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CONTENTS

SPIS TREŚCI

ÍNDICE

СОДЕРЖАНИЕ

INHALTSVERZEICHNIS

TABLE DES MATIÈRES

INDICE

EUROPEAN UNION REGULATIONS CONCERNING VACCINATION AS A MEANS OF PREVENTING INFECTIOUS DISEASES IN THE FACE OF COVID-19/SARS-COV-2 PANDEMIC

JACEK SOBCZAK*

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The outbreak of the COVID-19 global pandemic caused by the coronavirus SARS-CoV-2 resulted in fierce criticism of the European Union accused by the EU Member States' mass media of being unprepared to counteract the situation.[1] The opinions were accompanied by numerous statements made by politicians first in Italy

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[1] Z. Krasnodębski, *Unia kompletnie nieprzygotowana do pandemii*, Rzeczpospolita, 17.4.2020, https://www.rp.pl/Koronawirus-SARS-CoV-2/200419407-Zdzislaw-Krasnodebski-Unia-kompletnie-nieprzygotowana-do-pandemii.html (accessed 6.6.2020); A. Turczyn, *Zwalczanie chińskiego #koronawirus jest odbieraniem ludziom wolności przez rządy przy pomocy strachu bez wystrzału*, 17.5.2020, https://trybun.org.pl/2020/05/17/zwalczanie-chinskiego-koronawirus-jest-odbieraniem-ludziom-wolnosci-przez-rzady-przy-pomocy-strachu-bez-wystrzalu (accessed 6.6.2020); R. Grochal, *Rząd robi dobrą minę, ale jest nieprzygotowany na koronawirusa*, Newsweek Polska, 22.5.2020; S. Stodolak, *Koronawirus wywoła gospodarczy kryzys. Nie gasić pożaru benzyną*, Dziennik.pl, 18.3.2020, https://wiadomosci.dziennik.pl/opinie/artykuly/6464480,koronawirus-kryzys-gospodarczy-opinia.html (accessed 6.6.2020); S.L. Greer, *How Did the EU Get the Coronavirus so Wrong? And What Can it do Right Next Time?*, The New York Times, 6.4.2020, https://nytimes.com/2020/04/06/opinion/europe-coronavirus.html (accessed 6.6.2020); D.M. Herszenhorn, S. Wheaton, *How Europe Failed the Coronavirus Test. Contagion's Spread is a Story of Complacency, Overconfidence and Lack of Preparation*, Politico, 7.4.2020, https://www.politico.eu/article/coronavirus-europe-failed-the-test (accessed 6.6.2020); R. Stavrinou, *Europe is Unprepared to Face Future Deadly Disease Outbreaks*, New Europe, 17.12.2019, https://www.neweurope.eu/article/europe-is-unprepared-to-face-future-deadly-disease-outbreaks (accessed 6.6.2020); M. Pierini, *Caught Unprepared by Pandemic, Europe Must Relearn Tough Lessons*, Carnegie Europe, 18.3.2020, https://carnegieeurope.eu/2020/03/18/caught-unprepared-by-pandemic-europe-must-relearn-tough-lessons-pub-81315 (accessed 6.6.2020).

and then in other EU countries. The criticism also concerned the World Health Organisation (WHO) accused of failure to satisfy people's expectations. The US president expressed particularly harsh criticism of the situation and threatened to withdraw the United States' funding for the organisation.[2] Those attacks were undoubtedly aimed at shifting responsibility for failure to prepare the infrastructure and coordinate activities in particular states. It was ignored that for years the WHO and the European Union bodies even to a greater extent, developing the foundations of health policy, have been drawing attention to the need to work out the rules of preventing a pandemic in many normative acts. It was argued that it was not possible to develop vaccines against a pandemic. However, it was indicated that states should prepare for such a hazard. Concerns were also voiced in relation to anti-vaccination movements which influence Member States' societies with the use of the freedom of speech and communications media.[3]

Article 168 placed under Title XIV Public health of the Treaty on the Functioning of the European Union (hereinafter TFEU) in seven successive paragraphs determines the European Union powers to act in the sphere of public health, specifies its objective and indicates activities that should be undertaken in order to achieve those aims, at the same time defining measures that can be used.[4] Obviously the

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[2] It finally happened on 20 May 2020. See C. Finnegan, *Trump Escalates Fight Against World Health Organization, Threatens to Permanently cut US Funds*, ABC News, 20.5.2020, https://abcnews.go.com/Politics/trump-escalates-fight-world-health-organization-threatens-permanently/story?id=70771446 (accessed 6.6.2020); *Coronavirus: What are President Trump's Charges Against the WHO?*, BBC, 1.6.2020, https://www.bbc.com/news/world-us-canada-52294623 (accessed 6.6.2020); B. Lovelace Jr., *Trump Says the U.S. will cut Ties with World Health Organization*, CNBC, 29.5.2020, https://www.cnbc.com/2020/05/29/trump-says-the-us-will-cut-ties-with-world-health-organization.html; A. Wolska, *Trump: USA zrywają relacje ze Światową Organizacją Zdrowia*, Euractive.pl, 31.5.2020, https://www.euractiv.pl/section/bezpieczenstwo-i-obrona/news/trump-usa-who-zerwane-relacje-chiny-pandemia-koronawirus (accessed 6.6.2020).

[3] *Ruchy antyszczepionkowe jednym z największych zagrożeń dla zdrowia*, Medycyna Praktyczna, 17.1.2019, https://www.mp.pl/szczepienia/aktualnosci/202357,ruchy-antyszczepionkowe-jednym-z-najwiekszych-zagrozen-dla-zdrowia (accessed 6.6.2020); N. Sayegh, *Europe's Anti-vaxxers Could Lead to a Public Health Crisis*, TRT World, 5.11.2019, https://www.trtworld.com/opinion/europe-s-anti-vaxxers-could-lead-to-a-public-health-crisis-31141 (accessed 6.6.20202); H. Larson, A. de Figueiredo, E. Karafllakis, M. Rawal, *State of Vaccine Confidence in the EU 2018*, European Commission, Luxembourg 2018, https://ec.europa.eu/health/sites/health/files/vaccination/docs/2018_vaccine_confidence_en.pdf (accessed 6.6.2020); K. Jennings, *48 Percent of Europeans Believe False Claims on Vaccines. While Most People Agree Vaccines are Important, a Relative Majority Incorrectly Believe they Often Cause Serious Side Effects*, Politico, 26.4.2019, https://www.politico.eu/article/poll-48-percent-of-europeans-believe-false-claims-on-vaccines (accessed 6.6.2020); Ph. Oltermann, *Europe's Covid Predicament – How do you Solve a Problem Like the Anti-vaxxers?*, The Guardian, 23.5.2020, https://www.theguardian.com/world/2020/may/23/europes-covid-predicament-how-do-you-solve-a-problem-like-the-anti-vaxxers (accessed 6.6.2020); K. Juničić, S. Michalopoulos, *Measles hit Zagreb as Social Media Join Fight Against Anti-vaccination*, Euractive, 24.9.2019, https://www.euractiv.com/section/health-consumers/news/measles-hit-zagreb-as-social-media-join-fight-against-anti-vaccination (accessed 6.6.2020).

[4] The founding treaties did not contain regulations granting the European Community institutions powers in the field of public health. The European Communities founding treaties did not deal with the sphere of public health at all. Integration was designed to have only an economic dimension. The concept of health was used in Article 69 Treaty establishing the European Coal and Steel Community (hereinafter TECSC), in which the Member States were obliged to eliminate any limitations to employment in coal and steel industry, with the exception

powers of the European Union in the field of public health support, coordinate and supplement the activities of the Member States. However, Article 168 para. 6 TFEU stipulates that the Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in Article 168 TFEU. Certainly, the recommendations cannot lead to harmonisation of national statutory and implementing provisions, nevertheless Article 168 makes it possible to undertake normative actions aimed at ensuring high quality standards and security of

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of those that result from the need to protect health and public order. Not earlier than in the Treaty establishing the European Atomic Energy Community (hereinafter TEAEC), were there declarations concerning the need to create the conditions of safety necessary to eliminate hazards to the life and health of the public (recital 4 of the Preamble). Article 30 of Chapter 3 of the Treaty grants the Commission and the Council powers to establish basic standards for the protection of the health of workers and the general public, however, only against the dangers arising from ionizing radiations. Similar solutions can be found in the Treaty establishing the European Economic Community (hereinafter TEEC). Article 56 TEEC allows issuing national regulations concerning special treatment of foreign nationals on grounds of public health. Article 57 TEEC envisages progressive abolition of limitations and coordination of national provisions concerning medical and allied professions, including pharmaceutical ones, in order to make it easier for citizens of one Member State to take up and pursue activities as self-employed persons in another Member State. Article 118 TEEC obliges the Commission to promote close cooperation between the Member States in the field of protection against occupational accidents and diseases by conducting studies, delivering opinions and arranging consultations (D. Bach-Golecka, *Pomiędzy solidarnością a wspólnym rynkiem. Uwagi na tle orzecznictwa ETS dotyczącego usług medycznych*, [in:] S. Biernat, S. Dudzik (eds), *Przepływ osób i świadczenie usług w Unii Europejskiej. Nowe zjawiska i tendencje*, Warszawa 2009, p. 287; A. Krajewska, *Ochrona zdrowia w Unii Europejskiej*, [in:] J. Barcz (ed.), *Polityki Unii Europejskiej: polityki społeczne, aspekty prawne*, Warszawa 2010, p. 67). The issue concerning the protection of health occurred in recital 4 TEAEC and Article 36 TEEC. The latter normative act admits the application of prohibitions or restrictions on imports, exports or goods in transit justified on grounds of health and life of humans. Article 129 Treaty on European Union (the Maastricht Treaty) introduced a clear competence of the Community in the field of public health. A successive change was introduced by the Treaty of Amsterdam, which recognised public health as one of the priorities of the European Community. Article 152 of the Treaty establishing the European Community (TEC) imposed an obligation to maintain a high level of human health protection and the Community action should be directed towards improving public health, preventing human illnesses and diseases, and obviating sources of danger to human health. It was aimed at fighting against the major health scourges by promoting research into their causes, their transmission and prevention, as well as health information and education (see M. Malczewska, [in:] K. Kowalik-Bańczyk, M. Szwarc-Kuczer, A. Wróbel (ed.), *Traktat o Funkcjonowaniu Unii Europejskiej*, Vol. II, Warszawa 2012, pp. 1048–1053). The Single European Act added Article 118a to TEEC obliging the Member States to pay particular attention to encouraging improvements, especially in the field of health protection. On the other hand, the amended Article 108 TEEC recommended that the Community institutions adopt high level of standards for health protection in the field of healthcare. It corresponded to Article 130r added to TEEC, indicating that one of the Community's aims in the field of natural environment is to contribute to the protection of human health. Further changes in this respect were introduced in the Maastricht Treaty, where the content of Article 129 TEC was changed, and ensuring a high level of human health protection was indicated as one of the aims of the Community, feasible by encouraging cooperation between the Member States. The Treaty recommended that health protection requirements should form a constituent part of the Community's other policies. Article 129 TEC was amended by means of the Treaty of Amsterdam, which recognised public health as one of the European Community's priorities. In accordance with the amended Article 152 para. 1 TEC, the Community action in the area should take into account improvement of public health, prevention of human illnesses and diseases, and obviating sources of danger to human health. The action should cover the fight against

therapeutic and medicinal products and health protection. Article 168 para. 4 TFEU provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee for the Regions, can adopt relevant measures. The measures may be designed to protect and improve human life, in particular to combat the major cross-border health scourges. They may also concern monitoring serious cross-border threats to health, early warning of such threats and combating them. The direct objective of those measures should be the protection of public health, especially regarding tobacco and the abuse of alcohol. The events in recent weeks, the occurrence of the coronavirus (SARS-CoV-2)[5] causing the COVID-19 disease, prove that Europe is in fact one organism and great mobility of its citizens indicates that health protection should be treated as a category concerning the continent and even the whole world.

The European Union's health policy, although it seems to result only from Article 168 TFEU, is based on quite detailed regulations adopted later. They concern prevention of human diseases and illnesses, elimination of the sources of threats to physical and mental health, prevention and combat of infectious diseases, and reduction of the harmful consequences of addictions (especially drug addiction, abuse of alcohol and tobacco). In addition, cross-border cooperation between Member States in the field of provision of health services and cooperation with non-EU countries became subject to regulation.[6] Within its health policy, the EU

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the major health scourges by complementing national policies. Article 152 para. 5 TEC recognised exclusive responsibilities of the Member States for the organisation and delivery of health services and medical care. Although the Treaty of Nice did not introduce any changes in the field of public health, Article 3 of the Charter of Fundamental Rights adopted then recognised everyone's right to respect for his or her physical and mental integrity, indicating that in the field of medicine and biology, the following must be respected in particular: the free and informed consent of a person concerned, according to the procedures laid down by law. Article 35 of the Charter of Fundamental Rights formulates what constitutes the basis of patients' rights by stating that: 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.' The content of Article 35 is based on the text of Article 152 TEC and Article 11 of the European Social Charter. For more on the issue, see A. Świątkowski, *Karta Praw Społecznych Rady Europy*, Warszawa 2006, pp. 369–376; *idem*, *Prawo socjalne Rady Europy*, Kraków 2006, pp. 152–157.

[5] K. Pyrć, *Ludzkie koronawirusy*, Postępy Nauk Medycznych XXVIII (4B), Borgis, 2015, pp. 48–54. See Projekt ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych [Bill on special solutions related to prevention, counteracting and combating of COVID-19, other communicable diseases and the resulting crisis situations], Sejm paper No. 265, Sejm of IX term; *Getting your workplace ready for COVID-19* of 27 February 2020, available at https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid- 19.pdf?sfvrsn=359a81e7_4 (accessed 8.3.2020, 13:03).

[6] What may be particularly interesting in connection with that are agreements on partnership and cooperation with Russia and former Soviet republics. Such agreements were signed, inter alia, with Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan and Moldova, as well as Tajikistan. On the other hand, there are no such agreements with Ukraine and Belarus. The European Union conducts the so-called European Neighbourhood Policy, which covers three- to five-year bilateral Action Plans agreed with Belarus and Ukraine, as well as fourteen

establishes standards of quality and security of human organs and blood, thoroughly regulating the issue of blood donation, and the rules of dealing with blood and human tissues. In this area, there are also regulations concerning therapeutic and medicinal products, pharmaceutical policy, including the development of the therapeutic products market, and the regulation of medicinal products trade.[7]

The content of Article 168 TFEU,[8] Title XIV,[9] stipulates that a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. The Union action, which must complement national policies, is directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action must cover the fight against the major health scourges, by promoting research into their causes, transmission and prevention, as well as health information and education, and monitoring, early warning and combating serious cross-border threats to health.[10]

Article 168 para. 2 TFEU stipulates that:

> The Union shall encourage cooperation between Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between Member States to improve complementarity of their services in cross-border areas. Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

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other states, including Algeria, Egypt, Georgia, Israel, Morocco and Tunisia, and offering the analysis of the directions of reform of national healthcare systems, exchange of best practices, research and statistical methods and information, participation in the network of control of infectious diseases, and cooperation between research laboratories. It is interesting that the European Neighbourhood Policy as well as agreements on partnership and cooperation cover Armenia, Azerbaijan, Georgia, and Moldova.

[7] The issues concerning the scope of health policy are thoroughly analysed by M. Malczewska, [in:] A. Wróbel (ed.), *supra* n. 5, pp. 1056–1085.

[8] The text of Article 168 was amended and given the present number by Article 2 para. 26 and Article 12 paras 1 and 2 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and some other related acts – Dz.U. 2004, No. 90, item 864/31 – in connection with Poland's accession to the European Union. A successive change was introduced through Article 2 para. 2(a), (c), (d) and para. 127, and Article 5 paras 1 and 2 of the Treaty of Lisbon amending the Treaty on European Union, the Treaties establishing the European Community and some related acts, entering into force on 1 December 2009, OJ C 306, 17.12.2007, p. 1.

[9] Title XIV was added by Article G(D) para. 38 of the Treaty on the Functioning of the European Union, Dz.U. 2004 No. 90, item 864/30, in connection with Poland's accession to the European Union. The number of the Title was determined in Article 12 para. 1 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and some related acts, Dz.U. 2004 No. 90, item 864/31 – in connection with Poland's accession to the European Union. The present numbers were determined in Article 5 para. 1 the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17.12.2007, p. 1 – entering into force on 1 December 2009.

[10] J. Sobczak, *Prawo a medycyna*, Poznań 2018, pp. 33–48.

It is also declared that the Union and the Member States should foster cooperation with third countries and the competent international organisations in the sphere of public health. Further on, it is laid down that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee for the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns: measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures; measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health; measures setting high standards of quality and safety for medicinal products and devices for medical use (Article 168 para. 4 TFEU).[11]

It is also emphasised that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee for the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States (Article 168 para. 5 TFEU). Finally, it is emphasised that Union action must respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States include the management of health services and healthcare and the allocation of resources assigned to them. The measures referred to in Article 168 do not affect national provisions on the donation or medical use of organs and blood (Article 168 para. 7). It is also indicated that the Council, on a proposal from the Commission, may adopt recommendations for the purposes set out in that Article, designed to improve public health in order to combat the major health scourges and monitor, early warn of and combat serious cross-border threats to health.[12]

It should be emphasised that, as it is indicated in literature, diseases that can be prevented with the use of vaccination are recognised as the most serious health

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[11] I. Wrześniewska-Wal, *Wspólnotowe regulacje prawne w obszarze zdrowia publicznego*, Prawo i Medycyna 4, 2004, p. 101 et seq.; P. Saganek, *Ochrona zdrowia*, [in:] J. Barcz (ed.), *Prawo Unii Europejskiej. Prawo materialne i polityki*, Vol. II, 2nd edn, Warszawa 2006, p. 585; *idem*, *Dostęp do usług medycznych w innych państwach członkowskich w świetle orzecznictwa Europejskiego Trybunału Sprawiedliwości*, Przegląd Prawa Europejskiego i Międzynarodowego 2, 2008, p. 59; M. Malczewska, [in:] A. Wróbel (ed.), *supra* n. 5, pp. 1048–1049.

[12] On this issue, see J. Sobczak, *Zdrowie publiczne a prawa pacjentów w transgranicznej opiece zdrowotnej*, [in:] M. Urbaniak, R. Staszewski (eds), *Aktualne problemy przemian systemu ochrony zdrowia w Polsce*, Poznań 2017, pp. 9–29; *idem*, *Poważne transgraniczne zagrożenie zdrowia w systemie prawa unijnego*, [in:] T. Gardocka, A. Fiutak, D. Jagiełło (eds), *Aktualne problemy prawne w psychologii i medycynie*, Warszawa 2018, pp. 117–134.

scourges. The European Union has drawn attention to the significance of vaccination for the protection of public health many times on various occasions.

Directive 2000/54/EC of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work,[13] which determines the minimum requirements designed to guarantee the safety of workers, including the necessity to offer preventive vaccination to workers who have not been already immune, is an example.

In 2000, the Global Alliance for Vaccines and Immunisation (GAVI) was formed. The Commission donated 83 million euros to the Alliance until 2015, which contributed to the immunisation of 277 million children in the period 2011–2015. The Commission declared to donate successive 200 million euros for the period 2016–2020, planning to vaccinate 300 million children in this period. It should be added that during the World Health Assembly 2012, the ministers for health approved the Global Vaccine Action Plan (GVAP) in order to ensure access to important vaccines for everyone by 2020. In 2014, the WHO Regional Office for Europe endorsed the European Vaccine Action Plan for 2015–2020. In 2018, the common Union vaccination activities co-financed within the EU Third Health Programme started, first of all to exchange the best practice in the field of national vaccination and to determine technical requirements concerning electronic systems of information in the field of immunisation used to programme vaccination, set priorities in the field of research and development concerning vaccination and to do research aimed at resolving the problem of evading vaccination.[14]

It is worth mentioning that the Resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, adopted by the UN General Assembly on 25 September 2015, aims to guarantee all people at any age health and to promote welfare, and emphasises the importance of vaccines in protecting people against diseases. At the same time, the European Union and its Member States adopted the European Consensus on Development 'Our World, our Dignity, our Future'.[15]

Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use[16] and Regulation (EC) No 726/2004 of the European Parliament and

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[13] OJ L 262, 17.10.2000, p. 21.

[14] See Regulation (EU) No 282/2014 of the European Parliament and of the Council on the establishment of a third Programme for the Union's action in the field of health (2014–2020) and repealing Decision No 1350/2007/EC (OJ L 86, 21.3.2014, p. 1). It is worth mentioning that the first Programme for the Union's action in the field of health 2003–2008 was adopted through the Decision of the European Parliament and of the Council of 23 September 2002 (OJ L 271, 9.10.2002, p. 1). The second Programme for Union's action in the field of public health 2008–2013 was adopted through the Decision of the European Parliament and of the Council of 23 October 2007 (OJ L 301, 20.11.2007, p. 3). Both programmes did not directly concern the issue of vaccination. However, it should be remembered that on 24 September 1998, the Decision 2119/98/EC of the European Parliament and of the Council set up a network for the epidemiological surveillance and control of communicable diseases in the Community (OJ L 268, 3.10.1998, p. 1).

[15] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, *The New European Consensus on Development 'Our World, our Dignity, our Future'* (OJ C 210, 30.6.2017, p. 1).

[16] OJ L 311, 28.11.2001, p. 67.

of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency[17] authorised regulatory organs to promote and protect public health by granting authorisation for safe and efficient vaccines and by continuous assessment of benefits resulting from vaccination in relation to the risk arising from authorisation for marketing.

Council Directive 2010/32/EU of 10 May 2010 implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by the European Hospital and Healthcare Employers' Association (hereinafter HOSPEEM) and the European Federation of Public Service Unions (hereinafter EPSU)[18] stipulates that if the assessment reveals that there is a risk to the safety and health of workers due to their exposure to biological agents for which effective vaccines exist, workers must be offered vaccination.

The Council of the European Union in Council conclusions on childhood immunisation: success and challenges of European childhood immunisation and the way forward of 8 July 2011 asked the Member States and the Commission to prepare common action in order to exchange the best practices in the field of vaccination policy.[19]

Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control (hereinafter ECDC) [20] states that the Member States must provide information on communicable diseases in accordance with Article 4 of Decision No 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community.[21] The annex to the decision provides a list indicating categories of communicable diseases, including diseases preventable by vaccination. The decision was repealed by Article 20 para. 1 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC.[22] The European Parliament in its Resolution of 8 March 2011 and the Council in its Conclusions of 13 September 2010 stressed the need to introduce a common procedure for the joint procurement of medical countermeasures, and in particular of pandemic vaccines, to allow the Member States, on a voluntary basis, to benefit from such group purchases, e.g. by obtaining advantageous prices and order flexibility with regard to a given product. With regard to pandemic vaccines, in the context of limited capacities at the global level, such a procedure would be undertaken with the aim of enabling more equitable access to vaccines for the Member States involved, to help them to better meet the vaccination needs of their citizens, in line with vaccination policies in the Member States. It is also indicated that the Commission will strengthen cooperation

17 OJ L 136, 30.4.2004, p. 1.
18 OJ L 134, 1.6.2010, p. 6.
19 OJ C 202, 8.7.2011, p. 4.
20 OJ L 142, 30.4.2004, p. 1.
21 OJ L 268, 3.10.1998, p. 1.
22 OJ L 293, 5.11.2013, p. 1.

with the European Medicines Agency and the WHO to improve the methods and processes through which information related to the coverage of vaccine-preventable diseases is provided.

Decision of 22 October 2013 emphasises that in case of a pandemic situation involving human influenza, it is possible to apply accelerated marketing of certain medicinal products as well as a human influenza vaccine even where certain non-clinical or clinical data are missing.[23] It is emphasised that the occurrence of an event that is linked to serious cross-border threats to health and likely to have Europe-wide consequences could require the Member States concerned to take particular control or contact-tracing measures in a coordinated manner to identify those persons already contaminated and those persons exposed to risk.

Before recognising a situation of public health emergency at the Union level, the Commission should liaise with the WHO in order to share the Commission's analysis of the situation of the outbreak and to inform the WHO of its intention to issue such a decision. Where such a decision is adopted, the Commission should also inform the WHO thereof. The occurrence of an event that is linked to serious cross-border threats to health and likely to have Europe-wide consequences could require the Member States concerned to take particular control or contact-tracing measures in a coordinated manner to identify those persons already contaminated and those persons exposed to risk. Such cooperation could require the exchange of personal data through the system, including sensitive information related to health and information about confirmed or suspected human cases of disease, between those Member States directly involved in the contact-tracing measures.

The Council conclusions of 6 December 2014 on vaccinations as an effective tool in public health[24] draw attention to the fact that vaccines are medicinal products subject to the rules and procedures adopted at the Union level, authorised by national authorities or by the Commission on the basis of an assessment carried out by the European Medicines Agency and subject to post-marketing monitoring. The document reminds one about the WHO European Region Vaccine Action Plan 2015–2020, which was approved in response to the Decade of Vaccines, setting a course through a regional vision and goals for immunisation and control of vaccine-preventable diseases. It is pointed out that post-marketing studies carried out by marketing authorisation holders are important for the evaluation of vaccine products and should be carried out in a transparent way. The Member States are encouraged to carry out independent studies. It is indicated that some re-emerging

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[23] This concerns situations envisaged in the Commission Regulation (EC) No 507/2006 of 29 March 2006 on the conditional marketing authorisation for medicinal products for human use within the scope of Regulation (EC) No 726/2004 of the European Parliament and of the Council (OJ L 92, 30.3.2006, p. 6), as well as the Commission Regulation (EC) No 1234/2008 of 24 November 2008 concerning the examination of variations to the terms of marketing authorisations for medicinal products for human use and veterinary medicinal products (OJ L 334, 12.12.2008, p. 7). The texts of Articles 12 and 13f of the last Regulation concerning human influenza vaccines indicate rules concerning the departure from the procedure of examination of such vaccines. For more on the issue, see K. Kumala, J. Piecha, R. Stankiewicz, *Procedura zmian istotnych typu II*, [in:] R. Stankiewicz (ed.), *Instytucje rynku farmaceutycznego*, Warszawa 2016 (Chapter 4.3.3.).

[24] OJ C 438, 6.12.2014, p. 3.

communicable diseases still present a public health challenge. It is recognised that vaccination programmes are the responsibility of the individual Member States, while various vaccination schemes exist in the EU. This results in the necessity of strengthening cooperation. It is recognised that many vaccines used in community vaccination programmes have been able to prevent disease in individuals and the herd immunity phenomenon contributed to a healthier global society. This type of immunity may be considered an objective in national vaccination plans. It is observed that in the demographic structure of the European population, there must be a greater focus on preventing infectious diseases by means of vaccination of all age groups. The conclusions emphasise the importance of the general public understanding of the value of vaccination and note the occasional lack of awareness of the benefits of some vaccines and the increasing refusal of vaccination in some Member States. This may lead to under-vaccination in some populations, resulting in public health problems and costly outbreaks.

It is recognised that the public should be aware of the value of vaccination and the crucial role of healthcare professionals in informing and educating the population about the benefits of vaccination is underlined. It is recognised that effective vaccination campaigns are useful in preventing the spread of communicable diseases and they should be absolutely carried out. It is pointed out that some Member States should inform their citizens travelling abroad about the risk of communicable diseases that are not present in the Union. It is emphasised that some viruses can cause chronic pathologies, some even of a neoplastic nature. It is considered necessary that an analysis and evaluation of the safety, effectiveness and impact of vaccines to prevent distinct communicable diseases in the European Union be carried out. It is also regarded as useful that the Member States collaborate and exchange best practices concerning the prevention of communicable diseases through vaccination. It is expected that policies to encourage research, including clinical studies, in the field of vaccination should be supported within the Union, and it is observed that as a result of the success in reducing the spread of a number of serious communicable diseases due to widespread use of vaccinations, the population may believe that these diseases no longer represent a threat to public health.

It is also considered appropriate, in order to react to inaccurate information regarding vaccinations in some Member States, that communication campaigns continue to be carried out to educate the public about the risks related to communicable diseases preventable by vaccination. Then, the Member States are encouraged to: continue to improve epidemiological surveillance and evaluation of the situation concerning communicable diseases in their territories, including diseases preventable by vaccination; improve national vaccination programmes and to strengthen national capacity for carrying out evidence-based, cost-effective vaccination, including the introduction of new vaccines where considered appropriate; develop plans and standard operating procedures in collaboration with the ECDC and the WHO to ensure a timely and effective response to vaccine-preventable diseases during outbreaks, humanitarian crises and emergencies; develop comprehensive and coordinated approaches within vaccination

programmes, following the Health in All Policies approach creating synergies with broader health policies and pro-actively working with other preventive sectors; ensure transparency with regard to the post-marketing evaluations of vaccines and of studies on the impact of vaccination programmes in order to provide reliable information for both governments, medicine regulators and manufacturers; actively offer appropriate vaccination to population groups considered to be at risk in terms of specific diseases and consider immunisation beyond infancy and early childhood by creating vaccination programmes with lifelong approach. It is considered necessary that the Member States work with health professionals on risk communication in order to maximize their role in informed decision-making, further increase activities aimed at expanding, where necessary, the immunology and vaccinology components of the basic medical training curricula for students of medical and health sciences and provide health professionals with relevant in-service training opportunities, and inform the population in order to raise its trust in vaccinations programmes, using appropriate tools and communication campaigns, also by engaging opinion leaders, civil society and relevant stakeholders (e.g. academia).

Council Recommendation of 7 December 2018 on strengthened cooperation against vaccine-preventable diseases is undoubtedly the summing-up of the Union activities.[25] It is stated in it that vaccination is one of the most powerful and cost-effective public health measures developed in the 20th century and remains the main tool for primary prevention of communicable diseases. The Recommendation adopted by the Council in accordance with Article 168 para. 6 TFEU aims to improve public health. And it is indicated that although vaccination programmes are the responsibility of the Member States, the cross-border nature of vaccine-preventable diseases and the common challenges faced by national immunisation programmes would benefit from the more coordinated EU action and approaches to preventing or limiting the spread of epidemics and diseases with a cross-border dimension. It is emphasised in the Recommendation (recital 5) that the rapid spread of misinformation through social media and by vocal anti-vaccination activists has fuelled misconceptions that are shifting the public focus away from the individual and collective benefits of vaccination and the risks posed by communicable diseases. Anti-vaccination movements focus towards increased distrust and fears of unproven adverse events. That is why, action is needed to strengthen dialogue with citizens to understand their genuine concerns and doubts about vaccination and to adequately address issues, on the basis of individual needs. It is pointed out that it is necessary to improve vaccination coverage rates, which is the healthcare workers' task. That is why, they should be offered opportunities for continuing education and training on vaccination in accordance with national recommendations.

The Recommendation points out that the differences in vaccination schedules between the Member States, the number of doses administered and timing increase the risk that citizens, particularly children, miss a vaccination while moving from one Member State to another. In such a situation there is a need to bring immunisation services closer to citizens and increase efforts to reach out to the most vulnerable

[25] OJ C 466, 28.12.2018, p. 1; hereinafter Recommendation.

in society. It is indicated that the European Structural Funds, in particular the European Social Fund (ESF) and the European Regional Development Fund (ERDF), offer significant opportunities for the Member States to strengthen vaccine-related training of healthcare staff and to reinforce health infrastructure capacities in the area of vaccination. It is reminded that demographic changes, mobility of people, climate change and waning immunity are contributing to epidemiological shifts in the burden of vaccine-preventable diseases, which require vaccination programmes with a life-course approach beyond childhood years. This will ensure adequate lifelong protection and contribute to healthy living and healthy aging as well as the sustainability of healthcare systems (recital 10).

The Recommendation points out that vaccine shortages have direct consequences for the delivery and implementation of national vaccination programmes. The Member States face various vaccine supply disruptions, production capacities in the EU remain limited and difficulties persist in sharing vaccines across borders, while the lack of coordinated forecast planning contributes to demand uncertainty. In this context, the European Union and its citizens remain vulnerable in the event of outbreaks of communicable diseases. Thus, there is a need to rapidly advance research and development of new vaccines and improve or adapt existing ones.

Having noticed that considerable proportion of population in the Member States evades vaccination, the authors of the Recommendation point out that the present situation requires innovative partnerships and platforms, high-level expertise and stronger links between disciplines and sectors, as well as investment in social (sic!) and behavioural science research to improve understanding of context-specific determinants underpinning vaccine-hesitant attitudes (recital 12).

In the conclusions of the Recommendation it is stated that the Member States should develop and implement vaccination plans at national and/or regional level, as appropriate, aimed at increasing vaccination coverage with a view to reaching the goals and targets of the WHO's European Vaccine Action Plan by 2020. It is emphasised that the plans could include, for example, provisions for sustainable funding and vaccine supply, a life-course approach to vaccination, capacity to respond to emergency situations, and communication and advocacy activities. It is pointed out that they should aim to achieve by 2020, for measles in particular, a 95% vaccination coverage rate, with two doses of the vaccine for the targeted child population, and work towards closing the immunity gaps across all other age groups, with a view to eliminating measles in the EU. It is indicated that it is necessary to introduce routine check of vaccination status and regular opportunities to vaccinate across different stages of life through routine visits to the primary healthcare system and through additional measures taken, for example when beginning (pre-)school, in the workplace or in care facilities.

The Member States should also facilitate access to national and/or regional vaccination services, by simplifying and broadening opportunities to offer vaccination, leveraging community-based providers, and ensuring targeted outreach to the most vulnerable groups, including socially excluded groups, so as to bridge inequalities and gaps in vaccination coverage. Their task should also be to encourage higher education institutions and relevant stakeholders to consider

including and strengthening training on vaccine-preventable diseases, vaccinology, and immunisation in national medical curricula and any continuing medical education programmes for healthcare workers across all sectors whenever advisable, to strengthen their key role in achieving higher vaccination coverage rates.

It is recognised necessary for the Member States to make use of the opportunities offered by the ESF and the ERDF in order to support the training and skills development of healthcare workers on vaccine-preventable diseases, vaccinology, and immunisation and to reinforce national and regional healthcare infrastructure capacities, including electronic immunisation information systems. It is emphasised that it is imperative to increase communication activities and awareness-raising on the benefits of vaccination by presenting scientific evidence in a form understandable to laypersons, using different context-based strategies, to counter the spread of misinformation, including, for example, through digital tools and partnerships with civil society and other relevant stakeholders. It is also recognised appropriate to engage with and offer training for relevant actors, such as healthcare workers, education stakeholders, social partners and the media as multipliers, to fight complacency and increase trust in immunisation.

It is also pointed out that the Member States must explore the possibility of developing the capacity of health and healthcare institutions to have electronic information on the vaccination status of citizens, for example based on information systems providing reminder functionalities, capturing up-to-date vaccination coverage data across all age groups, and allowing data linkages and exchanges across the healthcare systems. It is recognised that, where appropriate, they should increase support for vaccine research and innovation so that sufficient resources are available for rapid advancement of new or improved vaccines, and facilitate uptake of vaccine research for better-informed national and regional vaccination programmes and policies.[26]

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[26] The Recommendation indicates that the Commission intends to take actions in close cooperation with the Member States aiming to establish a European Vaccination Information Sharing (EVIS) system, coordinated by the ECDC, in order to: examine the feasibility of establishing, by 2020, guidelines for a core EU vaccination schedule taking into account the WHO recommendations for routine immunisation, aiming to improve the compatibility of national schedules and promote equity in the Union citizens' health protection, as well as the feasibility of creating a common vaccination card; strengthen consistency, transparency, and methodologies in the assessment of national and regional vaccination plans, by sharing scientific evidence and tools with the support of National Immunisation Technical Advisor Groups (NITAGs); design the EU methodology and guidance on data requirements for better monitoring of vaccination coverage rates across all age groups, including healthcare workers, in cooperation with the WHO and collect such data and share them at the EU level; establish, by 2019, a European vaccination information portal, with the support of the European Medicines Agency, to provide objective, transparent and updated evidence on vaccination and vaccines, their benefits and safety, and the pharmacovigilance process; counter online vaccine misinformation and develop evidence-based information tools and guidance to support the Member States in responding to vaccine hesitancy, in line with the Commission Communication on tackling online disinformation; continuously monitor the benefits and risks of vaccines and vaccination, at the EU level, including through post-marketing surveillance studies; work towards developing methodologies and strengthen capacities to assess the relative effectiveness of vaccines and vaccination programmes. The general aim is to strengthen the effective application of the Union rules on the protection of workers

The analysis of the EU regulations, in particular the content of the Recommendation, indicates that the Council is evidently concerned about the occurrence of a series of communicable diseases in Europe, which were, as it has turned out, too early considered to have been completely combated. Their return can be associated with sensational information about the alleged risks resulting from vaccination that may cause other dangerous diseases, lead to impairment, developmental delays, etc. Another reason can be the inflow of refugees from Africa and Asia, who may be carriers of some infectious diseases, which has not been given due attention for a long time. This last problem seems to be particularly difficult to solve and undoubtedly also very costly. Not ignoring humanitarian issues, the need to take care of people seeking refuge from war, looking for a home to go to and an opportunity to earn a living, the EU Member States must remember about the need to protect their citizens and, as a result, the necessity of examining immigrants and vaccinating them, and even keeping them in quarantine. The European Union legal acts lack attention drawn to this aspect. However, the European Union citizens' unexpected vulnerability to gossip, rumours, and false information about the alleged harmfulness of vaccination has been rightly ascertained. The issue should become an interesting research area for sociologists, political studies specialists, and anthropologists of culture. Indeed, legal regulations cannot change the awareness of their addressees, and dispel myths, stereotypes and superstitions.

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EUROPEAN UNION REGULATIONS CONCERNING VACCINATION AS A MEANS OF PREVENTING INFECTIOUS DISEASES IN THE FACE OF COVID-19/SARS-COV-2 PANDEMIC

Summary

The emergence of the coronavirus proves that Europe is essentially one organism, and the considerable mobility of its inhabitants indicates that health protection should be thought of in terms of the entire continent or even globally. Therefore, the health policy was rightly considered in the Treaty on the Functioning of the European Union, in Article 168, to be a separate policy of the European Union. However, it is also supported by later quite detailed regulations. These regulations stress the importance of vaccination for the protection of public health, and the need to provide information on infectious diseases. An epidemiological surveillance and control network has also been established in the EU. It was also noted that accelerated marketing of medicinal products, including vaccines, is possible even when some clinical data are not available. Vaccines were considered to be medicinal products that are subject to regulations and procedures adopted at the European Union level. It was pointed out that the whole society should be aware of the value of vaccination. It is necessary, in the face of false and inaccurate information, to conduct information campaigns on the dangers of infectious diseases that are preventable by vaccination. Attention was also paid to the negative effects of anti-vaccination movements, stating that as a result of their actions a significant part of the population in the EU countries evades vaccination.

Keywords: World Health Organization, pandemic, coronavirus, European Union, Treaty on the Functioning of the European Union, cross-border epidemic, cross-border health threat, European Union health policy, vaccination, global alliance for vaccines and vaccination, public health, diseases preventable by vaccination

REGULACJE UNIJNE W ZAKRESIE SZCZEPIEŃ JAKO ŚRODEK ZWALCZANIA CHORÓB ZAKAŹNYCH W OBLICZU PANDEMII COVID-19/SARS-COV-2

Streszczenie

Pojawienie się koronawirusa dowodzi, że Europa jest w gruncie rzeczy jednym organizmem, a olbrzymia mobilność jej mieszkańców wskazuje, że o ochronie zdrowia należy myśleć w kategoriach całego kontynentu czy nawet globalnie. Słusznie więc polityka zdrowotna w Traktacie o Funkcjonowaniu Unii Europejskiej została potraktowana w art. 168 jako samodzielna polityka Unii Europejskiej. Oparta jest ona jednak także o dość szczegółowe późniejsze regulacje. W treści tych regulacji zwrócono uwagę na znaczenie szczepień dla ochrony zdrowia publicznego oraz konieczność przekazywania informacji dotyczących chorób zakaźnych. Powołano także sieć nadzoru i kontroli epidemiologicznej w UE. Zauważono, że możliwe jest przyspieszone wprowadzenie do obrotu produktów leczniczych, w tym także szczepionek, nawet wtedy, gdy brak jest w odniesieniu do nich niektórych danych klinicznych. Uznano, że szczepionki są produktami leczniczymi, które podlegają przepisom i procedurom przyjętym na szczeblu Unii Europejskiej. Wskazano, że ogół społeczeństwa powinien być świadom wartości szczepień, a wobec nieprawdziwych i nieprecyzyjnych informacji konieczne jest prowadzenie kampanii informacyjnych o zagrożeniach związanych z chorobami zakaźnymi, które są możliwe do uniknięcia dzięki szczepieniom. Zwrócono także uwagę na negatywne skutki ruchów antyszczepionkowych, konstatując, że na skutek ich działań znacząca część populacji w państwach unijnych uchyla się od szczepień.

Słowa kluczowe: Światowa Organizacja Zdrowia, pandemia, koronawirus, Unia Europejska, Traktat o Funkcjonowaniu Unii Europejskiej, epidemia transgraniczna, transgraniczne zagrożenie dla zdrowia, polityka zdrowotna Unii Europejskiej, szczepienia, globalny sojusz na rzecz szczepionek i szczepień, zdrowie publiczne, przeciwdziałanie chorobom zwalczanym drogą szczepień

REGULACIÓN COMUNITARIA DE VACUNAS COMO MEDIDA DE LUCHA CONTRA ENFERMEDADES CONTAGIOSAS EN EL MARCO DE PANDEMIA COVID-19/SARS-COV-2

Resumen

La aparición de coronavirus demuestra que Europa en general es el un único organismo. La gran movilidad de sus habitantes indica que hay pensar sobre la protección de salud en la categoría de todo el continente o incluso globalmente. Con razón, la política sanitaria en el Tratado de Funcionamiento de la Unión Europea está regulada en el art. 168 como política independiente de la Unión Europea. Se basa, sin embargo, en la regulación posterior. Esta regulación presta la atención a la importancia de las vacunas para la protección de la salud

pública, a la necesidad de trasmisión de la información relativa a las enfermedades contagiosas. Se ha establecido también la red de supervisión y control epidemiológico en la UE. Se observa también, que es posible acelerar la introducción al tráfico de productos médicos, incluyendo las vacunas, incluso cuando carecen de algunos datos clínicos. Se considera que vacunas son productos médicos sometidos a la normativa y procesos aprobados por la Unión Europea. Se indica que la sociedad ha de ser consciente de la importancia de vacunas y en cuanto a la información falsa e imprecisa, es necesario llevar a cabo campaña de información sobre riesgos relacionados con enfermedades contagiosas que se pueden evitar gracias a las vacunas. Se presta también atención a los efectos negativos de movimientos antivacunas, llegando a la conclusión que por su actividad una parte importante de la población en los países comunitarios no se vacuna.

Palabras claves: Organización Mundial de la Salud, pandemia, coronavirus, Unión Europea, Tratado de Funcionamiento de la Unión Europea, epidemia transfronteriza, peligro transfronterizo para la salud, unión global a favor de vacunas y vacunación, salud pública, prevención ante enfermedades combatidas con vacunas

ЗАКОНОДАТЕЛЬСТВО ЕС ОТНОСИТЕЛЬНО ВАКЦИНАЦИИ КАК СРЕДСТВА БОРЬБЫ С ИНФЕКЦИОННЫМИ ЗАБОЛЕВАНИЯМИ В КОНТЕКСТЕ ПАНДЕМИИ КОВИД-19/SARS-COV-2

Аннотация

Распространение нового коронавируса показало, что Европа, по сути, представляет из себя единый организм. Ввиду значительной мобильности ее жителей проблемы здравоохранения следует рассматривать с точки зрения всего континента и даже в глобальном масштабе. Неслучайно в ст. 168 Договора о функционировании Европейского союза отдельно определена политика ЕС в области здравоохранения. Более детально политика в области здравоохранения регулируется последующими нормативными актами. Среди прочего, в нормативных актах ЕС особое внимание уделено важности вакцинации для охраны общественного здравоохранения, а также необходимости обмена информацией, касающейся инфекционных заболеваний. Кроме этого, в ЕС создана сеть учреждений эпидемиологического надзора и контроля. Законодательством ЕС предусмотрена возможность ускоренного выпуска на рынок лекарственных средств, в том числе вакцин, даже если по ним отсутствуют некоторые клинические данные. Вакцины относятся к лекарственным средствам, на которые распространяются правила и процедуры, принятые на уровне Европейского союза. Автор указывает, что широкая общественность должна осознавать важность вакцинации, и что ввиду распространения ложной и неточной информации необходимо проводить разъяснительные кампании о рисках, связанных с инфекционными заболеваниями, предотвратимых посредством вакцинации. Кроме этого, автор обращает внимание на негативные последствия деятельности движений против вакцинации и констатирует, что в результате их действий значительная часть населения в странах ЕС уклоняется от вакцинации.

Ключевые слова: Всемирная организация здравоохранения; пандемия; коронавирус; Европейский Союз; Договор о функционировании Европейского Союза; трансграничная эпидемия; трансграничные угрозы для здоровья; политика Европейского Союза в области здравоохранения; вакцинация; Глобальный альянс по вакцинам и иммунизации; здравоохранение; предотвращение заболеваний, против которых имеются вакцины

EU-VORSCHRIFTEN ZUR IMPFUNG ALS MASSNAHME ZUR BEKÄMPFUNG VON ANSTECKENDEN KRANKHEITEN MIT BLICK AUF DIE COVID-19/SARS-COV-2-PANDEMIE

Zusammenfassung

Die Ausbreitung des sogenannten Coronavirus zeigt, dass Europa im Grunde als ein Organismus betrachtet werden kann und die enorme Mobilität seiner Bewohner macht deutlich, dass über den Schutz der öffentlichen Gesundheit im Hinblick auf den Kontinent als Ganzes oder auch aus globaler Sicht nachgedacht werden sollte. So wurde die Gesundheitspolitik in Artikel 168 des Vertrages über die Arbeitsweise der Europäischen Union zu Recht als eigenständige EU-Politik behandelt. Sie stützt sich darüber hinaus aber auch auf spätere spezifische gesetzliche Regelungen. In diesen Rechtsvorschriften wird auf die Bedeutung von Impfungen für den Schutz der öffentlichen Gesundheit hingewiesen und die Notwendigkeit, Informationen über Infektionskrankheiten bereitzustellen, herausgestellt. Es wurde entschieden, in der EU ein Netz für die epidemiologische Überwachung und die Kontrolle übertragbarer Krankheiten aufzubauen. Außerdem wird festgestellt, dass auch wenn einige klinische Daten nicht verfügbar sind, ein beschleunigtes Inverkehrbringen von Arzneimitteln, einschließlich Impfstoffen, möglich ist. Es wird ausgeführt, dass Impfstoffe Arzneimittel sind, die den auf EU-Ebene erlassenen Vorschriften und Verfahren unterliegen. Betont wird, dass die Allgemeinheit sich über den Wert der Immunisierung durch Impfung bewusst sein sollte und dass angesichts der vielen kursierenden Falschinformationen und ungenauen Auskünfte Informationskampagnen über die Gefahren von Infektionskrankheiten notwendig sind, die sich durch Schutzimpfungen verhüten lassen. Es wird daneben auf die negativen Folgen der Impfgegnerschaft hingewiesen, und der Autor kommt zu dem Schluss, dass als Resultat der Aktivität der impfkritischen Bewegung ein erheblicher Teil der Bevölkerung in den EU-Ländern impfskeptisch ist.

Schlüsselwörter: Weltgesundheitsorganisation (WHO), Pandemie, Coronavirus, Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, grenzüberschreitende Epidemie/weit verbreitete schwere länderübergreifende Krankheit, grenzüberschreitende Gesundheitsbedrohung, Gesundheitspolitik der Europäischen Union, Impfungen, Globale Allianz für Impfstoffe und Immunisierung (GAVI), öffentliche Gesundheit, Bekämpfung von durch Impfung verhütbaren Krankheiten

RÉGLEMENTATION DE L'UE SUR LA VACCINATION COMME MOYEN DE LUTTE CONTRE LES MALADIES INFECTIEUSES FACE À LA PANDÉMIE COVID-19/SARS-COV-2

Résumé

L'émergence de soi-disant le coronavirus prouve que l'Europe est essentiellement un organisme, et l'énorme mobilité de ses habitants indique que la protection de la santé doit être envisagée en termes de tout le continent, et même globalement. Par conséquent, la politique de la santé a été traitée à juste titre dans le Traité sur le fonctionnement de l'Union européenne à l'art. 168 en tant que politique indépendante de l'Union européenne. Cependant, elle est également basé sur des réglementations ultérieures assez détaillées. Dans le contenu de ces réglementations, l'attention a été attirée sur l'importance de la vaccination pour la protection de la santé publique,

la nécessité de fournir des informations sur les maladies infectieuses. Un réseau de surveillance et de contrôle épidémiologiques a également été mis en place dans l'UE. Il a également été noté qu'une accélération de la mise sur le marché des médicaments, y compris des vaccins, est possible même lorsque certaines données cliniques ne sont pas disponibles. Les vaccins étaient considérés comme des médicaments soumis aux réglementations et procédures adoptées au niveau de l'Union européenne. Il a été souligné que le grand public devrait être conscient de la valeur des vaccinations, et étant donné les informations fausses et inexactes, il est nécessaire de mener des campagnes d'information sur les dangers des maladies infectieuses qui peuvent être évitées grâce à la vaccination. Une attention particulière a également été accordée aux effets négatifs des mouvements anti-vaccination, déclarant qu'en raison de leurs actions, une partie importante de la population des pays de l'UE échappe à la vaccination.

Mots-clés: Organisation mondiale de la santé, pandémie, coronavirus, Union européenne, Traité sur le fonctionnement de l'Union européenne, épidémie transfrontalière, menace sanitaire transfrontalière, politique de santé de l'Union européenne, vaccination, alliance mondiale pour les vaccins et la vaccination, santé publique, prévention des maladies contrôlées par la vaccination

NORME COMUNITARIE NELL'AMBITO DELLE VACCINAZIONI COME MEZZO DI LOTTA ALLE MALATTIE INFETTIVE DI FRONTE ALLA PANDEMIA COVID-19/SARS-COV-2

Sintesi

L'apparizione del cosiddetto coronavirus dimostra che l'Europa è in effetti un unico organismo e l'enorme mobilità dei suoi abitanti indica che la protezione della salute va pensata nelle categorie di intero continente e addirittura a livello globale. Giustamente quindi la politica sanitaria nel Trattato sul funzionamento dell'Unione europea è stata considerata nell'art. 168 come politica autonoma dell'Unione Europea. È basata tuttavia anche su successive norme abbastanza dettagliate. In tali norme si è posto l'accento sull'importanza delle vaccinazioni per la protezione della salute pubblica e sulla necessità di trasmissione delle informazioni riguardanti le malattie infettive. È stata istituita una rete di sorveglianza epidemiologica e di controllo delle malattie trasmissibili nell'UE. Si è notato anche che è possibile un'immissione accelerata sul mercato di medicinali, tra cui anche i vaccini, anche quando mancano nei loro confronti alcuni dati clinici. Si è riconosciuto che i vaccini sono medicinali soggetti alle norme e alle procedure assunte a livello di Unione europea. Si è indicato che in generale la società dovrebbe essere consapevole dell'importanza delle vaccinazioni, e nei confronti delle informazioni false e imprecise è necessario condurre campagne informative sui rischi legati alle malattie infettive, evitabili grazie alle vaccinazioni. Si sono fatte anche notare le conseguenze negative dei movimenti antivaccinisti, constatando che in seguito alle loro attività una parte significativa della popolazione negli stati comunitari evita le vaccinazioni.

Parole chiave: Organizzazione Mondiale della Sanità, pandemia, coronavirus, Unione europea, Trattato sul funzionamento dell'Unione europea, epidemia transfrontaliera, rischio sanitario transfrontaliero, politica sanitaria dell'Unione europea, vaccinazioni, Alleanza globale per i vaccini e l'immunizzazione, salute pubblica, lotta contro le malattie prevenibili da vaccino

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ELECTROMOBILITY PROGRAMME IN POLAND AND THE PROBLEM OF PENAL RESPONSE

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1. INTRODUCTION

The need to protect health and natural environment together with the growing market for the so-called alternative-fuel vehicles made the European Union lawmaker realise that there is a necessity for legal response in the area. The development of low-emission and zero-emission transport has become one of the priorities of the EU environmental policy, beside such areas and directions of action as, inter alia, the reduction of greenhouse gases emission and the development of renewable energy sources.[1] The policy resulted in Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the development of the alternative fuels infrastructure. It obliges the Member States to deploy the infrastructure of alternative fuels, including electric vehicles recharging points and natural gas refuelling points, as well as to introduce relevant technical specifications, common rules for recharging electric vehicles and user information requirements.

As a result, considerable legislative changes were introduced within the Electromobility Development Programme in Poland in the period 2016–2025. The Council of Ministers adopted Electromobility Development Plan in Poland on 16 March 2017 and the National policy framework for alternative fuels infrastructure development on 29 March 2017.[2] Finally, on 11 January 2018, the Act

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1 See A. Rabiega, *Instrumenty prawne stymulujące rozwój elektromobilności i infrastruktury paliw alternatywnych*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 7, 2018, p. 103 et seq.; A. Szafrański, *Prawne uwarunkowania realizacji Strategii na Rzecz Odpowiedzialnego Rozwoju w obszarze energetyki ze szczególnym uwzględnieniem elektromobilności*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 6, 2017, p. 11 et seq.

2 For more, see K. Kokocińska, *Spójność działań organów władzy wykonawczej na rzecz rozwoju (na przykładzie sektora elektromobilności)*, [in:] K. Kokocińska, J. Kola (eds), *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, Warszawa 2019, p. 20 et seq.

on electromobility and alternative fuels[3] was passed. It determines the rules for the development and functioning of infrastructure for the use of alternative fuels in transport, including technical requirements that must be met, obligations of public entities in the field of developing alternative-fuel infrastructure, user information requirements, conditions for the functioning of clean transport zones, national policy frameworks for alternative fuels infrastructure and methods of implementing them (Article 1 Elektromobility Act).

Among other aims, Article 1 of the statute determines the conditions of functioning of what is referred to clean transport zones. Such zones operate in many European cities, e.g. Paris and Hamburg, and their number has been systematically growing.[4] The national legislator also decided to create legal basis for the introduction of restrictions on petrol vehicles entry to specified zones. One of the guarantees of the compliance with the bans is the introduction of a regulation classifying such a misdemeanour. In accordance with Article 48 Electromobility Act, a provision of Article 96c[5] was introduced to the Misdemeanour Code, which stipulates: 'Whoever fails to comply with the restrictions on entry to a zone of clean transport, he is subject to a penalty of a fine of up to PLN 500.' Its broader analysis has not been carried out in literature, yet.

2. REGULATION UNDER ARTICLE 96C MISDEMEANOUR CODE

First of all, it should be mentioned that before the Electromobility Act was passed, there had been no national regulations directly banning the conduct specified in Article 96c MC. In general, the issue of electromobility and the market for alternative fuels had been then dealt with in a vestigial scope, mainly in the provisions of the Act of 25 August 2006 on the system and control of the quality of fuels,[6] the Act of 10 April 1997: Energy Law[7] and the Act of 21 December 2000 on technical supervision[8]. The statutes remain in force and, thus, the penal regulations laid down in them also do. However, they are not directly applicable to the issues analysed in the present article, therefore, there is no need to quote them.

As it has been mentioned above, matching the features of a misdemeanour under Article 96c MC is connected with failure to comply with restrictions on entry

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[3] Dz.U. 2018, item 317, as amended; hereinafter Electromobility Act.

[4] See E. Menes, M. Menes, W. Gis, *Elektryczne pojazdy samochodowe jako jeden z kierunków dekarbonizacji transportu*, Transport Samochodowy 2, 2010, p. 50 et seq.

[5] By the way, it should be emphasised that the legislator made an editorial error by introducing Article 96c to the Misdemeanour Code (henceforth MC) twice this way constructing two separate types of misdemeanours. It was done for the first time by means of the above-mentioned Act of 24 November 2017 amending the Act: Law on road traffic and some other acts (Dz.U. 2018, item 79, as amended), and then in accordance with Article 48 of the Act of 11 January 2018 on electromibility and alternative fuels (Dz.U. 2018, item 317). Eventually, pursuant to Article 71 para. 2 of the Act on public documents (Dz.U. 2019, item 53), the former provision was placed in Article 96d MC.

[6] Consolidated text, Dz.U. 2019, item 660.

[7] Consolidated text, Dz.U. 2019, item 755.

[8] Consolidated text, Dz.U. 2019, item 667.

to clean transport zones. Both the concept of such zones and the specification of the above-mentioned restrictions are based on the provisions of the Electromobility Act. First of all, it is worth considering the sense of criminalisation of the conduct classified in Article 96c MC. The legislative motives indicate an assumption that the development of such fuels as electricity and natural gas in transport is most desired, inter alia, from the perspective of the protection of human health and the environment. That is why, it is stipulated that community authorities should introduce clean transport zones where only alternative-fuel vehicles, exceptionally other vehicles, could be driven. As a result, the introduction of such zones should help local self-governments combat air pollution in towns. Non-compliance with the restrictions on entry to such zones can match the features of the discussed misdemeanour.[9] However, the above does not eliminate possible doubts connected with the indication of the legal interest that remains directly within the scope of protection of the normative construction of Article 96c MC. It should be pointed out that it was placed in Chapter XI MC entitled: Misdemeanours against safety and order in transportation. The fact can clearly suggest, at least *prima vista*, that in this case the object of protection consists in safety and order in transportation. It seems that order in transportation can be recognised as something remaining at least indirectly under the protection of Article 96c MC. However, making such a statement in relation to safety in transportation would mean a considerable misuse. Indeed, the norm discussed is blank in nature, because matching the features of the misdemeanour classified in it is possible when the provisions laid down in the Electromibility Act are also violated. Referring to them, including the above-mentioned aims of the statute expressed in Article 1 Electromobility Act, allows drawing a conclusion that the protected interests are, first of all, those values that were grounds for the application of the provisions of the statute. What is significant, within the regulation of Article 39 para. 1 Electromobility Act, the legislator clearly emphasises that the establishment of clean air zones should be substantiated by the need to prevent negative influence on human health and the environment connected with the emission of pollution that originates from vehicles. The above seems to result in a conclusion that the direct object of protection, in case of the type of misdemeanour laid down in Article 96c MC, is human health and the protection of the environment. On the other hand, such a statement can raise a question not about the grounds for criminalisation of the conduct specified in Article 96c MC, but about the rightness of the legislator's decision concerning placement of this regulation. It seems, however, that the criticism of the decision would be groundless. Firstly, it is hard to find a better place for a regulation concerning a misdemeanour described in Article 96c MC. The penal provisions of special statutes would not be appropriate. Secondly, the regulations of Chapter XI MC (Misdemeanours against safety and order in transportation) include other types of misdemeanours which main object

[9] Justification of the government Bill on electromobility and alternative fuels of 4 January 2018, Sejm paper No. 2147, p. 11.

of protection is undoubtedly safety and order in transportation (e.g. Articles 95a, 96b, and 96d MC).[10]

Next, it is necessary to evaluate the features of the act under Article 96c MC. It should be reminded once again that a perpetrator is subject to a penalty when he fails to comply with the restrictions on entry to a clean transport zone, which are determined in the provisions of the Electromobility Act. At first, attention should be drawn to the formulation of the verb. The legislator specifies the perpetrator's conduct by indicating that he 'does not comply with' specified restrictions. It concerns such conduct that is connected with failure to apply particular restrictions, disrespecting them, violating bans, infringing specified norms, etc.

Restrictions of this type concern the functioning of the clean transport zones. They may be established in the area of roads administered by a commune with the population exceeding 100,000 for a city centre built-up areas or its part constituting a densely built-up central city area determined in the local zoning scheme and, in the absence of one, in a study of conditions and directions of the commune zoning (Article 39 para. 1 Electromobility Act). Only a commune council is authorised to establish such a zone, which can be done by way of a resolution, which is a form of a local law act. A resolution should determine the borders of a clean transport zone, the organisation of the restrictions on entry to a clean transport zone and additional methods of publicising the content of the resolution establishing a clean transport zone (Article 40 paras 1–3 Electromobility Act).

As it has been stated earlier, the above-mentioned zones are established in order to prevent the negative influence of pollution from road transport on human health and the environment. To that end, in connection with the creation of clean transport zones, most vehicles are prohibited from entering them. However, the restrictions are not applicable to three situations. Firstly, they are not applicable to some types of vehicles, i.e. electric, hydrogen and natural gas vehicles (Article 39 para. 1 Electromobility Act). The legislator's original interpretation explains that:

1) An electric vehicle means a motor vehicle within the meaning of Article 2 para. 33 of the Act of 20 June 1997: Law on road traffic,[11] using only electric power from a battery charged from an external source;
2) A hydrogen vehicle means a motor vehicle within the meaning of Article 2 para. 33 LRT, using electric power produced from hydrogen in fuel cells that are installed therein;
3) A natural gas vehicle means a motor vehicle within the meaning of Article 2 para. 33 LRT, using compressed natural gas (CNG) or liquefied natural gas (LNG), including that of bio-methane origin (Article 2 paras 12, 14 and 15 Electromobility Act).

In addition, in case of an owner of a natural gas vehicle, the legislator indicates that he is not prohibited from driving into a clean air zone provided that he marks his vehicle with a special label on the windscreen, in accordance with the provisions

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[10] See M. Leciak, [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016, pp. 663 and 682.

[11] Consolidated text, Dz.U. 2018, item 618, as amended; hereinafter LRT.

of Article 76 para. 1(a) LRT. A village or town mayor or a city president should provide the vehicle owner in the respective place of residence with such a marking (Article 39 para. 2 Electromobility Act).

In this context, it is worth considering whether the lack of such a marking on a natural gas vehicle can result in matching the features of a misdemeanour under Article 96c MC in the case of entry to a clean transport zone. Although the approval of such a possibility may seem irrational, inter alia due to purposefulness, however, the legislator clearly stipulates in Article 39 para. 2 Electromobility Act that the restrictions on entry to a clean transport zone, which can carry liability under Article 96c MC in case of non-compliance with them, are not applicable to the owner of a vehicle only if the vehicle is properly marked.

Secondly, apart from the categories of vehicles indicated in Article 39 para. 1 Electromobility Act, the restrictions on entry to clean transport zones are not applicable to:

1) Vehicles:
   a) of the Police, the General Inspectorate of Road Transport, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the State Protection Bureau, the Prison Service, the National Revenue Administration, fire-fighting units, the Maritime Search and Rescue Service and life-saving services,
   b) used by the fleet of the Chancellery of the President of the Council of Ministers,
   c) of road administrators and entities performing road administrators' tasks,
   d) of the Armed Forces of the Republic of Poland, as well as foreign armed forces if an international agreement to which the Republic of Poland is a party stipulates so,
   e) with a gross weight of up to 3.5 tonnes if their owners or users are residents of clean transport zones;
2) Specialist means of transport used by medical rescue and health service transport units;
3) Zero-emission buses;
4) School busses (Article 39 para. 3 Electromobility Act).

Thirdly, a commune council has been entitled to decide, by means of a resolution, to establish a clean transport zone, and to exempt vehicles other than the above-mentioned from restrictions on entry to the zone (Article 39 para. 4 Electromobility Act).

Fourthly, a resolution establishing a clean transport zone gives a commune council the right to admit movement of vehicles other than the above-mentioned within the zone for a period not exceeding three years from the date of adopting the resolution provided an entry fee is paid (Article 39 para. 4a Electromobility Act). The fee for entry to such a zone is a commune's revenue that can only be used for the purpose of (Article 39 para. 4b Electromobilty Act):

1) signposting a clean transport zone;
2) purchasing zero-emission busses;

3) covering the costs incurred by local governments, except communes and counties with the population not exceeding 50,000, for developing analyses of costs and benefits connected with using in public transport zero-emission buses and other means of transport that use engines the working cycles of which do not result in the emission of greenhouse gases referred to in the Act of 17 July 2009 on the system of managing the emission of greenhouse gases and other substances[12] (Article 36 para. 1 and Article 37 para. 1 Electromobility Act). It is also indicated that the fee for entry to clean transport zones:
   a) cannot exceed PLN 2.50 per hour and cannot be charged only for movement of vehicles other than those stipulated in Article 39 paras 1–4 Electromobility Act in the zone between 9 am and 5 pm,
   b) can be made in the form of subscription or a lump sum (Article 39 para. 4c Electromobility Act). A village or town mayor or a city president is entitled to collect the fee (Article 39 para. 4d Electromobility Act).

As far as the above exemptions from Article 39 paras 1–4a Electromobility Act are concerned, it should be pointed out that the wording of Article 39 para. 1 raises considerable doubts as to how the exemptions from restrictions on entry to clean transport zones are formulated. It is indicated in the provision that 'there are restrictions on entry of vehicles' other than electric, hydrogen or natural gas ones to such zones. The term 'vehicle' has its legal definition according to which it is 'a means of transport designed to move on a road and a machine or a devise adjusted to do it' (Article 2 para. 31 LRT). Thus, it not only is a motor vehicle the movement of which can be connected with the emission of pollution harmful to human health and the environment, but also, for example, a bicycle (Article 2 para. 47 LRT) or a wheelchair (Article 2 para. 48 LRT). Therefore, the results of linguistic interpretation lead to a conclusion that the features of the discussed misdemeanour are matched also in the case a perpetrator enters a clean transport zone with the use of a vehicle other than a motor one. There should be no doubts that the legislator did not intend to penalise such cases.

Attention should also be drawn to the specific *lapsus linguae* in the wording of Article 39 para. 1 Electromobility Act. The legislator states in this provision that 'a clean transport zone can be established with restricted entry of vehicles other than' electric, hydrogen or natural gas ones. It seems that, instead of the word 'restricted', the legislator should have used the verb 'exempt' to speak about the entry of vehicles other than those indicated in Article 39 Electromobility Act.

One can mention many more such doubts. It is worth indicating term-related discrepancies between Article 96c MC and Articles 39–40 Electromobility Act. While the provisions of the Electromobility Act indicate restrictions on vehicle entry to clean transport zones, Article 96c MC speaks about restrictions on access to such zones.

Unfortunately, the legislator does not precisely determine the objective features of the place of commission of the discussed misdemeanour, either. It is hard to find whatever instruction concerning this issue in Article 96c MC as well as in

[12] Consolidated text, Dz.U. 2018, item 1271, as amended.

the provisions of the Electromobility Act. Although having checked the latter, one can find out that they can be applicable not only to road traffic but also, inter alia, to maritime transport, nevertheless, Article 39 para. 1 Electromobility Act clearly indicates that clean transport zones can be established in built-up residential areas with concentration of public buildings. Moreover, it should be pointed out that the legislator, within the scope of the provision of § 60d of the amended Regulation of the Minister of Infrastructure and the Minister of Internal Affairs and Administration of 31 July 2002 concerning traffic signs and signals,[13] determines the D-54 sign as 'clean traffic zone', which means entry to a clean transport zone, and the D-55 sign as 'clean transport zone end', which means an exit from a clean transport zone. In addition, in accordance with Article 39 para. 5 Electromobility Act, the borders of a clean transport zone are marked with signposts. Therefore, it can be recognised that the place of commission of a misdemeanour under Article 96c MC is one where there is road traffic. It must be reminded, however, that in accordance with Article 1 paras 1 and 2 LRT, the provisions of this statute are applicable to traffic on public roads, in residential areas and in traffic areas, as well as traffic outside those places within the scope necessary to avoid threats to safety of people or resulting from bans and road signals.

Analysing other objective features, it should be also pointed out that if matching them is to be connected only with such cases in which a perpetrator has failed to comply with particular provisions of the Electromobility Act concerning restrictions on entry to a clean transport zone, then it can also be treated as a formal misdemeanour within the regulation of Article 96c MC. In order to commit a misdemeanour classified in it, it is not important whether the above-mentioned conduct of a perpetrator has produced a result, e.g. in the form of a threat to human life, a threat to the environment, a threat to order in transportation, etc. And it is obviously not important with which of the statutory restrictions the perpetrator has not complied.

In the light of the above, it should also be recognised that matching the features of an act is in general connected with such conduct of a perpetrator which has the form of action. One can rather exceptionally imagine such conduct by which a perpetrator does not remove a vehicle from an area where there is a restriction, i.e. in the form of omission.

On the other hand, considerable interpretational problems can occur in connection with the need to determine a catalogue of potential perpetrators of the misdemeanour under Article 96c MC. There are no serious doubts whether such a case should be treated as an individual misdemeanour. However, they occur when it is necessary to precisely determine this catalogue. They focus on the question whether only drivers who do not comply with the provisions of the Electromobility Act should be included or whether also other people, e.g. vehicle owners should be considered. On the one hand, based on the regulations of the Electromobility Act, one may have an impression that they also apply to those persons. Article 39 para. 2 Electromobility Act indicates vehicle owners. However, it seems that such

[13] Dz.U. 2018, item 1656, as amended.

interpretation would be in conflict with *ratio legis* of the discussed regulation. Although the legislator indicates in the Electromobility Act that restrictions on entry to clean transport zones are applicable to vehicles, nevertheless it seems quite understandable for functional reasons. Thus, it should be assumed that the subject of the misdemeanour under Article 96c MC can only be the one who drives a vehicle other than electric, hydrogen or natural gas one, or such to which exemptions laid down in Article 39 para. 3 or 4 Electromobility Act are not applicable. Therefore, it does not matter whether a driver is a vehicle owner or just its user.

What is important, it should be mentioned here that the legislator did not consider penalisation of inciting and aiding and abetting in connection with the act under Article 96c MC (Article 14 § 1 MC) similarly to penalisation of an attempt (Article 11 § 2 MC).

As far as the subjective features of the norm under Article 96c MC are concerned, taking into account the regulation of Article 5 MC, there are no doubts that a perpetrator can match them intentionally (with direct or oblique intent) as well as unintentionally (because of carelessness or negligence). To exemplify unintentional conduct, two cases can be presented: in one a perpetrator has doubts concerning his vehicle (e.g. hybrid or electric) but nonetheless he unlawfully enters the clean transport zone; in the other case, which can be assessed similarly, a perpetrator does not pay attention to a signpost marking the clean transport zone or forgets that he has not paid the fee to prolong his subscription and enters the above-mentioned zone (Article 39 para. 4c(2) Electromobility Act).

Finally, it is worth considering whether, apart from the conduct specified in Article 96c MC, other features of the provisions of the Misdemeanour Code or the Criminal Code can be matched. Undoubtedly, the concurrence of Article 96c MC and Article 86 § 1 or § 2 MC seems to be possible if a perpetrator causes threat to safety in road traffic. The provision of Article 86 § 1 or § 2 MC prescribing a more severe penalty is applicable to the legal classification of an act (Article 9 § 1 MC). Similarly, it is necessary to indicate a real concurrence of provisions in the case a perpetrator drives a vehicle in the state specified in Article 87 § 1, § 1a or § 2 MC and does not comply with the restrictions under Article 96c MC. The provision of Article 87 § 1, § 1a or § 2 MC prescribes a more severe penalty (Article 9 § 1 MC). One cannot exclude a real concurrence of Article 96c MC and Article 88, Article 90, Article 91, Article 92 § 1 or § 2, Article 92a, Article 94, Article 95, Article 96a § 1 or § 2 and Article 97 MC. In accordance with Article 9 § 1 MC, the classification of the act should contain a more severe provision and, in the case of identical penalty, the provision that defines the nature of a perpetrator's conduct better. On the other hand, if a perpetrator matches the features of the act under Article 96c MC and then does not provide first aid to a victim of a road accident, there is a real concurrence of this misdemeanour and the misdemeanour under Article 93 § 1 MC (Article 9 § 2 MC).

From the practical point of view, it is also worth drawing attention to cases in which there is a concurrence of the type of misdemeanour discussed and a crime. For example, there is an ideal concurrence of a misdemeanour under Article 96c MC and an offence of an accident in transportation (Article 177 CC), causing a danger of

a catastrophe in transportation (Article 174 CC), or a catastrophe in transportation (Article 173 CC, Article 10 § 1 MC). The concurrence of this type can also be assumed in the case of driving under the influence of alcohol or drugs and violating the restrictions referred to in Article 96c MC (Article 178a § 1 CC). Similarly, matching the features of the act under Article 96c MC can be also connected with driving a vehicle in the conditions specified in Articles 178b, 180a or 244 CC.

Eventually, it is worth focusing on a sanction for a perpetrator of the act under Article 96c MC. It should be recognised that it is, in fact, symbolic in nature. It is a fine of PLN 20 to PLN 500 (Article 24 § 1 MC). Obviously, in the circumstances specified in Article 39 § 1 MC, it is possible to apply extraordinary mitigation of punishment and issue a reprimand (Article 39 § 2 and Article 36 § 1 MC) or abandon the imposition of a penalty (Article 39 § 1 and § 4 MC).

3. CONCLUSION

Summing up the above presentation focusing mainly on the evaluation of the new legal regulation placed in Article 96c MC, it should be first of all emphasised that it seems there is a faint possibility of its practical application at present. It results, inter alia, from the fact that so far the communes referred to in Article 39 para. 1 Electromobility Act have not decided to establish clean transport zones. There was only one zone like this established for a short period in the quarter of Krakow called Kazimierz.[14] Moreover, a comprehensive change of the legal acts granting powers to impose penalties for misdemeanours under Article 96c MC has not been introduced, yet. This concerns the provisions of the Regulation of the Minister of Internal Affairs and Administration of 17 November 2003 on misdemeanours for which municipal police officers are authorised to impose fines in the form of traffic offence tickets.[15] At the same time, there is no answer to the question why, among many obligations connected with electromobility and the market for alternative fuels resulting from Directive 2014/94/EU of the European Parliament and of the Council, the Polish legislator decided to introduce specific protection, i.e. in the form of a penal response, only in relation to clean transport zones. What is important, the introduction of the regulation specified in Article 96c MC does not cover any of the obligations imposed on the national legislators. Obviously, one can also ask a question why the introduction of other obligations stipulated in the provisions of the Electromobility Act is not accompanied by relevant penal regulations. For example, one can indicate inappropriate occupation of parking spaces next to free electric vehicles recharging points (Article 49 Electromobility Act; Article 12b Act of 21 March 1985 on public roads[16]).

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[14] www.bip.krakow.pl%2F_inc%2Frada%2Fuchwaly%2Fshow_pdf.php%3Fid%3D103563&usg=AOvVaw3jB9YCVi6kVMTFYO7A0oj3 (accessed 14.5.2019).

[15] Dz.U. 2003, No. 208, item 2026, as amended.

[16] Consolidated text, Dz.U. 2018, item 2068, as amended.

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ELECTROMOBILITY PROGRAMME IN POLAND AND THE PROBLEM OF PENAL RESPONSE

Summary

In accordance with the Act of 11 January 2018 on electromobility and alternative fuels, the creation of the so-called clean transport zones is stipulated. Failure to comply with the restrictions on entry to them can match the features of a new type of misdemeanour provided for in Article 96c of the Misdemeanour Code. The article aims to present its comprehensive analysis taking into account practical aspects of the above-mentioned provision.

Keywords: electromobility, alternative fuels, clean transport zones, misdemeanour, criminal penalty

PROGRAM ELEKTROMOBILNOŚCI W POLSCE A PROBLEM REAKCJI KARNEJ

Streszczenie

Z mocy przepisów ustawy z dnia 11 stycznia 2018 r. o elektromobilności i paliwach alternatywnych przewidziano powołanie tzw. stref czystego transportu. Nieprzestrzeganie ograniczeń w dostępie do nich może natomiast wyczerpywać znamiona nowego typu wykroczenia określonego w art. 96c k.w. Opracowanie ma na celu ich możliwie kompleksową analizę, przy uwzględnieniu praktycznych aspektów funkcjonowania ww. przepisu.

Słowa kluczowe: elektromobilność, paliwa alternatywne, strefy czystego transportu, wykroczenie, kara kryminalna

EL PROGRAMA DE ELECTROMOVILIDAD EN POLONIA Y EL PROBLEMA DE LA REACCIÓN PENAL

Resumen

En virtud de la ley de 11 de enero de 2018 sobre la electrmovilidad y combustibles alternativos se ha previsto la creación de las llamadas zonas de transporte limpio. La falta de observar las restricciones para acceder a ellas puede constituir el nuevo tipo de falta prescrito en el art. 96c del código de faltas. El artículo analiza de forma compleja dicha falta, considerando aspectos prácticos de funcionamiento de dicho precepto.

Palabras claves: electromovilidad, combustibles alternativos, zonas de transporte limpio, falta, pena criminal

ПРОГРАММА ЭЛЕКТРОМОБИЛЬНОСТИ В ПОЛЬШЕ И ПРОБЛЕМА УГОЛОВНО-ПРАВОВЫХ САНКЦИЙ

Аннотация

В соответствии с положениями Закона от 11 января 2018 года «Об электромобильности и альтернативных видах топлива» предусматривается создание так называемых «зон чистого транспорта». Несоблюдение ограничений касательно передвижения транспортных средств в таких зонах может исчерпывать признаки нового вида правонарушения, предусмотренного ст. 96 Кодекса административных правонарушений. Целью данной работы является по возможности всесторонний анализ признаков данного правонарушения с учетом практических аспектов функционирования вышеупомянутой статьи кодекса.

Ключевые слова: электромобильность; альтернативные виды топлива; зоны чистого транспорта; административное правонарушение; уголовное наказание

DAS PROGRAMM ZUR FÖRDERUNG DER ELEKTROMOBILITÄT IN POLEN UND DAS PROBLEM DER STRAFRECHTLICHEN REAKTION

Zusammenfassung

Nach den Bestimmungen des polnischen Gesetzes über die Elektromobilität und alternative Kraftstoffe vom 11. Januar 2018 ist die Schaffung sogenannter Umweltzonen vorgesehen und das Nichtbefolgen der verhängten Zufahrtsbeschränkungen kann den Tatbestand der in Artikel 96c des polnischen Ordnungswidrigkeitengesetzes bezeichneten neuen Art der Zuwiderhandlung erfüllen. Ziel der Studie ist eine möglichst umfassende Analyse dieser Tatbestandsmerkmale unter Berücksichtigung der praktischen Funktionsweise der genannten Vorschrift.

Schlüsselwörter: Elektromobilität, alternative Kraftstoffe, Umweltzonen, Ordnungswidrigkeit, strafrechtliche Sanktionen

PROGRAMME D'ÉLECTROMOBILITÉ EN POLOGNE ET LE PROBLÈME D'UNE RÉPONSE PÉNALE

Résumé

En application des dispositions de la loi du 11 janvier 2018 sur l'électromobilité et les carburants alternatifs, la mise en place de ce que l'on appelle zones de transport propre a été envisagée. Le non-respect des restrictions d'accès peut toutefois épuiser des éléments constitutifs d'un nouveau type d'infraction prévue à l'art. 96c du code des contraventions. Le but de l'étude est de les analyser de manière aussi complète que possible, en tenant compte des aspects pratiques du fonctionnement de la disposition susmentionnée.

Mots-clés: électromobilité, carburants alternatifs, zones de transport propre, infraction, sanction pénale

PROGRAMMA DI ELETTROMOBILITÀ IN POLONIA E IL PROBLEMA DELLA REAZIONE PENALE

Sintesi

Ai sensi delle norme della legge dell'11 gennaio 2018 sull'elettromobilità e sui carburanti alternativi si è prevista l'istituzione delle cosiddette zone di trasporto pulito. Il mancato rispetto delle limitazioni di accesso a tali zone può costituire un nuovo tipo di contravvenzione, definito nell'art. 96c del Codice delle contravvenzioni. L'elaborato ha per obiettivo la loro possibile analisi completa, considerando gli aspetti pratici di applicazione della norma sopra indicata.

Parole chiave: elettromobilità, carburanti alternativi, zone di trasporto pulito, contravvenzione, sanzione penale

Cytuj jako:

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COMMENTS ON CREDITING THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS PENALTY OF RESTRICTION OF LIBERTY UNDER ARTICLE 63 CRIMINAL CODE

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1. GENERAL REMARKS

As set out in Article 63 of the 1997 Criminal Code,[1] the obligation to credit the period of actual deprivation of liberty towards the penalty imposed in a given case is one of the basic sentencing principles.

This institution dates back to the 1932 Criminal Code[2] in which the legislator allowed the period of pre-trial detention to be credited towards the sentence of imprisonment (Article 58 of the 1932 Criminal Code). The positive adjustment was optional as it depended on the court's discretion in this respect.[3] It was also up to the court to decide whether the period of pre-trial detention was to be credited in whole or in part only. However, the credit could only be granted towards the

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1 Act of 6 June 1997: Criminal Code (Dz.U. 1997, No. 88, item 553; consolidated text Dz.U. 2018, item 1600).

2 Regulation of the President of the Republic of Poland, Criminal Code of 11 July 1932 (Dz.U. 1932, No. 60, item 571).

3 V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń 2002, p. 58.

imposed sentence of imprisonment (i.e. jail or custody time).[4] It could not be granted towards other penalties, including imprisonment in default of other penalties.[5]

The 1969 Criminal Code[6] brought about far-reaching changes in the legal institution discussed in this paper. Under Article 83 of the 1969 Criminal Code, the legislature required the court to credit the period of pre-trial detention towards the imposed sentence, and the institution itself was qualified as one of the sentencing principles.[7] The period of pre-trial detention had to be credited as a whole by operation of law. A list of penalties with regard to which such credit could be granted was also extended and, in addition to the sentence of imprisonment, there was also a possibility to credit the period of pre-trial detention towards a sentence of restriction of liberty and a fine.[8] The Supreme Court held that: 'The *ratio legis* underlying these provisions was dictated by the assumption, arising from justice and equity considerations, that the burden associated with the application of pre-trial detention to the offender should not remain beyond the scope of the sentence of imprisonment or a sentence of restriction of liberty or a fine, imposed on the offender and enforceable. As such, the crediting of the period of pre-trial detention towards one of these sentences constitutes a statutory benefit offered to a sentenced person.'[9] In this context, it is worth noting that although the literal wording of Article 83 of the 1969 Criminal Code stipulated that only the period of pre-trial detention was to be credited, the case law extended the possibility of crediting towards the sentence also periods of the actual restriction of liberty other than pre-trial detention, e.g.: (1) the period of detention in a closed psychiatric institution for the purpose of psychiatric assessment applied under Article 184 of the 1969 Criminal Procedure Code,[10] ordered by the court or public prosecutor,[11] (2) the period of detention in a juvenile correctional facility or a juvenile pre-trial detention facility,[12] or (3) the period of detention provided for in Articles 206 to 208 of the 1969 Criminal Procedure Code, if it was not subsequently converted into pre-trial detention[13].

In the 1997 Criminal Code, the legislator directly allowed that the actual periods of deprivation of liberty served by the offender in a given case[14] be credited towards

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[4] G.A. Skrobotowicz, *Zaliczenie tymczasowego aresztowania na poczet kary orzeczonej w innej sprawie*, Prokuratura i Prawo 9, 2011, p. 100. See also Z. Sienkiewicz, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol I: *Art. 1–116*, Wydawnictwo ARCHE, Gdańsk 2005, p. 570.

[5] The Supreme Court resolution of 6 August 1968, VI KZP 26/68, Legalis No. 556016.

[6] Act of 19 April 1969: Criminal Code (Dz.U. 1969, No. 13, item 94).

[7] V. Konarska-Wrzosek, *supra* n. 3, p. 58.

[8] Literature accepted that this principle extended to the death penalty as well, since it was convertible into another sentence. Cf. V. Konarska-Wrzosek, *supra* n. 3, p. 58.

[9] Judgment of the panel of seven judges of the Supreme Court of 20 August 1970, R Nw 33/70, Legalis No. 14771.

[10] Act of 19 April 1969: Criminal Procedure Code (Dz.U. 1969, No. 13, item 96).

[11] The Supreme Court judgment of 2 April 1975, Rw 142/75, Legalis No. 18673.

[12] Judgment of the Court of Appeal in Łódź of 8 September 1993, II AKr 215/93, Legalis No. 33227.

[13] The Supreme Court resolution of 19 July 1995, I KZP 24/95, Legalis No. 29416.

[14] The literature assumes that the principle in question concerns: (1) detention under Article 244 Criminal Procedure Code or Article 45 Petty Offence Procedure Code, (2) pre-trial detention (which refers to the period of actual pre-trial detention in the case), (3) placing an offender in a medical hospital for psychiatric observation, (4) detention in a juvenile pre-trial detention facility and stay

the sentences other than pre-trial detention, which was reflected in the content of Article 63 § 1 Criminal Code. Pursuant to the introductory part of that provision, the period of actual deprivation of liberty imposed in a given case is to be credited towards the sentenced person's sentence, rounded up to the nearest full day.

As in the 1969 Criminal Code, it is the duty of the court to credit such periods (and it is one of the sentencing principles). This means that the court has to credit such period on its own motion. A breach of this obligation by the court is tantamount to a violation of substantive law, which results in a decision being reversed or amended.[15]

The credit should be granted towards any sentence,[16] with the assumption that one day of actual deprivation of liberty corresponds to one day of imprisonment, two days of restriction of liberty or two daily rates of a fine[17] (a conversion factor of 1:1 was introduced for the sentence of imprisonment and 2:1 for the remaining sentences).

2. ROUNDING UP OF THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS THE SENTENCE OF RESTRICTION OF LIBERTY

As already indicated above, when applying Article 63 § 1 Criminal Code to converting the period of actual deprivation of liberty into the credit towards the sentence imposed, the principle is that the period to be credited is rounded up to the nearest full day.

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in a juvenile correctional facility, (5) effective detention abroad and the sentence served there, and (6) any other time served in confinement where this is connected with criminal proceedings in a particular case. Joanna Długosz also considers placing of a person detained under Article 244 § 1 Criminal Procedure Code in a sobering-up facility to be the actual time served in confinement that can be credited towards the sentence. Cf. J. Długosz, [in:] M. Królikowski and R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, Wydawnictwo C.H. Beck, Warszawa 2017, pp. 882–883. Legal authors and commentators are inconsistent as to whether this principle also applies to the actual time served in confinement resulting from the detention of a person in a police facility for the purpose of carrying out a procedural action relating to his/her apprehension or awaiting transportation. Some of legal authors and commentators make the possibility of crediting this period dependent on its duration: only a longer detention period is credited (see: V. Konarska-Wrzosek, *supra* n. 3, p. 60; A. Marek, [in:] *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2007, p. 169; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2016, p. 381). In the opinion of other legal authors and commentators, this period is credited regardless of its duration (see: G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Wolters Kluwer, Warszawa 2012, p. 441; J. Długosz, *supra* n. 14, p. 883; M. Melezini, [in:] T. Kaczmarek (ed.), *System Prawa Karnego*, Vol. 5: *Nauka o karze. Sądowy wymiar kary*, Wydawnictwo C.H. Beck. Instytut Nauk Prawnych PAN, Warszawa 2017, p. 185).

15 M. Melezini, *supra* n. 14, p. 184.

16 Including the sentence of life imprisonment. In such case, crediting of the actual time served in confinement is essential to determine the date from which the sentenced person may apply for conditional early release. Cf. W. Wróbel, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 53–116*, Wolters Kluwer, Warszawa 2016, pp. 219–220. See also Z. Sienkiewicz, *supra* n. 4, p. 571; M. Melezini, *supra* n. 14, p. 187.

17 In the case of the amount of a fine, it should be assumed that one day of actual depravation of liberty corresponds to the amount of a double daily rate defined in accordance with Article 33 § 3 Criminal Code.

In this context, Violetta Konarska-Wrzosek points out that the issue of converting the period of actual deprivation of liberty into the credit towards the restriction of liberty has not been regulated in a comprehensive manner. The legislator does not directly determine how to assess the situation where the sentence to be served by the sentenced person is set out in months and days.[18] In her view, in such situation, the duration of the sentence of restriction of liberty resulting from the calculation should be rounded up to a full month.[19] In this respect, Violetta Konarska-Wrzosek proposes to adopt a solution analogous to that of Article 83 § 2 of the 1969 Criminal Code, according to which the period of restriction of liberty, by which the sentence remaining to be served is to be reduced, is rounded up to a full month.[20] The author stresses that in this aspect such an interpretation adheres to the principle of imposing the penalty of restriction of liberty in full months, which applies in our system, and it also works to the sentenced person's advantage.[21] Włodzimierz Wróbel takes a similar view in this respect. According to him, the necessity of rounding up the restriction of liberty to a full month is supported by the fact that this sentence is imposed in months, and the obligation to perform work (community service) is determined on a monthly basis.[22]

However, this view is arguable. First of all, it should be noted that it follows directly from the wording of Article 63 § 1 Criminal Code that one day of actual deprivation of liberty is equal to one day of imprisonment, two days of restriction of liberty or two daily rates of a fine, and any rounding up may only be made to a full day, and not a month. If the legislator intended that the period of restriction of liberty be rounded up to a full month, that would have been made clear in the wording of Article 63 Criminal Code, as it was done in Article 83 § 2 of the 1969 Criminal Code. However, the legislator has now abandoned this provision.

Moreover, it is difficult to find justification for such a far-reaching 'bonus' for sentenced persons whose sentence of restriction of liberty resulting from the application of Article 63 Criminal Code is set out in months and days. Such an interpretation would lead to unequal treatment of those sentenced to restriction of liberty, because if a sentenced person, after converting the actual time served in confinement into a sentence of restriction of liberty, has an insignificant period of time left (e.g. six months and six hours), the whole next month of the restriction of liberty should be deducted from this additional period (these six hours), although the person has actually been deprived of liberty for additional few hours.

It appears that in the case of granting credit towards the penalty of restriction of liberty under Article 63 Criminal Code, the fact that this penalty is imposed in monthly units (full months) is also irrelevant. The institution of crediting the actual

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[18] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63; *eadem*, *W kwestii zaliczania faktycznego pozbawienia wolności na poczet orzeczonej kary*, Przegląd Sądowy 9, 2000, p. 97.

[19] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63; *eadem*, *W kwestii*, *supra* n. 18, p. 97. See also V. Konarska-Wrzosek, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2017, p. 469; M. Melezini, *supra* n. 14, p. 186.

[20] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63; *eadem*, *W kwestii*, *supra* n. 18, p. 97. See also V. Konarska-Wrzosek [in:] R.A. Stefański (ed.), *Kodeks*, *supra* n. 18, p. 469.

[21] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63.

[22] A. Wróbel, *supra* n. 16, p. 220.

time served in confinement towards the sentence imposed is, in fact, an institution of penal enforcement law. As such, it should be based on the framework set out in the Penal Enforcement Code.[23] At the stage of enforcement proceedings, the penalty of restriction of liberty may be converted into a custodial sentence if the sentenced person evades serving the penalty of restriction of liberty, or fails to pay the amounts imposed or perform the obligations imposed under Article 34 § 3 Criminal Code.[24] In such case, pursuant to Article 65 § 1 PEC, it should be assumed that one day of imprisonment applied as a penalty in default corresponds to two days of restriction of liberty.[25] At the same time, the court is obliged to take into account the period of the restriction of liberty served by the sentenced person before a sentence of imprisonment in default has been imposed on him/her. However, the conversion may only be effected with respect to that part of the sentence not served by the sentenced person before the penalty in default has been activated. An order activating the sentence of imprisonment in default requires the court to carefully take into account the penalty of restriction of liberty actually served by the sentenced person on a day-to-day basis. Importantly, the same mechanism applies to a sentenced person who has evaded serving his/her sentence or performing his/her obligations for a full month (a multiple thereof) as well as for those who have done so for several days (e.g. the sentenced person has served a penalty of restriction of liberty for the first 10 days and subsequently started evading the same). The adjustment is granted in proportion to the time when the sentenced person has actually served the sentence imposed on him/her. It should be stressed that the same mechanism applies where a sentence of imprisonment in default is suspended under Article 65a PEC. In such case, the conversion is effected the other way round, i.e. from a custodial sentence into a non-custodial sentence. However, the court is each time required to grant the sentenced person credit for each period of imprisonment in default towards the restriction of liberty (Article 65a § 3 PEC). A similar principle also applies in the case of a sentence of restriction of liberty in the form of unpaid, supervised community service (or a fine) under Article 75a § 1 Criminal Code, i.e. in lieu of activating a previously suspended sentence of imprisonment.

In the light of the foregoing, it must be concluded that the provisions of the enforcement procedure allow, and indeed prescribe, that non-custodial sentences, including those involving restriction of liberty, be converted into custodial sentences at a 2:1 ratio.[26] The same calculation should be made when crediting the period of actual deprivation of liberty towards the sentence of restriction of liberty.

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[23] Act of 6 June 1997: Penal Enforcement Code (Dz.U. No. 90, item 557; consolidated text: Dz.U. 2018, item 652); hereinafter PEC.

[24] If the sentenced person evades serving the restriction of liberty, the sentence of imprisonment in default is obligatorily imposed. Otherwise, such an activating order is optional.

[25] However, if the law does not provide for imprisonment for a given offence, the upper limit of the replacement sentence imposed in lieu of the restriction of liberty may not exceed six months.

[26] Such a conversion rate also applies when converting a fine into a replacement sentence of imprisonment (cf. Article 46 § 2 PEC).

It should be also noted that it is difficult to understand why it is proposed to round up to a full month the period of actual deprivation of liberty, when crediting the said period towards a sentence of restriction of liberty, which is set out in days, and if the same period is to be credited against a penalty of imprisonment, credit is granted on a day-to-day basis (1:1) with no reservations.[27]

Furthermore, it is worth noting that in the literature referring to Article 57a Criminal Code it is explicitly allowed that the penalty of restriction of liberty can be imposed in a fractional part of a month since it is assumed that the lower limit of this penalty is one month and 15 days.[28] In this regard, Article 57a Criminal Code is considered to be *lex specialis* for Article 34 § 1 Criminal Code, which allows for the imposition of the penalty of restriction of liberty for a fraction of a month. It seems that Article 63 Criminal Code should also be treated as a special rule in relation to the provision laying down general limits on the penalty of restriction of liberty.

In the light of the foregoing, it appears that the period of actual deprivation of liberty which is credited towards a penalty of restriction of liberty can (and should) only be rounded up to a full day, even if – as a result of such calculation – the period of imprisonment which should be regarded as having been served by the sentenced person due to his/her previous detention in custody is set out in months and days.

Importantly, the period of actual deprivation of liberty, to be credited towards the sentence of restriction of liberty, not only affects the length of time of the penalty to be served by the convicted person but also results in the necessity to reduce, as appropriate, the number of hours of unpaid, supervised community service or the amount to be deducted from the sentenced person's work remuneration in the reference month in which the penalty of restriction of liberty remaining to be served covers only a fraction of the month.[29]

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[27] The lower limit of imprisonment is one month and, pursuant to Article 37 Criminal Code, it is imposed in months and years (similar to the penalty of restriction of liberty).

[28] See: R. Hałas, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2018, p. 484; see also M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2017, p. 217 and V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2016, p. 217. A similar view – although with regard to the sentence of imprisonment – was presented by the Supreme Court, which interpreted Article 59 § 1 of the 1969 Criminal Code (equivalent to Article 57a of the currently applicable Criminal Code) and stressed that: 'the lowest penalty for an offence punishable by imprisonment for a term of three months or more, committed in the circumstances stipulated in Article 59 § 1 Criminal Code, is four and a half months.' See the Supreme Court resolution of 20 May 1970, VI KZP 21/70, Legalis No. 14595.

Two other views are also presented by legal authors and commentators in this respect. According to the first one, in such case the sentence imposed should be rounded up to a full month (see I. Andrejew, [in:] I. Andrejew, W. Świda, W. Wolter (eds), *Kodeks karny z komentarzem*, Wydawnictwo Prawnicze, Warszawa 1973, pp. 253–254.). As opposed to this view, there is another interpretation, according to which in such case the lower penalty limit is increased by half and then rounded down to full months (see G. Łabuda, *supra* n. 14, pp. 409–410; W. Zalewski, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, Wydawnictwo C.H. Beck, Warszawa 2017, pp. 846–847).

[29] Cf. L. Osiński, [in:] J. Lachowski (ed.), *Kodeks karny wykonawczy. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2016, p. 315.

In this context, it is worth noting that after the entry into force of the 1997 Criminal Code doubts arose as to how the rounding referred to in Article 63 § 1 Criminal Code should be effected. Wojciech Marcinkowski presented two methods that could be used. The first one consisted in assuming that one day of actual time served in confinement corresponds to a clock day, i.e. the consecutive 24 hours, and the rounding was only effected if 'the last clock day of the period of actual of deprivation of liberty did not reach the full 24 hours'.[30] The other method meant separate rounding of each calendar day to the full day, regardless of 'how many hours per day the offender was actually deprived of his or her liberty'.[31] These doubts were dispelled by inserting of Article 63 § 5 Criminal Code, by force of the Act of 20 February 2015 amending the Criminal Code and certain other acts,[32] whose wording clearly indicates that one day of actual deprivation of liberty to be credited towards the sentence imposed is taken to be 24 hours calculated from the moment of the actual detention in custody.

Under the above-mentioned Act, the legislator also clarified the issue of the time frames with regard to penalties and other measures imposed under provisions of the Penal Enforcement Code. Pursuant to Article 12c PEC, it should be assumed in enforcement proceedings for such penalties and measures that one week counts as seven days, one month as 30 days and one year as 365 days. However, as noted in the literature, against the background of this provision, a discrepancy between the period of one year, which counts as 365 days, and the period of 12 months equivalent of 360 days (12 times 30 days) needs to be considered.[33] In this context, it should be noted that under Article 34 § 1 Criminal Code, the shortest penalty of restriction of liberty lasts one month and the longest penalty of restriction of liberty lasts two years, unless the law provides otherwise, and it is imposed in months and years. However, the legislator has not decided whether the penalty of restriction of liberty should be imposed in 12 months or one year. According to the view prevailing in literature, in such case a penalty of one year should be imposed.[34] It is stressed that such an interpretation is supported by systemic interpretation in the case of regulations governing the sentence of imprisonment.[35] At the same time, it is noted

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[30] W. Marcinkowski, *Wybrane zagadnienia z praktyki stosowania prawa karnego materialnego i procesowego*, Wojskowy Przegląd Prawniczy 4, 2005, p. 128.

[31] Such an interpretation was approved by V. Konarska Wrzosek, *W kwestii*, *supra* n. 18, p. 97.

[32] Dz.U. 2015, item 396.

[33] J. Lachowski, *Wymiar kary w miesiącach i latach na gruncie kodeksu karnego z 1997 r.*, [in:] A. Muszyńska, P. Góralski (eds), *Współczesne przekształcenia sankcji karnych – zagadnienia teorii, wykładni i praktyki stosowania*, Instytut Wydawniczy EuroPrawo, Warszawa 2018, pp. 96–97; M. Szewczyk, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i środki karne. Poddanie sprawcy próbie*, Wydawnictwo C.H. Beck, Instytut Nauk Prawnych PAN, Warszawa 2016, pp. 214–215; I. Zgoliński, [in:] J. Lachowski (ed.), *Kodeks karny wykonawczy. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2016, p. 79.

[34] B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2016, p. 204; similarly also M. Szewczyk, *supra* n. 33, pp. 214–215; T. Sroka, *Kara ograniczenia wolności*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Krakowski Instytut Prawa Karnego Fundacja, Kraków 2015, pp. 94–95.

[35] Jerzy Lachowski argues that the Criminal Code (both the general part and the special part) and the Penal Enforcement Code contain a number of provisions in which the legislator

that 'years are plural for one year'.[36] However, the literal wording of Article 34 § 1 Criminal Code does not preclude the possibility of imposing a 12-month penalty of restriction of liberty. The word 'years' means a multiple of one year[37] and, as such, means a time unit greater than one year.[38] It is also worth noting that until 30 June 2015, the penalty of restriction of liberty was, as a rule, imposed for up to 12 months, but in some cases it could be imposed beyond that period, e.g. in the case of an aggregate sentence. In such a situation, the court could impose the penalty of restriction of liberty for a term up to two years, but it had to be imposed (as is the case now) in months and years (Article 86 § 1 Criminal Code effective from 8 June 2010 to 30 June 2015). The above summary leads to the conclusion that the legislator did not associate the concept of 12 months with one year in the case of the penalty of restriction of liberty.[39] It should be pointed out, though, that while before 1 July

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uses the term of one year imprisonment rather than 12 months imprisonment (e.g. Articles 43 § 1, 64 § 2, 279 § 1 Criminal Code or Article 43la § 1(1) PEC). On the other hand, the author notes that the legislator in the Criminal Code uses the phrase of 12 months with regard to certain obligations (this refers to the obligation to report to the Police or another designated authority: Article 41a § 1 and § 2 in conjunction with Article 43 § 1a Criminal Code). In his opinion, in cases where the law provides for a penalty smaller than one year and one month but larger than 11 months, the minimum penalty of one year (either under the provisions of the special or general part of the Criminal Code) should be imposed as one-year imprisonment or restriction of liberty (the same applies to penal measures in which the legislator has set the lower limit of one year), and in cases where the legislator has set the upper limit of some obligations at 12 months (Article 41a § 1 and § 2 in conjunction with Article 43 § 1a Criminal Code), these obligations should be imposed for a maximum period of 12 months rather than one year. The author does not, however, decide the extent to which, in his view, the penalty of restriction of liberty or imprisonment is to be imposed if the court imposes this penalty for more than 11 months, but less than one year and one month, in a situation where this penalty is neither the minimum nor maximum penalty provided for under the statutory length for the offence in question. Compare J. Lachowski, *Wymiar kary*, *supra* n. 33, pp. 100–103.

[36] B.J. Stefańska, *supra* n. 34, p. 204.

[37] *Słownik Języka Polskiego*, the Polish language dictionary entry for 'lata', https://sjp.pwn.pl/szukaj/lata.html (accessed 24.10.2018).

[38] Moreover, the literature points out that the legislator, in Article 34 § 1 Criminal Code (as well as Articles 37 and 322 Criminal Code), when determining the penalty in months and years, uses the conjunction; it should therefore be assumed that a penalty in months and years is possible only if the length of the penalty is at least one year and one month (cf. J. Lachowski, *Wymiar kary*, *supra* n. 33, p. 101).

[39] Against the background of historical and legal remarks, it is worth noting that in the transitional period, i.e. from 1 July 2015 to 14 April 2016, one of the elements of the optionally obligatory penalty of restriction of liberty was the obligation to remain in the place of permanent residence or in another designated place, with the use of the electronic monitoring system (Article 34 § 1a(2) Criminal Code in the wording in effect from 1 July 2015 to 14 April 2016). In Article 35 § 3 Criminal Code (in the wording in effect from 1 July 2015 to 14 April 2016), however, the legislator directly stipulated that this obligation may be imposed for a period not longer than 12 months (and not longer than one year). Therefore, it is inconceivable that a court, intending to impose this obligation for the maximum length (12 months), would be required to impose the one-year restriction of liberty. Importantly, both the replacement of Articles 34 § 1a(2) and 35 § 3Criminal Code and the insertion of Article 12d Criminal Code were performed by way of the same statutory instrument.

In this context, Jerzy Lachowski additionally points out that in the period from 1 September 1998 to 7 June 2010, in the case of an extraordinary aggravation of the penalty of restriction of liberty, this penalty could be imposed for up to 18 months, which directly resulted from

2015 it was only a semantic issue, at present – due to Article 12c Criminal Code – it is of utmost importance for the sentenced person, because the interpretation decides whether he or she will serve the sentence five days longer or not. In the light of the foregoing, one should consider whether to adopt an interpretation that is more favourable for the sentenced person, which in turn would mean that the sentence would have to be served for 12 months rather than one year.[40] Adopting an interpretation unfavourable for the sentenced person would require a final decision on the above issue by the legislator and an amendment to Article 34 § 1 Criminal Code. However, there is also a third option. Any interpretative doubts would be dispelled by amending the wording of Article 12c PEC and assuming that a year means 360 days or 12 months. Such a solution would require the authorities that pursue enforcement proceedings to be particularly accurate in calculating the periods of a sentence as well as other broadly defined measures to correspond to a criminal offence. An alternative solution would be to repeal Article 12c PEC, but in such case the length of the sentence (or another measure) would depend on the length of the month in which it is served, which would put sentenced persons in different situations depending on the months in which they serve the sentence.

The above considerations, although of more general nature, are also relevant in the context of crediting the period of pre-trial detention towards the sentence of restriction of liberty. There is a problem with crediting the period of six months of the actual period of deprivation of liberty towards this penalty. Since under Article 63 § 1 Criminal Code, one day of actual time served in confinement equals two days of restriction of liberty, the sentence to be credited in this example is 12 months, having regard to Article 12c Criminal Code. If the court passes a sentence of one year's imprisonment, the question arises as to what to do with five days' imprisonment, which actually 'remains' to be served by the sentenced person. In such a situation, it is difficult to require the sentenced person to serve those five days of his or her sentence. This would be completely unreasonable and would also generate costs

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Article 38 § 2 Criminal Code in the wording in effect from 1 September 1998 to 7 June 2010. In such case, the penalty was imposed in months. On the other hand, the author argues that this may indicate that the legislator abandoned such a solution (as it did also in the case of the reservation that a sentence of imprisonment shorter than one year was imposed in months and a sentence of imprisonment longer than one year – in months and years, which resulted from Article 32 § 2 of the 1969 Criminal Code); see J. Lachowski, *Wymiar kary*, *supra* n. 33, pp. 101–102.

[40] Initially, Jerzy Lachowski also approved of such an interpretation (cf. J. Lachowski, *Zasady orzekania kary ograniczenia wolności – wybrane zagadnienia*, [in:] T. Kalisz (ed.), *Nowa Kodyfikacja Prawa Karnego*, Vol. XL, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2016, pp. 38–39). Nevertheless, in more recent studies, the author does not prejudge the issue in question, although at the same time he points out that there are more arguments in favour of the court determining the penalty at 12 months rather than one year in such a case (cf. J. Lachowski, *Wymiar kary*, *supra* n. 33, pp. 100–103).

Tomasz Kalisz also seems to support the view of imposing a 12-month (rather than one-year) penalty of restriction of liberty as he uses the below-mentioned phrase to give examples of the operative part of a judgment which could be issued in the case of a multi-variant (initiated sequentially) penalty of restriction of liberty: 'and for that sentences him/her to 12 months of restriction of liberty consisting in [...]'; cf. T. Kalisz, *Kara ograniczenia wolności. Możliwości i bariery*, [in:] P. Góralski, A. Muszyńska (eds), *Racjonalna sankcja karna w systemie prawa*, Instytut Wydawniczy EuroPrawo, Warszawa 2019, p. 213.

associated with having to implement and enforce the sentence for merely a few days. It is not always possible to take advantage of Article 64 PEC in such case, since the decision whether and to what extent the penalty of restriction of liberty may be regarded as having been enforced is assessed in the light of the achievement by the sentenced person of the objectives of the penalty as set out in Article 53 PEC. In such case, a solution may also be to release the sentenced person from the remainder of the sentence of restriction of liberty under Article 83 Criminal Code. However, the reduction of the sentence under Article 83 Criminal Code may only be applied to a sentenced person who meets the conditions set out in that provision.[41] Thus, not every sentenced person can benefit from this institution.[42] Therefore, solving this problem requires the legislator's interference by amending (or repealing) Article 12c PEC and eliminating the discrepancies between 12 months and one year.

3. CREDITING THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS THE PENALTY OF RESTRICTION OF LIBERTY VS SERVING A SENTENCE UNDER ARTICLE 83 CRIMINAL CODE

In the light of the above, it is worth noting that positive adjustment crediting the actual period of deprivation of liberty towards the sentence of restriction of liberty also has an impact on the sentenced person's eligibility to apply for early release from the remainder of the sentence of restriction of liberty under Article 83 Criminal Code.

One of the grounds on which the legislator has based the possibility of taking advantage of Article 83 Criminal Code by the sentenced person is that he or she has served at least half his/her sentence. The question therefore arises as to whether, when calculating that period, one should also take into account the actual period of restriction of liberty which has been credited towards the sentenced person's penalty of restriction of liberty under Article 63 § 1 Criminal Code. The literature takes the view that this period should be taken into account when assessing whether the sentenced person complies with the provisions (having served the determined part of the sentence) of Article 83 Criminal Code.[43] Nothing prevents the interpretation that this period should be taken into account in such case,[44] all the more so as such interpretation benefits the sentenced person.

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[41] The court may grant such release to a person sentenced to restriction of liberty who has served at least half of his/her sentence (formal grounds) and who has complied with the legal order and fulfilled the obligations imposed on him/her, the imposed penal measures, compensation measures and forfeiture (substantive grounds).

[42] In particular, as the period of time that remains for the sentenced person to serve is very short, there is a risk that the court may not be able to issue its decision in time.

[43] S. Hypś, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2018, p. 567; J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Wydawnictwo C.H. Beck, Warszawa 2017, p. 1074.

[44] By way of the Act amending the Criminal Code and some other acts of 20 February 2015, the legislator eliminated the grounds of diligent performance of the indicated work by the sentenced person. This change was connected with the introduction of the new content

The literature stresses that crediting the actual period of deprivation of liberty towards the penalty of restriction of liberty should be treated as one of the forms of serving this penalty.[45] It is worth noting that in exceptional cases the penalty as a whole can be enforced in this very form. This would be the case when crediting of the actual period of deprivation of liberty towards the sentence imposed 'covers' the imposed sentence in its entirety (e.g. a sentenced person has been remanded in custody for three months and then sentenced to six months' restriction of liberty). Above all, however, the credit would only be a modal form of the penalty, which – unlike the traditional forms – has been actually enforced before the convicted person started serving his/her sentence (and even before his/her conviction). In practice, even a long period may elapse between the end of the actual period of deprivation of liberty and the beginning of the penalty of restriction of liberty imposed on the sentenced person. However, it should be pointed out that the period between the end of the actual period of deprivation of liberty and the beginning of the penalty of restriction of liberty served by the sentenced person does not count when assessing whether the sentenced person has served the period required by the legislator in order to be released from the remainder of his/her sentence, as stipulated in Article 83 Criminal Code. Consequently, only the actual period referred to in Article 63 § 1 Criminal Code is relevant when assessing whether the formal grounds for releasing the sentenced person from the remainder of the sentence are present.

In this context, it is worth noting that the beginning of the sentence is connected with the date on which the sentenced person has commenced performing the work prescribed under the sentence of restriction of liberty in the form defined in Article 34 § 1a(1) Criminal Code or with the date being the first day of the period in which a deduction is made from the sentenced person's remuneration in the case of a sentence referred to in Article 34 § 1a(4) Criminal Code. If a sentence is cumulatively imposed in both forms, the commencement of the entire sentence is linked to the date when the enforcement of the first form of restriction of liberty imposed on the sentenced person begins.[46] In such case, the sentence ends upon the end of the period for which the sentence has been imposed, calculated from the date on which the sentenced person has begun to serve the first form of this sentence (regardless of the extent to which the second form has been served and whether it has been served at all). The period during which the sentenced person has served at least half of his/her sentence of restriction of liberty, for the purposes of Article 83 Criminal Code, should also be calculated in the same way. The beginning of

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of the penalty of restriction of liberty; however, although the legislator abandoned two forms of the penalty of restriction of liberty, i.e. the obligation to remain in the place of permanent residence or in another designated place with the use of the electronic monitoring system, as well as the obligation referred to in Article 72 § 1(4) to (7a), the wording of Article 83 Criminal Code was not further amended. Therefore, for the purpose of Article 83 Criminal Code, every form of serving the penalty of restriction of liberty should be acknowledged, including such that has been served by crediting the period of actual deprivation of liberty towards that penalty under Article 63 § 1 Criminal Code.

45 J. Lachowski, *supra* n. 43, p. 1074.

46 T. Sroka, *supra* n. 34, p. 101. Compare also L. Osiński, *supra* n. 29, p. 312.

the period referred to in Article 83 Criminal Code should be counted from the date on which the sentenced person has started (chronologically) to serve the first form of the penalty of restriction of liberty.[47] The part of the sentence period which has been credited to the sentenced person under Article 63 Criminal Code must be added to the period so calculated.

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[47] Legal authors and commentators also present a different view. According to some legal scholars, if both options of the penalty of restriction of liberty are included in a cumulative ruling, at least half of each must be enforced. See: J. Skupiński, J. Mierzwińska-Lorencka, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2017, p. 579; J. Lachowski, *supra* n. 43, p. 1074.

It seems, however, that such a view is not justified in the light of Article 83 Criminal Code, as well as in the light of the concept of the unity of the penalty of restriction of liberty. Article 83 Criminal Code uses the phrase 'the sentenced person has served at least half of his/her sentence' and does not stipulate that he/she has served at least half of each option of the sentence. In this context, it should be stressed that, in accordance with the concept of the unity of the penalty of restriction of liberty, the forms of penalty cumulatively imposed on the sentenced person constitute a single and indivisible penalty (cf. T. Sroka, *supra* n. 34, p. 144). As such, there are no grounds for assessing the period of time served by the sentenced person referred to in Article 83 Criminal Code from the perspective of its different forms. All the more so because such an interpretation could in practice deprive the sentenced person of taking advantage of Article 83 Criminal Code (or at least make it significantly more difficult) in a situation when a long period of time elapses between the moments when particular forms of penalty are initiated or when the restriction of liberty imposed on the sentenced person takes a consecutive form in which particular options of the sentence are enforced one after another (on the admissibility of using such a model, see T. Kalisz, *Treść i elementy kształtujące karę ograniczenia wolności*, Ius Novum 3, 2016, p. 72).

Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, Wydawnictwo C.H. Beck, Warszawa 2017.
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COMMENTS ON CREDITING THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS PENALTY OF RESTRICTION OF LIBERTY UNDER ARTICLE 63 CRIMINAL CODE

Summary

This article discusses certain issues relating to the crediting of the period of actual deprivation of liberty towards the penalty of restriction of liberty in accordance with Article 63 of the Polish Criminal Code. The author presents a method of rounding up the period of a sentenced person's prior detention to be credited towards the penalty of restriction of liberty subsequently imposed upon him/her, which differs from the method adopted so far in the legal doctrine, while indicating that there are no grounds in the current legal state for rounding that period up to a full month and that the rounding up should only be to a full day. The paper also points to the difficulties related to the crediting of the period of actual deprivation of liberty towards the penalty of restriction of liberty resulting from the lack of coherence between the period of one year and the period of 12 months (Article 12c of the Polish Penal Enforcement Code). The article also discusses the impact that crediting of the sentenced person's detention period under Article 63 Criminal Code has on the possibility of releasing such person from serving the remainder of his/her penalty under Article 83 Criminal Code.

Keywords: penalty of restriction of liberty, crediting of the period of actual deprivation of liberty, release of the sentenced person from the remainder of the penalty of restriction of liberty

KILKA UWAG W KWESTII ZALICZENIA OKRESU RZECZYWISTEGO POZBAWIENIA WOLNOŚCI NA POCZET KARY OGRANICZENIA WOLNOŚCI NA PODSTAWIE ART. 63 K.K.

Streszczenie

Artykuł dotyczy wybranych zagadnień związanych z zaliczaniem okresu rzeczywistego pozbawienia wolności na poczet kary ograniczenia wolności w trybie art. 63 k.k. Autorka prezentuje odmienny od przyjmowanego dotychczas w doktrynie sposób zaokrąglania okresu uprzedniej izolacji skazanego na poczet orzeczonej następnie względem niego kary ograniczenia wolności, wskazując, że w aktualnym stanie prawnym brak jest podstaw do zaokrąglania tego okresu w górę do pełnego miesiąca, a zaokrąglenie powinno nastąpić w górę jedynie do pełnego dnia. W pracy zwrócono również uwagę na trudności związane z dokonywaniem zaliczenia okresu rzeczywistego pozbawiania wolności na poczet kary ograniczenia wolności, wynikające z braku koherencji pomiędzy okresem jednego roku, a okresem 12 miesięcy (art. 12c k.k.w.). Omówiony został także wpływ zaliczenia skazanemu okresu izolacji, w trybie art. 63 k.k., na możliwość zwolnienia go od reszty kary na podstawie art. 83 k.k.

Słowa kluczowe: kara ograniczenia wolności, zaliczenie okresu rzeczywistego pozbawienia wolności, zwolnienie skazanego od reszty kary ograniczenia wolności

ALGUNOS COMENTARIOS SOBRE LA CÓMPUTO DEL PERIODO DE PRIVACIÓN DE LIBERTAD EFECTIVA PARA LA PENA DE RESTRICCIÓN DE LIBERTAD EN VIRTUD DEL ART. 63 DEL CÓDIGO PENAL

Resumen

El artículo versa sobre algunos problemas relacionados con el cómputo de periodo de privación de libertad efectiva para la pena de restricción de libertad impuesta en virtud del art. 63 del código penal. La autora presenta el cómputo de redondeo de previo aislamiento, asentado en la doctrina, para la pena de restricción de libertad impuesta posteriormente, indicando que en la regulación vigente faltan bases para redondear este periodo hasta el mes completo, por lo que habrá que redondear únicamente hasta el día completo. Se presta también atención a las dificultades relativas al cómputo de periodo de privación de libertad efectiva para la pena de restricción de libertad, que se deben a falta de coherencia entre el periodo de un año y el periodo de 12 meses (art. 12c del código penal de ejecución). Se habla también de cómo afecta el cómputo de periodo de aislamiento de condenado a la pena de restricción de libertad en virtud del art. 63 del código penal a la posibilidad de eximirle del resto de la pena en virtud del art. 83 del código penal.

Palabras claves: pena de restricción de libertad, cómputo de periodo efectivo de privación de libertad, liberación de condenado del resto de la pena de restricción de libertad

НЕСКОЛЬКО ЗАМЕЧАНИЙ ОТНОСИТЕЛЬНО ЗАЧЕТА ВРЕМЕНИ СОДЕРЖАНИЯ ПОД СТРАЖЕЙ В СРОК НАКАЗАНИЯ В ВИДЕ ОГРАНИЧЕНИЯ СВОБОДЫ В СООТВЕТСТВИИ СО СТ. 63 УК

Аннотация

В статье рассмотрены некоторые вопросы, связанные с зачтением времени содержания под стражей в срок наказания в виде ограничения свободы в соответствии со ст. 63 УК. Автор представляет метод округления времени предварительного заключения осужденного при его зачете в срок назначенного ему наказания в виде ограничения свободы, который отличается от ранее принятого в доктрине. Она указывает, что действующее законодательство не дает оснований для округления этого срока в большую сторону до целого месяца, и что округление должно проводиться в большую сторону только до целого дня. В работе также обращено внимание на трудности, связанные с зачтением времени фактического лишения свободы в срок наказания в виде ограничения свободы из-за несовпадения периода длительностью один год с периодом длительностью 12 месяцев (статья 12c УИК). В ней также обсуждается влияние зачета осужденному времени содержания под стражей в соответствии со ст. 63 УК на возможность его освобождения от отбывания оставшейся части наказания в соответствии со ст. 83 УК.

Ключевые слова: наказание в виде ограничения свободы; зачет времени фактического лишения свободы; освобождение осужденного от отбывания оставшейся части наказания в виде ограничения свободы

EINIGE BEMERKUNGEN ZUR ANRECHNUNG DER TATSÄCHLICHEN DAUER DES TATSÄCHLICHEN FREIHEITSENTZUGS AUF EINE FREIHEITSBESCHRÄNKENDE STRAFE NACH ARTIKEL 63 DES POLNISCHEN STRAFGESETZBUCHES

Zusammenfassung

Der Artikel befasst sich mit ausgewählten Fragen im Zusammenhang mit der Anrechnung der Dauer des tatsächlichen Freiheitsentzugs auf eine freiheitsbeschränkende Strafe nach Artikel 63 des polnischen Strafgesetzbuches. Die Verfasserin stellt eine von der bisher in der Rechtslehre anerkannten Praxis abweichende Methode zur Rundung der Dauer des vorherigen Freiheitsentzugs eines Verurteilten auf die nachfolgend gegen diesen verhängte Freiheitsbeschränkungsstrafe zur Diskussion und weist darauf hin, dass nach dem aktuellen Stand der Rechtsvorschriften keine Grundlage dafür besteht, diese Zeitdauer auf volle Monate aufzurunden und eine Aufrundung nur auf ganze Tage erfolgen sollte. Die Arbeit machte auch auf die Schwierigkeiten im Zusammenhang mit der Anrechnung der tatsächlichen Haftdauer auf eine freiheitsbeschränkende Strafe aufgrund der mangelnden Kohärenz zwischen dem Zeitraum von einem Jahr und der Zeit von 12 Monaten (Artikel 12c des polnischen Strafvollstreckungsgesetzbuches – *Kodeks karny wykonawczy*) aufmerksam. Ebenfalls erörtert wird der Einfluss, den die Anrechnung der Isolationszeit eines Verurteilten nach Artikel 63 des polnischen Strafgesetzbuches auf die Möglichkeit hat, diesem den Rest seiner Strafe gemäß Artikel 83 des polnischen Strafgesetzbuches zu erlassen.

Schlüsselwörter: Freiheitsbeschränkungsstrafe, Anrechnung der Dauer des tatsächlichen Freiheitsentzugs, Befreiung einer zu Freiheitsbeschränkung verurteilten Person von der Reststrafe

QUELQUES REMARQUES CONCERNANT L'IMPUTATION DE LA PÉRIODE EFFECTIVE DE PRIVATION DE LIBERTÉ SUR LA PEINE DE RESTRICTION DE LIBERTÉ PRÉVUE À L'ARTICLE 63 DU CODE PÉNAL

Résumé

L'article concerne certaines questions liées à l'imputation de la période effective de privation de liberté sur la peine de restriction de liberté conformément à la procédure de l'art. 63 du Code pénal. L'auteur présente un moyen, différent de celui adopté jusqu'à présent dans la doctrine, d'arrondir la période d'isolement préalable d'un condamné à la condamnation ultérieure à une restriction de liberté, en indiquant que, dans le cadre juridique actuel, il n'y a aucune raison d'arrondir cette période à un mois complet, et que l'arrondi devrait avoir lieu vers le haut jusqu'à la journée complète. L'auteur attire également l'attention sur les difficultés liées à l'imputation de la période effective de privation de liberté sur la peine de restriction de liberté résultant d'un manque de cohérence entre la période d'un an et la période de 12 mois (article 12c du Code pénal exécutif). L'impact de l'octroi au condamné d'une période d'isolement conformément à l'art. 63 du Code pénal pour la possibilité de libération du reste de sa peine conformément à l'art. 83 du Code pénal a également été discuté.

Mots-clés: restriction de liberté, l'imputation de la période d'emprisonnement effective, libération du condamné du reste de la peine de restriction de liberté

ALCUNE OSSERVAZIONI SULLA DETRAZIONE DEL PERIODO DI EFFETTIVA PRIVAZIONE DELLA LIBERTÀ DALLA PENA DETENTIVA SULLA BASE DELL'ART. 63 DEL CODICE PENALE

Sintesi

L'articolo riguarda aspetti selezionati legati alla detrazione del periodo di effettiva privazione della libertà dalla pena detentiva ai sensi dell'art. 63 del Codice penale. L'autrice presenta un modo diverso da quelli finora assunti di arrotondamento del periodo di precedente isolamento del condannato, da detrarre dalla pena detentiva successivamente comminata nei suoi confronti, indicando che nell'attuale contesto normativo non vi sono le basi per arrotondare tale periodo per eccesso al mese intero, mentre l'arrotondamento dovrebbe essere svolto per eccesso unicamente al giorno intero. Nel lavoro si è posta anche l'attenzione sulle difficoltà legate alla detrazione del periodo di effettiva privazione della libertà dalla pena detentiva derivanti dalla mancanza di coerenza tra il periodo di un anno e il periodo di 12 mesi (art. 12c del Codice penale esecutivo). È stato anche trattato l'effetto della detrazione del periodo di isolamento del condannato, ai sensi dell'art. 63 del Codice penale, sulla sua possibile liberazione condizionale sulla base dell'art. 83 del Codice penale.

Parole chiave: pena detentiva, detrazione del periodo di effettiva privazione della libertà, liberazione condizionale del condannato

Cytuj jako:

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RIGHT TO APPROPRIATE REPRESENTATION OF DEFENDANTS WITH INTELLECTUAL DISABILITIES IN CRIMINAL PROCEEDINGS

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There is no doubt that people with mental and intellectual disabilities who are parties to criminal proceedings should be ensured opportunities to exercise their right to equal treatment of all citizens.[1] Apart from Article 32 of the Constitution of the Republic of Poland, this results directly from Article 13 of the Convention on the Rights of Persons with Disabilities, which obliges States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participation, including as witnesses, in all legal proceedings, including at investigations and other preliminary stages.[2] The necessity of taking into account the disability of victims is also emphasised in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.[3]

Intellectual disability of persons who are subject to criminal proceedings[4] means that they are covered by the definition of suspected or accused persons who require special treatment. The Preamble to the Commission Recommendation of

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1 Compare K.L. Paprzycki, *Osoba niepełnosprawna psychicznie w prawie i postępowaniu karnym. Zarys problematyki*, Forum Iuridicum 2, 2002, pp. 107–111, 119.

2 Dz.U. 2012, item 1169.

3 OJ L 315, 14.11.2012, p. 57.

4 The article presents a deepened analysis of some theses presented in a conference paper at the 9th Convention of Criminal Procedure Departments: *Quo vadit processus criminalis? Proces karny sensu largo – rzeczywistość i wyzwania*, Łódź 16–18 September 2019.

27 November 2013[5] devoted to this category of participants to criminal proceedings indicates that it applies to all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities. Moreover, the act lays down the necessity of presuming particular vulnerability of persons suspected or accused in criminal proceedings. However, although the act is declarative in nature, it does not remain only in the declarative sphere. The need to grant those people additional rights was also expressed in several directives of the European Parliament and of the Council.[6]

The content of the above-mentioned regulations and standards laid down in them aimed at ensuring that accused persons with intellectual disability have relevant safeguards justifies the attempt to assess relevance of Polish solutions in the context of appropriate procedural representation. The analysis will cover two most important aspects: firstly, theoretical and practical issues concerning granting intellectually disabled persons legal assistance will be analysed not only through the prism of statutory solutions but also recommendations addressed to law enforcement bodies. Secondly, the article will present the analysis of national provisions concerning the participation of an appropriate adult in proceedings involving this category of suspects or accused persons in the light of the Commission Recommendation. Apart from the comparison of regulations concerning the representation of a victim and the accused when they fulfil the criterion of 'a vulnerable person' but are not legally incapacitated, an institution of a temporary advisor envisaged in civil procedure will also be mentioned. The discussion presented in the article justifies a statement that the existing regulations are not sufficient to ensure that people with intellectual disability get real legal support and that there is no regulation of grounds for and participation of a person taking care of an accused intellectually disabled person in procedural activities.

The findings of empirical research show that the issues are not just theoretical in nature. Although there are no up-to-date statistics concerning the situation in

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[5] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (OJ C 378/02, 24.12.2013, p. 8); hereinafter Commission Recommendation.

[6] Apart from Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1), which is beyond the scope of analysis in this article, although they should be classified as a category of people requiring special support, these are: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010. p. 1); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1); Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

Poland[7] showing the scale of the phenomenon, the data of 1983 indicate that ca. 40% of convicts were recognised as suffering from some type of mental disability.[8] It should be emphasised here that although the Act on the protection of mental health[9] includes mentally impaired persons in the category of persons with psychological disorders, the above-mentioned statutory term, though still quite commonly used in legal literature and case law, is subject to criticism in medical literature.[10] That is why, a term of 'intellectual disability' (ID) is used instead of 'mental impairment', 'intellectual retardation' or 'general learning disability'.[11] As Piotr Gałecki and Kinga Bobińska emphasise: 'The legislator does not take into account the dynamics of changes in the medical approach to the issues of mental health.'[12] Although the proportion of people with intellectual development disorder[13] is difficult to determine, it is estimated to be 1% of the population, although according to some sources, it may reach 2–3%.[14] Based on research conducted in various states, it is assumed that the proportion of people with ID among convicts accounts for 4–10%. According to Janusz Heitzman's estimation, in the case of convict population of 70 thousand, it may concern 3 thousand to 7 thousand persons.[15] Regardless of methodological reservations, over-representation of people with intellectual development disorder among prisoners is confirmed by data obtained in other countries.[16]

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[7] M. Gordon, *Osoby niepełnosprawne w jednostkach penitencjarnych*, paper presented at the First National Congress on Human Rights on 9 December 2017, information available at: https://www.rpo.gov.pl/pl/content/kpo/panel/panel-sytuacja-osob-z-niepelnosprawnoscia-intelektualna-lub-psychiczna-w-jednostkach-penitencjarnych (accessed 7.6.2019).

[8] According to M. Gordon, *Sytuacja osób z niepełnosprawnością intelektualną lub psychiczną w jednostkach penitencjarnych*, available at: https://webcache.googleusercontent.com/search?q=cache:RCiAr9paDMgJ:https://www.rpo.gov.pl/sites/default/files/M%2520Gordon%2520Osoby%2520niepe%25C5%2582nosprawne%2520w%2520jednostkach%2520penitencjarnych.pptx+&cd=3&hl=pl&ct=clnk&gl=pl (accessed 10.9.2019).

[9] Article 3 para. 1 Act of 19 August 1994 on the protection of mental health (consolidated text, Dz.U. 2018, item 1878, as amended).

[10] P. Gałecki, A. Szulc, *Psychiatria*, Wrocław 2018, p. 365; also the Ombudsman draws attention to that in Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2018, p. 314, available at: https://www.rpo.gov.pl/sites/default/files/Informacja%20Roczna%20Rzecznika%20Praw%20Obywatelskich%20za%20rok%202018.pdf (accessed 10.2.2020).

[11] P. Gałecki, A. Szulc, *supra* n. 10, p. 367.

[12] As the authors predict, in the future the term 'ID' will be recognised as stigmatising, which will mean the need to change it, K. Bobińska, P. Gałecki, K. Eichstaedt, *Ustawa o ochronie zdrowia psychicznego. Komentarz*, Warszawa 2016, pp. 43, 45.

[13] The term is quoted after K. Bobińska, P. Gałecki, K. Eichstaedt, *ibid*., p. 47.

[14] P. Gałecki, A. Szulc, *supra* n. 10, pp. 365, 372.

[15] J. Heitzman, *Niepełnosprawni intelektualnie i chorzy psychicznie w jednostkach penitencjarnych*, [in:] E. Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością intelektualną lub psychiczną osadzone w jednostkach penitencjarnych. Z uwzględnieniem badań przeprowadzonych przez pracowników Biura Rzecznika Praw Obywatelskich*, Warszawa, 2017, p. 19.

[16] G. Murphy, J. Mason, *Osoby niepełnosprawne intelektualnie w konflikcie z prawem*, [in:] N. Bouras, G. Holt (eds), Polish edition: A. Florkowski, P. Gałecki (eds), *Zaburzenia psychiczne i zaburzenie zachowania u osób niepełnosprawnych intelektualnie*, transl. by M. Grzesiak, Wrocław 2019, p. 196.

Some authors also recognise intellectual disability as a factor more conducive to the commitment of crime than physical impairment,[17] which encounters empirical justification in some research conducted in various countries.[18] It should be emphasised, however, that there are also opinions negating or at least challenging this thesis.[19] It is hard to disagree with Glynis Murphy and Jonathan Mason who write: 'Maybe people with ID are not so fit to avoid being apprehended by the police […], maybe they are also more "visible" or "easier" to apprehend (or even to be unjustly convicted […].'[20] As it is rightly pointed out in literature, deficiencies in the mental sphere have more negative effects than physical impairment; they even preclude people who suffer from them from defending themselves efficiently.[21] It is highlighted not only in Polish literature but also in, e.g. Swedish,[22] Czech[23] or English-Welsh[24] analyses. Around 90% of such people have problems with understanding, expressing their thoughts, social communication and reading; they often cannot understand information provided or questions asked.[25] It is also pointed out that people with intellectual development disorder can be more likely

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[17] M. Ciosek, *Psychologia sądowa i penitencjarna*, Warszawa 2003, pp. 208–210.

[18] Research findings presented by G. Murphy, J. Mason, *supra* n. 16, pp. 190–197.

[19] P. Gałecki, K. Eichstaedt, K. Bobińska, *Aspekty prawne i orzecznictwo u osób z niepełnosprawnością intelektualną w polskim ustawodawstwie*, [in:] K. Bobińska, T. Piertas, P. Gałecki (eds), *Niepełnosprawność intelektualna – etiopatogeneza, epidemiologia, diagnoza, terapia*, Wrocław 2012, pp. 530–531 and sources referred to therein.

[20] G. Murphy, J. Mason, *supra* n. 16, pp. 190, 207, 210.

[21] R.A. Stefański, [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2017, p. 895; M. Mazur, *Wybrane aspekty prawa do obrony w kontekście osób z niepełnosprawnością intelektualną lub psychiczną*, [in:] E. Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością*, *supra* n. 15, p. 107. It was also emphasised by the Supreme Court, which, referring to the Strasburg case law, indicated that 'just the lack of a defence counsel during the first interrogation in preparatory proceedings against a suspect does not constitute an obstacle to use his/her explanations provided in such conditions at a trial due to Article 6 para. 1 in conjunction with Article 6 para. 3(c) European Convention on Human Rights of 1950 provided that there is no objective vulnerability of the suspect to harm.', the Supreme Court ruling of 5 April 2013, III KK 327/12, OSNKW 2013, No. 7, item 60.

[22] According to Civil Rights Defenders and RMSH, *Alternative Report to the Swedish Government's Response on the Compliance of the EU-Commission's Recommendation of 27 November 2013 on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings (2013/C 378/02)*, Stockholm, November 2016, p. 4 et seq., available at: https://crd.org/wp-content/uploads/2016/12/CRD-Report-on-EU-Commission-Recommendation-on-procedural-safeguards-for-vulnerable-suspected-or-accused-in-criminal-proceedings-2013%EF%80%A2C-37-8%EF%80%A202.pdf (accessed 20.2.2019).

[23] Z. Durajová, M. Střítesk, *Dignity at Trial. Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings. Key Findings of the Czech National Report*, League of Human Rights, p. 7, available at: https://bim.lbg.ac.at/en/project/current-projects-projects-human-dignity-and-public-security-projects-development-cooperation-and-business/dignity-trial-enhancing-procedural-safeguards-suspects-intellectual-and-psychosocial-disabilities (accessed 19.2.2020).

[24] F. Gerry, P. Cooper, *Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility*, Journal of Judicial Administration 26 (4), 2017, p. 1.

[25] European Union Agency for Fundamental Rights, *Rights of Suspected and Accused Persons Across the EU: Translation, Interpretation and Information*, Luxembourg 2016, p. 96, available at: https://fra.europa.eu/en/publication/2016/rights-suspected-and-accused-persons-across-eu-translation-interpretation-and (accessed 20.2.2020).

to be affected by suggestions made during an interrogation, which can increase the risk of self-incrimination resulting from the formulation of questions asked.[26]

In accordance with para. 3, Section 1 Commission Recommendation, vulnerable persons should be associated in accordance with their best interests to the exercise of procedural rights taking into account their ability to understand and effectively participate in the proceedings. It is also emphasised in the preamble of the document that there is a need to provide them with appropriate assistance and support during criminal proceedings. The issue of vulnerable persons can be analysed on a few levels, however, in this paper, only one aspect is discussed more thoroughly: the right to appropriate representation during procedural activities.

In the Polish case law and legal doctrine, deficiencies connected with intellectual disability are traditionally associated with the issue of obligation to have a defence counsel. It is of course a right approach, and casuistic analysis of case law shows that such persons must be represented by the counsel due to the need to fulfil the criteria laid down in Article 79 § 1(3) and (4) Criminal Procedure Code (CPC) or in case of recognition of another circumstance hampering defence.[27] The recognition by the Polish legislator of the obligation to have a defence counsel in the circumstances mentioned in the above provisions can be *prima facie* regarded as being in compliance with para. 11, Section 3 Commission Recommendation, which stipulates that if a vulnerable person is unable to understand and follow the proceedings, the right to a lawyer in accordance with Directive 2013/48/EU should not be waived. What is fundamental and particularly important in this context is the issue resulting from the Supreme Court's[28] statement that the assessment of circumstances is not only applicable to the relative obligation to have a counsel[29] but also to the grounds for the counsel appointment based on the present content of Article 79 § 1(4) CPC. As Katarzyna Dudka rightly notes, the necessity of determining whether the accused persons can defend themselves in a reasonable way 'is extremely evaluating in nature'.[30]

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[26] G. Murphy, J. Mason, *supra* n. 16, p. 202 and sources referred to therein; also compare J. Heitzman, *supra* n. 15, p. 22.

[27] R.A. Stefański, *Obrona obligatoryjna w polskim procesie karnym*, Warszawa 2013, pp. 140–148, 168–177; *idem*, *Obrona obowiązkowa ze względu na okoliczności utrudniające obronę*, Prokuratura i Prawo 12, 2006.

[28] The Supreme Court rulings: of 7 February 2004, II KK 277/02, OSNKW 2004, No. 4, item 43; of 25 June 2014, II KK 124/14, LEX No. 1480317.

[29] R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 911; *idem*, *Obrona obligatoryjna*, *supra* n. 27, p. 166; *idem*, *Obrona obowiązkowa*, *supra* n. 27, p. 111 and case law referred to therein; K. Eichstaedt, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2018, p. 410; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2014, p. 356; R.A. Stefański, *Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 r.*, [in:] M. Kolendowska-Matejczuk, K. Szwarc (eds), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014, p. 29.

[30] K. Dudka, *Wyznaczniki procesowej pozycji obrońcy w procesie karnym*, [in:] M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B.T. Bieńkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa 2015, p. 60; attention is also drawn to that by R.A. Stefański, *Obrona obligatoryjna*, *supra* n. 27, p. 123; M. Klejnowska, *Prawo do samodzielnej i rozsądnej obrony w świetle nowelizacji Kodeksu postępowania karnego z dnia 27 września 2013 r.*, [in:] M. Rogacka-Rzewnicka et al. (eds), *Wokół gwarancji*, *supra* n. 30, p. 239;

Another issue connected with ensuring a defence counsel's assistance for an accused person with intellectual disability can result from the lack of efficient regulations guaranteeing appropriate flow of information. The rules and regulations for internal operations of public prosecution organisational units obliges a prosecutor, in case of the recognition of circumstances justifying the appointment of a counsel in accordance with Article 79 § 1 and § 2, to file a relevant motion to the president of a competent court without delay.[31] However, it is worth drawing attention to the guidelines issued by the Chief Commander of the Police that indicate that in the case the behaviour of the accused person during an interrogation raises justified doubts as to his/her sanity and the continuation of proceedings might result in justified charges of violation of the rights of the accused persons, a police officer should stop interrogating them, document the reason for the decision in the report and refer the preparatory proceeding files to a prosecutor with a motion to appoint two expert witnesses – psychiatrists.[32] It is clearly stated in § 38 that this obligation is limited to this activity and the situation concerning justified doubts as to sanity of the accused occurring in its course. This surely makes reference to the approach to the reasons for the recognition of the obligatory participation of a defence counsel before the amending statute of 2013 entered into force. However, it divided the grounds for granting the accused professional assistance into *tempore criminis* and *tempore procedendi*. It was emphasised in the justification for the bill that in the circumstance laid down in § 3, it was to refer to the content of Article 31 § 1 and § 2 Criminal Code and not 'as before, to the concept of "sanity", which is difficult to define', with the simultaneous separate approach to the grounds for recognition of a defence counsel's participation as obligatory due to justified doubts as to the ability of the accused to defend themselves in an independent and reasonable way.[33] Although in the legal state before 1 July 2015, in accordance with the Supreme Court resolution of 21 January 1970, it was also assumed that doubts as to sanity of the accused person concern not only the moment of a crime commission but also the period of criminal proceedings,[34] the issue required urgent and relevant amendment. It is also important that, despite the fact that a court was granted competence to decide

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K. Eichstaedt, *Kodeks postępowania karnego*, *supra* n. 29, p. 410; S. Ładoś, *Wątpliwości co do stanu zdrowia psychicznego jako przesłanka obligatoryjnej obrony formalnej*, [in:] M. Kolendowska-Matejczuk, K. Szwarc (eds), *supra* n. 29, p. 89 et seq. The Supreme Court indicated the existence of objective evaluating criteria for justified doubts concerning sanity of the accused in relation to grounds for obligatory participation of a defence counsel laid down in Article 70 Criminal Procedure Code of 1969 – the Supreme Court resolution of 21 January 1970, VI KZP 23/69, OSNKW 1970, No. 2–3, item 15.

[31] Compare § 168(2) Rules and regulations for common organisational units of public prosecution operation – Regulation of the Minister of Justice of 7 April 2016 (Dz.U. 2017, item 1206, as amended).

[32] Guidelines No. 3 of the Chief Commander of the Police of 30 August 2017 concerning the performance of some investigative activities by police officers (Dziennik Urzędowy Komendy Głównej Policji of 2017, item 59).

[33] Justification for the governmental Bill amending the Acts: Criminal Procedure Code, Criminal Code and some other acts, Sejm paper No. 870, p. 30, available in Polish at: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=870 (accessed 22.2.2020).

[34] The Supreme Court resolution of 21 January 1970, VI KZP 23/69, OSNKW 1970, No. 2–3, item 15; R.A. Stefański, *Obrona obligatoryjna*, *supra* n. 27, pp. 126–128; S. Ładoś, *Pozycja prawna*

that there are circumstances in a case that hamper defence, it is assumed that the regulation is also applicable to preparatory proceedings.[35] The interpretation should be approved of also in the context of a recommendation emphasising the necessity of observing the procedural rights granted to vulnerable persons in the course of the whole criminal proceedings. However, due to the wording of the above-mentioned recommendations, there is a considerable risk that the relevant information will not be passed to a prosecutor supervising preparatory proceedings. In addition, as the Ombudsman highlighted in his addresses to the Chief Commander of the Police and the President of the Council of Ministers, the regulations in force do not oblige police officers to document information indicating that a person arrested or one that is subject to other activities may belong to the category of vulnerable persons. In his opinion, the relevant observation should be written down in the arrest or interrogation report. However, in the opinion of the Minister of Internal Affairs and Administration, there is no need to change the report format by introducing a special section and obliging police officers to write down their observations concerning facts or circumstances that may indicate that a person arrested or interrogated may meet the requirements stipulated in the Commission Recommendation.[36]

The cases in which even the direct contact of a court with a person with intellectual development disorder did not always result in obligatory participation of a defence counsel prove the insufficiency of Polish regulations in the area and irregularities concerning the application of provisions, e.g. the famous case in which Judge Alina Czubieniek issued a decision on waiving temporary arrest of the accused with ID who could not write or read.[37] The Ombudsman's procedural interventions resulting from the examination of the situation of 100 persons with intellectual disability or mental disease serving the penalty of deprivation of liberty also confirm this. Most of those cases required that relevant action was taken. He initiated supervision of sentences in 45% of cases. In thirteen (out of fourteen) cassation cases, the Supreme Court recognised irregularities constituting absolute grounds for appeal that consisted in a court's failure to take into account data concerning health condition of the accused indicating doubts as to sanity, as well as unjustified hearing of a case in writ proceedings.[38] Courts have also agreed

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oskarżonego z zaburzeniami psychicznymi, Warszawa 2013, p. 185 et seq.; M. Klejnowska, *supra* n. 30, p. 229 et seq.

[35] R.A. Stefański, *Obrona obowiązkowa*, *supra* n. 27, p. 100; W. Posnow, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2020, p. 246; T. Grzegorczyk, *supra* n. 29, p. 356; S. Steinborn, *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, commentary on Article 79, thesis 23, LEX/el. 2016; K.T. Boratyńska, P. Czarnecki, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2018, p. 269.

[36] J. Nowakowska, *Wczesna identyfikacja osób wymagających szczególnego traktowania, będących uczestnikami postępowania karnego*, [in:] E. Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością intelektualną*, *supra* n. 15, p. 160.

[37] M. Bober, P. Gąciarek, J. Jurkiewicz, J. Kościerzyński (ed.), M. Krasoń, D. Zabłudowska, *Wymiar sprawiedliwości pod presją – represje jako metoda walki o przejęcie kontroli nad władzą sądowniczą i Prokuraturą w Polsce. Lata 2015–2019*, Iustitia Raporty, p. 26, available at: https://www.iustitia.pl/images/pliki/raport2020/Raport_PL.pdf (accessed 9.3.2020).

[38] The Ombudsman's address of 17 March 2017 to the Speaker of the Senate concerning information on activities undertaken by the Ombudsman in relation to proceedings against

with the Ombudsman's charges in 18 out of 22 cases in which he filed a motion to reopen the proceedings due to the recognition of new important, earlier unknown, circumstances supporting the necessity of participation of the defence counsel in the proceedings concluded with legal force.[39]

However, it is necessary to strongly emphasise that the right of persons with intellectual disability to appropriate representation, which is expressed in the Commission Recommendation, has a broader meaning than the right to a lawyer and can be exercised not only through a professional procedural representative. The content of para. 10, Section 3, indicates that a legal representative or an appropriate adult who is designated by the vulnerable person or by the competent authorities to assist that person should be present at the police station and during court hearing. The legal representative, within the meaning of this document, is a person who represents the interests and oversees the legal affairs of the vulnerable person, e.g. a court appointed guardian. The term 'appropriate adult' means a relative or a person in a social relationship with the vulnerable person, who is likely to interact with the authorities and to enable the vulnerable person to exercise his or her procedural rights.

Taking into account the content of the Commission Recommendation, it is worth indicating the evident asymmetrical treatment, still at the legislator's level, of the victim and the accused person, provided that both parties to the proceedings fulfil the criterion of 'vulnerable persons'. Although the provisions in force applicable to the latter entity grant the right to participate in the proceedings to a person who takes care of them not only permanently[40] but also temporarily, and he or she does not have to be appointed by a family court,[41] it is important that this care is really provided.[42] However, Article 76 CPC clearly limits this to minors or incapacitated persons against whom criminal proceedings are conducted. Moreover, although according to the stand dominating literature, which should be approved of, it should also apply to partial deprivation of legal capacity,[43] due to the lack of relevant regulation, there are also opinions that it should be limited to complete

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persons with intellectual or mental disability who are in prisons or on remand, p. 2, available in Polish at: www.senat.gov.pl › senat › senatoswiadczenia › 09_035_818_1_odp (accessed 15.2.2020).

39 J. Nowakowska, *Wprowadzenie*, [in:] Dawidziuk, M. Mazur (eds), *Osoby z niepełnosprawnością intelektualną*, *supra* n. 15, p. 13.

40 T. Grzegorczyk, *supra* n. 29, p. 338; S. Steinborn, *supra* n. 35, commentary on Article 76, thesis 5.

41 R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 855.

42 W. Posnow, *supra* n. 35, p. 239; P. Mazur, W. Nowak, *Sytuacja prawna opiekuna oskarżonego ubezwłasnowolnionego całkowicie w polskim postępowaniu karnym przed sądem pierwszej instancji*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 1, 2007, pp. 88–90.

43 R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 856; A. Światłowski, *Przedstawiciel ustawowy oskarżonego nieletniego lub ubezwłasnowolnionego*, [in:] C. Kulesza (ed.), *System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, p. 859; S. Steinborn, *supra* n. 35, commentary on Article 76, thesis 3; W. Posnow, *supra* n. 35, pp. 238–239; M. Jankowska, K. Witkowska, *Niepoczytalność w prawie karnym, w prawie cywilnym a udział i reprezentacja stron procesowych z zakłóceniami czynności psychicznych w procesie karnym*, Wojskowy Przegląd Prawniczy 2, 2011, p. 45.

incapacitation.[44] An important issue that deserves separate discussion is also the establishment of instruments aimed at ensuring that procedural bodies be really informed about a civil court final decision[45] concerning this matter in every case.

In relation to the accused person, the catalogue of situations enabling third parties to represent him or her is much broader. It is not only minority or incapacitation but also helplessness, which can also apply to persons enjoying all civil rights.[46] In accordance with Article 51 § 3 CPC, the reason why they can exercise their rights through another entity may be in particular old age or health condition. As it is rightly indicated in literature, this also concerns mental sphere:[47] circumstances indicating that it is a person with mental or intellectual impairment, the states 'that justify complete or partial incapacitation, although it has not been introduced, as well as when there are no grounds for issuing such a decision but a person has considerable difficulties with the independent exercise of his/her rights'.[48]

Enacting the above provision by means of the amending statute of January 2003 was justified by social reasons, in particular the need to protect victims.[49] It is approved of in literature,[50] also due to the fact that it makes it easier for some participants to act in proceedings.[51] As it has been mentioned above, the regulation 'fills the huge gap'[52] because before the amendment the Criminal Procedure Code did not allow legal representation of helpless victims.[53] It cannot be excluded that this resulted from more pragmatic reasons: the necessity of ensuring representation for such participants in order to enable procedural bodies to conduct procedural activities with their participation (in particular in preparatory proceedings) and their status of a party granted by force of law. Finally, it is also important in this context that the statute of 28 November 2014[54] introduced Article 299a § 1 CPC.

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[44] H. Paluszkiewicz, [in:] K. Dudka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2018, p. 209; K. Eichstaedt, *Kodeks postępowania karnego*, *supra* n. 29, p. 393.

[45] The Supreme Court ruling of 9 April 1968, II CR 112/68, LEX No. 6309.

[46] T. Grzegorczyk, *supra* n. 29, p. 273.

[47] S. Steinborn, *supra* n. 35, commentary on Article 51, thesis 12; K.T. Boratyńska, P. Czarnecki, *supra* n. 35, p. 217.

[48] R.A. Stefański, *Kodeks postępowania karnego*, *supra* n. 21, p. 727; also compare M. Jankowska, K. Witkowska, *supra* n. 43, pp. 43–44.

[49] Justification for the Bill of … 2001 amending the Acts: Criminal Code, Criminal Procedure Code, Code of Criminal Execution and some other acts [Projekt ustawy z dnia … 2001 o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy i niektórych innych ustaw], Czasopismo Prawa Karnego i Nauk Penalnych, Year V: 2001/2, p. 46.

[50] P. Hofmański, *Opinia o rządowym projekcie Ustawy o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy oraz niektórych innych ustaw (druk nr 2510 – w zakresie przepisów procesowych) oraz poselskich projektach ustaw o zmianie Ustawy – Kodeks postępowania karnego (druki nr: 1638, 1655, 1814, 2154 oraz 2336)*, Czasopismo Prawa Karnego i Nauk Penalnych, Year V: 2001/2, p. 60.

[51] S. Zabłocki, *Opinia dotycząca zmian w Kodeksie postępowania karnego, zawartych w projekcie rządowym (druk nr 2510) oraz w projektach poselskich (druki nr: 2336, 2154, 1638, 1814 i 1655)*, Czasopismo Prawa Karnego i Nauk Penalnych, Year V: 2001/2, p. 123.

[52] A. Światłowski, *supra* n. 43, p. 856.

[53] S. Steinborn, *supra* n. 35, commentary on Article 51, thesis 12.

[54] Act of 28 November 2014 on the protection of and assistance to victims and witnesses (Dz.U. 2015, item 21).

The regulation, which obviously resulted from the need to implement Article 3 para. 3 Directive 2012/29/EU, grants a victim the right to be assisted in preparatory proceedings in which he/she participates by a person of his/her choice (provided that it does not preclude or considerably hamper the activities). In relation to persons with intellectual disability against whom criminal proceedings are conducted, there are no legal grounds for admitting an appropriate adult to participation in procedural activities, except in the situation stipulated in Article 76 CPC.

It is worth drawing attention to the institution of a temporary advisor envisaged in civil proceedings. In accordance with Article 548 Code of Civil Procedure (CCP), in a situation when a motion is filed to incapacitate an adult, when initiating proceedings or in their course, a court can appoint a temporary advisor if it is recognised necessary for the protection of a person or his or her property (it is emphasised in literature that the fulfilment of this condition means an obligation[55] not a right). This entity's task is to protect the interests of a person against whom incapacitation proceedings have been initiated in the transition period.[56] Apart from a spouse, a relative or another person in close relationship, the role may be also played by a person designated by a non-governmental organisation the statutory tasks of which is the protection of the right of disabled people, providing them with assistance or the protection of human rights (Article 548 § 4 and Article 546 § 3 CCP). A court can request the above-mentioned entity to designate a person who might be appointed a temporary advisor in case there are no close relatives or there is no possibility of appointing one in this character due to a conflict between them and a person subject to incapacitation proceedings.[57] In accordance with Article 549, the appointment of the temporary advisor results in the recognition of a person's limited legal capacity as in the case of partial incapacitation. It is indicated in literature that the temporary advisor is a statutory representative of a person and a court should determine the scope of competences granted in its appointment decision,[58] yet unlike in the case of the guardian, the temporary advisor's competences concern the whole legal sphere of the person represented.[59]

Theoretically, *de lege lata*, taking into account entitlements granted to a prosecutor in civil proceedings, there are no legal obstacles to initiate proceedings concerning deprivation or limitation of a suspect's legal capacity and file a motion to appoint a temporary advisor if, in his opinion, the requirements under Article 13 Civil Code are satisfied (Article 546 § 2 CCP). In practice, due to the regulations in force concerning organisation and division of work in particular organisational units, the use of such a possibility would have to result in the lengthening of proceedings:

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[55] J. Gudowski, [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. IV, Warszawa 2016, p. 188; B. Czech, [in:] A. Marciniak (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. III, Warszawa 2020, p. 744.

[56] K. Flaga-Gieruszyńska, [in:] K. Flaga-Gieruszyńska, A. Zieliński, *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2019, p. 1202.

[57] P. Pruś, [in:] M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa 2015, pp. 103–104; A. Górski, [in:] H. Dolecki, T. Wiśniewski (eds), *Kodeks postępowania cywilnego. Komentarz*, Vol. III, Warszawa 2013, p. 132.

[58] B. Czech, *supra* n. 55, pp. 745–746.

[59] J. Gudowski, *supra* n. 55, p. 188.

usually by referring the case files to a prosecutor competent in civil cases. At the same time, it would mean the necessity of suspending criminal proceedings, which, due to the tasks laid down in Articles 297 CPC and 2 CPC, seems to be difficult to imagine. Simultaneously, it would be in general excluded in cases where a suspect with intellectual disability is on remand, regardless of their vulnerability and the need of assistance.

There are a few arguments for the need to grant the accused vulnerable persons additional guarantees, apart from the grounds for the implementation of the Commission Recommendation. For example, one can indicate the modification of criminal procedure, in particular initiated by the amending statute of 2013, which fundamentally changed the rules of the accused person's participation in a trial, and was connected with the introduction of an elaborated system of instructions. This can cause serious problems with exercising the right to a lawyer, by the way, not only for vulnerable persons. The introduction of the evidence-taking time limit[60] or a possibility of conducting a trial despite justified absence of the accused makes the present situation of persons with intellectual disability in criminal proceedings very difficult. However, the preparatory stage of criminal proceedings, especially conducted in the form of investigation, poses incomparably more threats to the interests of those people. The growing number of cases in which sentences may be issued in the absence of an accused person, especially when a prosecutor enters into a relevant agreement with the accused concerning a penalty or other measures prescribed for a misdemeanour referred to in Article 335 CPC via a police officer, can also result in a lower chance of recognising the problems of the accused person with an intellectual development disorder.

Even only those reasons are for the legitimacy of legislative changes. It is worth drawing attention to the Ombudsman's reasonable demands that, inter alia, police officers should be obliged to report the fact of impeded contact with a person that is subject to the proceeding activities, to record an interrogation electronically and to recognise the inability of the suspect to write or read as a circumstance requiring obligatory participation of a defence counsel *ex lege*, and therefore to eliminate some arbitrariness.[61] Apart from the above-mentioned necessity of harmonising the guidelines of the Chief Command of the Police and the present content of Article 79 CPC, similarly to covering all procedural activities performed in relation to the accused persons or suspects with an obligation resulting from § 38 in case their features or behaviour prescribe presumption of their vulnerability, the introduction of a third party's right to participate in the proceedings needs urgent regulation. *De lege ferenda*, it might consist in supplementing Article 76 CPC, following the model of the regulation concerning a helpless victim. At the same time, it would

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[60] Ł. Chmielniak, M. Klonowski, A. Rychlewska-Hotel, J. Zagrodnik (ed.), *Kodeks postępowania karnego. Komentarz praktyczny do nowelizacji 2019*, Warszawa 2020, commentary on Article 170.

[61] Another proposal concerned legitimacy of social environment interviews in order to establish whether a person subject to proceedings has features confirming that he or she should be recognised as a vulnerable person, which could precede potential psychological or psychiatric examinations, see Ombudsman, *Informacja*, *supra* n. 10, p. 121; also compare M. Mazur, *Wybrane aspekty*, *supra* n. 21, pp. 122–124, 163.

be reasonable to approve of granting a prosecutor the right to apply to a court for requesting a non-governmental organisation (referred to in Article 546 § 3 CCP) to designate a person who could provide assistance to a person with intellectual development disorder in case he or she has no close relative, or there is a lack of interest in or a possibility of taking on this function. It should be also recognised necessary to introduce a provision obliging procedural bodies to unconditionally admit an appropriate adult to participation in proceedings conducted in relation to the accused person with intellectual disability and other vulnerable persons in the course of the entire criminal proceedings. In addition, in opposition to Article 299a CPC, the regulation making it conditional not only on a motion filed by a person against whom the proceedings are conducted but also at the initiative of an appropriate adult as well as *ex officio* should be recognised as justified.

Participation of an appropriate adult in procedural activities concerning accused vulnerable persons undoubtedly has positive influence on their procedural situation. This is confirmed, inter alia, by research into the practice in Austria[62] and some other, not only European, states.[63] However, the fact can be also important from the point of view of procedural bodies and efficiency and effectiveness of procedural activities. As it was indicated in the report of the European Union Agency for Fundamental Rights, the representatives of the broadly understood administration of justice point out communication problems with such persons and appropriate interpretation of their behaviour.[64] The fact that the role of an appropriate adult is not only to assist a vulnerable person within the meaning of the proceedings in which he or she participates but also to facilitate effective communication between him or her and police officers is emphasised in Scottish legislation (section 3(2) The Criminal Justice (Scotland) Act 2016 (Support for Vulnerable Persons) Regulations 2019). The issue is regulated similarly, although more broadly, in the English and Welsh Code C,[65] a legal act issued by the Home Office (after its submission to the Parliament and obtaining the approval of both Houses) based on the Police and Criminal Evidence Act 1984, which is treated as a concise investigation guidebook.[66]

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[62] B. Linder, N. Katona, T. Schleicher, *Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings: Exploring the Need for Actions, Key Findings of the Austrian National Report*, Austria Boltzmann Institute Human Rights, p. 24, available at: https://bim.lbg.ac.at/sites/files/bim/attachments/austria_key_findings_of_the_national_reports.pdf (accessed 28.2.2020).

[63] It concerns e.g. Singapore or the Australian state of Victoria, according to J. Beqiraj, L. McNamara, V. Wicks, *Access to Justice for Persons with Disabilities: From International Principles to Practice*, International Bar Association, October 2017, p. 30, available at: https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf (accessed 2.3.2020).

[64] European Union Agency for Fundamental Rights, *Rights of Suspected and Accused Persons*, *supra* n. 25, p. 96.

[65] The regulation determines the tasks of the appropriate adult in a little broader way than the Scottish statute and indicates that its role is also to safeguard the rights and entitlements and welfare of vulnerable persons; compare paragraphs 1.7–1.7A Code C – Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers, July 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729842/pace-code-c-2018.pdf (accessed 6.2.2020).

[66] J. Sprack, *A Practical Approach to Criminal Procedure*, New York 2011, p. 25.

It is also indicated in literature that the motive behind active participation of this entity is the reduced risk that the discussed category of suspects will provide evidence that may result in unjust conviction.[67]

CONCLUSIONS

Due to inadmissibility of waiving the right of an accused person with intellectual disability to a lawyer, Polish regulations can be recognised as being in conformity with the requirements established by the European Commission. At the same time, due to the evaluating nature of the conditions for obligatory participation of a defence counsel, it is not possible to exclude the risk of a court's failure to appoint such counsel for the accused who meets the criterion of 'a vulnerable person'. Indeed, it is empirically confirmed. Apart from incompatibility of the guidelines of the Chief Commander of the Police with the present wording of Article 79 § 1(3) and (4) CPC, there is an additional problem, which is the lack of a regulation obliging police officers to provide a prosecutor with information about facts suggesting that there is a need to treat a person that is subject to proceedings as a vulnerable one. Apart from sharing the Ombudsman's stand on the legitimacy of the modification of the arrest report form, it is necessary to call for the introduction of relevant and necessary changes in the guidelines and public prosecution service rules and regulations aimed, inter alia, at ensuring the assistance of a defence counsel to persons with intellectual disabilities who participate in procedural activities other than interrogation. A prosecutor's motion to a court to appoint the defence counsel at the stage preceding the formulation of charges would also create a chance that he/she would participate in the first interrogation.

What raises even more serious objections is the irrelevance of the provisions in force applicable to the representation of the accused with intellectual disability by a statutory representative or another appropriate adult. The legislator limited the regulation of the statutory representative's participation in the case of an incapacitated person, in addition, without determining whether it also applies to partial legal incapacitation. Despite theoretical possibility of initiating incapacitation proceedings by a prosecutor and a related possibility of designating a temporary advisor for the accused person, it is necessary *de lege ferenda* to call for an amendment to Article 76 CPC following the model of the change in provisions concerning a helpless victim introduced in 2003. Apart from harmonising Polish law with the European Commission Recommendation, the additional introduction of a provision based on the example of Article 299 CPC but regulating the rules of participation of an appropriate adult in proceedings and acting for the benefit of the accused vulnerable person would reflect the principle of equality.

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[67] C. Palmer, *Still Vulnerable After all These Years*, Crim. L. R. 1996, Sep., 633–644, p. 633 and sources referred to therein.

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RIGHT TO APPROPRIATE REPRESENTATION OF DEFENDANTS WITH INTELLECTUAL DISABILITIES IN CRIMINAL PROCEEDINGS

Summary

The subject of this paper is a discussion of selected issues related to ensuring appropriate representation for people with intellectual disabilities against whom criminal proceedings are conducted. The need to grant them additional rights stems from the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. The text points to problems connected with ensuring in practice the participation of a defence counsel for this category of the accused and with inadequate Polish procedural regulations concerning the obligation to ensure the presence of a legal representative or an appropriate adult during preparatory proceedings and a court hearing. The text also draws attention to the inequality in this respect of the legal situation of the accused and the injured party who require additional support due to, for instance, intellectual development disorders suffered by them.

Keywords: vulnerable person, accused person with intellectual disability, legal representation, appropriate adult

PRAWO DO ODPOWIEDNIEJ REPREZENTACJI OSKARŻONYCH Z NIEPEŁNOSPRAWNOŚCIĄ INTELEKTUALNĄ W POSTĘPOWANIU KARNYM

Streszczenie

Przedmiotem niniejszego opracowania jest omówienie wybranych kwestii związanych z zapewnieniem odpowiedniej reprezentacji osobom z niepełnosprawnością intelektualną, przeciwko którym prowadzone jest postępowanie karne. Powinność przyznania im dodatkowych praw wynika z Zalecenia Komisji Europejskiej z dnia 27 listopada 2013 r. w sprawie gwarancji procesowych dla osób wymagających szczególnego traktowania podejrzanych lub oskarżonych w postępowaniu karnym. W tekście wskazano na problemy związane z realnością zagwarantowania tej kategorii oskarżonym udziału obrońcy oraz niedostateczność polskich regulacji proceduralnych dotyczących powinności zapewnienia obecności przedstawiciela prawnego lub stosownej osoby dorosłej podczas czynności postępowania przygotowawczego oraz rozprawy. W artykule zwrócono również uwagę na asymetrię w tym zakresie pomiędzy sytuacją prawną oskarżonego oraz pokrzywdzonego, którzy z uwagi np. na zaburzenia rozwoju intelektu wymagają dodatkowego wsparcia.

Słowa kluczowe: osoby wymagające szczególnego traktowania, oskarżony z niepełnosprawnością intelektualną, reprezentacja procesowa, stosowna osoba dorosła

DERECHO A LA REPRESENTACIÓN ADECUADA DE ACUSADOS CON DISCAPACIDAD INTELECTUAL EN EL PROCESO PENAL

Resumen

La presente obra analiza algunas cuestiones relacionadas con la obligación de representación adecuada de las personas con discapacidad intelectual contra las cuales se lleva a cabo el proceso penal. El deber de proporcionarles derechos adicionales resulta de la Recomendación de la Comisión, de 27 de noviembre de 2013, relativa a las garantías procesales para las personas vulnerables sospechosas o acusadas en procesos penales. El texto plantea problemas en la práctica de garantizar a esta categoría de acusados la participación de abogado y las deficiencias de regulación procesal polaca relativa al deber de asegurar la presencia del representante legal o persona mayor de edad pertinente durante las diligencias en la fase de instrucción y en el juicio. El artículo presta la atención también a la asimetría en este ámbito entre la situación legal del acusado y del perjudicado que debido, p. ej. a trastornos de desarrollo intelectual requieran ayuda adicional.

Palabras claves: personas que requieran trato especial, acusado con discapacidad intelectual, representación procesal, mayor de edad pertinente

ПРАВО НА НАДЛЕЖАЩЕЕ ПРЕДСТАВИТЕЛЬСТВО В УГОЛОВНОМ ПРОЦЕССЕ ОБВИНЯЕМЫХ С ОГРАНИЧЕННЫМИ УМСТВЕННЫМИ ВОЗМОЖНОСТЯМИ

Аннотация

Работа посвящена обсуждению отдельных вопросов, связанных с обеспечением надлежащего представительства лицам с ограниченными умственными возможностями, в отношении которых возбуждено уголовное дело. Необходимость предоставления им дополнительных прав вытекает из Рекомендации Европейской комиссии от 27 ноября 2013 года относительно процессуальных гарантий для лиц, нуждающихся в особом обращении и являющихся подозреваемыми или обвиняемыми по уголовному делу. В статье обозначены встречающиеся на практике проблемы с обеспечением участия защитника для этой категории обвиняемых, а также отмечена недостаточность польских процессуальных норм, касающихся обязанности обеспечить присутствие законного представителя или соответствующего взрослого лица во время предварительного расследования и судебного процесса. Автор также обращает внимание на асимметричность, возникающую в этой связи между правовым положением обвиняемых и потерпевших, которым требуется дополнительная поддержка, например, в силу расстройств умственного развития.

Ключевые слова: лица, требующие особого подхода; обвиняемый с ограниченными умственными возможностями; процессуальное представительство; соответствующее взрослое лицо

DAS RECHT VON ANGEKLAGTEN MIT GEISTIGER BEHINDERUNG AUF EINE ANGEMESSENE VERTRETUNG IN STRAFVERFAHREN

Zusammenfassung

Gegenstand dieser Studie ist die Erörterung ausgewählter Themen im Zusammenhang mit der Problematik, Menschen mit einer geistigen Beeinträchtigung, gegen die ein Strafverfahren durchgeführt wird, eine angemessene Vertretung zu gewährleisten. Aus der Empfehlung der Europäischen Kommission vom 27. November 2013 über Verfahrensgarantien in Strafverfahren für verdächtige oder beschuldigte schutzbedürftige Personen ergibt sich die Pflicht, ihnen zusätzliche Rechte einzuräumen. Im Text werden Probleme im Zusammenhang mit der Machbarkeit angesprochen, solchen Angeklagten die Hinzuziehung eines Verteidigers zu gewährleisten und es wird die Unzulänglichkeit der polnischen Verfahrensvorschriften in Bezug auf die Pflicht hingewiesen, die Anwesenheit eines gesetzlichen Vertreters oder geeigneten Erwachsenen an den Verfahrenshandlungen im Vorverfahren und der Verhandlung sicherzustellen. Der Artikel macht außerdem auf die diesbezügliche Asymmetrie zwischen der rechtlichen Situation von Beschuldigten und Opfern aufmerksam, die beispielsweise aufgrund von Störungen der geistigen Entwicklung zusätzliche Unterstützung benötigen.

Schlüsselwörter: Schutzbedürftige Personen, Beschuldigter mit einer Beeinträchtigung der intellektuellen Fähigkeiten, Prozessvertretung, geeigneter Erwachsener

LE DROIT À UNE REPRÉSENTATION APPROPRIÉE DES PRÉVENUS AYANT UNE DÉFICIENCE INTELLECTUELLE DANS LES PROCÉDURES PÉNALES

Résumé

Le sujet de cette étude est de discuter de certaines questions liées à la garantie d'une représentation adéquate des personnes handicapées mentales contre lesquelles des poursuites pénales sont menées. L'obligation de leur accorder des droits supplémentaires résulte de la recommandation de la Commission européenne du 27 novembre 2013 relative à des garanties procédurales en faveur des personnes vulnérables soupçonnées ou poursuivies dans le cadre des procédures. Le texte fait état de problèmes liés à la réalité de garantir aux aqccusés de cette catégorie la participation du défenseur et à l'insuffisance des règles de procédure polonaises concernant l'obligation d'assurer la présence d'un représentant légal ou d'un adulte approprié lors de la procédure préparatoire et du procès. L'article attire également l'attention sur l'asymétrie à cet égard entre la situation juridique de l'accusé et de la partie lésée qui, en raison, par exemple, de troubles du développement intellectuel, ont besoin d'un soutien supplémentaire.

Mots-clés: personnes nécessitant un traitement spécial, accusé ayant une déficience intellectuelle, représentation légale, adulte approprié

DIRITTO DI ADEGUATA RAPPRESENTANZA DI IMPUTATI CON DISABILITÀ INTELLETTIVE NEL PROCEDIMENTO PENALE

Sintesi

Oggetto del presente elaborato è la presentazione di questioni selezionate legate alla garanzia di adeguata rappresentanza di persone con disabilità intellettive, nei confronti delle quali viene intentato un procedimento penale. L'obbligo di concedere loro dei diritti aggiuntivi deriva dalla Raccomandazione della Commissione, del 27 novembre 2013, sulle garanzie procedurali per le persone vulnerabili indagate o imputate in procedimenti penali. Nel testo si sono indicati i problemi legati alla reale garanzia, a tali categorie di persone, della partecipazione del difensore nonché l'insufficienza delle norme procedurali polacche riguardanti l'obbligo di garantire la presenza del rappresentante legale o di un adulto idoneo durante le attività delle indagini preliminari e durante le udienze. Nell'articolo si è fatta anche notare l'asimmetria in tale ambito tra la situazione giuridica dell'imputato e della parte lesa, che a motivo dei disturbi dello sviluppo intellettuale richiedono un sostegno aggiuntivo.

Parole chiave: persone vulnerabili, imputato con disabilità intellettive, rappresentanza processuale, adulto idoneo

Cytuj jako:

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ADMISSIBILITY OF A CASSATION APPEAL AGAINST THE JUDGMENT ON DISCONTINUANCE OF PROCEEDINGS DUE TO A PERPETRATOR'S INSANITY AND APPLICATION OF PREVENTIVE MEASURES

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The discontinuance of proceedings in accordance with Article 17 § 1(2) of the Polish Criminal Procedure Code (henceforth CPC) in relation to an insane perpetrator, in conjunction with the application of preventive measures laid down in Article 93a § 1 and § 2 of the Polish Criminal Code (henceforth CC) can take place at different stages of criminal proceedings.

In preparatory proceedings, a prosecutor can lodge a motion to a court to discontinue the proceedings and apply preventive measures (Article 324 § 1 CPC). As a rule, the court hears the motion on trial (Article 354(2) *in principio* CPC). When examining the grounds, the court adjudicates on the issue of the perpetration of a prohibited act by the suspect and the need to prevent its repeated commission (preventive measures). It is connected with the necessity of collecting and assessing evidence and reconstructing the facts concerning the perpetration, analysing the elements of social harmfulness of the acts in question and evaluating the level of their harmfulness. The type of a preventive measure to be applied and the way in which it is to be executed must be commensurate with the level of social harmfulness of the act. Placing a perpetrator in an appropriate psychiatric hospital is possible only when the act committed shows a 'significant' level of this criterion (Article 93b § 1 sentence 2 and § 3 sentence 1 CC). The preventive measure in the form of placement in a psychiatric hospital matches the hardship of the penalty of

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deprivation of liberty, however, the length of its application is not determined in advance. In such conditions, the trial most fully safeguards the suspect's rights.[1]

A trial is conducted based on the principles laid down in the Criminal Procedure Code prescribed for this forum, however, its openness is excluded *ex lege* and the legislator did not envisage whatever exceptions to this rule (Article 359(1) CPC). A person whom a prosecutor accuses of the commission of a prohibited act and applies for the discontinuance of proceedings and application of preventive measures is subject to the provisions concerning the accused applied by analogy (Article 380 CPC). In accordance with Article 354(1) CPC, in the case of proceedings concerning a prosecutor's motion to discontinue the proceedings and apply preventive measures, the provisions concerning auxiliary prosecutors are not applicable and a victim cannot be a party to the proceedings, which also affects cassation proceedings.

The provision of Article 354(2) CPC does not determine the type of judgment issued after a trial. It should be derived from a general rule expressed in Article 93 § 1 CPC, which stipulates that in case there is no statutory obligation to issue a sentence, a court should adjudicate by issuing a ruling. Such a conclusion also results from Article 354(3) CPC, which provides that in the case of discontinuance, Article 322 § 2 and § 3 CPC should be applied directly and not 'by analogy' as in the case of Article 414 § 2 CPC. The provision determines what elements should be included in the ruling on discontinued proceedings. Case law and most of the representatives of the legal doctrine remain unanimous as far as the type of judgment issued in accordance with Article 354(2) CPC is concerned.[2] Failure to apply the appropriate form may constitute grounds for lodging, and also accepting, an appellate measure.[3]

The prosecutor's motion can be heard on trial only exceptionally if all the following conditions are met jointly:

1) in the light of the material of the preparatory proceedings, there is no doubt that:
   a) the suspect has committed an offence;
   b) he/she was sane at the moment of the act commission;[4]

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[1] P. Rogoziński, [in:] S. Steinborn (ed.), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016, Article 354, no. 8; L.K. Paprzycki (ed.), *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX/el. 2015, Article 345, no. 8.

[2] The Supreme Court resolution of 19 August 1999, I KZP 21/99, OSNKW 1999, No. 9–10, item 49; the Supreme Court ruling of 6 October 2011, III KZ 67/11, LEX No. 1044043; the Supreme Court judgment of 12 December 2012, II KK 326/12, LEX No. 1231522; R.A. Stefański, [in:] Z. Gostyński (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 1998, p. 225; P. Hofmański (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 1999, pp. 287–288; A. Ważny, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2015, pp. 778–779; K. Eichstaedt, *Środek zabezpieczający w postaci pobytu w zakładzie psychiatrycznym, wątpliwości związane z orzekaniem*, Prokuratura i Prawo 12, 2016, pp. 75–94; although differently, L.K. Paprzycki, *Kodeks postępowania karnego. Komentarz*, LEX/el., Article 354, no. 20.

[3] The Supreme Court judgment of 12 December 2012, II KK 326/12, LEX no. 1231522. The judgment was issued as a result of hearing a cassation case indicating the breach of Article 354 (2) CPC and Article 414 § 1 CPC. In case of appeal against a judgment issued in an inappropriate form, it is possible to apply the same charge to the infringement under Article 438 (2) CPC.

[4] The criteria are not subject to extended interpretation; see the Supreme Court ruling of 17 March 2008, V KK 30/08, OSNKW-R 2008, No. 1, item 663.

2) the court president, an authorised judge (Article 93 § 2 CPC) or a court[5] recognises it as purposeful.

The lack of doubts in the meaning of Article 354(2) CPC is a situation where as early as during the initial stage of the examination of a motion, in the light of evidence collected in the course of the preparatory proceedings, there are no reservations concerning the commission of an act by the suspect and his/her insanity.[6] Filing a motion to be heard at a session should be done carefully. The occurrence of evidence confirming a different course of events, unclear content of evidence collected, including, in particular, judicial and psychiatric opinions, are arguments for filing a motion to hear a case on trial.[7] Hearing a motion at a session should take place without prejudice to the suspect's procedural guarantees. A prosecutor and a counsel for the defence are obliged to participate in the session. As a rule, a suspect should take part in the session and the obligation can be abandoned only in case expert witnesses unanimously state it would be inadvisable. But even in such cases, a court may decide that a suspect's participation is necessary (Article 354 sentence 2 CPC). A victim can also participate in the session. Paradoxically, it extends the scope of his/her rights even if it concerned only the ability to express his/her own reasons in a trial, which is not only conducted with the exclusion of openness but also without the participation of an auxiliary prosecutor in the proceedings, as it has been mentioned above.

A court is bound by a prosecutor's motion, which means that in the case of recognition of grounds for that, it should adjudicate on the discontinuance of proceedings or application of a preventive measure. However, it is not obliged to rule on a preventive measure that a prosecutor has applied for. If the court is convinced that it is necessary to apply another preventive measure (Article 93a § 1 and § 2 CC), it discontinues the proceedings and rules on the application of that measure.[8] On the other hand, in the case it recognises the lack of grounds for accepting the motion, the court refers the case to the prosecutor in order to continue the proceedings (Article 324 § 2 CPC).

A court's decision to discontinue the proceedings and a ruling to apply a preventive measure can be appealed against, regardless of the forum where the case has been heard (Article 459 § 1 and § 2 CPC).

The circle of entities that are entitled to appeal against a court's decision on discontinuing the proceedings and applying a preventive measure includes the parties and persons who are not parties to the proceedings but the decision concerns them directly (Article 459 § 3 CPC). Thus, a prosecutor as well as a person who is subject to the discontinued proceedings and the application of a preventive measure

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[5] D. Świecki, [in:] D. Świecki (ed.), *Kodeks postępowania karnego*, Vol. I: *Komentarz aktualizowany*, LEX/el. 2020, Article 354, no. 8.

[6] K. Eichstaedt, [in:] D. Świecki (ed.), *supra* n. 5, Article 354, no. 8.

[7] P. Rogoziński, [in:] S. Steinborn (ed.), *supra* n. 1, Article 354, no. 10.

[8] The Supreme Court resolution of 26 September 2002, I KZP 13/02, OSNKW 2002, No. 11–12, item 88; decision of the Court of Appeal in Katowice of 22 March 2017, LEX No. 2333277; R.A. Stefański, *supra* n. 2, p. 116; P. Hofmański (ed.), *supra* n. 2, p. 138; M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa 2018, p. 1210; B. Skowron, [in:] K. Dudka (ed.), *Kodeks postępowania karnego. Komentarz*, Wolters Kluwer Polska 2018, Article 324, no. 7.

may undoubtedly file a complaint against the decision. However, there are doubts concerning the status of a victim in the proceedings conducted in accordance with Article 354(2) CPC, and more precisely, whom the decision directly concerns.

In order to resolve the problem, first of all, it is necessary to determine at which stage of the proceedings a court deals with a prosecutor's motion lodged in accordance with Article 324 § 1 CPC. It is important to establish whether these are preparatory proceedings where a victim is a party pursuant to Article 299 § 1 CPC and the court's adjudication is a judicial action in the proceedings or judicial proceedings in which a victim's action as a party depends on his/her role of an auxiliary prosecutor (Articles 53 and 54 § 1 CPC). There is no unanimous stand on this matter in literature.

Some representatives of the doctrine are of the opinion that a prosecutor's motion lodged in accordance with Article 324 § 1 CPC constitutes a court's action in preparatory proceedings and the decision issued is a special type of judgment closing this stage of the proceedings.[9] They argue that upon determining parties to proceedings in Article 354 CPC, the legislator used the terms typical of preparatory proceedings, i.e. 'a suspect' and 'a victim', and not 'the accused' or 'a party'. It is also raised that in relation to the motion alone the situation is not similar to the case of filing an indictment, i.e. it becomes independent of a prosecutor's will (Article 14 § 2 CPC). In the proceedings concerning a motion, in a situation when a court does not recognise grounds for it or upon its withdrawal,[10] the case is referred to a prosecutor to be continued (Article 324 § 2 CPC), which may further result in the prosecutor's lodging of an indictment or discontinuance of the preparatory proceedings. Moreover, the type of adjudication in the form of a ruling and not a sentence is typical of preparatory proceedings. The discontinuance of these preparatory proceedings is a prosecutor's competence (Article 322 § 1 CPC), and a court's competence in this area occurs when there are grounds for the application of a preventive measure (Article 324 § 1 CPC). Statutory provisions also lack norms in accordance with which a prosecutor's motion to discontinue proceedings and apply a preventive measure might, in certain circumstances, substitute for an indictment as it happens, e.g. in relation to a motion to discontinue proceedings conditionally (Article 341 § 2 CPC). The provision of Article 354(1) CPC should be interpreted only as a logical consequence of a fact that the prosecutor is not a counsel for the prosecution in these proceedings and does not lodge an indictment, and a person who is charged with an offence is not the accused.[11]

A different stand is based on an assumption that proceedings conducted pursuant to Article 354 CPC do not constitute a court's interference into preparatory proceedings and are part of the judicial phase with some differences concerning the ruing on a preventive measure. As far as formal requirements are concerned,

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[9] K. Eichstaedt, *Glosa do uchwały SN z 25 lutego 2005 r., I KZP 35/04*, Palestra 3–4, 2007, item 306.

[10] Resolution of seven judges of the Supreme Court of 26 September 2002, I KZP 13/02, OSNKW 2002, No. 11–12, item 88.

[11] K. Eichstaedt, *supra* n. 2, pp. 75–94; glosses on the Supreme Court resolution of 25 February 2005, I KZP 35/04: K. Eichstaedt, Palestra 3–4, 2007, item 306; W. Sych, Przegląd Sądowy 3, 2006, item 132; K. Eichstaedt, [in:] D. Świecki (ed.), *supra* n. 5, Article 354, no. 9.

a motion to discontinue the proceedings and apply a preventive measure is close to an indictment (Article 324 § 1a CPC) and constitutes a basic complaint instigating judicial proceedings.[12] The Supreme Court has also supported such interpretation and indicated that, as a rule, adjudication on the matter of a motion is performed on trial, which is not envisaged at the stage of preparatory proceedings, and that the provisions applied in these proceedings are placed under Chapter 41 concerning preparation for a trial, and the court hearing the motion adjudicates as a bench specified in Article 28 § 1 CPC and not that prescribed for a court's action in preparatory proceedings (Article 329 § 1 CPC). If the proceedings conducted pursuant to the mode laid down in Article 354 CPC were not judicial ones, the regulation included in para. 1 of the provision would be useless. There is no doubt that the provisions concerning an auxiliary prosecutor excluded based on it apply in judicial proceedings and not preparatory ones.[13] Approving of the grounds for those stands, it is necessary to add that before an indictment and a motion to discontinue proceedings are lodged, a prosecutor issues a decision to close the investigation (Article 321 § 6 and Article 324 CPC). This procedural decision, regardless of possible future court's decisions, finishes the stage of preparatory proceedings at the time.

The Supreme Court has adopted this direction of interpretation and expressed it in one of its judgments based on Article 521 CPC in the wording of 1 July 2003.[14] It recognised that a judgment issued in accordance with Article 354(2) CPC is a court's judgment closing the 'court's' proceedings in the meaning of Article 521 CPC and can be subject to a cassation appeal brought by parties determined in this provision.[15] If one analyses the present wording of the above-mentioned provision, the doubts existing then are out-of-date because an extraordinary cassation appeal may apply to 'final court's judgments that close proceedings', thus those issued by a court in the course of the preparatory proceedings and during the judicial ones, but due to the nature of the proceedings closing the 'judicial proceedings', they still remain up-to-date and support the opinion that adjudicating on a prosecutor's motion to discontinue proceedings and apply preventive measures takes place within the framework of these proceedings.

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[12] P. Rogoziński, [in:] S. Steinborn (ed.), *supra* n. 1, Article 354, no. 2; J. Grajewski, P. Rogoziński, [in:] S. Steinborn (ed.), *supra* n. 1, Article 324, no. 4; T. Grzegorczyk, *Kodeks postępowania karnego*, Vol. I: *Artykuły 1–467. Komentarz*, LEX 2014, Article 354, no. 8; A. Ważny, [in:] A. Sakowicz (ed.), *supra* n. 2, p. 779.

[13] The Supreme Court resolution of 25 February 2005, I KZP 35/04, OSNKW 2005, No. 2, item 14 with glosses by: D. Kaczmarska, Przegląd Sądowy 1, 2006, item 14; K. Woźniewski, *Pokrzywdzony w postępowaniu sądowym na podstawie art. 354 k.p.k.*, GSP-Prz. Orz. 4, 2005, pp. 81–86; W. Marcinkowski, Wojskowy Przegląd Prawniczy 2, 2005, item 138; K. Dudka, *Uprawnienia pokrzywdzonego do zaskarżenia postanowienia sądu wydanego w trybie art. 354 k.p.k.*, Państwo i Prawo 7, 2005, pp. 119–122.

[14] Before the amendment of the Criminal Procedure Code introduced by the Act of 10 January 2003 amending the Act: Criminal Procedure Code, the Act: Provisions implementing the Criminal Procedure Code, the Act on crown witnesses and the Act on the protection of classified information (Dz.U. 2003, No. 17, item 155), the provision stipulated that the Minister of Justice-Prosecutor General, and the Ombudsman could file a cassation appeal against every final judgment closing 'court's' proceedings.

[15] The Supreme Court ruling of 5 April 2001, IV KKN 652/00, LEX No. 51426.

The consequence of recognising that the moment a prosecutor lodges a motion to discontinue proceedings and apply a preventive measure it enters the stage of judicial proceedings is the assumption that a victim in these proceedings is not entitled to the status of a party.[16] The persons' rights are that a prosecutor must inform them about lodging a motion with a court (Article 324 § 1a CPC), and they must be notified of the time and place of a trial (Article 350 § 4 in conjunction with Article 354 § 1 CPC), and in the case of proceedings in a session, they must be notified of it as they have the right to participate (Article 117 § 1 CPC). Apart from the fact that they are not parties, they are not persons who are not directly concerned in the meaning of Article 459 § 3 CPC, which results in inadmissibility of their appeal against a ruling. Thus, they are not entities entitled to lodge a cassation appeal (Article 520 § 1 *a contrario* CPC). They may only do that via entities determined in Article 521 CPC.

One of the aims of criminal proceedings is to respect legally protected interests of a victim (Article 2 § 1(3) CPC), which the legislator should also take into account at the time of determining their rights in proceedings concerning a case in which a perpetrator being in the state of insanity has committed an offence to their detriment. Allowing victims to participate in the proceedings, and at the same time depriving them of the possibility of being procedurally active in their favour, also in the context of cassation proceedings in which the parties' right to appeal against a ruling issued in accordance with Article 354(2) CPC were extended, makes the above guarantee illusory. The justification may only be looked for in the specificity of proceedings where, in case of recognition that the suspect has committed an act due to a negative procedural condition, there is no conviction, which excludes the application of compensatory measures. However, no consistence can be found here. If a court does not find grounds for the application of a preventive measure, in accordance with Article 324 § 1 CPC, it refers the case to a prosecutor to continue the proceedings. As a result, these may be also discontinued in accordance with Article 17 § 1(2) CPC, against which a victim, who is a party in the preparatory proceedings, may appeal. In the judicial proceedings, he/she is deprived of such a possibility. His/her status is also different in proceedings conducted in the same matter but when the circumstances necessary for discontinuance of the proceedings occur after opening a trial.

If circumstances evidencing a perpetrator's insanity do not occur in preparatory proceedings and the proceedings are not closed by a motion pursuant to Article 324 § 1 CPC but an indictment or a motion referred to in Article 335 § 1 CPC or Article 336 § 1 CPC, and there are grounds for accepting them after a trial starts (Article 385 § 1 CPC), then, in accordance with Article 414 § 1 *in fine* CPC, a court issues a judgment discontinuing the proceedings. The discontinuance of the proceedings based on the above-mentioned circumstances excluding prosecution may be connected with the application of a preventive measure. In accordance with Article 414 § 3 CPC, in the case of discontinuance of proceedings for this reason, if the results of judicial proceedings justify that, a court applies a preventive measure stipulated in Article 93a § 2 CC, i.e.

[16] P. Rogoziński, [in:] S. Steinborn (ed.), *supra* n. 1, Article 354, no. 2; J. Grajewski, P. Rogoziński, [in:] S. Steinborn (ed.), *supra* n. 1, Article 324, no. 4; T. Grzegorczyk, *supra* n. 13, Article 354, no. 8; A. Ważny, [in:] A. Sakowicz (ed.), *supra* n. 2, p. 779.

a ban on holding specific posts, a ban on exercising specific professions or engagement in specific business activities as well as a ban on driving, or in Article 22 § 3(5) and (6) Fiscal Penal Code, i.e. forfeiture of property, a ban on exercising specific professions or holding specific posts. It is not a closed catalogue of preventive measures that can be ruled on at a trial. A court may rule on measures listed in Article 93a CC (Article 93c § 1 CC), and also placement in a psychiatric hospital in order to prevent the perpetrator from repeated commission of a prohibited act of considerable social harmfulness (Article 93b § 1 sentence 1 CC). The court decides about the placement in a psychiatric hospital of a perpetrator against whom the proceedings have been discontinued because he/she committed a prohibited act in the state of insanity referred to in Article 31 § 1 CC (Article 93c(1) CC) if there is a high probability that he/she will commit a prohibited act of considerable social harmfulness again due to a mental illness or mental disability. In such cases, the court issues a judgment on discontinuing the proceedings and applying a preventive measure (Article 414 § 1 CPC).

In proceedings instigated by an indictment or its substitute, provided victims express such a will, they may be a party (Article 54 § 1 CPC) and, depending on whether they exercise this right, have the right to appeal against a sentence (Article 422 § 1 CPC and Article 425 § 1 CPC). It can be noticed that in relation to this entity, there is clear inconsistence concerning the possibility of appealing against judgments on discontinuance of proceedings and applying preventive measures. Different forms of judgments, depending on the stage of the proceedings when a perpetrator's insanity has been recognised, also decide on admissibility of a cassation appeal that a victim can file in the case of an obstacle referred to in Article 520 § 2 CPC only when a sentence is issued.

The problems that arise in relation to the rights of the subject to proceedings are not smaller. While there are no doubts that the party to the proceedings has a right to appeal against a judgment on the discontinuance of the proceedings and application of preventive measures, their access to a cassation appeal raises a series of questions.

Article 519 CPC in the wording prior to 1 July 2015[17] stipulated that only a final sentence issued by an appellate court and closing the proceedings can be subject to a cassation appeal. The above-mentioned regulation directly resulted in the fact that rulings were excluded from the parties' objective scope of cassation (Article 520 § 1 CPC).[18] Thus, unlike appellate courts' sentences closing proceedings issued as a result of hearing an appeal against judgments on the discontinuance of proceedings and applying preventive measures adopted in circumstances referred to in Article 414 § 1 CPC, an appellate court's ruling closing proceedings issued as a result of hearing a complaint against a judgment on the discontinuance of proceedings due to a perpetrator's insanity and the application of a preventive measure, issued at a trial or at a session in accordance with Article 354 (2) CPC, could

[17] As amended by the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Dz.U. 2013, item 1247).

[18] The Supreme Court rulings of 23 September 1999, III KZ 97/99, LEX No. 39109, and of 13 July 2000, IV KZ 46/00, LEX No. 491416.

not be subject to a cassation appeal filed by the parties but only to an extraordinary cassation appeal (Article 521 CPC).[19]

After the Act of 20 July 2000 amending the Act: Criminal Procedure Code, Provisions implementing the Criminal Procedure Code and the Act: Fiscal Penal Code[20] entered into force, the above-mentioned change introduced new broad limitations of the objective scope of cassation depending on its aim. Cassation in favour could be lodged only in the case of conviction for an offence or a fiscal offence for the penalty of absolute deprivation of liberty (Article 523 § 2 CPC), and cassation to the disadvantage could be brought only in the case of acquittal or discontinuance of proceedings, at the beginning for reasons referred to in Article 17 § 1(3) and (4) or because of a perpetrator's insanity, and then as a result of the successive amendment based on the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts,[21] due to all reasons for discontinuance of proceedings (Article 523 § 3 CPC).

As a result, a doubt was also raised in connection with a cassation appeal by a person who was subject to discontinued proceedings and to whom a preventive measure was applied: second-instance judgments concerning sentences issued in accordance with Article 414 § 1 CPC. A literal interpretation of those regulations led to a conclusion that a cassation appeal against a sentence discontinuing proceedings was only possible to the disadvantage, which excluded a possibility of filing it by a party who was subject to discontinued proceedings and a preventive measure, and only a prosecutor or a victim acting as a party (under some conditions referred to in Article 54 § 1 and Article 520 § 2 CPC) were entitled to file it. It did not only concern a situation in which a party raised the occurrence of a violation determined in Article 439 CPC (exclusion referred to in Article 523 § 4 CPC).

In relation to the preventive measure in the form of placement in a closed psychiatric hospital, the Supreme Court expressed the opinion that the above-mentioned limitation was not applicable to sentences discontinuing proceedings and ruling this measure.[22] It decided that the application of this preventive measure was a situation analogous to adjudication on a correctional measure in the form of placement of a minor in a juvenile detention centre in relation with which one judgment stated admissibility of cassation.[23] The Supreme Court came to a conclusion that the same reasons supported the extension of cassation cognition also into psychiatric detention ruled in accordance with Article 414 CPC. Referring to the justification for the Bill amending Article 523 CPC that accepted grounds for cassation only in the case of most painful convictions, the Court assumed that although the discontinuance of proceedings and application of a preventive

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[19] The Supreme Court rulings: of 5 May 2008, IV KZ 18/08, LEX No. 609594; of 25 March 2009, IV KZ 15/09, LEX No. 608539; of 4 November 2010, V KK 211/10, OSNwSK 2010, No. 1, item 2170; of 19 February 2014, II KZ 6/14, LEX No. 1427408; of 6 October 2011, III KZ 67/11, LEX No. 1044043; of 2 October 2007, II KZ 33/07, OSNwSK 2007, No. 1, item 2158.

[20] Dz.U. 2000, No. 62, item 717.

[21] Dz.U. 2016, item 437.

[22] The Supreme Court ruling of 30 August 2007, II KZ 25/07, OSNKW 2007, No. 9, item 66, with a gloss of approval by D. Miszczak, OSP 2008, No. 5, item 57 and a critical one by K. Sychta, Palestra 9–10, 2009, pp. 273–283.

[23] The Supreme Court ruling of 12 July 2001, III KZ 39/01, OSNKW 2001, No. 9–10, item 82.

detention measure did not mean conviction and punishment, nevertheless, taking into account actual painfulness, indeed it did not differ from deprivation of liberty within the execution of a penalty. Thus, a cassation in favour with respect to such a sentence should be admissible. Approving of this interpretation, it is necessary to notice that the above-mentioned argument cannot be extended to the entirety of preventive measures the painfulness of which in relation to the most severe one is incomparably smaller and does not result in the limitation of liberty, e.g. a ban on driving motor vehicles (Article 39(3) CC), a ban on holding specific posts (Article 39(2) CC), or other penal measures listed in Article 39(2)–(3) CC, which pursuant to Article 93a § 2 CC may be also adjudicated as preventive measures.

What was to support the extended interpretation of the objective scope of cassation in the light of the statutory limitations under Article 523 § 2 and § 3 CPC was also the fact that they are applicable to criminal proceedings only in their main course and not to the issues connected with adjudication on criminal liability of the accused. Consequently, it was concluded that the admissibility of cassation in favour was invalid with respect to a sentence discontinuing proceedings and ruling the placement of a perpetrator in a psychiatric hospital or a juvenile perpetrator in a juvenile detention centre, as well as compensation regulated in Chapter 58 CPC or compensation and redress adjudicated in accordance with the Act of 21 February 1991 on the recognition of judgments issued against persons victimised for the fight for the independent Polish State.[24] This argument referred to the motives behind the Supreme Court resolution of 24 July 2001, I KZP 15/01,[25] which stated inadmissibility of cassation adjudicated based on the above-mentioned statute. However, while in the proceedings concerning compensation and redress a court indeed does not adjudicate on a perpetrator's criminal liability, and as a result it cannot be assumed that limitations concerning the accused under Article 533 § 2 and § 3 CPC do not apply to the applicant, in the proceedings concerning discontinuance and application of a preventive measure a penalty is not actually administered because in the case of insanity at the time of an act commission a perpetrator cannot be attributed guilt (Article 31 § 1 CC), however, legal consequences of the act commission are adjudicated in the form of the placement in a psychiatric hospital. Thus, it is an action where a perpetrator plays the procedural role of the accused or a suspect who are subject to appropriate provisions applicable to the accused (Article 380 CPC) and there is no justification for treating these proceedings by analogy with the proceedings concerning compensation and redress. In the above-mentioned resolution, the Supreme Court expressed an opinion that in the light of Article 519 sentence 1 and Article 523 § 2 CPC, cassation in favour of the accused may be filed at present only in the case of conviction for an offence or a fiscal offence with a sentence of the penalty of deprivation of liberty without conditional suspension of its execution, thus with the exclusion of a possibility of filing it against other sentences or for acts other than offences, and sentences concerning the discontinuance or conditional

[24] Dz.U. 2015, item 1583; the Supreme Court ruling of 24 July 2001, I KZP 15/01, OSNKW 2001, No. 9–10, item 74; B. Augustyniak, K. Eichstaedt, M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania karnego*, Vol. II: *Komentarz aktualizowany*, LEX/el. 2020, Article 523, no. 43.

[25] OSNKW 2001, No. 9–10, item 74.

discontinuance of criminal proceedings. This type of interpretation was presented in the Supreme Court case law and rightly assumed inadmissibility of a cassation appeal in favour of the accused (after 1 September 2000), inter alia, in the case of conditional discontinuance of proceedings,[26] unconditional discontinuance,[27] or in cases concerning misdemeanours[28]. Thus, the Supreme Court was for inadmissibility of cassation in favour filed against discontinuance of proceedings.

As a result, access to a cassation appeal in the case of a judgment on the discontinuance of proceedings and application of preventive measures did not have a uniform nature. Whether a party could use this extraordinary appellate measure did not depend on the object of adjudication but on the stage of proceedings during which the judgment was issued. It determined the type of judgment and, in the face of limitation of cassation by the parties to appellate courts' final sentences closing the proceedings (Article 519 CPC), it excluded a cassation appeal against the ruling. After the ruling was issued as a result of hearing a prosecutor's motion filed in accordance with Article 324 § 1 CPC, it was only possible to file a cassation appeal in accordance with Article 521 CPC. When a negative procedural condition was recognised on trial, the discontinuance of proceedings and application of a preventive measure always adopted the form of a sentence, a party had the right to a cassation appeal to the disadvantage not only due to the reasons laid down in Article 439 CPC (Article 523 § 4(1) CPC) but also because of another instance of flagrant violation of law that could have significant influence on the content of the judgment (Article 523 § 1 CPC). However, in accordance with the opinion expressed in the Supreme Court judgment of 30 August 2007, II KZ 25/07,[29] this extraordinary appellate measure in favour was available only for a judgment concerning the most painful preventive measure.

The issue has been addressed in literature. The normative state that does not give a perpetrator who was to be deprived of liberty in a closed psychiatric hospital the right to a cassation appeal against this judgment but only a possibility of applying to special entities to file a cassation appeal in accordance with Article 521 CPC is presented as one that did not follow the appropriate standards of the constitutional principle of equality before law. It is indicated that the moment when a perpetrator's insanity is recognised should not decide on admissibility of cassation; it should be the fact of issuing a judgment discontinuing proceedings and applying a preventive measure that is detention-like in nature.[30] The issue resulted in *de lege ferenda* proposals that when a prosecutor files a motion in accordance with Article 324 § 1 CPC and a case is referred to a session in order to issue a judgment concerning the discontinuance of proceedings and application of preventive measures, a court should always issue a sentence. On the other hand, *de lege lata*, if in accordance with Article 380 CPC the provisions concerning

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[26] The Supreme Court ruling of 7 March 2001, II KKN 6/01, unpublished.

[27] The Supreme Court ruling of 31 January 2001, V KZ 131/00, unpublished.

[28] The Supreme Court rulings of 2 February 2001, V KKN 550/00 and of 3 April 2001, IV KZ 22/01, unpublished.

[29] The Supreme Court ruling of 12 July 2001, III KZ 39/01, OSNKW 2001, No. 9–10, item 82.

[30] S. Zabłocki, P. Hofmański, *Reforma procedury karnej a Sąd Najwyższy*, [in:] P. Kardas, T. Sroka, W. Wróbel (eds), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, Vol. II, Warszawa 2012, pp. 1631–1635.

the accused are applied by analogy to a person who is charged with commission of a prohibited act in the state of insanity, there have been calls for considering whether Article 519 CPC should not be applied by analogy to final judgments issued by an appellate court and closing proceedings by discontinuance and the application of a preventive measure, in spite of the fact that the judgment is not a sentence.[31]

Having in mind the need to standardise access to a cassation appeal in this kind of cases, as the exception to a rule that an appeal with the application of this measure can be filed against sentences determined in Article 519 CPC, with the introduction of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts[32] the legislator created a possibility of filing a cassation appeal against 'final appellate court judgments discontinuing proceedings and applying a preventive measure laid down in Articles 93 and 94 Criminal Code'. At that time, the provisions regulated adjudication on placement in a psychiatric hospital. Under the rule of symmetry, a cassation appeal became available only against a ruling on the discontinuance of proceedings and application of this measure. The justification for the Bill indicated that it concerned situations in which a prosecutor, having closed preparatory proceedings, filed a case with a court with a motion to discontinue proceedings due to a perpetrator's insanity and to apply a preventive measure; thus, when a court's judgment that could be adopted on trial as well as at a session took a form of a ruling, which could be subject to a complaint.[33] It was made clear that it was the exception to the rule that a cassation appeal should be available only against final appellate court judgments closing a procedure. Moreover, it was emphasised that cassation in such a case could be filed only against a ruling 'upholding a judgment accepting a prosecutor's motion to discontinue proceedings and apply preventive measures laid down in Article 93 CC or in Article 94 CC and not against any final appellate court's judgment on the mater. The requirements stipulated in Article 519 *in fine* CPC must be cumulatively fulfilled. Thus, a party has no right to a cassation appeal against a negative ruling, i.e. dismissing a prosecutor's motion, and against a ruling partly accepting the motion and discontinuing proceedings but lacking a judgment on the application of a preventive measure laid down in Article 93 CC or in Article 94 CC'.[34] The last sentence of the provisions referred to above raises doubts because Article 324 § 2 CPC, in the wording of the Act of 10 January 2003 amending the Act: Criminal Procedure Code, the Act: Provisions implementing the Criminal Procedure Code, the Act on crown witnesses and the Act on the protection of classified information,[35] does not authorise a court to adjudicate on discontinuance of proceedings if it cannot find grounds for the application of a preventive measure.[36]

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[31] D. Miszczak, gloss on the Supreme Court ruling of 30 August 2007, II K 25/07, OSP 2008, No. 5, item 57.

[32] Dz.U. 2013, item 1247.

[33] Justification for the Bill, Sejm of the Republic of Poland, 8th term, paper No. 870, www.sejm.gov.pl., pp. 104–105.

[34] *Ibid*.

[35] Dz.U. 2003, No. 17, item 155.

[36] The Supreme Court ruling of 13 August 2013, V KK 176/13, LEX No. 1350336; K. Eichstaedt, *supra* n. 2, pp. 75–94.

The opinion was also presented earlier in connection with the former legal state.[37] A cassation appeal is available only against a judgment concerning the discontinuance of proceedings and application of a preventive measure. The use of the conjunction 'and' indicates the necessity of joint occurrence of those aspects, i.e. the discontinuance of proceedings and the application of a preventive measure.

The style of the amended Article 519 CPC is inappropriate in the sense that the literal interpretation of the phrase 'final appellate court's judgment on the discontinuance of proceedings and application of a preventive measure' should lead to a conclusion that it is a situation in which an appellate court issues such a judgment. However, it would be competent to do that only in the case of issuing a reforming judgment, i.e. changing a ruling appealed against, which has dismissed a motion to discontinue proceedings and apply a preventive measure, and adjudicating diversely. In other cases, the role of an appellate court consists in upholding a judgment appealed against or quashing it; and this former solution was subject to an amendment extending the scope of cassation cognition by the Supreme Court.[38]

The legislative intention concerning the objectives of the amendment was obvious. The situation existing for many years was unacceptable from the point of view of equal possibility of exercising the procedural interest concerning parties' access to a cassation appeal in proceedings in which the same judgments were issued. Admitting a cassation appeal in relation to a judgment on the discontinuance of proceedings and placement in a psychiatric hospital was a right legislative solution standardising the parties' rights to a cassation appeal in such proceedings and the rules of appealing against a sentence adopted in the Supreme Court case law, based on the limitations laid down in Article 523 § 2 and § 3 CPC.

On 1 July 2015, when the Act of 20 February 2015 amending the Act: Criminal Code and some other acts[39] entered into force, Chapter X of the Criminal Code concerning preventive measures was reorganised and the normative state concerning the scope of cassation was considerably changed. The statute repealed the provisions of Articles 93 and 94 CC listed in Article 519 CPC, and the catalogue of preventive measures was determined in Article 93a § 1 and § 2 CC and extended. Reference made to the provision of Article 93a CC was placed in the content of the amended Article 519 CPC. At present, preventive measures include: electronic monitoring of residence, addiction therapy, and placement in a psychiatric hospital. In addition, a court may also rule other preventive measures in the form of orders or bans laid down in Article 39 (2)–(3) CC, i.e. a ban on holding specific posts or exercising a specific profession, or engaging in specific business activities, and a ban on driving motor vehicles (Article 93a § 2 CC). As a result, the literal interpretation of the

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[37] The Supreme Court resolution of 23 April 2002, I KZP 7/02, OSNKW 2002, No. 7–8, item 59; R.A. Stefański, *Organ uprawniony do umorzenia postępowania przygotowawczego z powodu niepoczytalności podejrzanego w nowym kodeksie postępowania karnego*, Państwo i Prawo 12, 1997, pp. 127–132.

[38] D. Świecki, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 2018, p. 518; the Supreme Court ruling of 20 September 2017, III KK 384/17, OSNKW 2018, No. 1, item 6.

[39] Dz.U. 2015, item 396.

presently binding Article 519 CPC leads to a conclusion that parties have the right to a cassation appeal against judgments discontinuing proceedings in which each of the above-mentioned preventive measures has been adjudicated and not only a detention-related one that the legislator was interested in while amending Article 519 CPC on 27 September 2013. As a consequence, the symmetry has been lost because in the light of the Supreme Court ruling of 30 August 2007, II KZ 25/07, in spite of the limitations laid down in Article 523 § 2 and § 3 CPC, the possibility of filing a cassation appeal in favour of a sentence discontinuing proceedings due to a perpetrator's insanity exists only in a situation when the most painful preventive measure has been applied to him/her. In order to implement the original assumptions concerning extraordinary extension of the objective scope of cassation, Article 519 CPC should, *de lege ferenda*, be narrowed by precise formulation of its content and determining that it concerns the discontinuation of proceedings and application of a preventive measure laid down in Article 93a § 1(4) CC (placement in a psychiatric hospital). Such wording would fully reflect the legislator's assumptions (making it possible to file a cassation appeal against a judgment that is comparable to the penalty of deprivation of liberty as far as its painfulness is concerned) and introduce equal rights in case of appeal in favour in relation to every type of judgment. The present shape of the discussed regulation misses the aim of the amendment of 27 September 2013 and, in the face of a broader use than it was originally assumed, it also loses its nature of the exception to the rule, in accordance with which only sentences can be subject to cassation cognition.

There is an opinion presented in literature that while it is not possible to challenge the grounds for the extension of cassation against judgments resulting in actual long-term deprivation of liberty in the form of placement in a psychiatric hospital, it is not right to apply this extension to all preventive measures. Similarly to a situation in which a party cannot appeal against an imprisonment sentence with conditional suspension of its execution, there should be no possibility of appealing against, e.g. a ban on engaging in specific business activities or a ban on driving motor vehicles.[40] There is also an opinion, according to which all preventive measures laid down in Article 93a § 1 CC should be subject to a possible cassation appeal, due to the fact that they considerably limit an individual's freedom or deprive a person of personal freedom and are applied with no time limit. Moreover, the Supreme Court case law within the scope of hearing cassation appeals concerning those matters under Article 521 CPC indicates a considerable number of infringements in the area. Only § 2 of Article 93a CC should be excluded from the scope of cassation cognition as it stipulates that an order and bans laid down in Article 39 (2)–(3) CPC are also preventive measures. The argument for such a limitation was the recognition that the above-mentioned order and bans constitute penal measures at the same time and adjudicated in this form cannot be subject to a cassation appeal.[41]

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[40] M. Laskowski, *Kasacja obrońcy i pełnomocnika po 1 lipca 2015 r.*, [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach*, Warszawa 2015, p. 498 et seq.

[41] A. Sakowicz, M. Warchoł, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2018, p. 1219.

The stand cannot be approved of. Although it is inadmissible to file a cassation appeal only because of disproportionality of a penalty (Article 523 § 1 sentence 2 CPC), with the exception of cassation filed by Prosecutor General in accordance with Article 523 § 1a CPC, the indication by the applicant filing this appellate measure that a flagrant contempt of the substantive law has occurred also in provisions on adjudicating on penalties and preventive measures, which could have considerable influence on the content of the judgment appealed against, makes cassation in this matter admissible.[42] However, taking into account the wording of Article 523 § 2, § 3 and § 4 CPC, apart from grounds determined in Article 439 CPC opening the way to a cassation appeal against sentences without limitations resulting from its direction, based on another flagrant violation of law determined in Article 523 § 1 CPC, cassation to the disadvantage may be filed against a sentence in the case of discontinuance and application of any preventive measure, and in favour, in accordance with the interpretation presented by the Supreme Court, only against the most painful measure. Comparing the admissibility of appealing against judgments issued in the matter, it is justifiable to consider whether the limits determined in Article 523 § 2 and § 3 CPC are applicable also in this area. There is an opinion expressed in the legal doctrine that admissibility of appealing against a judgment laid down in Article 519 CPC remains autonomous and independent of them, which is justified by the fact that they concern the accused in judicial proceedings, and a person who is subject to a prosecutor's motion does not have such a status.[43] Taking into account the wording of Article 380 CPC, the above-presented reasoning is not convincing. It is so because this person should be subject to analogous provisions concerning the accused, which is not excluded also based on cassation proceedings (Article 458 in conjunction with Article 518 CPC).

As far as cassation in favour against a judgment indicated in Article 519 is concerned, it is rather necessary to consider whether the subjective limitations should not be excluded in the face of the literal interpretation of the provision that by reference to Article 93a CC thoroughly determines (by listing preventive measures) the types of judgments that can be appealed against. If we assumed that it was subject to limitation pursuant to Article 523 CPC, which would result in a conclusion (as in case of sentences) that a party has the right to cassation to the disadvantage against every measure and to cassation in favour only against the detention-related one, reference to a particular provision of the Criminal Code would be useless. Thus, it should be assumed that cassation in favour against a ruling is not limited by the type of an adjudicated preventive measure, and that, in spite of the steps undertaken by the legislator to make access to cassation equal, there is still inconsistence in admissibility of a cassation appeal against judgments issued in relation to persons against whom proceedings have been discontinued and to whom a preventive measure has been applied.

The aim of the application of a preventive detention measure is to improve a perpetrator's health condition and conduct so that he/she might function in society

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[42] For instance, the Supreme Court judgments: of 16 February 2017, II KK 361/16, LEX No. 2241388; of 10 August 2017, III KK 307/17, LEX No. 2338018.

[43] D. Świecki, [in:] D. Świecki (ed.), *supra* n. 39, p. 519.

in the way that would not pose threat to the legal order and, in case of a perpetrator placed in a psychiatric hospital, be treated in non-hospitalised conditions. The time of psychiatric hospitalisation is not determined in advance (Article 93d § 1 CC). The moment a court adjudicates, it has no possibility of thoroughly determining if and when the circumstances determining the application of this measure will disappear, in particular in what way and whether at all a perpetrator's mental health will improve. When it is recognised that there is no need to continue applying this measure, a court is obliged to issue a judgment quashing the former one (Article 93b § 2 CC). In the case of a perpetrator's placement in a psychiatric hospital, not less often than every six months, a court adjudicates on the matter of further application of the measure (Article 204 § 1 Penal Enforcement Code *in principio*).

A question is raised whether, in the case of prolonged application of this measure, cassation pursuant to Article 519 CPC is also admissible. The Supreme Court supported the restrictive interpretation of this provision and stated that this type of adjudication on the matter of prolonged application of placement in a psychiatric hospital is not listed therein, thus it is not subject to a cassation appeal.[44] The legislator makes reference only to the first adjudication on the matter by the use of a term 'application', which does not cover successive decisions, i.e. 'prolonged' application. Thus, further decisions taken in accordance with Article 204 § 1 Penal Enforcement Code are excluded from the possibility of filing a cassation appeal because they do not meet the statutory requirements (Article 519 CPC). If parties do not have the right to a cassation appeal against an appellate court's judgment upholding the decision on prolonging the application of this measure, like in the case of a reforming judgment issued by an appellate court as a result of hearing a complaint, Article 530 § 2 CPC should be applied to cassation filed against such a judgment. The provision obliges a court to dismiss a cassation appeal in the circumstances referred to in Article 429 § 1 CPC, i.e. inadmissibility *ex lege*. In the case of groundless admission of a cassation appeal, it should be left without adjudication (Article 531 § 1 CPC).[45]

Summing up, adjudication on the matter of criminal liability of an insane perpetrator closed by the discontinuance of proceedings and application of a preventive measure takes place in a different forum, and thus results in a victim's different status. The person, in the case of adjudication by way of a ruling, is deprived of the rights of a party and, as a consequence, of the right to file a cassation appeal, which should be criticised if a different situation of an auxiliary prosecutor in judicial proceedings is taken into account. The situation cannot be approved of at least from the point of view of the constitutional principle of equality before law. Parties' access to a cassation appeal against a ruling to discontinue proceedings and apply a preventive measure in the present legal state remains broad and does not match the scope of admissibility of a cassation appeal against sentences issued on

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[44] The Supreme Court rulings: of 17 January 2017, II KZ 1/17, LEX No. 2188427; of 17 July 2019, IV KZ 29/19, LEX No. 2696929.

[45] The Supreme Court rulings: of 17 January 2017, II KZ 1/17, LEX No. 2188427; of 20 September 2017, III KK 384/17, OSNKW 2018, No. 1, item 6; of 10 April 2019, IV KK 610/18, LEX No. 2654537; of 17 July 2019, IV KZ 29/19, LEX No. 2696929; A. Partyk, *Przedłużenie pobytu podejrzanego w szpitalu psychiatrycznym nie jest kasatoryjne*, LEX/el. 2019.

the same matter. The present legal state not only raises a series of interpretational doubts mentioned above but also deprives all entities of equal rights to make use of this measure. Thus, while it is not an indispensable measure from the constitutional point of view (Article 176 para. 1 Constitution of the Republic of Poland), unequal access to it may raise reservations based on Article 32 para. 1 Constitution. From the perspective of the right aim of the amendment to Article 519 CPC, possibly the appropriate solution would be the re-assumption of the limitation laid down in Article 523 § 2 CPC in order to eliminate the above-presented discrepancies. This would also enable a victim to act as a party to the proceedings concerning a prosecutor's motion filed pursuant to Article 324 § 1 CPC and would aim to eliminate differences in this person's rights connected with the mode of conducting the proceedings and their consequence in the form of unequal access to appellate measures, including cassation.

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ADMISSIBILITY OF A CASSATION APPEAL AGAINST THE JUDGMENT ON DISCONTINUANCE OF PROCEEDINGS DUE TO A PERPETRATOR'S INSANITY AND APPLICATION OF PREVENTIVE MEASURES

Summary

The article aims to present interpretative doubts that are raised in connection with admissibility of a cassation appeal against a judgment concerning the discontinuance of proceedings and application of preventive measures, as well as to assess the latest legislative changes that result in the extension of the objective scope of cassation by judgments issued on this matter.

Keywords: criminal proceedings, cassation appeal against a ruling on the discontinuance of proceedings and application of a preventive measure, extension of the objective scope of cassation, admissibility of a cassation appeal against a ruling

PROBLEMATYKA DOPUSZCZALNOŚCI KASACJI OD ORZECZENIA O UMORZENIU POSTĘPOWANIA Z POWODU NIEPOCZYTALNOŚCI SPRAWCY I ZASTOSOWANIU ŚRODKÓW ZABEZPIECZAJĄCYCH

Streszczenie

Celem niniejszej publikacji jest przedstawienie wątpliwości interpretacyjnych, które zrodziły się na gruncie dopuszczalności kasacji od orzeczenia o umorzeniu postępowania i zastosowania środków zabezpieczających, oraz ocena ostatnich zmian legislacyjnych, skutkujących rozszerzeniem zakresu przedmiotowego kasacji o wydawane w tym przedmiocie postanowienia.

Słowa kluczowe: postępowanie karne, kasacja od postanowienia o umorzeniu postępowania i zastosowaniu środka zabezpieczającego, rozszerzenie zakresu przedmiotowego kasacji, kasacyjna zaskarżalność postanowienia

LA PROBLEMÁTICA DE ADMISIÓN DE CASACIÓN CONTRA LA RESOLUCIÓN DE SOBRESEIMIENTO DE PROCESO DEBIDO A LA INIMPUTABILIDAD DEL SUJETO Y LA APLICACIÓN DE LAS MEDIDAS DE SEGURIDAD

Resumen

El objetivo del presente artículo es presentar las dudas de interpretación en relación con la admisibilidad de la casación contra la resolución de sobreseimiento de proceso debido a la inimputabilidad del sujeto y la aplicación de las medidas de seguridad y valorar las últimas reformas que amplían el ámbito objetivo de la casación por estos motivos.

Palabras claves: procedimiento penal, casación contra la resolución de sobreseimiento del proceso y la aplicación de las medidas de seguridad, ampliación del ámbito objetivo de la casación, casación de auto

ПРОБЛЕМА ДОПУСТИМОСТИ КАССАЦИОННОГО ОБЖАЛОВАНИЯ РЕШЕНИЯ О ПРЕКРАЩЕНИИ ПРОИЗВОДСТВА В СВЯЗИ С НЕВМЕНЯЕМОСТЬЮ ПРЕСТУПНИКА И ПРИМЕНЕНИИ МЕР ПРЕСЕЧЕНИЯ, НЕ СВЯЗАННЫХ С ЛИШЕНИЕМ СВОБОДЫ

Аннотация

В статье рассмотрены интерпретационные неясности, возникающие в связи с допустимостью кассационного обжалования решения о прекращении производства и применении мер пресечения, не связанных с лишением свободы. Кроме этого, приводится оценка недавних изменений в законодательстве, приведших к расширению объекта кассационного обжалования на постановления, выносимые в подобных случаях.

Ключевые слова: уголовный процесс; кассационное обжалование постановления о прекращении производства и применении меры пресечения, не связанной с лишением свободы; расширение объекта кассационного обжалования; допустимость обжалования судебного постановления в кассационном порядке

DIE FRAGE DER ZULÄSSIGKEIT EINER KASSATIONSBESCHWERDE GEGEN DEN BESCHLUSS ÜBER DIE EINSTELLUNG EINES VERFAHRENS WEGEN UNZURECHNUNGSFÄHIGKEIT DES TÄTERS UND DIE ANWENDUNG EINER SICHERUNGSMASSREGEL

Zusammenfassung

Ziel des Artikels ist es, Auslegungszweifel im Zusammenhang mit der Zulässigkeit einer Kassationsbeschwerde gegen den Beschluss über die Einstellung eines Verfahrens und die Anwendung von Sicherungsmaßregeln darzulegen sowie eine Bewertung der jüngsten Gesetzesänderungen, die zu einer Ausweitung des Anwendungsbereichs des in Rede stehenden

Rechtsmittels der Kassationsbeschwerde um diesbezüglich ergangene Beschlüsse Entscheidungen geführt haben/zur Folge hatten.

Schlüsselwörter: Strafverfahren, Kassationsbeschwerde gegen einen Einstellungsbeschluss und die Anordnung von Sicherungsmaßregeln, Ausweitung des sachlichen Anwendungsbereichs einer Kassationsbeschwerde, Anfechtbarkeit eines Beschlusses durch Kassationsbeschwerde

LA QUESTION DE LA RECEVABILITÉ D'UN POURVOI EN CASSATION CONTRE L'ARRÊT DE NON-LIEU EN RAISON DE L'ALIÉNATION MENTALE DE L'AUTEUR ET D'APPLIQUER DES MESURES PRÉVENTIVES

Résumé

Le but de cet article est de présenter les doutes d'interprétation qui se sont posés sur la base de la recevabilité d'un pourvoi en cassation contre l'arrêt de non-lieu et d'appliquer des mesures préventives, ainsi que l'évaluation des récents changements législatifs ayant conduit à étendre la portée du pourvoi en cassation pour inclure les décisions rendues à cet égard.

Mots-clés: procédure pénale, pourvoi en cassation contre la décision de non-lieu et application d'une mesure conservatoire, extension du champ du pourvoi en cassation, recours contre la décision

PROBLEMATICA DELLA RICEVIBILITÀ DEL RICORSO PER CASSAZIONE AVVERSO LA SENTENZA DI NON LUOGO A STATUIRE PER INCAPACITÀ DI INTENDERE E DI VOLERE DELL'IMPUTATO E DI ADOZIONE DI MISURE CAUTELARI

Sintesi

Lo scopo dell'articolo è la presentazione dei dubbi interpretativi insorti sulla base della ricevibilità del ricorso per cassazione avverso la sentenza di non luogo a statuire e di adozione di misure cautelari, nonché la valutazione delle ultime modifiche legislative, che determinano l'ampliamento del campo di applicazione del ricorso per cassazione alle ordinanze emesse in tale ambito.

Parole chiave: procedimento penale, ricorso per cassazione avverso un'ordinanza di non luogo a statuire e di adozione di misure cautelari, ampliamento del campo di applicazione del ricorso per cassazione, impugnabilità con ricorso per cassazione di un'ordinanza

Cytuj jako:

Parapura D., *Admissibility of a cassation appeal against the judgment on discontinuance of proceedings due to a perpetrator's insanity and application of preventive measures [Problematyka dopuszczalności kasacji od orzeczenia o umorzeniu postępowania z powodu niepoczytalności sprawcy i zastosowaniu środków zabezpieczających]*, „Ius Novum" 2020 (14) nr 3, s. 87–106. DOI: 10.26399/iusnovum.v14.3.2020.27/d.parapura

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LIMITATION PERIOD FOR PUNISHABILITY OF DISCIPLINARY OFFENCE HAVING ELEMENTS OF CRIMINAL OFFENCE AND THE PRINCIPLE OF JURISDICTIONAL INDEPENDENCE OF DISCIPLINARY COURT

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As the period of limitation regarding the punishability and prosecution of disciplinary offences committed by representatives of legal professions[1] (i.e. persons exercising their profession or holding an office) is usually short, the problem of the existence or non-existence of the right of the disciplinary court to establish that the offence 'has the constituent elements of a criminal offence' is particularly significant from the point of view of the effectiveness of disciplinary proceedings, which would allow the adoption of the limitation periods specified in the Criminal Code[2] in relation to a given type of offence, depending on the length of the statutory sentence of imprisonment (Article 108 § 4 LSCC, Article 88 para. 3 LA, Article 70 para. 3 AAL). However, in order to address this issue, it is necessary to discuss the meaning of the quoted phrase, since the use of one of two possible interpretations

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1 See, for example, Article 108 § 1 of the Act of 27 July 2001: Law on the system of common courts (consolidated text, Dz.U. 2019, item 52), hereinafter LSCC; Article 88 para. 1 of the Act of 26 May 1982: Law on advocates (consolidated text, Dz.U. 2019, item 1513), hereinafter LA; and Article 70 para. 1 of the Act of 6 July 1982 on attorneys-at-law (consolidated text, Dz.U. 2020, item 75), hereinafter AAL.

2 *Lege non distinguente*, it must be considered that the statement: 'the limitation period provided for in the provisions of the Criminal Code' indicates the need to apply not only Article 101 Criminal Code, but also Article 102 Criminal Code and other provisions on the limitation period; see the Supreme Court resolution of 7 December 2007, SNO 81/07, OSNwSD 2007, item 16; the Supreme Court judgment of 15 June 2011, SNO 25/11, OSNwSD 2011, item 34.

has significant consequences for the scope of the disciplinary court's jurisdictional independence in the situation referred to, inter alia, in Article 108 § 4 LSCC.

According to the first view, represented by some legal commentators, the phrasing: 'has the constituent elements of a criminal offence' should be interpreted as: 'has the constituent elements of a prohibited act'.[3] This is supported by a grammatical interpretation. In accordance with the directive on legal language, the concept of 'constituent elements' refers to a prohibited act specified by law (see Article 115 § 1 Criminal Code, Article 53 § 1 Fiscal Penal Code, Article 47 § 1 Petty Offences Code). As such, it does not relate to other elements of an offence, i.e. unlawfulness, punishability or guilt, which cannot, in any case, be regarded as 'constituent elements'. However, in the light of the directive on a linguistic interpretation – the *per non est* principle – a provision of law cannot be interpreted to such an effect as to render any portion thereof redundant. This, in turn, indicates that adoption of a view other than the one currently presented would make the term of 'constituent elements' redundant.

It is worth noting that whenever this expression is used in the Criminal Code, it is always linked to a specific definition of a prohibited act (cf. Article 11 § 2, Articles 91 § 1 and 91 § 3, Article 115 § 1, Article 231 § 4 Criminal Code). Based on this, it can be assumed that the expression is used specifically for the purposes of emphasising the fact that the prohibited act represents a criminal offence. It should be noted that, from a legal viewpoint, a prohibited act can also be an administrative or civil wrongful act, as well as a misdemeanour.[4] The distinction between a prohibited act and a criminal offence, which has its obvious justification in the Criminal Code, may lead to misunderstandings on the grounds of the law on the system of courts where – as it has already been pointed out – a 'prohibited act' is understood in broader terms than under criminal law *sensu stricto*. It is clear, however, that in order for a prohibited act to constitute a criminal offence, it is necessary that the existence of unlawfulness, punishability, guilt and an adequate degree of social harmfulness be established, and these elements of a criminal offence cannot be described as its constituent elements.

In addition, if the legislator wanted the criminality of an act to be grounds for extending the limitation period for a disciplinary offence under Article 108 § 4 LSCC, they would use the expression 'constitutes a criminal offence' as it is done in certain corporate acts.[5] Moreover, the literature indicates that the purpose of extending the limitation period for a disciplinary offence on the basis of the above provision is to take account of the seriousness of an act, perceived in abstract terms, which constituted the basis for the legislator's decision to criminalise the act, with

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[3] See A. Bojańczyk, T. Razowski, *Konsekwencje procesowe przewinienia dyscyplinarnego będącego przestępstwem*, Prokuratura i Prawo 11–12, 2009, pp. 45–50.

[4] See, for example, Article 1 § 2(2)(b) of the Act of 26 October 1982 on procedure in juvenile delinquency cases (consolidated text, Dz.U. 2018, item 969), where the legislator also understands a minor offence as a prohibited act.

[5] See Article 64 para. 4 of the Act of 2 December 2009 on medical chambers (Dz.U. 2009, No. 219, item 1708, as amended, consolidated text, Dz.U. 2019, item 965); Article 46 para. 4 of the Act of 1 July 2011 on self-government of nurses and midwives (Dz.U. 2011, No. 174, item 1038, consolidated text, Dz.U. 2018, item 916).

regard to which it is not required to establish unlawfulness, punishability or guilt, as well as *in concreto* a sufficiently high degree of social harmfulness.[6]

A different view, supported by no less relevant arguments, was presented in the Supreme Court resolution of 28 September 2006,[7] which was approved of by some legal commentators.[8] The court stated that the expression 'has the constituent elements of a criminal offence' implies an obligation to establish the criminality of an act and, as such, also the unlawfulness, punishability, guilt and a sufficiently high degree of social harmfulness. In other words, the expression 'has the constituent elements of a criminal offence' is tantamount to 'constitutes a criminal offence'. In support of its view, the Supreme Court pointed out that under the Criminal Code the limitation period is related to the concept of a criminal offence and not to the concept of a prohibited act, and – more specifically – the appropriate limitation periods are prescribed in the context of a specific criminal offence, especially the severity of the penalty it carries. After all, one cannot speak of the limitation period for a prohibited act. The court also pointed out that since 'in disciplinary proceedings, concerning legal professions, the legislator explicitly allows the possibility of staying these proceedings pending the conclusion of criminal proceedings regarding the same act, this undoubtedly will not undermine the assumption that it is reasonable of the legislator to allow this possibility also in disciplinary proceedings against judges (public prosecutors, notaries), by staying, in the same circumstances, disciplinary proceedings on the basis of Article 22 § 1 of the Criminal Procedure Code applied *mutatis mutandis*'.[9]

The Supreme Court elaborated on its position in its judgment of 25 July 2013.[10] In this case, parallel criminal proceedings were pending, in which the appellate court reversed a judgment whereby the trial court conditionally discontinued the proceedings and dismissed the criminal case due to a negligible degree of social harmfulness of the act. Against this procedural background, the Supreme Court held that there were no grounds for considering that the limitation period applicable to the offence was effective in the examined case (Article 70 para. 3 AAL). It emphasised that the phrase 'has the constituent elements of a criminal offence' should be interpreted as comprising the requirement of establishing that the act is criminal which, in addition to meeting the constituent elements of a prohibited act specified in the criminal law, also includes unlawfulness, guilt and a degree of social harmfulness greater than negligible. The court added that this view – due to the vagueness of the concept of 'constituent elements of a criminal offence' in the

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[6] Compare A. Bojańczyk, T. Razowski, *supra* n. 3, p. 49.

[7] I KZP 8/06, OSNKW 2006, No. 10, item 87, OSNwSD 2006, item 118.

[8] W. Wróbel, *Zasada domniemania niewinności – wybrane zagadnienia na marginesie uchwały Sądu Najwyższego z dnia 28 września 2006 r. (I KZP 8/06)*, Studia i Analizy Sądu Najwyższego, Vol. I, ed. K. Ślebzak, Warszawa 2007, pp. 112–129.

[9] OSNwSD 2006, item 118, p. 369. However, it should be noted that with regard to the latter argument, Antoni Bojańczyk and Tomasz Razowski submit that the absence of an appropriate regulation in the Law on the system of common courts should lead to the opposite conclusion, i.e. it should invite a more prudent approach when considering the question of applying the institution of stay of disciplinary proceedings (see A. Bojańczyk, T. Razowski, *supra* n. 3, p. 52).

[10] SDI 13/13, OSNwSD 2013, item 49, LEX No. 1375237.

legal language, where the notion of 'constituent elements' should be construed as referring to a prohibited act specified in the criminal law rather than to a criminal offence, the determination of which requires that other grounds of criminal liability be established – may give rise to doubts; these, however, can be dispelled using other methods of interpretation. Given the ambiguity of the result of the grammatical interpretation, reference should be made to a systemic and dynamic interpretation (in line with the current legislator's intention), while establishing the meaning of the provision of Article 70 para. 2 AAL (currently, Article 70 para. 3) based on the wording of analogous regulations in more recent corporate acts, i.e. the Act of 2 December 2009 on medical chambers and the Act of 1 July 2011 on self-government of nurses and midwives. In these statutory instruments, the functional equivalents of Article 70 para. 2 AAL, i.e. Article 64 para. 4 Act on medical chambers and Article 46 para. 4 Act on self-government of nurses and midwives, contain the phrasing of 'constitutes a criminal offence', which indicates that the meaning of a similar regulation under the Act on attorneys-at-law should also be interpreted this way as this corresponds to the current legislator's intention. Although the above decision was made on the basis of the Act on attorneys-at-law, the same application of the problematic expression 'contains the constituent elements of a criminal offence' is also significant for disciplinary proceedings conducted pursuant to the Law on the system of common courts and other acts containing provisions parallel to those set out in Article 70 para. 3 AAL and Article 108 § 4 LSCC.

It must be acknowledged that the first of the presented views seems to be much more favourable from the point of view of implementing of the principle of disciplinary court jurisdictional independence, which can be derived from Article 8 of the Criminal Procedure Code in conjunction with Article 128 LSCC. If the discussed expression were to be interpreted this way, i.e. narrowly, the disciplinary court could freely decide whether a given alleged conduct of the defendant met the constituent elements of a prohibited act, without going into the question of further grounds for criminal liability which, once established, could be regarded as overriding the constitutional principle of the presumption of innocence (Article 42 para. 3 of the Polish Constitution).[11]

In turn, in the interpretation made by the Supreme Court in the above-mentioned decisions, the provision of Article 108 § 4 LSCC (Article 70 para. 3 AAL, etc.) will constitute a bar to the adoption of full jurisdictional independence of disciplinary proceedings, as stipulated e.g. in Articles 119 and 120 LSCC.[12] If it is assumed that a disciplinary court, when called upon to examine whether there are grounds for applying Article 108 § 4 LSCC, will have to establish whether a given act constitutes a crime, then – in the Supreme Court's view – this will violate the principle of presumption of innocence. Therefore, as indicated in the resolution I KZP 8/06, 'it must be accepted that in disciplinary proceedings, the finding that a disciplinary offence contains the constituent elements of a criminal offence must be based on a final and non-appealable conviction for the offence whose constituent elements

[11] See more in W. Wróbel, *supra* n. 8, pp. 112–129.
[12] See also Article 86 LA, Article 67 para. 1 AAL.

are present in the alleged disciplinary offence.'[13] However, the problem is that the period during which a final and non-appealable decision is issued by a criminal court typically exceeds the limitation period for punishability and prosecution of a given act with a view to its being considered a disciplinary wrongful act. This will imply the necessity to discontinue disciplinary proceedings that have been stayed in connection with pending criminal proceedings, due to the expiry of general limitation periods set out, e.g. in Article 108 § 1 or Article 108 § 2 LSCC, in the event of a discontinuance of criminal proceedings or an acquittal, while such a decision does not necessarily have to be issued in disciplinary proceedings where the same act is subject to legal evaluation in the light of different criteria.

An important argument supporting the adoption of the resolution I KZP 8/06 is the risk of a double legal and criminal assessment being made in respect of the same act.[14] In the said resolution, the Supreme Court stressed that 'where criminal and disciplinary proceedings are pending at the same time and involve the same subject matter and individuals, the disciplinary courts should, when deciding whether to continue disciplinary proceedings, always consider the extent to which the risk of different decisions being issued in disciplinary and criminal proceedings is actually real. High probability of conflicting decisions should lead to the interruption or postponement of the hearing or even to the stay of disciplinary proceedings in order to mitigate the risk of two different decisions being issued in separate proceedings relating to the same factual and legal background'.[15]

Therefore, it seems that the proposition provided in the Supreme Court resolution of 28 September 2006 does not imply that disciplinary courts must be absolutely limited in hearing cases regarding acts that have the constituent elements of a criminal offence, even though such a view was taken in a number of subsequent cases before the Supreme Court. For example, in case no. SNO 39/09,[16] the Supreme Court, in its decision of 26 May 2009, referring to the above-mentioned resolution, held that 'in a situation where a disciplinary offence have the constituent elements of a criminal offence, it is necessary to stay disciplinary proceedings pending a final and non-appealable judgment of the criminal court, while applying *mutatis mutandis* Article 22 § 1 Criminal Procedure Code in conjunction with Article 128 Law on the system of common courts'.[17] Meanwhile, in the last sentences of the reasons for the above-mentioned resolution, the Supreme Court admitted that the issue of staying disciplinary proceedings was primarily a matter for the court hearing the case since the resolution should be examined – as it has been pointed out earlier – in the context of the circumstances of a specific case. In formulating the final position, less firm than it would appear from earlier arguments, the court found that 'since the provisions of the Criminal Procedure Code are applied *mutatis mutandis* in

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[13] OSNwSD 2006, item 118, p. 368.

[14] This was in particular noted by Wiesław Kozielewicz; see *idem*, *Odpowiedzialność dyscyplinarna sędziów. Komentarz*, Warszawa 2005, p. 89.

[15] OSNwSD 2006, item 118, p. 369.

[16] OSNwSD 2009, item 52.

[17] See decision of the Supreme Court – Disciplinary Chamber of 5 October 2010, SNO 44/10, OSNSD 2010, item 53.

disciplinary proceedings in cases involving judges, taking into account the specific nature of both the disciplinary proceedings and the disciplinary liability itself, then – where criminal and disciplinary proceedings are pending at the same time and involve the same subject matter and individuals and the disciplinary court considers it necessary to stay the disciplinary proceedings until the conclusion of the criminal proceedings – there are no reasonable grounds to exclude such a possibility'.[18]

Therefore, it seems that the proper understanding of the resolution of 28 September 2006 should be essentially a matter of endorsing jurisdictional independence in the context of disciplinary proceedings (first sentence of the thesis of the resolution setting out this principle) and accepting the admissibility of applying Article 22 § 1 Criminal Procedure Code in the context of disciplinary proceedings, in particular due to the procedural economy or the fact that criminal and disciplinary proceedings are pending at the same time and involve the same subject matter and individuals, in light of the need to adopt a longer limitation period under Article 108 § 4 LSCC. These provisions can only be regarded as optional exceptions to the principle that a court decides on factual and legal issues on its own and is not bound by decisions of any other court or authority.[19]

Therefore, it should be considered that a disciplinary court, due to the different grounds for disciplinary and criminal liability for the same act, may conduct proceedings parallel to criminal proceedings, unless it sees a risk of different decisions being issued, which – given a non-exhaustive list of the grounds for the application of Article 22 § 1 Criminal Procedure Code – may be regarded as a long-lasting obstacle preventing proceedings from being conducted. In addition, the stay of proceedings may be expedient where it proves necessary to base the findings of facts on complex or extensive evidence that can effectively be obtained in criminal proceedings (for reasons of procedural economy) in order to issue a disciplinary decision. The third circumstance, the least evaluative (which is left *ad casum* to the discretion of the disciplinary courts), but at the same time the most arguable, is the stay of proceedings when there is a need to apply the institution specified in Article 108 § 4 LSCC.

However, it is worth considering whether it will always be necessary to stay criminal proceedings when the duration of the disciplinary proceedings approaches or exceeds the limitation period for a disciplinary offence. This seems to be necessary if the court has to wait for evidence to be collected in criminal proceedings or – which is also related to the assessment of the evidence – finds it highly probable that different decisions as to whether or not the act constitutes an offence will be made. This issue is important in disciplinary proceedings themselves, but it is also relevant after a disciplinary decision has become final and non-appealable in cassation proceedings.[20]

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[18] OSNwSD 2006, item 118, p. 370.

[19] It seems that such view was presented, among others, in the decision of the Supreme Court – Disciplinary Chamber of 15 January 2014, SNO 38/13, OSNwSD 2014, item 13.

[20] For example, in proceedings concerning the examination of a cassation appeal in cases regarding defendant notaries (where Article 52 § 2 Law on notaries has the same wording as Article 108 § 4 LSCC), the Supreme Court stayed cassation proceedings for reasons of procedural

It seems that on the basis of the analysed problem a compromise solution can be proposed for the views presented at the beginning of this paper in relation to the interpretation of Article 108 § 4 LSCC, where their advantages are reconciled and mutual disadvantages eliminated. More specifically, it can be said that the phrasing 'has the constituent elements of an offence' implies the requirement for the disciplinary court to establish the fulfilment of the statutory elements of an offence and to assume a high probability that such conduct will be considered criminal by the criminal court. This also entails the need to consider that the disciplinary court should not make a different factual and legal assessment of a defendant's act subject to criminal proceedings.

In this context, it is worth making a few remarks concerning the nature of a disciplinary court's finding that a given act to be subject to disciplinary and legal evaluation constitutes a criminal offence, which is significant in light of the Supreme Court's view endorsing such a broad understanding of the grounds stemming from Article 108 § 4 LSCC, as set out in the resolution I KZP 8/06 and in case SDI 13/13. It is clear that the disciplinary court is not competent to establish that an act is a criminal offence since only a criminal court is competent to do so by way of a judgment.[21] It is for this reason that the disciplinary court can at most make an assessment in respect of the fulfilment of the constituent elements of a prohibited act and a probabilistic assessment of the likelihood of establishing the criminality of an act. This view respects the principle of the jurisdictional independence of disciplinary courts and the principle of the presumption of innocence when establishing a criminal offence. At the same time, this does not preclude the disciplinary court from staying the proceedings if it considers that the issuance of a decision carries too high a risk of different decisions being made with regard to the assessment related to the criminality of the act, determining the subjective and substantive identity of the criminal and disciplinary proceedings. It is clear that a range of behaviour constituting a disciplinary wrongful act is not equivalent to a catalogue of criminal offences, since the legal assessment of a given act is based on the criteria which are the same as to the type but differ as to the quality.[22]

This is particularly evident in the assessment of the substance of an act. Although corporate harm is a derivative of social harm under criminal law, the application of Article 115 § 2 Criminal Code may only be appropriate, and thus take into account the specificity of disciplinary liability, i.e. liability in the context of the professional activity of a defendant within a given corporate government and obligations related

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economy and the presumption of innocence (see the Supreme Court decision of 9 August 2012, SDI 19/12, LEX No. 1228608), stressing the need to wait for a judgment of the criminal court establishing the existence of the grounds referred to in Article 52 § 2 of the Law on notaries (see the Supreme Court decision of 9 August 2012, SDI 13/12, unpublished).

[21] See W. Wróbel, *supra* n. 8, p. 125.

[22] In a situation where only a part of the alleged disciplinary misconduct of the defendant is subject to criminal proceedings, it may be necessary to stay disciplinary proceedings in full, even if the disciplinary offence and the criminal offence the defendant is charged with are not the same, when there is a strong time and contextual connection and a causal link between the individual conduct of the defendant; see the decision of the Supreme Court – Disciplinary Chamber of 15 January 2014, SNO 38/13, OSNwSD 2014, item 13.

to the exercise of a specific profession (an advocate, a notary, etc.) or the exercise of office (a judge, a public prosecutor). Therefore, it will not always be the case that a criminal court's finding of a negligible social harm of an act will oblige the disciplinary court to accept the same assessment of the degree of corporate harm of the same act as a disciplinary offence, since these assessments are based on similar but nonetheless non-identical criteria. The *signum specificum* is the context of specific conduct which for the criminal liability has a social dimension, while for the disciplinary liability – a corporate dimension. As indicated in the body of judicial decisions, what is called corporate harmfulness, which is an element of an offence specified in Article 107 § 1 LSCC, means social harmfulness within the meaning of ordinary criminal law, supplemented by elements of harmfulness measured against the judge's professional environment, taking into account the protection of the prestige of the judiciary and the repute of the courts and judicial authorities as well as individual judges. The extent of this harmfulness is also determined by subjective factors concerning the defendant, the extent of the damage, the manner and circumstances in which the act has been committed, and the nature and significance of the rules infringed.[23] This, in turn, seems to support the need for the disciplinary court to recognise an act that fulfils the constituent elements of a criminal offence, even if the court in a criminal case established the absence of the grounds under Article 1 § 2 Criminal Code. This possibility would naturally open up when a narrow understanding of the expression 'has the constituent elements of an offence' is accepted. It should also be noted that the criminalisation of an unintentional misdemeanour does not automatically mean that a disciplinary court will consider such conduct as a disciplinary offence. As indicated in the case law on the disciplinary liability of judges (which *mutatis mutandis* can be applied to other legal professions), 'the dignity of the judge's office is compromised when the judge is a perpetrator who has breached the law, and in particular when he or she commits a criminal offence. However, not every such conduct implies "violation of the dignity of the office". In the case of an unintentional misdemeanour, its nature and seriousness, as well as the manner and circumstances in which it has been committed, must be assessed from the point of view of the socially acceptable standard of the judge's profession. In unintentional offences, including traffic offences, the type of rules of reasonable conduct that have been violated and the extent to which they have been violated shall be a determining factor.'[24]

The fact that the grounds for disciplinary and criminal liability do not completely match is an important argument in favour of the jurisdictional independence of disciplinary courts, since not every finding of a criminal offence will mean that a disciplinary offence can be punished and, at the same time, not every disciplinary offence must be a criminal offence. This is all the more important as in the event of acquittal or discontinuance of criminal proceedings, or even the expungement

[23] Decision of the Supreme Court – Disciplinary Chamber of 20 July 2011, SNO 31/11, OSNSD 2011, item 4.

[24] Decision of the Supreme Court – Disciplinary Chamber of 26 May 2009, SNO 37/09, OSNwSD 2009, item 6, LEX No. 1288878.

of a conviction,[25] it is possible, in certain circumstances, to hold the offender liable in disciplinary terms. This, in turn, leads to the conclusion that it is not always necessary to await the decision of a criminal court, which, as already indicated earlier, may lead to the expiry of the limitation period for a disciplinary offence. It is worth noting that in the event when the assessment of actual conduct differs in light of the criteria applied to criminal and disciplinary proceedings, it is possible to resume the latter (e.g. in cases of judges under Article 126 LSCC), which is a kind of a safe option that eliminates the situation of two conflicting judgments. There may also be situations in which it is the disciplinary court that makes a proper legal assessment of an act, combining the issue of criminal and disciplinary liability.[26]

In conclusion, it appears that, in affirmation of the principle of jurisdictional independence of disciplinary courts, it is appropriate to support the view allowing disciplinary proceedings regarding an act which is subject to parallel criminal proceedings to be conducted also after the expiry of the limitation period for a disciplinary offence, provided that this is not precluded by reasons of procedural economy and limited capacity of the disciplinary court as regards evidence-gathering, and that the disciplinary court does not find it highly probable that a decision other than that of the criminal court will be made in respect of the commission and the legal qualification of the defendant's act in the context of its criminal nature. The adoption of this view is in favour of the efficiency of disciplinary proceedings, which could otherwise be 'paralysed' by the course of criminal proceedings. At the same time, it poses a minimum risk of violating the principle of the presumption of innocence, though only based on axiological grounds and not on formal and legal grounds, which all the more supports the view that the disciplinary court should be allowed to make legal and criminal assessments that are, after all, made only for the purposes of applying a longer limitation period to the punishability of a disciplinary offence.

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[25] See decision of the Supreme Court of 4 January 2011, SDI 29/10, OSNwSD 2011, item 56, OSNKW 2011/5/40.

[26] See e.g. a judgment of the Supreme Court – Disciplinary Chamber of 27 February 2008, SNO 7/08, OSNwSD 2008, item 31, in which, referring to the principle of jurisdictional independence, the Supreme Court made a different assessment of the causal link between the act of the defendant judge and the traffic accident, stating that 'since, in the light of the experts' opinion, the victim violated the elementary road traffic rules and the defendant's conduct consisting in exceeding the speed limit was not linked to the consequence of the accident, there are no grounds to reasonably consider that he violated the dignity of the judge's office'.

LIMITATION PERIOD FOR PUNISHABILITY OF DISCIPLINARY OFFENCE HAVING ELEMENTS OF CRIMINAL OFFENCE AND THE PRINCIPLE OF JURISDICTIONAL INDEPENDENCE OF DISCIPLINARY COURT

Summary

This paper addresses the issue of jurisdictional independence of a disciplinary court in terms of the possibility of assessing an act under investigation in the context of the grounds of criminality of an act. The issue is of particular importance in view of the rules on limitation periods for disciplinary offences, which require the adoption of limitation periods for criminal offences where the act constitutes a criminal offence. Such a solution may lead to a conflict between the principle of jurisdictional independence of the disciplinary court and the principle of the presumption of innocence, since this presumption can only be rebutted by a final and non-appealable judgment of a criminal court. In turn, the stay of disciplinary proceedings and waiting for a final and non-appealable judgment of the criminal court may have a negative impact on the decision concerning the issue of disciplinary liability. This study proposes a compromise solution which, according to the author, would respect both principles.

Keywords: disciplinary proceedings, period of limitation, disciplinary offence, disciplinary judiciary, prohibited act, principle of jurisdictional independence, presumption of innocence

PRZEDAWNIENIE KARALNOŚCI PRZEWINIENIA DYSCYPLINARNEGO ZAWIERAJĄCEGO ZNAMIONA PRZESTĘPSTWA A ZASADA SAMODZIELNOŚCI JURYSDYKCYJNEJ SĄDU DYSCYPLINARNEGO

Streszczenie

Niniejsze opracowanie porusza problematykę samodzielności jurysdykcyjnej sądu dyscyplinarnego w zakresie możliwości dokonywania oceny czynu będącego przedmiotem postępowania przed tym sądem w kontekście warunków przestępności czynu. Doniosłość tego zagadnienia jest szczególna z uwagi na unormowania dotyczące terminów przedawnienia dyscyplinarnego, które nakazują przyjąć terminy właściwe dla przedawnienia przestępstw, jeżeli czyn stanowi przestępstwo. Takie rozwiązanie prowadzić może do kolizji zasady samodzielności jurysdykcyjnej sądu dyscyplinarnego z zasadą domniemania niewinności, albowiem domniemanie to może być obalone jedynie prawomocnym wyrokiem sądu karnego. Z kolei zawieszenie postępowania dyscyplinarnego i oczekiwanie na prawomocny wyrok sądu karnego może przynieść negatywne skutki dla rozstrzygnięcia o kwestii odpowiedzialności dyscyplinarnej. W przedmiotowym opracowaniu zaproponowano kompromisowe rozwiązanie, które – w przekonaniu autora – respektowałoby obie wskazane zasady.

Słowa kluczowe: postępowanie dyscyplinarne, przedawnienie, przewinienie dyscyplinarne, sądownictwo dyscyplinarne, czyn zabroniony, zasada samodzielności jurysdykcyjnej, domniemanie niewinności

PRESCRIPCIÓN DE INFRACCIÓN DISCIPLINARIA QUE CONTENGA ELEMENTOS DE DELITO Y EL PRINCIPIO DE AUTONOMÍA JURISDICCIONAL DEL TRIBUNAL DISCIPLINARIO

Resumen

La presente obra versa sobre la problemática de autonomía jurisdiccional del Tribunal disciplinario en cuanto a la posibilidad de enjuiciar el hecho que sea objeto del proceso ante este Tribunal desde la perspectiva de condiciones criminales de hecho. La importancia de esta cuestión es especial, debido a la regulación de plazos de prescripción de infracción disciplinaria que obligan aplicar plazos previstos para la prescripción de delitos, siempre y cuando el hecho sea constitutivo de delito. Tal solución puede producir la colisión entre principio de autonomía jurisdiccional del Tribunal disciplinario con el principio de presunción de inocencia, ya que la presunción puede ser negada sólo a través de la sentencia firme del Tribunal penal. La suspensión de proceso disciplinario y la espera a la sentencia firma del Tribunal penal puede conducir a consecuencias negativas en cuanto a la resolución sobre la responsabilidad disciplinaria. En la presenta obra se propone una solución de compromiso que – según el autor – respeta ambos principios señalados.

Palabras claves: procedimiento disciplinario, prescripción, infracción disciplinaria, jurisdicción disciplinaria, hecho prohibido, principio de autonomía jurisdiccional, presunción de inocencia

СРОК ДАВНОСТИ В ОТНОШЕНИИ ДИСЦИПЛИНАРНОГО ПРОСТУПКА, СОДЕРЖАЩЕГО ПРИЗНАКИ ПРЕСТУПЛЕНИЯ, И ПРИНЦИП ЮРИСДИКЦИОННОЙ НЕЗАВИСИМОСТИ ДИСЦИПЛИНАРНОГО СУДА

Аннотация

В статье затрагивается вопрос юрисдикционной независимости дисциплинарного суда относительно его способности дать оценку деянию, которое рассматривается в данном суде и в котором имеются признаки состава преступления. Важность данного вопроса обусловлена, в частности, положениями о сроках давности по дисциплинарным делам, согласно которым, если деяние представляет собой преступление, следует принять сроки давности, предусмотренные для преступлений. Такое решение может привести к коллизии между принципом юрисдикционной независимости дисциплинарного суда и принципом презумпции невиновности, поскольку презумпция невиновности может быть опровергнута только вступившим в силу приговором уголовного суда. С другой стороны, приостановление дисциплинарного разбирательства до вступления в силу решения уголовного суда может негативно повлиять на решение вопроса о дисциплинарной ответственности. Автор предлагает компромиссное решение, которое, по его мнению, удовлетворяет обоим вышеуказанным принципам.

Ключевые слова: дисциплинарное расследование; срок давности; дисциплинарный проступок; дисциплинарные суды; запрещенное действие; принцип юрисдикционной независимости; презумпция невиновности

DIE VERJÄHRUNG DER STRAFVERFOLGUNG VON DISZIPLINARVERGEHEN UND DER GRUNDSATZ DER GERICHTLICHEN UNABHÄNGIGKEIT DES DISZIPLINARGERICHTS

Zusammenfassung

Diese Studie befasst sich mit der Frage der Unabhängigkeit der Gerichtsbarkeit von Disziplinargerichten hinsichtlich der Möglichkeit einer Bewertung der verfahrensgegenständlichen Zuwiderhandlung vor diesem Gericht im Kontext der Bedingungen der Strafbarkeit. Diesem Thema kommt aufgrund der Vorschriften über die Verjährungsfristen für die disziplinarische Verfolgung, nach denen – sofern es sich bei der Zuwiderhandlung um eine Straftat handelt – die für Straftaten geltenden Verjährungsfristen festgelegt werden müssen, besondere Bedeutung zu. Bei dieser Lösung kann zu einem Konflikt zwischen dem Grundsatz der Unabhängigkeit des Disziplinargerichts und dem Grundsatz der Unschuldsvermutung führen, da die Unschuldsvermutung nur durch ein endgültiges, rechtskräftiges Strafurteil überwunden werden kann. Die Aussetzung des Disziplinarverfahrens und das Warten auf ein rechtskräftiges Urteil des Strafgerichts können sich wiederum nachteilig auf die Entscheidung über die Frage der disziplinarrechtlichen Haftung auswirken. In der vorliegenden Studie wird eine Kompromisslösung vorgeschlagen, die nach Ansicht des Autors beiden Grundsätzen Rechnung tragen würde.

Schlüsselwörter: Disziplinarverfahren, Verjährung, Disziplinarvergehen, Disziplinargerichte, strafbare Handlung, Grundsatz der Unabhängigkeit der Gerichtsbarkeit, Unschuldsvermutung

PRESCRIPTION DE LA RESPONSABILITÉ PÉNALE POUR LES INFRACTIONS DISCIPLINAIRES ET PRINCIPE DE L'INDÉPENDANCE JURIDICTIONNELLE DU TRIBUNAL DISCIPLINAIRE

Résumé

Cette étude aborde la question de l'indépendance juridictionnelle du tribunal disciplinaire dans le cadre de la possibilité d'apprécier l'acte faisant l'objet d'une procédure devant ce tribunal dans le contexte des termes de l'infraction. L'importance de cette question est particulière en raison de la réglementation relative aux délais de prescription disciplinaire, qui exige que des délais de prescription des infractions soient adoptés si l'acte constitue une infraction pénale. Une telle solution peut conduire à un conflit entre le principe de l'indépendance juridictionnelle du tribunal disciplinaire et la présomption d'innocence, cette présomption ne pouvant être réfutée que par un jugement définitif d'un tribunal pénal. À son tour, la suspension de la procédure disciplinaire et l'attente d'un jugement définitif d'un tribunal pénal peuvent avoir des effets négatifs sur la détermination de la question de la responsabilité disciplinaire. Dans la présente étude, une solution de compromis a été proposée qui, de l'avis de l'auteur, respecterait ces deux principes.

Mots-clés: procédure disciplinaire, prescription, infraction disciplinaire, juridiction disciplinaire, acte défendu, principe d'indépendance de juridiction, présomption d'innocence

PRESCRIZIONE DEL REATO DISCIPLINARE CONTENENTE ELEMENTI COSTITUTIVI DI REATO E PRINCIPIO DELLA GIURISDIZIONE AUTONOMA DEL TRIBUNALE DISCIPLINARE

Sintesi

Il presente elaborato tratta la problematica della giurisdizione autonoma del tribunale disciplinare nell'ambito della possibilità di valutazione dell'azione che costituisce l'oggetto del procedimento innanzi a tale tribunale, nel contesto delle condizioni di punibilità. La rilevanza di tale questione è particolare a motivo delle norme riguardanti i termini di prescrizione disciplinare, che impongono di assumere i termini applicabili per la prescrizione dei reati, se l'atto costituisce reato. Tale soluzione può portare alla collisione dei principi di giurisdizione autonoma del tribunale disciplinare con il principio di presunzione di innocenza, poiché tale presunzione può essere confutata unicamente da una sentenza del tribunale penale passata in giudicato. D'altra parte la sospensione del procedimento disciplinare e l'attesa della sentenza del tribunale penale passata in giudicato può portare conseguenze negative per la pronunciazione sulla questione della responsabilità disciplinare. Nell'elaborato in oggetto si è proposta una soluzione di compromesso che secondo la convinzione dell'autore rispetterebbe entrambi i principi indicati.

Parole chiave: procedimento disciplinare, prescrizione, infrazione disciplinare, magistratura disciplinare, reato, principio di giurisdizione autonoma, presunzione di innocenza

Cytuj jako:

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ANALYSIS OF COMPLIANCE OF BILLS WITH THE EUROPEAN UNION LAW IN PARLIAMENTARY WORK IN 2015–2016

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1. INTRODUCTION

The Republic of Poland's membership of the European Union has not only changed the economic and political situation in the country but also exerted considerable influence on the legislation processes. Still in the pre-accession period, based on the Association Agreement,[1] the Republic of Poland was obliged to adjust its national law to *acquis communautaire*. The provisions of Articles 68 and 60 of the Agreement recognised that the major precondition for Poland's economic integration into the Community was the approximation of the country's existing and future legislation to that of the Community. Moreover, Poland was obliged to make its best endeavours to ensure that future legislation is compatible with the Community legislation. The Association Agreement stipulated that the approximation of laws should take place still in the pre-accession period and indicated the most important areas it should cover. Those included, inter alia, customs law, company law, banking law, company accounts, entrepreneurship, taxation (in particular indirect taxes), intellectual property, protection of workers at the workplace, financial services, rules on competition, customer protection, protection of health and life of humans, animals and plants, technical rules and standards, transport and the environment.[2]

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1 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part signed in Brussels on 16 December 1991, OJ L 348, 31.12.1993, p. 184 (Dz.U. 1994, No. 11, item 38); hereinafter Association Agreement.

2 Compare Article 69 Association Agreement.

Poland's accession to the EU on 1 May 2004 resulted in natural expiration of the Association Agreement and its substitution with the Accession Treaty,[3] and in consequence of that, being fully bound by the Treaties on the European Union[4]. Obligations resulting from the membership are laid down in Article 4 para. 3 TEU, which stipulates the principle of sincere cooperation and obliges the Member States to take any appropriate measure to ensure the achievement of tasks of the Treaties and refrain from any measure which could jeopardise the attainment of the Union's objectives. The principle obliges the Member States to adjust national law to the entire EU legislation and recognise the primacy of the EU law over national law,[5] and the necessity of taking measures to harmonise and unify the Member States' law.

Due to the legal complexity of integration processes within the EU, it is necessary to establish clear rules concerning the division of competences to enact law and to indicate the fields where law is enacted at the supranational level and where the legislative process remains the Member States' competence. The Union constitutional principle regulating the above issues is the principle of conferral (Article 5 paras 1 and 2 TEU), under which the Union enacts law only within the limits of competences conferred upon it by the Member States in the Treaties. This means that the EU as a supranational organisation has only as much legislative power as results from the transfer of legislative power by the Member States. It was confirmed in the judgment in *Van Gend en Loos*,[6] containing the characteristic features of the Union law as a new international legal order, in which sovereign powers in certain fields of law are transferred from the national level to the Union level. The article analyses the general rules of the division of competences between the Member States and the Union, which in practice can translate into legislative discretion at the national level. Then, the article more thoroughly discusses notification obligations connected with informing the EU about domestic bills. Finally, selected legal acts passed in the period 2015–2016 in connection with election-related promises are evaluated. 70 legal acts are analysed in order to determine whether and, if so, to what extent the Union law was an obstacle to national legislation, and what was the influence of the obligations resulting from the membership on the shape of selected provisions.

2. EU COMPETENCES TO LEGISLATE AS A LIMITATION TO THE FREEDOM TO SQUANDER NATIONAL ELECTION PROMISES

After the Treaty of Lisbon entered into force, a formal Treaty-based division of competences between the Member States and the Union took place. There are three types of competences: exclusive, shared and supporting ones. The analysis of their

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[3] OJ L 236, 23.9.2003, p. 46 (Dz.U. 2004, No. 90, item 864).

[4] Treaty on European Union and Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 1–390; hereinafter TEU and TFEU, respectively.

[5] For more on the principle of the EU law primacy, compare E. Całka, *Zasada pierwszeństwa w prawie Unii Europejskiej. Wybrane problemy*, Studia Iuridica Lublinensia Vol. XXV, 1, 2016, pp. 47–58.

[6] ECJ judgment of 5 February 1963 in Case 26-62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

specificity and the scope of the fields they cover lead to a conclusion that the obligations resulting from the Republic of Poland's membership of the European Union may totally exclude the state's freedom to enact national law (fields of exclusive competences) or considerably limit it (shared and supporting competences). Moreover, it is also necessary to take into account the principle of the EU law primacy over national law, which, based on the collision rule, admits non-application of the national law that is in conflict with the EU law. The EU law primacy does not automatically eliminate national norms that are in conflict with the EU law and it does not in advance prevent the adoption of national solutions infringing the Union regulations. It is due to the fact that it is the primacy of application and not of being in force.[7] This means that in the process of law application by courts or administration bodies, in case of collision between the national law and the Union law, the latter is applicable.[8] Despite the basic function of primacy determined this way, it should be noticed that the principle also precludes the adoption of national provisions that are in conflict with the Union law and hampers the entry into force of a norm of national law that is in conflict with the Union law.[9] That is why, in the national legislative process, bills also include justification from the point of view of their conformity with the Union law. In the Polish legislative practice, it constitutes the expression of respecting the principle of the Union law supremacy and also the principle of precedence resulting from Article 91 para. 3 Constitution of the Republic of Poland. The provision stipulates that: 'If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.' In addition, at the stage of taking a decision to develop a bill, there is an obligation to take into account the analysis of the present legal state, including the European Union law,[10] and every bill's justification should contain, inter alia, a declaration of its conformity with the EU law or a declaration that the subject matter of the bill is not covered by the EU law.[11]

The exclusive competence conferred on the Union by the Treaties in the legislative area means that only the Union may legislate and adopt legally binding acts, and the Member States are able to do so themselves only if they are empowered by the Union or for the implementation of the Union acts (Article 2 para. 1 TFEU). The Union has exclusive competence in the following areas: customs union; the

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[7] E. Całka, *supra* n. 5, pp. 48–49.

[8] ECJ judgment of 9 March 1978 in Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECLI:EU:C:1978:49.

[9] *Ibid.*, para. 17.

[10] Compare § 1 sub-section 1(2) Annex 'Legislative technique rules' to the Regulation of the President of the Council of Ministers of 20 June 2002 concerning legislative technique rules (consolidated text, Dz.U. of 2016, item 283).

[11] Compare Article 34 para. 2(7) of the Rules and Regulations of the Sejm of the Republic of Poland, M.P. of 2012, item 32, as amended. For more on the obligations of the authors of bills, see P. Kuczma, *Obowiązki projektodawców w związku z koniecznością respektowania zasady pierwszeństwa prawa UE*, [in:] M. Jabłoński, S. Jarosz-Żukowska (eds), *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP*, Wrocław 2015, pp. 108–117, http://www.bibliotekacyfrowa.pl/Content/64518/Zasada_pierwszenstwa_prawa_Unii_Europejskiej.pdf (accessed 20.5.2019).

establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; and common commercial policy (Article 3 TFEU). This relatively narrow catalogue of exclusive competence limits the discretion to legislate for provisions by the Member States to the greatest extent. Evaluating the scope of most important acts adopted in Poland in 2015 and 2016 in connection with the electoral campaign and next fulfilling the election promises, one can assume that none of the acts analysed belonged to the areas of exclusive competence.[12]

Shared competences constitute an absolutely more complex area both in terms of the rules regulating the division of legislative powers between the EU and the Member States and the scope of matters covered. The provision of Article 2 para. 2 TFEU stipulates that both the Union and the Member States may legislate for acts in this area. The Member States exercise their competence to the extent to which the Union has not exercised its competence or the Union has decided to cease exercising its competence. Shared competence between the Union and the Member States applies to the following areas: internal market; social policy (for the aspects defined in the Treaty); economic, social and territorial cohesion; agriculture and fisheries (excluding the conservation of marine biological resources); environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and common safety concerns in public health matters, for the aspects defined in the Treaty.[13]

The weakest EU competences to legislate for acts are the ones that support, coordinate or complement the action of the EU Member States. Their characteristic feature is that the acts relating to these areas do not entail harmonisation and the rule that the Union measures do not supersede the competence of the Member States (Article 2 para. 5 TFEU). The supporting competences include the following areas: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation.[14]

Exercising all the competences, the European Union follows the principle of proportionality. This way, the protection of the Member States powers to legislate for acts within the Union legislative system is implemented. In accordance with the principle, the content and form of the Union action do not exceed what is necessary to achieve the objectives of the Treaties (Article 5 para. 4 TEU).[15] Proportionality as a general principle of law may be also treated in a broad way. Then, it covers the Member States' actions connected with the application of the Treaties or judgments on derogation of fundamental freedoms of the internal market (for goods, persons,

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[12] For more on the scope of exclusive competence, compare P. Saganek, Article 3, [in:] D. Miąsik, N. Półtorak, A. Wróbel (eds), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom I (art. 1–89)*, Wolters Kluwer Polska, 2012.

[13] For more on shared competences, *ibid.*, Article 4.

[14] For more on the scope of supporting competences, *ibid.*, Article 6.

[15] The principle of proportionality within the Treaties concerns the Union measures. Proportionality as a general legal principle may be also approached in a broad way, then it covers actions.

services, capital and payments). Each of these freedoms prescribes a catalogue of special public interests that can justify departure from the Treaty-based rules.[16] The Member States can adopt national legal solutions serving the protection of one of the important interests recognised by the EU law (e.g. protection of health, protection of the environment, protection of order and public security), provided that the undertaken legal measures proportionally protect a given interest without excessive interference into the content of the given Treaty-related freedom. This means that, in this approach, the principle of proportionality limits legislative action of the Member States.[17]

Shared and supporting competences are additionally governed by the principle of subsidiarity (Article 5 para. 3 TEU). The principle means that the EU legislation is possible when the objectives of the proposed action cannot be sufficiently achieved by the Member States (either at the central or at the regional and local levels) but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. Thus, in accordance with the principle of subsidiarity, legal regulations should be legislated on at the level that is closest to citizens and the interference at the Union level should be well grounded. Only if the requirements laid down in Article 5 para. 3 TEU are met, the adoption of a Union act and, this way, the limitation of the legislative discretion of the Member States are possible.[18]

3. NOTIFICATION OBLIGATIONS AS A LIMITATION OF THE FREEDOM TO LEGISLATE FOR NATIONAL LEGAL ACTS

The freedom of the Member States, including obviously the Republic of Poland, to legislate for national acts, apart from a general obligation not to pass national acts that are in conflict with the EU law, which, as it has been said above, results from the principle of loyal co-operation and the principle of the EU law primacy, is limited

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[16] Compare Articles 36, 45, 52 TFEU. Moreover, derogations can be judicial in nature. Then, they are referred to as necessary requirements, imperative requirements or important reasons of public interest.

[17] For more on the issue of the principle of proportionality, compare J. Maliszewska-Nienartowicz, *Zasada proporcjonalności w prawie Wspólnot Europejskich*, Toruń, 2007.

[18] The principle of subsidiarity is reviewed at the stage of a legislative process as well as after legal acts have been passed. The *ex-ante* review is carried out in cooperation with National Parliaments, which should receive a draft of a Union legal act properly justified with respect to subsidiarity. Pursuant to Article 5 para. 3, second sub-section, and Article 12(b) TEU, National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol 2 attached to the Treaty. In fact, National Parliaments cannot use the procedure to block the adoption of a bill that is in conflict with the principle of subsidiarity. However, they can induce the institution that is the author of the bill to change or withdraw it. If, within the standard legislative procedure, National Parliaments challenge the conformity of a bill with the principle of subsidiarity and the European Commission does not withdraw it, the case is first read in the European Parliament and the Council. If they recognise the bill is in conflict with the principle of subsidiarity, they may vote against it by the majority of 55% of the Council members or the majority of votes cast in the European Parliament. The *ex-post* review of the principle of subsidiarity is judicial in nature and is carried out based on a complaint about the invalidity of the EU act brought to the CJEU (Article 263 TFEU).

by a series of notification obligations resulting from the Union law. In some areas, within the national legislative process, there is an obligation to notify the Union institutions of proposed bills. There are four main notification procedures at present, which make legislative work at the national level discontinue in order to obtain approval of the bills. These include the notification of: (1) public aid (pursuant to Article 108 TFEU and the Council Regulation (EU) 2015/1589); (2) technical regulations; (3) harmonisation of the Member States' national regulations; and (4) national regulations that are within the competence of the European Central Bank.

The notification of public aid under Article 108 TFEU and the Council Regulation (EU) 2015/1589 of 13 July 2015[19] concerns any plans to grant new aid or to amend the existing aid granted in accordance with Article 107 TFEU. A Member State must notify the European Commission thereof. A Member State cannot legislate on bills granting public aid before the conclusion of the examination procedure by the Commission in accordance with the Council Regulation (EU) 2015/1589. This means the necessity of discontinuation of all national legislative work until the Commission has taken a decision.[20] Public aid that is subject to notification in accordance with Article 108 and the Council Regulation 2015/1589 cannot be put into effect until the Commission has taken or is deemed to have taken a decision authorising it. This means that the Member States' freedom in this respect is limited and subject to the Commission's decision.

Another notification procedure is connected with the functioning of the freedom of movement of goods and services, and results from Directive (EU) 2015/1535 of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services.[21] It concerns notification of bills proposing technical regulations. They cover technical specifications of products (e.g. regulations concerning the characteristics required of a product such as, inter alia, levels of quality performance, safety, packaging and marking) and other requirements or rules on services provided at a distance, by electronic means and at the individual request of a recipient. The procedure determined in Directive 2015/1535 obliges the Member States to notify the Commission of any national draft regulations concerning technical regulations. It is connected with the necessity of ensuring full freedom of the movement of goods and the freedom of the provision of services by making it possible for the Commission and other Member States, which are indirect addressees of the notification, to make amendments to their planned national measures to be introduced in connection with technical regulations. The amendments aim to eliminate or reduce any barriers that might occur in the free

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[19] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, pp. 9–29.

[20] For more on the notification procedure in accordance with Article 108 TFEU, compare B. Pawłowski, *Notyfikacja – obowiązek informowania UE o projektowanych krajowych aktach prawnych*, INFOS. Zagadnienia społeczno-gospodarcze, Biuro Analiz Sejmowych 9(213), 19.5.2016, pp. 1–2.

[21] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

movement of goods due to the application of different technical regulations in the Member States. The notification procedure under Directive 2015/1535 can block the legislative process of the bill notified for a period from three to 18 months.

The process of harmonisation of national law is connected with the notification obligations that can be imposed on the Member States in the course of the national legislative process (Article 114 paras 4–6 TFEU) and after an act on a directive transposition is passed. The first of the above-mentioned cases concerns a harmonisation measure adopted at the Union level in accordance with Article 114 TFEU, which authorises the Union institutions to adopt provisions that have as their objective the establishment and functioning of the internal market. The notification under Article 114 TFEU applies to national provisions concerning harmonisation, which, however, contain legal solutions that depart from the standard laid down in the transposed directive. The differences may result, firstly, from the Member States' desire to maintain legal solutions protecting important social interests determined in Article 36 TFEU[22] or connected with the protection of the natural environment or the working environment. Secondly, after the adoption of a harmonisation measure by the Union institutions, a Member State may deem it necessary to introduce provisions based on new scientific evidence relating to the protection of the natural environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure. Within the procedure laid down in Article 114 paras 4–6 TFEU, a Member State notifies the Commission of the provisions it is going to introduce in accordance with Article 114 paras 4 or 5 TFEU. The Commission must, within six months of the notifications, approve or reject the national provisions involved, having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade, and whether or not they constitute an obstacle to the functioning of the internal market.

Within the harmonisation of law of the Member States, apart from notification blocking the legislative process, there is also notification of an act that has been adopted as a result of transposition of a Union directive to the national system. Timely and proper transposition of Union directives is every Member State's obligation. The type of harmonisation involved determines the regulatory discretion at the national level. When a directive envisages full harmonisation, a Member State in fact does not have any freedom to formulate national provisions and must strictly transpose complete, uniform and exhaustive Union solutions to the national law. Minimal harmonisation indicates the adoption of a minimum level of protection at the Union level, which must be maintained in national regulations; however, it is possible to introduce national solutions that raise the level of protection.

Every Member State is obliged to notify the Commission of the introduction of statutory, implementing and administrative provisions that are necessary to transpose a given directive after the adoption of those provisions without delay.

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[22] Article 36 TFEU lays down the catalogue of derogations from quantitative restrictions and measures having the equivalent effect. The Member States can limit trade on grounds of: public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value; or the protection of industrial and commercial property.

The Member States submit the text of a transposition act, which should contain clear reference to the implemented directive, to the Commission. The obligation to notify of acts that transpose directives is important from the point of view of ensuring a coherent level of legal protection in the EU, which is guaranteed by harmonisation norms. The failure to fulfil the obligation to notify of implementation measures is an unambiguous signal for the Commission that the deadline for transposition has been missed, which can result in the initiation of a procedure against a Member State for an alleged infringement of an obligation under the Treaties (Article 258 FEU).

A legislative process can also be halted in connection with the obligation to notify of national draft legislative provisions that are within the competence of the European Central Bank. Article 127 para. 4 TFEU and the Council Decision 98/415/EC of 29 June 1998[23] are legal grounds for consultation with the ECB. Thus, the legislative discretion of the Member States is limited in relation to currency matters, means of payment, national central banks, the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payment statistics, payment and settlement systems, and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. The Member States that have not adopted the single currency are obliged to consult the ECB on any draft legislative provisions on the instruments of monetary policy (Article 2 Decision 98/415/EC).

Summing up the general rules concerning notification of national regulations to the Commission or the ECB, it should be emphasised that failure to comply with the obligations laid down in the Union law means the infringement of the Union law and authorises the Commission to initiate a procedure against a Member State for the infringement of an obligation under the Treaties (Article 258 TFEU). Evaluating the consequences of the notification obligations from the point of view of a Member State, it can be assumed that national regulations adopted in conflict with the notification obligations can be invalid and public aid unlawfully granted will be subject to recovery.

4. LEGISLATION ON ELECTION PROMISES IN THE PERIOD 2015–2016 VERSUS THE EU LAW

Moving the above discussion to a practical level and evaluating the legislative process connected with election promises in the period 2015–2016 from the point of view of obligations resulting from the membership of the European Union, it is necessary to establish some organisational issues. The research into the above-mentioned period analysed a total number of 70 bills, including 35 in 2015 and 35 in 2016. The matters regulated concerned mainly social policy, agricultural policy and issues connected with cohesion policy. Legal acts adopted in 2015 and 2016 included

[23] Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (98/415/EC), OJ L 189, 3.7.1998, pp. 42–43.

a series of solutions, inter alia, extending the scope of social and health benefits, determining the rules on access to subsidies within the direct support systems of agricultural policy, or regulating the retirement system rules. Evaluating the course of the legislation in the above-mentioned years, in relation to selected legal acts, one can notice that every bill was evaluated with regard to its conformity to the EU law. In case of every bill, reference to its conformity to the EU law can be found in the content of the justification for draft regulations as well as opinions expressed in the legislative process by the Ministry of Foreign Affairs or the Bureau of Research of the Chancellery of the Sejm (BAS). This means that the principle of primacy of the Union law over national law is important in the legislative process in Poland and is complied with by the authors of draft regulations and entities whose role is to evaluate bills in the course of legislative process. It also constitutes the expression of respect for the national rules on legislative technique mentioned in section 2 of the paper.

The analysed legal acts can be divided into two main groups. The first one contains acts that regulate issues not covered by the Union law. The other group consists of acts which scope is within the Union legislative competence.

In 2015, among the legal acts analysed, the following bills contained statements that the matters regulated in them were not covered by the Union law: the Act of 5 August 2015 amending the Act on social insurance of farmers and the Act on the social security system;[24] the Act of 5 August 2015 on free legal assistance;[25] the Act of 9 October 2015 on the support for mortgage debtors in a difficult financial situation;[26] the Act of 11 September 2015 amending the Act on the provision of healthcare services financed from public funds;[27] the Act of 16 December 2015 amending the amended Act on the provision of healthcare services financed from public funds, and some other acts;[28] the Act of 25 September 2015 on financing some healthcare services in the period 2015–2018;[29] the Act of 5 March 2015 amending the Act on old-age and disability pensions from the Social Insurance Fund;[30] the Act of 15 May 2015 amending the Act on financial benefits from social insurance in case of illness and maternity, and some other acts;[31] the Act of 12 June 2015 amending the Act on some forms of support for residential construction and the amended Act on collateral and guarantees granted by the State Treasury and some legal persons, the Act on the Bank Gospodarstwa Krajowego, and some other acts[32]; the Act of 25 June 2015 amending the Act on cash equivalent of the right to free coal for employees

[24] Dz.U. 2015, item 1506.
[25] Dz.U. 2015, item 1310.
[26] Dz.U. 2015, item 1925. In this case, in addition, the BAS issued an opinion (BAS-WAPEiM-1928/15) stating that the Bill does not exercise the EU law; compare the Sejm paper No. 3859.
[27] Dz.U. 2015, item 1692.
[28] Dz.U. 2015, item 2198.
[29] Dz.U. 2015, item 1770.
[30] Dz.U. 2015, item 552.
[31] Dz.U. 2015, item 1066.
[32] Dz.U. 2015, item 1169.

of mining enterprises[33]. Thus, in the case of the above-mentioned acts, regulatory autonomy was broad and was not connected with the necessity of harmonising the scope of national regulations with the Treaties' provisions or those resulting from the Union regulations, directives or decisions. It should be also highlighted that in six bills of 2015, one could find some logical inconsistence in relation to the justification from the point of view of the Union law: the same bills were assessed as being in conformity with the Union law (or not in conflict therewith)[34] and, at the same time, not within the scope of the Union regulation (e.g. the justification of a bill indicated that it was not under the regulation and the BAS evaluated the bill as being in conformity with the EU provisions).[35] Such inconsistent justification is logically inappropriate. If the subject matter is not regulated in the Union law, there is no issue of its conformity evaluation at all. Of course, the final result of the evaluation does not lead to important discrepancy in the assessment whether provisions are admissible (such a discrepancy, hypothetically, might occur if a bill was at the same time deemed to concern a subject matter not regulated in the Union law and in conflict with it). Nevertheless, the authors of the justification and opinions should indicate relations between bills and the Union law in a consistent way.

In 2016, similarly, five bills were specified as ones that regulated subject matters not regulated in the Union law. These were as follows: the Act of 2 December 2016 amending the Act on the provision of healthcare services financed from public funds;[36] the Act of 5 September 2016 amending the Act on supporting a family and the system of substitute guardianship, the Act on social assistance and the amended Act on commune self-government, and some other acts;[37] the Act of 15 January 2016 on one-off extra payment for some old-age and disability pensioners and persons entitled to pre-pension benefits, bridging pensions or compensation allowance for teachers in 2016;[38] the Act of 25 February 2016 amending the Act on one-off extra payment for some old-age and disability pensioners and persons entitled to pre-pension benefits, bridging pensions or compensation allowance for teachers in 2016;[39] the Act of 20 May 2016 amending the Act on family benefits and the Act

[33] Dz.U. 2015, item 1179.

[34] For more on the relation between cohesion and non-conflict as one of the requirements of the legislative technique as well as on the systemic rules that influence the legal situation of entities, see T. Braun, *Unormowania compliance w korporacjach*, Warszawa 2017, p. 38 et seq.; *idem*, *Korporacyjne normy compliance a zasada spójności prawa*, Ius Novum 1, 2014, p. 164 et seq.

[35] Compare the Act of 25 September 2015 amending the Act on financial support for the development of social dwellings, protected apartments, doss houses, and homeless hostels (Dz.U. 2015, item 1815); the Act of 25 September 2015 amending the Act on the provision of healthcare services financed from public funds, and some other acts (Dz.U. 2015, item 1735); the Act of 6 February 2015 amending the Act on vocational and social rehabilitation and employment of disabled persons (Dz.U. 2015, item 493); the Act of 9 April 2015 amending the Act on the social security system (Dz.U. 2015, item 689); and the Act of 24 July 2015 amending the Act on the provision of healthcare services financed from public funds and the Act on prevention and combating of infections and infectious diseases in people (Dz.U. 2015, item 1365).

[36] Dz.U. 2016, item 2169.

[37] Dz.U. 2016, item 1583.

[38] Dz.U. 2016, item 188.

[39] Dz.U. 2016, item 366.

on the establishment and payment of benefits for guardians[40]. On the other hand, the bills the justification for which indicated that the subject matter was not within the scope of the Union regulation but were in conformity with them, included: the Act of 6 October 2016 amending the Act on the social security system;[41] the Act of 2 December 2016 amending the Act on social assistance;[42] the Act of 4 November 2016 amending the Act on the provision of healthcare services financed from public funds, and some other acts;[43] the Act of 21 October 2016 amending the Act on social insurance of farmers;[44] the Act of 29 November 2016 amending the Act on personal income tax, the Act on corporate income tax and the amended Act: Taxation Law, and some other acts;[45] the Act of 4 November 2016 amending the Act on old-age and disability pensions form the Social Insurance Fund;[46] the Act of 15 November 2016 amending the Act on the Poles' Card and the Act on foreigners;[47] the Act of 21 July 2016 amending the Act on the provision of healthcare services financed from public funds, and some other acts;[48] the Act of 18 March 2016 amending the Act on the provision of healthcare services financed from public funds, and some other acts;[49] the Act of 18 March 2016 amending the Act: Teachers' Card, and some other acts;[50] the Act of 13 May 2016 amending the Act on the Poles' Card, and some other acts;[51] the Act of 6 July 2016 amending the Act: Atomic Law[52].

The other group of the analysed regulations indicated connections with the areas within the competence of the EU. The bills, and then acts adopted based on them, included those that implemented the Union law and those that did not have such a nature. A regulation that implements the Union law is one that is adopted in connection with the obligation imposed on the Republic of Poland to adjust the national law to the Union law. It may result from the necessity of adopting measures of transposition of the Union directives to the national legal system or from the necessity of implementing the provisions of the Union regulations[53] and creating

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40 Dz.U. 2016, item 972.
41 Dz.U. 2016, item 1921.
42 Dz.U. 2016, item 214.
43 Dz.U. 2016, item 2173.
44 Dz.U. 2016, item 2043.
45 Dz.U. 2016, item 1926.
46 Dz.U. 2016, item 1935.
47 Dz.U. 2016, item 2066.
48 Dz.U. 2016, item 1355.
49 Dz.U. 2016, item 652.
50 Dz.U. 2016, item 668.
51 Dz.U. 2016, item 753.
52 Dz.U. 2016, item 1343.
53 Compare the Act of 19 July 2016 on access to genetic resources and sharing of benefits from their utilisation (Dz.U. 2016, item 1340). The Act implemented the rules of application of Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union (OJ L 150, 20.5.2014, p. 59) and the Commission implementing Regulation (EU) 2015/1866 of 13 October 2015 laying down detailed rules for the implementation of Regulation (EU) No 511/2014 of the European Parliament and of the Council as regards the regulations of collections, monitoring user compliance and best practices (OJ L 275, 20.10.2015, p. 4).

coherent conditions for their application. In the period analysed, the following acts transposing and adjusting national law to the Union directives were adopted: the Act of 5 August 2015 amending the Act on state compensation to victims of some crimes, the Act: Code of Civil Procedure and the Act on court costs in civil cases[54] (transposition of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims[55]); the Act of 25 June 2015 on the treatment of infertility[56] (transposition of four directives: Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells;[57] Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC;[58] Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC;[59] Commission Directive 2012/39/UE of 26 November 2012 amending Directive 2006/17/EC[60]); the Act of 29 April 2016 amending the Act on the promotion of employment and labour market institutions, the Act on the Chief Labour Inspectorate and the Act on the implementation of some EU provisions concerning equal treatment[61] (transposition of Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers[62]); the Act of 22 June 2016 amending the Act on renewable sources of energy and some other acts[63] (reference to Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC[64]).

Among the discussed statutory regulations, one can distinguish a group of legal acts that adjusted national provisions to the Union regulations adopted within the Cohesion Policy[65] and Common Agricultural Policy. The areas, important elements of which are the systems of direct support based on subsidies or other mechanisms of financing connected with the Union distribution within subsidies from structural

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54 Dz.U. 2015, item 1587.
55 OJ L 261, 6.8.2004, pp. 15–18.
56 Dz.U. 2015, item 1087.
57 OJ L 102, 7.4.2004, pp. 48–58.
58 OJ L 38, 9.2.2006, pp. 40–52.
59 OJ L 294, 25.10.2006, pp. 32–50.
60 OJ L 327, 27.11.2012, pp. 24–25.
61 Dz.U. 2016, item 691.
62 OJ L 128, 30.4.2014, pp. 8–14.
63 Dz.U. 2016, item 925.
64 OJ L 140, 5.6.2009, pp. 16–26.
65 Compare the Act 5 August 2015 amending the Act on some forms of support for innovative activities and the Act on the National Capital Fund, Dz.U. 2015, item 1308 (it adjusted the national law to Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, pp. 320–469).

funds or other financial instruments, require the adoption of detailed legal solutions at the national level that implement the rules on spending the Union funds. In the case of the Common Agricultural Policy, the acts adopted concerned the establishment of uniform rules on direct support (subsidies), in particular by granting bodies and organisational units competences concerning direct payments,[66] general rules on financing the Common Agricultural Policy,[67] as well as structural aid for agriculture within the Rural Development Programme for 2014–2020[68].

What also often occurred in the discussed areas is the issue of adjusting national solutions to the Union rules for admissibility of public aid, including *de minimis* aid. In the group of legal acts adopted, where it was necessary to take into account standards of public aid resulting from Commission Regulation No 651/2014,[69] one needs to point out: the Act of 5 August 2015 amending the Act on some forms of support for innovative activities and the Act on the National Capital Fund,[70] and the Act of 25 September 2015 amending the Act on vocational and social rehabilitation and employment of disabled people[71]. On the other hand, the issue of *de minimis* aid regulated in Commission Regulation (EU) No 1407/2013[72] occurred at the stage of legislating on the Act of 5 August 2015 amending the Act on social employment and some other acts[73] and the Act of 16 November 2016 amending some acts in order to facilitate the sale of food by farmers[74].

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[66] Act of 5 February 2015 on payments within the systems of direct support (Dz.U. 2015, item 308); Act of 24 April 2015 amending the Act on payments within the systems of direct support (Dz.U. 2015, item 653), taking into account the necessity of implementing the Union provisions resulting from a series of the Union regulations connected with the system of direct support within the Common Agricultural Policy.

[67] Act of 27 May 2015 on financing the Common Agricultural Policy (Dz.U. 2015, item 1130).

[68] Act of 20 February 2015 on support for rural development with the resources of the European Agricultural Fund for Rural Development within the Rural Development Programme for 2014–2020 (Dz.U. 2015, item 439), which implements the provisions of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, OJ L 347, 20.12.2013, p. 487.

[69] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Text with EEA relevance, OJ L 187, 26.6.2014, pp. 1–78.

[70] Dz.U. 2015, item 1308.

[71] Dz.U. 2015, item 1886.

[72] Commission Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, Text with EEA relevance, OJ L 352, 24.12.2013, pp. 1–8.

[73] Dz.U. 2015, item 1567. It should be noted that in the legislative process for the above-mentioned act, which concerned the method of calculating subsidies for Social Integration Centres and Social Integration Clubs, there were discrepancies in the opinions concerning conformity of the bill with the Union rules for *de minimis* aid. The BAS issued a negative opinion on the matter recognising that the bill was in conflict with the EU law. On the other hand, the representatives of the Ministry of Labour and Social Policy presented an opposite opinion supported by the Minister of Foreign Affairs of 29 July 2015, which stated that there was no conflict with the EU law. This meant the assumption in the bill and then in the adopted act that subsidies paid from the Labour Fund were not included in the payments increasing *de minimis* aid.

[74] Dz.U. 2016, item 1947.

In the case of two acts adopted in the period analysed, the necessity of notification of public aid in accordance with Council Regulation (EU) No 2015/1589[75] was considered in the course of the legislative process. In the first case, the Act of 25 September 2015 amending the Act on financing support for the development of social dwellings, protected apartments, doss houses, and homeless hostels,[76] there were interpretational discrepancies concerning the nature of support. According to the opinion of the BAS of 15 September 2015,[77] the envisaged support constituted the state aid, thus it required notification to the Commission. However, in the opinion presented later, the President of the Office of Competition and Consumer Protection[78] decided that the support provided did not meet all the requirements under Article 107 para. 1 TFEU, in particular distorting competition and affecting trade. This meant that the adopted provisions did not constitute public aid and did not require notification to the Commission. Such notification was required, however, in the case of the Act of 22 January 2015 amending the Act on the functioning of coal mining for 2008–2015 and some other acts[79].

The Act of 6 July 2016 on the tax on the retail sector[80] is an interesting example of the influence of the Union law on the national legislative process. After the act was passed, the European Commission initiated the formal investigation procedure[81] concerning charges that progressive taxation of revenue linked to the size of the undertaking introduces a difference in treatment for undertakings with small income and selective advantage over competitors, which is an infringement of the rules for the state aid.[82] Due to these proceedings and until the issue of the decision by the Commission, the government presented the Bill of 6 July 2016 amending the Act on the tax on the retail sector introducing in the transitional provisions a decision on the application of statutory provisions to revenue obtained after 1 January 2018.[83] The time limit was determined this way so that it was sufficient for the Commission to issue a final decision in which it would evaluate the compatibility of Polish regulations with the internal market. The Commission took the decision on 30 June 2017,[84] where it recognised the provisions of the Act of 6 July 2016 on the tax on the retail sector as the state aid that was incompatible with the internal market and stated that they had been unlawfully put into effect. At the same time, due to the Act amending the Act

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75 The procedure is in general described under section 3 herein.

76 Dz.U. 2015, item 1815.

77 Opinion BAS-WAPEiM-1957/15, the Sejm paper No. 3929.

78 Opinion of the President of the Office of Competition and Consumer Protection of 24 September 2015 on the Sejm paper No. 3929.

79 Dz.U. 2015, item 143.

80 Dz.U. 2016, item 1155.

81 European Commission Decision C(2016) 5596 final of 19.9.2016 concerning the state aid SA.44351(2016/C) (ex 2016/NN).

82 Compare justification for the governmental Bill amending the Act on the tax on the retail sector of 19.10.2016, the Sejm paper No. 952.

83 Act of 15 November 2016 amending the Act on the tax on the retail sector (Dz.U. 2016, item 2099).

84 European Commission Decision (UE) 2018/160 of 30.6.2017 concerning the State aid SA.44351(2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector (notified under document C(2017) 4449), OJ L 29, 1.2.2018, p. 38.

on the tax on the retail sector adopted on 15 November 2016, which cancelled the implementation of the measure, the Commission decided that there was no need to recover the aid from beneficiaries. The Polish government applied to the General Court to annul the decision. The General Court in its judgment of 16 May 2019 annulled two decisions issued by the Commission (of 19 September 2016 and of 30 June 2017).[85] This means that the original Act of 6 July 2016 did not introduce an unlawful measure of public aid and the tax laid down in it can be collected.

The legislative process of the Act of 6 July 2016 on the tax on the retail sector illustrates the influence of potential obligations resulting from particular provisions of the Treaties or the secondary EU law (including the rules for the state aid) as well as the influence of the CJEU case law on the legal regulations that are in force in Poland. In the case of the Act on the tax on the retail sector, its validity was confirmed by the judgment of the Court, which was issued in accordance with Article 263 TFEU stipulating the possibility of applying for the recognition of invalidity of the Union law (in this case, the evaluation concerned the validity of the European Commission decision recognising the Polish Act as the infringement of the Treaties' provisions concerning the state aid).

The Act of 5 August 2015 amending the Act on social welfare[86] is the statute that still at the stage of legislative work required adjusting to the Union law, namely the Treaties' provisions on the freedom of movement for workers according to the principle of abolition of any discrimination based on nationality (Article 45 TFEU). One of the provisions of the Bill concerned the rules for access to a job of a supervisor of social work. In the initial version, the provision of Article 1 para. 22 of the Act in question stipulated that this job requirement should be at least five-year work experience in organisational units of social welfare institutions or documented at least 500 hours of training for social workers. The opinion on this Bill issued by the BAS[87] indicated that the solution is in conflict with the principle of freedom of movement for workers with regard to the introduction of a discriminatory requirement for access to the job based on work experience acquired in organisational units of social welfare institutions. The BAS drew attention to the fact that organisational units of social welfare institutions are entities operating in Poland for the implementation of the state social policy.[88] This means that the proposed provision was disadvantageous for persons who acquired vocational experience in social work in institutions other than organisational social welfare units. Such persons, in accordance with the initial version of the provision, would not be able to have their work as social workers in the social welfare institutions in other EU Member States treated as meeting the requirement. Therefore, it

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[85] Judgment of the ECJ, General court of 16 May 2019 in joined cases T-836/16 and T-624/17, *Republic of Poland v. European Commission*, ECLI: EU:T:2019:338.

[86] Dz.U. 2015, item 1310.

[87] Opinion BAS-WAPEiM-874/15, the Sejm paper No. 3473.

[88] Article 6 para. 5 of the Act on social welfare provides that organisational units of social welfare institution include regional social policy centres, county support centres for family, social welfare centres, social welfare homes, specialist advice centres, including centres for family support, welfare centres and crisis intervention centres.

constituted a reflection of indirect discrimination abolished under Article 45 TFEU. The BAS comments were taken into account in the course of legislative work and the wording of the adopted provision is neutral as it uses the criterion of five-year work experience as a social worker. The requirement formulated this way is not limited to social welfare in national organisational units and makes it possible to recognise work periods in other Member States.

Another example of a national regulation the provisions of which result from the judgment of the European Court of Justice is the Act of 1 December 2016 amending the Act on the tax on the retail sector, and some other acts.[89] The adopted changes concerning exemption of, inter alia, insurance services from VAT resulted from the judgment of the Court of Justice in case C-40/15, *Aspiro*[90].

A considerable number of the 2015–2016 legal acts analysed, in the justification for them, contain an opinion on the lack of conflict or on conformity with the EU law. The authors of the bills also indicated the lack of notification obligations. The group includes: the Act of 25 July 2015 amending the Act on the support for persons entitled to alimony, the Act on old-age and disability pensions from the Social Insurance Fund and the Act on family benefits;[91] the Act of 10 September 2015 amending the Act on some forms of support for residential construction, and some other acts;[92] the Act of 16 December 2015 on special solutions for the implementation of the Act on 2016 budget;[93] the Act of 16 December 2015 amending the Act on amendment of some acts in connection with the implementation of the Act on the budget;[94] the Act of 24 July 2015 amending the Act on family benefits, and some other acts;[95] the Act of 15 May 2015 amending the Act on family benefits;[96] the Act of 25 June 2015 amending the Act: Public Procurement Law and the Act amending the Act on the social security system, and some other acts;[97] the Act of 10 July 2015 on family benefits and some other acts;[98] the Act of 16 December 2016 amending the Act on pension schemes for officers of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Brigade and the Prison Service, and their families;[99] the Act of 21 October 2016 amending the Act on the promotion of employment and the institutions of labour market and the Act on pre-retirement benefits;[100] the Act of 4 November 2016 on the 'For Life' support for pregnant women and families;[101] the Act of 30 November 2016 amending the Act on the functioning

[89] Dz.U. 2016, item 2024.

[90] ECJ judgment of 17 March 2016 in case C-40/15, *Minister Finansów v. Aspiro SA*, ECLI:EU:C:2016:172.

[91] Dz.U. 2015, item 1302.

[92] Dz.U. 2015, item 1582.

[93] Dz.U. 2015, item 2199.

[94] Dz.U. 2015, item 2194.

[95] Dz.U. 2015, item 1217.

[96] Dz.U. 2015, item 995.

[97] Dz.U. 2015, item 1153.

[98] Dz.U. 2015, item 1359.

[99] Dz.U. 2016, item 2270.

[100] Dz.U. 2016, item 1942.

[101] Dz.U. 2016, item 1860.

of coal mining, and some other acts;[102] the Act of 29 January 2016 amending the Act on audit of some investments;[103] the Act of 11 February 2016 on the state support for child-raising;[104] the Act of 18 March 2016 amending the Act: Family and Guardianship Code;[105] the Act of 13 April 2016 amending the Act on personal income tax, the Act on corporate income tax and the Act on the freedom of business activity;[106] the Act of 29 April 2016 on special solutions connected with the protection of work places and the Act on the protection of workers' claims in case of an employer's insolvency;[107] the Act of 13 May 2016 amending the Act: Labour Code;[108] and the Act of 13 May 2016 amending the Act: Taxation Law and some other acts[109].

5. CONCLUSIONS

Trying to assess the influence of the Union law on the scope of national regulations analysed, it is necessary to draw attention to, in general, the legislator's respect for the obligations of the Republic of Poland resulting from its membership of the EU. The legal acts adopted in 2015 (at the time of the government formed by the Civic Platform party and at the beginning of the government formed by the Law and Justice party) as well as those adopted in 2016 (at the time of the government of the Law and Justice) were passed with respect for legislative procedures in which it is necessary to take into account justification from the point of view of compatibility with the EU law or covering the statutory subject matter by the EU law or determining whether a regulation implements the EU law.[110] As it has been argued above, in the case the lack of compatibility of statutory provisions with the EU law is recognised (e.g. based on the BAS opinion), this kind of reservation is taken into account in the course of further legislative work so that the adopted legal act contains appropriate provisions in compliance with the Union regulation.

The EU law has the biggest influence on national regulations connected with the implementation of the Union policies at the national level: the Common Agricultural Policy and the Cohesion Policy. Financial advantages for the citizens and entrepreneurs (direct subsidies and grants from the Union funds) result directly from the principles established at the Union level. The national legislator's role is

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[102] Dz.U. 2016, item 1991.
[103] Dz.U. 2016, item 149.
[104] Dz.U. 2016, item 195.
[105] Dz.U. 2016, item 406.
[106] Dz.U. 2016, item 780.
[107] Dz.U. 2016, item 827.
[108] Dz.U. 2016, item 910.
[109] Dz.U. 2016, item 846.
[110] For more on the course of the legislative procedure with regard to the examination of compatibility of legal acts with the EU law, compare P. Kuczma, *Procedura badania zgodności projektu ustawy z prawem UE*, [in:] M. Jabłoński, S. Jarosz-Żukowska (eds), *Zasada pierwszeństwa*, *supra* n. 11, p. 133 et seq., http://www.bibliotekacyfrowa.pl/Content/64518/Zasada_pierwszenstwa_prawa_Unii_Europejskiej.pdf (accessed 15.6.2019).

to create efficiently functioning procedural and institutional instruments making it possible to implement the forms of support envisaged by the Union law.

The necessity of taking into account the Union rules concerning public aid and *de minimis* aid is a considerable potential limitation of the Member States' regulatory discretion. The legislative processes analysed show the full respect for those Union rules and procedures. The Act of 6 July 2016 on the tax on the retail sector[111] is an example. The national legislator, being aware of the legal consequences connected with the potential necessity of returning unlawfully granted state aid, undertook legislative initiatives that were aimed at eliminating possible disadvantageous decisions of the European Commission.

Due to the specificity of the division of competences between the Union and the Member States, a considerable number of the adopted legal acts fulfilling the most important election promises (e.g. *dezubekizacja*,[112] 500+[113]) were not within the competence of the Union law, which means that the national legislator had legislative discretion making it possible to take steps promised during the electoral campaign.

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[111] Dz.U. 2016, item 1155.

[112] Act of 16 December 2016 amending the Act on the pension schemes for officers of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Brigade and the Prison Service, and their families (Dz.U. 2016, item 2270).

[113] Act of 11 February 2016 on the state support for child-raising (Dz.U. 2016, item 195).

ANALYSIS OF COMPLIANCE OF BILLS WITH THE EUROPEAN UNION LAW IN PARLIAMENTARY WORK IN 2015–2016

Summary

A given state's membership of the European Union may limit its regulatory discretion and legislative activities. It results from the principle of primacy of the Union law as well as the Treaties-based division of competences between the Union and the Member States. Moreover, there is a series of areas such as public aid, regulations concerning technical norms, rules for the functioning of the internal market or currency policy, which require notification of any national legal acts to the European Commission or the European Central Bank. The Member States, adjusting national law to the Union directives, also act within the limits determined by the objective of a given directive. All those obligations then translate into national legislative processes. In Poland, every legal act adopted by the Sejm is evaluated from the point of view of obligations resulting from the membership of the European Union. The analysed legislative processes in the period connected with the 2015 electoral campaign and the fulfilment of election promises proved that in general the Union law either did not cover the regulatory subject matter or the national legislator, passing legal acts connected with the election promises, ensured respect for the Union law.

Keywords: legislative process, the Union law, the Union competences, election promises, social policy, harmonisation of law

BADANIE ZGODNOŚCI PROJEKTÓW USTAW Z PRAWEM UNII EUROPEJSKIEJ W PRACACH PARLAMENTARNYCH W LATACH 2015–2016

Streszczenie

Członkostwo danego państwa w Unii Europejskiej może ograniczać jego swobodę regulacyjną i działalność prawodawczą. Wynika to zarówno z zasady pierwszeństwa prawa unijnego, jak i traktatowo umocowanego podziału kompetencji między Unię i państwa członkowskie. Ponadto istnieje szereg obszarów, takich jak pomoc publiczna, regulacje dotyczące norm technicznych, zasad funkcjonowania rynku wewnętrznego czy polityki walutowej, które wymagają notyfikowania Komisji Europejskiej lub Europejskiemu Bankowi Centralnemu wszelkich krajowych aktów prawnych. Państwa członkowskie, dostosowując prawo krajowe do dyrektyw unijnych, również działają w granicach wyznaczonych celem danej dyrektywy. Te wszystkie obowiązki przekładają się następnie na krajowe procesy legislacyjne. W Polsce każdy akt prawny przyjmowany przez Sejm jest oceniany z punktu widzenia zobowiązań wynikających z członkostwa w UE. Analizowane procesy prawodawcze w okresie związanym z kampanią wyborczą w 2015 r. oraz realizacją obietnic wyborczych wykazały, że zasadniczo prawo unijne albo nie obejmowało swoim zakresem materii regulacyjnej, albo prawodawca krajowy, uchwalając ustawy związane z obietnicami wyborczymi, gwarantował poszanowanie prawa unijnego.

Słowa kluczowe: proces legislacyjny, prawo unijne, kompetencje unijne, obietnice wyborcze, polityka społeczna, harmonizacja prawa

ANÁLISIS DE CONFORMIDAD DE PROYECTOS DE LEY CON EL DERECHO COMUNITARIO DURANTE EL PROCESO LEGISLATIVO EN 2015–2016

Resumen

El hecho de pertenecer como Estado Miembro en la Unión Europea puede imitar la libertad del Estado en cuanto a su regulación y actividad legislativa. Esto resulta tanto del principio de primacía del Derecho Comunitario, como de la división de competencias reguladas en los tratados entre la UE y los EE.MM. Además, hay muchas áreas, como p.ej. ayuda pública, regulaciones técnicas, principios de funcionamiento del mercado interno o política monetaria, que requieren notificar a la Comisión Europea o al Banco Central Europeo todas las leyes nacionales. Los EE.MM, a la hora de adaptar la legislación nacional a las directivas comunitarias, también actúan en el marco de los objetivos de la directiva en cuestión. Todas estas obligaciones influyen los procesos legislativos nacionales. En Polonia, cada norma jurídica adoptada por el Congreso se valora desde el punto de vista de las obligaciones resultantes del hecho de ser el EM de la UE. Los procesos legislativos analizados en el periodo relativo a la campaña electoral en el 2015 y la ejecución de las promesas electorales demuestran que, en general, el Derecho Comunitario, o bien no incluye el ámbito de la regulación en cuestión, o bien el legislador nacional, aprobando las leyes relativas a las promesas electorales, promete respetar el Derecho Comunitario.

Palabras claves: proceso legislativo, Derecho Comunitario, competencias comunitarias, promesas electorales, política social, armonización de derecho

ПРОВЕРКА СООТВЕТСТВИЯ ЗАКОНОПРОЕКТОВ ПРАВУ ЕВРОПЕЙСКОГО СОЮЗА В ХОДЕ ПАРЛАМЕНТСКОЙ ДЕЯТЕЛЬНОСТИ В 2015–2016 ГГ.

Аннотация

Членство той или иной страны в Европейском Союзе может накладывать на нее определенные ограничения в области регулятивной и законодательной деятельности. Это следует как из принципа верховенства права ЕС, так и из договорного разделения полномочий между Европейским Союзом и государствами-членами. Кроме того, существует целый ряд сфер, таких как государственные дотации, регулирование технических стандартов, правила функционирования внутреннего рынка и валютной политики, которые требуют уведомления Европейской комиссии или Европейского центрального банка обо всех законодательных актах, принимаемых на национальном уровне. При приведении национального законодательства в соответствие с директивами ЕС государства-члены Европейского Союза также должны действуют в рамках, соответствующих целям данной директивы. Все эти обязательства впоследствии влияют на процессы законотворчества на национальном уровне. В Польше любой правовой акт, принимаемый Сеймом, проходит оценку с точки зрения обязательств, вытекающих из членства в ЕС. Анализ процессов законотворчества за период, связанный с избирательной кампанией 2015 года, а также с выполнением предвыборных обещаний, показывает, что, как правило, национальный законодатель при принятии законов, связанных с предвыборными обещаниями, обеспечивал их соответствие праву Европейского Союза. В иных случаях объект принимаемых нормативно-правовых актов находился вне сферы применения законодательства ЕС.

Ключевые слова: процесс законотворчества; право Европейского Союза; компетенция Европейского Союза; предвыборные обещания; социальная политика; гармонизация законодательства

PRÜFUNG DER VEREINBARKEIT VON GESETZESENTWÜRFEN MIT DEM EU-RECHT BEI DER PARLAMENTARISCHEN ARBEIT IN DEN JAHREN 2015–2016

Zusammenfassung

Durch die Mitgliedschaft eines Staates in der Europäischen Union können dessen regulatorische Handlungsspielräume eingeschränkt und seiner gesetzgeberischen Tätigkeit Grenzen gesetzt sein. Dies ergibt sich sowohl aus dem Grundsatz des Vorrangs des EU-Rechts als auch aus der vertraglichen Zuständigkeitsverteilung zwischen der Union und den Mitgliedstaaten. Darüber hinaus gibt es eine ganze Reihe von Bereichen wie staatliche Beihilfen, Vorschriften zu technischen Standards oder die Grundprinzipien des Binnenmarktes oder der Währungspolitik, in denen die Mitgliedsstaaten verpflichtet sind, der Europäischen Kommission bzw. der Europäischen Zentralbank alle nationalen Rechtsakte mitzuteilen. Bei der Anpassung der einzelstaatlichen Rechtsvorschriften an die EU-Richtlinien agieren die Mitgliedstaaten innerhalb der durch die Zielsetzung der betreffenden Richtlinie gesteckten Grenzen. Alle diese Verpflichtungen werden anschließend in den nationalen Gesetzgebungsverfahren umgesetzt. In Polen wird jeder vom Sejm verabschiedete Rechtsakt unter dem Gesichtspunkt der sich aus der Mitgliedschaft in der EU ergebenden Verpflichtungen bewertet. Die untersuchten Gesetzgebungsprozesse im Zeitraum im Zusammenhang mit dem Wahlkampf zur Parlamentswahl 2015 und die Umsetzung der Wahlversprechen zeigen, dass das betreffende Unionsrecht grundsätzlich entweder keine regulatorischen Fragen betraf oder der nationale Gesetzgeber bei der Verabschiedung von Gesetzen im Zusammenhang mit Wahlversprechen die Einhaltung des EU-Rechts garantierte.

Schlüsselwörter: Gesetzgebungsprozess, EU-Recht, Zuständigkeiten der EU, Wahlversprechen, Sozialpolitik, Angleichung der Rechtsvorschriften

EXAMEN DE LA CONFORMITÉ DES PROJETS DE LOI AVEC LE DROIT DE L'UNION EUROPÉENNE DANS LES TRAVAUX PARLEMENTAIRES EN 2015–2016

Résumé

L'adhésion d'un État à l'Union européenne peut limiter sa liberté de réglementation et son activité législative. Cela résulte à la fois du principe de primauté du droit de l'UE et de la répartition des compétences fondée sur les traités entre l'Union et les États membres. En outre, de nombreux domaines, tels que les aides d'État, les réglementations sur les normes techniques, les règles du marché intérieur ou de la politique monétaire, nécessitent la notification de tous les actes juridiques nationaux à la Commission européenne ou à la Banque centrale européenne. Lorsqu'ils adaptent le droit national aux directives de l'UE, les États membres agissent également dans les limites fixées par l'objectif d'une directive donnée. Toutes ces obligations sont ensuite traduites en processus législatifs nationaux. En Pologne, chaque acte juridique adopté par le Sejm est évalué du point de vue des obligations découlant de l'adhésion à l'UE. Les processus législatifs analysés au cours de la période relative à la campagne électorale de 2015 et à la mise en œuvre des promesses électorales ont montré qu'en principe, le droit de l'UE ne couvrait pas les questions réglementaires, ou que le législateur national, en adoptant des lois relatives aux promesses électorales, garantissait le respect du droit de l'UE.

Mots clés: processus législatif, droit de l'UE, compétences de l'UE, promesses électorales, politique sociale, harmonisation des lois

ANALISI DELLA CONFORMITÀ DEI PROGETTI DI LEGGE CON IL DIRITTO DELL'UNIONE EUROPEA, NEL LAVORI PARLAMENTARI DEGLI ANNI 2015–2016

Sintesi

L'appartenenza di un determinato stato all'Unione europea può limitare il suo margine di discrezionalità normativa e la sua attività legislativa. Questo deriva sia dal principio di priorità del diritto comunitario, che dalla ripartizione delle competenze, stabilita nel trattato, tra l'Unione e gli Stati membri. Inoltre esistono molti ambiti come gli aiuti pubblici, le regolamentazioni relative alle norme tecniche, le norme sul funzionamento del mercato interno o la politica monetaria, che richiedono la notifica alla Commissione europea o alla Banca centrale europea di tutti gli atti giuridici nazionali. Gli Stati membri inoltre, recependo nel diritto nazionale le direttive comunitarie, operano entro i confini stabiliti dall'obiettivo della determinata direttiva. Tutti questi obblighi si traducono successivamente in processi legislativi nazionali. In Polonia ogni atto giuridico adottato dal Parlamento viene valutato dal punto di vista degli obblighi derivanti dall'appartenenza all'Unione europea. I processi legislativi analizzati, nel periodo legato alla campagna elettorale del 2015 e alla realizzazione delle promesse elettorali, hanno mostrato che il diritto comunitario non comprendeva nel suo ambito la materia normativa, oppure che il legislatore nazionale, adottando le leggi legate alle promesse elettorali, ha garantito il rispetto del diritto comunitario.

Parole chiave: processo legislativo, diritto comunitario, competenze comunitarie, promesse elettorali, politica sociale, armonizzazione legislativa

Cytuj jako:

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TIME LIMIT FOR SUBMITTING APPLICATION TO DETERMINE A MEDICAL INCIDENT: ANALYSIS AND COMMENTS *DE LEGE FERENDA*

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1. INTRODUCTION**

The provisions of Title 13a of the Act of 6 November 2008 on patients' rights and Patient Ombudsman[1] entered into force on 1 January 2012. These regulate the procedure for the patient or his/her heirs to pursue the claim to determine a medical incident in proceedings before voivodship committees deciding on medical incidents (hereinafter committees). The objective of the newly established system was to introduce, as part of the overall legal system, an independent method to compensate for damage occurring in the course of medical treatment that would be subsidiary to court proceedings. The legislative work undertaken by the legislator aimed at eliminating the difficulties in obtaining compensation in civil proceedings for damage suffered during medical treatment which effectively limited the patient's right to compensation for damage caused.[2] The amended APR sought to simplify and speed up the process of obtaining compensation for personal injury suffered by the patient

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1 Dz.U. 2012, item 159, as amended; hereinafter APR.

2 The European Charter of Patients' Rights, prepared in 2002 by Active Citizenship Network in cooperation with 12 organisations from various EU countries, contains a catalogue of 14 patients' rights. One of them is the right to compensation, which provides that 'Each individual has the right to receive sufficient compensation within a reasonably short time whenever he or she has suffered physical or moral and psychological harm caused by a health service treatment.'; see http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf.

and to reduce the costs of proceedings vis-à-vis court proceedings.[3] At this point, it is worth noting that the system adopted in Poland is original and, despite the legislator's assurance, differs from the systems present in other countries.[4]

The purpose of this article is to analyse the legal nature of the time limit for submitting an application to determine a medical incident by a patient or his/her heirs (Article 67c paras 2 and 4 APR) and to identify the consequences of the adopted legal qualification.

2. LEGAL NATURE OF TIME LIMITS UNDER ARTICLE 67C PARA. 2 APR

Pursuant to Article 67c para. 2 APR, a patient or his/her heir may submit an application in order to determine a medical incident within one year following the date on which he/she has learned of an infection, bodily injury or impairment of health or on which the patient's death occurred, as indicated in Article 67a para. 1 APR (*a tempore scientiae* time limit), with this period being limited to three years following the date when the damage occurred (*a tempore facti* time limit). In the case of heirs, the period for submitting the application does not run until the succession proceedings have been completed (Article 67c para. 4 APR).

To begin the discussion, one should note that the time limits for pursuing a claim to determine a medical incident are, in their nature, final under substantive law. In legal scholarship, this view has been expressed by Ireneusz Kunicki[5] and, most likely, by Hanna Frąckowiak.[6] Other scholars only define this period as 'a substantive law time limit'.[7] In a few cases, representatives of the doctrine who address this topic do not classify the time limits set out in Article 67c para. 2 APR.[8] Moreover, according to another

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[3] See the justification of the judgment of the Polish Constitutional Tribunal of 11 March 2014, K 6/13 (Dz.U. 2014, item 372; OTK-A 3/2014, item 29).

[4] It is widely claimed in the legal doctrine that the system regulated in Title 13a APR is the hybrid of the Swedish system, where the legal design of the system was borrowed from, and the French system, which inspired the development of legal aspects of the committees; see K. Bączyk-Rozwadowska, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu*, 2nd edn, Toruń 2013, pp. 338–339.

[5] I. Kunicki (ed.), *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych. Komentarz do art. 67a–67o ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta*, Warszawa 2016, Legalis, Article 67c, section no. 13.

[6] Hanna Frąckowiak calls the time limit referred to in Article 67c para. 2 APR 'the time limit for pursuing claims' (H. Frąckowiak, *Postępowanie przed Wojewódzką Komisją do spraw orzekania o zdarzeniach medycznych*, 1st edn, Warszawa 2016, p. 252), which is a reference to one of the categories of substantive-law final time limits (B. Kordasiewicz, [in:] Z. Radwański (ed.), *System prawa prywatnego*, Vol. 2: *Prawo cywilne – część ogólna*, 2nd edn, Warszawa 2008, p. 676), or, in other words, time limits for asserting rights (Z. Radwański, *Prawo cywilne – część ogólna*, 9th edn, Warszawa 2007, p. 359).

[7] Z. Cnota, G. Gura, T. Grabowski, E. Kurowska, *Zasady i tryb ustalania świadczeń/roszczeń (odszkodowania i zadośćuczynienia) w przypadku zdarzeń medycznych. Komentarz*, Warszawa 2016, Article 67c, section no. 2.

[8] See, e.g. K. Bączyk-Rozwadowska, *supra* n. 5, pp. 354–355; or M. Nesterowicz, M. Wałachowska, *Odpowiedzialność za szkody wyrządzone przy leczeniu w związku z nowym pozasądowym systemem kompensacji szkód medycznych*, [in:] E. Kowalewski (ed.), *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, Toruń 2011, p. 28.

view the time limit set out in Article 67c para. 2 APR is considered formal grounds for the admissibility of pursuing 'a claim to determine a medical incident' before the committee.[9] An analysis of the rules of procedure adopted by individual committees also indicated that this time limit is viewed as a procedural-law time limit since once this limit is exceeded, this excludes the possibility for the case to reach a substantive settlement and results in a decision to reject the application (see, for instance, § 42 para. 1(1) of the Rules of Procedure of the Warmińsko-Mazurskie Committee, § 44 para. 1(1) of the Rules of Procedure of the Podkarpackie Committee, and § 47 para. 1(1) of the Rules of Procedure of the Zachodniopomorskie Committee) or to return it (see, for instance, § 25 para. 2(3) of the Rules of Procedure of the Mazowieckie Committee).[10] However, this is an erroneous view that leads to a contradiction between the rules of procedure of voivodship committees and the content of Article 67c para. 2 APR. The time limit stipulated in Article 67c para. 2 APR sets the boundaries for pursuing a claim to determine a medical incident, and does not merely limit the time for a party in the proceedings to initiate an act of legal procedure (understood as filing an application to institute proceedings before a committee).[11]

In addition to its theoretical importance, the problem raised here is also of practical significance. The mere qualification of the time limits set out in Article 67c para. 2 APR as substantive-law rather than procedural-law time limits excludes the possibility of applying the reinstatement of a time limit upon its expiry (Article 67o APR in conjunction with Article 168 § 1 of the Act of 17 November 1964: Code of Civil Procedure[12].[13] If these time limits are classified as final substantive-law ones rather than time limits for limitation, this gives rise to further consequences related in particular to moderating their duration.

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[9] D. Karkowska, J. Chojnacki, *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych*, Warszawa 2014, pp. 165–166. According to those authors, submission of an application after the expiry of the time limits set out in Article 67c para. 2 APR should result in 'returning the application without examination'. In line with this view, the legal basis for such a decision should be provided for in the committee's rules of procedure (see Article 67e para. 13 APR). The authors also argue that if an application to determine a medical incident were submitted after the time limit, the committee should issue a decision to discontinue the proceedings (Article 67o APR in conjunction with Article 350 Code of Civil Procedure).

[10] Rules of procedure of voivodship committees for adjudicating on medical incidents are published on the websites of the relevant voivodship offices.

[11] Statutory time limits for a party to civil proceedings to carry out an act of legal procedure temporarily limit the right of a party to carry out a specific act within the ongoing proceedings; see, for example, the time limit for lodging an appeal (Article 369 § 1 and § 2 Code of Civil Procedure), a complaint (Article 394 § 2 Code of Civil Procedure), a cassation (Article 398^5 Code of Civil Procedure), an application for reopening proceedings (Article 407 Code of Civil Procedure), an application to supplement a judgment (Article 351 § 1 Code of Civil Procedure) or an application to restore records that have been lost or damaged (Article 718 § 2 Code of Civil Procedure); for more on this subdivision of procedural time limits, see W. Broniewicz, *Postępowanie cywilne w zarysie*, 10th edn, Warszawa 2008, pp. 92–95; H. Pietrzkowski, *Metodyka pracy sędziego w sprawach cywilnych*, 7th edn, Warszawa 2014, pp. 337–339. These time limits, however, do not limit the competence to initiate civil proceedings in order to pursue a procedural claim, which is restricted by substantive-law time limits (either the limitation period or the final time limit).

[12] Dz.U. 2018, item 1360, as amended; hereinafter CCP.

[13] Differently, upon the assumption that the time limit under Article 67c para. 2 APR is a procedural-law time limit, see D. Karkowska, J. Chojnacki, *supra* n. 10, p. 207.

When justifying the assertion formulated herein, one should begin by establishing the meaning of the 'final substantive-law time limit'. In the doctrine, final substantive-law time limits are distinguished by applying the negative method, where the set of debarring time limits include all time limits which restrict the pursuance of a claim or other exercise of a right but are not limitation periods, while the norms which shape subjective rights are previously excluded from this set as they have an inherent in-built time limit (the latter include, e.g. proprietary copyrights or patent rights which expire after the lapse of the period specified in the law, regardless of the right holder's conduct).[14]

Therefore, in order to correctly classify a particular time limit as final, it is necessary to define a 'limitation period' first. According to Jerzy Ignatowicz, the limitation period is a period which restricts the time for pursuing a property claim, and once this period expires, the claim can no longer be pursued but does not expire as such.[15] The aforementioned characteristics of a limitation period must be fulfilled jointly.[16] Consequently, the absence of even one of the aforementioned characteristics prevents a time limit from being classified as a limitation period.

Apart from the method described above, legal scholarship admits a simplified method to distinguish between the 'limitation period' and the 'final time limit'. This method is based on the assumption of the legislator's linguistic consistency, where the legislator who formulates a final time limit in a provision of law and introduces a temporal restriction on the ability to pursue a right at court does not use the phrase 'the claim is subject to the statute of limitations'.[17]

Another argument in favour of the adopted classification of the time limit set out in Article 67c para. 2 APR can be found by looking at the subject matter of the proceedings before the committee. The content of the application and, at the same time, the purpose of the proceedings (Article 67i para. 1 APR) is to determine whether the event resulting in material or non-material damage is a medical incident. This should be viewed as a request which is similar to the claim for determining an entitling fact[18] provided for in Article 189 CCP.[19] In this context, it is important to

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[14] B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, pp. 570–571.

[15] J. Ignatowicz, *Bieg terminów zawitych w obrocie podlegającym orzecznictwu sądów powszechnych*, Zeszyty Naukowe Instytutu Badania Prawa Sądowego 5, 1976, p. 8 et seq.

[16] *Ibid*.

[17] B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, p. 571.

[18] See the justification of the resolution of the seven-judge panel of the Supreme Court – Civil and Administrative Chamber, legal principle of 17 December 1987, III CZP 68/87, OSNCP 1988, No. 6, item 74. There is no doubt in the judicature that apart from establishing a right or a legal relationship, the claimant in an action brought under Article 189 CCP may demand that an entitling fact be established. The said category of entitling facts includes, inter alia, establishing that the claimant's statement of will to terminate an agreement was ineffective (the ruling of the Supreme Court – Civil Chamber of 10 June 2011, II CSK 568/10, OSNC 2012, No. B, item 40), determining that an agreement was concluded (e.g. the ruling of the Supreme Court – Civil Chamber of 11 September 1953, I C 581/53, OSNCK 1954, No. 3, item 65), establishing effective evasion of the effects of a declaration of will (the decision of the Supreme Court of 3 September 1945, I C 241/45, OSNC 1945, No. 1, item 3), or determining a legal fact which resulted in the cessation of a legal relationship (the ruling of the Supreme Court of 13 March 1984, I PRN 23/84, OSP 1985, No. 6, item 120).

[19] Likewise, J. Jarocha, *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych*, Studia Prawa Publicznego 1, 2013, pp. 43–49.

bear in mind that the claim under Article 189 CCP is not subject to the statute of limitations as it does not constitute 'pursuance of a claim' within the meaning of Article 117 § 2 of the Act of 23 April 1964: Civil Code,[20] and the lapse of time as such may be examined by the court when analysing if the conditions for the effectiveness of the claim are fulfilled and, in particular, when analysing the existence of a legal interest in instituting an action.[21] Therefore, the statute of limitations does not apply, for instance, to a request for determining the entry into a lease relationship,[22] a request for determining the existence of a right or a legal relationship,[23] and a request for determining the liability of a perpetrator of personal injury[24].

Once both of the aforementioned methods have been applied to distinguish the final time limits and once the subject matter of the proceedings before the voivodship committee has been considered, it should be concluded that the time limits specified in Article 67c para. 2 APR are final substantive-law time limits. The literal interpretation of this provision must lead to the conclusion that this is not a limitation period, and that the purpose of proceedings before the committee is to determine an entitling fact rather than to pursue a property claim[25] referred to in Article 117 § 1 Civil Code.[26] Therefore, it is possible to classify the analysed time limit into the category of debarring time limits for pursuing the discussed determination claim.[27]

3. CONSEQUENCES OF CLASSIFYING THE TIME LIMIT FOR SUBMITTING AN APPLICATION TO DETERMINE A MEDICAL INCIDENT AS A FINAL SUBSTANTIVE-LAW TIME LIMIT

Once the legal qualification of the time limit has been established, the rules that affect its expiry or inhibition can be identified. Unfortunately, this task of the interpreter is not facilitated by the legislator that decided not to regulate the overall

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[20] Dz.U. 2018, item 1025, as amended; hereinafter Civil Code.

[21] See A. Zieliński, K. Flaga-Gieruszyńska, *Kodeks postępowania cywilnego. Komentarz*, 8th edn, Warszawa 2015, Legalis, Article 189, section no. 69; K. Piasecki (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 1–366*, 6th edn, Warszawa 2014, Article 189, section no. 64–66; A. Góra-Błaszczykowska (ed.), *Kodeks postępowania cywilnego*, Vol. 1: *Komentarz. Art. 1–729*, Legalis, Article 189, section no. 32.

[22] Ruling of the Supreme Court – Civil Chamber of 12 February 2002, I CKN 527/00, OSNC 2002, No. 12, item 159.

[23] Ruling of the Supreme Court – Civil Chamber of 1 March 1963, III CR 193/62, OSNCP 1964, No. 5, item 97. The Supreme Court rightly notes that an objection of limitation may result in the dismissal of a claim only if the subject-matter of proceedings involves 'a claim'. On the other hand, where a lawsuit is not aimed at satisfying the claimant, the allegation of the statute of limitations is irrelevant. Thus, if the claimant does not pursue a claim and the subject-matter of the proceedings is to determine the invalidity of an agreement, i.e. to establish the non-existence of the rights that would arise from the agreement, then the validity of allegation regarding the statute of limitations is a logical impossibility.

[24] Ruling of the Supreme Court – Civil Chamber of 6 October 2006, V CSK 183/06, Legalis.

[25] Likewise, D. Karkowska, J. Chojnacki, *supra* n. 10, pp. 165–166.

[26] See also B. Ziemianin, *Prawo cywilne. Część ogólna*, Poznań 1999, p. 286.

[27] See a broad discussion of the classification of final time limits by B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, pp. 576–577.

problem of final time limits in the Civil Code, despite having appropriate models in place under the Act of 18 July 1950: General Provisions of Civil Law[28]. In Articles 114 to 117 GPCL, the legislator introduced a legal definition of a final time limit. The legislator provided that the lapse of such a final time limit is taken into account by the court *ex officio*, and indicated that the course of a final time limit is suspended only in the case of suspension of the administration of justice or force majeure, and that the recognition of the claim resulted in the interruption of its course if made in writing. The legislator also allowed, to the extent not expressly regulated in law, that the provisions on the statute of limitations would apply accordingly to final time limits.

The absence of regulations, as well as the multitude of final time limits provided for in the Civil Code and other laws, and the number of their subdivisions means that it is difficult to draw general conclusions in the legal doctrine as to the nature of such time limits. However, scholarship indicates that it is possible to attempt to define final time limits by referring to the effect of their expiry, the possibility of moderating their duration, the way in which their expiry may be taken into account by court, and the assessment of the petrification of a request, given the expiry of the final time limit from the perspective of the rules of social coexistence (Article 5 Civil Code).[29]

Firstly, according to the prevailing view, the expiry of a debarring time limit results in a claim being extinguished.[30] Secondly, despite existing doubts,[31] scholarship[32] admits that the course of final time limits can be regulated by certain provisions on the statute of limitations for property claims aimed at extending the debarring time limit, i.e. Article 121(4) and Article 123 § 1(2) Civil Code.[33] The Polish Supreme Court has been quite unanimous in its opinion in the matter, ruling in favour of the possibility to apply the aforementioned provisions by analogy.[34] Thirdly, as regards the possibility

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[28] Dz.U. 1950, No. 34, item 311, as amended; hereinafter GPCL.

[29] See a broad discussion *ibid.*, pp. 682–696.

[30] See J. Gwiazdomorski, *Terminy zawite do dochodzenia roszczeń*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 3, 1968, p. 100; B. Ziemianin, *supra* n. 27, p. 286; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, p. 360.

[31] See a broad discussion in S. Grzybowski (ed.), *System prawa cywilnego*, Vol. I: *Część ogólna*, Warszawa–Wrocław 1974, p. 651 et seq.

[32] B. Ziemianin, *supra* n. 27, p. 287; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, pp. 360–361; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1966, pp. 339–341; J. Ignatowicz, *Glosa do orzeczenia SN z 10.3.1992*, OSP 1993, p. 74 et seq.

[33] It is important to note a certain inconsistency on the part of the legislator, namely in Article 124 § 3 of the Act of 16 September 1982: Law on cooperatives (Dz.U. 1982, No. 30, item 210, as amended), the legislator explicitly indicates that if the loss adjuster recognises a claim, this will interrupt the course of the statute of limitations and the final time limit whenever such recognition is made in writing (cf. Article 117 GPCL), whereas no similar general regulation is contained in the Civil Code. This way of regulating the issue concerned could be seen as an argument against recognising that the Polish civil law includes a principle whereby the recognition of a debt interrupts the course of a final time limit. However, the opposite view prevails in scholarship (B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, p. 682).

[34] The resolution of the Supreme Court – Civil Chamber of 10 March 1992, III CZP 10/92, OSP 1993, No. 2, item 30 (the restrictions of the martial law and initiation of criminal proceedings on account of political activity, preventing the concerned member of a cooperative from returning safely to the country, justify the application of Article 121(4) Civil Code by analogy to final time

of applying Article 5 Civil Code to the expiry of the final time limit, there is some discord among scholars: some of them are sceptical about this possibility,[35] while others believe that the allegation of abuse of a right may affect the expiry of the final time limit.[36] Fourthly, according to a view that has been undisputed in the doctrine, the court takes into account the expiry of a time limit in the case of time limits which are final *ex officio*.[37] This means that the committee is obliged *ex officio* to consider the expiry of the final time limit set out in Article 67c para. 2 APR. It should be assumed, however, that the committee is entitled to examine whether or not the consequences of the expiry of a final time limit will undermine the rules of social coexistence in a given situation.[38] Such cases tend to be rare, especially since the loss of the right to pursue a claim in the proceedings before the committee does not preclude the patient[39] from going to court to seek redress for damage caused by medical treatment. Consequently,

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limits under Article 42 Act of 16 September 1982: Law on cooperatives, Dz.U. 1982, No. 30, item 210, as amended); the decision of the Supreme Court – Civil Chamber of 5 November 1976, III CRN 202/76, OSNCP 1977, No. 10, item 186 (the time limit for submitting documents justifying the so-called preemptive right of an invention to a foreign entity is a final (debarring) time limit under substantive law; this time limit is provided for in § 3 para. 3 of the Ordinance of the President of the Patent Office of the Polish People's Republic of 21 December 1972 on the protection of inventions and utility models, M.P. 1973, No. 1, item 4; this time limit sets the time frame for the exercise of the right, and this exercise is excluded upon the ineffective expiry of this time limit; by analogy, Article 121(4) Civil Code on the suspension of the course of the limitation period due to force majeure is applicable to that time limit); or the resolution of the full Civil Chamber of the Supreme Court of 20 May 1978, III CZP 39/77, OSNCP 1979, No. 3, item 40.

[35] A. Szpunar, *Nadużycie prawa w dziedzinie przedawnienia*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 4, 1969, p. 43. The view that Article 5 Civil Code is not applicable to the expiry of a final time limit in substantive law is also presented in more recent case law (see, in particular, extensive discussion in the justification of the resolution of seven judges of the Supreme Court of 20 June 2013, III CZP 2/13, OSNC 2014, No. 2, item 10).

[36] B. Ziemianin, *supra* n. 27, p. 288; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, p. 360. On the basis of the legal situation following the entry into force of the Act of 28 July 1990 amending the Civil Code (Dz.U. No. 55, item 321), which repealed Article 117 § 3 Civil Code, one must, in particular, refer to the resolution of the Supreme Court – Civil Chamber of 10 March 1993, III CZP 8/93, OSNCP 1993, No. 9, item 153. Also in its other rulings, the Supreme Court held that the application of Article 5 Civil Code was justified in a situation when a final time limit was not observed, provided that failure to observe the time limit was caused by reasons beyond the control of the party and without the party's fault, and, moreover, if confirmation of the expiry of the final time limit would result in an irreparable loss for the party, e.g. a definite loss of the possibility to pursue a specific entitlement (see, e.g. the ruling of the Supreme Court – Civil Chamber of 11 December 2002, I CKN 1385/00, Legalis). See also a dissenting opinion of the Supreme Court judge Krzysztof Pietrzykowski to the aforementioned resolution of the seven judges of the Supreme Court of 20 June 2013, III CZP 2/13, OSNC 2014, No. 2, item 10. One should agree with the aforementioned dissenting opinion which refers, in particular, to axiological arguments and the previously established line of jurisprudence.

[37] B. Ziemianin, *supra* n. 27, p. 286; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, p. 359; A. Wolter, J. Ignatowicz, K. Stefaniuk, *supra* n. 33, pp. 339–340.

[38] Likewise, I. Kunicki (ed.), *supra* n. 6, Article 67c, section no. 13.

[39] However, it may be considered that such cases may be justified with regard to the patient's heirs who, at the same time, are not immediate family members within the meaning of Article 446 § 3 and § 4 Civil Code. In that case, the expiry of the time limit under Article 67c paras 2 and 4 APR results in an irreversible loss of the possibility to obtain compensation for the damage suffered, also through civil proceedings. However, such cases need to be decided on *a casu ad casum* basis.

the provisions of Article 121(4) Civil Code and Article 123 § 1(2) Civil Code also apply to the course of time limits set out in Article 67c para. 2 APR.

The legal nature of the time limit stipulated in Article 67c para. 2 APR determines the type of a decision to be taken by the committee if, in the course of the examination of the case, the committee establishes that the time limit for submitting an application has expired. It is important to note that sometimes the preliminary examination of medical documentation, or even the content of the statements made in the application for determining a medical incident, enables the committee to establish that the time limit (especially counted *a tempore facti*) has been exceeded (which, however, should not *a priori* constitute grounds for rejecting or returning the application, as provided for in the rules of procedure that have been analysed). However, in many a case, this fact may only be verified in the course of the preparatory inquiry. As a consequence, if the time limit set out in Article 67c para. 2 APR is exceeded and, at the same time, there are no reasons to moderate its duration by applying Article 121(4) or Article 123 § 1(2) Civil Code by analogy, or if there are no reasons for not taking its expiry into account in view of the rules of social coexistence (Article 5 Civil Code), the committee should, pursuant to Article 67j para. 1 APR, issue a decision on the absence of a medical incident.[40] Incidentally, it is also worth noting that – contrary to the rules of procedure adopted by some committees[41] – none of the APR provisions provide for any sanction for breaching Article 67c para. 2 APR that might be imposed during the preliminary examination of an application for determining a medical incident. Article 67d para. 5 APR only stipulates that an incomplete or unduly paid application is returned to the applicant without being examined. As regards the examination of the completeness of the application, this provision refers to Article 67d paras 1 and 2 APR which contain an exhaustive list of requirements to be met by an application for determining a medical incident, and it does not stipulate that Article 67c para. 2 APR should be examined.[42] This is an additional argument supporting the idea that compliance with the time limits set out in Article 67c para. 2 APR should be examined in the course of the preparatory inquiry and that non-compliance with such time limits does not entail the breach of formal requirements for the application to determine a medical incident.

4. ASSESSMENT OF THE REGULATIONS AND COMMENTS *DE LEGE FERENDA*

The assessment of the regulations adopted in Article 67c paras 2 and 4 APR is not only strictly related to the consequences of the classification as final time limits, but must also be made from the perspective of the duration of those time limits and the moment when they begin to run.

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[40] Likewise, Z. Cnota, G. Gura, T. Grabowski, E. Kurowska, *supra* n. 8, Article 67c, section no. 2; I. Kunicki (ed.), *supra* n. 6, Article 67c, section no. 19.

[41] See, e.g. § 25 para. 1 and para. 2(3) of the Rules of Procedure of the Mazowieckie Committee.

[42] Likewise, I. Kunicki (ed.), *supra* n. 6, Article 67d, section no. 2; or D. Karkowska, J. Chojnacki, *supra* n. 10, pp. 487–488.

The time limit for submitting an application for determining a medical incident is far too short. The period of one year following the date when the patient learns about an infection, bodily injury or impairment of health, or following the patient's death, as well as the period of three years following the occurrence of the damage do not correspond to the views expressed in scholarship in support of the idea of extending the time limits for pursuing personal injury claims, especially in the case of 'medical damage'.[43] The postulates put forward in the legal doctrine in this respect are closely related to the incubating and dynamic nature of this kind of damage, which often develops without symptoms that would enable such damage to be detected sufficiently early.[44] Notably, already during the legislative work on the Act of 28 April 2011 amending the Act on patients' rights and Patient Ombudsman and the Act on mandatory insurance, Insurance Guarantee Fund and the Polish Motor Insurers' Bureau,[45] a proposal was formulated in the parliamentary Health Committee that the provision of Article 67c para. 2 APR should be worded in a way similar to former Article 442 § 1 Civil Code.[46] However, the legislator did not decide to extend the time limits as proposed, even despite the fact that the adoption of the proposed regulation would nevertheless be a step back vis-à-vis the protection granted to the injured parties under Article 442^1 § 3 Civil Code, justifying it with a terse statement that their duration is sufficient to ensure protection of patients' rights.[47]

Moreover, pursuant to Article 67c para. 2 APR, the one-year period for submitting an application to determine a medical incident runs from the moment when the injured party learns only about the damage (and not also about the entity which is obliged to redress it, as is the case with Article 442^1 § 3 Civil Code), whereas the short three-year period runs from the moment when damage occurs and absolutely limits the possibility to pursue the claim for determining a medical incident in proceedings before the committee. The solution that has been adopted is definitely less favourable in comparison with the one provided for in the Civil Code. Given the conjunction of the grounds occurring in Article 442^1 § 3 Civil Code, the limitation period begins to run against the injured party once the injured party has collected all the information necessary to pursue the claim. On the other hand, in the case of

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[43] M. Śliwka, *Wybrane czynniki determinujące działalność wojewódzkich komisji orzekających o zdarzeniach medycznych*, Prawo i Medycyna 3–4, 2012, pp. 17–18.

[44] In that regard, see the views expressed in case law regarding the occurrence of the so-called 'new damage' or 'new health condition', e.g. the ruling of the Supreme Court – Civil Chamber of 2 December 1998, I CKN 910/97, OSNC 1999, No. 6.

[45] Dz.U. 2011, item 660, as amended.

[46] Drafted with effects for Article 67c para. 2: The application shall be submitted within three years following the date on which the applicant learns about the infection, bodily injury or impairment of health or the date of death of the patient referred to in Article 67a para. 1; however, this period may not be longer than 10 years from the date on which the event resulting in the infection, bodily injury or impairment of health or the patient's death occurs (see Additional report of the Health Committee on the government Bill amending the Act on patients' rights and Patient Ombudsman and some other acts (paper No. 3488) of 18 March 2011, paper No. 3922-A).

[47] See the justifications of the Bill amending the Act of 6 November 2008 on patients' rights and Patient Ombudsman, published on the website of the Senate of the Republic of Poland, paper No. 3488, http://ww2.senat.pl/k7/dok/sejm/074/3488.pdf (accessed 2.2.2012).

a patient or the patient's heirs involved in the proceedings before the committee, the period for them to submit an application for determining a medical incident starts to run as early as from the moment when they learn about damage within the meaning of Article 67a para. 1 APR. It is emphasised in the case law that the moment when the injured party learns about the entity obliged to redress the damage[48] is of particular importance for the limitation period specified in Article 442^1 § 3 Civil Code. This moment may potentially occur after obtaining the information about the damage itself,[49] and yet this has no effect on the situation of the patient or his/her heir wishing to initiate proceedings before the committee.

As the law now stands, the statute of limitation for claims under wrongful acts is regulated by Article 442^1 Civil Code,[50] which was introduced into the Civil Code in parallel with repealing of Article 442 Civil Code,[51] as the latter had been criticised in the doctrine.[52] The amendments to these provisions of the Civil Code were inspired by the ruling of the Constitutional Tribunal of 1 September 2006.[53] In that ruling, the Constitutional Tribunal stated that by depriving the injured party of the possibility to claim compensation for personal injury that becomes apparent after the lapse of ten years following the occurrence of the event that caused the damage, Article 442 § 1 second sentence of the Civil Code is inconsistent with Article 2 and Article 77 para. 1 of the Constitution of the Republic of Poland of 2 April 1997.[54] In other words, the legal situation in that regard was changed on the basis of the idea that a claim cannot become subject to the statute of limitations before it has reached maturity,[55] while such effects sometimes resulted from how this issue was regulated in Article 442 § 1 and § 2 Civil Code.[56] Therefore, the method adopted by the legislator to regulate the time limit set out in Article 67c para. 2 APR means that a patient may lose his/her right to pursue a claim for determining a medical incident even before the personal injury caused to that patient becomes apparent.

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[48] See, e.g. the ruling of the Supreme Court – Civil Chamber of 10 April 2002, IV CKN 949/00, Legalis.

[49] It is difficult to imagine the reverse situation, where the injured party knows about the person obliged to redress property damage but does not know about the damage itself (see also the ruling of the Supreme Court – Civil Chamber of 27 October 2010, V CSK 107/10, Legalis).

[50] More on the work of the Civil Law Codification Commission, see M. Balwicka-Szczyrba, *Przedawnienie roszczeń o naprawienie szkody wyrządzonej czynem niedozwolonym*, Monitor Prawniczy 24, 2007, pp. 6–7.

[51] Amendments to the Civil Code were introduced by the Act of 16 February 2007 amending the Civil Code (Dz.U. 2007, No. 80, item 538) and entered into force on 10 August 2007.

[52] See broadly in Z. Radwański, *Przedawnienie roszczeń z czynów niedozwolonych w świetle znowelizowanego art. 442 k.c.*, Monitor Prawniczy 11, 2007, p. 58 et seq. See also in more detail on the evolution of the principles of the statute of limitations in claims under torts, and the views in the legal doctrine and judicature in this respect in M. Balwicka-Szczyrba, *supra* n. 51, pp. 1–2.

[53] Ruling of the Constitutional Tribunal of 1 September 2006, SK 14/05 (Dz.U. 2006, No. 164, item 1166).

[54] Dz.U. No. 78, item 483, as amended.

[55] A. Śmieja, [in:] A. Olejniczak (ed.), *System prawa prywatnego*, Vol. 6: *Prawo zobowiązań – część ogólna*, 2nd edn, Warszawa 2014, p. 697.

[56] See the ample justification of the resolution of the full Civil Chamber of the Supreme Court of 17 February 2006, III CZP 84/05, OSNC 2006, No. 7–8, item 114. See also W. Czachórski, [in:] Z. Radwański (ed.), *System prawa cywilnego*, Vol. III: *Prawo zobowiązań – część ogólna*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1981, p. 698 and the literature cited therein.

The issue of the time limit set for submitting an application for determining a medical incident also covers the issue of the time limit for the heirs of a deceased patient to pursue a clam for determining a medical incident. Pursuant to Article 67c para. 4 APR, in the case of the patient's death referred to in Article 67a para. 1 APR, the time limit stipulated in Article 67c para. 2 APR does not begin to run until the succession proceedings are completed.

Although the rule set out in Article 67c para. 4 APR should be endorsed as it excludes the possibility for the time limit under Article 67c para. 2 APR to start running until the succession proceedings are finally concluded, it should be noted that this provision appears to be incorrectly worded in the light of the rules of correct legislation. Firstly, it should be included as the second sentence of Article 67c para. 2 APR, thus leading to greater consistency of this regulation. Secondly, it should be noted that Article 67c para. 4 APR refers to a 'time limit' in the singular, whereas Article 67c para. 2 APR contains a regulation concerning two time limits for pursuing the determination claim (defined *a tempore scientiae* and *a tempore facti*). Since it is not possible to establish which of the two time limits regulated in Article 67c para. 2 APR the legal norm under Article 67c para. 4 APR refers to, it is necessary to propose an interpretation of this provision that would be closest to its purpose. It should be assumed that by introducing para. 4 to Article 67c APR, the legislator wanted to enable heirs to pursue a succession case without the risk of them losing the right to apply for determining a medical incident. Accordingly, the phrase 'the time limit [...] does not run' should be understood broadly as 'the time limit for submitting an application for determining a medical incident in proceedings before the committee'. This conclusion also stems from the wording of Article 67c para. 2 APR. The time limit *a tempore facti* has the nature of an absolute (cut-off) time limit,[57] which means that, according to the view held by some scholars, the suspension of the course of only the time limit a *tempore scientiae*[58] will not affect the three-year time limit provided for in Article 67c para. 2 APR. The only acceptable interpretation, therefore, is that Article 67c para. 4 APR refers to both time limits set out in Article 67c para. 2 APR.

If this interpretation is adopted, it creates a risk that the institution provided for in Article 67c paras 2 and 4 APR will be distorted. In fact, the submission of a claim of succession to an estate or the registration of an act certifying succession are not limited in time and may take place many years after a patient's death. Thus, if the aforementioned interpretation is considered correct, one should acknowledge the possibility that heirs may effectively seek the determination of a medical incident long after the injury has been inflicted to the patient. It is difficult to understand the *ratio legis* behind this solution, which imposes very restrictive time limits on the right of the directly injured person to initiate proceedings before the committee, while extending (without any statutory limit, in fact) the time limit for submitting an application for determining a medical incident for persons injured indirectly.

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57 I. Kunicki (ed.), *supra* n. 6, Article 67c, section no. 19.

58 H. Frąckowiak, *supra* n. 7, p. 253.

This problem is also important from another perspective. The APR provisions are the only ones that grant the possibility of compensation to an heir as a person who is indirectly injured because of the damage suffered by a patient during medical treatment. The provisions of the Civil Code do not provide for such a possibility (see Article 446 § 3 and § 4 Civil Code). This means that the expiry of the time limit set for pursuing the claim for determining a medical incident by the heirs in proceedings before the committee leads to a situation where some heirs (especially in the case of intestate succession) will lose the possibility of compensation for the damage suffered, i.e. those who cannot be regarded as the immediate family members of the deceased patient within the meaning of Article 446 § 3 and § 4 Civil Code.[59] In order to give effect to the legislator's intention to grant the patient's heirs the right to compensation of damage in proceedings before the committee, the time limit set in Article 67c para. 2 APR in conjunction with Article 67c para. 4 APR must be genuinely achievable for this group of indirectly injured persons. This intention should also be taken as a point of reference when interpreting the regulation in question.

To complete the foregoing discussion, it should also be stressed that, contrary to the views taken by some legal scholars who believe that Article 67c para. 4 APR only applies to the confirmation of inheritance by court,[60] this provision also applies to the acquisition of inheritance through the registration of a certificate of inheritance. Thus, the completion of succession proceedings within the meaning of Article 67c para. 4 APR should be understood, on the one hand, as the moment when the decision confirming the acquisition of inheritance becomes final (Article 521 § 1 in conjunction with Article 677 § 1 CCP) and, on the other hand, as the date when the certificate of inheritance is registered (see Article 95p of the Act of 14 February 1991: Law on notaries[61]).[62]

The present analysis of the time frame during which it is permissible to submit an application for determining a medical incident leads to a conclusion that the regulation adopted in Article 67c paras 2 and 4 APR is clearly a step backwards

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[59] In the case law, the meaning of the term of the 'immediate family member' used in Article 446 § 3 and § 4 Civil Code is based not so much on blood relationship or affinity (the basis for determining the group of persons entitled to intestate inheritance) as on the actual emotional bond between the indirectly injured person and the deceased person. Therefore, it is assumed in scholarship that immediate family members within the meaning of Article 446 § 3 and § 4 Civil Code include, for example, people living in an informal relationship (cohabiting) (see K. Bączyk-Rozwadowska, *Roszczenia odszkodowawcze rodzin poszkodowanych pacjentów po nowelizacji kodeksu cywilnego (art. 446 § 4)*, Prawo i Medycyna 2, 2010, pp. 32–34). Thus, although the common-law spouse has the right to pursue claims under Article 446 § 3 and § 4 Civil Code in connection with the death of his/her partner, this spouse is not entitled to obtain the status of an heir in intestate inheritance, unless he/she has been appointed to the inheritance in the will and, as a consequence, the right of the spouse to effectively submit an application for determining a medical incident is excluded.

[60] Z. Cnota, G. Gura, T. Grabowski, E. Kurowska, *supra* n. 8, Article 67c, section no. 4; I. Kunicki (ed.), *supra* n. 6, Article 67c, sections no. 16–18.

[61] Dz.U. No. 22, item 91, as amended.

[62] For the effects of registration of the certificate of inheritance, see also P. Borkowski, *Prawo o notariacie. Komentarz do zmian wprowadzonych ustawą z dnia 24 sierpnia 2007 r. o zmianie ustawy – Prawo o notariacie oraz niektórych innych ustaw*, LEX, Article 95p, section no. 1–3.

in the statutory protection to injured parties, for instance, in comparison with the amendments that have been introduced with regard to the statute of limitations for a claim for compensation for personal injury caused *ex delicto*. The fact that Article 442 Civil Code was repealed and Article 442^1 § 3 Civil Code entered into force had a positive effect on the legal situation of injured parties. Despite the expiry of the time limit under Article 67c para. 2 APR, a patient and some of his/her heirs can still go to court to pursue a damages claim, but in order to enhance the efficiency of the committees and, as a consequence of achieving the legislator's intention to disburden common courts, at least partially,[63] it is necessary to postulate, *de lege ferenda*, the unification of the time limits set in Article 67c paras 2 and 4 APR as well as the prerequisites for the commencement of those time limits with Article 442^1 § 3 Civil Code. The Civil Code regulation of the statute of limitations for claims for compensation of personal injury caused by a wrongful act is an optimal solution, and it would be desirable to equalise the rules governing the time limit for the patient or the indirectly injured person to submit an application for determining a medical incident with the statute of limitations applicable to claims for compensation for damage caused by a wrongful act. Meanwhile, it should be stressed that it is far more important not just to extend the time limits for submitting an application for determining a medical incident, but also to properly determine the moment of their commencement *a tempore scientiae*, while simultaneously lifting the restriction arising from the time limit running *a tempore facti*.

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[63] See the justifications of the Bill amending the Act of 6 November 2008 on patients' rights and Patient Ombudsman, published on the website of the Senate of the Republic of Poland, paper No. 3488, http://ww2.senat.pl/k7/dok/sejm/074/3488.pdf (accessed 2.2.2012).

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TIME LIMIT FOR SUBMITTING APPLICATION TO DETERMINE A MEDICAL INCIDENT: ANALYSIS AND COMMENTS *DE LEGE FERENDA*

Summary

The aim of this article is to critically assess the time limit for submitting an application for determining a medical incident. The starting point for the evaluation of Article 67c paras 2 and 4 of the Act on patients' rights and Patient Ombudsman is the inference that this time limit

should be qualified as final. This conclusion in particular impacts the effects of its expiry and the lack of possibility – contrary to the individual rules of procedure of voivodship committees deciding on medical incidents in which the time limit is defined under procedural law – for its restoration. The analysis of the solution adopted by the legislator is also conducted through the prism of its comparison with the statutory period of limitation in claims for compensation for damage caused by a wrongful act (Article 442^1 § 3 Civil Code). This comparison leads to the conclusion that the time limit for submitting an application for determining a medical incident significantly limits access to this alternative method of redressing damage caused by medical treatment.

Keywords: medical incident, application for determining a medical incident, substantive-law final time limit, compensation for damage

TERMIN DO ZŁOŻENIA WNIOSKU O USTALENIE ZDARZENIA MEDYCZNEGO – ANALIZA I UWAGI *DE LEGE FERENDA*

Streszczenie

Celem artykułu jest poddanie krytycznej analizie terminu do wniesienia wniosku o ustalenie zdarzenia medycznego. Punktem wyjścia dla oceny art. 67c ust. 2 i 4 ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta jest ustalenie, iż termin ten powinien być kwalifikowany jako termin zawity prawa materialnego, co rzutuje w szczególności na skutki jego upływu i brak możliwości – wbrew przyjętej w regulaminach poszczególnych komisji do spraw orzekania o zdarzeniach medycznych kwalifikacji tego terminu jako terminu prawa procesowego – jego przywrócenia. Analiza przyjętego przez ustawodawcę rozwiązania prowadzona jest również przez pryzmat jego porównania z ustawową regulacją przedawnienia roszczeń majątkowych o naprawienie szkody na osobie, wyrządzonej czynem niedozwolonym (art. 442^1 § 3 k.c.). Porównanie to prowadzi do wniosku, że termin do dochodzenia żądania ustalenia zdarzenia medycznego w znaczący sposób ogranicza dostęp do tej alternatywnej drogi służącej do indemnizacji uszczerbku powstałego w związku z leczeniem.

Słowa kluczowe: zdarzenie medyczne, wniosek o ustalenie zdarzenia medycznego, termin zawity prawa materialnego, naprawienie szkody

EL PLAZO PARA PRESENTAR LA SOLICITUD DE DETERMINAR SUCESO MÉDICO – ANÁLISIS Y COMENTARIOS *DE LEGE FERENDA*

Resumen

El artículo critica el plazo para presentar la solicitud de determinar suceso médico. Para valorar el art. 67c ap. 2 y 4 de la ley de derechos de paciente y del Defensor de Derechos de Paciente hay que hacer constar que el plazo debe ser calificado como plazo perentorio de derecho sustantivo, lo que afecta en particular las consecuencias de su transcurso y falta de posibilidad de restaurarlo– a contrario de calificación de este plazo como plazo de derecho procesal adoptado en reglamentos de varias comisiones de sucesos médicos. El análisis de la solución prevista por el legislador se lleva a cabo también comparándola con la regulación legal de prescripción de pretensiones patrimoniales de reparación de daño personal ocasionado por

el hecho prohibido (art. 442[1] § 3 del código civil). Tal comparación lleva a la conclusión, que el plazo para presentar la solicitud de determinar suceso médico de una forma significativa limita el acceso a la vía alternativa que permita indemnizar el daño ocasionado en relación con el tratamiento.

Palabras claves: suceso médico, solicitud de determinar suceso médico, plazo perentorio de derecho sustantivo, reparación de daño

СРОК ПОДАЧИ ЗАЯВЛЕНИЯ О ЗАСВИДЕТЕЛЬСТВОВАНИИ МЕДИЦИНСКОГО ИНЦИДЕНТА: АНАЛИЗ И КОММЕНТАРИИ *DE LEGE FERENDA*

Аннотация

Статья посвящена критическому разбору срока подачи заявления о засвидетельствовании медицинского инцидента. При оценке ст. 67c § 2 и § 4 Закона «О правах пациента и об уполномоченном по правам пациента» отправным пунктом является констатация, что срок подачи заявления следует квалифицировать как преклюзивный срок действия материального права. Этот факт имеет значение, в частности, с точки зрения последствий истечения данного срока, а также обусловливает невозможность его восстановления, несмотря на принятую в регламентах отдельных комиссий по рассмотрению медицинских инцидентов квалификацию данного срока в качестве процессуального. Анализ соответствующих положений законодательства включает в себя сравнение с нормативным урегулированием срока давности по имущественным требованиям о возмещении ущерба здоровью, причиненного запрещенным действием (ст. 442[1] § 3 ГК). По результатам этого сравнения можно сделать вывод, что срок, в течение которого можно затребовать засвидетельствования медицинского инцидент, существенно ограничивает доступ граждан к этому альтернативному способу возмещения ущерба в связи с врачебной ошибкой.

Ключевые слова: медицинский инцидент; заявление о засвидетельствовании медицинского инцидента; преклюзивный срок действия материального права; возмещение ущерба

DIE FRIST FÜR DIE EINREICHUNG DES ANTRAGS AUF FESTSTELLUNG EINES MEDIZINISCHEN EREIGNISSES – ANALYSE UND ANMERKUNGEN *DE LEGE FERENDA*

Zusammenfassung

In dem Artikel wird die Frist für die Einreichung des Antrags auf Feststellung eines medizinischen Ereignisses kritisch analysiert. Ausgangspunkt für die Bewertung von Artikel 67c Absatz 2 und 4 des polnischen Gesetzes über Patientenrechte und den Patientenombudsmann ist die Feststellung, dass diese Frist als materielle Ausschlussfrist anzusehen ist, was insbesondere Auswirkungen auf ihren Ablauf und die mangelnde Möglichkeit – entgegen der in den Geschäftsordnungen der einzelnen Bewertungsausschüsse für die Feststellung von medizinischen Ereignissen angenommenen Einstufung dieser Frist als Frist des Verfahrensrechts – ihrer Wiedereinsetzung hat. Die Analyse der vom Gesetzgeber gewählten Lösung erfolgt auch durch Vergleich mit der gesetzlichen Regelung zur Verjährung von vermögensrechtlichen Ansprüchen auf Ersatz des aus einer unerlaubten Handlung entstandenen Schadens an einer

Person (Artikel 442[1] § 3 des polnischen Zivilgesetzbuches). Dieser Vergleich führt zu dem Schluss, dass die Frist für die Beantragung der Feststellung eines medizinischen Ereignisses den Zugang zu diesem alternativen Weg zum Ersatz eines durch die medizinische Behandlung verursachten Schadens erheblich einschränkt.

Schlüsselwörter: Medizinisches Ereignis, Antrag auf Feststellung eines medizinischen Ereignisses, materielle Ausschlussfrist, Schadensausgleich

LE DÉLAIS DE SOUMISSION D'UNE DEMANDE D'ÉTABLISSEMENT D'UN ÉVÉNEMENT MÉDICAL – ANALYSE ET COMMENTAIRES *DE LEGE FERENDA*

Résumé

Le but de l'article est d'analyser de manière critique le délai de soumission d'une demande d'établissement d'un événement médical. Le point de départ de l'évaluation de l'art. 67c alinéa 2 et 4 de la loi sur les droits des patients et du médiateur des patients, est la détermination que ce délai doit être qualifié de délai préfix du droit matériel, ce qui affecte notamment les effets de son expiration et le manque de possibilités de sa restauration – contrairement à ce qui est adopté dans les règlements des commissions individuelles de jugement des événements médicaux qualifiant ce délai comme le délai de droit procédural. L'analyse de la solution adoptée par le législateur se fait également dans l'optique de sa comparaison avec le règlement statutaire de prescription des prétentions patrimoniales en réparation du préjudice causé à une personne par un délit (art. 442[1] § 3 du Code civil). Cette comparaison conduit à la conclusion que le délai pour demander d'établissement d'un événement médical limite considérablement l'accès à cette voie alternative utilisée pour indemniser le préjudice résultant du traitement.

Mots-clés: evénement médical, demande d'établissement d'un événement médical, délai préfix du droit matériel, réparation du préjudice

TERMINE PER LA PRESENTAZIONE DELLA DOMANDA DI DETERMINAZIONE DI UN FATTO MEDICO: ANALISI E OSSERVAZIONI *DE LEGE FERENDA*

Sintesi

Obiettivo dell'articolo è l'analisi critica del termine per la presentazione delle domanda di determinazione di un fatto medico. Il punto di partenza per la valutazione dell'art. 67c commi 2 e 4 della legge sui diritti del paziente e sul Difensore dei diritti dei pazienti, è l'assunzione che tale termine debba essere qualificato come termine di decadenza di diritto sostanziale, con tutto ciò che ne deriva in particolare sulle conseguenze della sua scadenza e sull'assenza di possibilità di riapertura del termine, nonostante la qualificazione di tale termine come termine del diritto processuale, assunta nei regolamenti delle singole commissioni giudicanti sui fatti medici. L'analisi della soluzione assunta dal legislatore è condotta anche attraverso il prisma del suo confronto con la norma giuridica della prescrizione delle rivendicazioni patrimoniali di risarcimento del danno alla persona, inferto con un illecito civile doloso (art. 442[1] § 3 del

Codice civile). Tale confronto porta alla conclusione che il termine per far valere una richiesta di determinazione di un fatto medico limita in modo significativo l'accesso a tale via alternativa per l'indennizzo di un danno insorto in conseguenza a un trattamento.

Parole chiave: fatto medico, domanda di determinazione di un fatto medico, termine di decadenza di diritto sostanziale, risarcimento del danno

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PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

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1. INTRODUCTION

The pre-emption right is not merely a theoretical issue but it also bears above-average normative relevance for legal practice, in particular for the everyday professional work of notaries. Its presence can be discovered in numerous substantive[1] and procedural[2] statutes. The right has been addressed in a number of purely academic studies,[3] including monographs,[4] as well as publications intended for practical use[5]. The pre-emption right is of considerable interest for civil law authors and

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1 For example, Article 3 of the Act of 11 April 2003 on agrarian system (Dz.U. 2019, item 1362, as amended); Article 147 § 2 of the Act of 16 September 1982: Law on cooperatives (Dz.U. 2018, item 1285, as amended); Article 37a of the Act of 28 September 1991 on forests (Dz.U. 2020, item 6, as amended).

2 Article 1069 of the Code of Civil Procedure of 17 November 1964 (Dz.U. 2019, item 1460, as amended); Article 110n of the Act of 17 June 1966 on enforcement proceedings in administration (Dz.U. 2019, item 1438, as amended), hereinafter EPAA.

3 For example, A. Kunicki, *Zakres skuteczności prawa pierwokupu*, Nowe Prawo 12, 1966; R. Czarnecki, *Prawo pierwokupu z uwzględnieniem przepisów szczegółowych*, Nowe Prawo 6, 1970; A. Banaszkiewicz, *Prawo pierwokupu jako forma ograniczenia swobody rozporządzania nieruchomością przez jej właściciela*, Acta Universitatis Wratislaviensis 68, 2005; M. Pazdan, *Bezwarunkowa sprzedaż nieruchomości wbrew umownemu prawu pierwokupu*, [in:] *Obrót nieruchomościami w praktyce notarialnej*, Kraków 1997.

4 W. Gonet, *Prawo pierwokupu nieruchomości*, Warszawa 2017.

5 For example, Z. Tuszkiewicz, *Prawo pierwokupu w świetle ustawy o gospodarce nieruchomościami*, Rejent 2, 1997; *idem*, *Prawo pierwokupu w świetle ustawy o gospodarce nieruchomościami*, Rejent 12, 1998; J. Górecki, *Wpis umownego prawa pierwokupu do księgi wieczystej i jego wpływ na ochronę tego prawa*, Rejent 9, 1999; G. Bieniek, *Dodatkowe zastrzeżenie umowne w praktyce notarialnej*, Nowy Przegląd Notarialny 2, 2009.

commentators. This is justified by the fact that the original concept of pre-emption as a legal institution is found in the Civil Code.[6] The analysis of detailed issues related to the pre-emption right in administrative enforcement proceedings is not possible without referring to the essence of pre-emption regulated in the Civil Code and the legal effects of entering into an unconditional sale.

The purpose of this article is to analyse and describe the essence of the pre-emption right in administrative enforcement proceedings. The article is intended to fill a significant gap, because no complete discussion of the essence of the pre-emption right in administrative enforcement proceedings can be found to date in legal literature, not even in studies of systemic nature.[7] The analysis will be conducted using analytical-legal and formal-dogmatic research methods. The research carried out will allow suggestions to be formulated for future legislation.

2. LEGAL CONCEPT OF THE PRE-EMPTION RIGHT IN THE CIVIL CODE

If a statute or a legal transaction reserves the right of first purchase of a particular thing to one of the parties should the other party sell the thing to a third party (pre-emption right), the regulations of Chapter IV of the Civil Code apply, unless superseded by specific provisions (Article 596 Civil Code). The legal concept of the pre-emption right as regulated by the Civil Code serves as a generic model for determining the legal nature of this institution in normative acts other than the Civil Code by establishing a general framework for their application.[8] Aleksander Kunicki rightly notes that 'reserving the right of first purchase of a particular thing results in a debtor-creditor relationship between the owner of the thing and the party for whose benefit the pre-emption is reserved by statute or contract. The entitled party in this relationship is the person on whose behalf the reservation is made (the obligee). The obliged party is the owner of the thing named in a statute or a contract (the obligor). The essence of this relationship are the rights of a person on whose behalf the pre-emption right has been reserved, i.e. the rights consisting in entering into a legal relationship resulting from the sale contracted between the obligor and a third party, and the obligations of the obligor consisting in notifying the obligee about entering into the contract of sale with the third party and formulating that contract in a manner that does not breach the rights of the obligee, i.e. inserting therein a clause that the effectiveness of the sale is conditional upon the obligee waiving their right of pre-emption.'[9] Establishing a contractual pre-emption right does not limit the obligor in disposing of the right of ownership of real estate encumbered with the pre-emption right, either legally or factually,

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[6] Articles 596–602 of the Civil Code of 23 April 1964 (Dz.U. 2019, item 1145, as amended).

[7] J. Niczyporuk, S. Fundowicz, J. Radwanowicz (eds), *System egzekucji administracyjnej*, Warszawa 2004.

[8] M. Safjan, *Art. 596*, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny*, Vol II: *Komentarz. Art. 450–1099. Przepisy wprowadzające*, Warszawa 2018, p. 386.

[9] A. Kunicki, *supra* n. 3, p. 1527.

which means that such right may be encumbered with limited property rights and form the object of tenancy, lease, etc.[10] From the viewpoint of assessing the legal essence of pre-emption as regulated in the EPAA, an important reservation is that 'the pre-emption right remains closely connected to the institution of sale. It can be exercised only when the obligor enters into such a contract with a third party. If the obligor and the third party enter into a contract obligating the obligor to transfer ownership otherwise than through sale, the pre-emption right will depend on the nature of the source from which it has originated.'[11] If the obligor under a contractual pre-emption right sells real estate to a third party on condition that the pre-emption obligee waives their right, this means that the obligor has only and exclusively entered into a contract obliging them to transfer the ownership of real estate, and if the obligee subsequently waives their right, to transfer the ownership to the third party the obligor and the third party must enter into another contract providing for the unconditional transfer of the right of ownership of real estate.[12] The contractual pre-emption right may be reserved by inserting an additional clause into a nominate contract, as well as by concluding an entirely new contract, but its establishment by means of a unilateral legal transaction, for example in a will, cannot be excluded, either.[13]

3. PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS – INTRODUCTORY REMARKS

The legal concept of the pre-emption right has been set out in Article 110n EPAA. Pursuant to the said Article, if a piece of real estate is located in the area assigned to public purposes in the local zoning plan, an enforcement authority, before proceeding to describe and appraise the value of the real estate, requests the competent local government unit to declare its intention to exercise the pre-emption right within three months from the date of serving the request. If the local government unit waives the pre-emption right or the enforcement authority is not served with the relevant statement within the set time limit, the pre-emption right expires (Article 110n § 1 EPAA). If the statement on exercising the pre-emption right is served on the enforcement authority within the set time limit, the authority decides the purchasing price equal to the value of the seized real estate, as determined by a certified appraiser. A decision on the purchase price has the effect of a bid adjudication. Article 112 § 1 EPAA applies accordingly to the purchase price (§ 3). The decision on the value of the purchase price is served on the local government unit, the obligor, and the creditor. The decision is appealable (§ 4). If the local government unit has no right of pre-emption or such right has expired, the provisions of § 1–4 apply accordingly to the pre-emption right recorded in the land and mortgage register for the benefit of third

[10] J. Wasilkowski, *Znaczenie wpisu w księdze wieczystej według prawa rzeczowego*, Państwo i Prawo 5–6, 1947, p. 47.

[11] A. Kunicki, *supra* n. 3, p. 1528.

[12] R. Czarnecki, *supra* n. 3, p. 822.

[13] M. Pazdan, *supra* n. 3, p. 162.

parties (§ 5). If the local government unit has no right of pre-emption or such right has expired, the provisions of Article 110n § 1–4 EPAA apply accordingly, regardless of whether the pre-emption right recorded in the land and mortgage register results from a contract or from separate statutes.[14] Roman Hauser and Andrzej Skoczylas rightly note that 'it is inadmissible for a commune authority to make a statement on exercising the statutory pre-emption right (in the manner set out in Article 110n) for a price higher than that set out in a resolution or a statement of another commune authority. Such a statement would essentially be conditional, where the condition is the price determined by the enforcement authority (head of a tax office) within the bounds set by the commune.[15] The legislator does not specify expressly in what manner the local government unit statement is to be made. It appears that a simple written form would be sufficient. This is unlike the right of pre-emption which the commune can exercise pursuant to Article 109 REMA,[16] where the commune statement should be made in the form of a notarial deed. In the latter case, the commune statement form is dependent on the form in which the conditional contract of sale is entered into. This analogy is, however, not valid for administrative enforcement proceedings because no conditional contract of sale is entered into during the enforcement proceedings. Based on the text of Article 110n EPAA and using a linguistic interpretation alone, it is not possible to answer the question what local government unit is meant therein. The legislator does not answer the question how to determine in practice which local government unit is competent to make a statement on exercising or waiving the pre-emption right. In fact, nor does the local government unit know what amount is to be expended from its budget to purchase the right of ownership of real estate, because the statement must be made before the real estate is described and appraised.[17] Such a solution runs contrary to Article 46(2) of the Act on commune self-government[18] and its counterparts set out in other local government acts. When a competent local government unit makes a statement on exercising the pre-emption right, the commune treasurer cannot countersign it because they do not know what the real estate purchase price is and, consequently, whether it can be financed from the commune budget.

4. OBJECT OF THE PRE-EMPTION RIGHT

The pre-emption right applies to real estate. The legislator included a legal definition of real estate in Article 1a(5) EPAA, which states that real estate is also understood to mean a cooperative member's proprietary right to a residential unit, a cooperative member's right to commercial premises, a cooperative member's right to a single-

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[14] R. Hauser, A. Skoczylas, *Art. 110n*, [in:] R. Hauser, A. Skoczylas (eds), *Postępowanie egzekucyjne w administracji. Komentarz*, Warszawa 2016, p. 504.

[15] *Ibid*.

[16] Act of 21 August 1997 on real estate management (Dz.U. 2018, item 2204, as amended); hereinafter REMA.

[17] Compare also M. Wolanin, *Prawo pierwokupu nieruchomości*, part V, Nieruchomości 3, 2003, Legalis.

[18] Act of 8 March 1990 on commune self-government (Dz.U. 2019, item 506, as amended).

family home, as well as a cooperative member's right to a residential unit in housing constructed by the cooperative to be conveyed to the cooperative member. As it turns out, while 'real estate' has been legally defined, the content of the definition is of no use in discovering how to understand that concept. From the viewpoint of principles of legislative drafting, the concept has been incorrectly defined. If the legislator wanted to specify what real estate is under the EPAA, a reference to the relevant statute would be sufficient. The absence of such reference gives rise to major doubts in practice because the concept in question is legally defined in more than one normative act. Introducing a legal definition not only overrides the colloquial meaning but also makes for well-ordered legislation and is helpful when construing legal provisions.[19] The legal definition of real estate does not match these assumptions. To discover the meaning of real estate in administrative enforcement proceedings, one must refer to Article 46 Civil Code[20] which stipulates that real estate consists of parts of terrestrial surface that constitute distinct property (land), as well as buildings or parts of buildings permanently attached to land if they constitute property separate from land under specific provisions. The Civil Code, therefore, posits the existence of three kinds of real estate: land, buildings and building units.[21] While each land that constitutes separate property is treated as real estate, a building or part thereof can form separate real estate only when this is stipulated in specific provisions. Instances in which buildings and building units can form separate property are exceptions from the Roman law principle of *superficies solo cedit*, according to which buildings and other structures permanently attached to land form its constituent parts, and therefore cannot be the object of ownership and other property rights in isolation from land.[22] Land real estate consists of land together with its constituent parts, except for buildings and building units, if they form separate property (Article 4(1) REMA). Land real estate may consist of one or more plots of land which can be conveyed together or separately.[23] Building real estate consists, by way of exception under specific provisions, of a building permanently attached to land. Building real estate owned by a perpetual usufructuary is a building situated on land leased under perpetual usufruct. It applies, however, only to buildings erected by the usufructuary or previously existing and acquired by them when entering into the lease contract.[24] In turn, building unit real estate consists of part of a building that forms separate property under specific provisions.[25] To conclude this part of discussion, it should be stated that real estate composed of land, buildings and building units can be

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19 M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa 2010, pp. 212–215.

20 W. Grześkiewicz, *Egzekucja z nieruchomości w postępowaniu egzekucyjnym w administracji*, Warszawa 2017, p. 50.

21 I. Ignatowicz, K. Stefaniak, *Prawo rzeczowe*, Warszawa 2003, pp. 18–19.

22 R. Świrgoń-Skok, *Art. 46*, [in:] M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 140 et seq.

23 The Supreme Court judgment of 23 November 2004, I CK 261/04, LEX No. 589942.

24 T. Sokołowski, *Art. 46*, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz. Art. 1–352*, Warszawa 2018, pp. 431–432.

25 E. Gniewek, *Art. 46*, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz*, Warszawa 2017, p. 106.

covered by the pre-emption right and may be subject to administrative enforcement proceedings. In addition, a share in real estate as well as the right of perpetual usufruct may likewise be subject to enforcement.

5. PUBLIC PURPOSE

A condition for exercising the pre-emption right by a local government unit is that the real estate must be situated in an area assigned for public purposes in the local zoning plan. In the EPAA, the legislator does not indicate to the authority applying the provisions what is meant by 'public purpose'. A notion of public purpose found in both legislative and legal language is a normative category.[26] A list of public purposes is found primarily in Article 6 REMA. Public purposes in the meaning of Article 6 REMA include:

1) designation of land as public roads, bike paths and waterways, the construction, maintenance and performance of construction works of or on such roads, facilities, and public transport infrastructure, as well as public communication and signals;
1a) designation of land as railways and their construction and maintenance;
1b) designation of land as airports, infrastructure and facilities to handle air traffic, including approach areas, and the construction and operation of such airports and infrastructure;
2) construction and maintenance of drainage systems, conduits and infrastructure used to transmit or distribute liquids, steam, gas, and electric energy, as well as of other facilities and installations necessary to use such conduits and infrastructure;
2a) construction and maintenance of carbon dioxide transport infrastructure;
3) construction and maintenance of public infrastructure used to supply the population with water, to collect, transmit, treat, and discharge sewage, and to recover and eliminate waste, including its storage;
4) construction and maintenance of infrastructure and facilities to protect the environment, cisterns and other water installations used for water supply, flow rate regulation and flood protection, as well as regulation and maintenance of waters and water improvement facilities owned by the State Treasury or local government units;
5) care for real estate classified as monuments in the meaning of regulations on monument protection and care;
5a) protection of the Holocaust Monuments in the meaning of provisions on the protection of former Nazi death camps and sites and monuments commemorating victims of the communist terror;
6) construction and maintenance of office premises for state authorities, administrative authorities, courts and prosecutor offices, federations of higher educa-

[26] G. Matusik, *Art. 6*, [in:] S. Kalus (ed.), *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2012, p. 55.

tion and scientific entities referred to in Article 165 para. 1(1) of the Act of 20 July 2018: Law on higher education and science (Dz.U. item 1668), public schools, state or local government cultural institutions in the meaning of provisions on organizing and conducting cultural activities, as well as public healthcare facilities, kindergartens, nursing homes, care and education facilities, and sport venues;

6a) construction and maintenance of premises necessary for the performance of obligations related to the provision of universal services by the designated operator in the meaning of the Act of 23 November 2012: Postal Law (Dz.U. of 2017, item 1418, and of 2018, items 106, 138, 650, 1118 and 1629), as well as other facilities and premises used for the provision of such services;

7) construction and maintenance of facilities and infrastructure necessary for the state defence and protection of the state border, and for ensuring public safety, including the construction and maintenance of detention centres, penal institutions, and juvenile penal institutions;

8) exploration, prospecting for and extraction of mineral deposits part of mining property;

8a) exploration or prospecting for underground carbon dioxide storage complexes and underground storage of carbon dioxide;

9) establishment and maintenance of cemeteries;

9a) establishment and maintenance of national memorial sites;

9b) protection of plant and animal species or natural habitats threatened with extinction;

9c) designation of areas for publicly available walkways, squares, parks, promenades, and boulevards owned by the local government, as well as their establishment, including construction or reconstruction;

9d) construction of installations or structures to prevent or combat infectious diseases in animals;

10) other public purposes provided for in separate statutes.

The above-mentioned public purposes allow one to determine how the public purpose concept is to be understood in the normative context. Article 6 REMA does not define any criteria or means to consider an activity as a public purpose and merely provides a list of various activities classified as public purposes, which is closed within the REMA itself but can be extended because of Article 6(10), which states that different (other) public purposes may be stipulated in separate statutes.[27]

A public purpose is an objectively defined state of affairs assumed by the public and viewed by it as desirable and worthy of achieving.[28] Wojciech Szydło is right saying that 'public purposes should be viewed in the light of the certainly wider concept of public interest, because they form the mandatory foundation of activities undertaken by entities owning public property to perform the tasks imposed on them in the interest of the public and to satisfy general needs. By

[27] E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2017, p. 43.

[28] W. Szydło, *Cele publiczne w gospodarce nieruchomościami skarbowymi i samorządowymi*, Kwartalnik Prawa Prywatnego 3, 2015, p. 145.

naming the essence of tasks of individual entities, public purposes are therefore used to pursue public interest, dictating the manner in which the tasks must be performed.'[29] Legal literature has on many occasions attempted to define the concept of public purpose that either matches or deviates from the above statement. Following the majority of legal theorists, a public purpose is everything which the purposes listed in Article 6 REMA are used to achieve.[30] According to Tadeusz Woś, public purposes cover four categories of activities: firstly, activities considered to be investments; secondly, activities aimed at maintaining completed investments; thirdly, protection and conservation activities; and fourthly, the separate activities of exploration, prospecting for and extraction of minerals. The author stresses that attempts to provide a concise definition of public purpose are devoid of any deeper meaning.[31] A public purpose may also serve as a justification for the sovereign interference of an authority into the administrative and legal situation of an entity in order to protect public interest.[32] A public purpose is also viewed as an activity undertaken to improve the safety and living conditions of the general public.[33] Basically, a standpoint narrowing down the public purpose concept can be adopted, according to which a public purpose can exist only when activities listed in Article 6 REMA and specific provisions are undertaken, hence public purposes not known to the statute but asserted to be such by reference to the meaning of public purpose are not allowed.[34] An activity not listed in any statute as a public purpose cannot be a treated as such.[35]

The enforcement authority, based on the prevailing actual and legal circumstances, is each time obliged to assess on its own whether the real estate is situated in an area assigned to a public purpose in the local zoning plan. If the real estate has been assigned to purposes listed in Article 6 REMA, this will not be difficult. If the authority is not certain whether specific real estate has been assigned to public purposes, two options are possible: either to request the commune authorities to provide such information in the manner specified under Article 36 EPAA, or to request that the respective statement be made by the city president, mayor or village head. If the competent authority discovers that the real estate is not assigned to public purposes, it must reply that it has no pre-emption right with respect thereto.

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[29] *Ibid.*, p. 145.

[30] E. Bończak-Kucharczyk, *supra* n. 27, p. 45; G. Matusik, *supra* n. 26, p. 58; Z. Marmaj, *Art. 6*, [in:] G. Bieniek (ed.), *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2011, p. 45.

[31] T. Woś, *Wywłaszczanie nieruchomości i ich zwrot*, Warszawa 2011, p. 66.

[32] E. Drozd, Z. Truszkiewicz, *Gospodarka gruntami i wywłaszczanie nieruchomości. Komentarz*, Kraków 1995, p. 206.

[33] M. Horoszko, D. Pęchorzewski, *Gospodarka nieruchomościami. Komentarz*, Warszawa 2010, p. 25.

[34] T. Grossmann, *Pojęcie inwestycji celu publicznego w dziedzinie łączności*, Państwo i Prawo 9, 2005, p. 84.

[35] The Supreme Court resolution of 17 July 2003, III CZP 46/03, OSNC 2004, No. 10, item 153.

6. PRE-EMPTION IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS?

Pre-emption is a private and not a public law institution, nevertheless many public law provisions refer not only to the civil law concept itself, but even, as for example Article 109 et seq. REMA, directly to the Civil Code provisions. If a statute or legal transaction reserves the right of first purchase of a particular thing to one of the parties, should the other party sell the thing to a third party (pre-emption right), the regulations of this chapter apply, unless superseded by specific provisions (Article 596 Civil Code). Therefore, a question arises whether the Civil Code provisions can be applied to pre-emption mentioned in Article 110n REMA. Both in legal theory[36] and judicial decisions[37] there is no doubt that the pre-emption right can be exercised only when the owner or a person entitled to dispose of a thing has entered into a conditional contract of sale. On the other hand, in enforcement proceedings the ownership of real estate is transferred following a decision to grant ownership, and not a contract of sale. One should therefore accept the view of Czesław Martysz that the final decision to grant ownership has a constitutive nature, because it serves as grounds for transferring the ownership of real estate to the purchaser and as a title for recording the ownership right vested in the purchaser in the cadastral register and in the land and mortgage register or a documentation applicable to the real estate.[38]

Incidentally, one must not overlook the wording of Article 110w § 1 EPAA, which stipulates that seized real estate is sold by the enforcement authority through public bidding. Consequently, the sale of real estate is effected through enforcement proceedings. In a typical contract of sale, the transfer of ownership occurs when the contract is entered into, and an entry in the land and mortgage register has a declarative nature, as opposed to administrative enforcement proceedings in which the ownership transfer actually occurs later. Despite the wording of Article 110w § 1 EPAA in which sale is mentioned, it must be acknowledged that this is not sale in the meaning of Article 596 Civil Code, because the transfer of ownership of real estate occurs through a decision of the enforcement authority and not a contract. This stand has also been confirmed by judicial decisions in court enforcement proceedings.[39] Consequently, Article 599 § 2 Civil Code, stipulating that if the pre-emption right is statutorily vested in the State Treasury, a local government unit, a joint owner or a lessee, the sale made unconditionally is invalid, will not be applicable here, either.

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[36] Compare K. Mularski, *Art. 596*, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. II: *Komentarz. Art. 450–1088*, Warszawa 2016, p. 540 et seq. and the literature cited therein.

[37] The Supreme Court judgment of 18 April 1997, III CKN 39/97, LEX No. 50774.

[38] Cz. Martysz, *Egzekucja administracyjna z nieruchomości*, [in:] J. Niczyporuk, S. Fundowicz, J. Radwanowicz (ed.), *System egzekucji administracyjnej*, Warszawa 2004, p. 430.

[39] Compare the Supreme Court judgment of 9 August 2000, V CKN 1254/00, Monitor Prawniczy 2001, No. 11, item 595.

7. EFFECTS OF IGNORING PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

The consequence of a local government unit exercising the pre-emption right vested in it is that the unit becomes a participant of administrative enforcement proceedings. The legislator does not answer the question about the consequences of the enforcement authority failing to fulfil its statutory obligation to request the local government unit to make a statement on exercising the pre-emption right in cases where the real estate is situated in an area assigned for public purposes in the local zoning plan. Another question is whether a local government unit that wishes to interfere with the course of enforcement proceedings when the enforcement authority breaches the obligation stipulated in Article 110n § 1 REMA has legal remedies to do so. Obtaining an answer to these questions is important for at least two reasons. Firstly, the right of the local government unit to pre-empt the sale has a constitutive nature; secondly, the unit has a legal interest to interfere if it is not notified of its right to pre-empt. This interest is expressed as the will to acquire the right of ownership of real estate being the object of enforcement proceedings. The local government unit cannot raise objections against the description and appraisal of the real estate referred to in Article 110u EPAA. The right to raise objections against the description and appraisal of real estate is vested in all participants of the enforcement proceedings, namely the creditor and the obligor, as well as entities having limited property rights in the real estate, entities whose personal rights of claims have been secured by an entry in the land and mortgage register, and the authority that has previously entered a contract to lease the real estate as perpetual usufruct.[40] The local government unit is not included in the group of participants of enforcement proceedings.

The enforcement authority issues an appealable decision granting the ownership (Article 112b § 1–2 EPAA). Piotr M. Przybysz is right to note that 'an appeal against a decision granting the ownership cannot set out the deficiencies related to enforcement activities conducted before filing an appeal against the bid adjudication decision. Such deficiencies ought to have been set out at earlier stages of the proceedings and in an appeal against the bid adjudication decision.'[41] It appears, however, that despite this reservation of P.M. Przybysz, local government units should be awarded standing to appeal a decision granting the ownership because the legislator does not offer them a remedy which can be used to effectively demand the exercise of the pre-emption right vested in them at earlier stages of the proceedings.

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[40] R. Hauser, A. Skoczylas, *supra* n. 14, p. 504.

[41] P.M. Przybysz, *Postępowanie egzekucyjne w administracji. Komentarz*, Warszawa 2015, p. 455.

8. CONCLUSIONS

The view presented by Marian Wolanin that 'Article 110n EPAA does not create a separate substantive law basis for exercising the pre-emption right but is a procedural norm for exercising the pre-emption right vested in local government units by other legal instruments' cannot be accepted.[42] Otherwise, the legislator would have expressly inserted a reference to substantive law provisions, and specifically to Article 109 EPAA, in this provision. It should be remembered that issues related to exercising the pre-emption right vested in the commune, should a sale occur when the prerequisites described in this provision are fulfilled, have been regulated by the legislator on a comprehensive basis. The Act on real estate management contains express provisions concerning the manner and method of exercising the pre-emption right.

A local government unit may exercise the pre-emption right vested in it by citing Article 110n EPAA alone. While this provision uses the word 'pre-emption', this is not a sufficient justification for applying the Civil Code provisions in this case. The legislator should consider abolishing Article 110n EPAA not only because of its numerous legislative defects, but also because the interest of a commune, as far as the transactions in ownership rights of real estate situated in an area assigned to public purposes in the zoning plan are concerned, is already secured due to the fact that the commune holds the pre-emption right (Article 109 para. 1(3) REMA) in such case.[43] In other cases, Article 110n EPAA itself should be amended, primarily through doing away with the use of 'pre-emption' in favour of allowing a commune (and not local government units) to exercise the pre-emption right when acquiring the ownership right of real estate. A commune should exercise its right to make the relevant statement after, and not before as in the currently effective Article 110n § 1 EPAA, the real estate is described and appraised. In addition, the legislator should put in place penalties for an enforcement authority that fails to comply with the obligation of requesting a local government unit to exercise the pre-emption right, and expressly name the form in which such a statement of the local government unit should be made.

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[42] M. Wolanin, *supra* n. 17.

[43] Compare also P.M. Przybysz, *supra* n. 41, pp. 427–429.

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PRE-EMPTION RIGHT IN ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

Summary

The pre-emption right to real estate is an important legal institution not only for legal theory, but also for legal practice. The pre-emption right has been regulated in substantive and procedural law. It also arouses considerable interest among representatives of the civil law doctrine. The aim of the study is to analyse a narrow issue, namely the pre-emption right in administrative

enforcement proceedings. The right of pre-emption of real estate in administrative enforcement proceedings is granted when the real estate has been used for public purposes in the local zoning plan. Use of this right by the local self-government during administrative enforcement results in the acquisition of ownership of this property. The analysis of the essence of the pre-emption right shows that the legal provisions concerning this right raise considerable doubts. The legislator did not specify precisely in which form the pre-emption right should be exercised. The understanding of the concept of public purpose is not clear, either. The author of the article seeks to resolve the doubts that may be related to the exercise of the pre-emption right during administrative enforcement proceedings.

Keywords: enforcement proceedings, pre-emption, real estate/property, local self-government

PRAWO PIERWOKUPU W ADMINISTRACYJNYM POSTĘPOWANIU EGZEKUCYJNYM

Streszczenie

Prawo pierwokupu nieruchomości jest instytucją prawną, istotną nie tylko dla teorii prawa, ale również praktyki prawniczej. Zostało ono unormowane w ustawach materialnych i procesowych, cieszy się także dużym zainteresowaniem doktryny prawa cywilnego. Celem opracowania jest analiza wąskiego zagadnienia, a mianowicie prawa pierwokupu w administracyjnym postępowaniu egzekucyjnym. Prawo pierwokupu nieruchomości w administracyjnym postępowaniu egzekucyjnym przysługuje, wtedy gdy nieruchomość w miejscowym planie zagospodarowania przestrzennego została przeznaczona na cele publiczne. Skorzystanie przez jednostkę samorządu terytorialnego z przysługującego jej prawa pierwokupu w toku egzekucji administracyjnej skutkuje nabyciem prawa własności tej nieruchomości. Analiza istoty prawa pierwokupu pokazała, że przepisy prawne odnoszące się do prawa pierwokupu w dużej części budzą wątpliwości. Ustawodawca nie określił precyzyjnie, w jakiej formie ma być wykonane prawo pierwokupu. Wątpliwości budzi również rozumienie pojęcia celu publicznego. Lektura artykułu pozwala wyjaśnić wątpliwości, jakie mogą wiązać się ze skorzystaniem z prawa pierwokupu w ramach administracyjnego postępowania egzekucyjnego.

Słowa kluczowe: postępowanie egzekucyjne, pierwokup, nieruchomość, samorząd terytorialny

DERECHO DE RETRACTO EN EL PROCESO ADMINISTRATIVO DE EJECUCIÓN

Resumen

El derecho de retracto de inmueble es una institución jurídica importante no sólo para la teoría de derecho, sino también para la práctica. Queda regulado en las leyes sustantivas y procesales y despierta un gran interés en la doctrina de derecho civil. El artículo tiene por objetivo analizar un aspecto muy detallado, o sea, el derecho de retracto en el proceso administrativo de ejecución. El derecho de retracto en el proceso administrativo de ejecución corresponde cuando el inmueble en el plano local de ordenación espacial está destinado para fines públicos. El ejercicio por la unidad de gobierno territorial de derecho de retracto durante la ejecución administrativa significa la adquisición de propiedad de tal inmueble. El análisis de natura-

leza de derecho de retracto demuestra, que la regulación legal relativa a derecho de retracto despierta dudas en su mayor parte. El legislador no ha determinado con precisión en qué forma hay que ejercer el derecho de retracto. Surgen dudas en cuanto al concepto de fin público. La lectura del artículo permite esclarecer dudas que pueden surgir a la hora de ejercer el derecho de retracto en el marco del proceso administrativo de ejecución.

Palabras claves: proceso de ejecución, retracto, inmueble, gobierno territorial

ПРЕИМУЩЕСТВЕННОЕ ПРАВО НА ПОКУПКУ В ХОДЕ АДМИНИСТРАТИВНО-ИСПОЛНИТЕЛЬНОГО ПРОИЗВОДСТВА

Аннотация

Преимущественное право на покупку объекта недвижимости является важным правовым институтом как с точки зрения теории права, так и с точки зрения юридической практики. Оно регулируется материальным и процессуальным правом и вызывает большой интерес в гражданско-правовой доктрине. В данной работе рассматривается сравнительно узкий вопрос, а именно: преимущественное право на покупку в ходе административно-исполнительного производства. Право преимущественной покупки недвижимости в рамках административно-исполнительного производства предоставляется в том случае, если генеральным планом развития населенного пункта предусмотрено использование данной недвижимости в общественных целях. При осуществлении органом местного самоуправления права на преимущественную покупку в рамках административно-исполнительного производства происходит приобретение права собственности на данный объект недвижимости. Анализ сущности права преимущественной покупки приводит к выводу, что действующие правовые нормы, касающиеся этого права, вызывают значительные сомнения. Законодатель не уточняет, в какой форме должно осуществляться право преимущественной покупки. Сомнения вызывает и понятие общественных целей. Данная работа призвана прояснить возможные сомнения, связанные с осуществлением права преимущественной покупки в рамках административно-исполнительного производства.

Ключевые слова: исполнительное производство; преимущественное право покупки; недвижимость; местное самоуправление

DAS VORKAUFSRECHT IM VERWALTUNGSVOLLSTRECKUNGSVERFAHREN

Zusammenfassung

Das Vorkaufsrecht ist ein Rechtsinstitut, dem nicht nur in der Rechtstheorie, sondern auch in der juristischen Praxis große Bedeutung zukommt. Es ist in den materiell- und verfahrensrechtlichen Gesetzen geregelt und in der Zivilrechtslehre von großem Interesse. Ziel der Studie ist die nähere Untersuchung einer eng gefassten Problematik – des Vorkaufsrechts im Verwaltungsverfahren zur Vollstreckung von Verwaltungsakten. Das Vorkaufsrecht an einer unbeweglichen Sache im Verwaltungsvollstreckungsverfahren steht dann zu, wenn die unbewegliche Sache im besonderen Flächennutzungsplan für öffentliche Zwecke ausgewiesen ist. Durch Ausübung des ihr zustehenden Vorkaufsrechts durch die Gebietskörperschaft im Zuge der zwangsweisen Durchsetzung von Verwaltungsakten durch Verwaltungsbehörden wird das Eigentum an dieser unbewegliche Sache erworben. Bei der Analyse des Wesens des Vor-

kaufsrechts wird deutlich, dass die gesetzlichen Bestimmungen zum Vorkaufsrecht in großen Teilen Zweifel aufkommen lassen. Vom Gesetzgeber wurde nicht präzisiert, in welcher Form das Vorkaufsrecht auszuüben ist. Es bleiben auch Zweifel, was unter dem Begriff „öffentlicher Zweck" genau zu verstehen ist. Durch Lektüre des Artikels lassen sich Unklarheiten ausräumen, die im Zusammenhang mit der Ausübung des Vorkaufsrechts im Rahmen eines Verwaltungsvollstreckungsverfahren entstehen können.

Schlüsselwörter: Vollstreckungsverfahren, Vorkaufsrecht, unbewegliche Sache, Gebietskörperschaft

DROITS DE PRÉEMPTION DANS LES PROCÉDURES ADMINISTRATIVES D'EXÉCUTION

Résumé

Le droit de préemption est une institution juridique importante non seulement pour la théorie du droit mais aussi pour la pratique juridique. Il a été réglementé par des lois de fond et de procédure et bénéficie d'un grand intérêt de la doctrine du droit civil. Le but de l'étude est d'analyser une question étroite, à savoir le droit de préemption dans les procédures administratives d'exécution. Le droit de préemption de propriété dans les procédures administratives d'exécution est dû lorsque le bien dans le plan d'aménagement du territoire a été destiné à des fins publiques. L'exercice du droit de préemption par la collectivité locale dans le cadre de l'exécution administrative entraîne l'acquisition de la propriété de ce bien. L'analyse de l'essence du droit de préemption a montré que les dispositions légales concernant le droit de préemption sont largement discutables. Le législateur n'a pas précisé sous quelle forme le droit de préemption doit être exercé. La compréhension du concept d'utilité publique soulève également des doutes. La lecture de l'article permet de clarifier les doutes, qui pourraient découler de l'exercice du droit de préemption dans le cadre d'une procédure administrative d'exécution.

Mots-clés: procédure d'exécution, préemption, immobilier, gouvernement local

DIRITTO DI PRELAZIONE NEL PROCEDIMENTO AMMINISTRATIVO DI ESECUZIONE

Sintesi

Il diritto di prelazione di un immobile è un istituto giuridico essenziale non solo per la teoria del diritto ma anche per la pratica giuridica. È stato regolamentato nelle leggi sostanziali e processuali e gode di grande interesse da parte della dottrina del diritto civile. L'obiettivo dell'elaborato è l'analisi di una ristretta questione, e in particolare del diritto di prelazione nel procedimento amministrativo di esecuzione. Il diritto di prelazione di un immobile nel procedimento amministrativo di esecuzione spetta quando l'immobile nel piano regolatore locale è destinato a finalità pubbliche. L'esercizio del diritto di prelazione spettantele da parte di un ente locale nel corso dell'esecuzione amministrativa determina l'acquisizione del diritto di proprietà di tale immobile. L'analisi dell'essenza del diritto di prelazione ha mostrato che le norme giuridiche riferite al diritto di prelazione in gran parte sollevano dubbi. Il legislatore

non ha stabilito con precisione in che forma debba essere esercitato il diritto di prelazione. Solleva dubbi anche la comprensione del concetto di finalità pubblica. La lettura dell'articolo permette di chiarire i dubbi che possono essere legati all'esercizio del diritto di prelazione nell'ambito del procedimento amministrativo di esecuzione.

Parole chiave: procedimento di esecuzione, prelazione, immobile, ente locale

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AMENDMENT TO NATIONAL PROVISIONS IMPLEMENTING THE HAGUE CONVENTION

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1. INTRODUCTION

An announcement entitled 'Let us protect the rights of Polish children – new specialist courts start working' appeared on the website of the Ministry of Justice[1] on 27 August 2018 providing information about entry into force of the statute[2] prepared by the Ministry and reforming the procedure of dealing with applications for the return of abducted children, in accordance with the Hague Convention. The announcement states, inter alia, that: 'The new solutions are to guarantee that no Polish child will fall into the wrong hands and the cases of this type will have a smaller impact on the youngest children. We are changing our policy which has not kept guard over Polish children for years.' This and other statements suggested that the legal state concerning the implementation of the Hague Convention regulations in Poland has been completely inefficient so far and the proceedings in such cases have been a considerable problem for the administration of justice. However, the amendment is to outright improve the situation. The above as well as the purposefulness and the necessity of the amendment should be challenged and this is the aim of this article, which will analyse the introduced changes. Taking into account the ease of travel and the increasing development of the society, the issue is of fundamental importance.

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1 https://www.ms.gov.pl/pl/informacje/news,11592,chronimy-prawa-polskich-dzieci---ruszaja-nowe.html.

2 Act of 26 January 2018 on the performance of some activities of the Central Authority in family-related cases concerning legal transactions in accordance with the European Union law and international agreements (Dz.U. 2018, item 416).

2. THE HAGUE CONVENTION AND A CHILD RETURN PROCEDURE

The Convention on the Civil Aspects of International Child Abduction of 1980[3] is an international legal act at present binding a few dozens of states in the world and regulating states' cooperation in the field of the return of a child abducted and taken to another state. It resulted from the cooperation of the Hague Conference on Private International Law, which is a standing intergovernmental committee.[4] The Convention entered into force in Poland on 1 November 1995,[5] and the Ministry of Justice was designated a Central Authority obliged to discharge thereof. In accordance with Article 1 Convention, its objective is to secure the prompt return of children wrongfully abducted to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State. However, the Convention is applicable until the child attains the age of 16 years. The Convention enjoys great popularity due to growing globalisation and the ease of travel as well as the estimated return of a few thousand abducted children thereunder.[6] The Convention regulates the wrongfulness of abduction in Article 3 defining it as a breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention, and when at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The duties imposed by the Convention are discharged through cooperation of Central Authorities that the Contracting States designate (Article 6), and which, if they receive an application from another Contracting State, are obliged to take all appropriate measures, in particular:

a) to discover the whereabouts of a child who has been wrongfully removed or retained;
b) to prevent further harm to the child or prejudice to interested parties by taking or causing provisional measures to be taken;
c) to secure the voluntary return of the child or to bring about an amicable resolution of the issue;
d) to exchange, where desirable, information relating to the social background of the child;
e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

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[3] The Convention on the Civil Aspects of International Child Abduction concluded in the Hague on 25 October 1980 (Dz.U. 1995, No. 108, item 528); hereinafter Convention.

[4] M. Kulas, *Praktyka stosowania Konwencji haskiej dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę (cz. 1),* Palestra 5–6, 2009, p. 14.

[5] Government announcement of 15 May 1995 concerning the Republic of Poland's accession to the Convention on the Civil Aspects of International Child Abduction concluded in the Hague on 25 October 1980 (Dz.U. 1995, No. 108, item 529).

[6] L. Kuźniak, *Praktyka stosowania Konwencji haskiej, dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę*, Biuletyn Informacyjny Rzecznika Praw Dziecka 1–2, 2009, p. 3.

f) to initiate or facilitate the institution of the judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

The proceedings in a case concerning the return of an abducted child is in general based on the provisions of the Convention alone. Its main assumptions are the protection of a child's interests and their protection against the negative consequences of abduction, which should be reflected in the prompt return to the state before abduction.[7] The authorities' proceedings in the field are deformalized in nature because they aim to return a child quickly to the place from which the child has been removed. It is also connected with the special obligation to protect the rights of children resulting from the Constitution of the Republic of Poland and international legal acts, including the right to upbringing in a family.[8] The Central Authority that receives an application is obliged to send it to a competent court, which hears the case only in order to judge whether the child's abduction has been wrongful, in accordance with Article 3 Convention, and whether there are negative reasons for the return of the child laid down in Articles 12 and 13 Convention. Formerly, there were no special regulations in the Polish legislation on dealing with applications for the return of a child in accordance with the Hague Convention. To tell the truth, the legislator introduced the provisions of Article 598^1 Code of Civil Procedure (CCP) and next those concerning the return of a child, however, they are also applicable to 'national' proceedings. Only one provision, i.e. Article 598^2 CCP, directly refers to the Convention and stipulates that in the course of the proceedings concerning a child's return in accordance with the Convention, the matter of parental right of custody or childcare cannot be judged. As a result of the fact that the legislator did not lay down a special type of non-judicial proceedings of the return of a child under the Convention, the proceedings must be carried out based on general guardianship provisions on childcare and matters concerning the return of a person that is subject to parental custody or being under custody (Section 5, Chapter II, Part II CCP), however, the Convention is applicable in the national proceedings as a directly binding source of law.[9] It is pointed out that the provisions

[7] D. Szczęch, *Ochrona praw dziecka w konwencjach międzynarodowych*, pp. 46–47; m.wspia.eu/file/20244/08-SZCZĘCH+DOROTA.pdf.

[8] K. Szmigiel, *Ochrona praw dziecka w świetle regulacji prawa międzynarodowego i polskiego*, Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM 8, 2018, pp. 272–274; Also see J. Błeszyński, A. Rodkiewicz-Ryżek, *Ochrona praw dziecka w świetle standardów polskich i międzynarodowych*, Pedagogia Christiana 2/30, 2012, p. 97 et seq.

[9] I. Biedrzycka, *Dobro dziecka w świetle konwencji haskiej dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę*, Kortowski Przegląd Prawniczy 1, 2012, p. 37. Act of 19 July 2001 amending the Act: Code of Civil Procedure, the Act on legal costs in civil proceedings and the Act on bailiffs and execution (Dz.U. 2001, No. 98, item 1069).

of this last Section introduced by means of the amendment of 2001[10] were added for the purpose of discharging the Hague Convention.[11] Therefore, the scope of dealing with an application filed based on the Convention is limited to examination of circumstances of the wrongful abduction and possible lack of negative premises, however, the issue of parental rights of custody remains beyond a court's cognition, which also results from Article 598[2] § 1 and § 3 CCP.

3. AMENDING STATUTE

The Act of 26 February 2018 introduces a fundamental change in the proceedings concerning a receipt of an application under the Convention and dealing therewith. In accordance with the amending provisions, the statute completely remodels the procedure under the Hague Convention. Article 14 stipulates that the Minister of Justice refers an application to a court competent to hear the case or to a foreign Central Authority via e-mail or similar means of distance communications and the original document via registered post the receipt of which must be confirmed; however, it does not determine which court is competent to hear the case. Nevertheless, in accordance with Article 569[1] CCP placed in general provisions concerning guardianship, a district court in a town that is the seat of an appellate court has jurisdiction over cases concerning the return of a person subject to parental custody or being under custody and dealt with in accordance with the Hague Convention of 1980, provided that the person subject to parental custody or being under custody resides or stays in the area. On the other hand, in accordance with Article 518[2] § 1 CCP, the Court of Appeal in Warsaw is the second-instance court to deal with all decisions issued under the Convention.

In the justification for the Bill, the Ministry of Justice indicates that: 'Entrusting cases concerning the return of a child abroad to numerous regional courts is not conducive to fast proceedings in such cases', and argues that: 'There is often a lack of foreign language sworn translators and specialist family law counsel within the area of a court jurisdiction. This also has influence on the possibility of adjudicating on the matter in time required by the Hague Convention of 1980. Moreover, taking into account that the frequency of such cases in one court is very low, i.e. ca. 1,000 cases per year countrywide, it is hard for judges to find opportunities to specialise in the adjudication of such matters as this requires hearing many cases of a particular type.' [12] Further, the authors of the Bill claim that: 'The specificity of such cases and the requirement of fast proceedings under the Convention require concentrating them in the hands of judges who have considerable experience. Thus, new Article 569[1] § 1 CCP entrusting the examination of cases concerning the return of a child subject to parental custody or being under custody conducted in accordance with the Hague Convention of 1980 to first-instance district courts

[10] Act of 19 July 2001 amending the Act: Code of Civil Procedure, the Act on legal costs in civil proceedings and the Act on bailiffs and execution, *supra* n. 9.

[11] M. Kulas, *supra* n. 4, p. 15.

[12] Justification for the Bill, Sejm paper No. 1827, Sejm of the 8th term, p. 26.

in towns where appellate courts have a seat should serve as an instrument for doing that.' The above means that the statute not only delegates adjudication on the application under the Hague Convention to higher instance courts but also limits their territorial jurisdiction. Not all existing regional courts are authorised to hear such cases as first-instance ones but only those in towns where appellate courts have a seat, i.e. only 11 out of 45 district courts. As a result, the competence to hear a matter is moved from a regional court, designed to be more accessible due to its small territorial jurisdiction, which in particular concerns family courts, to the level of an appellate court in fact, because a district court in a town of a particular appellate region is competent to hear such a case. The statute also introduces the time limit of six weeks for hearing the case in the first-instance proceedings (Article 569^1 § 2 CCP). As a rule, in accordance with Article 10 § 1a Act on the common courts system,[13] a regional court is established for an area of one or a number of communes inhabited by at least 50,000 people, provided that the total number of civil, criminal, family and juvenile cases filed to the existing regional court from the area of this commune or a few communes accounts for at least 5,000 per year; on the other hand, a district court is established for an area of at least two regional courts' jurisdiction, thereinafter referred to as a 'court district'. However, what is more important, the assignment of cases to judges in a court dealing with guardianship cases is based on the territorial divisions, which is laid down in § 46(2) of the Rules and regulations of common courts,[14] and execution proceedings are within the competence of a judge hearing the case (§ 246(1) Rules and regulations). As a result, judges adjudicating in a family court are most familiar with the specificity of guardianship matters, including those concerning a particular family. Therefore, the above-mentioned argument that a judge at the regional level lacks relevant experience in such matters is not convincing. Also the argument concerning the fact that a regional court jurisdiction does not always ensure the participation of a translator in the proceedings is inaccurate. Even in the case of small courts operating in small towns, there is no obstacle to ask a translator from another town for assistance. There are no grounds for stating that it is especially difficult to obtain a translator's assistance in county towns (where regional courts usually have a seat). Such an argument can only be valid for rare foreign languages but even in such cases obtaining assistance of a translator from a bigger city does not seem to be so difficult that it would cause excessive lengthening of proceedings. Also the change of the competence to hear the case that was intended to accelerate proceedings may eventually bring about the opposite effect. The transfer of this category of first-instance cases to district courts in towns that are capitals of appellate districts, i.e. relatively big courts with a considerable number of cases, justifies a claim that the effect will be opposite. As the Supreme Court rightly stated in its opinion about the Bill,[15] the transfer of the

[13] Act of 27 July 2001: Law on the common courts system, consolidated text (Dz.U. 2018, item 23).

[14] Regulation of the Minister of Justice of 23 December 2015: Rules and regulations for the operation of common courts (Dz.U. 2015, item 2316).

[15] The Supreme Court Research and Analyses Office, *Uwagi do projektu ustawy, przygotowanego przez Ministerstwo Sprawiedliwości (UD 123), o wykonywaniu niektórych czynności organu centralnego*

competence in such cases to the level of a district court will not contribute to the acceleration of such proceedings, which are conflicting in nature, and this is the reason of lengthening them. Moreover, this will not improve the 'quality' of hearing those cases, either, because courts dealing with guardianship matters are the ones that are organised in the way guaranteeing that adjudicating judges will specialise, while fulfilling some tasks at the regional level will not be feasible.

The legislator is also inconsistent when it comes to proceedings before court proceedings are instigated. While the legislator, as it has been mentioned above, justifies the transfer of competence in cases under the Hague Convention from a regional court to a district court by indicating judges' bigger expertise and specialisation, the statute under Article 13 para. 2 obliges the Minister of Justice to inform a court dealing with guardianship matters about an application filed, and under Article 20 about referring the application, inter alia, to a court that has heard the case of parental custody or childcare, i.e. a family court. Moreover, a court is obliged to conduct a social environment interview via a court-appointed legal guardian who is formally subordinated to the president of a district court but performs basic tasks within the operation of a regional court.

Evaluating the length of proceedings under the Hague Convention, it is necessary to take into account the entirety of the changes introduced. In accordance with Article 518^2 § 1 CCP, only one court is a court of appeal against first-instance courts' decisions, i.e. the Court of Appeal in Warsaw, which has three civil divisions with 46 judges in total, but some of them perform administrative functions or are seconded to the Ministry of Justice. Taking into consideration that an appellate court adjudicates as a three-person bench (Article 367 § 3 CCP), provided that the inflow of the new category of cases is not numerous, the appellate proceedings can considerably lengthen the entire proceedings. Mainly technical factors can influence that. The designation of a single court as a second-instance one for the territory of the whole country can cause problems connected with the distance from this court to a party's place of residence in a completely different part of Poland. The six-week time limit for the adjudication on the appeal by the Court of Appeal in Warsaw, introduced under Article 518^2 § 2 CCP, will not change the situation because it is a prescriptive period. Moreover, Article 11 Hague Convention stipulates that the entire proceedings should take six weeks and when the period expires the applicant has the right to request a statement of the reasons for the delay. At the same time, the Polish legislator, explicitly against the Convention, decides that just the appellate proceedings can take six weeks. The Convention clearly indicates that the time limit determined reflects the conviction that taking care of the child's interests, in particular protection against unfavourable influence of the lengthening stay away from the family environment, is a priority.[16] In the face of the stipulation of the maximum six-week time limit for the proceedings before first-instance court and the inflow of cases to the Court of Appeal in Warsaw, in which 14 judges

w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych oraz zmianie ustawy – Kodeks postępowania cywilnego i niektórych innych ustaw, BSA I-021-12/17, pp. 2–3.

[16] I. Biedrzycka, *supra* n. 9, p. 36.

adjudicate in I Civil Division hearing appeals (in three-person benches) concerning those cases,[17] there is a justified assumption that the length of the proceedings will not be shorter than in the past.

In fact, the justification for the Bill stated that, for example, there is a single court in England and Wales competent to adjudicate on cases under the Hague Convention, similarly to one single specialist court competent to hear such cases in the Czech Republic, Lithuania, Hungary and Sweden, but there are 22 such courts in Germany and 27 in Ukraine. Based on the data of the Hague Conference on Private International Law,[18] it should be pointed out that in countries with the population similar to Poland's, e.g. in Italy, there are 27 juvenile courts competent to adjudicate on matters under the Convention and their decisions can be appealed against to the Supreme Court, there are 35 competent courts in France, and 179 courts in Turkey, which leads to a conclusion that the considerable limitation of the number of courts competent to hear such cases in countries similar to Poland is rare. Thus, the assessment whether the amendment consisting in the change of first-instance courts' competence will serve more efficient proceedings will be possible from a time perspective, however, the author's opinion is that such assessment should be negative.

Another basic change influencing the length of the proceedings is an application lodged for their cassation, which is laid down in Article 519^1 § 2^1 CCP. The legislator indicated that: 'Taking into account the significance of judgments issued in such cases, due to their international context, it will be justified, regardless of the above solutions, to enable the Supreme Court to shape case law in such cases.' At the same time, the circle of entities entitled to lodge the appeal was limited under Article 519^1 § 5 CCP to the Ombudsman, the Children's Ombudsman and the Prosecutor General, who can do so within the period of two months. However, it is not a new solution because, until the amendment to the Code of Civil Procedure of 24 May 2000[19] entered into force, it had been possible to lodge an appeal in cassation concerning such cases to the Supreme Court. Both the advantages and disadvantages of such a regulation were presented in the legal doctrine because it had a negative impact on the length of proceedings; on the other hand, the Supreme Court's interpretation of the Convention proved to be useful.[20] Nevertheless, it should be mentioned that in the former legal state, also the parties to the proceedings had the right to apply for cassation concerning the return of a child and they could effectively lengthen the proceedings if they were not satisfied with the decisions issued by common courts. It must be admitted that *de lege lata* the legislator avoided the problem by rightly limiting the circle of entities entitled to lodge a cassation appeal only to the state bodies indicated. From the point of view of the length of proceedings, in accordance with Article 598^5 § 3 CCP, the obligation to develop motives for the decision on the return of a child under the Hague Convention and to deliver them to a public

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17 http://www.waw.sa.gov.pl/index.php?p=m&idg=mg,77,79,129.

18 https://www.hcch.net/en/instruments/conventions/publications1/?dtid=42&cid=24.

19 Act of 24 May 2000 amending the Act: Code of Civil Procedure, the Act on the registered pledge and the pledge registry, the Act on legal costs in civil cases and the Act on bailiffs and execution (Dz.U. 2000, No. 48, item 554).

20 M. Kulas, *supra* n. 4, p. 15.

prosecutor also seems to be justified. However, while the abstract interpretation of the Hague Convention by the Supreme Court of 30 June 2000 was influenced by the relatively short period of its application, the need does not seem to be substantiated at present. In addition, the need to shape case law stated in the justification is eliminated by the new regulation of the course of instance-related proceedings and the indication of the Court of Appeal in Warsaw as the only one competent to hear such cases in the second-instance proceedings. The National Council of the Judiciary in Poland,[21] in its opinion on the Bill, also rightly notes the legislator's certain inconsistence because, in accordance with Article 598^4 § 5 CCP, a court's decision is executable the moment it becomes valid and can be obligatorily executed pursuant to Article 598^6 CCP. However, the time for lodging a cassation appeal at the Supreme Court is two months, which, taking into account the time necessary to hear it, can result in a situation where, if the appellate court's judgment is overruled, it can be necessary to take a child back from the person to whom it has been returned. The National Council of the Judiciary is right to propose that the development of uniform case law by the Supreme Court be done without the subjective extension of cassation cases because the effect can be also obtained by means of filing a motion to solve discrepancies in the interpretation of the provisions of law that are grounds for adjudication by the First President of the Supreme Court, the Ombudsman, the Children's Ombudsman and the Prosecutor General (Article 83 § 1 and § 2 Act on the Supreme Court[22]). An appellate court can also ask the Supreme Court for solving a legal question that raises serious doubts (Article 390 § 1 CCP in conjunction with Article 13 § 1 and § 2 CCP). This leads to a conclusion that the extension of the Supreme Court's cassation cognition to cases under the Hague Convention is not fully justified. It is necessary to share the stand presented in the justification for the above-mentioned amendment to the Code of Civil Procedure of 2000, which was not more broadly elaborated though, that apart from the matters concerning adoption and division of joint property, matters concerning family law are not subject to cassation due to their instability and conflicting nature. As it has been argued above, the legislator's assumption in the interpretation of the Convention can be achieved without any obstacles with the use of other available legal measures.

The amendment also makes another important change in the scope of proceedings before a court by introducing, under Article 578^2 § 1, a provision of obligatory participation of a counsel. The obligation does not apply to the proceedings concerning the exemption from legal costs and the appointment of a counsel, and the situation where a party to the proceedings, its body, its statutory representative or proxy is a judge, a prosecutor, a notary, a professor or doctor of law, a defence counsel, an attorney-at-law, a legal advisor or a lawyer of the General Counsel to the Republic of Poland (Article 578^2 § 2 CCP). The above means that the obligation is applicable to both parties to the proceedings, i.e. an applicant and the participants.

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[21] Opinion of the National Council of the Judiciary of 7 February 2017 concerning the Bill on the performance of some activities of a Central Authority in family cases within the scope of legal transactions in accordance with the European Union law and international agreements and amending the Act: Code of Civil Procedure and some other acts, p. 1.

[22] Act of 8 December 2017 on the Supreme Court (Dz.U. 2018, item 5).

However, the statute, within the scope in which it changes the provisions of the Code of Civil Procedure, does not stipulate the method of procedural substitution for the applicant who does not have a seat in Poland. Moreover, at the stage of the proceedings involving the application before the Minister of Justice as the Polish Central Authority, Article 4 of the statute stipulates that the applicant can, i.e. does not have to, be represented by a counsel who can also be, apart from an attorney-at-law, the applicant's spouse, siblings, descendants, ascendants, and people who are in the adoption relationship with the applicant. In the justification for the Bill, its authors indicated that: 'The obligatory participation of a counsel, in conformity with the intention of the Bill, shall not apply to the act of filing an application because an applicant can do this on their own, which is guaranteed by the provisions of the Hague Convention of 1980.' It is also stated in the justification that: 'In the case of no possibility of appointing a counsel, because of the financial situation, a party to the proceedings can apply for the appointment of a counsel by court.' However, no legislation followed that idea and there is an obvious lack of such regulations. The statute does not specify any method or mode of informing an applicant having a seat abroad about the necessity of appointing a professional counsel. It seems that the regulation contained in Article 16 of the statute is insufficient in this regard. In accordance with this provision, the Minister of Justice passes information on the running of the proceedings concerning applications, information about the law that is in force in the Republic of Poland, other information and notifications to the foreign Central Authority acting in the case or the applicant. In the case the applicant has appointed a proxy, the Minister addresses correspondence to him or her. Thus, it means that potential information about obligatory participation of a counsel may reach the applicant after a long time, which should be negatively evaluated from the point of view of possible consequences of the lack of such representation. It is desirable that the Ministry of Justice should respond to the application and automatically notify the applicant of the obligation to appoint a professional counsel if the application is referred to a court.

4. CONCLUSIONS

At the present stage, an unequivocal evaluation of the amendments to the proceedings concerning an application for the return of a child under the Hague Convention is difficult, however, in the author's opinion, the direction of changes and their justification are at least doubtful. Undeniably, in cases of this kind, the well-being of a child should be the primary interest. That is why, the proceedings should be shaped in the way ensuring their effectiveness and efficiency. The assessment whether the proceedings before a district court will be more efficient than they used to be before a regional court will be possible after some period when the amended provisions are in force.

However, as it has been discussed above, the changes introduced by the analysed amendment raise doubts concerning their rationality from the point of view of the Hague Convention as well as the real need in this regard. In fact, there

have been no opinions so far that the proceedings in such cases were inefficient or the practice was incapable. Moreover, the Ministry of Justice has not presented data justifying those changes. The essence of the proceedings under the Hague Convention is to oblige a parent who has abducted a child to return him/her to their country of origin, and the Convention lays down the possibility of rejecting the application in extraordinary situations. Therefore, proceedings in such cases should be carried out efficiently and should be accessible to parties. However, the change of the competence of courts adjudicating in those cases will cause difficulties for the people concerned.

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AMENDMENT TO NATIONAL PROVISIONS IMPLEMENTING THE HAGUE CONVENTION

Summary

The article discusses issues related to the recently amended provisions of the Code of Civil Procedure with regard to proceedings in the case of an application to return a child filed under the Hague Convention. The amended Act changes the jurisdiction of a court in these matters, transferring it from the level of a lowest regional court to selected district courts, and in appeal proceedings, the only competent court is the Court of Appeal in Warsaw. The Act also introduces the possibility of lodging a cassation appeal against the decision of the second-instance court. As the Ministry of Justice, the author of the Bill, directly claims, the aim of the regulation is to 'protect Polish children'. As a result, the Act raises extralegal emotions. With this in mind, and primarily considering the purpose of the Convention, which is the best interests of the child, the assessment of the amendments should be made with great caution.

Keywords: Hague Convention, civil aspects of international child abduction, child abduction, parental abduction

NOWELIZACJA KRAJOWYCH PRZEPISÓW DOTYCZĄCYCH WYKONYWANIA KONWENCJI HASKIEJ

Streszczenie

Artykuł dotyczy problematyki związanej z dokonaną w ostatnim czasie nowelizacją przepisów kodeksu postępowania cywilnego w zakresie postępowania w sprawie wniosku o wydanie dziecka złożonego na podstawie konwencji haskiej. Ustawa ta dokonuje zmiany właściwości rzeczowej sądu w tych sprawach, przenosząc je z poziomu sądu rejonowego do wybranych sądów okręgowych, a w postępowaniu odwoławczym jako jedyny właściwy określa Sąd Apelacyjny w Warszawie. Ustawa wprowadza także możliwość złożenia skargi kasacyjnej od postanowienia sądu drugiej instancji. Jak wprost przyznaje Ministerstwo Sprawiedliwości, będące autorem projektu ustawy, jej celem jest „ochrona polskich dzieci". Powoduje to, że ustawie towarzyszą pozaprawne emocje. Mając to na względzie, a przede wszystkim patrząc na cel konwencji, jakim jest dobro dziecka, ocena dokonanych zmian powinna być dokonywana z dużą ostrożnością.

Słowa kluczowe: konwencja haska, cywilne aspekty uprowadzenia dziecka za granicę, uprowadzenie dziecka, porwanie rodzicielskie

REFORMA DE NORMAS NACIONALES RELATIVAS A LA EJECUCIÓN DEL CONVENIO DE LA HAYA

Resumen

El artículo versa sobre la problemática relacionada con la reforma efectuada últimamente de preceptos del código de procedimiento civil en cuanto al proceso de la solicitud de entrega de niño presentado en virtud del Convenio de la Haya. Esta ley modifica la competencia objetiva de Tribunales en estos casos, trasladándola de los Tribunales de Primera Instancia

a determinados Tribunales regionales; en el proceso de apelación, el único órgano competente es el Tribunal de Apelación en Varsovia. La ley introduce también la posibilidad de presentar el recurso de casación contra auto del Tribunal de II instancia. Como admite directamente el Ministerio de Justicia, el autor de proyecto de la ley, su objetivo consiste en "proteger a los niños polacos". Esto significa, que la ley está acompañada por emociones extralegales. Teniendo esto en cuenta y, en particular, viendo el objetivo de la Convención que es el bien del niño, la valoración de modificaciones efectuadas ha de ser muy precavida.

Palabras claves: Convención de la Haya, aspectos civiles de secuestro de niño al extranjero, secuestro de niño, secuestro parental

ИЗМЕНЕНИЯ В НАЦИОНАЛЬНОМ ЗАКОНОДАТЕЛЬСТВЕ, КАСАЮЩЕМСЯ ВЫПОЛНЕНИЯ ГААГСКОЙ КОНВЕНЦИИ

Аннотация

В статье рассматриваются вопросы, связанные с недавним изменением положений Гражданского процессуального кодекса, касающихся производства по заявлению о возвращении ребенка, поданному в соответствии с Гаагской конвенцией. Законом, вносящим эти поправки, изменена материальная юрисдикция суда по соответствующим делам. Они передаются с уровня районных судов на уровень нескольких окружных судов, а в качестве единственной апелляционной инстанции указан Апелляционный суд в Варшаве. Кроме этого, законом предусмотрена возможность подачи кассационной жалобы на решение суда второй инстанции. Автор законопроекта, которым является Министерство юстиции, прямо указывал, что его целью является «защита польских детей». Как следствие, принятию закона сопутствовали эмоции, никак не связанные с юриспруденцией. Ввиду этого, а также учитывая основную цель конвенции, которой является благополучие ребенка, к внесенным недавно изменениям следует отнестись с большой осторожностью.

Ключевые слова: Гаагская конвенция; гражданские аспекты международного похищения ребенка; похищение ребенка; похищение ребенка родителем

ÄNDERUNG DER EINZELSTAATLICHEN VORSCHRIFTEN ZUR AUSFÜHRUNG DES HAAGER ÜBEREINKOMMENS

Zusammenfassung

Der Artikel behandelt Fragen im Zusammenhang mit der jüngsten Änderung der polnischen Zivilprozessordnung in Bezug auf die Behandlung eines Antrags auf Anordnung der Rückgabe eines Kindes nach dem Haager Übereinkommen. Durch dieses Gesetz ändert sich die sachliche Zuständigkeit der Gerichte in diesen Fällen und überträgt diese von der Ebene des Sąd rejonowy, der Eingangsinstanz in Zivil- und Strafsachen in Polen auf ausgewählte Bezirksgerichte (Sąd okręgowy), die gewöhnlich die zweite Instanz der ordentlichen Gerichtsbarkeit in Polen sind, und legt das Berufungsgericht Warschau (Sąd Apelacyjny w Warszawie) als alleinig für Berufungsverfahren zuständiges Gericht fest. Das Gesetz räumt auch die Möglichkeit ein, gegen zweitinstanzlich ergangene Entscheidungen Kassationsbeschwerde einzulegen. Wie das polnische Justizministerium, das den Gesetzesentwurf ausgearbeitet hat, explizit einräumt, zielt dieses darauf ab, „polnische Kinder zu schützen". Dies hat zur Folge, dass mit

dem Gesetz auch außergerichtliche Emotionen einhergehen. Vor diesem Hintergrund und vor allem unter Berücksichtigung des Zwecks des Haager Übereinkommens, das das Wohl des Kindes im Auge hat, sollte die Bewertung der vorgenommenen Änderungen mit großer Vorsicht erfolgen.

Schlüsselwörter: Haager Übereinkommen, zivilrechtliche Aspekte der grenzüberschreitenden Kindesentführung, Kindesentführung, elterliche Kindesentführung

MODIFICATION DES DISPOSITIONS NATIONALES CONCERNANT LA MISE EN ŒUVRE DE LA CONVENTION DE LA HAYE

Résumé

L'article traite des questions liées à la récente modification des dispositions du Code de procédure civile dans le cadre de la procédure relative à la demande de remise de l'enfant présentée en vertu de la Convention de La Haye. Cette loi modifie la compétence matérielle du tribunal dans ces affaires, en les transférant du niveau du tribunal de district aux tribunaux d'arrondissement sélectionnés, et détermine la cour d'appel de Varsovie comme la seule compétente en matière de procédure d'appel. La loi prévoit également la possibilité de déposer une plainte en cassation contre une décision du tribunal de deuxième instance. Comme l'admet explicitement le ministère de la Justice, auteur du projet de loi, son objectif est de «protéger les enfants polonais». Il fait que l'acte s'accompagne d'émotions extra-légales. Dans cette optique, et surtout au regard de l'objet de la convention, qui est le bien de l'enfant, l'appréciation des changements doit se faire avec une extrême prudence.

Mots-clés: Convention de La Haye, aspects civils de l'enlèvement d'enfants, enlèvement d'enfants, enlèvement parental

RIFORMA DELLE NORMATIVE NAZIONALI RIGUARDANTI L'APPLICAZIONE DELLA CONVENZIONI DELL'AIA

Sintesi

L'articolo riguarda la problematica legata alla riforma, ultimamente introdotta, delle norme del codice di procedura civile nell'ambito del procedimento circa la domanda di ritorno di minore, presentata sulla base della convenzione dell'Aia. Tale legge introduce variazioni della competenza ratione materiae del giudice in tali casi, trasferendola dal livello di tribunale circondariale a tribunali distrettuali scelti, e nel procedimento d'impugnazione come unico competente viene indicata la Corte di Appello di Varsavia. La legge introduce anche la possibilità di presentare un ricorso per cassazione avverso le sentenze del giudice di secondo grado. Come ammette esplicitamente il Ministero della Giustizia, autore del progetto di legge, il suo obiettivo è la "tutela dei bambini polacchi". Questo fa sì che la legge sia accompagnata da emozioni extragiuridiche. Considerando questo e soprattutto guardando all'obiettivo della convenzione, ossia il bene del bambino, la valutazione delle modifiche introdotte deve essere eseguita con grande prudenza.

Parole chiave: Convenzione dell'Aia, aspetti civili della sottrazione trasfrontaliera di minore, sottrazione di minore, sottrazione da parte di un genitore

Cytuj jako:

Kluza J., *Amendment to national provisions implementing the Hague Convention [Nowelizacja krajowych przepisów dotyczących wykonywania konwencji haskiej]*, „Ius Novum" 2020 (14) nr 3, s. 176–189. DOI: 10.26399/iusnovum.v14.3.2020.32/j.kluza

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MAŁGORZATA SEKUŁA-LELENO*

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Limits of a notary's obligation of disclosure in the making of a deed – gloss on the Supreme Court judgment of 28 June 2019, IV CSK 224/18

THESIS

A notary is liable for harm inflicted in the course of a notarial transaction whether on a client or third parties, on the basis of Article 415 of the Civil Code, on account of failure to exercise due diligence (Article 49 of the Act of 14 February 1991: Notarial Law, consolidated text: Polish Journal of Laws – Dz.U. 2019, item 540, as amended), in a culpable manner, allowance being made for the professional nature of the notary's activities (Article 355 § 2 Civil Code) and the limits of professional diligence set out by Article 80 § 1 to § 3 NLA.

FACTS OF THE CASE

The facts in the judgment at hand are that the claimant claimed the amount of PLN 87,189.53 from the defendant notary pursuant to Articles 49 and 80 of the Act of 14 February 1991: Notarial Law[1] and Article 474 of the Civil Code, in damages for harm inflicted by the defendant notary's deputy in the making of a deed of donation of a residential apartment.

The claimant claimed damages from the defendant notary for harm inflicted by a notarial associate – for whom the defendant notary was liable – as a result of the associate's failure to investigate the legal basis for the donor's acquisition of the apartment estate from the defendant's municipality and failure to advise the claimant as

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1 Consolidated text, Dz.U. 2019, item 540, as amended; hereinafter NLA.

the donee – in the drafting and execution of the contract of donation of the apartment estate of 31 December 2009 – that any subsequent alienation by the claimant of the donated estate could trigger the consequences set out in Article 68 para. 2 of the Act of 21 August 1997 on real estate management,[2] in the form of an obligation to refund the discount granted by the Municipality of Olsztyn as the original owner. The claimant explained that the amount claimed was the value of the refunded discount along with statutory interest and the claimant's costs in judicial and enforcement proceedings.

By judgment of 10 February 2017, the Regional Court in Olsztyn dismissed the claim for failure to specify the grounds for the defendant notary's liability in tort. In the court's view, the notarial associate's obligation of disclosure in the making of the donation contract of 31 December 2009 (Article 80 paras 2 and 3 REMA) did not extend to instructing the claimant on the consequences of hypothetical future disposals of the residential apartment donated to him by his wife. The Court also noted that the obligation to refund the discount, on which the claimant's alleged harm hinged, originated not from the donation contract of 31 December 2009 but from a subsequent donation contract of 28 December 2010, executed in different notarial offices.

By judgment of 8 December 2017, the Court of Appeal in Białystok dismissed the claimant's appeal, agreeing with the findings of facts and legal reasoning of the court of first instance.

By judgment of 28 June 2019, the Supreme Court dismissed the appeal-in-cassation for want of merit.

COMMENTARY

The core issue in this judgment was to answer the question of what is the scope of the obligations imposed on notaries by the provisions of Article 80 § 2 and § 3 NLA. Even more detailed questions come forward in this context. Firstly: does the notary have a duty to personally examine the grounds of the acquisition of the estate concerned in the contract made before the notary for the alienation of such estate, and to check the title in the land-and-mortgage register, which, in consequence, could be indicative of the absence of special diligence and justify the view that notarial misconduct has occurred? Secondly and more importantly: what is the scope of the notary's obligation of disclosure, i.e. is the notary required to instruct the parties only about the consequences of the specific transaction being made before the notary or also about the consequences likely to arise from another contract? Ultimately, which is even more particularly highlighted by this case: does the notary have an obligation to instruct the transferee about the obligation to refund the discount in the event of the grounds of Article 68 para. 2 REMA materialising when the transferor is the original transferee to whom the discount has been granted and the transferee is a person close to the transferor? These issues, which are of significant importance, as they touch upon the scope of the notary's duties, have not been more broadly explored to date by either scholars or courts.

[2] Dz.U. 2018, item 2204, as amended; hereinafter REMA.

The Supreme Court's decisions emphasize the notary's special role as a 'custodian guaranteeing the compliance of civil law transactions with the provisions of law and the associated liability in the context of societal perception of a notarial deed form as a guarantee of the certainty of legal transactions and certainty and stability of perfected rights'.[3]

However, the scope of the notary's liability is a matter of significant controversy in court decisions, especially in common courts. Some courts find that notaries' obligation is limited to examining the consequences arising from the transaction being executed before them; thus, the notary is not required to engage in document review, including the basis for the acquisition, or to instruct the parties about consequences other than those directly arising from the transaction underway. Other courts, on the other hand, construe the notary's duties broadly, holding that besides the direct consequences of a transaction, the notary also should instruct the parties about indirect consequences, especially if the circumstances of the transaction hint at the possibility.[4]

No conclusive answers or guidelines in this matter can be found in the very limited literature available on the subject.

THE NOTARY'S STATUS – GENERAL REMARKS

Before embarking on the analysis of the above-identified problems, it would be expedient to make some remarks about the notary's status under law.

In accordance with Article 49 NLA, the notary is liable for harm inflicted while engaging in notarial activities, on the terms set forth in the Civil Code, subject to special diligence required in such activities. On the other hand, Article 80 § 1 NLA provides that the notary should draft deeds and documents intelligibly and clearly. In notarial activities, the notary is required to see to the due protection of the rights and legitimate interests of parties and others for whom a transaction can trigger legal effects and is also required to provide the parties with the necessary explanation concerning the notarial transaction underway (Article 80 § 2 and § 3 NLA).

The provisions just cited define the limits of these obligations only in a very general way; literature[5] and court decisions[6] have, however, gone a long way

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[3] Supreme Court judgment of 27 April 2016, II CSK 518/15, sn.pl; see also: resolution of the Supreme Court – Civil Chamber of 18 December 2013, III CZP 82/13, Legalis; judgments: of 12 June 2002, III CKN 694/00, Legalis; of 17 May 2002, I CKN 1157/00, Legalis; of 23 January 2008, V CSK 373/07, Legalis; of 7 November 1997, II CKN 420/97, Legalis; the nature of this liability is liability in tort (the Supreme Court judgments: of 27 April 2016, II CSK 518/15, Legalis; of 9 May 2008, III CSK 366/07, unpublished; of 12 June 2002, III CKN 694/00, OSNC 2003, No. 9, item 124; of 5 February 2004, III CKN 271/02, unpublished; the Supreme Court resolution of 1 June 2007, III CZP 38/07, OSNC 2008, No. 7–8, item 76).

[4] See A. Oleszko, *Przegląd orzecznictwa w sprawach notarialnych*, Rejent 12, 2015, p. 7 et seq.

[5] A. Oleszko, *Prawo o notariacie. Komentarz*, Part II, Warszawa 2012, pp. 256–257; M. Kolasiński, *Odpowiedzialność cywilna notariusza*, TNOiK, Toruń 2005.

[6] Compare the Supreme Court judgments: of 27 April 2016, II CSK 518/15, OSP 2017, No. 1, item 2; of 9 May 2008, III CSK 366/07, unpublished; of 12 June 2002, III CKN 694/00, OSNC 2003, No. 9, item 124; of 5 February 2004, III CKN 271/02, unpublished; and the Supreme Court resolution of 1 June 2007, III CZP 38/07, OSNC 2008, No. 7–8, item 76.

toward narrowing them down. The notary gives shape to the property interests of various persons and entities, deciding the future fate of business relationships, guarantees the compliance of civil law transactions with the provisions of law and is a 'custodian' of the existing legal order. Notarial deeds must provide legal safety to all participants.[7]

The literature on the subject notes that these obligations should in principle be limited to predicting the civil law consequences tightly linked to a relevant notarial transaction or at least related to the official activities of the notary drafting a relevant document.[8]

As regards the sale of communal properties outside of tenders and involving discounts, Aleksander Oleszko notes that both the value of the discount and the refund depend on a number of factors, for which reason the notary is not required to advise about this manner of property acquisition, as such an assessment is not within the limits of the notary's competence.[9]

On the other hand, Gerard Bieniek points out the differences in the notary's conduct in the drafting of a dispositive contract of sale where the transferee takes advantage of discounts to bring the price down.[10]

Literature emphasizes that: 'The notary is oftentimes required to offer guidance to the original transferee about the possible consequences provided for in Article 68 REMA in respect of having to refund the discount, and in any case whenever drafting a contract for further alienation of the estate to a close person.'

In Aleksander Oleszko's opinion, before making expectations of the notary in this regard, one should be mindful that Article 68 REMA has undergone frequent amendments, giving rise to a multitude of legal doubts. The notary cannot be saddled with burden of explaining such doubts as to the refund.[11]

The author goes on to observe that greater expectations should be made of the notary in respect of further alienation of the property by its original transferee having taken advantage of the discount and the transferee being a close person who cannot claim this privilege. The notary should drive the point home that alienation of property in violation of Article 68 para. 2 REMA could trigger a demand for the discount to be refunded, even though the transferor might have allocated the price of sale to the construction of a detached house.[12]

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[7] Compare reasons for the Supreme Court resolution of 18 December 2013, III CZP 82/13, OSNC 2014, No. 10, item 101.

[8] For example, a notary cannot be required to instruct the transferees of land estates built over with multi-apartment buildings becoming owners (perpetual usufructuaries) of land developed as a result of previous 'handover processes' of the Treasury assets to local-government units that only they, as the current property owners as opposed to anyone before them, should be aware of the possibility of tenants (and persons close to them) exercising first-purchase rights if selling to a third party (the Supreme Court judgment of 26 April 2009, I CSK 137/09, LexPolonica No. 2375685). Moreover, a notary cannot be required to advise a developer, as a professional participant in real-estate trade, about the zoning fee.

[9] A. Oleszko, *Prawo o notariacie. Komentarz*, Part II, Vol. I, Warszawa 2012, p. 273.

[10] See G. Bieniek, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2011, pp. 376–394.

[11] Thus A. Oleszko, *supra* n. 9, 278; and G. Bieniek, *ibid*., p. 383.

[12] A. Oleszko, *ibid*., p. 279.

The literature also observes that the limit of the necessity of the notary's explanations is the possibility of the notarial transaction 'triggering legal consequences'.[13]

Confronting the above reflection with the judgment under analysis, it must be noted that the donation contract between the claimant and his wife did not trigger consequences in the form of an obligation to refund the discount, and it apparently is not the notary's role to predict what other contracts the transferee contemplated or would contemplate. Another issue is that the claimant went too far in delineating the notary's duties preceding the execution of the deed. From the Supreme Court's reasoning and from the findings of facts binding on this court it occurs that during the drafting and execution of the donation contract of 31 December 2009 the notarial deputy undertook acts of diligence consisting in a title check in the land-and-mortgage register book for the residential apartment, drafted a formally correct and valid donation contract, successfully transferring the ownership of the apartment (as a separate estate) to the claimant and constituting the basis for disclosing the claimant as the owner in the said book, and instructed the parties about the consequences of the transaction as identified in the legislation cited within the contract.

Thus, the notary checked the contents of the land-and-mortgage register book and found that it allowed the notarial deed to be made. The donor, on the other hand, did not advise the notary about having purchased the property at a discount.

The notary's professional obligations do not eliminate the transactional party's need to see to its own interests, including without limitation a title check in the publicly available land-and-mortgage register book.[14] Two special circumstances of the present case must be emphasized in this context: firstly, that the disputed donation took place between spouses, which needed not prompt, on the part of the notary, a higher degree of prediction of harm the parties could inflict on each other; and secondly, that the claimant did not deny having been a professional realtor at the time. As a professional and the donor's husband, the claimant had more reason that the notary to suspect that any further alienation of the property would forfeit the discount. As the analysis of the reasons for the judgment at hand shows, this evaluation is not changed by the fact that the claimant did not review the wife's acquisition contract until in 2012.

LEGAL STATUS OF THE NOTARY IN THE SUPREME COURT'S DECISIONS

The notary is a guarantor of the safety of legal transactions and not only a position of public trust but also, as some put it, an auxiliary body of the administration of justice, an active participant in the broadly understood administration of justice.[15]

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[13] *Ibid.*, p. 282.

[14] The Supreme Court judgment of 17 September 2003, II CK 10/02, LexPolonica No. 363363.

[15] The Constitutional Tribunal judgment of 10 December 2003, K 49/01, OTK-A Zb.Urz. 2003, No. 9, item 101; and the Supreme Court resolution of 1 June 2007, III CZP 38/07, OSNC 2008, No. 7–8, item 76.

The notary is a person in a position of public trust, and documents containing notarial transactions are official documents within the meaning of the Code of Civil Procedure.

Already in its decision of 22 March 1935,[16] the Supreme Court took the view that one should not expect the notary to establish beyond any doubt the authenticity of a document being submitted for the transaction because 'sufficient diligence' was enough, which meant, for example, the need to turn attention to visible signs of forgery.

In the judgment of 25 September 2002 the Supreme Court held: 'The obligor's due diligence in the scope of the obligor's business activity, which is defined in the context of the professional nature of such activity, does not imply exceptional diligence but [only diligence] adapted to the person acting, the object of the activity, and the circumstances in which the activity is taking place.'

In the Supreme Court's body of decisions attention should be drawn to the resolution of 9 May 1995, III CZP 53/95,[17] whereby the notary cannot refuse a notarial activity pursuant to Article 80 § 2 NLA; such refusal is only possible if the condition set out in Article 81 NLA is met.

Concerning the notary's statutory obligations, in the judgment of 17 May 2002[18] the Supreme Court took the view that the notary's statutory duty (Article 80 § 2 NLA) is – unless requesting appropriate documents – personal inspection of the land-and-mortgage register. If the notary checks the book in a manner which is not diligent, missing certain entries or mentions of applications, and provides the client with assurances of a state of affairs inconsistent with the contents of the entries to the book or applications filed to it, then the notary fails to be diligent within the meaning of Article 49 NLA and is liable for the full extent of the harm.[19] For the notary is not merely allowed to, as everyone else, inspect land-and-mortgage register books but also to inspect the files. Where the notary accepts the future transferee's mandate to check all encumbrances on a property, the notary plainly acts with less than adequate diligence in failing to notice the mention of an application and inspect its contents.

In the judgment of 5 February 2004, III CK 271/02,[20] the Supreme Court – following in the footsteps of its earlier resolution of 29 May 1990, III CZP 29/90,[21] and the rationale therein – found the notary to exercise preventive jurisdiction, influencing the interested parties' conduct to shape their transactions in accordance with law and with the principles of social co-existence. The Supreme Court endorsed

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16 C I 2123/34, PN 1935, No. 17, item 381.

17 LEX No. 563626.

18 I CKN 1157/00, LEX No. 55249; the Supreme Court judgment of 14 June 2017, IV CSK 104/17, OSNC 2018, No. 3, item 35.

19 Compare the Supreme Court decision C III 577/36, PN 1937, No. 17–18, item 140; and the Supreme Court judgment of 7 November 1997, II CKN 420/97, unpublished.

20 LEX No. 602711.

21 OSNC 1990, No. 12, item 150.

this view in the reasons expounded in the resolution of a seven judges' panel of 7 November 2010, III CZP 86/10.[22]

As regards the model of the notary's conduct in connection with Article 81 NLA, the Supreme Court's judgment of 7 November 1997, II CKN 420/97,[23] plays an important role. There, the Court held that notaries are liable for the execution of a legal transaction inconsistent with law. It also noted that the notary has an obligation to advise the interested parties of the conflict with law and to refuse to execute the transaction if a party so notified continues to demand the execution of the notarial deed. The Supreme Court emphasized that while a warning of the legal risk associated with the contract being made does satisfy Article 80 § 2 NLA, it is not sufficient for the purposes of Article 81 NLA.

In the resolution of 18 December 2013, III CZP 82/13, the Supreme Court, in reference to the notary's status and tasks under Polish law, explained as follows:

> The notary is a person in a position of public trust, and documents containing notarial transactions are official documents within the meaning of the Code of Civil Procedure. The notary's task is to guarantee the safety and reliability of legal transactions. The state transferred to the notary part of its own powers in respect of activities it deemed to be of legal and general social significance. The notary's tasks are also important from the perspective of a subject of civil law. The notary gives shape to the property interests of various persons and entities, deciding the future fates of business relationships, guarantees the compliance of civil law transactions with the provisions of law and is a 'custodian' of the existing legal order. Notarial deeds must provide legal safety to all participants. The notary has to eliminate or mitigate the risk of a future court dispute, and, should such a dispute take place, the notary's role is to assist the civil proceedings by supplying clear evidence.

The Court also emphasized that:

> the evaluation of the notary's liability in connection with a violation of Article 81 NLA is unaffected by the attitude of the counterparties and by the notary's exhaustive explanation of the dangers involved in the transaction. The key is to eliminate the risk of defective notarial transactions, not merely to compel the parties to a deeper reflection on the transaction underway or to provide them with correct information about the consequences and hazards relating to it.

In the judgment of 27 April 2016 the Supreme Court emphasized that special diligence as the grounds of liability under Article 49 NLA has to be evaluated on a case-by-case basis, with any attempt at construing on this basis a universal rule of legal compliance for the notary being incorrect here.[24]

The overview of a selection of the most representative decisions shows that the notary's basic obligations arise directly from the principles of the legal order and are binding on a third party just as well as the notary's client. The statute unquestionably requires the notary to observe special diligence while fulfilling these duties.

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[22] OSNC 2011, No. 5, item 41, as well as the reasons for the Supreme Court resolution of 29 May 1990, III CZP 29/90, OSNC 1990, No. 12, item 50.

[23] OSNC 1998, No. 5, item 76.

[24] Compare the Supreme Court judgment of 27 April 2016, II CSK 518/15, OSP 2017, No. 1, item 2.

ORIGINAL ANALYSIS

In the case at hand the key issue was the refund of the discount granted to the original transferee (the claimant's wife) of a separately owned apartment under Article 68 REMA. The numerous amendments to this provision, especially concerning who exactly is required to refund this discount, undoubtedly attract much attention. The difficulties in the interpretation and application of this provision were also noted by the Supreme Court in the reasons for the discussed judgment.[25] From the language of the notarial contract of 7 December 2009 it followed that the notary had instructed the parties on Article 68 REMA. Hence, the execution of a donation contract for the apartment estate with the claimant as the donee did not have the effect of requiring the transactional parties to refund the discount; this is because the claimant, as husband, was the donor's close person within the meaning of Article 68 para. 2a(1) REMA in the wording applicable on the date of entering into the said contract. While drafting the contract, the notarial deputy instructed the parties on the direct legal effects of the transaction specified in the legal instruments cited in the text of the contract. The Supreme Court emphasized that the obligation to provide the parties with the necessary explanation as to the notarial transaction being effected (Article 80 § 3 NLA) did not include the notarial deputy's activities in the area of advising or informing the claimant not directly on the form, contents and legal effects of the notarial transaction being the donation of the apartment but in reference to the claimant's intentions or all possible hypothetical future transactions involving the object of the acquired right. A contrary view would be hardly acceptable as it would exceed the notary's statutory scope of duties identified in Article 80 § 2 and § 3 NLA and determined by the function of the notary as the main regulator of the business sphere and the legal safety of the contracting parties, as well as the 'guarantor' of the certainty and stability of civil transactions. It would make the notary's position identical to that of a private legal, tax or investment advisor retained by one of the parties to the transaction and would also presuppose a duty for the notary to foresee the type and nature of the party's potential future transactions involving the subject-matter of the contract now before the notary, for which proposition there would be no legal basis. It is beyond any doubt that the notary had a duty to instruct the original transferee on the consequences of a hypothetical alienation within five years, which was actually done in the 2009 notarial deed, as the analysis of the facts of the case shows. Any interpretation of the relevant provisions lending itself to the conclusion that the obligation to advise applies to the notary even where the original transferee is donating the property to the spouse with no resulting obligation to refund the discount would appear to be incorrect. The notary, *de lege ferenda* in a way, would have to advise the donee that if the latter wanted to alienate the property within five years, the obligation to refund the discount had to be taken into account.

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[25] Compare the Supreme Court resolutions of 24 February 2010, III CZP 131/09, OSNC 2010, No. 9, item 118; resolution of the seven judges' panel of the Supreme Court of 11 April 2008, III CZP 130/2007, OSNC 2008, No. 10, item 108; judgments of the Supreme Court: of 14 July 2010, V CSK 15/10, OSNC-ZD 2011, No. A, item 15; of 24 January 2013, II CSK 286/12, unpublished.

It appears that – as the courts adjudicating on the merits were right to conclude – the correct interpretation of Article 80 § 2 and § 3 cannot impose on the notary such a far-reaching obligation to predict the parties' future conduct. Furthermore, in its literal reading Article 80 § 2 refers to the notarial transaction being in the process of execution before the notary and not one that might or might not be effected in the future, being highly improbable due to the loss of the discount. The above-referenced duties, however, are not unlimited, and, according to the view established among scholars, they should: 'in principle be limited to predicting the civil law consequences strictly linked to the relevant notarial transaction'. The notary's obligations do not eliminate the transactional party's need to see to its own interests, including without limitation a title check in the publicly available land-and-mortgage register book.[26] The party should also inform the notary of any circumstances potentially affecting the relevant transaction, especially when the party is a professional in real-estate trade.

Additionally, it must be noted that Article 19 § 2 NLA explicitly prohibits the notary from advising in business transactions.

Furthermore, Article 19 § 3 NLA provides for the necessary explanation concerning the notarial deed underway, that is for appropriate guidance to be given by the notary witnessing the transaction giving rise to the obligation of refunding the discount. These limits do not include the imposition on the notary of an obligation to analyse previous notarial deeds for potential terms involving the discount in order to warn the parties of the possibility of having to refund it upon alienation of the property. Thus, the scope of the notary's disclosures does not include the obligation to evaluate the substantive law and predict consequences arising, as they do in the facts at hand, from further alienations. It is aptly noted that the notary's obligation of due diligence cannot be regarded as tantamount to the obligation of performing an interpretation of law in such a manner as to subsequently be approved by the court.[27] The notary does not resolve disputes about what the law is or exercise the administration of justice. It is unquestionably one of the notary's chief tasks to protect the safety of legal transactions by preventively eliminating defective legal transactions and to protect the party's interests by preventing the party's engagement in an undertaking capable of later being found to be defective. The proceedings connected with the execution of notarial transactions do not equip the notary with legal tools to gather complete information in this matter and, in particular, to determine the facts with the same degree of certainty as a court typically does.

LIMITS OF THE NOTARY'S PROFESSIONAL DILIGENCE

Another imputed ground of liability in the judgment at hand comes down to the alleged duty on the part of the notary (notarial associate) to examine the contract for the acquisition of the residential apartment as a separate estate from the municipality

[26] The Supreme Court judgment of 17 September 2003, II CK 10/02.
[27] III CZP 82/13.

and advise the claimant about the consequences of a hypothetical further alienation in the future in the form of triggering the obligation to refund the discount granted to his wife when purchasing the same estate from the municipality. The dispute, therefore, focused around the scope of the notarial deputy's duties attendant on the execution of the relevant deed in the form of a notarial deed, the limits of the notary's obligation to have care of the due protection of the rights and interests of the parties to that transaction (the claimant and the wife) and the obligation to provide information to the parties (Article 80 § 2 and § 3).

It appears that the notary has an obligation to exercise special diligence, which includes not only the requirement of drafting and executing the notarial deed in compliance with formal requirements but also the evaluation of substantive law, which is only possible to determine following review of the documents relating to the subject matter of the notarial deed, along with the consequences of any further alienation. This is because the notary's liability for harm inflicted in the execution of notarial transactions materializes when the grounds set out in Article 49 NLA are met, provided that the notary has an obligation of special diligence in the making of the transaction.

The above thus invites yet another question about the limits of the notary's professional diligence.[28] Due to the importance of this profession, the search for the appropriate solutions to narrow down the criterion of special diligence refers to Article 355 § 2 Civil Code. One could agree with Edward Drozd's opinion that the reference to 'special diligence' does not explain anything. The scope of the notary's professional diligence is determined by the scope of the notary's duties.[29] According to Agnieszka A. Machnicka, on the other hand, diligence is defined as a set of positive qualities characterising the obligor's conduct; this conduct should be described by conscientiousness, forethought, prudence, caution and care to the achievement of the intended purpose.[30] According to Zbigniew Banaszczyk and Paweł Granecki, due diligence is an objectively existing model of conduct created for the purpose of the correct performance of the obligation as best possible, while securing the obligors' interests by referring the contents of the diligence to the relevant type of relationships.[31]

Aleksander Oleszko is correct in noting that Article 49 NLA introduces one of the multiple types of professional diligence.[32]

Considering the professional nature of the activity, one could adhere to Marek Safjan's view that the professional diligence criterion aggravates the required standard performance of an obligation, as it allows the charge of failure of diligence

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[28] For more details, see M. Sekuła-Leleno, *Glosa do wyroku SN z 27.04.2016 r. II CSK 518/15*, Rejent 1, 2017, pp. 89–108.

[29] E. Drozd, *Odpowiedzialność notariusza w wypadku nieważnej (bezskutecznej) czynności prawnej*, [in:] Romuald Sztyk (ed.), *III Kongres Notariuszy Rzeczypospolitej Polskiej. Nowoczesny notariat w bezpiecznym państwie*, Warszawa 2006, p. 81.

[30] See A.A. Machnicka, *Przedkontraktowe porozumienia – umowa o negocjacje i list intencyjny. Studium prawnoporównawcze*, Warszawa 2007, p. 247.

[31] See Z. Banaszczyk, P. Granecki, *O istocie należytej staranności*, Palestra 7–8, 2002, p. 19; and, in this particular scope, M. Sośniak, *Należyta staranność*, Katowice 1980, pp. 115–119.

[32] A. Oleszko, *Ustrój polskiego notariatu*, Kraków 1999, p. 222.

in the context of such duties as, even though perhaps not formulated by the parties, are tightly connected with the professional nature of the relevant activity, and thus shape the counterparty's legitimate expectations.[33]

Against this background, Mieczysław Sośniak aptly notes that the requirement of always the highest diligence should not be assumed, nor should the standards be *a limine* reduced to the absolute minimum. Sośniak supports reference to the term 'due diligence', functioning in the context of Article 355 § 1 Civil Code. This, therefore, involves the diligence required in the relevant type of relationships, such as may be required of the respective group of persons, whereby it is average or very high, depending on the circumstances.[34]

It ought to be emphasized, however, as the subject literature nowadays sometimes tends to do, and correctly so, that the assertion alone that in the specific case the evaluated conduct of a given person diverged from the above-discussed normative model implies only the conclusion that such a person has failed to exercise due diligence but does not yet make the attribution of culpability a decided matter. Here, some writers note that misconduct cannot be imputed not only where compliance with the requirements of due diligence is impossible as a matter of fact but also whenever the choice of the relevant course of action has been made due to having access only to incomplete or misleading information and thus in the case of justified error or abnormal motivational situation (e.g. acting under the influence

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[33] See: M. Safjan, [in:] J. Okolski (ed.), *Prawo handlowe*, Warszawa 1999, p. 389.

[34] M. Sośniak, *Elementy winy nieumyślnej w prawie cywilnym*, Pr.Nauk.UŚl.Pr.Prawn. 6, 1975, pp. 161–162; *idem*, *supra* n. 31, p. 171. In his monograph he notes that due diligence may variously imply ordinary, average or above-average diligence. According to him, however, one cannot of speak of an elevated threshold of diligence, e.g. for professionals, as even professional diligence is simply another type of diligence, which should also be classified as due diligence, since the latter is simply adapted to the specific set of facts, both as to the persons or entities whose conduct is being evaluated and the subject matter involved in the transaction, as well as the circumstances wherein the transaction has taken place. The distinction lies, therefore, in the shape of the objectivised normative models of diligence and not the level of assiduity in action; see M. Sośniak, *supra* n. 31, pp. 189–190. A contrary view is presented in the judgment of the Court of Appeal in Kraków of 9 March 2001, I ACa 124/01, Przegląd Sądowy 10, 2002, p. 130, wherein the court held that above-average diligence is required of physicians, due to the object of their activities being the human person and the consequences that are often irreversible. This view is endorsed by Mirosław Nesterowicz in his gloss on that judgment, who – in agreement with the court's thesis – submitted that the requirements made of a specialist must be higher, also reflecting the state of knowledge and progress made in the field of medicine, due to the fact that a physician should always maintain continued professional development in terms of knowledge and skill; see M. Nesterowicz, *Glosa do wyroku Sądu Apelacyjnego w Krakowie z dnia 9 marca 2001 r., I ACa 124/01*, Przegląd Sądowy 10, 2002, p. 132. Nesterowicz is justified in his tendency to rely on the term 'due diligence' as opposed to average diligence, for the latter does in fact invoke negative associations in certain writers. For example, Stefan Grzybowski submits that: 'In pursuit of findings involving the physician's civil liability one has to have regard to the existing state of medical knowledge and art and the appropriate level of prudence, diligence and care for the patient. This does not mean average values, [just about] any sort of values, the adoption of which would be the result of capitulation in the fact of an oftentimes unsatisfactory current state of affairs; on the contrary, it implies the highest level;' see S. Grzybowski, *Odpowiedzialność cywilna lekarza*, [in:] *idem* (ed.), *Odpowiedzialność cywilna za wyrządzenie szkody (zagadnienia wybrane)*, Warszawa 1969, pp. 159–160.

of a threat).[35] There can be no doubt that in their legal aspect the purpose of the notary's activities is to safeguard the certainty of legal transactions and as such also of the legal order. Hence, it is aptly emphasized in the literature on the subject that the notary cannot 'approach without any criticism or reflection the submitted documents touching not only on the validity and effectiveness of the transaction attested in the deed but also on the nature of the notarial document itself'.[36]

Biruta Lewaszkiewicz-Petrykowska correctly observes that 'almost all proposals for the improvement of so-called professional liability are characterised by a desire for making it more severe and more objective,' and appears, moreover, to be consistent with this view. Lewaszkiewicz-Petrykowska is right in asserting that the aggravation of liability needs to have its own limits. Making all professionals liable for all consequences of their activities would not be expedient.[37]

The narrowing down of the notary's culpability is a search for (construction of) of a normative model of the notary's professional (special) diligence, which matter is not quite uncontroversial.[38] In its reasons, the Supreme Court aptly noted that the notary was liable for harm inflicted in the making of a specific notarial deed as a result of failure to comply with the obligation to inform the parties about all of the consequences of the statements made by them and constituting the contents of the transaction underway. This means the civil law consequences linked directly to the notarial deed or the official activities of the notary executing the deed.

CONCLUSIONS

Evaluation of the notary's conduct must reflect the professional nature of the notary's activities (Article 355 § 2 Civil Code) along with the criterion of special diligence expressly set out in Article 49 NLA.[39] The requirement of special diligence is linked to the notary's role as a custodian of the legal order and bearer of public trust (Article 2 § 1 NLA) exercising care so that the participants of legal transactions shape their legal relationships in accordance with law and with the principles of social co-existence, mitigating the risk of future litigation.[40] The notary's duties in this regard are narrowed down by Article 80 § 2 NLA, mandating that the notary must ensure the due protection of the rights and legitimate interests of parties and others

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[35] P. Machnikowski, *System Prawa Prywatnego*, Warszawa 2018, p. 415.

[36] A. Oleszko, *Staranność zawodowa notariusza w świetle art. 80 prawa o notariacie*, Rejent 9, 1997, pp.16–17.

[37] B. Lewaszkiewicz-Petrykowska, *Nowe tendencje w zakresie cywilnej odpowiedzialności zawodowej*, [in:] A. Mączyński, M. Pazdan, A. Szpunar (eds), *Rozprawy z polskiego i europejskiego prawa prywatnego*, Kraków 1994, p. 190.

[38] See, e.g. M. Safjan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, Vol. 1, Warszawa 2002, 677 et seq.; A. Oleszko, *Akt notarialny jako podstawa odpowiedzialności prawnej notariusza – dyscyplinarnej, cywilnej, karnej*, Warszawa 2015.

[39] Compare the Supreme Court judgment of 12 June 2002, III CKN 694/00, OSNC 2003, No. 9, item 124.

[40] Compare the Supreme Court resolution of 18 December 2013, III CZP 82/13, OSNC 2014, No. 10, item, 101.

for whom the transaction could have legal consequences. The function exercised by the notary, in connection with the liability grounds arising from Article 415 Civil Code read in conjunction with Article 49 REMA, has the result that the slightest form of culpability (*culpa levissima*), determined in reliance on the aforementioned stringent test of diligence, is sufficient to hold the notary liable.[41]

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[41] Compare the Supreme Court judgments: of 14 June 2017, IV CSK 104/17, OSNC 2018, No. 3, item 89; of 22 March 2019, I CSK 89/18.

LIMITS OF A NOTARY'S OBLIGATION OF DISCLOSURE IN THE MAKING OF A DEED – GLOSS ON THE SUPREME COURT JUDGMENT OF 28 JUNE 2019, IV CSK 224/18

Summary

A notary is liable for harm inflicted in the course of a notarial transaction whether on a client or third parties, on the basis of Article 415 of the Civil Code, on account of failure to exercise due diligence (Article 49 Notarial Law Act), in a culpable manner, subject to the professional nature of the notary's activities (Article 355 § 2 Civil Code) and the limits of professional diligence set out by Article 80 § 1 to § 3 NLA. The notary is the bearer of an office of public trust, and documents containing notarial transactions are official documents within the meaning of the Code of Civil Procedure. The notary's task is to guarantee the safety and credibility of legal transactions, which is of importance both to the public interest and the private interests of parties to notarial transactions. The proceedings before the notary are not a contest between the parties, and the nature of control exercised by the notary is preventive.

Keywords: notarial tort, harm, disclosure obligation, due diligence, status of a notary

GRANICE OBOWIĄZKU INFORMACYJNEGO NOTARIUSZA PRZY SPORZĄDZANIU AKTU NOTARIALNEGO – GLOSA DO WYROKU SĄDU NAJWYŻSZEGO Z 28 CZERWCA 2019 R., IV CSK 224/18

Streszczenie

Notariusz ponosi odpowiedzialność za wyrządzoną przez niego przy wykonywaniu czynności notarialnej szkodę zarówno wobec klienta, jak i osób trzecich, na podstawie art. 415 k.c., za niezachowanie należytej staranności (art. 49 u.p.n.), w sposób zawiniony, z uwzględnieniem zawodowego charakteru jego działalności (art. 355 § 2 k.c.) i granic staranności zawodowej wyznaczonych przez art. 80 § 1–3 u.p.n. Notariusz jest osobą zaufania publicznego, a dokumenty zawierające czynności notarialne mają charakter dokumentów urzędowych w rozumieniu kodeksu postępowania cywilnego. Jego zadaniem jest zapewnienie bezpieczeństwa i wiarygodności obrotu prawnego, co jest istotne zarówno z punktu widzenia interesu publicznego, jak i prywatnych interesów stron czynności notarialnych. Postępowanie przed notariuszem nie ma charakteru sporu między stronami, a kontrola sprawowana przez niego jest kontrolą prewencyjną.

Słowa kluczowe: delikt notarialny, szkoda, obowiązek informacyjny, należyta staranność, status notariusza

LOS LÍMITES DE OBLIGACIÓN DE INFORMACIÓN POR PARTE DE NOTARIO A LA HORA DE PREPARAR LA ESCRITURA PÚBLICA – COMENTARIO A LA SENTENCIA DEL TRIBUNAL SUPREMO DE 28 DE JUNIO DE 2019, IV CSK 224/18

Resumen

El notario incurre en responsabilidad por el daño ocasionado a la hora del acto notarial tanto frente al cliente como a los terceros, en virtud del art. 415 del código civil, por no observar diligencia debida (art. 49 de la ley derecho de notariado), mediando la culpa, teniendo en cuenta el carácter profesional de su actividad (art. 355 § 2 del código civil) y dentro de los límites de diligencia profesional establecidos por el art. 80 § 1–3 ley derecho de notariado. El notario es una persona de fe pública y los documentos notariales se consideran como documentos oficiales de acuerdo con el código de procedimiento civil. Su papel consiste en dar la seguridad y credibilidad de tráfico jurídico, lo que es importante tanto desde el punto de vista de interés público como de interés privado de partes de actos notariales. El proceso ante el notario no tiene carácter litigioso entre las partes y el control ejercido por él es un control preventivo.

Palabras claves: infracción notarial, daño, obligación de información, diligencia debida, estatus de notario

ПРЕДЕЛЫ ОБЯЗАННОСТЕЙ НОТАРИУСА ПО ИНФОРМИРОВАНИЮ ПРИ СОСТАВЛЕНИИ НОТАРИАЛЬНОГО АКТА. КОММЕНТАРИЙ К РЕШЕНИЮ ВЕРХОВНОГО СУДА ОТ 28 ИЮНЯ 2019 Г., IV CSK 224/18

Аннотация

Нотариус несет ответственность за ущерб, причиненный им при осуществлении нотариальной деятельности, как перед клиентом, так и перед третьими лицами (ст. 415 ГК) за несоблюдение должной осмотрительности (ст. 49 Закона «О нотариате») по собственной вине, с учетом профессионального характера его деятельности (ст. 355 § 2 ГК) и пределов должной осмотрительности, определенных в ст. 80 § 1–§ 3 Закона «О нотариате». Нотариус является лицом общественного доверия, а документы, с которыми совершались нотариальные действия, являются официальными документами в понимании Гражданского процессуального кодекса. Задача нотариуса – обеспечить безопасность и достоверность юридических сделок, что важно с точки зрения как общественных интересов, так и частных интересов сторон, являющихся участниками нотариальных действий. Нотариальный процесс не носит характера спора между сторонами, а контроль, осуществляемый нотариусом, имеет упреждающий характер.

Ключевые слова: нотариальный деликт; ущерб; обязанность по информированию; должная осмотрительность; статус нотариуса

GRENZEN DER INFORMATIONSPFLICHT DES NOTARS BEI DER ERRICHTUNG VON NOTARIELLEN URKUNDEN – KOMMENTAR ZUM URTEIL DES SĄD NAJWYŻSZY, DER HÖCHSTEN INSTANZ IN ZIVIL- UND STRAFSACHEN IN POLEN, VOM 28. JUNI 2019, IV CSK 224/18

Zusammenfassung

Ein Notar haftet für von ihm bei der Ausübung notarieller Geschäfte schuldhaft verursachte Schäden – sowohl Kunden als auch Dritten gegenüber – gemäß Artikel 415 des polnischen Zivilgesetzbuches, wenn er seine Sorgfaltspflicht verletzt (Artikel 49 des polnischen Notariatsgesetzes), unter Berücksichtigung der beruflichen Natur seiner Tätigkeit (Artikel 355 § 2 des polnischen Zivilgesetzbuches) und der der in Artikel 80 § 1–§ 3 des polnischen Notariatsgesetzes festgelegten Grenzen der beruflichen Sorgfalt. Notare sind Personen des öffentlichen Vertrauens und notarielle Urkunden amtliche Dokumente im Sinne der polnischen Zivilprozessordnung. Ihre Aufgabe besteht darin, die Sicherheit und Verlässlichkeit des Rechtsverkehrs zu wahren, was sowohl aus Sicht des öffentlichen Interesses, als auch der privaten Interessen der Parteien notarieller Rechtsgeschäfte von Wichtigkeit ist. Das Verfahren vor dem Notar ist von seiner Natur her keine Streitigkeit zwischen Parteien und die von ihm ausgeübte Kontrolle hat vorbeugenden Charakter.

Schlüsselwörter: Amtsdelikt eines Notars, Schaden, Informationspflicht, gebotene Sorgfalt, Notarstatus

LIMITES DE L'OBLIGATION D'INFORMATION DU NOTAIRE LORS DE LA PRÉPARATION D'UN ACTE NOTARIÉ – COMMENTAIRE DE L'ARRÊT DE LA COUR SUPRÊME DU 28 JUIN 2019, IV CSK 224/18

Résumé

Le notaire est responsable des dommages causés par lui dans l'exercice des acts notariés au client et aux tiers, conformément à l'art. 415 du Code civil, pour défaut de diligence raisonnable (article 49 de la loi sur le droit notarial), de manière coupable, compte tenu du caractère professionnel de son activité (article 355 § 2 du Code civil) et des limites de la diligence professionnelle énoncées à l'article 80 § 1–§ 3 de la loi sur le droit notarial. Un notaire est une personne de confiance et les documents contenant des acts notariés sont des documents publics au sens du Code de procédure civile. Sa tâche est d'assurer la sécurité et la crédibilité des transactions juridiques, ce qui est important tant du point de vue de l'intérêt public que des intérêts privés des parties aux actes notariés. La procédure devant le notaire n'est pas un différend entre les parties, et le contrôle exercé par lui est un contrôle préventif.

Mots-clés: délit de notaire, dommages, obligation d'information, due diligence, statut de notaire

LIMITI DELL'OBBLIGO INFORMATIVO DEL NOTAIO NELLA REDAZIONE DI UN ATTO NOTARILE – GLOSSA ALLA SENTENZA DELLA CORTE SUPREMA DEL 28 GIUGNO 2019, IV CSK 224/18

Sintesi

Il notaio è responsabile del danno da lui causato nell'esercizio delle attività notarili, sia nei confronti del cliente che nei confronti di terzi, sulla base dell'art. 415 del Codice civile, del mancato rispetto della dovuta diligenza (art. 49 della legge Diritto notarile), colpevolmente, considerando il carattere professionale della sua attività (art. 355 § 2 del Codice civile) e il limiti della diligenza professionale stabiliti dall'art. 80 § 1–§ 3 della legge Diritto notarile. Il notaio è una persona che gode di fede pubblica e i documenti che contengono gli atti notarili hanno carattere di documenti ufficiali ai sensi del procedimento civile. Il suo compito è assicurare la sicurezza e la credibilità delle transazioni legali, essenziale sia dal punto di vista dell'interesse pubblico che degli interessi privati delle parti degli atti notarili. Il procedimento davanti al notaio non ha carattere di controversia tra le parti e il controllo da lui esercitato è un controllo preventivo.

Parole chiave: illecito notarile, danno, obbligo informativo, dovuta diligenza, status di notaio

Cytuj jako:

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Gloss on the Supreme Court ruling of 23 July 2020, II KO 42/20

THESIS

A court lodging a motion with the Supreme Court in accordance with Article 37 Criminal Procedure Code (CPC) and urging that the state of health of a party to the proceedings is an indicator of the good of the administration of justice that admits the possibility of conducting a trial before another court of the same instance should, first of all, establish, in the way raising no doubts, that the circumstance is up-to-date on the day when the motion is lodged.[1]

COMMENTARY

In the ruling analysed, the Supreme Court determined the scope of obligations of a court lodging a motion in accordance with Article 37 CPC to refer a case for hearing to another court of the same instance and urging that the threat to the good of the administration of justice results from the lack of possibilities of conducting a trial before a court having territorial jurisdiction, due to the poor state of health of a party to the proceedings. This state of facts does not allow conducting a trial before a competent court in accordance with general principles (Articles 31 and 32 CPC) but offers such a possibility before another court of the same instance. The opinion expressed in the ruling is right and has a significant practical value.

The special entitlement of the Supreme Court laid down in Article 37 CPC is an exception to the general principles of determining territorial jurisdiction stipulated

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[1] The Supreme Court ruling of 23 July 2020, II KO 42/20, OSNKW 2020, No. 8, item 38.

in Articles 31 and 32 CPC. It is called extraordinary delegated competence (*forum extraordinatum*).[2] The hypothesis of this provision adopts a form of classical general clause with an unclearly specified scope of meaning[3] and makes it possible to eliminate a potential threat to the good of the administration of justice connected with the fact of hearing a case by a competent court.[4] The threat is untypical in nature and the circumstances that give grounds for the use of this institution cannot be predicted and, as a result, it is not possible to express them in the form of an abstract legal norm. What is equally important, some of them cannot be unambiguously verified, especially in the initial phase of judicial proceedings, when most often a motion is lodged with the Supreme Court in this mode. The principles of the rule of law require that a perpetrator should be tried by a court having jurisdiction over the location where an offence has been committed,[5] and the hearing of the case before a court competent, also territorially, is one of the basic procedural guarantees protected by the Constitution (Article 45 para. 1 of the Constitution of the Republic of Poland)[6] and international conventions[7] (Article 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950;[8] and Article 14 para. 1 of the International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966[9]). That is why, only the Supreme Court is given the right to choose a court of the same instance in this mode, which is a guarantee of impartiality and prudence.[10]

The capacity of the meaning of the term 'the good of administration of justice', in accordance with Article 37 CPC, makes the Supreme Court judgments issued based on it casuistic in nature, although they make it possible to identify some regularities and tendencies in judgments that are described in literature based on the analyses of case files.[11]

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[2] E.L. Wędrychowska, *Składy i właściwość sądu w nowym kodeksie postępowania karnego*, [in:] P. Kruszyński (ed.), *Nowe uregulowania prawne w kodeksie postępowania karnego z 1997 r.*, Warszawa 1999, pp. 119–120; S. Śliwiński, *Polski proces karny przed sądem powszechnym*, Warszawa 1959, p. 147.

[3] The Constitutional Tribunal judgments of 18 February 2004, K 12/03, OTK 2004, No. 2, item 8; and of 15 January 2009, K 45/07, OTK-A 2009, No. 1, item 3.

[4] J. Kosonoga, [in:] R.A. Stefański, S. Zabłocki (eds), *Kodeks postępowania karnego. Komentarz do art. 1–166*, Warszawa 2017, p. 522.

[5] The Supreme Court ruling of 24 September 1982, I KO 69/82, OSNPG 1983/2, item 18.

[6] The Supreme Court rulings: of 27 June 2019, V KO 45/19, LEX No. 2694519; of 29 January 2019, IV KO 126/18, LEX No. 2612839; of 11 July 2018, III KO 70/18, LEX No. 2522984; of 1 June 2010, IV KO 66/10, OSNwSK 2010, No. 1, item 1138; of 18 March 2010, III KO 16/10, LEX No. 577211.

[7] Where 'a court established by statute' is referred to.

[8] Dz.U. 1993, No. 61, item 284, as amended.

[9] Dz.U. 1977, No. 38, item 167.

[10] A. Mogilnicki, E.S. Rappaport, *Ustawy karne Rzeczypospolitej Polskiej*, Vol. I: *Kodeks postępowania karnego*, Part II: *Motywy ustawodawcze*, Warszawa 1929, pp. 54–55.

[11] S. Zabłocki, *Przekazanie sprawy do rozpoznania sądowi równorzędnemu ze względu na dobro wymiaru sprawiedliwości (art. 27 k.p.k.)*, Przegląd Sądowy 7–8, 1994, p. 3 et seq.; W. Grzeszczyk, *Właściwość miejscowa sądu z delegacji ze względu na dobro wymiaru sprawiedliwości (art. 37 k.p.k.)*, Prokuratura i Prawo 9, 2000, p. 121 et seq.; T. Artymiuk, *Przekazanie sprawy z sądu miejscowo właściwego do innego sądu równorzędnego (art. 37 k.p.k.) w orzecznictwie Sądu Najwyższego*, Studia i Analizy Sądu Najwyższego Vol. 1, 2007, p. 130 et seq.; R.E. Masznicz, *Przekazanie sprawy*

It is pointed out that it is possible in the case of the occurrence of real circumstances that may lead to a justified conviction that there are no conditions for the objective hearing of a case and, first of all, when there are doubts concerning impartiality of a competent court, and when there is a justified conviction that only referring of a case to another court will create better opportunities to adjudicate on the trial matter.[12]

The good of administration of justice may be endangered in a situation when adjudication by a court having territorial jurisdiction based on general rules would break the speed and efficiency of a trial, and referring a case for hearing to another court of the same instance is the only way to prevent this situation. Apart from obvious conditions for the functioning of justice administration in a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland), such as impartiality and independence,[13] adjudication on a case in reasonable time is equally important, and the legislator awards it the rank of a procedural directive (Article 2 § 1(4) CPC). The course of a trial that is not disrupted by standstills facilitates the collection of evidence and influences practical implementation of the principle of objective truth, minimises the risk of limitation of liability and, as a result, constitutes adequate response to the need for the right penal reaction. From the organisational point of view, it also reduces the proceeding costs. It also has impact on a court's prestige and positive social perception of the functioning of justice administration, in particular in a situation when accusations of sluggishness, inactivity, not to say incapacity, are common. Maintaining such a state is not in the interest of justice administration.[14]

The above does not mean that the provision of Article 37 CPC was intended to be a solution that will make common courts' organisational functioning proper.[15] The Supreme Court case law directly excludes the risk of limitation of liability from the scope of Article 37 CPC as a result of a competent court's heavy workload, which causes that it cannot hear all cases in a timely manner, and it rightly states that such situations are regulated in Article 11a of the Act of 6 June 1997: Provisions implementing the Code of Criminal Procedure[16]. The Supreme Court was also right

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ze względu na dobro wymiaru sprawiedliwości (art. 37 k.p.k.), Prokuratura i Prawo 7–8, 2007, p. 107 et seq.; L.K. Paprzycki, *Dobro wymiaru sprawiedliwości – art. 37 k.p.k.*, [in:] J. Jakubowska-Hara, C. Nowak, J. Skupiński (eds), *Reforma prawa karnego. Propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej*, Warszawa 2008, p. 391 et seq.; J. Kosonoga, *Dobro wymiaru sprawiedliwości jako przesłanka dokonywania czynności procesowych w postępowaniu karnym*, [in:] W. Cieślak, S. Steinborn (eds), *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013, p. 886 et seq.

12 The Supreme Court rulings: of 20 January 2010, II KO 122/09, LEX No. 570143; of 8 March 2006, IV KO 17/06, LEX No. 611019; of 13 July 1995, III KO 34/95, OSNKW 1995, No. 9–10, item 68; of 13 February 1982, IV KO 9/82, OSNKW 1982, No. 6, item 33; of 27 May 1972, IV KO 31/72; OSNPG 1972, No. 9–10, item 158.

13 The Constitutional Tribunal judgments: of 9 June 1998, K 28/97, OTK 1998, No. 4, item 50; of 10 July 2000, SK 12/99, OTK 2000, No. 5, item 143.

14 The Supreme Court rulings: of 15 December 2010, II KO 100/10, OSNwSK 2010, item 2520; of 21 October 2008, II KO 78/08, LEX No. 465871.

15 The Supreme Court rulings: of 10 May 2000, II KO 90/00, OSNKW 2000, No. 5–6, item 48; of 21 May 1998, II KO 55/98, Prokuratura i Prawo 1999, No. 9, item 7.

16 Dz.U. No. 89, item 556, as amended; see the Supreme Court rulings: of 25 October 2007, IV KO 77/07, OSNwSK 2007, No. 1, item 2359; of 19 April 2007, II KO 21/07, OSNwSK 2007, No. 1,

to challenge the possibility of referring a case in accordance with Article 37 CPC due to organisational difficulties that hamper, but not prevent, a trial,[17] even if they are connected with the state of health of a party to the proceedings. As far as this is concerned, it is worth mentioning the Supreme Court's stand, in accordance with which the implementation of a preventive measure that is exercised in a psychiatric hospital which is over 550 kilometres away from a competent court does not constitute grounds for the application of the provision discussed if it is possible to overcome the obstacle by moving the applicant to another hospital that can meet the requirements of that preventive measure and is 140 kilometres from the court.[18]

The good of justice administration is also understood as the need to lead to a trial, which, due to the state of health of a party to the proceedings, is not possible without a departure from the principle of a court's territorial jurisdiction.[19] This condition concerns the accused and other parties to criminal proceedings (an extra auxiliary prosecutor, a subsidiary auxiliary prosecutor, a private prosecutor, an applicant, a person screened, etc.). It is not applicable to a public prosecutor, who is an attorney, which results directly from the principle of impartiality (Article 4 of the Act of 28 January 2016: Law on public prosecution[20]). The situation is analogous to other public prosecutors, although there is no clear statutory rule. Article 37 CPC may be also applied, based on statutory reference, to other proceedings in which the CPC provisions are applied by analogy, e.g. fiscal penal proceedings,[21] proceedings into a misdemeanour,[22] disciplinary proceedings, including those concerning judges

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item 877; of 10 January 2007, V KO 112/06, OSNwSK 2007, No. 1, item 129; of 9 August 2006, II KO 43/06 OSNwSK 2006, No. 1, item 1550; of 10 June 2003, II KO 22/03, LEX No. 78372; of 18 December 2002, II KO 63/02, LEX No. 74419; of 22 August 2002, II KO 34/02, LEX No. 55210.

[17] The Supreme Court ruling of 18 December 2002, II KO 63/02, LEX No. 74419; also see the Supreme Court rulings: of 16 May 2003, II KO 20/03, LEX No. 78382; of 17 November 2004, III KO 45/04, LEX No. 141344; of 9 August 2006, II KO 42/06, OSNwSK 2006, No. 1, item 1549; of 30 July 2007, II KO 41/07, KZS 2007, No. 10, item 46; of 12 February 2009, III KO 1/09, OSNKW 2009, No. 3, item 23.

[18] The Supreme Court ruling of 14 December 2011, IV KO 106/11, OSNwSK 2011, item 2374.

[19] See, e.g. the Supreme Court rulings: of 14 January 2020, V KO 105/19, LEX No. 2772524; of 7 August 2019, IV KO 86/19, LEX No. 2749739; of 19 July 2019, II KO 37/19, LEX No. 2715009; of 16 October 2018, IV KO 69/18, LEX No. 2583086; of 8 August 2018, II KO 39/18, LEX No. 2530705; of 27 April 2017, IV KO 37/17, LEX No. 2281271; of 23 February 2017, II KO 9/17, LEX No. 2238704: of 26 January 2017, V KO 95/16, LEX No. 2192667; of 20 October 2016, V KO 73/16, LEX No. 2135823; of 16 June 2015, III KO 36/15, LEX No. 1730710; of 22 January 2015, III KO 107/14, LEX No. 1604646; of 22 May 2014, III KO 21/14, LEX No. 1511250; of 18 December 2013, IV KO 104/13, LEX No. 1403904; of 28 November 2012, III KO 79/12, LEX No. 1228574; of 21 October 2008, III KO 82/08, OSNKW-R 2008, item 2054; of 21 August 2008, III KO 55/08, LEX No. 448977; of 12 August 2008, OSNKW-R 2008, item 1625, LEX No. 567071; of 26 January 2005, III KO 48/04, OSNKW 2005, No. 2, item 23.

[20] Consolidated text, Dz.U. 2019, item 740, as amended.

[21] See, e.g. the Supreme Court rulings: of 10 April 2018, III KO 37/18, LEX No. 2496272; of 4 July 2013, V KO 51/13, LEX No. 1335677; of 30 June 2010, III KO 57/10, OSNwSK 2010, No. 1, item 1331.

[22] See, e.g. the Supreme Court ruling: of 21 March 2018, III KO 9/18, LEX No. 2558299; of 17 May 2010, IV KO 52/10, OSNwSK 2010, No. 1, item 1032; of 27 January 2009, IV KO 184/08, LEX No. 608450.

and associate judges,[23] judge-advocates,[24] or in proceedings conducted in accordance with the Act of 17 June 2004 on complaints about the infringement of a party's right to hear a case without unjustified delay in preparatory proceedings carried out or supervised by a prosecutor and judicial proceedings[25].

As far as the subjective aspect is concerned, referring a case to another court of the same instance covers cases in which the state of health of a party is not so serious to prevent conducting a trial but a party's appearance in a court having territorial jurisdiction and participation in procedural activities are hampered. In such a situation, departure from the statutory territorial jurisdiction is not only purposeful but also really necessary if it creates a possibility of carrying out proceedings in accordance with Article 2 § 1(4) CPC.

A motion of a competent court in accordance with Article 37 CPC based on the above-mentioned criterion depends on meeting the following requirements:

1) A party's state of health prevents or considerably hampers his/her participation in proceedings before a court having territorial jurisdiction in accordance with general rules due to his/her inability to appear and endangers the exercise of procedural rights, in particular the right of the accused to a fair trial;
2) The circumstance has been convincingly pointed out and is up-to-date at the moment of lodging a motion with the Supreme Court;
3) There is a real possibility of conducting proceedings before another court of the same instance.

The first of the above-mentioned requirements constitutes actual grounds for a motion. It is most often applied at the initial stage of first-instance proceedings, that is when a trial has not started yet or it should be started over. There are no obstacles, however, to put forward the initiative at the successive stages of the proceedings, including appellate proceedings. The complete lack of possibility of a party's participation in the proceedings occurs in a situation when physicians recommend complete exclusion of the possibility of appearing before a court having territorial jurisdiction. Most often it happens in cases when the place of residence and the location of a court require the travel for a long distance which is not recommended because of medical reasons or would create direct risk to health or life.[26] A real fear of creating the risk of worsening a party's state of health is a sufficient reason. The criterion of 'exposing health and life to serious risk' should be recognised as too absolute.[27] As far as this is concerned, what is important is the possibility of getting to a court on one's own. Other inconveniences connected with the conducted proceedings, even if they have health-related grounds, are insignificant, e.g. the strengthening of depression, or the occurrence of anxiety

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[23] See, e.g. the Supreme Court rulings: of 18 September 2017, SNO 33/17, LEX No. 2389604; of 16 July 2010, SNO 33/10, LEX No. 1289089; the Supreme Court resolution of 28 April 2009, SNO 27/09, LEX No. 1288838.

[24] The Supreme Court ruling of 9 February 2018, WO 1/18, LEX No. 2440473.

[25] Consolidated text, Dz.U. 2018, item 75, as amended; the Supreme Court ruling of 12 March 2013, KSP 2/13, LEX No. 1288771.

[26] The Supreme Court ruling of 12 December 2017, V KO 102/17, LEX No. 2420348.

[27] The Supreme Court ruling of 23 February 2017, II KO 9/17, LEX No. 2238704.

disorders because of the fear of the trial result. It also concerns such situations in which appearance before a court is theoretically possible but it would be connected with excessive inconveniences in a particular trial and constitute an extra suffering exceeding the standard consequences of participation in a trial to an obvious extent. The requirement is evaluative in nature. First of all, it is necessary to consider the opportunity to use public transport adequate to the state of health and average travel costs. As far as this is concerned, one must take into account the system of connections and their convenience from the point of view of a party's particular illnesses or disabilities. It should be considered whether it is purposeful to lodge a motion pursuant to Article 37 CPC also in a situation when coming to a court is possible without risk to health but requires assistance from other people, travelling by a hired or own vehicle or by public transport but one with limited availability (many changes or transfers, a long period of waiting for the next means of transport, lack of low-floor vehicles, extraordinary cost of air or rail travel), the necessity of taking medicine in the form of injections during such journey, etc.

However, there are no grounds for referring a case for hearing to another court of the same instance if a party needs medical assistance during the participation in procedural activities or assistance in moving in the court building, e.g. when it is not adjusted to the needs of disabled persons. The obligation to ensure architectural, and information- and communication-related accessibility of a court and, in case of the lack of such accessibility, the so-called alternative access to persons with special needs, including parties to criminal proceedings, is technical and organisational in nature and is provided based on the provisions of the Act of 19 July on the provision of accessibility to persons with special needs.[28] The Supreme Court's role under Article 37 CPC should not involve substituting judicial bodies in the fulfilment of their statutory obligation to ensure accessibility to disabled persons. However, it cannot be excluded that in particular circumstances it may prove to be purposeful for the Supreme Court to exercise this entitlement, especially in case of special coincidence of circumstances unfavourable for a party.

It is in the interest of the administration of justice to conduct criminal proceedings with no harm to a party's procedural guarantees. This circumstance is also important from the point of view of the reason for referring a case for hearting to another court of the same instance. Those grounds lose validity when a party alone gives up his/her rights and agrees for the conduction of the proceedings in his/her absence. A motion under Article 37 CPC should contain an unambiguous statement concerning this issue because in case a party does not want to participate in the procedural activities on his/her own or decides to participate only via counsel or proxy and his/her appearance before a court has not been recognised as obligatory, or this obligation does not result from statute (Article 374 § 1a CPC), there is no need to refer a case to another court. Participation in a trial is, as a rule, a party's right but lodging a motion in accordance with the above-mentioned provision, one cannot presume that he/she will want to exercise this right. Therefore, if the need to lodge a motion in accordance with Article 37 has not been notified by a party

[28] Consolidated text, Dz.U. 2020, item 1062.

pursuant to Article 9 § 2 CPC, it is necessary to establish his/her stance and order that a party should be asked to make a declaration concerning this issue. However, this poses an easily noticeable risk. On the one hand, the hearing can result in the need to summon a party to appear before a court in person. On the other hand, it is also possible that in the course of a trial a party may change the earlier stance and he/she may want to provide explanation, testimonies, opinions on particular evidence, present his/her stance or make a final speech. A court can also encounter procedural disloyalty in the field, which may prove to be difficult to discredit in the face of a guaranteed right to act in the proceedings in person, in particular the exercise of the right of the accused to a fair trial. As the author's experience shows, common courts seem to notice those dilemmas, which is sometimes confirmed in the content of motions lodged with the Supreme Court, in which one can see phrases like 'it is not inconceivable' that a party will try to exercise his/her right to appear in person. That is why, the refusal to refer a case cannot be too hasty as it can complicate proceedings at its successive stages, e.g. due to the necessity to adjourn a trial. However, within the scope of its considerations, the Supreme Court should take into account that a competent court may sometimes tend to free itself from the obligation to hear a case. There are no statutory obstacles to lodge a motion with the Supreme Court, again pursuant to Article 37 CPC, in case of a significant change in circumstances that are grounds for such motion.[29] However, referring a case in the course of a trial causes a necessity of starting it afresh, thus it is in conflict with the principle of efficiency and economy of proceedings.

The state of health that justifies a motion must be proved. This means the necessity of collecting evidence justifying lodging a motion and assessing it through the prism of provisions laid down in Article 7 CPC. The occurrence of a given type of illness alone that raises doubts whether a party can participate in a trial does not have to justify calling expert witnesses each time. The discretion to assess evidence prescribes recognition that a court may base its decision on evidence provided by a party, e.g. a surgery or hospital treatment documents, physicians' certificates, disability certificate, etc., clearly indicating particular impairments, especially those that are permanent. The assessment of credibility of the evidence provided by a party is within the competence of a court lodging a motion with the Supreme Court and cannot be transferred to the Supreme Court, which sometimes happens.[30] The occurrence of some doubts in this area, in general, obliges a court to call expert witnesses in order to unambiguously establish whether the state of health of a party really prevents or considerably hampers efficient course of a trial and, at the same time, if it seems likely that proceedings will be conducted before another court of the same instance with the participation of the party. Expert witnesses' statements should be absolute in nature and determine potential additional medical indications that should be considered when selecting a court's location. It most often concerns the distance (taking into account the length of a journey and the means of transport)

[29] The justification of the Supreme Court ruling of 22 November 2019, IV KO 120/19, OSNKW 2020, No. 1, item 4 (*in fine*).

[30] The Supreme Court ruling of 27 March 2019, II KO 15/19, LEX No. 2639500.

that a party can cover without the risk of worsening his/her state of health. An expert witness's opinion seems indispensable in case of illnesses that are characterised by varied intensity of symptoms or in which a patient's condition changes, and there are remission periods. From this point of view, an opinion should include conclusions concerning the predicted period of inability to participate in proceedings before a competent court. Temporary inability to participate in the proceedings that can disappear in a reasonable period, e.g. not exceeding half a year, does not substantiate referring a case to another court pursuant to Article 37 CPC. On the other hand, it is also conceivable that a party's state of health will gradually deteriorate, which can make his/her participation impossible at successive stages of a long trial, and should constitute an argument for exercising the entitlement by the Supreme Court.

If the state of health concerns the accused and constitutes grounds for discontinuation of proceedings, the *sine qua non* requirement for lodging a motion referred to in Article 37 CPC is that the proceedings have been instigated.[31] The Supreme Court was right to assume that, on the one hand, the grammatical interpretation of Article 22 § 3 CPC, which prescribes the performance of some activities at the time when proceedings are suspended but only in case they cover the protection of evidence against loss or damage, supports it. On the other hand, the functional context is an argument for the exclusion of the possibility of making use of the initiative referred to in Article 37 CPC at the time when proceedings are suspended. After the application of Article 37 CPC, the proceedings would have to be undertaken by another body than the one that has suspended it.

In the discussed ruling, the Supreme Court emphasised the need to establish whether the requirement in question is up-to-date. It should be understood as both the confirmation of the occurrence of illnesses that a party suffers from, which can potentially prevent or considerably hamper the course of criminal proceedings with his/her participation as well as the fact that the threat is materialised in the process being the basis for lodging a motion with the Supreme Court. The fulfilment of the first of the requirements discussed is not sufficient. One cannot assume that an impairment of some kind cannot, on a party's initiative, be overcome, e.g. with the help of another person who provides transport or necessary care. It is also hard to assume that in every case a party will be interested in the proceedings conducted before a court closer to the place of his/her residence. One can imagine a situation in which a trial conducted before a court having territorial jurisdiction creates opportunities to end the proceedings faster, e.g. because of its lower workload, which a party is aware of and on his/her own initiative will take steps to obtain other persons' assistance. Also in case of illnesses with different occurrence of symptoms, one cannot exclude the above-mentioned remission. In case many proceedings with the participation of a party are carried out, the determination of territorial jurisdiction by the Supreme Court in accordance with Article 37 CPC in one or even a few of them does not prejudge the grounds for lodging a motion in every successive trial. However, referring all cases concerning the accused to one

[31] The Supreme Court ruling of 22 November 2019, IV KO 120/19, OSNKW 2020, No. 1, item 4.

court established in accordance with the discussed provision may have positive impact on the coordination of activities undertaken in those cases.[32]

A court lodging a motion should take care of an up-to-date medical opinion confirming permanent inability to appear before a court, in particular in the case when the real grounds for a motion are reconstructed based on evidence derived from official documents issued in the past, or documents that are not procedural in nature, e.g. private opinions or opinions developed for the needs of other proceedings.

Obtaining an expert-witness's opinion indicating the need to refer a case should result in the assignment of a sitting concerning a motion in the nearest possible time so that the evidence in question will not become out-of-date at the moment when a motion is lodged with the Supreme Court. It is inadmissible, also if lengthiness of proceedings is not the case, to delay taking steps in order to lodge a motion in accordance with Article 37 CPC, which in one case heard by the Supreme Court led to inability to run the proceedings for four years from the date when an indictment was placed.[33]

A party's state of health that constitutes grounds for referring a case in accordance with Article 37 CPC must create chances for conducting proceedings.[34] Referring a case in this mode is not possible if, in accordance with the results of the evidence-related proceedings concerning the state of health of the accused, the only possible procedural decision is one on the suspension of judicial proceedings.

In cases in which a court competent to hear a case lodges a motion with the Supreme Court to refer this case for hearing to another court of the same instance due to the good of administration of justice (Article 37 CPC), a detainee awaiting a trial is not at the Supreme Court's disposal. It is rightly noticed that until a motion lodged with the Supreme Court is dealt with, the case remains a pending one before a competent court. Territorial jurisdiction, also in the context of functional competence, may be changed only when the Supreme Court refers the case to another court of the same instance. However, also in such a situation, this case will never be a case pending before the Supreme Court and will not result in the need to transfer the suspect or the accused to the disposal of the Supreme Court.[35]

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[32] The Supreme Court ruling of 17 July 2019, IV KO 59/19, LEX No. 2713726.

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[34] The Supreme Court ruling of 13 February 2020, IV KO 172/19, LEX No. 2779949.

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GLOSS ON THE SUPREME COURT RULING OF 23 JULY 2020, II KO 42/20

Summary

The ruling that is analysed in the gloss concerns the scope of obligations of a court that lodges a motion with the Supreme Court in accordance with Article 37 CPC to refer a case for hearing to another court of the same instance, and states that the risk to the good of the administration of justice results from the lack of possibilities of conducting a trial before a court having territorial jurisdiction, due to the bad state of health of a party to the proceedings. Providing the justification of the Supreme Court extended by the criteria for referring a case in accordance with Article 37 CPC, the author proves the grounds for the opinion that the discussed requirement must be up-to-date on the date of lodging the motion concerned.

Keywords: judicial proceedings, court, the good of administration of justice, state of health of a party to proceedings, territorial jurisdiction, delegated competence

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z 23 LIPCA 2020 R., II KO 42/20

Streszczenie

Glosowane postanowienie dotyczy zakresu obowiązków sądu zwracającego się w trybie art. 37 k.p.k. do Sądu Najwyższego o przekazanie sprawy do rozpoznania innemu sądowi równorzędnemu i podnoszącego, że zagrożenie dla dobra wymiaru sprawiedliwości wynika z braku możliwości prowadzenia procesu przed sądem miejscowo właściwym z uwagi na zły stan zdrowia strony postępowania. Autor – rozbudowując argumentację przedstawioną

przez Sąd Najwyższy o kryteria przekazania sprawy na tej podstawie w trybie art. 37 k.p.k. – wykazuje zasadność poglądu, że omawiana przesłanka musi pozostawać aktualna w dacie wystąpienia ze stosownym wnioskiem.

Słowa kluczowe: postępowanie sądowe, sąd, dobro wymiaru sprawiedliwości, stan zdrowia strony postępowania, właściwość miejscowa, właściwość z delegacji

COMENTARIO DEL AUTO DEL TRIBUNAL SUPREMO DE 23 DE JULIO DE 2020, II KO 42/20

Resumen

El auto comentado se refiere a las obligaciones de Jueces o Magistrados que se dirijan conforme con el art. 37 del Código de Procedimiento Penal al Tribunal Supremo para delegar el caso para que lo conozca otro Juzgado o el Tribunal del mismo rango, alegando que el perjuicio para la Justicia resulta de la imposibilidad de llevar a cabo el proceso ante el Juzgado o el Tribunal territorialmente competente debido al estado de salud de las partes del proceso. El autor – desarrollando la argumentación presentada por el Tribunal Supremo relativa a los requisitos de la delegación del caso en virtud del art. 37 del Código de Procedimiento Penal – demuestra que la postura presentada ha de ser actual siempre y cuando dichos requisitos se cumplan en el momento de presentar tal solicitud.

Palabras claves: procedimiento judicial, Juzgado, Tribunal, justicia, estado de salud de las partes del proceso, competencia territorial, delegación

КОММЕНТАРИЙ К ПОСТАНОВЛЕНИЮ ВЕРХОВНОГО СУДА ОТ 23 ИЮЛЯ 2020 Г., II KO 42/20

Аннотация

Комментируемое постановление касается обязанностей суда, обращающегося в Верховный суд с ходатайством о передаче дела на рассмотрение в другой суд такой же или высшей инстанции в порядке ст. 37 УПК на том основании, что интересы правосудия не могут быть соблюдены при проведении судебного процесса в суде надлежащей территориальной юрисдикции по причине плохого состояния здоровья одной из сторон процесса. Автор, развивая аргументацию Верховного суда касательно критериев для передачи дела в порядке статьи 37 УПК, подтверждает обоснованность мнения о том, что вышеупомянутая предпосылка для передачи дела должна существовать на день соответствующего ходатайства.

Ключевые слова: судопроизводство; суд; интересы правосудия; состояние здоровья стороны процесса; территориальная юрисдикция; передача дела в суд иной территориальной юрисдикции

KOMMENTAR ZUM BESCHLUSS DES SĄD NAJWYŻSZY VOM 23. JULI 2020, II KO 42/20

Zusammenfassung

Der Beschluss, über den abgestimmt wurde, betrifft den Aufgabenbereich des ersuchenden Gerichts, das nach Art. 37 der polnischen Strafprozessordnung beim Sąd Najwyższy, der höchsten Instanz in Zivil- und Strafsachen in Polen, beantragt, eine Rechtssache zur Prüfung an ein anderes gleichgestelltes Gericht zu verweisen und dabei geltend macht, dass eine Gefahr für das Interesse der Rechtspflege gegeben ist, da keine Möglichkeit besteht, das Verfahren aufgrund des schlechten Gesundheitszustands des Verfahrensbeteiligten vor dem örtlich zuständigen Gericht durchzuführen. Der Verfasser erweitert die vom Sąd Najwyższy vorgebrachte Argumentation um Kriterien für die Abgabe einer Rechtssache auf dieser Grundlage gemäß Art. 37 der polnischen Strafprozessordnung und weist die Rechtmäßigkeit der Auffassung nach, dass die in Rede stehende Voraussetzung zum Zeitpunkt des entsprechenden Ersuchens gegeben sein muss.

Schlüsselwörter: Gerichtsverfahren, Gericht, Interesse der Rechtspflege, Gesundheitszustand von Verfahrensbeteiligten, örtliche Zuständigkeit, Zuständigkeit durch Verweisung

COMMENTAIRE SUR L'ARRÊT DE LA COUR SUPRÊME DU 23 JUILLET 2020, II KO 42/20

Résumé

La décision commentée concerne l'étendue des devoirs du tribunal demandant, conformément à l'art. 37 du code de procédure pénale, à la Cour suprême de renvoyer l'affaire devant une autre juridiction équivalente, et faisant valoir que la menace pour le bien de l'administration de la justice résulte de l'incapacité de conduire un procès devant un tribunal local compétent en raison de la mauvaise santé de la partie à la procédure. En élargissant les arguments présentés par la Cour suprême avec les critères de transfert de l'affaire sur cette base en vertu de l'art. 37 du code de procédure pénale, l'auteur démontre le bien-fondé de l'opinion selon laquelle la prémisse discutée doit rester valable à la date de dépôt de la demande pertinente.

Mots-clés: procédure judiciaire, tribunal, bien de la justice, état de santé d'une partie à la procédure, compétence territoriale, compétence de délégation

GLOSSA ALL'ORDINANZA DELLA CORTE SUPREMA DEL 23 LUGLIO 2020, II KO 42/20

Sintesi

L'ordinanza commentata riguarda l'ambito degli obblighi del Tribunale che si rivolge alla Corte Suprema, ai sensi dell'art. 37 del Codice di procedura penale, richiedendo il trasferimento di un procedimento ad un altro tribunale di pari grado, sostenendo che la minaccia per gli interessi della giustizia derivi dall'impossibilità di svolgere il processo nel foro territorial-

mente competente a motivo delle cattive condizioni di salute di una parte del procedimento. L'autore, sviluppando l'argomentazione presentata dalla Corte Suprema circa i criteri di trasferimento del procedimento su tale base ai sensi dell'art. 37 del Codice di procedura penale, mostra la fondatezza della posizione che la condizione indicata debba essere attuale alla data di presentazione della relativa richiesta.

Parole chiave: procedimento giuridico, tribunale, interessi della giustizia, condizioni di salute di una parte del procedimento, competenza territoriale, competenza per delega

Cytuj jako:

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