groups in the context of the principles laid down in Articles 2, 32 and 84 of the Constitution of the Republic of Poland.
– Privileges produce a considerable burden for the social security system because of a large number of pensioners and exemption of some professional groups from social insurance premiums.
– The fact that people who can earn a living stop working and enjoy privileges causes a too heavy burden for the labour market and the state budget. It also affects the real value of pensions for the insured in the common system.

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[53] Constitutional Tribunal decision of 17 July 2014, S 3/14.

[54] Sprawozdanie końcowe z realizacji rządowego programu „Lepsze Regulacje 2015" za okres 2012–2015 [Report on "Better Regulations" state programme for 2012–2015], Ministry of Development, Warszawa 2017; J. Osiecka-Chojnacka, *System oceny skutków regulacji w Polsce*, Wydawnictwo Sejmowe dla Biura Analiz Sejmowych, INFOS No. 2 (26), 2008, pp. 2–3.

BIBLIOGRAPHY

Bednarczyk T.H., *Dostosowywanie systemów emerytalnych do zmieniających się warunków społeczno-ekonomicznych oraz kontrowersje z tym związane*, [in:] M. Żukowski (ed.), *Systemy ubezpieczeń społecznych – między solidaryzmem a indywidualizmem*, Zakład Ubezpieczeń Społecznych, Katolicki Uniwersytet Lubelski Jana Pawła II, Warszawa–Lublin, 2014.

Bińczycka-Majewska T., *Powszechność systemu ubezpieczeń społecznych – teoria i praktyka*, [in:] M. Żukowski (ed.), *Systemy ubezpieczeń społecznych – między solidaryzmem a indywidualizmem*, Zakład Ubezpieczeń Społecznych, Katolicki Uniwersytet Lubelski Jana Pawła II, Warszawa–Lublin, 2014.

Centrum Badania Opinii Społecznej (CBOS), *Wiek emerytalny kobiet i mężczyzn*, reports on surveys: BS/192/2003, BS/205/2005, BS/155/2007, BS/49/2010, Warszawa 2003, 2005, 2007, 2010.

Góra M., [in:] A. Dąbrowska-Nowacka (ed.), *Reforma reformy emerytalnej?*, Instytut Badań nad Gospodarką Rynkową i AXA Powszechne Towarzystwo Emerytalne S.A., Warszawa, 2011.

Hausner J., *Jerzy Hausner o emeryturach górniczych*, commentary of 11.04.2008: http://gornictwo.wnp.pl/jerzy-hausner-o-emeryturach-gorniczych,47521_1_0_0.html (accessed on 5.10.2018).

Hausner J., [in:] A. Dąbrowska-Nowacka (ed.), *Reforma reformy emerytalnej?*, Instytut Badań nad Gospodarką Rynkową i AXA Powszechne Towarzystwo Emerytalne S.A., Warszawa, 2011.

Liszcz T., *Ubezpieczenia społeczne w orzecznictwie Trybunału Konstytucyjnego*, [in:] M. Żukowski (ed.), *Systemy ubezpieczeń społecznych – między solidaryzmem a indywidualizmem*, Zakład Ubezpieczeń Społecznych, Katolicki Uniwersytet Lubelski Jana Pawła II, Warszawa–Lublin, 2014.

Ministry of Development, *Sprawozdanie końcowe z realizacji rządowego programu „Lepsze Regulacje 2015" za okres 2012–2015* [Report on "Better Regulations" state programme for 2012–2015], Warszawa 2017.

Osiecka-Chojnacka J., *System oceny skutków regulacji w Polsce*, Wydawnictwo Sejmowe dla Biura Analiz Sejmowych, „Zagadnienia społeczno-gospodarcze", INFOS No. 2 (26), 2008.

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.

Systemy emerytalne na świecie – porównanie, http://wszechnica.org.pl/wyklad/systemy-emerytalne-na-swiecie-porownanie/ (accessed on 20.09.2018).

Szpor G. (ed.), *System ubezpieczeń społecznych. Zagadnienia podstawowe*, 3rd edn, Wydawnictwo Prawnicze, LexisNexis, Warszawa 2006.

Świątkowski A.M., *Traktatowe i konstytucyjne zabezpieczenia zachowania uprawnień do nabytych świadczeń socjalnych*, [in:] Z Zagadnień Zabezpieczenia Społecznego No. 3, 2011 (A. Wypych-Żywicka, ed.), Wydawnictwo Uniwersytetu Gdańskiego.

Uścińska G. (ed.), *Zabezpieczenie społeczne w Polsce. Problemy do rozwiązania w najbliższej przyszłości*, Instytut Pracy i Spraw Socjalnych, Warszawa 2008.

ISSUE OF PRIVILEGES IN THE SOCIAL SECURITY SYSTEM. PART 2

Summary

The author illustrates the issue of privileges for selected professional groups that entitle them, inter alia, to retire at an earlier age, based on the legal regulations in force. The purpose of the article is, in particular, to answer the main research question whether the privileged pension rights for selected professional groups are justified in the context of the principles laid down in the Constitution of the Republic of Poland. It also aims to demonstrate that such a wide range of privileges that exempt selected professional groups from the obligation to pay insurance premiums and entitle them to early retirement is a very costly and destructive factor for the entire system and for all the insured in the common pension scheme. The conclusions present the author's views that inspire to revoke the majority of privileges and create a universal, uniform and coherent model of the social security system covering all professional groups. An exception in this area could only be particularly arduous or harmful working conditions that significantly affect health.

Keywords: pensions, officer, cost, privilege, pension system, social security system, benefits, social insurance

PROBLEMATYKA PRZYWILEJÓW W SYSTEMIE ZABEZPIECZENIA SPOŁECZNEGO. CZĘŚĆ II

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 stanowi czynnik bardzo kosztowny i destrukcyjny 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

LA PROBLEMÁTICA DE PRIVILEGIOS EN EL SISTEMA DE SEGURIDAD SOCIAL. PARTE II

Resumen

El autor presenta la problemática de privilegios para profesiones determinadas que permiten, entre otros, la jubilación anticipada en virtud de regulación legal. El artículo, en particular, quiere responder a la pregunta principal, si los privilegios de la jubilación para profesiones determinadas quedan fundados en los principios plasmados en la Constitución de la Republica de Polonia. También se pretende demostrar que el alcance tan amplio de privilegios que consisten en exención de obligación de cotizar y posibilidad de jubilación anticipada para profesiones determinadas, son factores muy costosos y destructivos para todo el sistema y para todos asegurados en el sistema común de jubilación. La conclusión presenta la opinión del autor que opta por liquidar mayor parte de privilegios y construir un modelo común, uniforme y coherente de seguridad social que incluya todas las profesiones. La excepción única serían las condiciones de trabajo particularmente gravosas o nocivas que influyan significadamente a la pérdida de salud.

Palabras claves: jubilación, funcionario, coste, privilegio, sistema de pensiones, sistema de seguridad social, prestaciones, seguro social

ВОПРОСЫ ПРЕИМУЩЕСТВ В СИСТЕМЕ СОЦИАЛЬНОГО ОБЕСПЕЧЕНИЯ. 0ЧАСТЬ II

Резюме

Автор иллюстрирует вопрос преимуществ/привилегий для отдельных профессиональных групп, предоставляющих право, среди прочего, досрочного выхода на пенсию, на основании цитируемых правовых норм. Цель статьи, в частности, состоит в том, чтобы ответить на главный вопрос исследования, оправданы ли привилегированные пенсионные права отдельных профессиональных групп в контексте принципов, изложенных в польской конституции? Цель также состоит в том, чтобы показать, что такой широкий спектр привилегий, заключающихся в освобождении отдельных профессиональных групп от обязанности платить страховые взносы и предоставляющих им права на досрочный выход на пенсию, является очень дорогостоящим и разрушительным фактором для всей системы и для всех застрахованных в универсальной пенсионной системе. В выводах исследования представлены взгляды автора, побуждающие к ликвидации большинства приведенных привилегий и построению универсальной, единой и последовательной модели системы социального обеспечения, охватывающей все профессиональные группы. Исключением в этом отношении могут быть только особо тяжелые или вредные условия труда, которые существенно влияют на потерю здоровья.

Ключевые слова: пенсии, должностное лицо, стоимость приврлегии, пенсионная система, система социального обеспечения, пособия, страхование, социальное обеспечение

FRAGEN ZU DEN PRIVILEGIEN IM SOZIALVERSICHERUNGSSYSTEM. TEIL II

Zusammenfassung

Der Autor erläutert die Frage der Privilegien für ausgewählte Berufsgruppen, unter anderem die Autorisierung vorzeitig in den Ruhestand zu gehen, basierend auf gesetzlichen Bestimmungen. Mit dem Artikel soll insbesondere die zentrale Forschungsfrage beantwortet werden, ob privilegierte Rentenansprüche für ausgewählte Berufsgruppen im Rahmen der in der polnischen Verfassung festgelegten Grundsätze gerechtfertigt sind? Ziel ist es auch zu zeigen, dass ein so breites Spektrum von Privilegien, die darin bestehen, ausgewählte Berufsgruppen von der Pflicht zur Zahlung von Versicherungsbeiträgen zu befreien und sie zur vorzeitigen Pensionierung zu berechtigen, für das gesamte System und alle Versicherten des Rentensystems sehr kostspielige und destruktive Faktoren sind. Die Ergebnisse der Studie präsentieren die Ansichten des Autors, die zur Liquidierung der meisten angeführten Privilegien und zur Schaffung eines universellen, einheitlichen und kohärenten Modells des Sozialversicherungssystems führen, das alle Berufsgruppen abdeckt. Eine Ausnahme könnten in dieser Hinsicht nur besonders schwierige oder schädliche Arbeitsbedingungen sein, die den Gesundheitsverlust erheblich beeinträchtigen.

Schlüsselwörter: Pensionen, Offizier, Kosten, Privileg, Pensionsystem, Sozialversicherungssystem, Leistungen, Versicherung sozial

PROBLÈMES DE PRIVILÈGES DANS LE SYSTÈME DE SÉCURITÉ SOCIALE. PARTIE II

Résumé

L'auteur illustre la question des privilèges accordés à certains groupes professionnels, donnant droit, entre autres, à une retraite anticipée, sur la base de dispositions légales citées. Le but de cet article est notamment de répondre à la question principale de la recherche: est-ce que les droits à pension privilégiés de certains groupes professionnels sont 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 universel. Les conclusions de l'étude présentent les points de vue de l'auteur qui ont conduit à la liquidation de la plupart des privilèges invoqués et à la construction d'un modèle universel, uniforme et cohérent du système de sécurité sociale, 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, officier, coût, privilège, système de pension, système de sécurité sociale, prestations, sécurité sociale

PROBLEMATICA DEI PRIVILEGI NEL SISTEMA DI PREVIDENZA SOCIALE. PARTE II

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, prestazione, assicurazione sociale

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WAIVER OF SUCCESSION WITH EFFECT ON A MINOR: COMMENTS *DE LEGE FERENDA*

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1. INTRODUCTION

Inheritance law is one of those fields of law that affects everyone in life practice. Many take legal actions that allow them to settle – to the extent permitted by law – the inheriting issue so that the final manner of transfer of ownership title after death in the existing circumstances corresponds to the actual human relations, and family relations in particular.

One of the legal actions envisaged by the legislature that may lead to modifying the intestate inheritance rules is a waiver of succession contract. Such a contract allows potential heirs to settle the issue of excluding them from inheriting with the future testator. Signing such a contract by relatives may turn out reasonable in a given case, considering the desire to counteract the emergence of disputes among the family after the death of one of its members. The motive for signing such a contract in practice is as a rule the intention to divide the estate in a fair manner by one of the relatives who desires that certain members of his/her family do not inherit from him/her. The law also allows such a contract to have consequences not only for the person waiving succession but also for his/her descendants.

In this paper I would like to focus on a selected area of waiver of succession, namely the issue of waiving succession which has consequences for minor children of the person waiving succession in the context of the need to obtain a relevant permission from the family court. Although this is not a frequently recurring issue in legal practice, in my opinion, it needs to be discussed in more detail. This is because in those cases where a descendant of the person waiving succession is a minor,

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unless the minor is excluded from the consequences of the waiver of succession, the minor's potential financial interests may be substantially violated.

This issue is not regulated directly under the currently applicable law, and opinions of representatives of the legal doctrine and judicial practice suggest that waiver of succession contracts are concluded without prior consent from a guardianship court also in those cases when they have (indirect) consequences for minor children of the person waiving succession. The legal regulations currently in force do not provide clear grounds for a different practice. However, it is worth suggesting that the legislator should consider amending the law to this effect so that the principle of protecting the child's best interests can be respected also in this area of inheritance law.

2. WAIVER OF SUCCESSION

Pursuant to sentence 1 of Article 1048 of the Polish Civil Code,[1] an intestate heir by signing a contract with a future testator may waive succession to him/her.[2] In turn, pursuant to Article 1049 § 1 Civil Code, waiver of succession also extends to the descendants of the person waiving succession, unless otherwise agreed. Article 1049 § 2 Civil Code provides that the person waiving succession and his/her descendants whom the waiver of succession concerns are excluded from inheriting as if they did not live to the opening the succession. The regulation referred to above is an exception to the ban on concluding agreements concerning inheriting from a living person (cf. Article 1047 Civil Code).[3] What is special about it is that it allows to determine (at least partly) the group of individuals who will inherit from the testator while the testator is still alive by excluding a certain person (certain individuals) from inheriting.[4] It needs to be assumed that the contract the subject of which is waiver of the right to succession in the future may concern not only the rights to inherit potentially vested in a given person as an heir of a whole but also a section of the

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[1] Act of 23 April 1964: Civil Code, consolidated text, Dz.U. 2017, item 459; hereinafter Civil Code.

[2] This institution does not originate from Roman law; it emerged in a later period. Cf. M. Załucki, *Wydziedziczenie w polskim prawie na tle porównawczym*, Warszawa 2010, p. 94; J.S. Piątowski, *Prawo spadkowe. Zarys wykładu*, 6th edn, Warszawa 2003, p. 62; R. Zych, *Abdicatio hereditatis in iure Polonia. Zrzeczenie się dziedziczenia w polskim porządku prawnym*, Acta Iuris Stetinensis No. 14, 2016, p. 6; E. Rott-Pietrzyk, *Umowa o zrzeczenie się dziedziczenia – uwagi de lege lata i de lege ferenda*, Rejent No. 3, 2006, p. 107. As regards its genesis in Polish law, see: G. Wolak, *Umowa zrzeczenia się dziedziczenia w polskim prawie cywilnym*, Warszawa 2016, pp. 65–83; M. Pazdan, *Umowa o zrzeczeniu się dziedziczenia w polskim prawie spadkowym*, Rejent No. 4, 1997, pp. 185–186.

[3] For more detail, see: G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 29–41; R. Niemotko, *Sankcja nieważności umów o spadek po osobie żyjącej*, [in:] P. Stec, M. Załucki (eds), *Wokół rekodyfikacji prawa cywilnego. Prace jubileuszowe*, Kraków 2015, pp. 397–405.

[4] E. Niezbecka, *Skutki prawne testamentu negatywnego i wydziedziczenia*, Rejent No. 7/8, 1992, p. 16.

estate[5] or even only the right to legitim which would have been vested in the person waiving succession in compliance with Article 991 Civil Code.[6]

Waiver of succession requires entering into a contract in the form of a notarised deed *ad solemnitatem* (Article 1048 sentence 2 Civil Code in conjunction with Article 73 § 2 Civil Code). Thus, it is inadmissible to waive succession by entering into a contract in a different form. It is also impossible to waive succession based on a unilateral legal activity, regardless of the legal form of the declaration of will made in this manner.[7] However, a prior consent from a guardianship court is required for a waiver of succession to be valid in the case of a person who has no full legal capacity.[8] In such a case, by "granting permission to waive succession, the court assesses the legality of the legal action, i.e. whether it is admissible under legal regulations currently in force, and its expediency, i.e. whether it is beneficial for the child in economic terms or necessary for other than economic reasons".[9]

It is assumed in literature that waiver of succession does not lead to depriving the person waiving succession of his/her right to inherit,[10] which leads to the conclusion that a person waiving succession is excluded from inheriting only in the case where succession takes place in the statutory manner. This also means that in case a will is drawn up envisaging contribution to the person who has previously waived

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[5] As in the decision issued by the Supreme Court of 21 April 2004 on the matter, III CK 353/02 (LEX No. 585802), where it was concluded that it is admissible to waive succession of a fractional share of the estate otherwise than in the case of waiving inheritance of specific objects, which the Supreme Court ruled out. However, literature provides no uniform position on this issue. A similar view to that presented by the Supreme Court is expressed by G. Wolak (*Umowa zrzeczenia*, *op. cit*., pp. 295–320). However, views that it is admissible to waive a right to a specific portion of the estate are also present in literature; for more on this issue, see P. Księżak, *Zachowek w polskim prawie spadkowym*, Warszawa 2012, pp. 124–130; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., pp. 193–194.

[6] The resolution of the Supreme Court of 17 March 2017 on the matter, III CZP 110/16 (LEX No. 2248747), awarding that it is admissible to conclude a waiver of the right to legitim (Article 1048 Civil Code). In particular, in the written reasons for this resolution, the Supreme Court aptly noted that there is no legal regulation in civil law that would directly allow waiving the right to legitim but, which is worth noting, there is also no legal regulation that would rule this out. Meanwhile, in the civil law system only the bans clearly envisaged by the legislator apply. The Supreme Court also emphasised that allowing for the possibility of waiving a legitim after a future testator results in a greater freedom of testation. In turn, different stances on the issue of admissibility of entering into a waiver of succession as regards the legitim alone have been presented in academic writings; cf. G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 320–335; P. Księżak, *Zachowek*, *op. cit*., pp. 130–140; M. Panek, *Dopuszczalność zrzeczenia się zachowku w prawie polskim*, Studia Iuridica Toruniensia Vol. XVI, 2015, pp. 93–108. See also M. Niedośpiał, *Swoboda testowania*, Bielsko-Biała 2003, p. 19.

[7] Decision of the Supreme Court of 3 February 2005, II CK 322/04 (LEX No. 603811).

[8] G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 168–169; J. Gwiazdomorski, *Prawo spadkowe w zarysie*, Warszawa, 1967, p. 71; E. Niezbecka, commentary on Article 1049 Civil Code (thesis 4), in A. Kidyba (ed.) et al., *Kodeks cywilny. Komentarz*, Vol. IV: *Spadki*, 4th edn, 2015 (LEX electronic version); S. Kalus, commentary on Article 156 FGC, in K. Piasecki (ed.) et al., *Kodeks rodzinny i opiekuńczy. Komentarz*, 5th edn, LexisNexis 2011 (LEX electronic version), and the literature quoted therein.

[9] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 169.

[10] Because the inheriting capacity is a "part of legal capacity". See P. Księżak, *Zachowek*, *op. cit*., p. 122 and the literature quoted therein.

succeeding to the future testator, this person is not deprived of the possibility to acquire an estate based on the last will of the deceased person.[11] This viewpoint is also approved of in case law. In the resolution of 15 May 1972 concerning the matter, III CZP 15/72,[12] the Supreme Court awarded that by law waiver of succession by an intestate heir or beneficiary shall not exclude the possibility of succession by will (drawn up before or after entering into the waiver of succession contract).[13]

In legal practice, waiver of succession contracts are often concluded because the prospective testator has made various contributions (financial or personal) to the person waiving succession, although obviously this is not an obligatory element. A frequent motive for waiving succession is prior obtaining of a significant donation by the potential heir, which, given the desire to ensure fair treatment, gives rise to the will to settle the issue of future succession, especially with respect to a parent in case only one of the children has received significant financial support. Therefore, it is the will of the future testator to ensure that his/her estate is inherited only by other children who did not received financial contributions while the testator was still alive.[14] From the historical viewpoint, it was even a custom for a daughter who received an adequate dowry when getting married to waive succession to her parents.[15] Doubtlessly, in situations like these a waiver of succession contract better fulfils the goal of excluding a potential heir from a share in the estate than a negative will which does not lead to depriving of the right to legitim. However, it is worth bearing in mind that a person waiving succession does not decide in all cases to enter into the contract envisaged under Article 1048 Civil Code in connection with receiving tangible financial benefits from a prospective testator. Therefore, it may happen that such a contract will be concluded by a person who will thus deprive him/herself of potential benefits of inheriting from a prospective testator without receiving anything in return.

It needs to be added that, regardless of the fact whether the waiver of succession contract is concluded in connection with receiving a contribution by a person waiving succession, it cannot be classified in the category of paid contracts.[16]

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[11] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 132–137, p. 266; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., p. 194; R. Zych, *Abdicatio hereditatis*, *op. cit*., p. 8.

[12] LEX No. 1673122.

[13] When the Inheritance Law of 1946 was in force, the waiver of succession contract covered, unlike in the legal regulations currently in force, along with inheritance by law also inheritance by will. Cf. R. Zych, *Abdicatio hereditatis*, *op. cit*., p. 8; resolution of the Supreme Court of 15 My 1972, III CZP 15/72; cf. reasons for the resolution of the Supreme Court of 17 March 2017, III CZP 110/16, LEX No. 2248747.

[14] Cf. M. Załucki, *Wydziedziczenie*, *op. cit*., pp. 94–97, who points out that a waiver of succession may be concluded especially in those cases where the prospective testator at the same time makes a donation to the person waiving succession. See also: G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 241–245; E. Rott-Pietrzyk, *Umowa o zrzeczenie*, *op. cit*., pp. 111–113; R. Zych, *Abdicatio hereditatis*, *op. cit*., pp. 6–7; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., pp. 194–195, p. 198.

[15] A. Penkała, *Panieńskie ochędóstwo. Kwestie posagowe i wienne w małżeństwach szlachty województwa krakowskiego w czasach saskich*, Kraków 2016, p. 58.

[16] M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., p. 188.

3. CONSEQUENCES OF WAIVER OF SUCCESSION FOR A DESCENDANT

The legislator provides in Article 1049 § 1 Civil Code that in principle a contract on waiver of succession between the testator and an intestate heir also covers descendants of the waiving person. Unless otherwise agreed by the parties to the contract, descendants of the waiving person are treated on equal terms with the person waiving succession as if they did not live to the day of opening of the succession. Thus, they also become excluded from succeeding. This supplementary regulation also allows a reservation that the waiver of succession by descendants of the person waiving succession will affect only some of them.[17]

The legislator, without excluding the possibility of depriving descendants of the person waiving succession of the right to inherit has thus automatically allowed for individuals who even are not parties to the waiver of succession contract to become excluded from succession. Pursuant to Article 1048 Civil Code, parties to a contract are only the prospective testator and the person waiving succession.[18] However, due to the deed effected by the potential heir with the prospective testator a third party (a descendant of the person waiving succession) may be excluded from the right to succession, while this individual is neither a party to this contract nor has legal measures to counteract concluding the contract.[19] As it has been pointed out by Elżbieta Niezbecka "descendants become deprived of the possibility to inherit due to the will of third parties (parties to the contract). They can neither prevent nor annul this effect. This is so because these consequences are brought about statutorily and only the parties' will may annul or modify them. Descendants themselves cannot effectively counteract them."[20] Consent from descendants of the person waiving succession is not required to conclude a legally effective contract as provided for in Article 1047 Civil Code,[21] and this pertains to both minor and adult descendants. It is also assumed in the legal doctrine that there are no grounds to verify the motives for concluding the contract by the parties thereto, whether by any third party or a court.[22] Furthermore, the exclusion of descendants of the person waiving succes-

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[17] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 279–281 and the standpoints quoted therein; J. Knabe, J. Ciszewski, commentary on Article 1049 Civil Code (thesis 2), in J. Ciszewski (ed.) et al., *Kodeks cywilny. Komentarz*, 2nd edn, LexisNexis 2014 (LEX electronic version); see also P. Borkowski, *Notarialne poświadczenie dziedziczenia*, Wolters Kluwer Polska, 2011, subchapter: 4.2.5. *Odrzucenie spadku i zrzeczenie się dziedziczenia* (LEX electronic version).

[18] In turn, succession can be waived by every potential heir to the prospective testator even if his/her statutory right to inherit is distant as regards the sequence of succession. However, the municipality of the last place of residence of the testator or the Treasury cannot act on behalf of the person waiving succession as *ultimus heres*. Cf. G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 156–161; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., p. 189; R. Zych, *Abdicatio hereditatis*, *op. cit*., pp. 7–8.

[19] Cf. J. Trzewik, *Wyłączenie od dziedziczenia a krąg osób uprawnionych do spadkobrania*, Roczniki Nauk Prawnych Vol. 19, No. 1, 2009, p. 127.

[20] E. Niezbecka, *Zrzeczenie się dziedziczenia i odrzucenie spadku a zdolność do dziedziczenia osób fizycznych*, Annales UMCS, Sectio G Ius, Vol. XXXIX, No. 8, 1992, p. 161.

[21] J. Knabe, J. Ciszewski, commentary on Article 1049 Civil Code (thesis 1), in J. Ciszewski (ed.) et al., *Kodeks cywilny*, *op. cit.*

[22] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 282 and the literature quoted therein.

sion from inheriting extends not only to the descendants living on the day when the contract is concluded as envisaged under Article 1048 Civil Code but also to those who will be born later. It is also consistently believed that this concerns also those descendants of the person waiving succession whose rights will be determined already after the contract defined in Article 1048 Civil Code has been concluded.[23]

Seemingly, it is impossible to see any real infringement of financial rights of descendants of the person waiving succession in the construct of waiver of succession, which also leads to the exclusion of the descendants from succession. Principally, it is not they who had the right to inherit from the testator.[24]

However, the waiver of succession leads to the assumption that a person waiving succession did not live to the moment of opening the succession. Furthermore, the view is predominant in literature that the waiver of succession contract, extending also to descendants of the waiving person, is also effective when the person waiving succession did not outlive the testator.[25] In this situation, descendants of this person are excluded from inheriting, even though these individuals did not participate in concluding the contract and, in the case of death of the immediate heir they would be vested with the right to inherit from the prospective testator had the waiver of succession contract not been concluded.

4. WAIVER OF SUCCESSION COVERS ALSO A MINOR

In the present legal conditions there is no single provision that would regulate the issue of admissibility of waiving succession the effects of which would also extend to minor children of the waiving person, considering the need to obtain a prior consent thereto from a guardianship court.

There is a commonly shared view in academic writings that consent from a guardianship court is not required to conclude a waiver of succession contract, even if descendants of the waiving person are minors. In particular, Grzegorz Wolak points out to the fact that in the case of the regulation in question "there is no consent to concluding the contract from a third party who is not a party to the contract but who is affected by its consequences". G. Wolak has branded this kind of legal instrument as "strict" because the consequences of such a contract "affect descendants of the person waiving succession regardless of the fact whether they are interested in this and whether they agree to this"[26]. A similar view has been expressed among others by Elżbieta Skowrońska-Bocian, who pointed out that "(...) it should be assumed that the person waiving succession does not have to seek

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[23] E. Niezbecka, commentary on Article 1049 Civil Code (thesis 5), in A. Kidyba (ed.) et al., *Kodeks cywilny*, *op. cit*., and the literature quoted therein.

[24] As pointed out above, succession can be waived even by a person who him/herself, due to being a distant relative of the prospective testator, stands a small "chance" of becoming an heir. However, in legal practice such a contract is usually concluded by close relatives, in particular, those in the parent-child relationship.

[25] For more detail, see P. Księżak, *Zachowek*, *op. cit*., pp. 122–124, who criticises the different view presented by E. Niezbecka, *Zrzeczenie się dziedziczenia*, *op. cit*.

[26] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 281 and the literature quoted therein.

consent from descendants to conclude the waiver of succession contract or consent from a court when the descendants are minors". In this author's opinion, "the effects of the waiver of succession contract in principle extend also to descendants of the person waiving succession. Therefore, in this case one deals with a situation which is rare in civil law where a contract has a direct effect on the legal situation of individuals who are not parties to this contract." In turn, Julita Zawadzka referring to the issue of consequences of the contract envisaged in Article 1048 Civil Code, in the case where the person waiving succession did not outlive the prospective testator, points out that "the person waiving succession decides by him/herself about the potential and future rights of his/her descendants to the extent that these rights are derived from his/her rights".[27]

There are no reasonable grounds to question the presented standpoints *de lege lata* also with regard to those cases where the potential heir waiving succession has parental authority over minor children and the waiver of succession contract leads to accepting a legal fiction that also these children may not live to the moment of opening the succession. It would be possible to attempt to refer to the systemic interpretation that the regulation in Article 1049 § 1 Civil Code should be applied in conjunction with Article 101 § 3 of the Polish Family and Guardianship Code[28] since the consequences of this legal act may also affect a minor, i.e. a child of the waiving person. However, attempts of this kind cause numerous practical difficulties and cannot lead to clear results. Meanwhile, legal practice explicitly indicates that waiver of succession contracts are concluded without prior consent thereto from a guardianship court.

Pursuant to Article 101 § 1 FGC, parents are obliged to manage the assets of the child under their parental care with due diligence. In turn, under § 3 of this article, parents may not, without consent from a guardianship court, carry out activities that exceed the scope of regular management or grant consent for the child to carry out such activities. Therefore, it should be considered whether *de lege lata* waiver of succession by a potential heir who has parental authority over minor children can be at all treated as an activity within the scope of managing the child's assets. It is pointed out in literature that an issue of exceeding regular asset management is essential from the point of view of this person's finances.[29] If a parent waives succession, there is no manifestation of direct interference with the financial condition of his/her child. In this situation, the minor is only potentially deprived of the possibility to obtain financial benefits from the succession in the future, and only assuming that had the waiver of succession not happened, such rights would have been vested in the child. This may happen because, as mentioned above, waiver of

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[27] J. Zawadzka, *Uwagi o czynnościach prawnych mortis causa*, [in:] B. Jelonek-Jarco (ed.) et al., *Usus magister est optimus: rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi*, Warszawa 2016, p. 286.

[28] Act of 25 February 1964: Family and Guardianship Code, Dz.U. 1964, No. 9, item 59, as amended; hereinafter FGC.

[29] Cf. A. Kunicki, *Pojęcie zwykłego zarządu w prawie rodzinnym i opiekuńczym*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 3, 1968, p. 115, https://repozytorium.amu.edu.pl/handle/10593/18476 (accessed on 25.09.2019).

succession has an effect on descendants of the waiving person also in the case when such person dies before the testator. Moreover, a descendant of the person waiving succession is treated as one who has not lived to the moment of opening the succession and also loses the right to the legitim which might have been vested in him/her if the testator had drawn up a will. Therefore, in those special cases waiver of succession might have indirect effects on the financial sphere of a minor child of the person waiving succession, however, only if the waiving person in fact would not have survived to the moment of opening the succession, which on the date of concluding the waiver of succession contract is by nature an uncertain future event.

Therefore, given the legal regulations that are currently in force, there are no express grounds to assume beyond any doubt that waiver of succession which also affects minor children of the waiving person goes beyond regular management of the child's assets as stipulated in Article 101 § 3 FGC.

5. CARE FOR THE CHILD'S BEST INTERESTS

One of the key family law principles is protection of the child's best interests. The child's best interests, in addition to the sphere of emotional (spiritual) values, also concerns the financial aspect which should be properly secured.[30] As regards the financial sphere, the law should be shaped in a manner that would make it impossible to deprive the child of any significant financial benefits that are due to the child, even potentially, without control of a guardianship court.[31]

Carrying out a number of legal activities in the area of inheritance law already in the present legal situation to be valid requires prior consent from a guardianship court.[32] It is generally assumed in the judicature and literature that to reject succession on behalf of a minor child, it is necessary to obtain prior consent from a guardianship court.[33] It is pointed out, in particular, that to evaluate whether it is reasonable to reject an estate on behalf of a minor child, it is necessary to carry out a detailed and thorough comparative analysis of potential benefits of accepting and rejecting the estate left by the deceased testator.[34] A corresponding situation takes place when a minor would waive financial payments due to him/her in proceedings

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[30] For more detail, see J. Skibińska-Adamowicz, [in:] J. Ignaczewski (ed.) et al., *Komentarz do spraw rodzinnych*, 2nd edn, Warszawa 2014, p. 286.

[31] For more detail, see J. Słyk, *Orzekanie w sprawach o zezwolenie na dokonanie czynności przekraczającej zakres zwykłego zarządu majątkiem dziecka*, Prawo w Działaniu. Sprawy Cywilne No. 21, 2015, p. 201. See also T. Sokołowski, *Ochrona interesu majątkowego dziecka*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, Vol. XLVII, No. 2, 1985, p. 115, who points out to the "need to protect those financial rights of the child which will arise only in the future".

[32] Cf. G. Jędrejek, commentary on Article 101 (thesis 14), in *Kodeks rodzinny i opiekuńczy. Komentarz*, 2017 (LEX electronic version).

[33] Like, e.g. the Supreme Court decision of 13 November 1998, II CKU 64/98, LEX No. 1215083.

[34] Cf. A. Partyk, *Glosa do postanowienia Sądu Najwyższego z dnia 20 listopada 2013 r. w sprawie I CSK 329/13*, LEX No. 1444970.

concerning the sharing of an estate.[35] In those cases, when a minor him/herself is a party to a waiver of succession contract (represented by a statutory representative), it is necessary to obtain a prior consent from a guardianship court to conclude the contract.[36]

From the practical point of view, entering into a waiver of succession contract leads to the same legal consequences for the children of the waiving person as in the case of rejection of the succession by the children themselves. Even though the actions of waiving succession and rejecting succession are different,[37] in both cases the law provides for a legal effect in the form of the fiction that a given person did not live to the moment of opening the succession (cf. Article 1020 Civil Code). Thus there are two legal activities in the legal system that can be taken by a parent, and the legal effects of both of them on the child are identical. Therefore, analysing the two legal constructs through the prism of their legal consequences, in my opinion, there are no grounds to differentiate between them as regards the need to obtain a consent from a guardianship court to carry out these activities. As it has already been pointed out, the admissibility of rejecting inheritance on behalf of a minor child depends on prior consent from a guardianship court, which in a given legal situation does not raise any doubts. Hence, is this proper that obtaining consent from a guardianship court is required for a given legal activity resulting in recognising that a minor has not lived to the moment of opening the succession, while for the other legal activity which has the same effect it is not necessary?

It is pointed out in judicial decisions that "any disposals made by parents on behalf of their minor child (...), unless they are contributing only, and thus may put at risk the child's financial interests, belong to the category of activities that go beyond regular management as defined in Article 103 § 3 FGC" (cf. the decision issued by the Court of Appeal in Gdańsk of 20 May 2015 in the case, V ACa 26/15[38]). In turn, it was assumed in the decision of the Court of Appeal in Łódź of 24 September 2014 in the case, I ACa 425/14,[39] that "a legal activity conducted by a statutory representative in matters that go beyond regular management is invalid if conducted without prior consent from a guardianship court. Such activity is unques-

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[35] The Supreme Court in the decision of 23 July 1998, III CKU 34/98 (LEX No. 1232690) recognised as defective the court's decision, according to which inherited estate had been acquired by one of the heirs without the obligation to pay off the other heirs, minor children. The Supreme Court pointed out that "waiving on behalf of the minor of her right to the estate left by her deceased father thus could not take place without prior consent from a guardianship court, while the waiver without such consent should not have any legal effects. A different stance adopted by the court concerning the custodian's statement (...) and depriving the minor of any benefits from the inheritance was a gross violation of the legal regulations quoted above."

[36] G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 168–169; J. Gwiazdomorski, *Prawo spadkowe*, *op. cit*., p. 71; E. Niezbecka, commentary on Article 1049 Civil Code (thesis 4), in A. Kidyba (ed.) et al., *Kodeks cywilny*, *op. cit*.; S. Kalus, commentary on Article 156 FGC, in K. Piasecki (ed.) et al., *Kodeks*, *op. cit*.

[37] For more detail, see: G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 245–251; A. Doliwa, [in:] B. Kordasiewicz (ed.) et al., *System Prawa Prywatnego*, Vol. 10: *Prawo spadkowe*, C.H. Beck, Warszawa 2009, pp. 924–925.

[38] LEX No. 1842294.

[39] LEX No. 1544878.

tionably invalid as being contrary to Article 58 § 1 Civil Code. (...) Proceedings for granting consent shall be conducted in the form of a legal action. This is so because the overriding goal of the regulation under Article 101 § 3 FGC is the best interests of the minor child and protection of the child's financial interests."

When analysing the consequences of waiving succession by a potential heir through the prism of the best interests of his/her minor children, it should be taken into account that loss of the status of even a potential heir or holder of the right to legitim (in the case the waiving person really has not lived to the moment of opening of the succession) may prove unbeneficial for the minor.

Accepting the legal fiction alone that a descendant of the person waiving succession has not lived to the moment of opening the succession gives rise to an effect in the form of depriving him/her of any rights to the estate. A descendant of the testator's child waiving succession is thus in a legal situation which is even worse than that of a descendant of the testator's disinherited child because the latter retains his/her own right to legitim,[40] and in the case the testator has not indicated any other beneficiaries in his/her will apart from disinheriting his/her child, descendants of the disinherited child acquire the estate as intestate heirs.[41]

In this context, care for the child's best interests, in my opinion, causes that waiving succession with effect on minor children should be a legal activity that requires prior consent from a guardianship court. It should not be forgotten that a waiver of succession contract (also one extending to minor descendants of the waiving person) can also be concluded where no benefit has been obtained by the person waiving his/her future inheritance rights. In my opinion, if a parent of a minor child makes a decision which may have effects of depriving his/her offspring of certain financial rights, such a decision cannot be dictated by reasons contradicting the child's best interests. It is the parent's obligation to take care that his/her minor child's

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[40] As it can be concluded from the resolution of the Supreme Court of 3 December 2015, III CZP 85/15 (LEX No. 1928533), a share in inheritance that would have been granted statutorily to a child who has been disinherited by the testator is vested in descendants of the disinherited person. In this decision the Supreme Court paid attention to the fact that "the standpoint that disinheriting a descendant leads only to depriving him/her of his/her right to legitim alone without excluding inheriting by his/her descendants by law has long been predominant in the judicial decisions of the Supreme Court. Disinheritance has only effect on the disinherited person but not on his/her descendants (Article 1011 Civil Code). Therefore, descendants of the disinherited person inherit from him by law as if he/she did not live to the moment of opening the succession. Descendants of the disinherited person can obviously be disinherited by a separate act of the testator. In case the testator has not indicated other heirs, his/her estate is inherited statutorily, and the disinherited person should be treated as if he/she did not live to the moment of opening the succession, and thus his/her descendants acquire the portion of inheritance vested in them *ex lege*." The Supreme Court's viewpoint regarding the need to recognise the disinherited as a person who has not lived to the moment of opening the succession has been questioned on numerous occasions in literature; cf. G. Wolak, *O skutkach wydziedziczenia zstępnego spadkodawcy*, Nowy Przegląd Notarialny No. 4 (66), 2015, who presents an overview of standpoints of the representatives and commentators of the doctrine concerning this issue. In my opinion, the view discussed in the decision of the Supreme Court should be seen as convincing and apt. Cf. also M. Załucki, *Wydziedziczenie*, *op. cit*., pp. 420–422. See also S. Kubsik, *Zachowek zstępnego wydziedziczonego oraz jego wysokość*, Rejent No. 9, 2012, p. 73 et seq.

[41] Cf. P. Księżak, *Zachowek*, *op. cit*., p. 207 et seq.

(being under his/her parental authority) interests are protected in the best possible manner also in the aspect of potential future financial claims. Family law protects the minor's best interests. Therefore, family courts are able to counteract any legal actions taken by parents that may harm their children's interests.

As already mentioned, in the present legal situation, this issue has not been successfully regulated, and legal practice reveals that waiver of succession contracts are concluded (approved by notaries) without any control from a guardianship court, also in the cases where the person waiving succession has a child under his/her parental care and the waiver of succession contract results in assuming that these children also did not live to the moment of opening the succession. However, in my opinion, legislative efforts should be made to ensure that in case a person waiving succession fails to seek consent from a guardianship court or does not receive the consent (if the guardianship court deems that concluding the waiver of succession contract which also has effect on minor children is contrary to their best interests), the legal consequences of the contract would not extend to children of the waiving person who were minors when the contract was concluded.

It is reasonable to implement the proposed legislative solution above all because it is necessary to introduce a legal mechanism that will exclude the possibility of effecting a legal activity by a parent which is not controllable in any manner, the negative consequences of which will directly affect a minor child. It is pointed out in literature, not without a reason, that "descendants may not (…) claim that a waiver of succession contract is invalid on the grounds of Article 58 § 2 Civil Code only because the effects of the contract extend also to them (as descendants of the waiving person) and the contract deprives them of legitim. This would mean circumvention of the clear provision under Article 1049 Civil Code and also of the principle that those entitled to inherit have no rights to the succession before its opening."[42] However, a distinction should be made between compliance of the waiver of succession contract with the provision of Article 1049 § 1 Civil Code and thus the absence of any grounds to claim that the contract is contrary to the rules of social co-existence and protection of the child's best interests. In my opinion, in this case there is a collision of legal norms concerning inheritance and family. The behaviour of a parent who waives succession with an effect extending also to his/her minor child should not be evaluated in terms of compliance of the legal activity with the law and rules of social co-existence alone (Article 58 § 1 and § 2 Civil Code in conjunction with Article 1049 § 1 Civil Code) but also from the point of view of family law norms. Article 1049 § 1 Civil Code allows one to conclude a waiver of succession contract which may have adverse legal consequences for a minor child of the person waiving succession. The principle originating from Article 87 FGC and Article 95 FGC that parents need to be guided by their child's best interests is contradictory to the possibility (which is not controlled in any manner) of depriving the minor child by his/her parent of succession rights, even if this is only potential. In my opinion, this makes it necessary to introduce the requirement to obtain consent from a guardianship court to a waiver of succession which also has impact on minor children of the waiving person.

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[42] G. Wolak, *Umowa*, *op. cit.*, p. 281.

6. COMMENTS *DE LEGE FERENDA*

Considering the reasons presented above, the legislator should take action to regulate whether a waiver of succession, which also has effects on minor children of the waiving person (when the waiver of succession contract does not include provisions excluding the rule provided under Article 1049 § 1 Civil Code), requires obtaining a prior consent from a guardianship court.

Before a waiver of succession, exerting effect also on a minor child of the person waiving succession, is concluded, the guardianship court should objectively verify *ad casum* whether concluding such contract is in fact unfavourable for the child. It is only upon obtaining a legally binding consent from a guardianship court to the waiver of succession in the above circumstances that the said contract could be concluded.

In such a case, the guardianship court would thus be tasked with determining a number of circumstances, in particular, motives for making the decision to conclude the waiver of succession and whether in particular circumstances of the case the waiver will not unreasonably deprive minor children of the waiving person of any inheritance rights, in particular, a potential right to legitim. As I have pointed out above, the loss of a potential right to legitim alone can be recognised by the guardianship court as detrimental to the minor child's best interests. It is worth adding that the guardianship court would have the possibility to employ the institution of listening to the minor (Article 576 of the Polish Code of Civil Procedure)[43] if, in the court's opinion, this would help issuing a just decision. In my opinion, the scope of procedures employed by the guardianship court in this case should be parallel to those adopted when deciding on granting consent to a waiver of succession effected by the minor him/herself (or any other person who has no full legal capacity) or to rejection of succession on behalf of a minor child.

It can be argued that in such a case the guardianship court's evaluation would refer to the condition existing when the decision on granting consent to the waiver was made, while a significant period may pass from that moment to the time of opening the succession. However, this does not mean that court's control of this kind would be meaningless. It is practically impossible to determine what the precise condition of the estate will be at the moment of the testator's death in an unknown future. This, however, should not be the main reference point for the guardianship court. The court should rather focus on checking whether there are circumstances that provide grounds for extending the effects of a waiver of succession to the waiving person's minor children. The absence of such circumstances may be the basis for the assessment that the waiving person's action is contrary to the principle of family law that the child's best interests need to be protected. From this point of view, the court should consider whether concluding a waiver of succession entails (or not) harming the child's best interests, taking into account the circumstances at the time when consent to concluding the contract is granted.

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[43] Act of 17 November 1964: Code of Civil Procedure, consolidated text, Dz.U. 2019, item 1460; hereinafter Code of Civil Procedure.

Considering the fact that, in the light of the arguments presented above, it is reasonable to impose a statutory requirement to obtain consent from a guardianship court to a waiver of succession which has effects also on minor children of the waiving person, the legal consequences of entering into this kind of contract without obtaining relevant consent from the court need to be taken into consideration. One option would be to introduce a solution that in such a case the contract would be absolutely null and void. However, this solution does not seem proper. The goal of the legal mechanism proposed by me is not the court's interference with the waiver of succession itself but to introduce an institution that will protect the minor's interests. Therefore, in my opinion, recognising that the waiver of succession has no effect on those children who were minors when the contract was concluded would be a proper legal effect of a waiver of succession. This would not require a prior consent from the guardianship court leading to recognising that also minor descendants of the person waiving succession have not lived to the moment of opening the succession. Although the view that "a legal activity conducted by a statutory representative covering matters that go beyond regular management without consent from a guardianship court is invalid" has been expressed in judicial rulings (cf. the decision of the Supreme Court of 5 February 1999, III CKN 1202/98[44]), adopting it in the case discussed in this paper would be improper. Firstly, there is no direct management of the child's assets. Secondly, deeming the entire waiver of succession contract absolutely invalid would be, as mentioned above, too severe a consequence. In my opinion, ineffectiveness of the waiver of succession contract only for minor children of the waiving person seems to be the most adequate solution since, on the one hand, it ensures sufficient protection of the child's essential interests, while on the other, it allows one to maintain the legal existence of the concluded contract.

The suggested solution will differentiate the legal situation of the person waiving succession, depending on their age on the day of entering into the waiver of succession contract. However, this differentiation seems inevitable if the legislative changes proposed above were to be introduced.

At the same time, to evaluate the admissibility of concluding a waiver of succession with respect to the need to obtain consent from a guardianship court, the condition existing on the day of signing the contract would be significant. Therefore, a relevant consent would only be required when the person waiving succession has minor children at the time of entering into the waiver of succession. In turn, if such children were born after the date of concluding the contract, the absence of consent from a guardianship court would not affect in any way the validity and effectiveness of the already conducted legal activity.

In this context it is also relevant to refer to the legal situation of a child who has been conceived but still is not born on the day when the waiver of succession is concluded by the child's parent. Article 927 § 2 Civil Code provides that a *nasciturus* has the right to inherit on condition that he/she is born alive. In terms of admissibility of concluding a waiver of succession contract which has effects also on the waiving person's descendants, the requirement to obtain consent from

[44] LEX No. 1213617.

a guardianship court should extend to children who have been conceived but are still unborn on the day of concluding the contract, if the person waiving succession knows about the fact that the child has been conceived. However, if on the day of concluding the waiver of succession the child has been conceived but the waiving person does not know about this, it is impossible to require from him/her to seek consent from a guardianship court to a waiver of succession which has effects also on the child. Therefore, if the waiving person becomes aware of the fact that the child has been conceived only after concluding the contract, this will not affect the validity and effectiveness of this legal activity, regardless of the lack of consent from a guardianship court to conducting it.

In the present legal situation, a court's decision with regard to granting consent to conducting a legal activity in the form of waiver of succession which has effects also on minor children of the waiving person would only be effective after becoming legally binding and could not be changed or revoked, if based on the consent legal effects have come to existence for third parties. This happens above all when the contract has already been concluded upon the court's consent.[45]

The group of participants in proceedings before a guardianship court initiated in order to obtain consent to waiving succession which has effects also on minor children of the waiving person should include all those concerned in compliance with Article 510 § 1 and 2 Code of Civil Procedure. Doubtlessly, those concerned in the case of proceedings of this kind should include the prospective testator and the potential heir waiving succession as parties to the contract which the consent directly concerns. The other parent of the minor child should also participate in the proceedings, considering the parental authority vested in him/her. The minor child him/herself, whose interests are the subject, is also directly concerned. Court proceedings the subject of which is also compliance of the waiver of succession with the protection of the best interests of the minor child of the waiving person would doubtlessly belong to the category stipulated in Article 98 § 3 FGC. In a matter of this kind representation of a minor by parents is excluded, while a custodian appointed by the guardianship court is the child's representative during the trial. Pursuant to Article 98 § 2(2) FGC, none of the parents may represent their child in the case of legal activities between the child and one of the parents or his/her spouse, unless the legal activity is a free contribution to the child or concerns means of support and upbringing due to the child from the other parent. This provision pursuant to § 3 of the aforementioned article is applied respectively in proceedings before a court or other state authorities. In turn, pursuant to Article 99 FGC, if none of the parents can represent a child being under their parental authority, the child should be represented by a custodian appointed by a guardianship court. Doubtlessly, a waiver of succession by a parent, if its effects also extend to his/her minor children, is not an activity of involving contribution for the child, nor is it linked with ensuring means of the child's upbringing and maintenance. Therefore, representation of the child by a procedural custodian would be necessary in this case.[46]

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[45] Cf. H. Ciepła, commentary on Article 101 FGC, in K. Piasecki (ed.) et al., *Kodeks*, *op. cit.*

[46] *Ibid.*, commentary on Article 99 FGC.

7. CONCLUSION

Taking a legal action directly affecting the sphere of rights and obligations of a minor child should be controlled by a court. A waiver of succession which has effects also on descendants of the waiving person may be a move that adversely affects the best interests of the minor in an essential area. For this reason, I believe that it is desirable to introduce legal mechanisms which will allow eliminating the threat that, in effect of a legal action taken by a parent who is not controlled in any manner, the child's inheritance rights are infringed upon as the child is recognised as if he/she did not live to the moment of opening the succession. The most proper solution, in my opinion, is to impose the obligation to obtain consent from a guardianship court by the waiving person to conduct the legal activity, if it has effects also on his/her minor descendants. In turn, the absence of such consent should result in recognising that the waiver of succession does not extend to those descendants of the waiving person who are minors when the contract is concluded.

I believe that the legislative solutions proposed above are necessary because in the present legal situation waiver of succession contracts have effects also on minor children. These contracts are not subject to any control whatsoever from the point of view of interests of the minors who become deprived of any potential inheritance rights. In my opinion, care for the best interests of children requires changing this practice, which is impossible without amending the relevant laws.

BIBLIOGRAPHY

Borkowski P., *Notarialne poświadczenie dziedziczenia*, Wolters Kluwer Polska, 2011 (LEX electronic version).

Ciszewski J. (ed.) et al., *Kodeks cywilny. Komentarz*, 2nd edn, LexisNexis 2014 (LEX electronic version).

Gwiazdomorski J., *Prawo spadkowe w zarysie*, Warszawa 1967.

Ignaczewski J. (ed.) et al., *Komentarz do spraw rodzinnych*, 2nd edn, Warszawa 2014.

Jędrejek G., *Kodeks rodzinny i opiekuńczy. Komentarz*, 2017 (LEX electronic version).

Kidyba A. (ed.) et al., *Kodeks cywilny. Komentarz*, Vol. IV: *Spadki*, 4th edn, 2015 (LEX electronic version).

Kordasiewicz B. (ed.) et al., *System Prawa Prywatnego*, Vol. 10: *Prawo spadkowe*, C.H. Beck, Warszawa 2009.

Księżak P., *Zachowek w polskim prawie spadkowym*, Warszawa 2012.

Kubsik S., *Zachowek zstępnego wydziedziczonego oraz jego wysokość*, Rejent No. 9, 2012.

Kunicki A., *Pojęcie zwykłego zarządu w prawie rodzinnym i opiekuńczym*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 3, 1968.

Niedośpiał M., *Swoboda testowania*, Bielsko-Biała 2003.

Niemotko R., *Sankcja nieważności umów o spadek po osobie żyjącej*, [in:] P. Stec, M. Załucki (eds), *Wokół rekodyfikacji prawa cywilnego. Prace jubileuszowe*, Kraków 2015.

Niezbecka E., *Skutki prawne testamentu negatywnego i wydziedziczenia*, Rejent No. 7/8, 1992.

Niezbecka E., *Zrzeczenie się dziedziczenia i odrzucenie spadku a zdolność do dziedziczenia osób fizycznych*, Annales UMCS, Sectio G Ius Vol. XXXIX, No. 8, 1992.

Panek M., *Dopuszczalność zrzeczenia się zachowku w prawie polskim*, Studia Iuridica Toruniensia Vol. XVI, 2015.
Partyk A., *Glosa do postanowienia Sądu Najwyższego z dnia 20 listopada 2013 r. w sprawie I CSK 329/13*, LEX No. 1444970.
Pazdan M., *Umowa o zrzeczeniu się dziedziczenia w polskim prawie spadkowym*, Rejent No. 4, 1997.
Penkała A., *Panieńskie ochędóstwo. Kwestie posagowe i wienne w małżeństwach szlachty województwa krakowskiego w czasach saskich*, Kraków 2016.
Piasecki K. (ed.) et al., *Kodeks rodzinny i opiekuńczy. Komentarz*, 5th edn, LexisNexis 2011 (LEX electronic version).
Piątowski J.S., *Prawo spadkowe. Zarys wykładu*, 6th edn, Warszawa 2003.
Rott-Pietrzyk E., *Umowa o zrzeczenie się dziedziczenia – uwagi de lege lata i de lege ferenda*, Rejent No. 3, 2006.
Skowrońska-Bocian E., *Komentarz do kodeksu cywilnego. Księga czwarta: Spadki*, 10th edn, LexisNexis, Warszawa 2011.
Słyk J., *Orzekanie w sprawach o zezwolenie na dokonanie czynności przekraczającej zakres zwykłego zarządu majątkiem dziecka*, Prawo w Działaniu. Sprawy Cywilne, No. 21, 2015.
Sokołowski T., *Ochrona interesu majątkowego dziecka*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, Vol. XLVII, No. 2, 1985.
Trzewik J., *Wyłączenie od dziedziczenia a krąg osób uprawnionych do spadkobrania*, Roczniki Nauk Prawnych Vol. 19, No. 1, 2009.
Wolak G., *O skutkach wydziedziczenia zstępnego spadkodawcy*, Nowy Przegląd Notarialny No. 4 (66), 2015.
Wolak G., *Umowa zrzeczenia się dziedziczenia w polskim prawie cywilnym*, Warszawa 2016.
Załucki M., *Wydziedziczenie w polskim prawie na tle porównawczym*, Warszawa 2010.
Zawadzka J., *Uwagi o czynnościach prawnych mortis causa*, [in:] B. Jelonek-Jarco (ed.) et al., *Usus magister est optimus: rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi*, Warszawa 2016.
Zych R., *Abdicatio hereditatis in iure Polonia. Zrzeczenie się dziedziczenia w polskim porządku prawnym*, Acta Iuris Stetinensis No. 14, 2016.

WAIVER OF SUCCESSION WITH EFFECT ON A MINOR: COMMENTS *DE LEGE FERENDA*

Summary

In the current legal status, an intestate heir may conclude a contract with the person from whom he/she is to succeed, to waive succession to that person. It has the effect of treating the waiving person as if he/she did not live to the opening of the succession. However, the same treatment is also given to descendants of the person waiving succession, even though they are not parties to the contract. The issue of the need to obtain consent from a guardianship court to the waiver of succession, the effects of which also extend to minor children of the one who has waived the succession, has not been regulated. However, the *de lege lata* prevailing opinion is that such a consent is not required. Still, given that the effects of the waiver of succession covering a minor child are identical to the effects of rejecting the succession on behalf of a minor child (in both cases considered as not having lived to the opening of the succession), it seems appropriate to introduce into the legal system an obligation to obtain the consent of the guardianship court also to conclude a contract of waiving succession if its effects are extended

to minors of the waiving person. The reason for this is the protection of the best interests of the child, who as a result of a contract of waiving succession entered into by his/her parent may, in some cases, be even totally deprived of any rights under the inheritance law which would be applicable to him/her if the waiver of succession were not concluded.

Keywords: waiver of succession, minor descendants of the person waiving succession, consent of the guardianship court, best interests of the child

ZRZECZENIE SIĘ DZIEDZICZENIA WYWIERAJĄCE SKUTKI ODNOŚNIE MAŁOLETNIEGO DZIECKA – UWAGI *DE LEGE FERENDA*

Streszczenie

W obecnym stanie prawnym spadkobierca ustawowy może zawrzeć ze spadkodawcą umowę o zrzeczeniu się dziedziczenia. Jej skutkiem jest traktowanie zrzekającego się dziedziczenia tak, jakby nie dożył on otwarcia spadku. Jednakże tak samo traktowani są również zstępni zrzekającego się dziedziczenia, mimo że nie są oni stronami umowy. Problematyka potrzeby uzyskania zezwolenia sądu opiekuńczego na zrzeczenie się dziedziczenia, którego skutki rozciągają się również na małoletnie dzieci zrzekającego się, nie została unormowana. Dominuje jednak zapatrywanie, iż *de lege lata* zezwolenie takie nie jest wymagane. Biorąc pod uwagę fakt, że skutki zrzeczenia się dziedziczenia rozciągającego się na małoletnie dziecko są identyczne jak skutki odrzucenia spadku imieniem małoletniego dziecka (w obu przypadkach uważa się je za niedożywające otwarcia spadku), wydaje się celowym wprowadzenie do systemu prawnego obowiązku uzyskania zezwolenia sądu opiekuńczego również na zawarcie umowy o zrzeczeniu się dziedziczenia, jeżeli jej skutki obejmą małoletnie dzieci zrzekającego się. Przemawia za tym nadto wzgląd na ochronę dobra dziecka, które wobec zawarcia umowy zrzeczenia się dziedziczenia przez jego rodzica, może w niektórych przypadkach zostać nawet całkowicie pozbawione wszelkich uprawnień na gruncie prawa spadkowego, które by mu przysługiwały, gdyby umowa zrzeczenia się dziedziczenia nie została zawarta.

Słowa kluczowe: zrzeczenie się dziedziczenia, małoletni zstępni zrzekającego się dziedziczenia, zgoda sądu opiekuńczego, dobro dziecka

LA RENUNCIA DE HERENCIA QUE PRODUZCA CONSECUENCIAS PARA EL MENOR DE EDAD – COMENTARIOS *DE LEGE FERENDA*

Resumen

El ordenamiento jurídico actual prevé que el heredero legal puede suscribir con el testador un contrato de renuncia de la herencia. Su efecto consiste en que se trata al renunciante de la herencia tal como si no llegase con vida a la apertura de la herencia. Esto se aplica también para los descendientes del renunciante, aunque no sean parte del contrato. La problemática de necesidad de obtener autorización del tribunal de tutela para la renuncia de la herencia, cuyas consecuencias afectan a los hijos menores de edad, carece de regulación alguna. Predomina, sin embargo, la postura que *de lege lata* tal autorización no es necesaria. Teniendo en cuenta que las consecuencias de la renuncia de la herencia para los hijos menores son iguales a las consecuencias del repudio de la herencia en nombre de hijo menor (en ambos casos se considera que no llegaron con vida a la apertura de la herencia), parece razonable introducir

al sistema jurídico la obligación de obtener autorización del tribunal de tutela también para suscribir el contrato de renuncia de la herencia, en caso sus consecuencias afecten también a hijos menores del renunciante. Esto viene justificado por la protección del bien de niño que, debido a la suscripción del contrato de renuncia de la herencia por su progenitor, podrá en algunos casos incluso ser privado de cualquier derecho hereditario que le correspondería si el contrato de renuncia de la herencia no fuese suscrito.

Palabras claves: renuncia de la herencia, menores de edad descendientes del renunciante de la herencia, autorización del tribunal de tutela, bien del niño

ОТКАЗ ОТ НАСЛЕДОВАНИЯ, ИМЕЮЩИЙ ПОСЛЕДСТВИЯ ДЛЯ НЕСОВЕРШЕННОЛЕТНЕГО РЕБЕНКА: ЗАМЕЧАНИЯ *DE LEGE FERENDA*

Резюме

В соответствии с действующим законодательством, законный наследник может заключить с наследодателем договор об отказе от наследования. Вследствие такого договора статус лица, отказавшегося от наследования, приравнивается к статусу лица, не дожившего до момента открытия наследства. При этом тот же статус приобретают и потомки лица, отказавшегося от наследования, хотя они и не являются сторонами договора. На законодательном уровне не урегулирован вопрос о необходимости получения разрешения суда по опеке и попечительству на отказ от наследования, который имеет последствия для несовершеннолетних детей лица, отказывающегося от наследования. Впрочем, преобладает мнение, что *de lege lata* такое разрешение не требуется. Однако, учитывая тот факт, что отказ от наследования, совершаемый родственниками несовершеннолетнего ребенка по прямой восходящей линии имеет для него такие же последствия, как и отказ от наследства от имени несовершеннолетнего ребенка (в обоих случаях ребенок имеет такой же статус, как если бы он не дожил до момента открытия наследства), представляется целесообразным внести в законодательство обязанность получать разрешение суда по опеке и попечительству также в случае заключение договора об отказе от наследования, если его последствия распространяются на несовершеннолетних детей лица, отказывающегося от наследования. Дополнительным аргументом в пользу такого решения является защита интересов ребенка, который при заключении его родителем договора об отказе от наследования может в некоторых случаях полностью лишиться всех прав наследования, которыми он обладал бы, если бы договор об отказе от наследования не был заключен.

Ключевые слова: отказ от наследования, несовершеннолетние родственники по прямой нисходящей линии лица отказывающегося от наследования, разрешение суда по опеке и попечительству, интересы ребенка

DIE AUSSCHLAGUNG EINER ERBSCHAFT MIT WIRKUNG FÜR EINEN MINDERJÄHRIGEN – ANMERKUNGEN *DE LEGE FERENDA*

Zusammenfassung

Nach geltender Rechtslage kann ein gesetzlicher Erbe mit dem Erblasser einen Erbverzichtsvertrag abschließen. Durch diese Verzichtserklärung wird der das Erbe Ausschlagende so behandelt, als ob er beim Eintritt des Erbfalls nicht mehr am Leben wäre. Doch werden

genauso auch Verwandte in absteigender Linie behandelt, von denen die Erbschaft ausgeschlagen wird, obwohl sie keine Parteien des Vertrages sind. Die Problematik, dass für einen Erbverzicht, dessen Wirkung sich auch auf minderjährige Kinder des auf seinen Erbteil Verzichtenden erstreckt, eine vorherige Genehmigung durch das Vormundschaftsgericht erforderlich sein könnte, wurde nicht geregelt. Es ist jedoch die Sichtweise vorherrschend, dass eine derartige Genehmigung *de lege lata* nicht erforderlich ist. Berücksichtigt man aber, dass die Wirkung eines Erbverzichts, der sich auf ein minderjähriges Kind erstreckt, identisch zur Wirkung einer Ausschlagung des Erbes im Namen des minderjährigen Kindes ist (In beiden Fällen gilt dieses als beim Eintritt des Erbfalls nicht mehr am Leben), erscheint es zweckdienlich, die Pflicht zur Einholung einer Genehmigung durch das Vormundschaftsgericht auch auf den Fall des Abschlusses eines Erbverzichtsvertrags in das Rechtssystem aufzunehmen, wenn sich die Wirkung der Ausschlagung des Erbes auf minderjährige Kinder des auf seinen Erbteil Verzichtenden erstreckt. Dafür spricht außerdem die Sorge um den Schutz des Wohls von Kindern, die bei Abschluss eines Erbverzichtsvertrags durch einen Elternteil in bestimmten Fällen sogar jegliche erbrechtlichen Ansprüche einbüßen, die sie gehabt hätte, wenn der Erbverzichtsvertrag nicht geschlossen worden wäre.

Schlüsselwörter: Erbverzicht, Ausschlagung der Erbschaft, minderjährige Nachkommen eines das Erbe Ausschlagenden, Genehmigung durch das Vormundschaftsgericht, Kindeswohl

RENONCIATION À LA SUCCESSION QUI A DES EFFETS SUR LE MINEUR – REMARQUES *DE LEGE FERENDA*

Résumé

En vertu du statut juridique actuel, l'héritier légal peut conclure un accord de renonciation à la succession avec le testateur. Son effet est de traiter la personne qui renonce à la succession comme s'il n'avait pas survécu à l'ouverture de la succession. Cependant, les descendants de la personne qui renonce à la succession sont également traités de la même manière, même s'ils ne sont pas parties au contrat. La question de la nécessité d'obtenir l'autorisation du tribunal de tutelle pour renoncer à la succession, dont les conséquences s'étendent également aux enfants mineurs de la personne qui renonce, n'a pas été normalisée. Cependant, l'opinion qui prévaut est que *de lege lata*, une telle autorisation n'est pas requise. Considérant, toutefois, que les conséquences de la renonciation à la succession s'étendant à un enfant mineur sont identiques à celles du rejet d'une succession au nom de l'enfant mineur (dans les deux cas, on les considère comme incapable de survivre à l'ouverture de la succession), il semble utile d'introduire dans le système juridique l'obligation d'obtenir l'autorisation du tribunal de tutelle pour conclure un accord de renonciation à la succession si ses effets s'appliquent également aux enfants mineurs de la personne qui renonce à la succession. Cela est également justifié par la protection du bien de l'enfant qui, dans le cas d'un accord de renonciation à la succession conclu par son parent, peut même parfois être totalement privée de tout droit de succession qu'il aurait eu si l'accord de renonciation n'avait pas été conclu.

Mots-clés: renonciation à la succession, descendants mineurs d'une personne renonçant à la succession, autorisation du tribunal de tutelle, bien de l'enfant

RINUNCIA A UNA SUCCESSIONE CON EFFETTI NEI CONFRONTI DI UN MINORE: OSSERVAZIONI *DE LEGE FERENDA*

Sintesi

Nell'attuale situazione giuridica l'erede per legge può stipulare con il dante causa un contratto di rinuncia alla successione. Il suo effetto è considerare il rinunciante alla successione come se non fosse sopravvissuto al momento dell'apertura della successione. Tuttavia vengono considerati allo stesso modo i discendenti del rinunciante alla successione, nonostante il fatto che essi non siano parti del contratto. La problematica della necessità di ottenere un'autorizzazione del giudice tutelare per rinunciare a una successione i cui effetti si estendono anche ai figli minori del rinunciante, non è stata regolamentata. Domina tuttavia la convinzione che *de lege lata* tale autorizzazione non sia richiesta. Considerando tuttavia il fatto che gli effetti della rinuncia alla successione che si estende a un figlio minore sono identici agli effetti della rinuncia alla successione a nome del figlio minore (in entrambi i casi si considera non sopravvissuto all'apertura della successione) sembra opportuna l'introduzione nel sistema giuridico dell'obbligo di ottenere l'autorizzazione del giudice tutelare anche per la stipula di un contratto di rinuncia alla successione, se i suoi effetti comprendono anche figli minori del rinunciante. Depone a tal senso inoltre la premura per la tutela del bene del figlio, che nei confronti della stipula di un contratto di rinuncia alla successione da parte del genitore può in alcuni casi venire completamente privato di tutti i diritti sulla base del diritto della successione, che gli sarebbero spettati se il contratto di rinuncia alla successione non fosse stato stipulato.

Parole chiave: rinuncia alla successione, discendenti minori del rinunciante alla successione, consenso del giudice tutelare, bene del figlio

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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, 1(64)2019, 2(65)2019, 3(66)2019.
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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.
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