RAPPORTS POLONAIS

XVIII[e] CONGRÈS INTERNATIONAL DE DROIT COMPARÉ

XVIII[th] INTERNATIONAL CONGRESS OF COMPARATIVE LAW

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LEGAL CULTURE AND LEGAL TRANSPLANTS

1. In the modern world – the Global Village, as described by Marshall McLuhan in 1960 – the spread of information is very rapid. It has the direct impact on the shape of the world and speeds up its social, political and economic changes. Even the most remote corners of the world are brought closer and integrated. Information contributes to the removal of old barriers and prevents the forming of new ones, whereas closer relationships and interdependences are built up. The process has been noticeable since the time of the great geographical discoveries and it has gained its momentum since the computer revolution in the second half of the 20th century. The spectacular accelerated exchange of information on the global scale has supported and increased the dynamics of the globalization process for many political, economic and social institutions. It particularly affects the legal functions of societies. The universal character of the globalization process can be noticed, associated with convergence in all aspects of social life.[1] The process is spontaneous, as provoked by the availability of information to private actors of social platform; it can also have its intentional and controlled dimension, especially if public entities are involved. In the latter case, the globalization results in institutional instruments meant to unify the world on different levels, above all in economic, social-cultural and legal aspects. The globalization of the world causes many phenomena criticized by its opponents and judged positively by its proponents.

2. The goal of the globalization is the social, economic and cultural integration of the world. The integrated global world should be characterized by high intensity and frequency of social contacts, pluralism and acceptance of existing systems of values and standards; a highly developed system of rules and standards of social coexistence, or even legal standards, should be included. Globalization is the approach and infiltration of societies, their different systems and institutions and values, also on the cultural level, including legal culture.

[1] Cf. J. K a l i ń s k i, *Globalization in Historical Perspective*, [in:] *Globalization A to Z*, Warsaw: National Bank of Poland 2004, p. 34.

3. Globalization leads to integration (even though the notions of globalization and integration are not the same) and evokes the culture diffusion process. Culture diffusion, according to sociologist Edward Burnett Tylor, is a process of social changes resulting from international and intercultural contacts, the spread and infiltration of the products of one culture to the other and the use of "transplants." Consequently, cultures become more similar and progress of culture can be noticed, independent of factors stimulating cultural evolution. The culture diffusion process leads to the transformation of cultural systems interactions – through *transculture* to *aculture*, to its ultimate level of *deculture,* i.e. the disappearance of a specific culture based on local tradition.[2]

4. The effect of globalization results from different social, economic and cultural phenomena. *Legal transplants* are included in the problems of globalization and worldwide integration, regarded as a way of the unification of the world and its institutions.

5. The fundamental questions related to law and legal culture must be pointed out to determine the scope of this contribution.

Firstly, the deliberations on the *legal transplants* are related to the systems of statutory law.

Secondly, the deliberations concern the *systems of concrete law* as sets of legal norms effective in specific place and time, within their hierarchic order and, in principle, coherent in logic and axiological aspects.[3] Furthermore, the systems are not identical and can be differentiated. It is worth mentioning that the theory of law disputes whether distinctive characteristics can be indicated to decide upon the identity and uniqueness of the systems of law. Some believe that it is not the systems of law themselves that have the unique characteristics; but they become unrepeatable in consideration of and in the environment of specific moral principles, political institutions, economic and cultural factors and their impact on legal thinking, procedures and institutions.[4] Opposite opinions also exist. Joseph Raz wrote of the unity of legal systems, in its formal and substantive sense, and he defined the formal unity as "identity."[5] In his opinion, the distinguishing factor of the systems is "the content of the law and the manner they are applied."[6] According to this author, the identity of the systems is not

[2] Cf. *New Universal Encyclopaedia of Polish Science Publishers*, Vol. 2, Warsaw 1997, p. 156.

[3] Cf. W. L a n g, J. W r ó b l e w s k i, S. Z a w a d z k i, *Theory of State and Law*, Warsaw 1986, p. 19.

[4] Cf. e.g. E. F e l d m a n, *"What's Japanese" About The Japanese Legal System? An American Perspective*, Paper presented at the annual meeting The Law and Society Association, Hilton Bonaventure, Montreal, Quebec, Canada, May 27, 2008, http//www.allacademic.com/meta/p235960_index.html.

[5] Cf. J. R a z, *The Authority of Law. Essays on Law and Morality*, Oxford: Clarendon Press, 1979, Chapter II, item 5.

[6] *Ibidem*, p. 79.

based on the identity of institutional details but it pertains to "...the all-pervasive principles and the traditional institutional structure and practices that permeate the system and lend to its distinctive character".[7] For the sake of this essay, I accept his point of view of basic uniqueness of the systems of law; I also accept that the identity of the systems is gradated. Concrete legal systems belonging to the same cultural group have low level of identity whereas those from different cultural groups are highly identifiable. Low identity is demonstrated in the material aspect – procedural and institutional similarities, manifested also on the level of details of legal institutions; the normative content of these systems is repeatable, they are hardly differentiated and characterized by *sui generis* identity interference with full formal identity. However, high identity level is noticeable in legal systems belonging to different legal cultures. The differences pertain not only to institutions, procedures and other details of legal regulations, but also to principles, structures and even functions of law (e.g. in western philosophy of law, *resolving* of a conflict is discussed, whereas far eastern philosophy *dissolving* of a conflict is aimed at, which has a direct link to legal procedures and the philosophy of the process).

Thirdly, it need be assumed that legal systems are a part of the specific type of legal culture and at least some functional relationship between them exists.

Legal culture is a part of general culture and deals with the relations and attitudes of legal entities to law. It consists in "habits and values related to the acceptance, assessment, criticism and use of existing law."[8] In other words: "Legal culture is the specific environment of statutory law. Ahead of the law, legal culture shows the legislators the aims of law and acceptable methods of their implementation, fulfilling the function of repairing the legislative errors and setting merciless criteria of assessing its norms. Legal culture is autonomous of legislative authorities and reminds of the autonomy of law. Its principles and rules protect the fundamental values of law, such as reliability, openness, confidence … it provides a great value."[9]

Legal culture is strictly interconnected with tradition and undergoing changes in the development of law. The history of law and the tradition of law can be divided into three basic stages: primitive, old and modern law.[10] They are a point of reference in the assessment of the development of law nowadays and in the past. Tradition, alongside with other factors, is significant in the typology of law systems, as distinguished by Rene David. He classified the following six types – families of law: Roman-Germanic system, *common law,* the family of socialist

[7] *Ibidem*.

[8] A. P o d g ó r e c k i, *The Prestige of Law*, Warsaw 1966, p. 179–180.

[9] S. W r o n k o w s k a-J a ś k i e w i cz, *About the Proclamation of Law and Legal Culture*, www.trybunal.gov.pl/wiadom/komunikaty/250107a/slawomira%wronkow/, p. 17.

[10] Cf. W. U r u s z c z a k, "Tradition in the History of Law. In memoriam of Professor Adam Vetulani," *Problems of Scientific Research* 2002, Vol. 3, p. 429 and the following ones.

laws, Islamic laws, Far Eastern laws and African laws.[11] Most of the classification has become historical. Each of the families of law consists of national legal systems, similar in their normative and formal aspects. Each of the aforementioned types of law – "grand legal systems" – is a part of its specific legal culture, co-creating it and existing under its impact.

Legal culture is also a domain of symbolic legal actions in a specific community in specific time.[12] From this point of view, legal culture together with the existing system of legal norms determines a specific communication and regulative code of law for social communication and limitation of human behaviour. Members of the community learn to understand the code in the course of social interaction. Among other things the awareness and understanding of legal regulative mechanisms decides about the consciousness of law.

Fourthly, this contribution is a description, from the functional and theoretical point of view, of *legal transplants* as existing elements of law or those whose existence is possible. No dogmatic, comparative or historical legal analysis is presented, even if it is a very interesting point of view, demanding further investigation.

6. The term "legal transplant" must be explained. "Transplant" originated in the medical field and means the *moving* of an organ from one place to another. Several types of transplants are known from the medical point of view:

– *autogenous transplants*, the removal of one's own organ and placing it in another place (e.g. removing skin transplant from buttocks and placing it on the face);

– *isogenic transplants*, between genetically identical persons (e.g. monozygotic twins);

– *allogenic transplants*, between genetically different persons, within one species (e.g. liver transplant from one man to another), and

– *xenogenic transplants*, between two different species (e.g. placement of a pig heart into a man).[13]

7. A broad linguistic convention is assumed and the term "legal transplant" will be based on a transfer of the normative content in its legal form constituting functional entirety, having considerable load of *normative novelty*, or a transfer of a *new method of legal regulation*, not yet present in a legal system, from one system of law (foreign) to another one (host).

The *transfer* of the normative content is certainly a metaphorical expression. The content is not "removed" and "put" into another system but the transfer means in fact *verbatim repetition* of the content or of its general idea – in the host system.

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[11] Cf. R. D a v i d, *Les grands systems de droits contemporains*, Paris: Dalloz,1982, p. 21 and the following ones.

[12] Cf. K. P a ł e c k i, "About the Usability of the Idea of Legal Culture," *Państwo i Prawo*, 1974, Vol. 2, p. 73–74.

[13] Cf. *New Universal Encyclopaedia*…, Vol. 6, p. 440.

The transfer of some normative content from one system to another results in a *change* of the host system, i.e. either the replacement of the existing legal regulation or its supplementing or amendment. The change can also be based on the introduction of a new method of legal regulation for a range of social relations.

There are different ways of effecting changes in the field of law. Some forms involve peaceful evolution of legal institutions by gradual and spontaneous transformation, preceded or accompanied by the transformation of all social and cultural environment, often also in their economic and political aspects. The source of such changes is law itself and its development. Philosophers often term this type of political and legal arrangement as *institutional legal framework.*

In other cases, the need of the transformation of law, the trends and the pace of the legal changes are decided upon by the legislator, an authority external to law. Such a need can emerge in connection with the pursuit of an assumed *social ideal* or the necessity of the *amendment* (modernization) of law. It can result from *instrumental* attitude to law, used by rulers to achieve their political objectives, without regard for the legal awareness of the society and "the state of readiness" of the system to accept the changes. *Normative revolutions* can arise therefrom. Among other factors, *legal transplants* cause normative revolutions. Furthermore, some of them lead to the "colonization" of host systems in extreme conditions, in particular in less developed countries, if the goal of the transplant is the impact on the society of a given system, by introducing foreign legal culture. Lawmakers can search inspiration, as to the trend and the transformation of law, within their own legal culture or in other legal systems. In the latter case, legal transplants are concerned.

Normative content constituting functional entirety is the subject of legal transplant. So it is a set of elements of foreign legal regulation, suitable for making changes in a host system in its transferred form or together with other elements. In addition, legal transplants are used for the sake of a situation in which normative content transferred from a foreign system constitutes *normative novelty* for a host system. "Normative novelty" is used in this contribution in accordance with language intuition, to mean new content or scope or a new method of legal regulation; without any reference to the problems of normative novelty widely discussed in the theory of interpretation of law.[14]

The transfer of normative content from one legal system to another must respect the legal form adequate for a host system. In the systems of statutory law, legislative procedures must be used and the inspiration (voluntary or involuntary) to start legislative proceedings in a host system pass form a foreign system.

[14] Cf. Z. Ziembiński, "Creation, Proclamation and Use of Law," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1993, No. 4.

The starting point for the existence of a *legal transplant* is *unique* normative content of a foreign system and host system, in the environment of *unique* legal culture, to which they are relativized. The type of the legal culture of both the systems is analogous to the function of species of individuals in medical transplantations.

8. Using the medical terminology, we can attempt to classify the basic characteristics of different types of *legal transplants*.

Autogenic legal transplants have no major legal significance. The idea is not intuitional in law and meets no requirements of the language convention – especially as regards the "foreign" character and the uniqueness of foreign systems.

The idea of *isogenic legal transplants* must receive consideration. The transplant is based on the transfer of the normative content from one system of law to another – "sister" system. The legal systems of the United States and the European Union are good examples. The federal law of the USA as "sister" law of American state systems (with some exceptions, e.g. the Louisiana system with its Civil Code based on the Napoleonic Code is unique in the States) and the law of the European Union and the systems of the EU member states as "sister" laws – are the source of transplants.

Allogenic legal transplants are based on the transfer of normative content or a method of legal regulation within different systems of concrete law belonging to the same type of legal culture. This type of situation can be exemplified with transplants made in the course of harmonizing Polish law with the law of the European Union, before the formal integration of Poland in the EU. Other examples are transplants within the family of socialist states, following the ideology of the states of the so-called "socialist democracy."

Xenogenic legal transplants – the most characteristic type – can be regarded as the best transplant paradigm. The idea is referred to the transfer of normative content to a system from another legal system belonging to a different type of legal culture. The transfer results in a "revolutionary" change of the normative *status quo* in the host system. This, in principle, impacts indirectly and gradually the social, economic and axiological environment of the host system. *Xenogenic* transplants are assumed to evoke a *sui generis* normative revolution. A good example is a well known history of the transformation and normative "revolutions" of Japanese law. After Japan had been opened in the end of the 19th century, its social and legal system was reconstructed and West European legal regulations were adopted almost directly; starting from French legislation in substantive and procedural penal law, followed by Prussian and German solutions, and North American regulation after World War II.[15] Other spectacu-

[15] Cf. J. I z y d o r c z y k, "Japanese Code of Penal Proceedings," *Prokuratura i Prawo* 2007, Vol. 4, p. 105 and the following ones.

lar legal transplants were transferred from the area of Soviet law to the area of Central and East Europe after World War II, alongside with ideology, political institutions, models of thinking and behaviour. The transplants formed a part of the far reaching sovietization policy of the region, controlled directly by the Soviet Union. The host legal systems were thus ruthlessly *colonized*.

Isogenic and *allogenic legal transplants* are used in legal systems belonging to the same cultural environment of *low* identity, as mentioned above. The conclusion is that the transplants do not change systems of homogenous culture considerably, do not contribute to their normative revolution and do not affect the configuration of the communication and regulative code of the legal culture. They are not transplants in the strict sense but mere *legal borrowings.*

Xenogenic legal transplants are used in reference to legal systems belonging to foreign legal cultures. The identity coefficient is *high,* the transformation of law results in normative revolution, the transplants do affect the communication and regulative mechanisms of legal systems. Such properties are characteristic of *legal transplants* in the strict sense.

9. Apart from the division of transplants described under 7, further classifications can be carried out.

Direct and indirect legal transplants can be distinguished. Direct transplants are transferred directly from foreign legislation to a host system. An example is the Napoleonic Code of 1804, effective in Poland on the territory of Warsaw Duchy since 1808, transplanted as a whole to Poland and binding in its original French version (!). Indirect transplants are transferred through a third system. Thus, attempts to transplant Roman law through German imperial law were unsuccessful in Poland and the unintentional reception of Roman institutions was carried out through canon law.[16]

From the point of view of introducing transplants into other systems, *enforcement of law* must be pointed out; i.e. transplants accepted under the pressure of foreign systems, by force or after conquest (see the Napoleonic Code imposed in Poland). Another class is composed of voluntary transplants, accepted and initiated by a host system, constituting the *reception of law* (legal regulations accepted by Japan from France, Germany and the USA). The third type of transplants are transfers of law, effected unintentionally and over long historical periods (reception of Roman law *via* canon law in Poland). The three types of legal transplants have played their role in the history of law many times.

In another classification, *simple* transplants can be distinguished, transferred from a legal institution or another separate element of a legal system, as well as *complex* transplants, transfers of a branch of law or a complex of legal regulations. In both cases, the transplants consist in normative content, being a functional entirety.

[16] Examples owed to Professor Jacek Matuszewski, the Head of the Chair of the History of Polish State and Law in Łódź, University of Łódź.

Transplants from *the past* can be distinguished (a great historical role of the *reception of Roman law*) an *modern transplants* (transfers from European law to the systems of the member states); the transfers are carried out from one legal system to another system coexisting in the same time, on a specific territory.

Another classification is based on the *source* of the transplant, therefore, whether it stems from a foreign legislative authority (the Napoleonic Code in Poland) – *system transplant*, or from foreign legal practice or jurisprudence – *cultural transplant* (the reception of Roman law).

Formal transplants can be distinguished for transfers incorporating *verbatim* new legal content, as opposed to *informal transplants*, reflecting the spirit of foreign law, not necessarily reproducing language formulations.

The last classification distinguishes *successful* and *unsuccessful transplants.* The new normative content of successful transplants becomes well rooted in host systems and gradually affects their legal environment to build up new tradition. Unsuccessful transplants are, sooner or later, derogated and replaced by other regulations.

10. Considering all the above criteria, one must state that they can be interconnected and sometimes "overlap". The criteria can be merged to attain new qualitative characteristics of legal transplants. For example, the well known legal transplant resulting from the reception of Roman law, of great importance for the continental legal systems in Europe, can be characterized as an *allogenic*, direct or indirect in some European areas, constituting the *reception of law,* cultural, informal, obviously successful complex transplant from the past. Each aspect of the transplant deserves thorough analysis, but even this short overview indicates how vast the spectrum of the effects of the transplant was.

11. Legal transplants can cause far reaching changes not only in laws of host systems, but also in their legal environment, especially in legal culture and sense of law on social scale.

Legal culture, as the whole of opinions and attitudes to law, is systemic and coherent to a certain degree. This statement is significant for the problem of *legal transplants.* It can be assumed that, depending on their legal culture, some transplants constituting new legal norms can be rooted in host systems, whereas other transplants can never be rooted. The key factor is the influence of *compliance*/*non-compliance* of legal rules with their axiological and ideological environment. Jurisprudence and policies of law emphasize that such compliance contributes to the stabilization of legal rules and their impact on recipients of law, strengthened with cultural background. Whereas non-compliance of legal rules with their environment weakens their effects and leads to their rejection (e.g. by *desuetudo).*

Are transplanted legal norms controlled by the same mechanisms? Generally so, but different historical situations have been experienced. If a *legal transplant* is transferred from the area of different legal culture, its rooting is

difficult and its effect on the recipients of law is weaker. Two consequent scenarios are possible: either the rejection of the transplant or a gradual change of the legal culture of the recipient law system under the influence of the transplant. The legal transplant acts like a stone thrown into water, causing the spread of water circles for a long time.

The *reception of law,* an intentional and planned transplant – in spite of cultural differences – would remain in the system and constitute an active *factor of change* within the recipient legal culture. It can even contribute to the change of the *cultural legal paradigm* of a specific society. The reception of Roman law in middle ages led gradually not only to the change of legal solutions in European states but also caused the changes of European legal culture and resultant changes of the sense of law in Europe. On the other hand, even when *enforcement of law* takes place for different political or economic reasons a transplant can be rooted and last for a long time, as evidenced by the rule of socialist law in Central and Eastern Europe.

Another question, very important from the point of view of legal transplants, is the role of local legal culture. As S. Wronkowska-Jaśkiewicz clearly put it: legal culture is the natural environment of legal norms. It is obvious that local culture is always very important reference for any system of law, and of primary relevance in the interpretation of law or the use of different interference rules. If legal norms fixed in a system after the transfer of a legal transplant should undergo the process of legal concluding or require the interpretation – legal practice usually uses local tradition, which is emphasized in legal reasearch.[17] Specific *transplant environment* is formed. Nevertheless local legal culture affects transferred regulations and their culture and they react to shape the culture of host systems to some degree. Culture diffusion process does not, however, reduce the leading role of local legal culture for the transplant environment. A principle of the *predominance of local legal culture* is decisive but it is partly reduced by the "revolutionary" character of the transplants. The illustration of the principle can be the case of Japanese law, also German law introduced in Poland in middle ages, implemented as "Polish German law."

12. A question arises what functions can be attributed to legal transplants in history and in contemporary legal cultures.

First of all, "legal transplant" is a very illustrative term and it reflects the idea of using foreign legal solutions in recipient legal systems. No axiological connotation of the term has matured and it can have pejorative or morally indifferent meaning.

The transplants can perform different functions, dependent on the way of their transfer – either the reception of law or enforcement of law.

[17] Cf. J. I z y d o r c z y k, *op. cit*., p. 105 and the following ones.

If transferred by the reception of law, the transplants can perform the civilizing function, by the use of transplanted legal content for the development or modernization of the recipient law. In addition, a transplant can have pragmatic and rationalizing significance, by using new experience in the area of specific legal regulation.

The functions can be different or the same in the case of the enforcement of law. In particular, the civilizing function can be performed also by enforced law, if the cultural difference between foreign systems and host systems is considerable. As a rule, however, the primary results of imposed law are political, economic and ideological impact of the host system, and the recipient law becomes colonized.

Both in the past and nowadays, legal transplants are used in the globalization process and perform their diffusion function in legal culture, by letting different elements permeate from one culture to another, changing systems of values and reshaping legal cultures. The transplants are an important factor of changing legal systems and their cultural environment. Their role in the modern world is becoming increasingly important.

SECTION II A

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CATASTROPHIC HARM – LIABILITY AND INSURANCE[1]

1. Harms and catastrophes: defining "catastrophic harms"

1.1. There is no legal definition of "catastrophic harm" in Polish statutory law. We do not find specific regulation dedicated to issues arising from accidents causing damage of extraordinary size, either. It does not mean that matters covered by this notion are not regulated at all. We can find them in many acts concerning civil and penal liability, insurance, environmental protection, protection of workers and administrative procedures for extraordinary events. On the other hand, we do not need a definition of "catastrophic harm" in statutory law to provide a proper response to incidents which are catastrophic as it is commonly understood. There many other notions known by law and jurisprudence which have never been defined by any acts so far, e.g. damage or fault which are basic for civil liability. However, the proper interpretation of regulation mentioned above in combination with traditional rules of law let us try to construct notion of "catastrophic harm."

1.2. The notion of "harm" or "damage" in Polish law is a broad-ranging one. Traditional civil law meaning of this notion was expressed by Art. 361 § 2 of Polish Civil Code as "losses borne by the injured person as well as the profit he could have made had he not sustained the damage." A notion "damage" in Polish law means not only death,[2] bodily injury, a disturbance of health,[3] deprivation of freedom, a qualified sexual abuse,[4] a property damage, but

[1] This article was prepared as an extended version of the Questionnaire for National Reporters for the 18th International Congress of Comparative Law. Generally, it answers questions and follows the order of the Questionnaire. The author presents only those facts and examples of Polish regulations which are significant for the main idea of the Questionnaire. The author presents his own views and is responsible for the facts and opinions expressed in this article.

[2] See Art. 446 § 1 of Polish Civil Code [hereinafter: C.C.].

[3] See Art. 444 § 1 C.C.

[4] See Art. 445 § 2 C.C.

economic loss, pain and suffering (moral injury) as well. The broadened meaning of "harm" includes also environmental, social or cultural damage if it is provided by a special regulation.

Special attention should be paid to pure economic loss as a case of property damage. Generally, there is no distinction between traditional property damage and economic loss in Polish law. All negative results of the action of a liable person in the property or economic rights of a victim are treated as property damage. Expected profits as far as they could be rationally proved, as well. The question to what extend pure economic loss should be covered by a liable person is a problem of causality rather than a definition of damage.

1.3. The "catastrophe" or "disaster" is not a legal but a common term. It is used by statutory law (e.g. criminal law) in its common sense. It means extraordinary and sudden events causing unforeseeable results of a great size or events that occurred in extraordinary circumstances. In that sense we talk about catastrophes in transport (railway catastrophes, road catastrophes etc.), natural catastrophes (flood, earthquake), construction disasters, mining catastrophes, chemical poisoning of natural sources (air, water) and nuclear incidents. Results of such events relate not only to individuals and their personal, economic and legal situation but also to organizations, communities and public authorities which have to meet the unusual challenge.

Sometimes, it is very difficult to distinguish between a catastrophe and an accident. What really decides about significant and substantial difference between those two incidents? It seems there are two main factors: a size of results and extraordinary circumstances. An accident means an occurrence which interrupts a normal and calm functioning of an installation, enterprise, traffic etc. whereas a catastrophe seems to have more serious results of a great size or is an unforeseeable incident accompanied by unnatural or inexplicable circumstances.

1.4. Considering the above remarks on two core parts of the "catastrophic harm," we can present a technical definition of it:

> Catastrophic harms are extraordinary events or combination of events caused by a person intentionally or unintentionally or arising from physical powers of a natural origin resulting in a damage of a great size or events that occurred in extraordinary circumstances which cause great disturbances for everyday functioning of a community.

It is obvious that the above definition is not complete and does not cover all *designata* of the term. But it draws its contours and limits an area of research.[5]

[5] See Z. B r o d e c k i, *Obowiązek naprawienia szkody o rozmiarach katastrofalnych* [Compensation for catastrophic damage], Gdańsk 1978.

2. Catastrophic harms and Statutory Law

2.1. Although there is no special regulation dedicated to "catastrophic harms" issues, there are several acts relating to this matter. It is obvious that catastrophes cause very serious and uncountable results. Sometimes it is very difficult to indicate an individual who is or should be liable for such an event. The main problem which makes it difficult is the causal link between the act of a person and damage. On the other hand traditional rules of liability are not sufficient for catastrophic cases. Therefore states join in the process of indemnification or redressing of damages of bigger size, especially when indicating a liable person is impossible or very difficult or when compensation delivered by a liable person does not satisfy all victims. In such cases administrative measures and solutions are more suitable.

2.2. The main legal instrument ruling the indemnification of a damage of extraordinary and huge size is the 2002 Act on Natural Disasters.[6] According to Art. 3 of this Act, a **natural disaster** means natural catastrophe or a technical incident which causes a threat for the life or health of a great number of people, for property of a great size or for environment. In this case aid or protection may be undertaken only by introducing extraordinary means in co-operation of many authorities and specialized services. The objective of the Act is to provide authorities with specific measures to be undertaken in two cases of a natural disaster as it is defined by the Act. There are two kinds of a natural disaster: a natural catastrophe and a technical incident. **A natural catastrophe** means an occurrence resulting from natural powers, in particular: lightening discharge, earthquake, hurricanes, intensive rainfalls or snowfalls, persistent high temperatures, fires, floods, droughts, epidemics etc. **A technical incident** is defined as a sudden, unforeseeable damage of a building, technical installation, or systems of installations. Natural catastrophes or technical incidents may be also caused by terrorist attacks.[7]

2.3. A natural catastrophe – as defined above – is not the only example of catastrophic harm which meets statutory response in Polish legal system. The chapters 11 and 12 of the 2000 Polish Atomic Energy Act[8] regulate radiological emergencies and results of a nuclear accident. As we know, since 1986 Chernobyl accident an individual nuclear occurrence may cause personal and property damage as well as damage to environment which means huge costs of reinstatement measures. The Atomic Energy Act provides for legal solutions adequate to such a risk using instruments of civil and administrative law.

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[6] Dziennik Ustaw [Journal of Laws – J. of L.], No. 62, item 558.

[7] Z. B r o d e c k i, *op. cit*., s. 13

[8] J. of L. 2007, No. 42, item 276 (uniformed text).

2.4. The law relating to catastrophes is very sensitive to new challenges. Especially, when any significant occurrence happens, lawyers and legislators analyze this incident and amend legal solutions considering imperfection and lacks of legislation which became apparent after the incident, e.g. after the great flood in Poland that took place in 1997, the law on natural catastrophes was rebuilt. After Chernobyl accident and under the influence of international legal instruments as Vienna Convention on Civil Liability for Nuclear Damage[9] the former Polish 1986 Atomic Energy Act was replaced by the new one which provides for protection of victims and liability rules which are in line with amended Vienna Convention. On the other hand, there is no significant example of a legal change caused by case law itself.

3. Liability and Insurance

As it is mentioned above, catastrophic harm in Polish law may generate several kinds of liability. All they should be treated as one comprehensive and coherent legal response to the complex problem of catastrophic harm. Each kind of liability plays a different role.

3.1. Civil liability and Insurance

This liability aims at delivering compensation for an injured person. It is connected with an insurance system which guarantees damages.

1. It can be based on a general clause of liability which obliges a faulty person to redress damage[10] or special rules of strict liability.[11] It is obvious that in majority of catastrophic harm cases liability based on the fault rule is not a proper means for a victim who is not able to prove the intentional act of a liable person, even if this person can be indicated. Therefore, rules of strict liability might be more often in use.

2. Strict liability is the common rule of compensating damage caused by industrial installations.[12] The liable person is anyone who runs an enterprise set into motion by natural powers. This person is liable for any damage to person or property which was caused through the operation of the enterprise unless the damage occurred due to act of God or exclusively through the fault of an injured person or any third one.

[9] J. of L. 1990, No. 63, item 370.
[10] Art. 415 C.C.
[11] Art. 435, 436, 449^1 C.C., Art. 101 Atomic Energy Act.
[12] Art. 435, 436 C.C.

Strict or even absolute liability is provided by special regimes of indemnification, as product liability[13] or liability for nuclear damage.[14]

A road incident in which a tanker lorry with dangerous fluid takes part, can be an example of catastrophic harm caused by an unsafe product. The producer of the product will be liable for damage according to strict liability rules.

In case of a nuclear accident, the only liable person is the operator of a nuclear installation. The operator is not liable only when damage was caused directly by acts of war or an armed conflict. Liability is limited to the amount of 150 million SDRs but the State guarantees the payment of compensation for personal damage. The environmental damage is limited to the amount of the reimbursement of actual or future costs of reinstatement measures taken to restore the environment.

3. Except for nuclear liability,[15] co-injurers are liable jointly and severally always when their common behavior caused damage or when their activity caused damage according to the rules of strict liability. The co-injurer who paid compensation to the victim has got a right of reimbursement to all other injurers according to their contribution to the damage.[16]

4. The Polish tort law accepted the *compensatio lucri cum damno* rule. If the same event causes damage and is the source of any income, this income should be taken into account to fix the amount of the compensation. There is no legal provision introducing this rule. The Supreme Court worked out some principles which are followed by common courts.[17]

5. The exemption clauses provided for a person liable according to product liability principles accept the State of Art Defence (Risk of Development) rule. According to Art. 449^3 of C.C. the producer is not liable when dangerous features of products could not have been recognized by using scientific and technical knowledge at the moment while the product was introduced into the market or when those features resulted from legal conditions.

6. There is no special regulation concerning catastrophic harms in Polish insurance law. No system of insurance pools dealing only with special kinds of catastrophes – as it is in case of e.g. nuclear insurance pools – exists in Poland.

However, the law demands in some cases to maintain financial security for catastrophic damages. The Atomic Energy Act, Art. 103, e.g. demands the operator of nuclear installation to maintain a financial security covering his

[13] Art. 449^1.

[14] Chapter 12 of Atomic Energy Act.

[15] The only liable person according to the channeling principle is the operator of a nuclear installation. See Art. 101.1 Atomic Energy Act.

[16] Art. 441 C.C.

[17] See Res. of Supreme Court 27.03.1961, I CO 27/60, OSPiKA 1962, No. 4, item 105.

liability. An insurance policy is the most common form of this security. In the case of a nuclear incident, the risk of nuclear damage – which is obviously an example of catastrophic harm – is covered by an insurer.

7. There is no distinction between damages covered by insurance policies and legally excluded ones. There is no distinction between sudden accidents and long term risks, either. All damages which should be paid according to civil liability law may be the subject of insurance policies. It depends only on a particular insurer if a catastrophic harm could be covered or not. Usually, such events like natural catastrophes are subject of special policies provided for those cases (see: nuclear damage). But if the law limits liability of the liable person in amount (as it is usually in case of high risk damage and strict liability rules), individual damages could be covered by an insurer only to the limited amount. There are no special policies providing insurance for the amounts over limits.

8. There is no fund created by the State or local communities covering extraordinary risks. Only in case of nuclear damage or sea claims operators are obliged to follow a specific procedure which provides for establishing a limited liability fund. It is created case by case. It helps not only the operator to distribute compensation but also victims by concentration of all claims in one court and in one specific litigation. This is a sign of liability channeling rule which focus all claims in one person liable and one insurer.

9. There are no provisions relating to risk concentration and magnitude which result in compulsory reinsurance or coinsurance as far as catastrophic harms are concerned. A risk of those harms is taken into account only in calculating rates and results may be controlled by supervisory authorities.

10. According to Art. 19 of the 2005 Act on Compulsory Liability Insurance, victims have the right to directly sue the insurance company.

11. Class actions as such are regulated neither by Polish civil nor administrative procedure. The governmental proposal of the amendment of Civil Procedure Code [C. P. C.] has been prepared to be adopted by the Parliament till the end of 2010. However, according to the present rules, organizations which represent consumers and victims have the right to sue the liable person (Art. 61 of C. P. C.).

3.2. Criminal liability

Criminal Code provides several types of crimes consisting in causing a catastrophe or a threat of a catastrophe (e.g. Chapters 20 and 21). If that crime is also a tort, an injured person may bring an action to the criminal court and the court will judge criminal and civil liability jointly. Criminal punishment does not preempt civil claims.

3.3. Labor liability

If an employee was injured, a claim will be judged by a labor court according to special rules of law on accidents at work.[18]

3.4. Administrative liability

Authorities may impose fines on a person who causes a danger of catastrophic harm and has not undertaken measures to avoid or minimize this danger.[19]

There are no rules limiting rights of bringing tort claims to the court in case of catastrophic harm. Polish law does not know general or even specific preemption clauses. However, it may happen in fact that when a natural disaster state or a state of emergency is announced for the case of catastrophic harms it will be impossible to bring actions to court which has been temporarily suspended. In this case, administrative decisions will govern the procedure of judging those claims during extraordinary states. In case of a sea catastrophe or a nuclear incident, the liable person should establish a limited liability fund. This means that individual claims are to be judged jointly by one court and in one litigation. Recognizing claims in that case bears more resemblance to administrative procedure than civil litigation. Individual separate litigation is excepted.

[18] Law on Social Security in Case of Accidents at Work and Workers' Diseases, J. of L. 2009, No. 167, item 1322 (uniformed text).

[19] See Art. 298 of 2001 Environment Protection Act, J. of L. 2008, No. 25, item 150 (uniformed text).

SECTION II A

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CONTRACT ON SURROGATE MOTHERHOOD IN POLISH LAW

1. So far there have been no regulations or judgments concerning surrogate motherhood. However, the phenomenon of the surrogate motherhood (womb for rent) takes place. At present there is a first case pending before the court – a surrogate mother, who had given birth to a child, not being genetically the mother, had given the child to a married couple (the husband was the biological father, the wife was infertile), with whom she had concluded a contract. She was paid 7500 Euro. Initially she claimed she would give up the battle for her child, for the welfare of the child. Afterwards she changed her mind. Now the surrogate mother is claiming the return of the child and determination of her rights to the child. This case is similar to the "Baby M" case (*Stern v. Whitehead*), decided by the New Jersey Supreme Court (1988).

The draft of the *in vitro* act provides the prohibition of the surrogate motherhood and subject the doctor, who performs such a procedure, fine or imprisonment up to 2 years. The draft also provides for the person who works as an agent to conclude a contract concerning surrogate motherhood, in order to achieve financial or personal gain, the imprisonment up to 3 years.

It is generally acknowledged in the doctrine that contracts on surrogate motherhood are void as contrary to public policy (Art. 58 § 2 of the Polish Civil Code [C. C.] of 1964).[1]

Moreover, Art. 61^9 of the Polish Family Law Code [F. L. C.] of 1964, added by the act of 6 XI 2008 r., which entered into force on 13 VI 2009, provides that "the mother is the woman who gave birth to the child." Regardless of whether the woman is genetically the mother of the child, she is undoubtedly the "legal" mother.

[1] See M. Nesterowicz, *Prawo medyczne* [Medical Law], Warszawa 2007, p. 258; J. Holocher, M. Soniewicka, "Analiza prawna umowy o zastępcze macierzyństwo" [Legal aspects of contract on surrogate motherhod], *Prawo i Medycyna* 2009, No. 3, p. 58.

The maternity of such "legal" mother cannot be argued. On the other hand the man who had given his gamete (sperm) for fertilization (biological father), could recognize the child before the head of the registrar's office or the guardianship court, if it is confirmed by the surrogate mother (Art. 73 of the F. L. C. of 1964). If the surrogate mother refuses to confirm, he cannot claim his paternity before the court, as Polish Law requires for establishing the paternity proof of the sexual intercourse with the mother of the child (Art. 85 of the F. L. C. of 1964), unless the child is born during the marriage (Art. 62 of the F. L. C. of 1964). The guardianship court could grant custody of the child to the biological father who is the "legal" father, if it comes to the conclusion it is for the welfare of the child, because of the possibility of bringing up and educating the child in a full family, material and personal conditions of the "surrogate mother" and the biological father etc. (like the *Stern v. Whitehead* case). The parental authority would then be given to both parents, however the guardianship court could grant the exercising of the parental authority solely to the father. To grant the full parental authority to both parents who live separately, an agreement about how the parental authority would be exercised and how the contacts with the child would be maintained must be submitted to the court, proving that it can be expected that the parents would cooperate in matters of the child. Otherwise the court can grant the exercise of the parental authority solely to one parent (e.g. the biological father), limiting the parental authority of the other (e.g. the surrogate mother) to the specific duties and powers towards the child (art. 107 § 2 of the F. L. C. of 1964). Regardless of parental authority, parents and their children have the right and obligation to maintain contact with each other. Contacts with the child shall in particular include the presence of a child (visits, meetings, taking away a child outside his place of residence), and direct communication, maintaining correspondence, the use of other means of distance communication, including electronic communication (Art. 113 of F. L. C. of 1964).

If the court decides to grant the executing of the parental authority and the child custody to the surrogate mother, the married couple (or the unmarried couple), with whom she concluded the contract on the surrogate motherhood, could not claim any compensation as the contract is considered to be void. It could be at most deliberated whether they can claim the reimbursement of the sum given to the surrogate mother as the undue benefit, according to the fact the contract is void and the intended purpose to provide was not reached (Art. 410 § 2 of Polish C. C.).[2] On the other hand the reimbursement of the sum paid cannot be claimed, if the performance meets the principles of fairness (Art. 411 sec. 2 of the Polish C. C.), i.e. when the child was born, whose father is the man (party of

[2] See J. H o l o c h e r, M. S o n i e w i c k a, *op. cit.,* p. 53.

the contract) that could have certain powers over the child provided to him by the court (when the custody is granted to the mother).

2. No powers to the child can be obviously granted to the man who did not give his gamete (sperm) for fertilization (so when the sperm was given by an anonymous donor) like his wife (partner), regardless of whether she gave the ovum or not. However, if she gave the ovum (because of anatomical or medical reasons she is not capable of giving birth to a child), she is the genetic mother and the court could take it into consideration in the adoption proceedings.

3. The contract on surrogate motherhood as considered void, obviously does not have any legal effects in the area of parental authority; the surrogate mother cannot be obliged to give the child nor to transfer of the parental authority to the "contracting" parents (so-called "sociological" parents),[3] or consent to adoption of the child. The surrogate mother could on the other hand agree to the adoption of the child by the "contracting" parents or by the wife (partner) of the man who is the biological father and recognized the child, however no sooner than after six weeks from the birth of the child (Art. 119² of the F. L. C.). Polish law provides for the institution of the adoption with indication, however the indication of the adopting person (persons) is not binding to the court. The court must take into consideration the welfare of the child (Art. 114 § 1 of the F. L. C.). The notion of "the welfare of the child" has been interpreted frequently by the Polish courts. It is not only the material situation that could be ensured by the adopting parents to the child, comparing to the previous situation, but also the immaterial conditions relating to the child's upbringing, education and development of his talents. Although the material welfare is of some importance, one must bear in mind it is not a decisive factor.[4]

[3] See M. S a f j a n, *Prawo wobec ingerencji w naturę ludzkiej prokreacji* [Legal aspects of the interference with the nature of human procreation], Warszawa 1990, p. 431.

[4] See Supreme's Court rulings cited by H. C i e p ł a, [in:] *Kodeks rodzinny i opiekuńczy z komentarzem* [Commentary on Family Law Code], Warszawa 2000, p. 633–634.

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CONSUMER PROTECTION IN INTERNATIONAL RELATIONS ACCORDING TO POLISH LAW

1. General framework

In the Polish legal system the vast majority of legal provisions, both substantive and procedural, protecting consumers involved in international transactions stem, more or less directly, from the law of the European Union, of which Poland has been a member since May 1, 2004. Many of these provisions have been established by legislation, both before and after Poland's accession to the EU, in accordance with Poland's obligation to implement EU Directives. EU regulations, on the other hand, became directly applicable in Polish courts forthwith upon Poland's accession to the EU on 1 May 2004. Of particular importance is EC Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Lugano Convention of 16 September 1988 on the same subject is also worth mentioning, as this Convention, which went into effect in Poland on 1 February 2000, still regulates Poland's relations with Switzerland, Norway and Iceland and, until Poland's accession to the EU, regulated its relations with the EU member states as well. The Rome Convention of 1980 on the law applicable to contractual obligations should also be mentioned. This Convention has bound Poland since 1 August 2007 and has been directly applicable in the Polish legal system since its official publication on 22 January 2008. And beginning on 17 December 2009 the provisions of EU Regulation No. 593/2008 (Rome I) will be applicable in Poland, except in relations with Denmark and Great Britain (which will continue to be governed by the 1980 Rome Convention). However this report will focus principally on the Polish rules which offer consumer protection, leaving the international and community rules aside.

2. Constitutional rules

The supreme norms in the area of consumer protection in the Polish legal hierarchy are found in Art. 76 of the Polish Constitution,[1] which provides: "Public authorities shall protect consumers, users, and lessees against activities which threaten their health, privacy, or security, as well as against unfair market practices. The scope of these protections shall be established by legislative statute."

The provision of Art. 76 of the Constitution has been the subject of a number of discussions and interpretations in legal doctrine and in the decisions issued by the Polish Constitutional Tribunal. There is general agreement on the fact that Art. 76 of the Constitution articulates principles which are binding on the legislature and which must be implemented in concrete statutes.[2] The named Article require the government to act legislatively to protect the values articulated, but do not provide individual citizens with direct rights upon which they may seek vindication in courts. Judges therefore may not resolve disputes over consumer protections in direct reliance on the provisions of Art. 76. This is also made clear by the provisions of Art. 81 of the Constitution, which states that the extent of the rights set forth in, inter alia, Art. 76 shall be determined with reference to statutes.[3] Two questions must thus be answered.

The first question is whether a consumer can vindicate his or her rights in reliance on legal norms other than those set forth in statutes. Within the context of international relations it is of particular importance to establish the relative position of norms contained in international consumer protection conventions. In light of Art. 91 § 2 of the Constitution – which provides that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes – it seems clear that reliance on protective norms contained in international conventions (for example Art. 5 of the Rome Convention on the Law Applicable to Contractual Obligations) is entirely appropriate.[4] It is equally

[1] The Constitution of the Republic of Poland of 2 April 1997, Dziennik Ustaw [Journal of Laws – J. of L.] 1997, No. 78, pos. 483, together with subsequent amendments (cited hereinafter as Constitution).

[2] As in the recent decision of the Polish Constitutional Tribunal of 2 December 2008, K 37/07.

[3] This is an exception to the principle laid down in Art. 8 § 2 of the Constitution: "The provisions of the Constitution shall be applied directly, unless otherwise established in the Constitution."

[4] Also in light of Art. 81 of the Constitution according to J. J ę d r o ś k a, M. B a r, *Dostęp do informacji o środowisku i jego ochronie* [Access to information on the environment and its protection], Wrocław 2002, p. 16. A contrary view, although with questionable justification, is expressed by P. S z k u d l a r e k, "Prawo do informacji w konwencji z Aarhus" [The right to

clear that reliance on consumer protection norms contained in EU regulations is appropriate (for example Art. 16 of Regulation No. 44/2001/EC – hereinafter "Brussels I") because Art. 91 § 3 of the Constitution guarantees that such regulations shall be applied directly and take precedence over any conflicting provisions in national legislation.

The second question is whether and when the provisions of the Constitution may be applied in determining the scope and range of consumer protections granted in statutes (and in the provisions of international conventions). In several of its decisions the Polish Constitutional Tribunal has emphasized that the reference in Art. 81 of the Constitution to statutory provisions does not preclude the possibility of testing their compatibility with Art. 76 of the Constitution. In other words, not every consumer protection statute is automatically in accordance with Art. 76 of the Constitution. In the opinion of the Tribunal, in testing the constitutionality of a consumer protection statute, the adequacy and proportionality of the means used must be taken into account, as well as the consumer protection principles and requirements laid down in EU law. This means that the primary goal of consumer protection regulation is to strengthen the relative position of the consumer as the weaker party vis a vis professional party in a transaction. The main means of accomplishing this goal is to create optimal conditions for consumers to receive complete, transparent, and understandable information which would allow them to make an informed decision.

Based on these fundamental assumptions the Tribunal held that Art. 14 § 1 of the Law of October 2, 2003 concerning bio-components in liquid fuels[5] was unconstitutional. In justifying its opinion the Tribunal emphasized that the provision in question did not, in light of the requirements of Art. 76 of the Constitution, provide the consumer with adequate information concerning the components, properties, and qualities of the fuel. In another decision the Tribunal held § 2 and 3 of Art. 8 of the Law of October 7, 1999 concerning the Polish Language[6] to be unconstitutional. The Tribunal held the provisions in question to be in violation of Art. 76 of the Polish Constitution in that they permitted consumers (or workers) domiciled in Poland to enter into contracts in a language they didn't understand. According to the Tribunal, a necessary condition for the constitutionality of the provisions in question would be actual knowledge by the consumer or worker of the language in which the contract was formed. In addition the Tribunal emphasized that the provisions of Art. 76 of the Constitution are not limited in their application only to Polish citizens or citizens of other member states of the EU.

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information in the Aarhus Convention], *Kwartalnik Prawa Publicznego* 2003, No. 3, p. 176, which recognizes Art. 81 of the Constitution as lex specialis relative to Art. 91.

[5] Cf. the decision of the Polish Constitutional Tribunal of 21 April 2004, K 33/03, OTK ZU No. 4/A/2004, pos. 31.

[6] Decision of the Polish Constitutional Tribunal of 13 September 2005, K 38/04.

In a recent decision the Tribunal undertook to assess the constitutionality of Art. 62 § 2 of the Law of November 15, 1984 – Transportation Law.[7] It ruled that the special provision under consideration, which required passengers seeking to hold a carrier liable for late arrival or cancellation of a regularly scheduled transportation course to prove that the carrier was guilty of intentional misconduct or gross negligence, deprived passengers of the consumer protections inherent in Art. 76 of the Constitution. From the date of publication of the Tribunal's decision, in accordance with Art. 190, § 2 and 3 of the Constitution, the special provision in question was stripped of legal effect and a transportation carrier's liability for the named occurrences are to be determined under general principles of liability, which are significantly more advantageous to the consumer.

3. Jurisdiction of Polish courts with regard to international consumer transactions

The issue of the jurisdiction of Polish courts in matters related to international consumer contracts is regulated by EU Regulation No. 44/2001 (Brussels I) when the defendant is domiciled in a EU Member State. If the defendant is domiciled in a non-EU state and no international conventions binding upon Poland are applicable, then the provisions contained in Book One of Part Four of Polish Code of Civil Procedure [C. C. P.] are applicable.[8] These provisions have recently been significantly reformed to assure harmony with the EU provisions.[9]

Art. 1103 of the C. C. P. is of fundamental significance. It gives the Polish courts general jurisdiction in all adversarial proceedings [w procesie] where the defendant is either domiciled in Poland, has his or her habitual residence in Poland, or has its seat in Poland.[10] Art. 1103 [6] § 1 of the C. C. P. contains specific provisions governing matters related to contracts when the plaintiff is a consumer. It also gives the Polish courts jurisdiction when the plaintiff is either domiciled in Poland or has his or her habitual residence in Poland and undertook the actions necessary to enter into the contractual relation in question in Poland. Based on this provision, such a plaintiff can sue a defendant in Polish courts

[7] Decision of the Polish Constitutional Tribunal of 2 December 2008, K 37/07.

[8] Act of 17 November 1964 – Code of Civil Procedure, J. of L. No. 43, pos. 296, with subsequent amendments.

[9] Modification of Part Four of the C. C. P. took place in the Act of 5 December 2008, J. of L. No. 234, pos. 1571, which took effect on 1 July 2009.

[10] It should be noted, however, that when the defendant is domiciled or has its seat in Poland, the provisions of Brussels I are applied. Therefore in this report further discussion of the provisions of the C. C. P. will refer to defendants who are not domiciled in or have seats in any EU member state but habitually reside in Poland.

even if the defendant is not habitual resident in Poland. In addition § 2 of Art. 1103[6] of the C. C. P. expands the jurisdiction of Polish courts to include matters where the party contracting with a consumer has an establishment or branch in Poland and the contract was concluded as part of the activities of said establishment or branch.[11] It would appear that this jurisdiction would extend to matters in dispute even if the plaintiff (consumer) is not domiciled in Poland and does not have his or her habitual residence there.

On the other hand the formulation of Art. 1103 [7] of the C. C. P., which lists other connecting factors for alternative jurisdiction of Polish courts (for example, place where an obligation has arisen, place of performance of a contract, place where object of the dispute is situated) while at the same time excluding its application from the matters mentioned in Art. 1103 [6], would indicate that parties to consumer contract disputes in adversary proceedings cannot rely on the connecting factors listed in Art. 1103 [7] to claim jurisdiction for Polish courts. This means that the consumer in a contractual dispute can only be summoned to take part in a Polish court proceeding on the basis of Art. 1103 of the C. C. P. This refers to consumers who are not domiciled in any EU country, but reside habitually in Poland.

Based on the above, it may be said that the provisions of the C. C. P. relating to jurisdiction protect the consumer to the same extent, and in some instances even greater, than the provisions of the Brussels I Regulation. In matters arising from consumer contracts a consumer may commence an action in Polish courts against a defendant who is not domiciled in the EU without regard to the type of consumer contract and regardless of whether the defendant carried out business activities in Poland or directed such activities to Poland. It is sufficient that the consumer undertook in Poland the actions necessary to enter into the contractual relationship. In addition, under § 1 of Art. 1103 [6] of the C. C. P. the connection of the consumer with Poland may be weaker than that required by Art. 16 § 2 of the Brussels I Regulation, inasmuch as the consumer need not be domiciled in Poland; it is sufficient that he or she have habitual residence there. In situations where consumers are defendants, the provisions of the C. C. P. grants them the similar protection as those of the Brussels I Regulation; a consumer may be summoned as a defendant in a Polish consumer action only if he or she has habitual residence in Poland.[12]

The provisions of the C. C. P. discussed above are applied only to adversary proceedings arising out of a consumer contract. They do not apply to consumers involved in a dispute arising from a unilateral legal act (for example an offer

[11] According to the provision such a party is to be treated as an entity having its domicile or seat in Poland (known as 'fictitious domicile').

[12] If a consumer defendant has his or her domicile in Poland, the jurisdiction of the Polish court is established by the Regulation Brussels I.

directed to a consumer), which in practice would not seem to be a significant limitation. On the other hand the provisions discussed are significantly limited by the subsequent provisions of Art. 1103 [8] of the C. C. P., which provides for the exclusive jurisdiction of Polish courts in disputes involving rights *in rem* in, or a possession of real property located in Poland, as well as disputes arising from lease, tenancy, or other contracts for use of such real property, with the exception of disputes over rent. In such disputes the consumer nature of the contract is irrelevant and the jurisdiction of Polish courts is based exclusively on the location of the property in question.

The range and scope of personal application of the provisions concerning Polish courts' jurisdiction in consumer disputes depends on the definition of a 'consumer', which should be based on Polish law.[13] Whether a party to a given contractual dispute is a consumer is determined by the specific provisions regulating types of consumer transactions or various legal issues related to consumer transactions. In the event no specific norm is applicable, Art. 22 [1] of the Civil Code (C. C.)[14] is applied. This Art. provides that "a consumer is a natural person engaging in a legal act which is not directly related to his or her business or professional activities." This general formulation first appeared in the in 2003, and its similarity to § 13 B. G. B. should be noted. While no Polish court decisions have been handed down to date interpreting this provision, it has been commented on in the legal literature, where it has been observed that the definition is paradoxically both too broad and too narrow. On one hand the limitation of the class of consumers to natural persons raises doubts, as it denies consumer protections to legal persons, such as small associations registered to carry out non-business activities and foundations of a charitable nature, solely based on the fact they act as legal persons and not natural persons.[15] On the other hand the formulation contained in Art. 22 [1] of the C. C. is certainly too broad in that it does not define those persons who may be party to a legal act concluded by a consumer. It cannot be reasonably posited that someone may be considered to be a consumer in relation to another person who is not an entrepreneur. Thus a majority of legal scholars maintain that a literal interpretation of Art. 22 [1] of the C. C. fails to meet the aims for which the provision is intended and thus it is necessary to fall back on a teleological interpretation to restrict the definition of 'consumer' to someone who enters into a contractual relationship

[13] In legal doctrine the qualification based on lex fori dominates in concepts associated with international civil procedural rules – cf. T. E r e c i ń s k i, [in:] T. E r e c i ń s k i, J. C i s z e w s k i, *Międzynarodowe postępowanie cywilne* [International Civil Procedure], Warszawa 2000, p. 20.

[14] Act of 23 April 1964 – Civil Code, J. of L. No. 16, pos. 93, together with subsequent amendments.

[15] Cf. T. P a j o r, [in:] *Kodeks cywilny, część ogólna – komentarz* [The Civil Code, General Part – Commentary], ed. M. Pyziak-Szafnicka, Warszawa 2009, p. 227–229.

with an entrepreneur.[16] In light of this proposed solution it is reasonable to assume that, in determining the jurisdiction of Polish courts the provisions of Art. 1103 [6] of the C. C. P. will be limited to contracts between consumers and entrepreneurs.

On the other hand when a transaction is of a mixed nature, partly private and partly professional, it will be a sufficient basis in Art. 22 [1] of the C. C. to conclude that the transaction is of a consumer character if it is proved that the prevailing aim of the transaction or intended use of the product or service was for private purposes. It would also seem that on the basis of Art. 22 [1] of the C. C. a person who, aiming to undertake business activities in the future, enters into a contract with an entrepreneur would still be a consumer inasmuch as the relationship between the transaction and his or her business or professional activities would be as yet indirect.

It's obvious that the provisions regarding jurisdiction are referred to primarily in cases involving international transactions. It should be noted however that the question how closely such transactions are connected with foreign states is principally irrelevant, inasmuch as it is the existence of a connecting factor(s) with Poland that is determinative. Thus the issue of the international character of consumer transactions will be primarily considered below, in discussions concerning the law to be applied to consumer disputes.

The mandatory nature of the Polish jurisdictional rules do not preclude the possibility of entering into agreements concerning jurisdiction, which the new provisions of the C. C. P. permit on a larger scale than previously. With certain exceptions it is possible to enter into an agreement conferring jurisdiction to Polish courts (Art. 1104 of the C.C. P) or excluding Polish courts from jurisdiction in favor of the courts of a foreign state (Art. 1105 of the C. C. P.). The general conditions permitting such agreements are the following: the dispute must arise out of a particular legal relationship, be capable of judicial resolution in adversary proceedings, be of a material character, and not belong to the exclusive jurisdiction (according to Polish law) of a state excluded from such jurisdiction by the agreement (Art. 1104 § 3 and Art. 1105 § 2 pt. 1 of the C. C. P.). In addition, according to the provisions of both cited Art.s the parties' agreement must be in writing.[17] However § 2 of Art. 1104 of the C. C. P. provides that the conferring of jurisdiction to Polish courts and, accordingly, the annulment of an agreement excluding Polish courts from jurisdiction (Art. 1105 § 6 of the C. C. P.) may occur impliedly through the commencement of litigation on the merits without the defendant raising the issue of lack of jurisdiction.

[16] *Ibidem* and the literature cited therein.

[17] Art. 1105 [1] of the C. C. P. liberalizes this requirement, indicating that for an accomplishment of the written form it is sufficient to exchange declarations of intent by a means of distance communication which allows for the establishments of their contents, or to point in a basic written contract to the document which contains a relevant clause on jurisdiction.

The parties to a consumer contract may, within the framework above, agree without limitation to litigate a matter in Polish courts. Existing legislation does not preclude the use of such clauses in consumer contracts, even where the consumer's domicile or place of habitual residence is outside Poland. On the other hand significant restrictions are added to the requirements for concluding an agreement excluding Polish courts from jurisdiction. Art. 1105 § 2 pt. 3 of the C. C. P. stipulates that such an agreement may not involve a dispute which arises or may arise out of a consumer contract when the consumer is domiciled or has his or her place of habitual residence in Poland.[18] At the same time § 4 of Art. 1105 of the C. C. P. allows the parties to conclude an agreement whereby a consumer may bring an action in the courts of a foreign jurisdiction. In effect this means that clauses concerning jurisdiction which increase a consumer's field of maneuver are permissible. This corresponds to the provision of Art. 385 [3] pt. 23 of the C. C., which provides that consumer contract clauses depriving Polish courts of jurisdiction shall, in case of doubt, be considered to be unfair contract terms.

Thus it can be seen that contractual clauses with regard to jurisdiction cannot deny a consumer a legal privilege concerning the jurisdiction of his or her nearby court. This protection however only concerns consumers who are domiciled or have their places of habitual residence in Poland, which is not a wholly satisfactory solution.[19] On the other hand the protection extends further than the parallel provisions contained in Art. 17 of the Brussels I Regulation, inasmuch as this Regulation permits agreements whereby a consumer waives local jurisdiction if such an agreement is entered into after a dispute has arisen, something not permissible under Polish law.

4. Recognition and enforcement of foreign judgments in consumer matters

The issue of recognition and enforcement of foreign judgments is controlled by Book Three of Part Four of the C. C. P.[20] These provisions have also

[18] Art. 1105 § 2 of the C. C. P. does not permit the exclusion of jurisdiction of Polish courts in labor law cases either (unless an agreement in this respect was reached after a dispute had arisen), nor in insurance cases.

[19] Especially in light of the decision of the Polish Constitutional Tribunal emphasizing that Art. 76 of the Constitution provides no basis for restricting the rights of foreign consumers (see note 6). In addition it should be noted that Art. 1103 [7] of the C. C. P. provides that in disputes arising from a consumer contract no consumer who does not have at least habitual residence in Poland may be sued in Polish courts on the basis of other connecting factors (for example place of origin or performance of an obligation or place where property of the defendant is located). And in accordance with Art. 1104 of the C. C. P. a consumer with no connection whatever with Poland can be sued in Polish courts on the sole basis that he or she consented to the agreement conferring jurisdiction to Polish courts.

[20] On the condition that no EU law or norms arising from conventions are applicable.

undergone substantial transformation and the revised version has been in effect since 1 July 2009. There are no provisions which are specifically applicable to consumer transactions, hence the recognition and enforcement of judgments rendered in consumer matters are subject to the same rules as the recognition and enforcement of other judgments. In light of Art. 1145 of the C. C. P. the decisions of foreign courts in civil matters are recognized as legally binding by virtue of the law, unless the provisions of Art. 1146 of the C. C. P. provide otherwise. Together these provisions establish that there is no need to apply for a decision recognizing foreign judgments. On the other hand, any party affected thereby has the right to apply to the court for a ruling whether such judgment is recognized or not (Art. 1148 § 1 of the C. C. P.). Only when such a proceeding has been commenced will the court examine whether the provisions of Art. 1146 prohibit the recognition of such a foreign judgment. Reasons for non-recognition include: lack of validity in law of a judgment in the state where the judgment was rendered; exclusive jurisdiction of Polish courts in the matter under consideration; failure to provide the defendant an opportunity to defend; pending litigation of a case arising from the same cause of action in a Polish court (lis pendens); the incompatibility of the foreign judgment with an earlier valid judgment given in the same case by a Polish or by a foreign court, if its judgment fulfills the requirements of recognition in Poland; or the failure of the foreign judgment in question to comport with the fundamental principles of the Polish legal system (public order clause). It should be noted that the new provisions have eliminated two reasons previously set forth for the non-recognition of foreign judgments, namely lack of reciprocity, and failure of the foreign court to apply Polish law in an issue where such law ought to have been applied.

A significant liberalization has also taken place with regard to the enforcement of foreign judgments. As with recognition, the requirements of reciprocity and the application of Polish law are no longer made litmus tests. The procedures for enforcement have also been simplified. In accordance with Art. 1150 and 1151 of the C. C. P., the enforceability of a foreign judgment is examined, with the court checking to see that it is enforceable in the state where it was rendered and that none of the provisions of Art. 1146 of the C. C. P. would render it unenforceable in Poland. Upon affirmation of its enforceability, an enforcement order is entered and execution may proceed in accordance with Polish law.

5. Law applicable to international consumers' transactions

Polish private international law (P. I. L) gives wide latitude to the parties to contractual obligations to choose the law applicable to their relations.[21] There are

[21] Act of 12 November 1965 – Private International Law, J. of L. No. 46, pos. 290 with subsequent amendments. Since the Rome Convention on the law applicable to contractual obligations

few restrictions. Art. 25 § 1 of the P. I. L. does provide that the law chosen must be "connected with the obligation," but the opinion expressed in prevailing legal doctrine is that this requirement should be broadly interpreted so as to also take into account the particular interests of the parties.[22] It is however widely agreed that the law chosen must be that of a particular state legal system. If the parties refer to rules which are not part of a state legal system, it is assumed that such rules are not the law applicable to a contract, but rather part of the contractual agreement of the parties. Art. 25 § 2 of the P. I. L. does indeed provide some restrictions with regard to obligations pertaining to real property, stipulating that the law applicable to such obligations must be the law of the state where the property is located.

It should be stressed that the freedom to choose the applicable law granted in Art. 25 § 1 of the P. I. L. relates only to contracts of an international character. This is clear from Art. 1 of the P. I. L., which provides that "This act establishes the law governing international relationships..." The prevailing legal literature explains that legal relationships can be deemed 'international' if they involve a situation connected with the law of more than one state.[23] The question remains, however, what that connection must be. As regards contractual obligations, there is no unanimity of view,[24] although there is an observable tendency to view the necessary connection in broad terms. It is generally agreed that the connection may be of an indirect nature (for example, a purely internal contract may be considered as an international one if it is commercially connected with a contract governed by foreign law).[25] On the other hand it is agreed that the choice of a foreign law for a contract connected only with one state is not sufficient to give the contractual relation an international character.

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has been applicable in Poland since 22 January 2008 and Rome I since 17 December 2009 – the significance of the rules contained in the P. I. L. of 1965 has undergone significant restriction. Nevertheless they are applicable in matters not covered by EU law. In the years 2003–2006 a new P. I. L. act was drafted and is currently under consideration by the parliament.

[22] Cf. for example J. S k ą p s k i, "Umowa licencyjna w polskim prawie prywatnym międzynarodowym" [Licensing Agreements in Polish private international law], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* 1973, Vol. 1, p. 372; M. T o m a s z e w s k i, "Zakres swobody stron w wyborze prawa właściwego dla zobowiązań umownych" [Freedom of contracting parties to choose applicable law to contractual obligations], *Studia Iuridica* 1977, Vol. 6, p. 72; J. P a z d a n, *Wybrane zagadnienia prawne eksportu budownictwa* [Selected Legal Issues regarding construction exports], Katowice 1986, p. 70. For a contrary view however, see M. P a z d a n, *Prawo prywatne międzynarodowe* [Private international law], 12th ed., Warszawa 2009, p. 143–144, who insists that the connection must arise from existing objective circumstances.

[23] See M. P a z d a n, *Prawo prywatne międzynarodowe*, p. 19.

[24] Cf. W. P o p i o ł e k, "W sprawie ograniczeń kolizyjnoprawnego wyboru prawa w polskiej ustawie o prawie prywatnym międzynarodowym" [Limitations on choice of law by the parties in the Polish Act on Private International Law], [in:] *Essays in Honor of Józef Skąpski*, Kraków 1994, p. 343–347.

[25] *Ibidem*, p. 346.

In the event the parties to an international contract have not chosen a law, the P. I. L. indicates the applicable law using the cascading approach. In the first instance the applicable law is that of the state where, at the time of entering into the contract, the both parties had their domicile or seat (Art. 26 of the P. I. L.).[26] If this connecting factor is not present, the applicable law is that of the state where the party determined according to Art. 27 of the P. I. L. has its domicile or seat. In most instances this will be the party which is required to provide the characteristic (non-monetary) performance. If a party entered into the contract within the scope of an enterprise's activity, rather than applying the law of the state where the domicile or seat of the party is located, the law of the state where the seat of the enterprise is situated will be applied (Art. 27 § 3 of the P. I. L). The final rung of the cascade is set forth in Art. 29 of the P. I. L., providing that in the event the previously delineated connecting factors are not present, the applicable law shall be that of the state where the contract was concluded.

The conflict of law rules stated above apply to consumer contracts as well, and the parties to such a contract may choose the applicable law based on the same principles.[27] In the event no applicable law is chosen by the parties, generally the applicable law is that of the business seat or domicile of the entrepreneur, being the party owing the characteristic performance. The P. I. L. does not put any additional limitations on choice of law where one of the parties is the 'weaker party', either as a consumer or worker.

Restrictions do exist however, and they derive from the collection of special conflict of law rules contained in legislative acts implementing EU consumer directives. As is widely known, since 1993 a number of directives have obligated the member states to introduce such rules which will ensure that a consumer will not lose the benefits of EU consumer protection law via the choice of law of a third, non-EU state, if the contract is closely connected with the territory of the EU.[28] It is worth noting that the provisions of these directives, as well as the national rules enacted in accordance therewith, take precedence over the provisions of the Rome Convention (Art. 20).[29] In this way the EU harmonized law should secure consumers against the application of foreign, less advantageous, law.

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[26] I am omitting here Art. 28 of the P. I. L. concerning market exchange contracts and contracts made at public fairs, as these matters are of little importance to consumer transactions.

[27] Subject to the reservation made in note 21.

[28] For example Art. 6 § 2 of Directive No. 93/13/EC concerning unfair terms in consumer contracts, Art. 12 § 2 of Directive No. 97/7/EC concerning protection of consumers in respect of distance contracts, Art. 7 § 2 of Directive No. 99/44/EC concerning the sale of consumer goods and associated guarantees, and Art. 12 § 2 of Directive No. 2002/65/EC concerning the distance marketing of consumer financial services.

[29] This is also reserved by Art. 23 of the Regulation Rome I.

The implementation of the above-mentioned EU directives into national law has been the source of many difficulties for a number of EU member states, including Poland.[30] It should be noted that Poland accomplished most of its harmonization legislation in this area prior to its accession to the EU. In most instances the relevant conflict of law rules took the same form. They provide that consumer rights established in the implementing law cannot be waived or limited by agreement, including agreement on choice of foreign law.[31] It should be emphasized that these rules do not exclude or limit the parties' right to choose the applicable law, but do limit the application of the law chosen such that lower standards of consumer protection will not be applied.[32] The conflict of law rules thus expressed are of a unilateral nature, providing that in the area of consumer protection Polish minimal standards will be applied. In this way Polish consumer protection law is elevated into an international standard, and indirectly EU consumer protection, as delineated in the directives, is maintained. One may conclude that the Polish legislation implementing the EU directives has been performed, at least partially, in the form of internationally mandatory rules.[33] The function of these rules is to control and correct the law chosen by the parties. They may thus be deemed to be internationally semi-mandatory rules.[34] They are not applied if the law chosen secures for the consumer protection equal to or more advantageous than that ensured by the implementing legislation. This

[30] For a critical view of this process, see P. M o s t o w i k, "Kolizyjnoprawne problemy dostosowania prawa polskiego do dyrektyw Unii Europejskiej", cz. I [Conflict of law problems with the adaptation of Polish law to EU Directives], Part I, *Rejent* 2002, No. 7, p. 121 and following; M. L i j o w s k a, "O kolizyjnoprawnych problemach dostosowania prawa polskiego do europejskiego prawa ochrony konsumenta" [Conflict of law problems with the adaptation of Polish law to EU consumer protection law], *Kwartalnik Prawa Prywatnego* 2004, No. 1, p. 169.

[31] Cf. the Art. 17 of the Act of 2 March 2000 concerning the protection of selected consumer rights and liability for harm from defective products, J. of L. No. 22, pos. 271 with subsequent amendments (this provision concerns contracts negotiated away from business premises, distance contracts, including financial services contracts); Art. 17 of the Act of 20 July 2001 concerning consumer credit, J. of L. No. 100, pos. 1081, together with subsequent amendments; and Art. 11 of the Act of 27 July 2002 concerning specific conditions applicable to consumer sale contracts, J. of L. No. 141, pos. 1176 together with subsequent amendments. On the other hand Polish legislator has not implemented the provisions of Art. 6 § 2 of Directive No. 93/13 concerning unfair contract terms.

[32] See M. P a z d a n, *Prawo prywatne międzynarodowe*, p. 148.

[33] See M. M a t a c z y ń s k i, "Przepisy wymuszające swoje zastosowanie w polskim prawie konsumenckim" [Overriding mandatory provisions in Polish consumer law], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2003, No. 3, p. 41; B. F u c h s, *Statut kontraktowy a przepisy wymuszające swoje zastosowanie* [Law applicable to a contract and overriding mandatory provisions], Katowice 2003, p. 72, 79, 187.

[34] The semi-mandatory nature of these rules is mentioned by P. M o s t o w i k, "Kolizyjnoprawne problemy dostosowania prawa polskiego do dyrektyw Unii Europejskiej, cz. II", *Rejent* 2002, No. 9, p. 75, and also by M. L i j o w s k a, *op. cit*., p. 160–164.

does not mean however that they lose their force as internationally mandatory rules, it only assumes that the standards guaranteed by them may be realized through the application of other law – in this case the foreign law chosen by the parties.[35]

The negative side of the conflict of law rules discussed above is that they do not protect consumers in instances where the applicable law has not been chosen and the contract is governed by foreign law which is objectively designated.[36] In addition they do not specify how to identify the range of consumer contracts to which the corrective application of Polish law is mandatory.[37] It seems clear that such application will not be required to contracts where the law chosen is that of an EU member state, since by definition the EU standards of consumer protection must be assumed to be in place in an EU member state.[38] In all remaining cases however, the scope of application of the above-mentioned conflict of law rules raises doubts.

Some legal scholars propose that these rules are to be applied only in those instances where, if the parties do not choose the applicable law, Polish law will be applied to the contract.[39] One may also defend the position however, that these rules would be applied, being conflict of law rules, to all consumer

[35] M. L i j o w s k a, *op. cit*., p. 163–164 is of a different opinion as well as M. Cz e p e l a k, "Zagadnienia kolizyjne ochrony konsumenta" [Conflict of law issues of the consumer protection], [in:] *Europejskie prawo konsumenckie a prawo polskie* [European consumer law and Polish law], eds. E. Nowińska, P. Cybula, Kraków 2005, p. 517.

[36] An exception to this approach is Art. 10 of the Act of 13 July 2000 concerning timesharing, J. of L. No. 74, pos. 855, together with subsequent amendments. If a contract (legal relationship) is governed by foreign law, and that law does not secure to the purchaser the protections contained in the implementing statute, the statutory provisions are applied, when (a) the building or premises are located in Poland, or (b) the purchaser is domiciled in Poland, or (c) the contract was concluded as the result of an offer made, or a prospectus handed in by an entrepreneur in Poland, or (d) the contract was concluded as the result of an offer made by the purchaser to the entrepreneur in Poland.

[37] In an exception, such a specification is provided by the Act of 29 August 1997 on tourist services, unified text J. of L. (2004), No. 223, pos. 2268, together with subsequent amendments. Art. 11b § 1 of this Act stipulates that the liability of an organizer of tourism for the non-performance or improper performance of the contract for the provision of tourist services cannot be limited or waived, even by the choice of foreign law. At the same time it results from Art. 1 of the Act that its provisions are to be applied when (a) the tourist services are provided in Poland, or (b) the contract for the provision of tourist services was concluded in Poland.

[38] Such a requirement may arise however if the EU member state whose law was chosen by the parties has failed to timely implement a directive or has implemented a directive in such a way as to fail to secure the required level of protection.

[39] See M. P a z d a n, *Prawo prywatne międzynarodowe*, p. 148. Based on Art.s 26 and 27 of the P. I. L. this would mainly concern contracts where the contracting entrepreneur had either a seat or domicile in Poland. On the other hand the provisions of Art. 5§ 3 of the Rome Convention (Art. 6 § 1 of the Regulation Rome I) provide that this would also apply to contracts where the consumer had his or her habitual residence in Poland.

contracts governed by foreign law chosen by the parties, where Polish courts have jurisdiction.[40] Neither of the aforementioned positions is wholly satisfactory.[41] Corrective application of the Polish protective laws should concern – in the context of the directives from which they originated – contracts connected not only with Poland but with the territory of any EU member state. Thus one may propose that the current approach to this problem be modified.[42] With regard to consumer contracts, a conflict of law rule should be formulated which would determine the scope of necessary (corrective) application of Polish laws implementing the EU protective standards. Such an approach would be consistent with the system of consumer protection envisioned in the multilateral choice of law rules set forth in Art. 5 of the Rome Convention as well as Art. 6 of the Regulation Rome I. Only by combining these two methods of regulation, multilateral and unilateral, can the interests of consumers be fully protected on the level of private international law. The multilateral conflict of law rules give protection against the law of a state which is less advantageous than that of the state in which a consumer has his or her habitual residence, and they are applicable to any consumer contract falling within the jurisdiction of a court of an EU member state. At the same time the unilateral conflict of law rule would guarantee to the consumer involved in a proceeding in Polish courts the protection of Polish law against less-advantageous treatment under the law of a foreign non-EU state, but only for contracts closely connected with EU territory.

The term 'close connection with EU territory' needs to be defined. It would seem obvious that, with regard to the main goal of substantive rules in question here, the establishment of a close connection with EU territory would take into account, in the first instance, the habitual residence of the consumer. Undoubtedly the lawgivers, both at the EU and national levels, are interested above all in providing protections for consumers residing in the EU member states. Habitual residence in the EU territory would not suffice to justify the application of EU protection standards however if the professional contracting party had no reason to foresee their application. Therefore it is necessary to cumulatively take into account the connections of the professional contracting party with the EU. In particular, the current formulation justifying a sufficient connection if the entrepreneur was 'directing by any means' economic or professional activities to

[40] See P. M o s t o w i k, *op. cit.* (note 30), p. 124 and M. C z e p e l a k, *op. cit.*, p. 516. In light of the new Polish provisions regarding jurisdiction this would concern contracts where the contracting consumer was domiciled or had his or her habitual residence in Poland or in which the parties agreed to confer jurisdiction to Polish courts (in writing or impliedly, through the commencement of litigation on the merits – Art. 1104 § 1 and 2 of the C. C. P.).

[41] See M. L i j o w s k a, *op. cit.*, p. 154–156.

[42] See T. P a j o r, "O zagadnieniach ochrony konsumenta w prawie prywatnym międzynarodowym" [Issues of consumer protection in private international law], [in:] *Essays in Honor of M. Pazdan*, Kraków 2005, p. 260.

the member state of the consumer or to any other EU member state[43] would seem appropriate to the proposal or conclusion of contracts via electronic means.

The question remains whether EU legal protections for consumers should be available to consumers residing outside the EU. One could posit that the extension of such protections to non-EU residents should not be considered as excessive altruism on the part of the EU member states, inasmuch as the cohesive functioning of the EU internal market would be served by having the same level of protection available to all consumers, including consumers from outside the EU, so long as their contracts would have the requisite close connection with the EU territory. Such connection would seem to exist if the professional contracting party (entrepreneur) had his or her habitual residence or seat in EU territory, and the contract was concluded and performed in the EU, or was meant to be performed there.

The comments above would seem to permit the drafting of a legal rule establishing the requisite 'close connection' which would justify the application of Polish law in the implementation of EU consumer protection standards. Such a rule should provide for the presumption of a 'close connection' between a consumer contract and the EU territory where:

– the consumer is a habitual resident of a member state and the non-consumer party by any means directs business or professional activities to that or any other member state, and the contract in question falls within the scope of such activities; or

– the non-consumer party has its seat or habitual residence in an EU member state and the contract with the consumer was concluded in that or another EU member state and performed, or meant to be performed, there.[44]

6. Alternative methods for settlement of interational consumer disputes

In essence the Polish Code of Civil Procedure places no special restrictions or limitations on the resolution of international consumer disputes by arbitration. None of the provisions of Part Five of the C. C. P. concerning arbitration exclude such international disputes there from. Art. 1157 of the C. C. P. provides that the parties to a dispute may submit to arbitration any dispute of a material or non-material nature which may be subject to an in-court settlement. In accordance with Art. 1161 § 1 of the C. C. P. parties wishing to submit their dispute to arbitration should conclude an agreement which sets forth the matter in dispute or the legal relationship out of which the dispute arises or could arise. Art. 1162

[43] See Art. 15 § 1 pt. c of the Regulation Brussels I, as well as Art. 6 § 1 pt. b of the Regulation Rome I.

[44] See T. P a j o r, "O zagadnieniach…", p. 261.

§ 1 of the C. C. P. provides that the agreement should be in writing, but § 2 of the Article relaxes the requirements concerning accomplishment of the form, by reference to Art. 1105 [1] of the C. C. P. regarding agreements on jurisdiction.[45] In accordance with Art. 1194 § 1 of the C. C. P. an arbitral tribunal will resolve a dispute by applying the law applicable to the relationship in question or, if specifically authorized by the parties, according to general principles of law or equity.

However, Art. 385 [3] pt. 23 of the C. C. places some restrictions on clauses submitting a consumer dispute to arbitration, Polish or foreign. According to this provision, in the event of doubt such a clause is deemed to be an unfair contract term. It should be noted that this provision offers greater protection to the consumer than the parallel provision contained in pt. q of the annex to EU Directive No. 93/13, inasmuch as the latter refers only to arbitration not covered by legal provisions. In a recent Polish Supreme Court decision, the Court held that an agreement to submit disputes to a US arbitral tribunal and to apply Illinois law, concluded in an on-line contract between a consumer residing in Poland and an entrepreneur with its business seat in the USA, constituted an unfair contract term.[46] Because the agreement in question was found to be closely connected with the territory of the EU, the Court concluded that, despite the failure to implement Art. 6 § 2 of Directive No. 93/13/EC into the Polish legal system, this provision of the Directive could be directly applied to decide the case. It thus decided that since the arbitration clause was, in light of the Directive, an unfair contract term, there was no authority for sending the dispute to arbitration based on Art. II § 3 of the New York Convention of 1958.[47] Although the Court did not explicitly state so in their reasoning, it seems reasonable to assume that the Court considered the provisions of the Polish Civil Code implementing the said Directive as Community mandatory rules, following in that respect the reasoning of the Court of Justice of the European Communities in the Ingmar case.[48]

On the other hand agreements to submit a dispute to a permanent court for arbitration of consumer disputes should be treated differently. The network of such courts has been in existence in Poland since 1991 and currently is comprised of 31 courts established on the basis of Art. 37 of the Law of 15 December 2000 concerning Trade Inspection,[49] as well as the executive regulations

[45] See note 17.

[46] Decision of the Supreme Court of 22 February 2007, IV CSK 200/06, OSP 2008/10/110, with a critical commentary by W. Kocot.

[47] See also T. Ereciński, K. Weitz, *Sąd arbitrażowy* [Arbitration Court], Warszawa 2008, p. 157.

[48] Judgment of the ECJ of 9 November 2000 in case No. C-381/98, O. J. 2000, p. I-9305.

[49] Unified text, J. of L. 2009, No. 151, pos. 1219.

issued by the Ministry of Justice on 21 September 2001.[50] These rules implement the policies of EC Commission recommendation No. 98/257 of 30 March 1998 concerning out of court settlements of consumer disputes. According to these rules, arbitration proceedings may be commenced only if both sides agree thereto (with such agreement generally occurring after the arisal of a dispute). If either party is unsatisfied with a decision of a consumer arbitration court, they may appeal the decision to a Polish state court in accordance with Art. 1205 § 1 of the C. C. P. This paragraph is mandatory, and the parties to a dispute may not agree to waive the right of appeal from a decision of the arbitration court.[51]

In addition to the general system of the above-mentioned arbitration courts, there are a number of particular consumer arbitration courts established in various sectors, such as bank services, the insurance industry, etc.

Another alternative method for resolving consumer disputes, applicable to international disputes as well, is mediation. The regulations governing this process were incorporated into the C. C. P. in 2005. Art. 183 [1] of the C. C. P. provides that mediation is voluntary and may be engaged in prior to as well as during litigation of a dispute, based either on the agreement of the parties or a court order directing the parties to engage therein. Mediation proceedings are not public (Art. 183 [4] of the C. C. P.) and are based on the principle of neutrality of the mediator (Art. 183 [3] of the C. C. P.). According to Art. 183 [15] of the C. C. P. a settlement reached before a mediator is, when confirmed by the court, the functional equivalent of a settlement reached in court.

It should be noted that in addition to mediation all civil matters which the law permits to be settled in court may be concluded by the same even before the filing of a complaint (Art. 184 of the C. C. P.). In addition the court should encourage the parties to reach a settlement during the course of proceedings, and in particular during the initial legal proceeding, after learning the preliminary positions of the parties (Art. 223 § 1 of the C. C. P.).

7. Specific procedures in consumer claims

The classification "a consumer protection case" first appeared in the Polish C. C. P. in 1985 in connection with the participation of social organizations in such cases. Currently social organizations, whose charters do not permit them to engage in economic activities (Art. 8 of the C. C. P.), may commence consumer protection proceedings and take part in the same at any stage (Art. 61 § 1 i 2 of the C. C. P.), with their role in the proceedings governed by the appropriate application of the provisions concerning public prosecutors (Art. 62 of the

[50] J. of L. No. 113, pos. 1214.

[51] See T. Ereciński, K. Weitz, *Sąd arbitrażowy*, p. 390.

C. C. P.). Even a social organization which isn't a party to the proceedings is entitled to present to the court their views on matters deemed essential to the case. The district or urban consumer advocates are also entitled to participate in consumer cases on a basis similar to that described above (Art. 63 § 3 and 4 of the C. C. P.). Both the social organizations as well as the consumer advocates are statutorily exempt from court costs.[52]

Since the year 2000, disputes arising from consumer transactions, including international transactions, may be resolved by Polish courts using a separate simplified procedure. Art. 505 [1] pt. 1 of the C. C. P. provides that this procedure may be applied if the contractual claim involved in the case does not exceed 10 000 PLN (approximately 2500 Euro), and in matters arising from a legal guarantee or contractual guarantee or from a lack of conformity of consumer goods with the contract, if the value of the product in question does not exceed 10 000 PLN. The complaint and other main court documents employed in such procedures are based on official forms. Court costs are significantly reduced (ranging from 30–300 PLN). The ability to combine cumulative claims, raise counterclaims, or seek set-offs are restricted, and amendment of the complaint or joining or substitution of plaintiffs is not permitted. Art. 505 [6] § 3 of the C. C. P. allows the court, in the event that strict calculation of claims is impossible or extremely difficult, to enter judgment based on an estimated assessment of the same, with taking into account all the surrounding circumstances.

It should be noted that, commencing on 1 July 2009, a separate Section VII has been added to the C. C. P. regarding European procedures in cross-border cases and, as part of it, Art. 505 [21–27] on the European small claims procedure supplementing the provisions of EC Regulation No. 861/2007 of 11 July 2007 (in effect since 1 January 2009). According to these provisions, where one of the parties to a consumer dispute is domiciled or has his or her place of habitual residence in another EU member state, the proceedings need not be governed by the provisions of the C. C. P. concerning simplified procedure, but rather by the European small claims procedure.[53] Section VII also includes provisions incorporating the European order for payment procedure (Art. 505 [15–20] of the C. C. P.).

Beginning on 1 January 2010 the provisions of Art. 505 [28–37] of the C. C. P. will take effect, allowing for the introduction of electronic summary procedure. This type of separate procedure primarily concerns disputes over monetary claims (Art. 498 § 1 of the C. C. P.) where the facts contained in the complaint

[52] Art. 96 § 1 pts. 6, 7 and 11 of the Act of 28 July 2005 concerning court costs in civil cases, J. of L. No. 167, pos. 1398 together with subsequent amendments.

[53] However Art. 505 [27] of the C. C. P. provides that some provisions concerning simplified procedure are to be applied in the European small claims procedure.

are beyond doubt and satisfaction of the claim is not conditioned on mutual performance (Art. 499 pt. 2 and 3 of the C. C. P.). The significance of this type of procedure in international transactions will be however limited by the fact that a court order to pay may not be issued if service cannot be made on the defendant within the country (Art. 499 pt. 4 of the C. C. P.).

8. Procedural tools available for international consumer disputes

Class action suits are not presently possible in under existing Polish civil procedures.[54] On the other hand in certain instances where collective consumer interests are violated procedures may be implemented which resemble *actio popularis*. In particular it is possible to commence a separate proceeding to have a provision in a standard form contract declared an unfair contract term.[55] Jurisdiction over this type of proceeding belongs to the Regional Court in Warsaw – court for the protection of competition and consumers (Art. 479 [36] of the C. C. P.). The plaintiff in such an action may be anyone to whom an offer from a defendant is directed proposing a contract which, in the opinion of the plaintiff, contains an unfair contract term (Art. 479 [38] § 1 of the C. C. P.). This means that a foreign consumer may also be authorized to bring such an action if a defendant directed its offer outside Poland. In addition, foreign organization registered on the list of organizations entitled in the EU may commence such an action if the standard form contract distributed in Poland is deemed to threaten the interests of consumers in another EU member state where the organization has its seat and the aim of the organization activities encompass the bringing of such an action (Art. 479 [38] § 2 of the C. C. P.).

In cases where an illegal practice threatens the collective interests of consumers (for example misleading advertising) special administrative-judicial procedures may be implemented based on the Law of 16 February 2007 concerning protection of competition and consumers [P. C. C.].[56] In the first phase such an action is initiated according to the provisions of the Code of Administrative Procedure (Art. 83 of the P. C. C.)[57] and may conclude with a cease and desist decision issued by the President of the Office of Competition and Consumer Protection. In this decision the President may also list the means to be undertaken to remove effects caused by the existence of a prohibited practice, in

[54] It should be noted that an act concerning class action suits was drafted last year and is currently under consideration by the parliament.

[55] In 2000 Polish legislator added provisions to the C. C. P. implementing the provisions of Art. 7 of Directive 93/13/EC concerning unfair terms in consumer contracts.

[56] J. of L. No. 50, pos. 331 together with subsequent amendments.

[57] However in matters of evidence the provisions of the C. C. P. are applied (Art. 84 of the P. C. C.).

particular by requiring the defendant to issue a statement with an appropriate content and in an appropriate form, or the President may order publication of his or her decision (Art. 26 of the P. C. C.). Proceedings are commenced ex-officio, but any person may inform the President in writing about the existence of practices raising suspicion that they violate collective consumer interests (Art. 100 of the P. C. C.). Foreign organizations registered on the EU list may also report to the President practices which take place in Poland but which such an organization feels violate the collective interests of consumers in another EU member state in which said organization has its seat (Art. 100 § 2 of the P. C. C.). Proceedings commenced are required to be carried out within two months, although in the case of particularly complicated matters this term may be extended to three months (Art. 104 of the P. C. C.). The President may make his or her decision effective immediately upon issuing it (Art. 103 of the P. C. C.). The President's decision may be appealed to the court for the protection of competion and consumers (Art. 81 of the PCC).

If an individual consumer's interests are threatened or violated by an unfair commercial practice he or she has recourse to the provisions of the Law of 23 August 2007 on combating unfair commercial practices [U. C. P.].[58] Art. 12 of the U. C. P. makes available to consumers a wide range of claims which can be raised in civil proceedings.[59] The consumer may demand that the entrepreneur: (a) cease and desist from such practices; (b) remove effects resulting from such a practice; (c) issue a statement in an appropriate content and in an appropriate form; (d) compensate for the damages caused, including nullification of the contract and return of all performances made as well as re-imbursement by the entrepreneur of the costs associated with obtaining the product. In addition the consumer may request the court to assess an appropriate sum which the entrepreneur must pay to a designated social organization devoted to propagating Polish culture, protection of a national heritage, or consumer protection (Art. 12 § 1 pt. 5 of the U. C. P.). The Ombudsman for Civil Rights, Insurance Ombudsman, or national or regional consumer organization as well as district or urban consumer advocates may also bring an action seeking the same remedies outlined above, except for compensation for resulting damages (Art. 12 § 2 of the U. C. P.). The burden of proof to show that the commercial practice in question is not an unfair misleading commercial practice rests on the entrepreneur (Art. 13 of the U. C. P.).

[58] J. of L. No. 171, pos. 1206. This Act implements into Polish law the provisions of Directive No. 2005/29/EC concerning unfair commercial practices.

[59] Because the provisions of the U. C. P. contain no restriction regarding the definition of 'consumer', they also cover consumers domiciled or habitually residing abroad.

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RECENT CODIFICATIONS OF PRIVATE INTERNATIONAL LAW THE POLISH EXPERIENCE

1. Introduction

1.1. In Poland, re-established in 1918 after many years of slavery, as much as five legal territories existed:

a) in the former Congress Kingdom, the Code of Napoleon (second and third book, Art. 516–2281, excluding Art. 1387–1581 and 2092–2203), as well as the Civil Code of the Kingdom of Poland from 1825, which constituted a modification of the first book of the Code of Napoleon (amended in 1836), and some other statutes were in force;

b) in the former Austria's annexed territory (Galicja, Cieszyn's Land) the Austrian Civil Code from 1811 was in force (ABGB) (including amendments from 1914, 1915 and 1916);

c) in the former Prussian annexed territory the German Civil Code from 1896 was in force (BGB);

d) within the lands belonging to Russia before the First World War, located east of the Congress Kingdom, part I of the Xth volume of the "Collection of Laws" (Svod Zakonov) was in force;

e) initially, in Spisz and Orawa, the Hungarian civil law was in force, which in 1922 was superseded, to a large degree, but not entirely, by Austrian law.

Within these legal territories one also had to take into account the binding force of separate conflict rules of private international law.[1] Such rules served two purposes. They were applied not only to Poland's external relations but were also applied for the purposes of solving conflicts concerning internal relations among the mentioned five legal territories.

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[1] Compare T. F. G r o d y ń s k i, *Międzynarodowe prawo prywatne (na tle stosunków między dzielnicami Polski)* [Private International Law (in the Context of Inter Regional Polsih Relations)], Kraków 1914, p. 40 *et seq*., 64 *et seq*., 80 *et seq*.; K. P r z y b y ł o w s k i, *Prawo prywatne międzynarodowe. Część ogólna* [Private International Law. The General Part], Lwów 1935, p. 63, 87; F. Z o l l, *Międzynarodowe prawo prywatne w zarysie* [An Outline of Private International Law], Kraków 1947, p. 15, 16.

1.2. Hence, the harmonization of private law, including private international law, became an urgent matter. The task of preparing suitable draft laws was entrusted to the Codification Committee appointed in 1919. The first drafts (by Fryderyk Zoll and Michał Rostworowski) were created in 1920. The Polish Private International Law Act was ultimately passed by the Parliament on 2 August 1926 (Official Journal of the Republic of Poland [O.J. RP] 1926, No. 101, item 581).

The Act on the Law Governing Internal Private Relations (private interregional law, O.J. RP 1926, no. 101, item 580 with subsequent amendments) was also passed on that very same day.

The 1926 Act was a significant achievement of the Polish legal thought.[2] Nonetheless, it also introduced various solutions, which were inappropriate.[3] As an example one may point to the following: favouring, in family relations, the husband's (Art. 14 (3), Art. 15) and father's (Art. 18, Art. 22) national law, particular treatment of illegitimate children (Art. 20–22), placing excessive emphasis on the regulation of impediments to entering a marriage in Polish law, when the marriage was concluded in Poland (Art. 12 (2)), excessive limitation of the parties' freedom to choose the proper law for obligations arising out of acts in law (i.e. acts intended to have a legal effect),[4] recognizing the influence of particular statutory prohibitions of the country where the debtor is domiciled and where his obligation is to be performed, which render acts in law null and void (Art. 10).

1.3. The above became the reason for the Civil Law Codification Committee, appointed in 1956, to begin the project of drafting a new act. The Committee was successful in its work and the new act was passed by the Parliament on 12 November 1965.[5] It came into force on 1 July 1966. Many provisions from the old act were kept, while the amendments were limited to the necessary minimum. Provisions which did not correspond to contemporary expectations, like the ones mentioned above, were replaced by new ones.

At the time when it was passed, the 1965 Act was, beyond doubt, a legislative achievement.[6] It did not, however, deal with a number of issues. Some of its

[2] Compare K. P r z y b y ł o w s k i, *op. cit*., p. 63 and the literature cited therein.

[3] Compare K. P r z y b y ł o w s k i, "Kodyfikacyjne zagadnienia polskiego prawa prywatnego międzynarodowego" [Codification issues of Polish private international law], *Studia Cywilistyczne* 1964, No. 5, p. 3–66.

[4] Under Art. 7 of the 1926 Act as applicable law the parties could choose only national law, the law of the domicile, law of the place where the act in law has been made, law of the place where the obligation is performed or law of the place where the property is located.

[5] O.J. RP of 1965, No. 46 item 290, with subsequent changes.

[6] Compare M. P a z d a n, "Założenia i główne kierunki reformy prawa prywatnego międzynarodowego w Polsce" [Assumptions and main goals of reforming private international law in Poland], *Państwo i Prawo* 1999, No. 54, p. 20–28; A. M ą c z y ń s k i, "O potrzebie, zakresie

provisions do not embrace contemporary requirements (as shall be demonstrated below). After Poland's accession to the European Union the need to harmonize (adapt) national private international law with community provisions arose.

1.4. The task of preparing suitable proposals has been entrusted to the sub-committee of private international law created within the new Civil Law Codification Committee (operating since 1996). Several years of work have resulted in the adoption of a draft of a new private international law on 9th October 2006. On 31 October 2008, the draft, including the amendments introduced during the legislative process, has been presented by the Chairman of the Board of Ministers (the Prime Minister) to the Parliament (document No. 1277). After the first reading in Parliament, which took place on 21 November 2008, the proposal has been lodged with a parliamentary committee, which continues its work on the proposal. Its text (with proposed amendments) has been attached to this study (hereinafter referred to as the "Draft Act").

2. Why a decision has been made to prepare a project of a new act?

2.1. Apart from its advantages, the 1965 Act had shortcomings, which were already present at the time when it was passed. Among them were the following:

a) too many areas left without legal regulation;

b) archaic regulation of the law applicable to the contractual obligations;

c) limited application of the possibility for the parties to choose the proper law as a means of determining the law applicable;

d) the lack of special conflict instruments protecting the "weaker" party of a legal relationship (consumer, employee, aggrieved party);

e) legislative escapism (luckily scarce) involving the use of reference norms (e.g. Art. 30), giving rise to interpretation riddles;

f) excessive rigidness of solutions, a lack of corrective rules, which could counterbalance the use of such rigid regulations;

g) few (luckily) provisions favouring the application of *legis fori* have been inserted in the act (Art. 17 § 3 and Art. 18).

2.2. The above flaws have not been completely eliminated by the 1980 Rome Convention on the law applicable to contractual obligations, which Poland has recently adopted.[7] The Convention does not encompass all contractual

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i sposobie reformowania polskiego prawa prywatnego międzynarodowego" [The need, scope and manner of reforming Polish private international law], [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu* [Private Law in Times of Change. Essays in Honour of Professor Stanisław Sołtysiński], ed. A. Nowicka, Poznań 2005, p. 851–876.

[7] O.J. RP of 2008, No. 10, item 57, which appeared with a date of 22 January 2008 (from that date the Convention forms part of the legal order binding in Poland).

obligations (compare its Art. 1 (2) and (3)). Therefore, the archaic conflict regulation of the 1965 Act remains binding in relation to contracts, which fall outside of the scope of the Convention. This unfavourable situation will change upon the entry of the Rome I Regulation and, as to the issues outside the Regulation's scope, upon the entry of the new act, which is drafted to include solutions complementary to the Rome I Regulation (compare Art. 19 and 30 of the Draft Act).

2.3. The Draft Act includes provisions concerning various matters, which were missing in the 1965 Act, such as: legal incapacitation (Art. 15), first and last name of a natural person (Art. 17), personal rights of natural, legal, and legal persons (Art. 18 and 20), power of attorney (Art. 21), existence and validity of an act in law (Art. 22), obligations arising from securities other than promissory notes and cheques (Art. 32), the effects of assignment of claims to third parties (Art. 34), assignment of debt/receivables (Art. 35), the effect of the change in currency value on the amount of the obligation (Art. 36), arbitration agreements (Art. 37-38), rights arising from an entry of a security into an account maintained within a book-entry securities system (Art. 42), revindication claims in relation to cultural property (Art. 43), intellectual property rights and employees rights in with respect thereof (Art. 45-46), *res in transitu* (Art. 41), the law applicable to obligations arising from unilateral acts in law (Art. 33), the difficult problem of the effectiveness of matrimonial property regimes against third parties (Art. 51).

2.4. The Draft Act introduces significant changes to issues regulated in the 1965 Act. Examples follow:

Acknowledging the advantages of allowing the paries to choose the proper law as a means of determining the applicable law, the scope of its admissibility has been greatly increased. It has been introduced into matrimonial property relations (Art. 50 (1)), matrimonial property contracts (Art. 50 (3)) and succession (Art. 58 (1) of the Draft Act).

The Draft Act does not, however, contain a general rule (escape clause) which would correct the applicable law according to a closer connection of the relevant issue with a law different from the one applicable under the provisions of the act (even though such rules exist in some other legal systems). Such a clause would undermine the certainty of trade, grant excessive discretionary powers to the judge, and create an incentive to favour the application of *legis fori*. Nevertheless, the Draft Act does contain corrective measures, which have a limited scopes of application (Art. 33 (2), Art. 41). They correspond to the corrective clauses adopted in Rome I and Rome II Regulations.

In some instances, the Draft Act refers to the criterion of the closest connection (compare Art. 49 (2), Art. 10 2nd sentence).

Other novelties that should be mentioned include: adopting the habitual residence of a natural person as the connecting factor (Art. 3 (1)), limiting transmis-

sion only to the so-called accepted transmission (Art. 5 (2)), excluding (with regard to the form) the application of *legis loci actus* to transfers and other disposals of immovables as well as to corporate contracts (Art. 23 (2)), the explicit regulation of the scope of the law applicable to the status of a legal person (Art. 19 (3)).

2.5. The Draft Act is harmonized with the regulations Rome II (in force since 11 January 2009) and Rome I (in force since 17 December 2009). It regulates issues falling outside of the scope of these regulations, in particular those excluded under Art. 1 (1) *in fine* (in connection with item 9 of the Preamble) and Art. 1 (2) item g) of the Rome II Regulation. These exclusions refer to crucial questions such as liability of the State for damages caused by acts of public authority (*acta iure imperii*) and non-contractual obligations arising from the violation of personal rights. The former matter has been regulated in a separate provision (Art. 35) of the Draft Act. The latter issue has been incorporated into the comprehensive regulation of personal rights in the Draft Act (Art. 18 and 20).

The provision of Art. 1 (2) item j) of the Rome I Regulation excludes some insurance contracts from the scope of its application. Art. 27 of the Draft Act provides that Rome I Regulation provisions are to be applied to such contracts. There are no arguments supporting a different conflict regulation of these contracts within the national provisions of private international law. The mentioned provision allows the authority applying the law to assess whether a contract provided for in Art. 1 (2) item j) of the Rome I Regulation should fall under the scope of the general provisions of the Rome I Regulation (Art. 3 and 4, including also Art. 6), which concern contractual obligations, or under the rule of the Regulation's Art. 7. The decision shall depend on the circumstances of the particular case.

The provision of Art. 28 (1) of the Draft Act introduces a unilateral conflict provision requiring the application of Polish law to insurance contracts, which are mandatory (i.e. there is a duty to insure) under Polish law. The close connection of these contracts with Polish law supports the exclusion of the parties' choice of law. The unilateral character of the mentioned conflict provision corresponds with the position that Polish statutory provisions of conflict law should not exclude the choice of law for insurance contracts, in relation to which insurance duty has been imposed by the law of a foreign state of the European Economic Area. At the same time, the need to consider the positive position of another EEA state's legal system as to the exclusion of the choice of law with respect to insurance contracts, in relation to which the insurance duty has been imposed by the law of that member state, has been included in the meta-conflict norm of Art. 28 (2) of the Draft Act.

The exclusion contained in Art. 1 (2) item e) of the Rome I Regulation refers to arbitration clauses (arbitration agreements). This issue has been regulated in Art. 37 and 38 of the Draft Act.

Naturally, the Draft Act also regulates other issues, which are excluded in Art. 1 (2) of the regulation (but not those regulated in other acts of international legislation). The relevant provisions are harmonized with the Rome I Regulation to a greater extent than the corresponding regulations of the 1965 Act. This, for example, refers to provisions concerning the law applicable to the personal status of physical and legal persons, the requirements with regard to the form of corporate contracts and the power of attorney, which all have been omitted in the 1965 Act.

3. General issues

3.1. According to K. Przybyłowski, the 1965 Act is phrased in "such a manner, which allows for a greater predictability of the consequences of conflict norms' application and thus enables the parties to foresee the consequences and take them into account to a greater degree than if terms increasing the court's discretion would have been employed." The Act does not comprise provisions introducing the criteria such as e.g. "reasonable assessment," "just assessment," "nature of things." Neither does it condition "the application of a law upon the evaluation of which law is 'more favourable' (as provided in the 1926 Act in its Art. 21 on illegitimate children). This is to avoid introducing criteria, which would be vague, subject to change or functioning unevenly in different directions, thus leading to uncertainty in legal relations."[8]

The solutions proposed in the Draft Act reflect a different approach. They aim to find the middle ground between the certainty of law (predictability of the governing law) and the necessity to look for a law, which is most closely connected with the relevant relationship as well as to reach a compromise between the principle of unity of the applicable law (allowing to reject dépeçage) and the concept of the closest connection. Introducing discretionary and vague wording (compare Art. 30 (2) 2nd sentence, Art. 41, Art. 49 (2), Art. 55 (2) 2nd sentence, Art. 61 of the Draft Act) could not be avoided. In some instances the Draft Act provides for a party's possibility to choose the law, which shall serve as a basis for his claim (compare Art. 18 (2), Art. 43 of the Draft Act).

[8] In the words of the main creator of the 1965 Act K. P r z y b y ł o w s k i, "Nowe polskie unormowanie problematyki kolizyjnej prawa prywatnego międzynarodowego" [New Polish regulation of collision aspects of private international law], *Studia Cywilistyczne* 1966, No. 8, p. 16 (3–37).

3.2. It is a dominant opinion in the Polish doctrine that one of the tasks of private international law is to draw boundaries between the scopes of application of different legal systems, to justly and harmoniously resolve conflicts between them. Such goals may be reached through conflict norms structured as the complete and not unilateral rules. The mentioned values should be considered when determining the criteria (connecting factors) decisive for the applicability of a particular law. Such assumptions have hitherto guided the Polish legislator both in 1926 and in 1965. They are still applicable today and are the basis for the Draft Act.

The interpretation of the substantive *legis fori* may not serve as a starting point for the analysis in terms of conflict of laws. It is not solely about solving a collision between one's own and a foreign substantive law.

The conflict rules indicating the governing law do not determine a given state's competence in the domain of private law. The application of foreign law being (sometimes) their consequence is not a sign of limiting the sovereignty of a state, whose conflict rules are involved.

According to the principle of equal treatment of laws in force on different territories, which has been accepted in Poland, foreign law must be treated on equal terms with the state's own law. The application of foreign law does not constitute an exception to some general rule (or presumption) of applicability of *legis fori*, as such rule (or presumption) does not exist under Polish law. Such a rule cannot be deduced from Art. 7 of the 1965 Act. At the same time, the conflict of laws mechanism incorporates instruments enabling the protection of particular interests of one's own legal system (compare Art. 6 of the 1965 Act).

Foreign law is to be applied within the limits of its applicability defined by private international law conflict norms which are in force in Poland. Such norms create the basis for the application of foreign law. Only exceptionally and only to the extent it is permitted by one's own private international law conflict provisions is it possible to consider foreign conflict rules during this process (particularly in transmission and remission processes). Not only Polish governing law, but also the relevant foreign law, must be applied as law. Hence, one may not treat foreign law as if it were a mere fact or hold, that in the case at hand, it is solely a confirmation of the acquisition of rights under the relevant foreign law.

One must distinguish the process of applying foreign governing law from situations in which certain provisions of a foreign domestic law are merely taken into account as the facts of the case.[9] In such situations they are treated equally to other circumstances of the assessed factual state.

Foreign governing law, applied by the court or other Polish authority, remains a foreign law. Therefore, in the course of application of foreign law its

[9] Compare T. E r e c i ń s k i, *Prawo obce w sądowym postępowaniu cywilnym* [Foreign Law in Civl Court Proceedings], Warszawa 1981, p. 153.

provisions are not integrated with (incorporated into) our legal system. The binding force and content of the foreign substantive provisions must be determined in accordance with the principles accepted in the relevant foreign country. One must thus respect such sources of law, which are binding within the given foreign law (including customary law), and comprehend the legal provisions of such law (interpret them) in accordance with the principles adopted in the relevant foreign country.

The governing law (both Polish and foreign) should be applied *ex officio*, irrespective of whether the parties have invoked it. This also refers to the law chosen by the parties within the autonomy granted by the conflict of laws. The lack of recognition of a particular foreign state (in the meaning of public international law), is not an obstacle to the application of that state's foreign law.

The application of foreign law is not dependant on reciprocity of the conflict of laws. Thus, one may not resign from applying foreign governing law only because a particular foreign legal system adopts with respect to a given issue a different conflict regulation than the one accepted under Polish law.

3.3. One may not rule out situations, where in pursuit of substantive justice the judge shall be forced to correct the results of the application of one's own conflict rules.

This may take place under the process of the so-called adjustment. The necessity of adjustment may arise in situations, where during the application of the proper law, various domestic laws come into contact and differently resolve particular legal issues. A frequently mentioned example is the coincidence of law applicable to succession and to the matrimonial property relations with respect to the assessment of the rights of the remaining spouse.[10] Breaking the impasse may be achieved by the judge's formulation of a synthetic norm based on both coinciding legal systems, which ensures an equitable solution.

3.4. The need to go beyond the scope indicated by a particular conflict rule may also arise in the course of applying the governing law in the light of evaluating the equivalence of legal institutions and concepts.

An example is provided by a case decided by the Polish Supreme Court in its decision dated 28 April 1997 (II CKN 133/97).[11] The question to be answered was whether a ban provided in Art. 158 § 3 of the Commercial Code (today Art. 151 of the Commercial Companies Code) forbidding sole shareholder limited liability company from creating a further sole shareholder limited liability company also applies to a German sole shareholder GmbH company. The answer to this question depended on determining the similarity of a German

[10] Compare B. W a l a s z e k, M. S o ś n i a k, *Zarys prawa prywatnego międzynarodowego* [An Outline of Private International Law], 2nd ed., Warszawa 1968, p. 132, 133.

[11] *Orzecznictwo Sądu Najwyższego* 1997, No. 10, item 154, p. 49–54.

GmbH company to a Polish limited liability company. This required a comparison of the Polish and German regulations in the course of applying Polish law.

4. Overriding mandatory provisions

Within substantive laws of particular countries one may come across provisions, which have a content, function or aim that more or less clearly indicates their scope of territorial application.

The mentioned provisions are applied concurrently with the law generally governing a given relationship (given situation), that is concurrently with the main law applicable to such a relationship. They are sometimes referred to as provisions, which's application is necessary (*lois d'application nécessaire*). Other terms are used as well: "norms, which determine their own scope of application" (*normes fixant leur propre domaine d'application*) or "directly applicable provisions" (*lois d'application immédiate*).

The Polish 1965 Act does not provide a regulation as to the application of the overriding mandatory provisions.

Opinions indicating the necessity to regulate provisions, which would be applied concurrently with the law governing the given scope of issues,[12] have been voiced in the Polish doctrine for quite some time.[13]

After the entry of the 1980 Rome Convention in Poland, the mentioned issue has been resolved with respect to contractual obligations (Art. 7 of the

[12] Compare W. P o p i o ł e k, "Znaczenie przepisów o 'bezpośrednim działaniu' w zakresie eksportu kompletnego obiektu" [The meaning of provisions with 'direct application' in the context of exporting a complete structure], [in:] *Zagadnienia prawne eksportu kompletnych obiektów przemysłowych* [Legal Aspects of Exporting Complete Industrial Stuctures], eds. M. Pazdan, A. Tynel, Katowice 1980, p. 117 *et seq.*; W. P o p i o ł e k, *Wykonanie zobowiązania umownego a prawo miejsca wykonania. Zagadnienia kolizyjnoprawne* [The Performance of Contractual Obligations and The Palce of Performance. Collision Aspects], Katowice 1989, pp. 55 *et seq.*; J. P a z d a n, "Znaczenie przepisów 'wymuszających swoją właściwość' przy wykonaniu umowy o budowę zakładu górniczego za granicą" [The meaning of overriding mandatory provisons during the performance of a contract to build a coal mine abroad], *Problemy Prawne Górnictwa* 1984, No. 7, p. 55–82.

[13] Some authors accept the admissibility of application of only one's own provisions of such a character. See e.g. B. F u c h s, *Statut kontraktowy a przepisy wymuszające swoje zastosowanie* [The Contractual Statute and Overriding Madatory Provisions], Katowice 2003, p. 196 *et seq.*; M. M a t a c z y ń s k i, "Obce przepisy wymuszające swoje zastosowanie. Rozważania na tle art. 7 ust. 1 konwencji rzymskiej oraz orzecznictwa sądów niemieckich" [Foreign mandatory, overriding provisions. Deliberations in the context of art. 7 s. 1 of the Rome convention and judgements of German courts], *Kwartalnik Prawa Prywatnego* 2001, No. 10, p. 375–413; M. M a t a c z y ń s k i, *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym* [Overriding Mandatory Provisions in Private International Law], Kraków 2005, p. 150 *et seq*.

Convention). This solution has served as a model for the authors of the Draft Act (Art. 9 of the draft proposal).

5. Ordre public

In Poland, the public policy clause is treated as a safeguard measure against the consequences of applying foreign law, which would be difficult to accept in the domestic legal system (a kind of a "safety clause"). The public policy clause is provided for in Art. 6 of the 1965 Act, as well as in Art. 8 of the Draft Act, which closely resembles the old Art. 6.

The term "public policy" remains an indefinite and flexible instrument. It may only be specified from the perspective of a given legal system, in which it is invoked, with consideration given to the precise moment in time it is used. Exceptionally, and only to a limited degree, may the public policy of another state be taken into account.

In modern days, a transnational public policy should also be considered. The transnational public policy includes values common to all mankind, recognized in legal acts such as: the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, the European Convention of Human Rights of 1950 and the European Charter of Fundamental Rights.

It is agreed in the Polish doctrine that giving effect to the public policy exception does not automatically lead to the application of the law of the forum (*lex fori*). Public policy often excludes the application only of a specific foreign provision, which contains a restriction difficult to accept in our own legal system, however the general applicability of that foreign law is not eliminated. On other occasions, it may prove reasonable to give effect to a different rule of the same foreign legal system, in place of the rule excluded by the public policy exception (e.g. where the application of a specific rule of law is excluded, a general provision of applicable law may be applied).[14]

[14] Compare M. S o ś n i a k, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym* [The Ordre Public Clause in Private International Law], Warszawa 1961, p. 223 *et seq.*; K. Z a w a d a, "Klauzula porządku publicznego w prawie prywatnym międzynarodowym (na tle orzecznictwa Sądu Najwyższego w sprawach z zakresu prawa rodzinnego i spadkowego)" [The ordre public clause in private international law (in the context of judgements of the Supreme Court concerning family and succession laws)], *Nowe Prawo* 1979, No. 35, p. 71–84; J. C i s z e w s k i, "Zakazy i ograniczenia małżeństw z cudzoziemcami a klauzula porządku publicznego" [Bans and limitations on marriages with foreigners in the context of the ordre public clause], *Państwo i Prawo* 1984, No. 39, p. 90–101; M. S o ś n i a k, «Les effets de l'application de la clause d'ordre public dans la doctrice et la législation contemporaines de droit international privé», *The Polish Yearbook of International Law* 1984, No. 13, 1985, p. 177–192; A. M ą c z y ń s k i, "Działanie klauzuli

In every single case when public policy is invoked, one should consider whether it is possible to limit the consequences of its use to mere negative effects. Only if this does not bring a satisfactory result, may a judge refer to his own substantive law (the positive effects of the public policy exception will then be produced).

Before public policy is brought into play, one should assess what would have been the concrete consequences of applying foreign law in given circumstances. When the public policy exception is used, a judge ought to consider not the general differences between the foreign legal system and our own law, but the results of applying foreign law in the particular circumstances of a given case. Sometimes, although the existing differences between the laws are significant, the results of applying foreign law are similar to the effects produced under the law of the forum. It should be added that the intervention of the public policy exception is not justified by the mere fact that the foreign law leads to different solutions than the law of the forum. This is because the result of applying foreign law is not necessarily at odds with the fundamental principles of the Polish public policy. The public policy exception may also be invoked with respect to issues covered by international conventions, operating in the field of the conflict of laws, even if the applicable law is the law of a country, which is a party to the convention. The conclusion of an international agreement with a given state, does not mean that all of its legal provisions (including future ones) are to be applied in Poland. If the intervention of the public policy is considered, one should take into account the current public policy, i.e. as it stands on the day when the decision of the court is made. Moreover, only the most fundamental principles of the legal order may be invoked.

The Polish courts have rarely appealed to the public policy exception. Most frequently, the public policy was used in cases where a foreigner had applied for an exemption from a requirement to present a certificate provided by his or her own state, confirming that he or she is allowed to get married. The Polish courts have rightly called upon the public policy exception when a case concerned the application of foreign laws permitting polygamy,[15] barring a woman from filing

porządku publicznego w sprawach dotyczących zawarcia małżeństwa" [The operation of ordre public in cases concerning entering into a marriage], [in:] *Proces i prawo. Księga pamiątkowa ku czci profesora Jerzego Jodłowskiego* [Procedure and Law. Essays in Honour of Professor Jerzy Jodłwski], ed. E. Łętowska, Wrocław 1989, p. 157–168; M. P a z d a n, "O niektórych osobliwościach poszukiwania prawa właściwego" [Deliberations on selected curiosities of searching for the proper law], [in:] *Valeat aequitas. Księga pamiątkowa ofiarowana księdzu Profesorowi Remigiuszowi Sobańskiemu* [Valeat aequitas. Essays in Honour of Prof. Remigiusz Sobański], ed. M. Pazdan, Katowice 2000, p. 339–350.

[15] Compare Judgment of the Supreme Court, dated 11 October 1969 (I CR 240/69), *Państwo i Prawo* 1972, No. 27, p. 161–173 (with gloss by J. Jodłowski); Resolution of the Supreme Court, dated 22 June 1972 (III CZP 34/72), *Orzecznictwo Sądu Najwyższego* 1973, No. 4, item 52, p. 3–6 (compare also gloss to that resolution by J. J a k u b o w s k i, *Państwo i Prawo* 1974, No. 29,

for a divorce,[16] or prohibiting a person to enter into marriage with a foreign citizen.[17]

Occasionally there were also cases, in which the public policy instrument had been employed erroneously. In the judgment of 28 May 1969 (III CZP 23/69), the Supreme Court[18] held: "[…] the Polish specific rules on the succession of farms belong to the category of rules which aim to transform the agrarian system in the spirit of socialism, and thus – to consolidate the social and economic regime, characteristic for the goals and tasks of the People's State."

These rules were to be applied under Art. 6 of the 1965 Act in every situation where a farm was located in Poland. Also J. S. Piątowski,[19] who had supported the position of the Supreme Court, justified the application of Polish specific rules on the succession of farms located in Poland by invoking the public policy exception, as he believed that the mentioned rules form part of the *ordre public*.

The judgment of the Supreme Court, as well as the view of J. S. Piątowski, were largely criticized in the Polish doctrine.[20] It was argued that the public policy exception cannot justify the permanent application of any particular group of the provisions of Polish law.

6. *Renvoi*

Poland is a country where the question of *renvoi* has met favourable treatment. Already in the 1926 Act, its Art. 36 provided that if the foreign law of

p. 166–172); Judgment of the Supreme Court, dated 16 November 1971 (III CRN 404/71), *Orzecznictwo Sądu Najwyższego* 1972, No. 5, item 91, p. 42–46; Judgment of the Supreme Court, dated 26 August 1974 (I CR 608/74), *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1976, No. 20, item 141, p. 319–322 (with gloss by M. T o m a s z e w s k i); Judgment of the Supreme Court, dated 11 October 1974 (II CR 735/74), *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1976, No. 20, item 142, p. 323–324.

[16] Compare Judgment of the Circuit Court in Zielona Góra, dated 21 February 1975 (II CR 109/75), *Orzecznictwo Sądów Polskich* 1976, No. 20, item 9, p. 23–25 (with gloss by J. J o d ł o w s k i).

[17] Compare Resolution of seven judges of the Supreme Court, dated 20 January 1983 (III CZP 37/82), *Orzecznictwo Sądu Najwyższego* 1983, No. 7, item 107, p. 1–6 (compare also the gloss by K. P i e t r z y k o w s ki, *Nowe Prawo* 1983, No. 39, p. 246–254).

[18] *Orzecznictwo Sądu Najwyższego* 1970, No. 3, p. 8–15.

[19] J. S. P i ą t o w s k i, "Z zagadnień dziedziczenia gospodarstwa rolnego po cudzoziemcu" [Remarks about inheriting an agricultural farm from a foreigner], *Państwo i Prawo* 1971, No. 27, p. 989–998 (in particular 995–998).

[20] Compare M. P a z d a n, "Przepisy szczególne o dziedziczeniu gospodarstw rolnych z kolizyjnoprawnego punktu widzenia" [Special provisions on the inheritance of farms in the context of collision provisions], [in:] *Zagadnienia prawa cywilnego, samorządowego i rolnego. Księga Profesora Waleriana Pańki* [Isuues of Civil, Local Authority and Agricultural Law], eds. A. Agopszowicz, T. Kurowska, M. Pazdan, Katowice 1993, p. 171–191 (in particular 183 *et seq*. and the opinions cited therein).

nationality of a given person – indicated as applicable under the Act – required to apply a different law, than this law was to be applied by the Polish judge.

The role played by *renvoi* has increased in the 1965 Act. Although transmission is defined in Art. 4 § 2 of the Act within the same limits as under the old law, remission has been delineated in a broader manner in Art. 4 § 1 of the 1965 Act. Remission is not limited to a situation when *renvoi* is made from the person's national law, it may also come into play when the Polish choice of law provision determines foreign law through a connecting factor other than nationality.

In order for the Polish court to apply *renvoi*, it is irrelevant whether the law indicated by the Polish choice of law rules is familiar with the concept of *renvoi*; a sufficient justification to rely on *renvoi* lays in the forum's own rule providing for this instrument. Thus, Poland has not accepted the concept of the so called "double *renvoi.*"

Under the 1926 Act and in accordance with the law presently in force, indirect remission is not accepted. Therefore, there will be no *renvoi* back to Polish law, if our choice of law rules provide for the applicability of the law of state B, the conflict of law provisions of B transmit to the law of state C, and the choice of law provisions of C indicate Polish law as applicable to the merits of the dispute. The same solution has been adopted in the Draft Act.

Transmission can only be made to the law of a third state C, indicated by the choice of law provisions of the state B, which in turn has been indicated by the Polish conflict rules, irrespective of whether the transmission is accepted in state C. The choice of law rules of state C are not considered. Consequently, Polish law has adopted a one-level transmission.

The existing rule on transmission is amended in the Draft Act. The Draft only allows for transmission which is acceptable under the law of the third state.[21] Therefore, if the choice of law provisions of the third state do not provide for the applicability of its own law, then the transmission will not take place. The Polish judge should then apply the law of a state indicated by the Polish conflict of laws rules. The one-level transmission will thus occur only if the choice of law rules of a third state confirm the applicability of its own law (if the choice of law rules of the transmitting state match the rules of the third state to which the transmission is made).

7. The problem of classification

In Polish private international law, classification denotes interpreting the terms used to define the scope of the choice of law rule, undertaken in order to

[21] In accordance with the proposal made by K. P r z y b y ł o w s k i, *Z problematyki stosowania obcych norm kolizyjnych* [The Issues of Applying Foreign Collision Norms], Kraków 1959, p. 31.

establish the applicability of the given rule. Procedures applied in order to determine the significance of the terms used to describe the connecting factors (provided that a given connecting factor possesses at least a legal tint) are normally also perceived as classification.

Neither the 1965 Act, nor the Draft Act, contains any indications as to the methods of classification. There is also no evidence of any uniform practice of Polish courts in that respect.

The Polish legal doctrine has been heavily influenced by the view expressed by K. Przybyłowski in 1935.[22] According to this author, the centre of gravity in the process of classification lays in the interpretation of the individual choice of law rules. If the content of a rule does not suggest otherwise, one should interpret the terms used therein autonomously for the purposes of private international law, in accordance with its aims and its unique character, without being bound by the meaning afforded to them under any substantive law. A similar opinion has also been expressed by other authors.[23]

Express rules, which are to be applied to special circumstances, may be found in some of the conventions signed by Poland as well as in the instruments of the European community law. These take the form of the conflict of law rules of classification or classification definitions.

The purpose of classification is not only to categorize a specific factual situation under the scope of the appropriate choice of law rule and enhance the understanding of the criteria utilized to define the connecting factor, but also to identify the substantive provisions of the applicable law, which are to be applied in a given case.

Nonetheless, the last remark should be treated with great caution. Without a doubt it is useful when the process of classification is to delimit the fields of application of two or more competing choice of law provisions (e.g. the choice of law rules appropriate for the question of capacity of the requirements as to the formal or material validity of a act in law). The consequences of this delimitation become visible when the substantive provisions, which are to constitute the grounds for the ruling, are identified within the applicable law. However, the fact that foreign law uses particular classifications, patterns or

[22] K. P r z y b y ł o w s k i, *Prawo prywatne międzynarodowe* [Private International Law], Lwów 1935, p. 104.

[23] Compare H. T r a m m e r, "Z rozważań nad strukturą normy kolizyjnej prawa prywatnego międzynarodowego" [Deliberations on the structure of a collision norm in private international law], *Studia Cywilistyczne* 1969, No. 13–14, p. 43, 402; B. W a l a s z e k, M. S o ś n i a k, *Zarys prawa prywatnego…*, p. 87; J. J a k u b o w s k i, *Prawo międzynarodowe prywatne* [Private International Law], Warszawa 1984, p. 53, 54; W. L u d w i c z a k, *Międzynarodowe prawo prywatne* [International private Law], Warszawa 1990, p. 69; M. S o ś n i a k, *Prawo prywatne międzynarodowe* [Private International Law], Katowice 1991, p. 53 *et seq.*

concepts, different from those, which have been indicated at the stage of delineating the boundaries of the given choice of law provisions, should not in itself stand in the way of applying the proper law. In principle one should take into consideration such rules of the applicable law, which would constitute the grounds for the assessment of the factual circumstances (or their element) in the state, in which the law is being applied.

If exceptionally, a Polish court applies foreign choice of law provisions, the court should interpret the terms used therein in accordance with the principles accepted in that foreign state.

8. Non-contractual obligations

The search for the law applicable to non-contractual obligations, which came into existence after the entry into force of the 1965 Act, but before the entry into force of the EC Regulation Rome II (i.e. between the 1 July 1966, and 11 January 2009) is carried out in accordance with Art. 31 of the 1965 Act. As to non-contractual obligations, arising as a result of events, which occurred after 11th January 2009, the law applicable is to be established on the basis of the choice of law rules provided in the Rome II Regulation.

Art. 31 § 1 of the 1965 Act first and foremost employs the connecting factor of the place, where an event giving rise to a non-contractual obligation occurred, which – with respect to torts – leads to the application of the *legis loci delicti commissi*. On the other hand, Art. 31 § 2 draws on an "intensified" personal connection; it requires the coincidence of nationality and domicile of both of the parties of the non-contractual obligation.

In practice, one has to first assess whether Art. 31 § 2 of the 1965 Act may be applied and only if it is found that its requirements are not satisfied, may one rely on Art. 31 § 1.

It is generally agreed in the relevant Polish literature, that while assessing a place of an event as a connecting factor defined in art. 31 § 1, a flexible approach should be adopted. The Polish judge can freely assess the significance of different elements (criteria), locating an event in accordance with the circumstances of the given case, not being bound by any assumptions made in advance, but basing the decision on a thorough analysis of the facts.[24]

Art. 31 § 2 of the 1965 Act expressly mentions nationality and domicile. These factors can only refer to the natural persons (in Poland the possibility of their application to the legal persons is rejected). Nevertheless, it has been rightly decided in judicature that Art. 31 § 2 of the 1965 Act may be interpreted

[24] Compare M. S o ś n i a k, *Prawo prywatne międzynarodowe*, p. 166.

extensively enough to also include factual situations concerning legal persons.[25] This solution has been accepted in academic writing.[26] In such cases, instead of nationality and domicile, one should take into account the seat of the legal person. This refers both to the relationships between two legal persons (Art. 31 § 2 will be applied if both legal persons have their seat in the same state), as well as to the relationships between legal and natural persons (in order for Art. 31 § 2 to be applied, it is required that the natural person has the nationality of and is domiciled in the same state, in which the legal person has its seat).

The connection described in Art. 31 § 2 of the 1965 Act should exist at the moment the event giving rise to the non-contractual obligation occurred. Subsequent changes have no effect on the determination of the applicable law. This concerns both the change of nationality or domicile of one of the parties, as well as the alteration of the creditor or debtor, in a situation where the new creditor or debtor has a different nationality or domicile.

The scope of Art. 31 of the 1965 Act has been widely defined. It encompasses not only obligations arising out of torts but also obligations resulting from other events, which are not acts in law (in particular the management of another person's affairs without mandate – the so called *negotiorum gestio*, and unjust enrichment).

Special regulations concern the air and sea laws (see Art. 12 and 14 of the Air Law; Art. 356, 357 and 358 of the Maritime Code).

Poland is also a party to the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents (Official Journal of 2003, No. 53, item 585). The Convention remains a valid source of rules even after the entry into force of the Rome II Regulation, because non-EU members are also a party to the Convention.

The conflict of law provisions relating to non-contractual obligations are also included in numerous bilateral conventions to which Poland is a party. However, the Rome II Regulation, as between Member States, takes precedence over conventions concluded exclusively between two or more of them (Art. 28 (2) of the Regulation).

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[25] See the Supreme Court in the Resolution of the full composition of the Civil Chamber, dated 5 October 1974, III CZP 71/73, *Orzecznictwo Sądu Najwyższego* 1975, No. 5, item 72, p. 1–6; *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1976, No. 20, item 202, p. 476–482 (with gloss by W. B r a ś) and *Państwo i Prawo* 1977, No. 32, p. 255–265 (with gloss by K. S k u b i s z e w s k i). Compare also Judgment of the Supreme Court, dated 22 November 1972, II CR 458/72, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1974, No. 18, item 6, p. 19–22 (gloss by M. S o ś n i a k) and *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1975, No. 19, item 32, p. 59–62 (gloss by K. Z a w a d a).

[26] Compare glosses mentioned in the preceding footnote and T. P a j o r, *Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym* [Tortious Liabibility in Private International Law], Warszawa 1989, p. 159.

The rule expressed in Art. 31 of the 1965 Act does not define the scope of issues covered by the applicable law. Nevertheless, Art. 31 § 3 mentions that it is the law applicable to the non-contractual obligations that is decisive in establishing whether a person with a limited capacity to act (e.g. a minor) can be held liable for a committed tort.

The doctrine accepts that the law applicable to non-contractual obligations governs both the event giving rise to the obligation, as well as the relationship, which is created thereupon. According to that law, the prerequisites of the non-contractual obligation and the method in which they are formulated (i.e. the question of damages, causal link, the degrees and range of fault, unlawfulness, grounds for exemption from liability) are identified. However, when unlawfulness is assessed, the rules of the law of the place of event can also be relevant. These should be taken into account irrespective of which law is applicable to a non-contractual obligation; thus, also in situations when the place of event is located abroad, but the law applicable under Art. 31 § 2 is the Polish law.

The law applicable to non-contractual obligations determines the question who is entitled to seek the remedies under tortious liability; whether it is only the aggrieved party or also an indirectly affected person (see e.g. the remedies provided for in Art. 446 of the Polish Civil Code [C. C.]). The same law is applied to decide who can be held liable for a tort, whether these persons are responsible jointly and severally, as well as about the availability of redress among the persons jointly liable. The law applicable to non-contractual obligations encompasses also the remedies, which a third party who has satisfied the claims of the aggrieved party may have against the wrongdoer.[27]

Finally, few words should be devoted to the question of concurrence of the conflict of law provisions relating to non-contractual and contractual liability.[28]

It is usually assumed that the scopes of the conflict of law rules of a given system do not overlap. The purpose of classification is to resolve doubts arising in the process of delimiting particular conflict of law provisions. It is justified to expect, that as a result of classification, the scopes of application of the given conflict of law provisions will be identified.

It seems however, that one cannot completely exclude some exceptions. A particular example is provided by the interaction of the conflict of law rules relating to non-contractual and contractual liability. One should admit the

[27] See correctly the Supreme Court (7 judges) in Resolution, dated 26 March 1982, III CZP 61/80, *Orzecznictwo Sądu Najwyższego* 1982, No. 11–12, item 161, p. 9–14 and Judgment, dated 29 November 1983, I CR 266/83, *Orzecznictwo Sądu Najwyższego* 1984, No. 7, item 120, p. 52–56.

[28] Compare M. P a z d a n, "Zbieg odpowiedzialności cywilnej *ex contractu* i *ex delicto* w prawie prywatnym międzynarodowym" [The concurrence of civil liability ex contractu and ex delicto in private international law], [in:] *Rozprawy z prawa cywilnego. Księga Witolda Czachórskiego* [A treatise on Civil Law. The Book of Witold Czachórski], eds. J. Błeszyński, J. Rajski, Warszawa 1985.

possibility of concurrence of these rules. Two arguments in favour of such concurrence are as follows: firstly, the concurrence of the *ex contractu* and *ex delicto* liability is permitted in many substantive laws (e.g. in Poland, Art. 443 of the C. C.), secondly, this provides an adequate protection to the aggrieved person.

The proposed solution is in the event of concurring conflict of law provisions, the injured party should have the opportunity to seek protection, both under the law applicable to the non-contractual and to contractual obligations. Obviously, this does not mean that both of the options will always end with a success. Nor does it mean that the party aggrieved may seek a double reparation.

Both of the concurring conflict of law provisions should be treated equally. None of them has a preference over the other one. The field of the overlapping rules can be indicated only with the assistance of comparative research. Only then is it possible to assess, whether it is reasonable to use both of the conflict of law provisions in a search for the proper law, which will be applied to the given case. For these reasons, to formulate more general directives would be risky and difficult.

9. The law applicable to contractual obligations

9.1. The 1965 Act allows a choice of law only for contractual obligations (Art. 25 § 1), obligations arising out of unilateral acts in law (Art. 30), contracts of employment (Art. 32). According to Art. 25 § 1 of the 1965 Act it was only possible to chose the law related to the contractual relationship. The choice for obligations relating to immovables was excluded (Art. 25 § 2).

9.2. The situation concerning contractual obligations and contracts of employment has changed since the Rome convention on the law applicable to the contractual obligations of 1980 came into force.

Further changes will take place when the Draft Act of the new private international law will be adopted. The Draft Act provides for an unlimited choice of law with respect to arbitration agreements (Art. 37 (1)) and unilateral acts in law (Art. 30) and for a restricted choice of law with respect to the matrimonial property relations (Art. 50 (1)), the matrimonial property contracts (Art. 50 (2)) and with respect to succession (Art. 58 (1)).

Presently, Polish law does not contain any conflict of law provisions relating to the arbitration agreements. Indications as to the law applicable can be found in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and in the European Convention on the International Commercial Arbitration of 1961. Poland is a party to both of these Conventions. Nevertheless, the Conventions encompass only the factual circumstances covered by their respective fields of application.

The new law on arbitration, which now constitutes part V of the Polish Code of Civil Procedure [C. C. P.], was enacted on 28 July 2005, and entered into force on 16 October 2005 (O.J. RP 2005, No. 178, item 1478). Before that date, a Polish party, who wished to submit a dispute to the jurisdiction of a foreign arbitration tribunal, was only allowed to do so, if the other party had a domicile or seat abroad or conducted a business, related to the dispute, abroad. Additionally, the arbitration agreement had to be effective under the law of the state where the arbitration was supposed to take place. The new law does not provide such restrictions. Moreover, the scope of the arbitrability of disputes has been broadened. Currently, the following disputes can be submitted to arbitration: a) disputes concerning proprietary or non-proprietary rights – if they can be subject to a court settlement, except for disputes concerning alimony payments (Art. 1157 of C. C. P.), b) disputes concerning labour law, if the arbitration agreement was concluded after the disagreement began (Art. 1164 of C. C. P.), c) according to Art. 1163 § 1 of C. C. P.: "an arbitration agreement provided in the deed of formation (articles of association) of the commercial company, referring to the disputes of a corporate relation, binds the company and its shareholders," d) the rule expressed in Art. 1163 § 1 of C. C. P. is by analogy applied to the arbitration agreement provided in the articles of association of a cooperative or an association (Art. 1163 § 2 of C. C. P).

The new law of 2005 has expressly determined the substantive legal grounds for deciding the case by an arbitration court. According to Art. 1194 of C. C. P., the arbitration tribunal decides on the basis of the law applicable to the legal relationship in question, or – if the parties have expressly agreed – on the basis of the general rules of law or equity.

It is worth pointing out that the possibility of an unlimited choice of law was already included in the European Convention of 1961 (Art. VII (1)). The Convention also permitted the arbitrators to act as *amiable compositeurs*, if the parties so decided and if they could have done so under the law applicable to the arbitration (Art. VII (2)).

9.3. The 1965 Act did not allow for a choice of law for obligations concerning immovables. Such obligations were compulsorily subject to the law of the place where the immovable was located (Art. 25 § 2).

9.4. In the absence of a choice of law, the 1965 Act has provided for the following solutions:

a) the obligations arising out of the contracts concluded on the stock exchange or at fairs were subject to the law of the seat of the stock exchange or the fair (Art. 28);

b) if the parties had, at the moment of the conclusion of the contract, their seat or domicile in the same country, the law of this country was applied (Art. 26);

c) if the parties did not have their seat or domicile in the same country, the applicable law with respect to certain types of contracts enumerated in Art. 27 § 1 was determined in accordance with the set of rules provided therein; these rules were based on the concept of characteristic performance;

d) with respect to contracts not enumerated in Art. 27 or 28, the law of the place where the contract was concluded was applied (Art. 29);

e) a separate conflict of law provision was provided for the contracts of employment (Art. 33).

Special conflict provisions have been provided in the air and maritime laws.

9.5. Poland is a party to numerous bilateral conventions, which contain conflict of law provisions for contractual obligations.

At the moment, when the Rome Convention has entered into force in Poland, the provisions of the 1965 Act, as well as the Air Law and the Maritime Code have lost their significance. On the other hand, all of the bilateral conventions remain an important source of conflict rules (including the conventions concluded between Poland and other member states of the European Union). Changes concerning these rules will only occur once the application of the Rome I Regulation commences.

9.6. The problem of the law applicable to contractual obligations, which are excluded from the Rome I Regulation, is dealt with in the Draft Act, Art. 27–29.

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COST AND FEE ALLOCATION IN CIVIL PROCEDURE

1. The basic rules: who pays?

1.1. Under the Polish Code of Civil Procedure [C. C. P.] of 1964, the basic rule of cost and fee allocation in civil proceedings is based on the principle of liability of a party for the result of the proceedings (Art. 98 § 1 C. C. P.).[1] It means that as a rule the losing party is obliged to pay to the winning party the costs of proceedings necessary to achieve the purpose of vindication of claims or defense.

As provided for in Art. 98 § 2 and § 3 C. C. P., the necessary costs of the proceedings conducted by the party in person or by a proxy holder who is not a professional attorney (barrister – advocate, legal advisor or patent agent)[2] include court fees (payments), expenses connected with the appearance of the party or its proxy in court as well as equivalence of the income lost as a result of such appearance. The total amount of travel expenses and lost income should not exceed the remuneration of one advocate performing his/her profession in the seat of the court. The necessary costs of the proceedings conducted by the attorney include the fee and expenses of the attorney as well as court fees and the costs of appearance of the party in court when summoned by a judge.

Necessary costs of the proceedings also include the costs of mandatory mediation commenced in compliance with an order of the court (Art. 98 (1) C. C. P.).

1.2. The reimbursement includes a fee payable to only one attorney (barrister). The attorney's fee awarded to the party must not exceed a sixfold mini-

[1] See A. B ą k, "A Practical Aspects of Allocation of the Costs of Civil Proceedings," *Przegląd Sądowy* 2000, No. 3, p. 87. All publication cited in the footnotes are in Polish.

[2] A legal aid in Polish legal system is performed as a rule by advocates (*adwokaci*) and so called legal advisors (*radcowie prawni*). In patent cases a representative of a party can be a patent agent (*rzecznik patentowy*). The above mentioned professions should be considered as a legal counsel and herein are referred to as "attorney."

mal fee rate provided for in the schedule and must not be higher than the amount in controversy. A fee exceeding that amount is not subject to reimbursement.[3]

1.3. The above mentioned rules apply also to appeal proceedings.

1.4. The costs of taking of evidence, including the costs of experts and witnesses are included in the court costs. This notion is defined in the Court Costs in Civil Cases Act of 2005. Court costs include fees and expenses. Court expenses include, in particular, the expenses of witnesses, remuneration and expenses of experts, translators and guardians, expenses of taking of evidence, costs of announcements etc.

It is a general rule that court expenses should be covered by a party who motioned them (Art. 2 Court Costs Act). Under Art. 130(4) of C. C. P., the party which applies for legal action which results in expenses is obliged to effect an advance payment. Nevertheless, if statutory regulation requires the performance of the act, the judge will order the performance, including taking of evidence *ex officio*. Under such circumstances, the required amount is temporarily covered by *Fiscus* or the State Treasury. The reimbursement of such expenses is decided by the court in its final decision.

1.5. Where parties settle their dispute, each party shall bear its own costs, unless otherwise agreed by parties (Art. 104 of C. C. P.).

2. Exceptions and modifications

2.1. There are some exceptions to the principle of liability of a party for the result of the proceedings. First of all, in a case when claims of a party were recognized by the court only in part, the costs of the proceedings are mutually cancelled out or proportionally distributed (divided) between or among the parties.

Apart from that, despite the result of the proceedings, in specific circumstances the court may not charge a losing party an obligation to pay costs to the winning party, in full or in part. The grounds for such a decision of the court may include a blatantly wrongful conduct of the proceedings by the winning party or a situation whereby a losing party could have been objectively convinced of the existence of its rights, but lost the lawsuit due to the limitation period.[4]

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[3] See also A. Z i e l i ń s k i, "A List of Costs and its Binding Character for Process Court," *Palestra* 1977, No. 8–9.

[4] See: T. E r e c i ń s k i, J. G u d o w s k i, M. J ę d r z e j e w s k a, K. W e i t z, *The Code of Civil Procedure with the Commentary*, Vol. 1, Warsaw 2009, p. 368.

A defendant is also entitled to the reimbursement of the costs if he/she did not specify the cause of action to initiate a lawsuit to the plaintiff and recognized the claim upon his/her first act in the proceedings.

Moreover, irrespective of the result of the proceedings, the court may order a party to pay the costs resulting from its action that is wrongful or lacking in diligence. This refers particularly to the costs resulting from avoiding to provide statements, giving false statements, concealing evidence or delay in submitting evidence as well as unjustified refusal to enter mandatory mediation to which a party agreed on in advance.

2.2. Pursuant to the provisions of Art. 183 (8) § 1 C. C. P., the court may order mandatory mediation between the parties. If mediation ends up with a settlement, the costs of the proceeding are borne by the parties, unless the parties agree otherwise. In this case also the costs of the mediation are mutually cancelled out.

2.3. The Polish Code of Civil Procedure does not establish legal grounds for parties agreements allocating costs and fees in case of litigation. The code regulations on allocation of costs of the civil proceedings are obligatory in nature and can not be excluded by the parties to a contract. No contractual provision can be accepted by the court when allocating costs and fees. It is also a commonly held view that no costs of the proceedings can be vindicated by a party against the other party after the termination of court proceedings which gave rise to such costs. Thus, an agreement concluded between parties on allocation of costs of the proceedings, although acceptable under a principle of freedom of contracts, should be deemed unenforceable. To my best knowledge, in the Polish legal practice these kinds of agreement are not observed.

2.4. As a rule in civil proceedings, parties are entitled to represent themselves and conduct the proceedings in person. The only exception to this rule refers to the proceedings in the Highest Court (especially in cassation proceedings which constitute an extraordinary legal measure). In more complex cases, however, it is not reasonable for a party to represent itself. Legal aid offered by attorneys is quite commonly accepted. In commercial cases the assistance of a lawyer, although not obligatory, is highly recommended due to the existence of numerous formal procedural requirements.

3. Encouragement or discouragement of litigation

3.1. It is not a task of regulations regarding cost and fee allocation to encourage or discourage a person to litigate. However, in some specific cases legal regulations provide for a statutory exemption from court costs (fees and expenses). The exemption from court costs can be based on objective (type of the case) or personal criteria (type of party).

As far as objective criteria are concerned, by virtue of Art. 96 of Court Costs Act of 2005, a plaintiff is not obliged to pay regular court costs and fees in cases referring to the establishment of paternity or maternity and claims relating thereto, alimony cases as well as cases that fall within the terms of reference of labour law (employees). The above mentioned cases are considered to be of great social importance and a statutory exemption form court cost and fee is meant to provide easy access to the system of justice.

As regards personal (subjective) criteria, court costs are not paid by the General Attorney of Poland, public prosecutors, ombudsmen, labour inspectors and trade unions (in labour cases), guardians appointed by court and other officers. Statutory exemption from courts costs and fees is also provided for in other statutes.

A party being a natural person may also apply to the court for complete or partial exemption from court costs and fees on the basis of a court decision. The applying party must declare that it is not in a position to bear the costs without detriment to the livelihood of itself and its family. The applying party must also enclose a written statement disclosing in detail information on its family situation, property, income and means of maintenance. The court may request an oath from said party.

Obtaining an exemption from court costs does not mean, however, that the party is free from paying the costs of the proceedings to the counterparty in case it loses a lawsuit.

3.2. An up front payment by the plaintiff includes court fee and attorney fee (where a party is represented by an attorney).

Court fees in property cases vary significantly depending on the disputed amount. In these cases a court fee equals to 5 percent of the amount in controversy, but not less than PLN 30[5] and no more than PLN 100 000 (US$ 33 300). In non-property cases court fees are fixed and are indicated specifically for each case. In these cases the fees are usually lower than those in property cases.

As far as attorney fees are concerned, their amount in property cases also depends on the amount in controversy.[6] The said amount of fees is specified in a Regulation of 2002 by the Ministry of Justice, which provides for a schedule of fees. The schedule, however, determines only minimal rates to be applied. The minimal attorney's fee rates range from PLN 60 to PLN 7 200. The regulation mentioned above specifies also minimal fees in non-property cases. The actual fee is determined in an agreement concluded by a litigant and his attorney. The attorney, however, has the right to agree upon a lower rate or to waive the fee in total.

[5] US$ 1.00 equals approx. PLN 3.00.

[6] See P. C z e p i e l, "Advocates and Legal Advisors' fees in Civil Proceedings," *Przegląd Sądowy* 2002, No. 11–12.

The most important expense connected with taking evidence is advance payment for the remuneration of an expert witness. The said amount varies depending on the complexity of the expert opinion, but it averages PLN 1 000 (US$ 333).

4. The determination of costs and fees

4.1. The amount of court fees is determined by the amount in controversy (in property cases) as well as by the nature of a case (in non-property cases). The total amount of expenses, in turn, depends mainly on the complexity of a case, the evidence that had to be taken, and, of course, on the duration of the proceedings (including the number of instances involved).

4.2. Lawyers' fees, as mentioned above, are determined in an agreement concluded between the lawyer and the litigant. They are usually higher than the fees established as minimal in the schedule. It is provided for by law that a type of a case and its complexity should be taken into consideration while determining the fee of the attorney in a relevant agreement.

4.3. As mentioned above, the attorney's fee awarded to the party must not exceed a six fold minimal fee rate provided for in the schedule and must not be higher than the amount in controversy. It follows that the wining party in some cases may not obtain full reimbursement for the fee paid to its attorney. The maximum amount that can be awarded to the party must not exceed PLN 43 200. Nevertheless, this amount does not have to be that high, since the court may, at its discretion, evaluate attorney's work with a view to calculating relevant fees, which is to be awarded by the court.[7] It is true, though, that courts very often award a party with the amount not exceeding the minimal fee.

The actual amount to be awarded to the party is determined by the court in the judgment ending the proceedings in each instance.

5. Special issues: success-oriented fees, class actions, sale of claims, and litigation insurance

5.1. A contingency fee is not regulated in the Polish legal system. In fact, it is considered to be against professional ethics and, as such, it is forbidden by the code of ethics adopted by the Bar Association. In fact, a contingency fee or a success premium is used by some lawyers, but it is a marginal question in the Polish legal practice. It should be mentioned, however, that the draft law on

[7] See A. N o w a k, "Practical Issues of Awarding Costs of Legal Representation in Civil Proceedings," *Przegląd Prawa Handlowego* 2006, No. 7.

class action in civil cases provides for a possibility to determine lawyers' fee on the success orientated basis.

5.2. The Polish law does not exclude selling claims for the purpose of litigation. It can sometimes be observed in practice, but it is not common.

5.3. A law on class action is underway on by the Polish Parliament. It is supposed to came into force in 2010. It is too early to evaluate this regulation.

5.4. To the best of my knowledge, insurance companies operating on the Polish market do not offer any insurance against costs of litigation. If so, it is not common yet.

6. Legal aid

6.1. The equality principle underlying the rule of law is crucial to the Polish civil procedure system. Under this principle, a litigant with limited means is entitled to appropriate legal aid. Pursuant to Art. 117 of C. C. P., a party which is exempted from court costs may apply court appointed counsel. This institution is called *ex officio* legal aid. A counsel is appointed if the court deems it necessary for a lawyer to participate in the proceedings. In fact, the court decides only on the necessity of legal aid and a lawyer is appointed by a relevant lawyers (bar) association (advocates or legal advisors) at the request of the court. A court-appointed lawyer is entitled to collect his/her fee and expenses form the amount adjudged from the counterparty. The unpaid costs of *ex officio* legal aid are borne by the State Treasury.

Ex officio legal aid is commonly used in the Polish legal system.

According to the draft amendment to the Code of Civil Procedure, the new regulation will allow the court to appoint a lawyer for a party also irrespective of the exemption from court costs.

6.2. It should also be stressed that according to the Polish civil procedure there are several options to institute civil litigation by public attorney (prosecutor) (Art. 7 of C. C. P.), non-profit organizations (Art. 8 of C. C. P.), ombudsmen and other entities acting on behalf of the litigant. These regulations are inherited after the communist period and are occasionally employed.

6.3. It seems that Polish regulations on costs and fees do not create a serious barrier to the system of justice, although some litigants complain about the amount of court fees, especially as far as litigation in commercial cases is concerned.

6.4. The Polish legal system does not provide for any barriers to bringing any kind of cases before the court. The amount in controversy is not an issue in this respect. The amount in controversy is important only in the case of cassation proceedings (i.e. before the Supreme Court) and determines accessibility of cassation, which is an extraordinary legal measure against valid judgments.

7. Examples

No statistical data are available as to the amount of costs of litigation in civil cases. A conservative estimate, based on the information obtained from lawyers, shows the following:

– small claim (equivalent of US$ 1 000) – amount of costs approx. US$ 300;

– small to medium claim (equivalent of US$ 10 000) – amount of costs approx. US$ 1 700;

– medium to large claim (equivalent of US$ 100 000) – amount of costs approx. US$ 8 400;

– large claim (equivalent of US$ 1 000 000) – amount of costs approx. US$ 39 000.

Conclusion

In 2005 a reform of the Polish regulation on costs in civil cases was introduced. It comprised the passing of a new Court Costs Act and adopting an amendment to the Code of Civil Procedure. The reform was meant mainly to simplify the system and to decrease court fees in civil cases. The amount of court costs in civil cases was often the subject of doctrinal criticism.[8] It was emphasized that they are higher than those in any other EEC member state.[9] As regards a decrease in fees, the reform proved successful. However, it is said that in the property cases a fee of 5 percent of the amount in controversy appears to much when said amount is really high. This is an important issue especially in commercial cases. It is further recommended that the schedule should be based on a regressive scale. In addition to that, the new regulation resulted in an unforeseeable practical complication in calculating courts fee and in an increase in the paperwork required. This problem, however, seems to have disappeared.

[8] M. S a f j a n, *Court Costs in Civil Cases*, Warsaw 1994.

[9] K. G o n e r a, *Commentary on Court Costs Act in Civil Cases*, Warsaw 2007, p. 13.

SECTION II C

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GROUP ACTION IN POLAND

1. Introductory remarks

1.1. The state of legal regulation

In the current Polish legal system, there is no specific regulation with regard to dealing with homogeneous or related civil claims. The Art. 479^{36} to 479^{45} of the Code of Civil Procedure [C. C. P.] are only a surrogate for such regulation. These laws provide proceedings for considering stipulations with respect to models of contracts as illegal. They were introduced in the Polish Code of Civil Procedure in 2000 and the judge's final and binding decision issued in such proceedings has effect towards third persons after it is registered. Moreover, there exists an institution of co-participation in the procedure as a form of individual enforcement of claims (Art. 72–74 C. C. P).

The introduction of a group action into the Polish legal system has been being considered for a couple of years now. A vivid discussion concerning this topic began in January 2007 during a conference consecrated to the question of collective litigation.[1] In the successive years, numerous scientific studies and feature monographs concerning group action have been published.[2] The above

[1] A. Ś w i c z e w s k a, *Class action oraz inne postępowania zbiorowe* [Class Action and other Forms of Collective Litigation], *Przegląd Sądowy* 2008, No. 4, p. 33.

[2] D. B a e t g e, *Class Actions, Group Litigation and other Forms of Collective Litigation*, a national report for a conference: *The Globalization of Class Action*, Oxford, 12–14 December 2007; Ch. H o d g e s, *Approaches to Group Litigation: the experience of differing approaches and the need for particular solutions and for flexibility*, transl. by M. Tulibacka, a report at a conference in Warsaw 18–19th January 2007, p. 3; R. K u l s k i, "Powództwo grupowe w świetle amerykańskiego federalnego prawa procesowego cywilnego" [Group Lawsuit in the Light of American Federal Civil Procedure Law], [in:] *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych* [Evolution of the Polish Civil Procedure in the Light of Political, Social and Economic Changes], ed. H. Dolecki, K. Flaga-Gieruszyńska,

mentioned conference concentrated mainly on the model of group action that can be adopted in Poland, since in different legal systems there are various models of civil procedure which are named together as "group action". The doctrine distinguishes three types of the broadly understood group action: an American class action, group action including elements different than those of an American class action and an action playing regulating role. According to the first model, anyone can bring an action for damages for the group members who may remain unknown until the decision is given and until they are under its effects (system opt-out). The second system supposes the necessity of forming the final composition of the group before the court issues a decision (system opt-in). Both models of civil procedure mentioned above serve as a protection of the sum of individual interests. The action playing regulating function is brought by organisations or natural persons with the aim of protecting collective interests.

During the discussion on the introduction of a particular model of a group action in Poland, the attention has been brought to the necessity of ensuring the accordance of the new regulation with the Constitution of the Republic of Poland and with international contracts valid for Poland. That is why the access to justice, expressed in the Art. 45 of the Constitution and in the Art. 6 of the European Human Rights Convention, becomes especially important. The American class action enables the judge to issue a decision binding the subjects who have not express their will to participate in a group or were not aware at all about the action under way. Then the right of such person to obtain judicial protection is greatly limited. That is one of the reasons why the doctrine[3] preferred that Poland adopts the opt-in model of a group action.

The doctrine noted the necessity of introducing a new type of action into the Polish system of civil procedure, showing its advantages and disadvantages. Using experience of other countries, P. Pogonowski[4] point to the following advantages:

– protection against giving divergent verdicts in similar factual states;
– diminishing costs;
– facilitating access to justice;

Warsaw 2008; V. M a g n i e r, *Class actions, group litigation and other forms of collective litigation*, a national report for a conference: *The Globalization of Class Action*, Oxford 12–14 December 2007; P. P o g o n o w s k i, "A group action – podstawowe założenia teoretyczne na tle istniejących unormowań proceduralnych" [A Group Action – Basic Theoretical Considerations in Comparison with the Existing Procedural Regulations], [in:] *Ewolucja polskiego postępowania cywilnego…*; "Ochrona roszczeń rozproszonych w Anglii i USA – dwa modele regulacji postępowań grupowych" [Protection of Dispersed Claims in England and in the USA – Two Models of Regulations of Group Actions], PS 2009, No. 6; P. P o g o n o w s k i, *A Group Action*, Warsaw 2009.

[3] Cf. e.g. A. Ś w i c z e w s k a, *op. cit*., p. 36.

[4] P. P o g o n o w s k i, *A Group Action*, p. 48.

– facilitating the reception of damages;

– assuring equality of arms in a procedure against an economically strong subject. The doctrine[5] also shows negative legal, social and economic aspects of introducing a group action. They are among others:

– too easy access to justice;

– cost increase of the judiciary;

– meeting false claims;

– conducting cases only in the interests of professional attorneys;

– disproportionately high remunerations of attorneys in relation to their working time;

– forcing companies who care for reputation to reach agreements;

– a slowdown in the economy as a result of high costs of the group action;

– an increase in the prices of services and goods caused by costs of insurance and covering damages by companies;

– creating unreasonably litigious indemnification culture.

The introduction of a new regulation concerning a group action will lead to a modification of the protective function of civil proceedings through the widening of the scope of protection of group interests in these proceedings.[6] It may also bring positive social results like facilitating access to justice to many subjects, who individually would not claim damages in civil proceedings. Moreover, a group action may turn out useful to the system of justice, enabling settling many civil cases during one action. The benefits of such procedure are appreciated in other countries, where has already been put into practice or is under way.[7] Therefore, we should approve of the initiative to introduce the construction of a group action in Poland.

1.2. The model of a group action as adopted in the bill

The Council of Ministers has drafted an Act on enforcing claims in a group action (document No. 1829) which was put forward before the Polish Parliament (the Sejm) on 26th March 2009. On 31st March 2009 the draft Act was submitted to the first reading on a session of the Parliament. During the session on 24th April 2009 the draft Act was sent for further elaboration to the Parliament

[5] P. P o g o n o w s k i, *A Group Action*, p. 49–50.

[6] On the protective function of civil proceedings and on the growing importance of the protection of collective interests as a protective function of these proceedings cf. S. C i e ś l a k, *Formalizm postępowania cywilnego* [Formalism of Civil Procedure], Warsaw 2008, p. 60.

[7] On the protection of collective interests in different countries, including especially Japan, Germany, France and the USA cf. M. D e g u c h i, "The Recent Legislation on the Consumer Group Action in Japan", [in:] *The Recent Tendencies of Development in Civil Procedure Law – Between East and West,* Vilnius 2007, p. 123–128.

Commission for Justice and Human Rights. The draft Act adopted the opt-in model of a group action.[8]

As a result of an open debate, various institutions have put forward their comments with regard to the draft Act, like for instance the National Judicial Council, the Union of Polish Banks, the Confederacy of Polish Employers, the National Bank of Poland and the Association of Polish Consumers. The National Judicial Council drew the attention to the fact that the planned group action was not well incorporated into a widely understood judicial procedure, since the suggested solutions are not developed enough and the terminology that is applied is not adjusted to the one which is common in the Polish Code of Civil Procedure. The Union of Polish Banks negatively estimated the proposal to make it impossible for a member of a group to resign their membership on a given stage of the procedure. The Union of Polish Banks considered such solution contrary to the right of judgement expressed in the Art. 6 of the European Human Rights Convention.

The Confederacy of Polish Employers put forward some critical remarks with regard to the draft Act and it drew a special attention to a wide presentation of the subjective and objective side of a group action. It thought it may breed difficulties for the application of the law due to the differences between the factual states. Apart from that, the Confederacy of Polish Employers put forward reserves of constitutional character with regard to a majority system of decision making with respect to dispositive acts in proceedings (e.g. when reaching an agreement or when resigning from a claim).

According to the Association of Polish Consumers, consumer organisations should also be included into the group of subjects entitled to initiate a group action. The Association negatively estimated excluding social organisations from these subjects.

1.3. Structure of the study

Having presented introductory remarks in point 1 of the study, the successive points will deal with detailed solutions concerning the Polish model of a group action, adopted in the draft Act. Further, static and dynamic elements of a group action will be presented (point 2–7 of the study) according to the draft Act, but we should bear in mind that in the course of a legislative process, the future law may be different from the draft Act. Finally, the paper will be summarized.

[8] On 5th November 2009 the draft Act was adopted by the lower chamber of the Parliament, but the legislative process is underway.

2. The objective scope of a group action, that is cases dealt with in this action

Under the draft Act, a group action has a wide object range. It is not provided to restrain its application only to some particular claims. Such a wide range of applications arouses doubts of some institutions, as well as representatives of the doctrine. Science considers whether it would not be better, in order to test the new regulation, to restrain its application only to some particular claims.[9] The object of the claim can be pecuniary as well as non-pecuniary, even though the attractiveness of a group action lies mainly in the possibility of demanding claims for indemnity for damages resulting mainly from the following events: transport accidents, construction catastrophes, medical errors, poor-quality tourist services, infringement of the natural environment etc.

Such a wide objective scope raises doubts of some institutions, as well as of the doctrine's representatives. Therefore, science suggested considering if it would not be better, in order to test the new solution, to restrain its scope to strictly limited claims.[10]

3. The subjective scope of a group action

The composition of a group is of the first importance in order to determine the subjective scope of a group action, which is related to the adopted opt-in model of a group action. The parties of the action are: a representative of a group, the group and the defendant. At the side of the active party, there is an absolute litigant subrogation.[11] It means that the group's representative has the right to bring a lawsuit in a group action (Art. 4 section 1 of the draft Act). He conducts an action in his own name, but with procedural consequences for all the group's members. As it was pointed out in the justification of the draft Act, such solution results from the specificity of a group action, in which a large group of persons may form a group (for example thousands of harmed people) and that is why, in order to ensure efficient course of an action, active legitimization has to be given only to one subject. According to the definition of a group

[9] Cf. CPR 19 and 20, where there has been mentioned a criterion allowing to determine the kind of cases which are dealt with in a group action. The only criterion is the existence of a few similar claims which have a common or related factual or legal basis, cf. Ch. H o d g e s, *op. cit.*, p. 11.

[10] P. P o g o n o w s k i, *A Group Action*, p. 181.

[11] On litigant subrogation cf. W. B r o n i e w i c z, "Podstawienie procesowe" [Litigant Subrogation], ZNUŁ 1963, issue I, book 31, p. 145–166, *Postępowanie cywilne w zarysie* [An Outline of Civil Proceedings], Warsaw 2008, p. 145.

action given in the Art. 1 section 1 of the draft Act, the action concerns exclusively procedural situations, where a group constitutes a plaintiff.

It should be noted, though, that the position of the group's representative may be different. We can differentiate two types of the group's representatives: a representative being a member of the group and a representative-public subject, who can only be a municipal consumer representative, acting within the scope of his cognizance. The other type of a representative of a group is not personally involved in the result of the action, since he is not a member of the group he represents. The representative of a group may be replaced by the court in the course of a group action upon application of more than a half of the group's members (Art. 18 section 1 of the draft Act).

4. Competence and composition of the court in a group action

A group action is a type of judicial civil proceedings not regulated in the Code of Civil Procedure. It lies within the competence of a regional court (court of first instance of a higher rank). Cases are examined by three professional judges (Art. 3 of the draft Act).

Such regulation of the competence and the composition of the court in a group action proves that the legislator has taken into consideration the importance of cases dealt with in this action. Generally, in the Polish civil procedure, in the first instance, civil cases are dealt before district courts (courts of first instance of a lower rank) by one judge (Art. 16 and 47 § 1 C. C. P.).

5. Stages in the course of a group action

In the course of a group action, we may differentiate three stages:
– action concerning admissibility of a group action;
– action aiming at final formation of the group;
– action aiming at examination and settlement of the case.

The first two stages are above all of introductory and preparatory character. Their objective is to create conditions enabling the settlement of the case that is to be tried in a group action.

5.1. Procedure concerning admissibility of a group action

During the first stage of the proceedings, the court determines whether there are premises to try the case in a group action. These premises have been stipulated in the Art. 1 section 1 of the draft Act and they include: claiming in a lawsuit

one type of damages, justification of the claims with an identical factual or legal basis, community of circumstances justifying the claim for all the damages, at least 10 persons being entitled to damages.

Depending on the results of an examination, i.e. whether a case meets all the premises mentioned above, the court issues a decision of trying the case in a group action or rejects the lawsuit (Art. 10 section 1 of the draft Act). There is a possibility of lodging a complaint against both decisions above mentioned (Art. 10 section 2 of the bill).

It should be noted that this stage of a group action is essential, since it is to form an efficient barrier against filing lawsuits aiming at insulting the defendant.[12]

5.2. Procedure concerning the final formation of the group

The next stage in a group action begins by the court's announcing a decision of filing a lawsuit in a group action. Such announcement should point to: the court before which the action is brought, the subject of the case and announcement to the persons entitled concerning the principles of the attorney's remuneration and the possibility of joining a group within the set time limit no longer than 2 months of the announcement (Art. 11 section 1 of the draft Act). It should be remembered that a lawsuit in a group action should include the announcement of joining a group from at least 10 persons (Art. 6 section 2 in relation to the art. 1 section 1 of the draft Act), however, the group may only be finally formed in the second stage of a group action.

The announcement mentioned above can be made after the judge's decision to try the case in a group action becomes valid. In the announcement of joining a group, the person entitled should specify their claim, point to the circumstances justifying the claim and the membership of a group. The court delivers a list of persons who joined the group to the defendant. After no sooner than a month, the defendant may raise exceptions against the membership of some of the group's or subgroup's members (Art. 15 of the draft Act). After this term, the court issues a decision with respect to the composition of a group. There is a possibility of lodging a complaint against that decision of the court (Art. 17

[12] The doctrine has been long pointing out the importance of the preparatory stage of a group action, cf. e.g. N. L'H e u r e u x, "L'Action Collective au Québec", [in:] *Group actions*..., p. 90. In various models of group actions, the importance of these preparatory proceedings is noted, even though it is different in nature. A Swedish regulation may be given as an example. It envisages two stages of the proceedings. At the first stage, an organisation representing particular interests or a government agency file a petition to the court to decide whether there are premises to bring a group action, cf. Ch. H o d g e s, *op. cit*., p. 4. The author notes that in every legal system there exists a kind of stage at which the court approves of initiating a group action, Ch. H o d g e s, *op. cit*., p. 34.

section 1 and 2 of the draft Act). After the judge's decision becomes legally valid no member can leave a group (Art. 17 section 3 of the draft Act).

5.3. Procedure concerning examination and settlement of the case

Substantial examination of a case in a group action takes place according to regulations on the procedure provided in the Code of Civil Procedure with additional laws included in the bill (Art. 24 section 1 of the draft Act). The draft Act clearly suggests that the following procedural institutions applied in ordinary proceedings should be excluded from a group action: the prosecutor and social organisations (Art. 7 and 8 C. C. P.), legal aid *ex officio* (Art. 117–124 C. C. P.), subjective change of an action (Art. 194–196), mutual action (Art. 204 and 205 C. C. P.), judge's discretionary power (Art. 207 § 3 C. C. P.). Moreover, regulations concerning separate proceedings in a civil lawsuit are not applied in a group action.

The draft Act treats the accomplishment of material and dispositive actions in a group action in a special manner. Under the Art. 19 section 1 of the draft Act, a withdrawal of a claim, quit-claim and concluding a compromise require consent of more than a half of the group's members. The court may consider the accomplishment of these actions to be inadmissible if the circumstances of a case show that the specified actions violate the law or good manners, they aim at circumventing the law, or they outwardly violate the interests of the group's members (Art. 19 section 2 of the draft Act).

As regards hearing of evidence in a group action, the draft Act provides only one special regulation (Art. 20). Under this article, a group's or subgroup's member is examined as a party. Such regulation is inextricably linked with the adopted Polish opt-in model of a group action, in which a strictly determined group of subjects constitutes the plaintiff of the proceedings. In consequence, a group's or subgroup's member can only be examined as a party, not as a witness. The draft Act gives the court hearing a case in a group action the right to direct the parties for mediation at any stage of the proceedings (Art. 7 of the draft Act). Since the bill has no specific regulations with respect to mediation, general principles of mediation expressed in C. C. P. should be applied.

6. Judicial decisions in a group action

As it has already been mentioned, the object of the claim can be pecuniary or as non-pecuniary. In case the plaintiff wins the case for pecuniary damages, two situations should be distinguished. The first occurs when the court – according to the content of the lawsuit – restricts itself to recognising the claims

as justified in principle, i.e. issues only a decision-prejudication, deciding only about the defendant's responsibility (Art. 2 section 3 of the draft Act). Then each member of the group, mentioned in the judicial decision, may bring an individual action in order to determine the exact amount of damages.

The other situation takes place when it is at the request of the plaintiff that the court adjudges a precise amount of damages for the group's members. Under the Art. 21 section 2 of the draft Act, the decision must specify the exact amount of damages falling at each member of the group or subgroup.

In case non-pecuniary damages are adjudged, the content of the decision should include the names of all the members of the group or subgroup.

Legally valid decisions adjudging pecuniary, as well as non-pecuniary damages, have effect of *res iudicata* in relations between each member of the group and the defendant.

As regards initiating the execution of pecuniary and non-pecuniary damages, adjudged in a group action, there are some differences. In the case of pecuniary damages, their execution takes place on the basis of individual petitions of the group's members. Under the Art. 22 of the draft Act, an executory title to do such execution is an excerpt from the decision specifying the amount of the damages due to each creditor (the group's member). In cases for non-pecuniary damages, the group's representative holds the right to file a petition to initiate the execution in the first place. If the group's representative does not file such petition within 6 months of the decision's becoming legally binding, any member of the group may file a petition to issue an executory formula and to initiate the execution (Art. 23 of the draft Act).

7. Costs of a group action

The normalization of laws with respect to the rules of bearing the costs of proceedings plays a crucial role in the correct functioning of group actions in all legal systems.[13]

The opt-in model of a group action adopted in the bill allows us to apply the rule of responsibility for the result of the case while determining the obligation of bearing the costs of a group action.

In the analysed proceedings, lower court fees are envisaged than in an ordinary civil proceedings regulated in the C. C. P. According to the draft Act, a relative fee in cases for property rights should amount to 2% of the value of the object of the dispute or an appeal, not less however than 30 PLN and no more

[13] H. L i n d b l o m, "*Group Actions*. A study of the Anglo-American Class Action Suit from a Swedish Perspective", [in:] *Group Actions and Consumer Protection*, Bruxelless 1992, p. 18; P. P o g o n o w s k i, *A Group Action*, p. 161.

than 100 000 PLN. It should be noted that in ordinary proceedings, in general, the fee amounts to 5% of the value of the object of the dispute or of the value of the object of appeal.

The bill gives a possibility of concluding a contract that would regulate the remuneration of attorney and which would specify the remuneration in relation to the amount adjudged in favour of the plaintiff (Art. 5 of the draft Act).

8. Conclusions

1. Despite the lack of a legally valid regulation in Poland concerning a group action as a method of enforcing some of the civil claims, its advantages have been noted and it is recognised that it should be introduced in Poland.

2. The draft Act of a group action assumes the introduction of an opt-in model which consists in the following elements:

a) a group action is to be a form of a court civil procedure regulated by separate laws, other than the C. C. P.;

b) before trying a case in a group action, the final composition of a group which constitutes the plaintiff has to be decided upon;

c) the bill does not envisage public subjects' participation (especially social organisations) as a group's representative, apart from one exception – district (municipal) consumer representative;

d) a rule of responsibility for the result of a case has been introduced, while determining the subject who will bear the costs of a group action;

e) a legally valid decision issued in a group action has effect of *res iudicata* with regard to relations among the group's members and the defendant.

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CLIMATE LAW IN POLAND

1. The idea of climate law

Creation of a system of legal regulations related to climate protection (climate law) results from recognizing the fact that countermeasures against the effects of climate change must be taken and that anthropogenic influence on climate is a fact. In this sense, the very creation of an appropriate system of regulations involves taking account of environmental conditions. The present form of the regulations, both at supranational and internal levels, is however an obvious compromise between the recognized requirements of environmental protection and the requirements connected with the satisfaction of specific needs by conducting economic activity. This is indicated, for instance, by international discussions aimed at reaching a compromise to adopt legal solutions that would continue the assumptions introduced by the Kyoto Protocol (especially discussions and decisions made at the so-called Climate Panels, including the COP14/MOP4 Conference in December 2008 at Poznań, Poland). Speaking in very general terms, I believe that "climate law" is a very clear example of obligations related to climate protection formulated on the basis of a compromise between such requirements and economic conditions.

In views publicly presented in Poland the need to introduce and enforce legal regulations related to climate protection is not always recognized as proved, which is connected with a sceptical approach by some social groups to the evidence of anthropogenic influence on climate. A certain politicization of discussion in this respect is quite evident; people challenging the necessity of increasing integration on a European (EU) and international scale tend to question the need to assume and perform obligations related to climate protection imposed on an international or EU level. Some scientific opinions challenging the actual anthropogenic impact on climate are presented as an argument. Climate protection laws are then regarded as an imposition – based on inconclusively proven premises – of legal solutions that are unfavourable for the state and place it in a difficult economic situation.

Poland's official position as presented on the international forum does not deny that it is necessary to adopt and implement climate protection regulations, and so recognizes the need to take account of the observed environmental conditions. However, an important aspect of such position is constituted by economic conditions, which is hardly surprising, considering the above-mentioned objective circumstances, which are mainly related to our country's energy production model and the economic situation of the energy sector and indeed of the entire country. It is in Poland's interest to negotiate requirements and to introduce solutions that will not drastically deteriorate the country's economic situation, which also calls for winning citizens' approval for the obligations and restrictions to be imposed on the state. All in all, climate protection regulations cannot ignore the existing economic conditions.

In Poland there are various views regarding the need to take steps related to climate protection. Relatively many people claim that the evidence of a relationship existing between anthropogenic greenhouse gas emissions and climate change is inconclusive scientifically. This position is mainly characteristic of people and political factions with a conservative-and-nationalistic attitude.

The government's view is also relatively cautious; it is based on the assumption that all obligations taken on by the state, especially those connected with our EU membership, should be honoured, but performed just as much as necessary. Such an attitude is also a consequence of the current economic situation (crisis) and Poland's somewhat peculiar position in respect of energy supply.

Generally, one may observe that the most prevailing view among ordinary people and politicians alike is that at the moment global warming does not pose any serious threat to the country's natural environment. This position is opposed to by ecological organizations and some scientific circles.

2. Legal structure of the climate law in Poland

The body of the legal acts regarding climate protection includes many different documents, as EU law in particular regulates the issue by acts related to various sectoral provisions. It is possible to divide these acts into two main groups: acts related to emissions trading and acts introducing various restrictions and imposing obligations on entities whose operation is somehow connected with greenhouse gas emission (mainly regulations for the power generation sector and those regarding emissions by motor vehicles). Analysing the system in general, one should also remember about general regulations, those related to air protection, in particular plans of action or acts fixing quality requirements.

The United Nations Framework Convention on Climate Change, drawn up on 9 May 1992, was ratified by the President of the Republic of Poland on

16 June 1994 and published nearly two years later, in Dziennik Ustaw [Journal of Laws – J. of L.] 1996, No. 53, item 238. A Government Announcement concerning the ratification was made on 15 September 1995.[1]The document was ratified by the President under the so-called Small Constitution,[2] which is no longer in force, with no recourse to the procedure under which the Sejm [the Lower House of the Parliament] is first asked for consent (Art. 33 (3) of the Constitution Act of 1992). In line with Art. 23 of the Convention, it came into force with regard to the Republic of Poland on 26 October 1994.

The Kyoto Protocol was ratified by the President of the Republic of Poland on 2 December 2002, under the authorizing parliamentary act passed in July that year.[3] The Protocol was also published after some time, in 2005.[4] A Government Announcement concerning the ratification was made on 9 June 2005.[5] Under Art. 25 (1) of the Protocol, it came into force with regard to the Republic of Poland on 16 February 2005.

On 28 October 2004 the Council of Ministers of the Republic of Poland approved the Agreement on the pilot area for application of the Kyoto mechanisms in the scope of energy projects in the Baltic Sea Region, drawn up at Gothenburg on 29 September 2003.[6] In line with Art. 14 of the Agreement, it came into force with regard to the Republic of Poland on 1 February 2005.

The two basic international agreements referred to above were accepted with no reservations or exclusions. As regards the Protocol, such need was justified in the statement of reasons for the parliamentary act entitling the President to ratify it above all with the fact that

> The Kyoto Protocol is the first legally binding international agreement aimed at protecting the environment and implementing a sustainable development programme on a global scale. It constitutes a beginning of a process designed to achieve stabilisation of greenhouse gas concentrations in the atmosphere. [...] The Protocol provisions concern the entire economy, which must take steps aimed at limiting the consumption of fuels, for instance by boosting energy efficiency and cutting down on material consumption rates. In this sense the Protocol is an economic rather than ecological agreement and may bring measurable benefits to economy, for instance better production competitiveness by limiting its costs, and at the same time improve the environment on both a regional and global scale.

[1] J. of L. 1996, No. 53, item 239.

[2] The Constitution Act of 17 October 1992 on Mutual Relations between the Legislative and the Executive of the Republic of Poland and on Local Self-Government (J. of L. 1992, No. 84, item 426, as amended).

[3] The Act of 26 July 2002 on the Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (J. of L. 2002, No. 144, item 1207).

[4] J. of L. 2005, No. 203, item 1684.

[5] J. of L. 2005, No. 203, item 1685.

[6] The Government Announcement of 7 June 2005 – Monitor Polski [Official Journal – O. J.] 2005, No. 57, item 777; the Agreement was promulgated in the same edition of O. J. as item 776.

Since 1 May 2004 Poland has been a full member of the European Union, with its internal law system integrated with that of the EU. This means that the current system of internal legal regulations regarding climate protection has been designed to incorporate the requirements of EU law. Internal law acts related to climate protection may be divided into several groups, similarly to EU law acts, as they are mainly used to transpose the requirements of EU law. The system of such acts is currently being redesigned; only one act from the new set has been adopted to date. It has been recognized that the existing legal status does not have any systemic regulations that would ensure the satisfaction by the Republic of Poland of its international obligations in respect of:

1) reductions in emissions of greenhouse gases and other substances;

2) conducting inventory of greenhouse gas emissions, and

3) reporting of amounts of pollutants released into the air.

Additionally, once the period of obligations arising from the Kyoto Protocol (2008–2012) ratified by Poland started, there appeared a need to formulate the rules for trading in units of allocated emissions. Because Poland had a surplus of such units, a mechanism was needed for managing funds acquired by selling such surplus, to enable promotion of capital investment projects aimed at air and climate protection and at preventing any negative consequences of climate change.

As a result, a decision was made to adopt new legal acts, among which the already passed act establishing a system for managing the national emission caps for greenhouse gases and other substances would be the key component of a set of three acts related to managing substance emissions into the air. The other acts to be part of the set include:

1) an act on the Community scheme for greenhouse gas emission allowance trading, which is to replace the currently binding act on emission allowance trading adopted in December 2004;

2) an act on balancing and accounting for quantities of emissions of sulphur dioxide (SO_2) and nitrogen oxides (NO_x) for big burning sources.

At the present moment (August 2009) both bills are still at the government consultation level and have not been referred to the Parliament for voting. The complete system is to enter into effect in January 2011.

The acts now in force include:

1. Acts related to adoption of international obligations (the Climate Convention and the Kyoto Protocol) – acts authorizing the President of the Republic of Poland to ratify, acts of ratification, government announcements about Poland's obligations under ratified international agreements.

2. Acts related to transposition of the requirements concerning the emission allowance trading scheme to internal law – especially Act of 22 December 2004 on Trading in Air Emission Allowances Concerning Greenhouse Gases and

Other Substances[7] with the secondary legislation.

3. Acts regarding other issues related to climate protection:

– Act of 17 July 2009 on the Greenhouse Gas and Other Substance Emission Management Scheme;[8]

– Act of 27 April 2001 – the Environmental Protection Law[9] together with its secondary legislation;

– Energy Law Act of 10 April 1997[10] and the related secondary legislation (promotion of renewable sources of energy);

– Liquid Biofuels and Biocomponents Act of 25 August 2006.[11]

4. Acts of general nature, connected with environmental protection:

– Act of 3 October 2008 on Making Available Information about the Environment and its Protection, the Public Participation in Environmental Protection and about Environmental Impact Assessments;[12]

– Act of 13 April 2007 on Preventing and Repairing Damage to the Environment;[13]

– Land Use Planning and Land Development Act of 27 March 2003.[14]

3. Competences of the administration

Poland is a unitarian country. The administration system at the local level operates on a dualistic principle and includes central government and local self-government bodies. The first perform above all control and supervisory functions. The principal central government administration body, operating within the area of a voivodeship,[15] is the voivode, who makes sure that the local self-government agencies comply with the laws in force and who controls other central government administration bodies. The central government administration body that supervises compliance with the environmental protection provisions is the Environmental Protection Inspectorate, comprising the General Inspectorate and voivodeship inspectorates. Towards the end of 2008 new

[7] J. of L., No. 281, item 2784, as amended.

[8] The Act was passed on 17 July 2009 and then submitted for signature to the President of the Republic of Poland. It should come into force 30 days after its publication in the Journal of Laws (probably in September/October 2009).

[9] J. of L. 2008, No. 25, item 150, as amended.

[10] J. of L. 2006, No. 89, item 625, as amended.

[11] J. of L. 2006, No. 169, item 1199, as amended.

[12] J. of L. 2008, No. 199, item 1227, as amended.

[13] J. of L. 2007, No.75, item 493, as amended.

[14] J. of L. 2003, No. 80, item 717, as amended.

[15] The highest-tier territorial division unit; currently the country is divided into 16 voivodeships.

central government administration bodies were established to deal with certain environmental protection matters (environmental impact assessment procedures, conservation of nature) in the form of environmental protection directors (the General Director at the central level, who operates under the Minister of the Environment, and voivodeship directors). Certain matters regulated by the Energy Law (including the issue of certificates of origin, which confirm that energy comes from a renewable source) are handled by the Energy Regulatory Office, which reports to the Minister of Economy.

At the non-central level local government bodies[16] are burdened with tasks of organizational nature, consisting in adopting and implementing by each local government unit environmental protection schemes (such acts are adopted by collegial bodies, such as poviat and gmina councils, voivodeship dietines). Such schemes are regarded as an expansion and fine-tuning of the National Ecological Policy. The executive bodies at the poviat level (the starosta) and the voivodship level (the marshall) also perform a number of rationing-like tasks, such as the issue of permits for environmental use and discharge of pollutants.

The powers and duties related to the performance of climate protection tasks aimed at environmental protection established at the central level have been assigned to the Minister of the Environment and as regards setting requirements for conducting specific types of economic activity – to the Minister of Economy.

The emission allowance trading scheme is supervised by the minister competent for environmental matters, with the assistance of the National Emission Allowance Trading Scheme Administrator. The National Administrator has been appointed by regulation of the Minister of the Environment. One of the most important tasks performed by the National Administrator is the maintenance of the National Allowance Registry, in which information about permits, allowances granted, sold, transferred and cancelled, as well as permissible emission levels is recorded. The Registry is public and access to the information in it is regulated by the general provisions regarding access to information about the environment and its protection contained in the Act of October 2008 (discussed in the following section). Additionally, the National Administrator performs the following tasks:

- maintenance of databases including information about installations covered by the scheme;
- monitoring of system operation;
- preparation of draft allowance allocation schemes;
- making available of draft allowance allocation schemes for public consultation;
- compilation of reports on system operation specified in the relevant provisions.

[16] Operating at three levels of territorial division – the gmina, the poviat and the voivodeship.

The tasks to be performed by the National Administrator have been assigned to the Institute for Environmental Protection, which is a research-and-scientific institution. The Institute is responsible for formulating the scientific basis for the state's strategy and policy as regards environmental protection as well as technical, economic, legal and organizational conditions for pursuing such policy.

The Act of July 2009 regarding the management scheme provides for the creation of a National Centre for balancing and managing emissions, whose tasks have also been assigned to the Institute for Environmental Protection. The main tasks of the National Centre comprise the performance of the functions of "the national system for balancing and forecasting emissions," including the maintenance of "a national database of emissions of greenhouse gases and other substances." These are new institutions, set up by the same Act. The National Centre is also to keep "a national register of Kyoto units," to give opinions on intended Joint Implementations outside the territory of the Republic of Poland and on Clean Development Mechanism proposals, to compile reports and projections regarding emissions of greenhouse gases and other substances. The National Administrator is to be incorporated into the National Centre (once an act on a EU scheme is adopted).

The powers and duties of the Minister of Economy encompass the operation of energy enterprises as regards imposition of obligations related to the use of renewable energy sources. The Minister sets the rules of accounting for the requirement to generate a certain part of energy from renewable sources and exercises supervision over the satisfaction of the obligation.

Supervision over the performance of their duties by central administration agencies is exercised on the general principles, according to systems of administrative dependence. Based on the provisions of the Constitution, parties may be held politically accountable before the State Tribunal.

The powers and duties of administrative agencies related to the operation of the emission allowance trading scheme are discussed elsewhere, in the section analysing the scheme. The section will also present the powers and duties of administration as regards the rationing of emissions.

4. Policies and national measures on the use of climate mechanisms (Kyoto mechanisms)

Under the Act of July 2009, "Kyoto units" (certified emission reduction units, assigned emission units, emission reduction units or absorption units) will be recorded in the national registry kept in the form of an electronic database by the National Centre. The national registry is to operate on the principles specified in Commission Regulation (EC) No. 2216/2004 of 21 December 2004 for

a standardised and secured system registries pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No. 280/2004/EC of the European Parliament and of the Council. Kyoto units owned by the State Treasury will be kept in the national holding account. The National Centre will formulate rules governing the detailed principles of opening, administering and maintaining accounts for installation operators and personal holding accounts in the national registry.

Kyoto units may be used to meet the greenhouse gas emission reduction requirements under the Kyoto Protocol or be internationally traded, as provided for by the Kyoto Protocol or decisions of the Conference of the Parties serving as a meeting of the Parties to the Kyoto Protocol, or be used in the successive settlement period on the principles set out in the Act. The minister for environmental matters will be competent in respect of matters related to managing and trading in Kyoto units.

The Act provides that allocated emission units may be transferred in international transactions concluded as international agreements or civil law contracts. Civil law contracts of sale or purchase of allocated emission units may be entered into by the minister for environmental matters, but only after obtaining the consent of the Council of Ministers. The minister is obliged to submit to the Council of Ministers a copy of each civil law contract of sale of units within 14 days of its conclusion.

Because the Kyoto Protocol allows for transferring the emission units allocated to Poland in the period 2008–2012 to successive settlement periods with no quantitative limitations, appropriate regulations are included in the Act. The ability to transfer emission reduction units and certified emission reduction units, as per the requirements of the Kyoto Protocol, was limited to the maximum of 2.5% of the national greenhouse gas emission limit.

The Act sets up a National Green Capital Investment Project System. The system is a derivative of the mechanism provided for in Art. 17 of the Kyoto Protocol and is to guarantee the ability to transfer units between countries that have reduction goals specified in the Protocol. The 'national system' is to be connected with 'earmarking the proceeds from the sale of surplus emission units in order to ensure they are used to achieve strictly defined goals related to environmental protection in the unit seller's country'.[17] The system is to guarantee that a country with a shortage of allowances is able to increase its greenhouse gas emissions by purchasing units and at the same time that the sale proceeds are used by the seller for purposes related to environmental protection, e.g. emission reduction. A sale of allocated emission units may only be effected if the seller guarantees that all sale proceeds will be used to finance projects related to a broadly-understood protection of the climate and the environment.

[17] Justification for the bill, Sejm Journal, No. 1936, p. 17.

Because of the need to guarantee the separateness of the funds acquired as a result of a sale of allocated emission units, the Act provides that the proceeds will be collected in a special bank climate account held by the National Environmental and Water Management Fund. The funds from the climate account will be used to finance tasks related to the promotion of undertakings implemented as part of programmes and projects under the National Green Capital Investment Project System as well as to cover the costs of operation and implementation of the system. The Act identifies the main areas of activity that may be paid for using the funds. Applications for funds are to be reviewed by the Consultation Council, as an advisory body to the minister for matters regarding the operation of the National Green Capital Investment Project System.

The Act of July 2009 also sets out the principles of Joint Implementations in the territory of the Republic of Poland as part of the national or international project implementation procedure. The latter encompasses the procedure concerning project approval, monitoring, assessment and verification according to the principles defined in decisions of the Conference of the Parties to Climate Convention. Joint Implementations in the Republic of Poland require, irrespective of the procedure selected, that a support letter and then an approval letter be obtained, which are issued as administrative decisions by the minister for environmental matters at the request of the interested party. The minister will issue a decision after consulting the National Centre if the project satisfies the requirements set out in the Act. Decisions issued in connection with the two types of applications are binding in nature; the Act specifies the circumstances in which a support letter or an approval letter for a JI should not be issued.

Under the Act, the party carrying out a JI is obliged to monitor the project, as per the monitoring plan specified in the implementation documentation. Using the monitoring data, a report should be prepared specifying the obtained reduction, avoidance or absorption of greenhouse gas emissions and the resultant quantity of emission reduction units obtained as a result of the implementation. The number of emission reduction units generated as a result of the implementation is to be subject to verification by an independent auditor.

The Act provides that participation in the carrying out of JIs outside the territory of the Republic of Poland and Clean Development Mechanism projects requires the consent of the minister for the environment in the form of an administrative decision. The consent is issued at the request of the party interested in participating in the project.

5. National emission trading law

The system is currently based on the Act of 22 December 2004 on Trading in Air Emission Allowances Concerning Greenhouse Gases and Other Substanc-

es.[18] The Act came formally[19] into effect on 1 January 2005, except for the provisions regarding the settlement of emissions taking account of trade effected under the Kyoto Protocol, which came into force in 2008.

In line with its title, the Act sets out the rules of trading in greenhouse gas emission allowances, but not only that. It should be emphasized that the solutions adopted in the Act have a wider application, and the emission trading scheme may be extended, within the country, to also cover other substances. In Art. 1 the Act defines the principles of operation of the scheme for trading in emission allowances in respect of greenhouse gases **and other substances**, which is aimed at limiting such emissions. Since 1 January 2005 the system has covered carbon dioxide, but at a later time a national solution may be implemented under which other substances, particularly SO_2, NO_x and dust, will be included.

In the meaning of the Act[20] the notion of **allowance** means the right to release into the air in a given period of time – the equivalent in the case of greenhouse gases and 1 Mg of other substances. According to the definition in Art. 3 (1) of the Act, the 'equivalent' means one megagram (1 Mg) of carbon dioxide (CO_2) or the amount of another greenhouse gas equivalent to 1 Mg of carbon dioxide, computed using the warming rates.[21] The 'allowance' is thus understood as a certain unit denoting the quantity of permissible emission which the party entitled to it may sell, transfer to another party or, above all, use it to account for its own emission, which will lead to such allowance being redeemed.

The Act of December 2004 does not define the legal nature of an 'emission allowance'; in practice it is regarded as a property right to intangible assets. Proceeds from sale of such a right are liable to income tax and the very transaction – to VAT. Because of the probably relatively insignificant size of the allowance trading market, it is difficult to assess its current impact on economy. Publicly available reports drawn up by the obliged parties do not evaluate the operation of the market; there is also no information about the way in which allowances given are used (redeemed to cover own emissions, sold). The currently available reports focus on estimating emissions of individual greenhouse gases from designated sources. In line with the Act, the National Registry is open to the public, but there are no plans to make it available *via* the Internet. Reports are published, however, regarding parties that fail to comply with the

[18] J. of L. 2004, No. 281, item 2784, as amended.

[19] Its actual coming into effect depended on the establishment of an allowance allocation plan, which was ready after nearly a year.

[20] The definition is given in Art. 1 (15).

[21] The definition in the bill referred to the warming rates specified by the International Climate Change Team set up under the United Nations Framework Climate Change Convention drawn up at New York on 9 May 1992 – J. of L. 1996, No. 53, item 238; the version actually adopted authorises the minister to set such rates by ordinance.

obligation to submit a sufficient quantity of allowances for redemption; in 2008 this regarded one enterprise.

The system established by the Act encompasses a European Union greenhouse gas emission allowance trading scheme[22] and a national emission allowance trading system, which in the long run is to improve activities aimed at meeting the annual permissible emission levels resulting from international agreements of other substances, especially sulphur dioxide (SO_2), nitrogen oxides (NO_x) and dust into the air. The installations covered by the system are specified in the implementing ordinance.[23] Specific installations included in the system, as indicated above, are set out in the National Emission Allowance Allocation Scheme.

The emission allowance trading scheme is supervised by the minister competent for environmental matters, with the assistance of the National Emission Allowance Trading Scheme Administrator. The National Administrator has been appointed by ordinance of the minister for environmental matters,[24] who supervises the Administrator. Supervision over the compliance with the rules formulated in the Act by the parties operating under the scheme is exercised by the Environmental Inspectorate.

The operator of an installation covered by the scheme is required to obtain the permit of the appropriate administration body and the exercise of obtained emission allowances is only possible after such a permit has been acquired. Greenhouse gas emission allowances are granted to the installation operator for each installation covered by the scheme, for a given settlement period, divided into individual years of the period. Allowances for existing installations are allocated in the National Scheme[25] and for new ones in the permit. The installation operator covered by the scheme who has been assigned allowances is obliged to pay a charge for such allowances. The charge constitutes income of the National Environmental and Water Management Fund.[26]

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[22] In the meaning of the Act these are: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydro-fluoro-carbons (HFCs), perfluorinated compounds (PFCs), sulphur hexafluoride (SF_6).

[23] Ordinance of the Minister of the Environment of 31 March 2006 on the Installation Types Covered by the European Union Emission Allowance Trading Scheme (J. of L. 2006, No. 60, item 429, as amended).

[24] Ordinance of the Minister of the Environment of 13 September 2005 on Appointing the National Administrator of the Emission Allowance Trading Scheme (J. of L. 2005, No. 186, item 1562) – the functions of the Administrator are performed by the Institute of Environmental Protection of Warsaw.

[25] The total number of carbon dioxide emission allowances for the period 2008–2012 amounts to 1 042 576 975 and results from the pool allocated to Poland under the EU scheme.

[26] A special fund for financing environmental protection tasks, managed by a separate organizational unit.

Under the scheme allowances may be disposed of, i.e. sold or transferred. Art.26 (1) of the Act provides that emission allowances allocated to a given installation for a given year of a settlement period may be:

1) used for the installation operator's own needs, corresponding to the actual emission of a given substance into the air;

2) sold;

3) used in the successive years of the settlement period or in the next settlement period.

Furthermore, Art. 30 (1) of the Act explicitly allows the installation operator to transfer his emission allowances between the installations to which he has a legal title. In order to be able to jointly account for allowances, operators of installations of one type may group installations, which requires the consent of the administration body designated in the Act. The Act also enables allowances to be transferred within one settlement period, but not between various settlement periods.

Sale may be made under a civil law contract, as to which the Act specifies no special requirements, apart from the fact that each contract should be reported within three working days of conclusion to the National Allowance Registry under pain of invalidity. Under the EU scheme, the reporting requirement is imposed on the operator of the installation located in the Republic of Poland.

Allowances are accounted for on the basis of annual reports specifying the number of allowances as at 31 December of the previous year, verified and assessed by authorised auditors or voivodeship environmental inspectors. The report verification costs are paid by the installation operator.

The Act allows for CERs and ERUs received as a result of carrying out CDM and JI projects provided for in the Kyoto Protocol to be used for emission settlement purposes by the installation operator. Both types of units are to be exchanged for allowances at a ratio of 1 : 1. However, such settlement may not be made using units received for implementation of capital investment projects consisting in the construction of nuclear facilities, changes in land use or in forestry.

The installation operator must submit an annual report to the body authorized to issue permits and to the National Administrator by 31 March. The number of allowances corresponding to the actual quantity of emission from a given installation for each year is redeemed on the basis of the verified annual report.

Emissions outside the allowances received are subject to sanctions in the form of pecuniary penalties. Such penalties are to be paid by the installation operator for the lack of allowances corresponding to the actual quantity of emissions in individual years of the settlement period as at 31 December each year. The penalties are imposed by decision of the Voivodeship Environmental Inspector. In the settlement period 2005–2007 the pecuniary penalty for the lack

of allowances for the emission of one tonne of carbon dioxide amounted to the Polish equivalent of EUR 40,00, and since 2007 – of EUR 100,00.

CO_2 emission allowances are traded on exchanges (in Poland – on Towarowa Giełda Energii [Polish Power Exchange]) and on the brokers market. There are two types of transaction on the allowance market: spot and forward transactions. A spot contract is a legally binding obligation to deliver/accept an agreed quality and quantity of a given asset, at an agreed price, with delivery and payment, which expires on the day of settlement. For such a transaction to be conducted a party must have an allowance account and the right to dispose of such allowances. A forward contract is a legally binding obligation to deliver/accept an agreed quality and quantity of a given asset, at an agreed price, at an agreed time in the future. On the day of conclusion of a forward contract the trader does not need to have allowances or funds; these must be available on the 'agreed date' in the future. An advantage of a forward contract is the ability to trade in allowances to which a given party is only entitled, e.g. 2010 allowances may be sold as early as 2009.

As indicated above, a party selling allowances should report the transaction to the National Registry; however, no data about the number of allowances transferred have been officially published to date. There is no publicly available information about the size of the emission allowance trading market in Poland. It follows from the reports published by Polish Power Exchange that in 2006 there were very few such transactions, no transactions in the years 2007–2008, and a dozen or so sell orders were given towards the end of 2008.

In the case of the EU ETS allowances may be traded between:

- individuals, corporations or organizational units without legal personality – within the EU;
- individuals, corporations or organizational units without legal personality from authorized countries,[27] provided such countries have ratified the Kyoto Protocol.

6. Inspection of emission with the use of rationing and economical instruments

Polish law provides for the obligation to acquire a permit for emission into the environment if such emission is from a designated type of installation. The emission allowance system is regulated by the Environmental Protection Law Act of 2001; the Act provides for two types of such permit: sector permits (for

[27] The countries regarded as such are listed in the relevant provision of the Act (Art. 3 (11)).

emissions of a specific type, including emissions into the air[28]) and integrated permits, which cover the entire environmental impact of a given installation[29] (meeting the requirements of IPPC Directive 1996/2008/EC). Installations that do not require an emission permit may be subject[30] to the requirement of notification to the appropriate administration body (the notification includes information about the intended emission; the body may – by decision – object to the conduct of such operation if it would violate the laws in force). Emission permits and notifications do not apply to greenhouse gases.

The installation emission standards are set out, as regards air emissions, in the Ordinance of the Minister of the Environment of 20 December 2005 on Installation Emission Standards.[31] The standards do not apply to greenhouse gases. Greenhouse gases are also not covered by the regulations concerning the obligation to measure emissions, establishing the scope and manner of such measurements.[32] The Act of December 2004 imposes the obligation to monitor emissions of such gases for purposes related to accounting for the use of emission allowances. The actual obligation to monitor greenhouse gas emissions results from the fact that they are subject to environmental use fees.

The system of environmental use fees is a peculiar institution of Polish law. Such fees are paid by 'parties making use of the environment'[33] in connection with the conduct of specific operations having an impact on the environment, e.g. in the form of emissions of specific substances into the air. Such substances are specified by ordinance,[34] and include greenhouse gases. The party obliged to pay the fee should establish its amount on its own, on the basis of emission data

[28] A permit has to be obtained by the operator of the installation causing emissions into the air, except for the installations designated in the implementing regulation – Ordinance of the Minister of the Environment of 22 December 2004 on the Cases in Which the Release of Gases or Dust into the Air from an Installation Does Not Require a Permit – J. of L. 2004, No. 283, item 2840.

[29] The types of installations subject to the requirement to obtain an integrated permit, as in the case of the IPPC Directive, are specified in the Ordinance of the Minister of the Environment of 26 July 2002 on the Types of Installations That May Cause Significant Pollution of Individual Natural Elements or the Environment as a Whole – J. of L. 2002, No. 122, item 1055.

[30] The list of installation types subject to the notification requirement is given in the Ordinance of the Minister of the Environment of 22 December 2004 on the Types of Installations Whose Operation Requires Notification – J. of L. 2004, No. 283, item 2839.

[31] J. of L. 2005, No. 260, item 2181, as amended.

[32] The Ordinance of the Minister of the Environment of 4 November 2008 on the Requirements Regarding Emission Measurements and Measurements of the Quantity of Water Drawn – J. of L. 2008, No. 206, item1291.

[33] These are mainly businesses and other organizational units.

[34] Currently (the system has been in operation for the last 20 years) it is the Ordinance of the Council of Ministers of 14 October 2008 on Environmental Use Fees – J. of L. 2008, No. 196, item 1217; the main greenhouse gases (CO_2 and methane) have been subject to the fees since the very beginning.

in its possession and make the payment into the account kept by the designated administration body, which also supervises the performance of the obligation. The money paid as fees constitute income of special funds that have the form of environmental funds (a national and local ones).

Currently the regulations regarding environmental impact assessments are set out in the Act of 3 October 2008 on Making Available Information About the Environment and its Protection, the Society's Participation in Environmental Protection and about Environmental Impact Assessments.[35] The impact assessment system complies with EU law. As part of each assessment, environmental impact resulting from greenhouse gas emissions should be evaluated.

[35] J. of L. 2008, No. 199, item 1227, as amended.

SECTION III A

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CORPORATE GOVERNANCE

RESPONSIBILITY OF MEMBERS OF MANAGEMENT AND SUPERVISORY BOARD IN POLAND

1. General information on corporate governance in the country

1.1. Definition of corporate governance

There is no legal definition of the term "corporate governance." The term is borrowed from the Anglo-American literature and is usually defined as a system of institutions and rules which govern competencies of company organs. Both in legal and non-legal parlance the foregoing term is mainly used with respect to public companies (i.e. companies whose shares are traded on the stock exchange).[1] Some authors use the term corporate governance in the narrow sense, namely, covering only soft rules adopted by public companies and/or by the Warsaw Stock Exchange by way of self-regulation. Such body of soft rules is frequently described as Best Practices.[2] In this report the term corporate governance is used in a broad sense covering both statutory and soft rules, including external corporate governance norms regulating competencies of company organs, including, for instance, accounting and auditing rules shaping rights and duties of company organs, in particular those applicable to management board and supervisory board.

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[1] G. D o m a ń s k i, "Znaczenie dobrych praktyk ładu korporacyjnego dla odpowiedzialności cywilnej spółek publicznych i członków ich organów," [in:] *Prawo prywatne czasu przemian* 2004, at 405 *et seq*.; M. F u r t e k, W. J u r c e w i c z, "Corporate Governance – ład korporacyjny w spółkach akcyjnych," *Przegląd Prawa Handlowego* 2002, No. 6, at 29.

[2] M. W i k t o r o w i c z, "Dobre praktyki w spółkach (corporate governance)", *Prawo Spółek* 2003, No. 10, at 17–26.

1.2. Statutory regulation of stock companies

The Code of Commercial Companies of 2000 constitutes a comprehensive regulation of capital companies and partnerships, including their restructurings (i.e. mergers, split-offs and transformations).[3] Stock Corporations (spółki akcyjne) are comprehensively regulated in the Code of Commercial Companies (C. C. C.). The Code distinguishes between public and private stock corporations.[4] The majority of the Code rules apply to both forms of corporations. But there is a growing number of special rules which cover only public companies. Sometimes, especially in the process of implementation of EU directives which govern public companies, the Polish Parliament extends European rules to private corporations. For instance, after the implementation of the EU Directive of July 11, 2007 on the exercise of certain rights of shareholders in listed companies,[5] shareholders of private corporations have gained from the implementation of the almost uniform application of the Directive, although some of these rules, especially those regarding disserent voting from each share or formalities for proxy holder may be too complicated for non-public companies.

1.3. Corporate Governance Code (*soft law*)

1.3.1. Foreword

Soft law, as opposed to *hard law*, has a strongly watered down coercive element, sometimes to such an extent that it *de facto* is a legal nullum and arguably should no longer be called *soft law* from an instrumental point of view. At other times, however, there are at least indirect legal effects of a system of soft law (cf. e.g. Deutsche Industrienorm (DIN) that forms the basis of a huge variety of contracts thus acquiring legal force). In certain areas soft law structures have characteristics that make them more suitable for regulation than hard law. For instance, the German Corporate Governance Kodex is more easily translated into other languages giving international players easier access to the local system.[6] Moreover, in a system where the legislator has had relatively little experience, it might be advantageous to start off with a system of no more than

[3] S. S o ł t y s i ń s k i, "Sources of Foreign Inspirations in the draft of the Polish Company Law, 1999," [in:] *Corporations, Capital Markets and Business in the Law*, eds. T. Baums, K. J. Hopt, N. Horn, Hamburg 2000, at 533 *et seq*.

[4] The Polish stock Corporation is a close equivalent of the German and Austrian Aktiengesellschaft.

[5] Directive No. 2007/36/EC, *Official Journal*, P. 0017-0024.

[6] Cf. M. L u t t e r, *Corporate Governance: Kodex statt Gesetz?*, who cites this as one of the primary reasons for the German adoption of a codex rather than hard law.

indirect legal force.[7] It also relieves the lawmaker of the need to concern itself with too many detailed questions whose correct answers might be subject to frequent change (too frequent for a legislature to properly keep up). The Polish system of Best Practices for Warsaw Stock Exchange (WSE) listed companies mirrors to some extent the German approach by being half way between non-committal[8] and indirectly coercive:[9] each company chooses to follow the Code, but management and supervisory boards must publicly explain whether and to what extent the Code is followed. However, the current version of the Polish "Best Practices" is a product of self-regulation rather than a statutory *fiat*.[10] The effect of this, at least in theory, is that investors and shareholders have additional knowledge of the company's position and that the market is able to reward and punish the "good" and the "bad" players.[11] Lutter also argues that corporate governance may be a criterion for credit rating.[12] Not all questions are equally well dealt with by a codex: questions of liability and conceptual questions, as well as those involving strong conflicts of interests are better resolved by the legislature in order to ensure one uniform standard and effective enforcement.

In the area of corporate governance, law is therefore limited to designing a normative model for corporate governance; other issues are regulated by a company's Articles of Association, good customs and best practices. Grzegorz Domański[13] mentions that it is unclear whence one takes the conviction that corporate governance should be regulated by a system of best practices. But if one accepts (as is the case in any developed economy) the primacy of a free market over a system fully regulated by hard law, then in conjunction with the need, especially obvious in the current times, to have some regulation beyond what is currently the case, soft law appears to be the only option, since the alternatives are hard law or no regulation at all. From a political point of view, best practices are instruments of deregulation under the assumption that with regard to detailed questions market mechanisms more effectively necessitate corporate governance than law can do.[14]

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[7] *Ibidem*.

[8] E.g. Austria and Switzerland.

[9] GB where a company is not admitted to the LSE without expressly accepting the Combined Code, n.b. deviation for good reasons is possible.

[10] See, section 3.2, *infra*.

[11] Polish and foreign empirical studies indicate, however, that the market does not provide a premium for companies complying with "best practices" codes.

[12] Also cf. P e l t z e r, "Germany," [in:] *Global White Page, Global Corporate Governance Guide* 2004, p. 197, 201.

[13] G. D o m a ń s k i, *op. cit.*

[14] Citing R. N e w e l l, G. W i l s o n, "A Premium for Good Governance," *The McKinsey Quarterly* 2002, No. 2, p. 20. The performance of capital markets during the Enron era scandal and the recent crises has severely undermined if not abolished the concepts of "market efficiency" and "rational expectation."

1.3.2. General characteristics of the Best Practices Code adopted by the Warsaw Stock Exchange

The Best Practices adopted by the Warsaw Stock Exchange (Zasady Dobrych Praktyk, ZDP) on July 4, 2007 are a voluntary code that companies deal with individually on the basis of the model of "comply or explain." They sometimes mirror Polish law[15] and good customs to which the Code of Commercial Companies relates. The majority of rules are practical recommendations with the aim of maintaining corporate order in companies such that decision-making takes into account certain values for the common corporate mission. *Ultima ratio* of the creation of Best Practices then stands on the correction of decisions of corporate organs beyond the invoking of values whose adherence one cannot, and should not, be forced by law (*non omne licitum honestum*). The Best Practices were adopted following a bottom-up approach with wide market participation from employers to market participants. The current version (2007) is the third after 2002 and 2005. The document is divided into recommendations to listed companies, management boards, members of supervisory boards and shareholders. It shares certain aspects with Central and Western European codes, and also incorporates some recommendations of the European Commission.[16]

The Code aims at increased transparency of listed companies and addresses those areas where its application may have a positive impact on the market valuation of companies; it strengthens the protection of shareholders' rights, including those not regulated by legislation and improves communication between companies and investors. It is implemented using the English practice of "comply or explain," i.e. a company must publicly state which of the Code's recommendations it follows and which it does not follow, giving an explanation. In practice, companies have complied with this informative obligation and corporate standards have bettered: the independence of supervisory board members and publicly available by-laws relating to management and supervisory boards are becoming a recognised guideline for public companies, which have become more transparent towards investors and they have recognised the value of good corporate governance. The WSE is interested in creating and maintaining a proper corporate culture; as such it is active in educating market participants and the general public about corporate governance through a series of conferences and seminars on the topic.

1.3.3. The interplay between hard and soft company law rules

Aside from reputational effects, the legal consequences of the Code are not entirely clear. Since the duty to declare does not come from law but from the

[15] E.g. the dualistic division of competencies into supervisory and management boards.
[16] *Best Practice for Supervisory Board Members*, Rule 6.

Rules of the Stock Exchange, there is doubt as to whether the Code can have any meaning in the sphere of civil responsibility of the company and members of its organs. Domański[17] agrees with Lutter[18] that if publication regarding adherence to the Code is inaccurate then this constitutes a breach of law. It also means that the members of the management and supervisory boards did not properly fulfil their functions and may come under a personal liability for causing loss to the company. Shareholders may then claim for the loss incurred by having faith in and relying on the publication. They ensure observance of the Code through the general law, i.e. by claims against the company or members of the boards for loss before the ordinary courts or before an arbitration tribunal, and liability will have a tortious character. There are two possible situations: first of all, if a company declares adherence, then the Articles of Association must serve the implementation of those rules[19]. If they are incorporated, then non-adherence will be an independent instance of liability for loss, vis à vis the company[20] or *vis-à-vis* the shareholders.[21] Secondly, if they are not taken into the constitution, then these constitute additional, dependent instances of liability for loss when determining whether members of boards have given the required effort in fulfilling their function.[22]

It remains contentious whether the behaviour of board members in contravention with publicly declared standards can, with regard to good custom, be illegal *eo ipso*. A claim for loss *vis-à-vis* the firm pursuant to Art. 416 of the Civil Code could ground title of the company *vis- à -vis* board members even if the adequate recommendation of the Best Practices was not put into the Articles of Association.[23] The Code also includes recommendations directed solely to shareholders. It is an unresolved issue whether in Polish civil law it is possible to construct tortious liability of companies *vis- à -vis* the shareholders for loss incurred through the violation of the Best Practices by shareholders in contravention of a positive declaration that they would follow them.[24] Due to the frequent prominence of dominant shareholders conflicts often arise

[17] G. D o m a ń s k i, *op. cit*., p. 407.

[18] M. L u t t e r, *op. cit*., p. 465; the German situation may be applied *mutatis mutandis*.

[19] N.b. this need not mean incorporation of all rules, but some must be incorporated for this comprises an instance of adherence to them, e.g. Rule 20 applying to the constitution of the supervisory board.

[20] Code of Commercial Companies, Art. 483 § 1.

[21] *Ibidem*, Art. 490.

[22] *Ibidem*, Art. 483 § 2.

[23] G. D o m a ń s k i, *op. cit*., p. 412.

[24] *Ibidem*.

between the strategic shareholder and minority.[25] Whether or not such liability exists, in practice it would often be very difficult to satisfy the burden of proof establishing the necessary causal link between the violation of the Code and the decline in the market value of the share. If this issue is resolved in the affirmative, the next question concerns the remedy of the company *vis-à-vis* these shareholders.

An apparent paradox is that a firm declaring to adhere to the Code may find itself in a legally weaker position than a firm declaring itself not to adhere. If the market does not honour "fair play" with the premium of higher demand from investors, then self-regulation under the Code will have limited effect and will not reach the envisaged goal. But if a system on the basis of this Code does have the desired effects,[26] then project soft law is well on track.

1.4. Regulation of capital markets

Whilst the majority of governance rules applicable to public companies are found in the C. C. C., there is a growing body of additional norms aimed specifically at regulating companies which trade their shares and other financial instruments on regulated markets. The following acts regulate trading in financial instruments on the Warsaw Stock Exchange and other regulated markets: the Act on Trading in Financial Instruments of July 29th, 2005,[27] the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading and Public Companies of July 29th, 2005,[28] and the Act on Investment Funds of May 27th, 2004.[29]

The Act on Public Offering regulates the institutions of public tenders and special rights and obligations of shareholders in public companies. It provides *inter alia* that a majority shareholder who owns shares representing at least 90% of the total vote in the public company shall be entitled to demand that the remaining minority shareholders sell all their shares held in the company (mandatory buy-out). Such squeeze-out has been introduced for the first time by the C. C. C. with respect to all corporations in 2000.[30] The Act also regulates the legal framework of public offers, including poison pills.

[25] Cf. the current complaint by Staten Pensjonsfond of Norway (holding € 270m in VW shares) that Ferdinand Piëch is not acting primarily *qua* President of VW's Supervisory Board but *qua* major shareholder of Porsche when assisting VW's purchase of Porsche assets; *Die Presse*, October 8th, 2009.

[26] As it has done e.g. in the U.K.

[27] As published in the Journal of Laws [J. of L.] of 2005, No. 183, item 1538, as amended.

[28] J. of L. 2005, No. 184, item 1539, as amended.

[29] J. of L. June 28th, 2004, as amended.

[30] Art. 418 of the C. C. C.

1.5. The role of case law

There is a growing number of legal disputes involving both private and public companies. The jurisprudence of the Supreme Court and lower courts shapes the final ramifications of statutory law. The Supreme Court has rendered several judgements applying the C. C. C. rules. The case law is significant in such areas, for instance challenging the resolutions of the general assembly of stock companies by shareholders and the right of standing of board members in case of their dismissal and ratification of void and voidable resolutions of company organs.

The C. C. C. distinguishes between void and voidable resolutions of the general meetings of shareholders (Arts. 422 and 425 of the C. C. C.). A resolution is null and void in case of violation of the law (i.e. statutory rules), although the right to challenge such resolutions is subject to a statutory period for filing a court action. By contrast, a resolution which violates the company charter (articles of association) or *bona mores* and is contrary to the interests of the company or shareholders is voidable (i.e. it may be challenged in courts but it is effective until declared invalid by the court). However, after a period of conflicting judgements, the Supreme Court has ruled that all the challenged resolutions of the general meeting of shareholders remain effective until finally adjudicated null and void by the court.[31] This dynamic law-making precedent of the Supreme Court is very controversial because it enables a group of shareholders, who have managed to pass a resolution which is flagrantly contrary to law to change the management and/or the supervisory board, and to "empty" the assets of the company during a period of three to four years which is usually required to finally adjudicate such disputes. Hence, there are proposals to amend the Code by establishing a list of gross violations of the law which would entail a sanction of invalidity *ex tunc* and *ex lege* without precluding to seek a declaratory judgement establishing the invalidity of a given resolution, but which would not give an excuse to the "invadors" and their appointees to distribute the company assets until the invalidity is finally proclaimed by a court of law.

The Supreme Court has also ruled that a dismissed member of the management board or the supervisory board may not challenge the resolution ousting him from the board, even in case the plaintiff is arguing that the resolution was null and void.[32]

The Supreme Court has also rendered a judgement which allows the appropriate company organ to ratify a voidable resolution of its predecessor (i.e. a resolution or a contract made by a truncated board).[33] The Court applied by

[31] Judgement of March 16, 2006, III CSK 32/06, OSP 2007, No. 3, item 7.
[32] Resolution of the Supreme Court of March 1st, 2007, III CZP 94/06.
[33] Resolution of the Supreme Cort of September 14, 2007, III CZP 31/07.

way of *analogia legis* Art. 103 of the Civil Code which provides that a principal may ratify a defective act of an attorney-in-fact who acted without a mandate.

On two occasions, conflicts involving company law have reached the Constitutional Court of Poland. First, the Court ruled that a specific provision of the Commercial Code (a predecessor of the C. C. C.) which required a statutory minimum of votes for challenging resolutions of a general meeting of shareholders, is unconstitutional. The Court explained that each shareholder shall have a right of standing in such disputes. More recently, the Constitutional Court has ruled that the squeeze-out (a compulsory buy-out) of minority shareholders provided for in Art. 418 of the C. C. C. is not contrary to the constitution, but that the majority shareholders must justify their actions. The decision has been criticised. Its Salomon judgement has watered down the squeeze-out which was subsequently adopted in the Act on Public Offering as a step of implementation of the EU Directive.

1.6. The role of banks, private equity and foreign investors

Unlike in Germany, banks do not play a significant role as major shareholders in Polish public companies. The majority of large Polish banks are listed on the Warsaw Stock Exchange. Foreign investors such as Citi, Commerzbank and ING are strategic investors in Polish privatised banks. During the process of privatisation, the Polish government has demanded that the foreign strategic investors should sell at least 25% of their total shares in the Polish banks. The Polish Treasury remains a majority shareholder in only one major Polish bank which has been partially privatised (Bank PKO BP SA).

Private equity companies and hedge funds are present on the Polish market. There are no restrictions in this field, except for prudential regulations which are consistent with the EU law.

1.7. Restrictions on foreign investment

There are no restrictions on foreign investment, including state funds regulations.

1.8. No major corporate governance scandals

Fortunately, there have been no significant corporate governance scandals or bankruptcy cases involving public companies in Poland.

Enron-like scandals in the US and the current financial market crisis have not resulted in significant initiatives to change the corporate governance framework so far. However, several issues are under discussion, for instance the

remuneration of board members, powers of the market regulators etc. Today, the uncritical aficionados of self-regulation and proponents of abandonment of mandatory rules in company law are less vocal, also the proponents of shareholders' value and believers in the efficiency of the stock markets have to take into account that the current crisis has originated in the US and had much stronger consequences in such countries as UK, Ireland, and their imitators in CEE, for instance, in the Baltic States in comparison with the jurisdictions which followed a more paternalistic approach to corporate governance and prudential regulation. It is worth mentioning that Poland, whose company law is patterned after Austrian and German models is expected to be the only EU economy whose GDP will grow in 2009.

2. Internal corporate governance

2.1. Is the board model option relevant in practice?

The C. C. C. provides for a two-tier board system. The Code mandates strict separation of the competencies of the management board and the supervisory board. The supervisory board may not issue binding directives to the management board. In practice, however, they quite frequently pass resolutions advising the management board to "consider" a concrete project or express opinions on a project presented by the management board. The supervisory board may also be empowered to approve major transactions pursuant to the charter of the company. The charter may not, however, shift the management responsibilities from the management board to the supervisory board. A two long list of approvals required from the supervisory board may be challenged or held invalid as contrary to the statutory division of powers between the two boards. The registration court may also refuse to register a charter which would muzzle the management board by the powers of the supervisory board.

It is expected that the C. C. C. will be modified enabling the shareholders' meeting to choose between the current two-tier board and one-tier board.

2.2. The size and composition of the two boards

The size of the management board is left to the discretion of the shareholders' meeting. The minimum number of seats in the supervisory board is three in case of a private company, and five members in public companies. There are no maxima with respect to both boards. The maximum duration of office of a management board member is five years. But there are no restrictions regarding the renewal of the term (Art. 369 of the C. C. C.). Staggered boards are

permitted, but not frequently adopted by management boards' and supervisory boards' charter regulations.

2.3. The roles of the president of the management board and the chairman of the supervisory board

In principle, members of the two boards collectively perform their duties and the president of the management board is only *primus inter pares*. However, the C. C. C., unlike the Commercial Code of 1934, has allowed the shareholders' meeting to upgrade the role of the chief executive officer. The president of the management board may have the right of exercising the so-called casting vote and be granted special competences by the charter. The charter may grant similar prerogatives to the chairman of the supervisory board.

Day-to-day "cohabitation" of the two boards is more and more similar to that of executive and non-executive directors in a one-tier board. As a rule, the supervisory board meets in the presence of the management board members, who are requested to leave the board room only in case of discussing their dismissal, evaluation or similar matters. It is also worth mentioning that according to a statutory model, the members of the management board are appointed, dismissed and suspended by the supervisory board. A charter may, however, provide otherwise.

2.4. Independent directors

The definition of independence is modelled on the EU guidelines. Charters frequently deviate from these guidelines, especially in private companies. According to the Best Practices Code, the majority of the audit committee and the remuneration committee shall be independent members of the management board.

Diverging stances relate to the institution of the independent director. The critics opine that their independence is doubtful given the process of their selection and that there is a risk of forming a constituency of independent directors in the board, leading to a split within this body.[34] In my opinion, the latter criticism is exaggerated, although it is true that independent directors are frequently recruited from friends and good acquaintances of the majority shareholder. However, a person who meets the criteria of independence is more likely to have his/her own opinion and to take difficult personal decisions than, for instance, an employee of the majority shareholder or his business client.

[34] A. O p a l s k i, "Obowiązek lojalności w spółkach kapitałowych," *Kwartalnik Prawa Prywatnego* 2008, Vol. 2, p. 467.

2.5. Special committees

The C. C. C. has adopted the German concept of Satzungsstrenge (i.e. the strict application of the statutory rules and the compliance of the articles of association with the law). According to this principle, the rules governing stock corporations are mandatory except as expressly provided otherwise. Hence, for instance, the shareholders may only establish organs permitted by the law. However, the charter may provide for establishing advisory bodies assisting the management board and the supervisory board in performing their duties. In particular, the supervisory board is now frequently assisted by such advisory bodies as the audit committee, the remuneration committee, the strategy committee, the risk committee etc. As a rule, such committees consist of board members. But it is not prohibited to include other persons. It is to be stressed that resolutions and recommendations of such committees are not binding on the board.

2.6. Duty of loyalty

2.6.1. The concept of duty of loyalty

In today's world commercial behaviour needs regulation. This is done *via* two systems: hard rules (i.e. law *stricto sensu*) and soft law. Loyalty, it has been argued,[35] plays a part in soft law as a behaviour-guiding principle of normative force that applies to varying degrees in interpersonal relations. Companies are entities formed by people with a view to pursuing a common goal. Invariably there arise situations where the presence of conflicting interests[36] allows for several options when deciding on one's conduct. It is here that the concept of loyalty and a corresponding duty has its application, namely in providing guidance as to which of these interests – and to what extent – is the most legitimate in grounding and justifying a given course of action.

The obligation of loyalty generally correlates directly with the influence someone has. The majority, because it has a greater say in how a company is run, is therefore under a stronger obligation. The obligation on the minority, contrariwise, is correspondingly smaller. Investors holding a few percent are under some obligation, whereas very small shareholders are more properly described as customers of an investment product (which is precisely what a publicly offered share is).

[35] *Ibidem*.
[36] *Ibidem*, dt. 500.

A. Szumański[37] negates a general obligation of loyalty, basing himself on the supposed lack of legal regulation of good custom whence this obligation comes. Such obligation would be contrary to the shareholder's role as passive investor (whose only obligation is the provision of capital). His obligations should not be interpreted expansively. The duty of loyalty befalls solely the management and the supervisory board. Szumański does, however, allow for bonds of loyalty in "small" firms whose structures of partners and capital resemble more closely that of limited liability company than that of public companies. A. Opalski convincingly counters this by arguing that the "capital" character of corporations and the shareholder's role qua passive investor are general concepts.[38] A strict division between personal and capital firms is difficult in the light of the legislature's merging of capital and personal elements in certain types of firms and the wide discretion when designing ownership structures. It is therefore unhelpful to think of separate categories when it comes to the concept of loyalty.

Each firm is created for the realisation of a given goal leading to the relations between the participants. Contractual obligations between the management and the shareholders are defined by the legislator. Loyalty in this context is primarily evidenced in the prohibition of doing harm to shareholders by using the law in a manner contrary to good custom.[39] The reach of these loyalty obligations is difficult to determine; for instance, a bank's shareholder does not act disloyally when he opens an account with a different bank or participates in organs of competing financial institutions.[40] A strategic shareholder, however, who uses the company's activities for his own benefit, for instance by purchasing real estate that the company needs in order to sell it on at a profit clearly acts disloyally with respect to this company. A "serial" shareholder, on the other hand, may publicly criticise the company and purchase shares in a rival without acting disloyally. As mentioned earlier, there are no definite boundaries between the categories. The extreme cases are easy to tell apart, viz. a big strategic and a very small shareholder. But in between the lines are often blurred.

2.6.2. The legal basis of such duty

Opalski[41] mentions several legal bases. First of all, the company or its shareholders may seek redress for damages incurred by the acts of disloyal

[37] *System prawa prywatnego*, Vol. 19: *Prawo papierów wartościowych*, red. Z. Radwański, Warsaw 2006, p. 266ff.

[38] A. O p a l s k i, *op. cit*., p. 475.

[39] C. C. C., Art. 249 § 1 and Art. 422 § 1; cf. also S. Sołtysiński in: S. S o ł t y s i ń s k i, A. S z a j k o w s k i, A. S z u m a ń s k i, A. S z w a j a, *Commentary on the Commercial Code*, Vol. 1, Warsaw 1997, p. 126, fn. 3.

[40] S. S o ł t y s i ń s k i, *op. cit*., p. 127.

[41] *Ibidem*, p. 476ff.

partners.[42] The duty of loyalty is derived from Art. 354 of the Civil Code which provides that the obligor and the oblige shall perform their duties and cooperate not only in accordance with the law but also taking into account *bona mores,* customs and socio-economic purpose of the obligation. According to Art. 2 of the C. C. C. the rules of the Civil Code apply to commercial company relations directly or, if required by the legal nature of a given commercial relation, *mutatis mutandis.* These include groundless interference by law.[43] If the prohibition of engaging in competitive activities is violated, then the transgressor must (i) make good the losses, (ii) give back any gains and (iii) stop such activities. Secondly, appeal against the Annual Meeting's decisions on legitimate grounds is possible, if such decisions go against good custom and against the company's interests or are victimising a shareholder.[44] The overlap of decision-making with these rules is the clearest sign of exercise of loyalty obligations in corporate relationships. Thirdly, one must not only not invoke the law in bad faith, but also use it if this is indispensable for the realisation of the common goal; thus both members of the majority and the minority are under an obligation to use the legal tools in such circumstances, as well as to refrain from blocking necessary decisions through law and from allowing dangers to the operation of the company. If a blocking vote is contrary to *bona mores* then it is to be ignored.[45] Fourthly, in extreme instances the consequences may be the exclusion of the partner from the partnership by way of judicial complaint for a good reason.[46] Similarly, joint stock companies may force a shareholder to remit shares in the instance of non-compliance with corporate duties.[47] The broadest and arguably most fundamental rule is the prohibition of unfair discrimination of shareholders found in Art. 20 of the C. C. C.

Essential factors in determining the strength of obligations grounded in the principle of loyalty will be the structure of internal relations and, consequently, the influence each person has. The legal structure of the company is thus a very important point of reference. The crux of the issue does not lie in whether a duty of loyalty exists, but in its reach in given circumstances and in the sanctioning of its breach.

2.6.3. Duty of loyalty of members of management board and supervisory board

Loyalty obligations on members of the management and supervisory boards are different from those on shareholders; as their trustees, they must do their

[42] C. C. C., Art. 57.
[43] C. C., Art. 5.
[44] C. C. C., Art. 249 § 1 and Art. 422 § 1.
[45] *Ibidem*, Art. 354 in conjunction with Art. 58 § 2 of the C. C.
[46] *Ibidem*, Art. 63 § 2 and Art. 266.
[47] *Ibidem*, Art. 199 § 1 and Art. 359 § 1.

utmost to administer the company's funds and to further its envisaged goal. The strength of such obligations correlates directly with the trust and powers given to members of the boards. Polish law regulates only some matters, and these exclusively with regard to the management board: (i) ban of competitive activities;[48] (ii) prohibition to participate in a decision in matters where there is a conflict of interests, even voicing of one's opinion in such matters can contravene the law;[49] (iii) requirement the alignment their own personal interest with that of the company;[50] and (iv) there is a general duty to act in accordance with good custom.[51] These duties are not a new concern: in 1936, T. Dziurzyński argued that management should refrain from any activity in conflict with the company's interests.[52] This duty is only weakened when the mandate is weaker.[53]

Given the fast-paced corporate world of today, courts should be reluctant to over-eagerly interfere with a company's decision since they often lack the appropriate resources (expertise and time). But if a concept as vague as a duty of loyalty with its corresponding obligations is to acquire a more definite form then court precedents are imperative: for this, three elements are necessary: relevant facts, determination of whence the relevant rights arise and sufficient expertise. There clearly is a time and a place for a court to step in – the challenge is to find out when and where.[54]

2.7. Regulation of conflicts of interests

Members of the two boards are subject to strict rules of conflicts of interests. According to Art. 377 of the C. C. C., a management board member shall refrain from participating in deciding matters involving such conflicts between the company and himself/herself or his/her next of kin (e.g. the member's spouse, relatives within the second degree under the Family Code or persons with whom the board member has a personal relationship). The Code provides furthermore that the board member shall not, without consent of the supervisory

[48] C. C. C., Arts. 211 and 380

[49] *Ibidem*, Arts. 209 & 377.

[50] *Ibidem*, Art. 15, Art. 210 § 1, Art. 228 (2), Art. 379 § 1, Art. 393 (2).

[51] C. C., Art. 354.

[52] T. Dziurzyński, Z. Fenichel, M. Honzatko, *Commentary on the Commercial Code*, Krakow 1936, Art. 204 (1).

[53] Cf. the lawmaker's reduced concern with members of the supervisory board compared to those of the management board: C. C. C., Arts. 211 and 380.

[54] Inspiration might be drawn from the adoption and development of the concept of proportionality, originally from the German jurisprudence, in the jurisprudence of the European Court of Human Rights (e.g. C-36/02 *Omega Spielhallen*, C-112/00 *Schmidberger*, C-438/05 *Viking*, C-341/05 *Laval*).

board, participate in a competitive business or a competitive company, whether as a shareholder/partner or as a member of an organ of such company/partnership. This prohibition shall equally apply to having interests in a competitive company, in the event that the board member should hold 10% or more shares in it or have the right of appointing at least one member of the management board thereof.

Although the two sections of the C. C. C. do not expressly deal with the corporate opportunity concept, several commentators are of the opinion that a management board member would violate the duty of loyalty in case of entering into a transaction which might be of interest to his/her company.

The foregoing conflict of interests rules apply *mutatis mutandis* to supervisory board members.

The Supreme Court ruled that the violation of Art. 377 of the C. C. C. does not cause the invalidity of a transaction with a third party which was executed by the board involving a member who should have abstained from participating in such transaction.[55] He may, however, be liable for damages incurred by the company, if any. The decision was criticised because the transaction involved a close family member of a board member and the interpretation offered by the court has left the illegal act of the board member without sanction, and the third party knew that the defendant should have refrained from deciding the matter.

2.8. Business judgement rule

See comments in section IV infra.

2.9. Remuneration of board members

Management board members are usually paid salaries and are eligible for stock options, bonuses and phantom shares. Thus it is clear from the above that the system of remuneration of management board members is patterned after US and Western European standards. Recently, following the lessons of the ongoing crisis and the recommendations of the European Commission, the Commission of Financial Supervision, the watchdog of the public companies, has ordered public companies to prepare modifications of the ongoing remunerations schemes in line with the European Commission guidelines. Those guidelines address the issue of excessive remuneration, the need to reduce the bonuses and align them with long term performance and objectives of the company. The commission also recommends that the supervisory board shall establish specific

[55] Judgement of the Supreme Court of January 11, 2002, IV CKN 1903/00, OSN 2002, No. 11, item 137.

and concrete prerequisites of granting bonuses and introduce maluses (penalties for non-performance or defective performance of the task).

Supervisory board members are paid monthly commissions. Occasionally the Charter may provide that they are entitled to a special remuneration in the form of the right to participate in the profit for a given financial year distributable among shareholders of the company. The latter form of remuneration is very rare.

2.10. Board members' liability towards corporations

Fortunately, there have been no spectacular corporate scandals during the crisis and even before due to the paternalistic system of company law in Poland and a rather satisfactory system of external supervision originally by the Commission on Financial Instruments and Stock Exchanges and now by the Commission of Financial Supervision.

The liability of board members towards shareholders and investors is discussed in section IV infra.

2.11. Shareholders

2.11.1. Fiduciary duties of controlling shareholders

One needs to find a compromise between the interests of different groups of shareholders; trust and loyalty among them limit the risk of investing in a company. Decisions do not derive absolute legitimacy solely by virtue of having been made by the majority. The legislator gives some procedural rules,[56] which give added protection to the minority, unless the strategic shareholder has the requisite majority all by himself. But the duty of loyalty does not place obligations solely on the majority; the minority is also under obligations: since one of the goals of the duty is to prevent the disproportionate realisation of a particular interest, vetoing certain decision necessary for a healthy and stable continuation of the company's operations violates this duty.[57] The obligations on the majority are greater, it is therefore no surprise that their breaches are more often in the spotlight, but one should not mistakenly believe that the system would always work in favour of the minority.

[56] E.g. QMV & quorum for certain decisions (C. C. C., Art. 415), separate voicing of holders of different types of shares (*ibidem*, Art. 419), justification of proposed decisions (*ibidem*, Art. 433).

[57] E.g. when changing legal circumstances require corresponding changes in the Articles of Association (C. C., Art. 43, C. C. C., Arts. 21, 172 & 327).

In a judgement from April 14th, 2004, the Supreme Court[58] had to consider a situation where the majority shareholder, using his influence in the general meeting, ensured that the company's profit was used in its entirety to purchase bills of sale from the majority shareholder; these proceeds were then used for its daily operations. The minority brought proceedings for breach of Art. 20 C. C. C. (requiring the equal treatment of shareholders), since the majority obtained a benefit from these transactions, and the minority a loss (capital needed to be raised on the capital market). The Supreme Court stressed the large discretion of the majority regarding the use of profits, but at the same time excluded total arbitrariness. Victimisation could not, however, be proven, since it the effect of the purchase of bills of sales in juxtaposition with other financial instruments was not sufficiently clear. Consequently, the case was sent back to the Appellate Court in Warsaw which in its decision[59] of May 15th, 2007, held that Art. 20 C. C. C. had indeed been breached, as the purchase of the bills of sales amounted to a low interest loan to the majority shareholder at higher risk for the company.

2.11.2. Shareholder's rights and minority protection

The powers of the general meeting of shareholders are patterned after German and Austrian company laws. Hence, they are much wider in scope than those in US or English law. Apart from rights required by the second EU Directive, the following competences of the general meeting of shareholders should be mentioned: (i) examination and approval of the management board's report on the company's activities and of financial statements for each financial year; (ii) granting a vote of acceptance to members of the two boards confirming the discharge of their duties; (iii) taking decisions in respect of claims for making good the damage suffered through the formation of the company or exercise management and supervision; (iv) transfer or lease of an enterprise; (v) acquisition and transfer of immovables, perpetual usufruct, except where the charter provides otherwise; (vi) issuing of convertible bonds with the priority warrants and an issue of the subscription warrants; (vii) conclusion of a management contract and similar "Konzern" contracts. The foregoing competences are listed in Art. 393 of the C. C. C.

Apart from that, Art. 418 (1) of the C. C. C. grants a minority shareholder(s) representing not more than 5% of the share capital the right to put on the agenda of the general meeting the issue of passing a resolution on compulsory repurchase of his (their) shares by the majority shareholders representing jointly not less than 95% of the share capital. The **reverse squeeze-out** is available to shareholders both in private and public companies.

[58] I CK 537/03, OSNC 2004, No. 12, pos. 204.
[59] I ACa 339/07, not published, cited from *LexPolonica*.

Minority shareholders in public companies have the right to demand the appointment of a **special auditor** by the general meeting. To this end the shareholder(s) may request that an extraordinary meeting be convened for this purpose. Such special purpose auditor shall review the books of the company and other documents to verify a specific issue related to the company's incorporation or the conduct of its business and defined by the minority shareholder(s). The auditor shall not be a member of a group which includes the entity which rendered the auditing services to the Company (Art. 84 of the Act on Public Offering). The institution of the special purpose auditor constitutes an important instrument of protecting minority shareholders. Thus in several cases, even the request to appoint a special purpose auditor leads to a compromise between a strategic investor and minority shareholders. In some cases, such disputes must be solved by way of judicial intervention. Several years ago, Michelin, a majority shareholder in Stomil Olsztyn, the largest tire manufacturer in Poland, was forced to buy shares of minority shareholders who brought an action against the defendant alleging transfer pricing practices.

The institution of **cumulative voting** aimed at election of supervisory board members is also worth mentioning. Pursuant to Art. 385 § 3, shareholders who represent no less than one fifth of the share capital may request that the supervisory board shall be elected by the next general meeting by a vote held in separate groups, even if the company charter provides for a different manner of appointing the board. Upon election of at least one member of the supervisory board pursuant to such cumulative voting, the incumbent supervisory board persons' terms of office expire ahead of time. Supervisory board members elected by a group may be empowered to perform supervision activities individually on a standing basis. They may also participate in meetings of the management board in the advisory capacity (Art. 390 § 2 of the C. C. C.). Thus a group of minority shareholders representing one fifth of the share capital may elect their representative who will have access to all information in the company and observe the activities of the management board. In principle, such member of the supervisory board shall take into account the interests of the company and all shareholders but, in practice, he is usually a loyal appointee of the group concerned.

2.11.3. Institutional investors: shareholder activism

Institutional investors frequently form ad-hoc coalitions aimed at electing supervisory board members by way of cumulative voting[60] or passing resolutions regarding payment of dividends, acquisition of the company's own shares by the corporation, etc. Generally, however, shareholder activism is rare.

[60] See 11.2 supra.

2.12. Labour

Codetermination in the management and supervisory boards is required by law only in State-owned corporations or partially privatised companies. The Statute on Commercialisation and Privatisation of State Enterprises of August 30th, 1996,[61] provides that as long as the State Treasury remains the sole shareholder of the company, its employees elect two fifth of the members of the supervisory board (Art. 12). Once the Treasury has disposed of more than a half of its shares in a given company, the employees retain the right to elect approximately one third of the board members. Furthermore, the employees elect one management board member in companies with participation of the Treasury, but only in entities which employ at least 500 employees (Art.16). The law is unclear whether these codetermination rights remain in force once the Treasury has disposed all its shares. The majority of commentators are of the opinion that the employees do not retain these rights in a fully privatised company.

The foregoing codetermination rights and other incentives, such as the right to obtain up to 10% of shares in privatised companies by its workforce, have been proclaimed by Parliament to reach a social consensus regarding privatisation. Nowadays, this social consensus is gone. Trade unions are frequently opposing full privatisation after obtaining their shares because full privatisation means absence of codetermination and the risk of tough economic measures taken by managers pressed by private shareholders. Recently, there have been several strikes against the completion of privatisation, although such protests are beyond the charter of the trade unions.

3. External corporate governance

3.1. Takeover regulation

The Act on Public Offering contains an extensive regulation of tender offers (Arts. 72 to 86). According to Art. 73, a shareholder may exceed 33% of the total vote in a public company only as a result of placing a tender offer to acquire or exchange shares in such company concerning a number of shares which confers the right to at least 66% of the total vote. Similarly, a shareholder intending to exceed 66% of the total votes in a public company shall present a tender offer to acquire or exchange all the remaining shares in the company (Art. 74 (1)). The Act lays down specific rules regarding the price to be offered during the tender (Art. 79) and the procedure of obtaining the necessary approvals.

[61] J. of L. 1996, No. 118, item 561, as amended.

"Poison pills" are specifically allowed against hostile takeovers. The articles of association of a public company may provide, however, that in the case of disposing shares in the framework of a tender offer, limitations of transferability of shares defined in the articles of association shall not apply. The majority of these rules are non-mandatory. According to Art. 80 (d), however, in the case of limitation of rights of shareholders, the articles of association of a public company should provide for the terms and conditions establishing fair compensation to shareholders whose powers have been limited.

Takeover bids from abroad are allowed.

3.2. Disclosure and transparency

Pursuant to the Audit Act 1994 the financial books of the corporation shall be subject to a regular audit every year. As already mentioned, the annual meeting of shareholders shall approve the management board's report on the company's activities and of financial statements for the preceding financial year. The financial statements shall be reviewed by the company auditor. The auditor shall check the annual accounts and the internal control system.

The auditors shall be independent. They are selected by the supervisory board of the company. Auditors involved in the audit of the annual accounts and the consolidated financial statements of a group are liable for the performance of their duties to the corporation for all the damages caused by negligent performance of their professional duties. There are no caps for such liabilities.

3.3. Accounting system

Polish companies are subject to IFRS Regulations. They may also, however, apply the US GAAP standards.

Public companies are subject to annual and ad-hoc disclosures. In principle, a public company shall disclose all events which may have an impact upon the price of their shares.

Prospective disclosures are required in the case of IPOs and the issuance of new shares. The prospectus shall be approved by the capital market authority.

4. Enforcement

4.1. Civil and criminal law sanctions

4.1.1. Civil law sanctions

The duties and civil law responsibilities of members of management and supervisory board of a Polish corporation/stock company are regulated in the

C. C. C. According to Art. 483 § 1 of the C. C. C., a member of a management board or a supervisory board and a liquidator is responsible *vis-à-vis* the company for damage contrary to law or the charter of the company, unless he proves that there was no fault on his part. Furthermore, pursuant to § 2 of that provision, a director shall perform his/her duties taking into account the professional character of his activity. The rules presented above establish a very high standard of responsibility not only in comparison with the prevailing US standards but also the applicable rules in leading Western European jurisdictions. First, the appurtenant C. C. C. rules are of **mandatory character** and may not be modified as frequently permitted by many US state laws. Second, the provision of Art. 483 establish a presumption of the board member's liability, so that the burden of proof is on the defendant. Third, the applicable measure of duty of care refers to the standard required from a professional business actor, rather than to that of ordinary negligence.

Fourth, the appurtenant rules do not expressly provide for the application of the business judgement rule although some commentators are of the opinion that such standard is reasonable under the applicable rules. On the other hand, a recent Supreme Court Decision has narrowed the scope of the defendant's liability, maintaining that the claimant has to prove a specific statutory provision or a charter rule violated by a member of the board for the purpose of proving the breach of Art. 483 § 1 of the C. C. C. This makes the task of the claimant difficult because there are frequent cases of gross negligence which are not associated with a violation of a specific statutory or articles of association rule.

There are not too many cases of actions brought against board members but apart from the precedent of the Supreme Court mentioned above, the courts interpret the provisions of Art. 483 rather rigorously, stressing the consequences of the reversed burden of proof and professional standard of due care of the board members. The majority of claims have been brought against management board members and not against members of supervisory boards. Recently, however, an amendment to the accounting law has introduced a joint and several liability of management and supervisory board members for the correctness and accuracy of the books of the company. This amendment has triggered a flurry of comments on this subject. It is being argued that it is an illusion to expect that supervisory board members can effectively control the accuracy of the accounts of the corporation. Members of the supervisory board, like non-executive directors in monistic legal systems, usually meet four to ten times a year. The newly established responsibilities, however, have activated audit committees, an advisory body to the supervisory board. Also, company auditors are more frequently invited to report to the supervisory board and/or the audit committee.

In principle, members of each of the two boards are jointly and severally liable for the damage done to the company. The C. C. C. rules on duties of the

management and supervisory boards provide that members of each of the two organs perform their duties jointly, except in some cases when the law or the charter provides otherwise. It does not mean, however, that all board members are always jointly responsible for wrongs committed by a single member of a given organ. A board member, for instance, who voted against a negligent project supported by his peers, shall have a perfect defence in case an action is brought against all members of the management board.

4.1.2. The significance of a vote of acceptance of performance of duties by a board member

A specific feature of Polish company law is an annual vote of the general assembly on accepting the performance of duties by each member of the two boards. Such vote of confidence or non-confidence takes place during the Annual Meeting of Shareholders. Obtaining an approval by the general meeting does not a given board member from all civil liability, but the company is barred from bringing an action against such a board member when the company report presented during the annual meeting described sufficiently all aspects of the activities of the board. However, in case the general assembly was not aware of a wrong or a breach of the law, a action can be brought also against a board member who received the approval of the general assembly. A vote of non-confidence has both moral and economic consequences, a board member who has not received a yearly approval of his duties has reduced chances of finding a job especially in public companies.

It is worth mentioning that the general assembly has broad competencies; they include *inter alia* a decision concerning bringing an action against a board member and approving a settlement between the company and a board member.

4.1.3. Derivative action

In case of a dispute between the company and a management board member, the latter is represented shall be represented by the supervisory board or by an attorney appointed by way of a resolution of the general meeting (Art. 379 § 1). Where the company has failed to bring an action for relief within one year from the disclosure of the injurious act, any shareholder or person otherwise entitled to participate in profits or in the distribution of assets of the company, may file a complaint for making good the damage inflicted to the company (Art. 486 § 1). In the event such derivative action is brought by a shareholder against a board member, the defendant may request the court to order a security deposit to be provided by the plaintiff. The court shall determine the amount and kind of security deposit at its discretion. Failing timely provision of the security deposit ordered by the judge, the complaint shall be dismissed (Art. 486 § 2). Where the action has proven groundless and the plaintiff, by bringing the action,

acted in bad faith or was flagrantly negligent, the plaintiff shall make good the damage brought upon the defendant (Art. 486 § 4).

The derivative action provisions are not widely used because in most cases the shareholder does not have an incentive to bring such an action. First, it is not settled whether he or she may recover the cost of bringing such action even in the event of success. Second, the successful shareholder may not participate directly in the benefits resulting from a judicial award. According to the prevailing view, a shareholder is not entitled to claim indirect damages in this way. Pursuant to a minority view, a shareholder may bring an action against the wrongdoer (i.e. a board member) only in the exceptional cases where the wrong committed by the board member results in direct loss to the shareholder, for instance, when the board has illegally stopped paying a dividend due to a shareholder.

4.1.4. Criminal law sanctions

The C. C. C. provides for several criminal law sanctions directed against board members. Two of them should be worth mentioning. Pursuant to Art. 585 § 1, a person participating in the creation of a commercial company or being a member of the management board, supervisory board or the audit board, or a liquidator thereof who has acted to the detriment of the company shall be liable for a penalty of a deprivation of liberty of up to five years and a fine. Pursuant to § 2 of the Art. 585, a person aiding or abetting an illegal act set forth in § 1 shall be liable for the same penalty. It is worth stressing that the sanctions set forth Art. 585 § 1 and 2 are directed not only to board members but also to promoters and valuers of in-kind contributions during the process of formation of a company.

The sanctions provided for in Art. 585 are quite harsh. A board member shall be liable if he has acted "to the detriment of the company." The proof of actual damage is not necessary. It is enough if the defendant has caused a concrete and real danger of causing detriment by his negligent acts or omissions. The foregoing basis of action is quite frequently used by public prosecutors against board members. There are not too many successful prosecutions, but the mere risk of long criminal proceedings is an effective deterrent. The majority of commentators are of the opinion, however, that Art. 585 of the C. C. C. fails to meet the constitutional grounds of specificity of punishable acts under criminal law. Hence it is expected that this provision will be modified.

The C. C. C. provides for criminal sanctions also in cases of failing to submit an application for the declaration of bankruptcy of a company (Art. 586), dissemination of misleading information (Art. 587), allowing acquisition of the company's own shares in violation of the law (Art. 588), issuing false share documents (Art. 589) and other illegal acts regarding the conduct of general meetings of shareholders.

4.2. Capital market supervision

In the past the capital markets have been supervised by Komisja Papierów Wartościowych i Giełd (the Commission of Financial Instruments and Stock Exchanges). The banks were supervised by the National Bank of Poland. There was also a special regulatory authority supervising insurance companies. In the past, all these watchdogs had a fairly good reputation, especially the National Bank of Poland and Komisja Papierów Wartościowych i Giełd were praised for their active and pragmatic policies.

As of today, Poland has one comprehensive capital market authority (Commission of Financial Supervision). The reform has had its costs. The Commission has a mixed record of performance, but it has improved its reputation during the crisis. The good standing of the Polish banking system is largely credited to the supervision of the central bank in the past. Ironically, the architects of Commission of Financial Supervision relied on, the British example of the FSA, which is now expected to be split by the Tories who emphasise the need to strengthen the role of the Central Bank in this field.

5. Miscellaneous

It is worth mentioning the role of the Association of Public Companies. The organisation is actively supporting the corporate governance movement. Their members participated in the preparation of the Best Practices Code. They are also actively promoting legislative changes and organisations of seminars, public conferences etc.

An active role is played by Instytut Dyrektorów (the Institute of Directors). It is a foundation established shortly after the opening of the Warsaw Stock Exchange. It organises regular conferences and workshops devoted to company law matters and capital market issues. It also actively promotes the best practices rules and corporate social responsibility.

SECTION III A

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LA RÉGLEMENTATION DES FONDS SPÉCULATIFS

1. Les hedge funds en Pologne – cadre général

Les *hedge funds* sont une forme alternative d'investissement sur le marché des fonds d'investissement. Afin de présenter les *hedge funds*, il est nécessaire d'expliquer la notion de « hedging ». Le « hedging » est un type de transaction qui sert de couverture contre des changements imprévisibles de prix sur le marché. Ainsi, le « hedging » peut être défini comme toute action qui réduit le risque d'investissement lié aux fluctuations de prix sur le marché[1]. Toutefois les *hedge funds* sont souvent décrits comme des fonds privés non réglementés qui peuvent avoir recours à un important effet de levier financier et à des stratégies d'investissement compliquées à travers des instruments financiers modernes[2].

En droit polonais la définition normative des hedge fonds n'existe pas. Des auteurs définissent ces fonds comme des fonds d'investissement à gestion active, destinés à un nombre restreint de grands investisseurs qui visent des taux de rendement trés attractifs. Il est possible de les atteindre grâce à l'emploi d'un large éventail d'instruments et de stratégies d'investissement ménés par les fonds. L'avantage des *hedge funds* sur d'autres fonds d'investissement est une diversité considérable des instruments financiers dans lesquels ils peuvent investir. En outre, un faible niveau de corrélation entre les *hedge funds* et les indices boursiers rend ce type d'investissements indépendants de la conjoncture générale sur le marché réglementé.

L'un des traits les plus caractéristiques des *hedge funds,* qui les distingue des investissements traditionnels s'appuyant sur des positions longues sur les actions et les obligations, est le fait qu'ils tentent de générer des taux de rendement positifs, indépendamment des baisses sur le marché[3].

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[1] K. Gabryelczyk, U. Ziarko-Siwek, W. Nawrot, *Inwestycje finansowe* [Les investissements financiers], CeDeWu, Warszawa 2007, p. 55.

[2] A. Szelagowska, *Instytucje rynku finansowego w Polsce* [Les institutions du marché financier en Pologne], CeDeWu, Warszawa 2007, p. 443.

[3] I. Pruchnicka-Grabias, *Funkcjonowanie funduszy hedgingowych na światowych rynkach finansowych i w Polsce* [Le fonctionnement des hedge fonds sur les marchés financiers et en Pologne], Zeszyty Naukowe ALMAMER, Warszawa 2007, p. 43.

Les *hedge funds* sont des institutions financières hautement spécialisées. Très souvent, ils utilisent des stratégies d'investissement risquées dans des secteurs de niche, telles que fusions, rachats des sociétés, les instruments dérivés, les short sales, dont le résultat est un retour sur investissement plus important.

Contrairement aux fonds d'investissement classiques, dont le fonctionnement est réglementé par la loi polonaise, les *hedge funds* agissent à la frontière du marché réglementé. Nombreux sont les fonds qui ont été établis dans des paradis fiscaux pour diminuer les coûts de leur fonctionnement[4].

Compte tenu des dispositions légales polonaises, les *hedge funds* affrontent des difficultés fondamentales. En effet, il existe des barrières majeures qui empêchent la création des *hedge funds* polonais. Jusqu'ici les fonds investis sur le marché polonais dépendent de fonds étrangers. Conformément à la loi sur les fonds d'investissement du 27 mai 2004, un fonds d'investissement fermé peut investir dans des titres de participation émis par des organismes de placements collectifs, établis à l'étranger[5]. D'après l'interprétation de la Commission de surveillance financière polonaise, même une société de type « limited partnership », établie à l'étranger et dont l'objectif est de réunir les capitaux apportés par des investisseurs afin de les placer collectivement, est un organisme de placement commun en vertu de la loi polonaise sur les fonds d'investissement. Une telle interprétation de la loi ouvre des possibilités légales pour créer un fonds d'investissement fermé qui fonctionnerait comme un *hedge fund* étranger[6].

En outre, il faut prendre en considération le fait que le caractère légal des titres de participation d'un *hedge fund* ne doit pas dépasser les formes licites d'un fonds d'investissement fermé.

Un autre problème est la protection des intérêts individuels. Dans les pays, où les marchés financiers sont plus développés, l'accès aux investissements à risque, soit aux *hedge funds,* a été limité. En effet, on y a introduit des dispositions légales qui limitent l'accès aux fonds par la détermination des seuils minimum d'investissement et du niveau de revenus ou de propriété.

Faute d'une quelconque protection, de nombreux investisseurs individuels, séduits par des taux de rendement potentiellement élevés, courent le risque de perdre tout leur capital. Il est bon de souligner dans ce contexte que le secteur est peu transparent et qu'il est nécessaire d'en avoir une connaissance approfondie pour choisir un bon *hedge fund*. Une interprétation ambiguë des dispositions concernant le lancement de *hedge funds* étrangers sur le marché polonais constitue un autre obstacle. Vu le risque élevé et l'absence de protection des

[4] *Inwestycje finansowe*, p. 44.

[5] J.O. 2004, no. 146, pos. 1546, avec changements ultérieurs.

[6] A. B r o d z k a**,** «Fundusze hedgingowe – alternatywne możliwości inwestowania» [Les hedge fonds – le financement alternatif], Zeszyty Naukowe Katedry Finansów, Warszawa 2006.

investisseurs, une distribution à grande échelle pourrait échouer faute d'accord de la Commission de surveillance financière[7].

Une transparence réduite dans les hedge fonds est souvent décrite comme un trait caractéristique des investissements alternatifs. N'étant pas soumis aux dispositions imposées aux fonds d'investissement traditionnels, les *hedge funds sensu stricto* ne sont pas obligés de publier des informations concernant l'actif accumulé, les méthodes précises de son affectation ou les résultats d'investissement. Les praticiens du marché argumentent que le manque de données publiques sur les stratégies et les résultats ne signifie pas que les investisseurs sont laissés dans l'ignorance. Les personnes directement impliquées dans le processus d'investissement sont tenues au courant des résultats des fonds d'investissement.

Par ailleurs, avant de rejoindre un fonds d'investissement, ils ont la possibilité d'examiner attentivement la stratégie d'un fonds et de prendre connaissance du caractère envisagé d'un investissement[8].

Pourtant, on ne peut pas s'attendre à un développement fulgurant de ces fonds en Pologne. Cela est dû au fait que des acteurs institutionnels, c'est-à-dire des fonds de pension, qui pourraient diversifier leurs portefeuilles avec des *hedge funds*, n'investissent pas dans les hedge fonds. En plus, une partie des clients fortunés qui seraient prêts à accepter un risque pareil en échange d'un taux de rendement plus élevé, se trouvent limités par un flou de dispositions concernant la distribution de fonds étrangers en Pologne. Néanmoins, la présence et l'activité des *hedge funds* sur le marché des capitaux en Pologne constituent une circonstance favorable pour son développement. Les investisseurs polonais doivent accepter un risque de perte à court terme pour profiter de gros bénéfices sur une longue période grâce à des investissements dans des *hedge funds.*

2. Marché des *hedge funds* en Pologne

Depuis son adhésion à l'Union européenne, la Pologne note un accroissement graduel de l'attention portée aux investissements alternatifs. Les investisseurs, de plus en plus conscients des règles des marchés financiers, ont commencé à étudier des perspectives élargies de placements financiers. La loi sur les fonds d'investissement, de 2004, a apporté de nouvelles possibilités d'investissement qui ont permis de lancer des fonds d'investissement spécialisés. Sur cette base, de nouveaux fonds ont été créés qui investissaient dans des groupes précis de sociétés (*DWS Top 25 Petites Sociétés*), dans l'immobilier (*Arka*, *BPH*, *Skarbiec* et *Index Nieruchomości*), dans des fonds de titrisation (*Intrum Justitia*) ou étaient concentrés sur des marchés étrangers (*UniGlobal*).

[7] *Inwestycje finansowe*, p. 62–63.
[8] *Ibidem*, p. 43.

Un *hedge fund* géré par « Commercial Union Investment Management » et un autre fonds géré par « Superfund TFI » ont été créés l'année dernière. Le fonds « Superfund » adresse son offre aux investisseurs riches qui sont prêts à placer au moins 40 mille euros dans l'une des trois stratégies d'investissement proposées par des fonds de Luxembourg. Ses titres de participation sont accessibles à tout le monde. Sur le marché polonais, également deux fonds fermés ont obtenu dans le passé une licence de la Commission des valeurs mobilières et des bourses. Ces deux fonds sont indépendants de grands groupes financiers et leurs stratégies consistent entre autres à investir dans des instruments dérivés[9].

Le fonds « TFI Opera » fonctionne depuis le mois de mai 2005, et il dispose à présent d'un actif de 300 millions de zlotys.« Opera » possède dans son portefeuille 4 fonds : 2 fonds ouverts (le fonds de la « Fondation pour la science polonaise » [Fundacja na Rzecz Nauki Polskiej] et le fonds pour des organisations autonomes) et 2 fonds fermés pour des investisseurs individuels. Le risque plus élevé des stratégies d'investissement employées par le « TFI Opera » est validé par le capital apporté par les fondateurs – 5 millions de zlotys [2]. « Opera » perçoit une redevance de 1,75% au titre de la gestion du fonds et une commission de 20% sur le bénéfice (versée après une période d'investissement de 4 ans ou bien au moment de l'annulation des certificats)[10].

Un autre fonds alternatif établi par des personnes physiques est le fonds « TFI Investors ». En septembre 2005, la société a vendu les certificats d'investissement du fonds fermé « Investor » dont la valeur s'élevait à 10,4 millions de zlotys[11]. La licence de la société permet de gérer un fonds investissant dans les devises, les marchandises et les instruments dérivés. A l'instar de « TFI Opera », les gérants sont aussi copropriétaires de « TFI » et participants au fonds fermé.

Les *hedge funds* sous la forme d'un fonds d'investissement soumis aux dispositions de la directive MIF (ceux qui offrent des services de conseil en investissement et de gestion de portefeuilles) doivent les respecter dans des domaines, tels que la réalisation de commandes, les conflits d'intérêts, la gestion du risque ou l'externalisation[12].

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[9] A. S ł a w i ń s k i, *Rynki finansowe* [Les marchés financiers], PWE, Warszawa 2006, p. 125.

[10] W. P r z y b y l s k a-K a p u ś c i ń s k a, *Rynek papierów wartościowych w Polsce. Wybrane problemy* [Le marché des valeurs mobilières en Pologne. Les éléments], Wydawnictwo Akademii Ekonomicznej, Poznań 2002, p. 36.

[11] J. T r u s z k o w s k i, «Fundusze hedgingowe i perspektywy rozwoju ich rynku w Polsce» [Les hedge fonds et leur perspectives en Pologne], [dans:] *Nowe usługi finansowe*, red. K. Gabryelczyk, Cedetu, 2006, I, p.43.

[12] D. D a w i d o w i c z, *Fundusze inwestycyjne. Rodzaje, typy, metody pomiaru i ocena efektywności* [Les fonds d'investissement, classification, typologie,les méthodes des mésuration, effectivité], CeDeWu, Warszawa 2009, p. 69.

3. Typologie de fonds en Pologne – exemples

3.1.Fonds de titrisation

Les fonds de titrisation sont des fonds d'investissement fermés qui émettent des certificats d'investissement afin de collecter des moyens pour l'acquisition de titres de créance ou de droits aux prestations résultant de créances (processus dit *titrisation* ou *sub-participation*)[13]. Un fonds de titrisation peut être établi en tant que fonds de titrisation normalisé ou non normalisé[14].

Dans le processus de titrisation, deux acteurs jouent un rôle substantiel : un initiateur de la titrisation, c'est-à-dire un créancier, et un émetteur qui, sur la base des créances acquises auprès de l'initiateur, émet des valeurs mobilières. Le fonds de titrisation joue ainsi le rôle d'émetteur.

Il existe deux méthodes de titrisation à travers un fonds de titrisation. La première s'appuie sur la vente de créances, tandis que la seconde – sur un contrat de sub-participation dans le cadre duquel l'initiateur de la titrisation ne vend pas de créances à l'émetteur, mais s'engage à lui transmettre toutes les prestations acquises au titre de la réalisation des créances titrisées[15].

Le fonds de titrisation ne peut placer son actif que dans des valeurs mobilières de créances, des titres de participation de fonds du marché financier, des dépôts bancaires, des instruments du marché financier et des instruments dérivés. Certains des instruments mentionnés se caractérisent par un taux de rendement relativement élevé (par exemple des titres de créance émis par des banques, qui sont couverts par des créances de crédits) mais aussi par un risque considérable[16].

Afin de créer une couverture additionnelle pour les participants à un fonds de titrisation, le fonds peut conclure des contrats liés au processus de titrisation (par exemple un contrat pour accorder une évaluation d'investissement), gérer des créances titrisées, fournir un cautionnement pour des créances du fonds ou accorder une garantie au profit du fonds). La conclusion d'un contrat de gestion des créances titrisées avec un acteur n'étant pas une banque nationale exige une autorisation de la Commission de surveillance financière[17].

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[13] R. B l i c h a r z, *Pozycja prawna uczestnika funduszu inwestycyjnego w Polsce* [La position des participants d'un fonds d'investissement en Pologne, questions juridiques), Wyższa Szkoła Zarządzania i Marketingu, Sosnowiec 2006, p. 24.

[14] M. A l-K h a b e r, *Rynki finansowe i instytucje* [Les marchés financiers et les institutions],Wydawnictwo Wyższej Szkoły Ekonomicznej w Białymstoku, Białystok 2006, p. 485.

[15] W. P o c h m a r a**,** W. Z a p a ł a, *Prawa uczestnika funduszu inwestycyjnego i sposób ich realizacji* [Les droits d'un investisseur et leur réalisation], KPWiG 2004, p. 28.

[16] Z. D o b o s z e w i c z**,** *Fundusze inwestycyjne* [Les fonds d'investissement], Twigger, 2008, pp. 53–54.

[17] R. B l i c h a r z, *op. cit.*, pp. 28–29.

3.2.Fonds de portefeuille

Un titre d'un fonds de portefeuille est une valeur mobilière admise à la cote de la bourse et émise par une institution financière sur la base d'un portefeuille déterminé d'instruments financiers créé par cette institution. Un tel fonds peut soit refléter la structure d'un portefeuille servant de base pour calculer l'indice boursier (portefeuille boursier), soit constituer un portefeuille basé sur la structure définie dans les statuts du fonds (portefeuille de base). Si, conformément aux statuts, un certificat d'investissement représente un ensemble précisément déterminé de valeurs mobilières, un participant au fonds peut exercer – grâce à ces valeurs – son droit de vote. Il est également possible, en cas d'annulation du certificat, de rendre les valeurs mobilières au lieu de payer une sanction d'annulation[18]. L'acquéreur de certificats de tels fonds reçoit ainsi une valeur mobilière dont il connaît bien la structure, il n'a pas peur des conséquences d'erreurs commises par des spécialistes qui gèrent le fonds, mails il sait aussi que c'est un instrument inflexible, qui représente dans certaines situations un risque de marché important[19].

3.3. Fonds du marché monétaire

Seuls les fonds d'investissement ouverts peuvent être des fonds du marché monétaire. Le trait caractéristique de ce type de fonds est un niveau de risque très bas pour ceux qui investissent dans ces fonds[20]. Ces fonds ne placent leurs actifs que dans des instruments du marché monétaire et dans des dépôts bancaires à court terme, payables sur demande. Ainsi, on assure la sécurité des placements tout en donnant la possibilité de réaliser des profits plus élevés que ceux résultant de placements bancaires. En plus, la liquidité de l'investissement est préservée[21].

Les fonds du marché monétaire ont le droit exclusif d'utiliser pour leurs noms la formule « de marché monétaire ». Le Ministre responsable d'institutions financières détermine dans un arrêté[22]:

1) les conditions à remplir par les placements d'un fonds, les remettants, les répondants ou les garants d'instruments du marché monétaire, les banques nationales et les institutions de crédit ;

2) les règles de l'évaluation de la sécurité de placements, également du point de vue de la capacité de remettants ou de banques nationales et

[18] W. P o c h m a r a, W. Z a p a ł a, *op. cit.*, p. 27.
[19] Z. D o b o s z e w i cz, *op. cit.*, p. 54.
[20] R. B l i c h a r z, *op. cit.*, p. 27.
[21] W. P o c h m a r a, W. Z a p a ł a, *op. cit.*, p. 27.
[22] J.O. 2009, no. 17, pos. 87.

d'institutions de crédit de remplir leurs engagements, y compris en indiquant un niveau minimum de notation effectuée par les institutions spécialisées et déterminées dans l'arrêté ;

3) les cas où les fonds sont obligés de vendre des instruments du marché monétaire ;

4) la manière de calculer une échéance moyenne maximale, pondérée par la valeur des placements, pour racheter les placements faisant partie du portefeuille d'investissement des fonds, afin de garantir un niveau approprié de sécurité des placements des fonds du marché monétaire[23].

3.4. Fonds des actifs non publics

Le fonds des actifs non publics est soit un fonds d'investissement fermé, soit un fonds d'investissement spécialisé ouvert, dont le fonctionnement est réglementé par la loi sur les fonds d'investissement. Ce fonds applique les règles et les limitations d'investissement propres à un fonds d'investissement fermé et il place au moins 80% de ses valeurs dans des actifs autres que les valeurs mobilières admises sur le marché réglementé (à moins que des valeurs mobilières ne soient admises sur le marché réglementé après leur acquisition par un fonds) et dans des instruments du marché monétaire (à moins qu'ils ne soient émis par des sociétés non publiques dont les actions ou les parts font partie du portefeuille d'investissement d'un fonds)[24].

Les instruments du marché monétaire ne peuvent pas dépasser 20% de la valeur des placements du fonds, à moins qu'ils ne soient émis par des acteurs dont les actions ou les parts font partie de son portefeuille d'investissement. Au cas où il existerait des dispositions adéquates dans ses statuts, le fonds des actifs non publics peut verser à ses participants les revenus de la vente des placements du fonds[25].

Une telle construction constitue une tentative d'encadrer le fonctionnement des fonds du secteur « private equity/venture capital » pour qu'ils agissent selon les dispositions légales prévues pour un fonds d'investissement fermé ou pour un fonds d'investissement spécialisé ouvert qui applique les limitations d'investissement propres à un fonds fermé. Les fonds de ce type peuvent ainsi devenir un objet de placement plus attractif par exemple pour les fonds de pension qui ne pourraient pas, autrement, faire des placements dans ce secteur à cause des limitations d'investissement qui leur sont imposées[26].

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[23] M. A l.-K h a b e r, *op. cit.*, pp. 484–485.
[24] R. B l i c h a r z, *op. cit.*, p. 29.
[25] http://www.newtrader.pl/Fundusze-aktywow-niepublicznych,about_5,15.php.
[26] W. P o c h m a r a, W. Z a p a ł a, *op. cit.*, p. 29.

4. Les fonds du type private equity

Le *Private equity* en Pologne peut exister en deux versions, soit comme un véritable *private equity*, avec des marques signifiantes dans son portefeuille et un capital vraiment important, auquel participent des investisseurs externes réels à travers leurs parts d'un fonds (investisseurs indirects) ; soit comme un véhicule financier (fiscal) confortable pour des *holdings* opérationnels ordinaires, plus ou moins grands, ou bien en général pour des entreprises familiales qui ne remplissent pas à elles seules de conditions pour devenir un fonds de capital--risque – cette seconde version est assez répandue en Pologne[27]. Cette dernière forme est utilisée par le capital polonais pour intervenir sur les marchés d'Europe orientale. La forme d'un *private equity* développé est plutôt utilisée avec l'enregistrement d'une société mère au Luxembourg, et le texte ci-dessous ne concernera pas ce type de sociétés[28].

En ce qui concerne de petits *private equity* polonais, le phénomène d'anéantissement de sociétés dans lesquelles on investit n'existe pas. Prenant en considération le fait que des entreprises principales existantes ont été créées au sein d'une société mère elle-même, c'est plutôt le choix de sociétés pour le portefeuille et leur bénéfice éventuel qui ont une importance majeure. L'abus de position par une société dominante se manifeste souvent par une pratique que l'on appelle « la gestion à la main » des sociétés filles par la société mère.

L'effet de levier est un phénomène qui se fait voir et qui constitue un axe essentiel de coopération entre des sociétés en surliquidité et celles qui traversent une récession.

Le phénomène de coopération avec des investisseurs actifs peut revêtir de nombreuses formes. En ce qui concerne des PE issus de petits groupes de production, comme c'est le cas en Pologne, l'intensité de l'activité des investisseurs est variée, mais la position dominante et le pouvoir de décision sont gardés par la société PE.

Dans le cas de sociétés par actions, elles exercent leur influence plutôt par le biais du conseil de surveillance. Il est alors envisageable de prendre des mesures permises, telles que la possibilité de révoquer le directoire ; de présenter des propositions de fusion et de racheter des parts dans des sociétés partiellement dépendantes pour les déplacer vers des sociétés qui se trouvent plus haut dans la hiérarchie ; de stimuler la croissance et l'expansion grâce à de divers outils ; de clôturer une partie de l'activité ou de la céder à des tiers.

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[27] Por. M. P a n f i l, *Fundusze private equity. Wpływ na wartość spółki* [Les fonds private equity. L'influence sur la valeur de la société], Difin 2008.

[28] A. K a l i s z u k, «Fundusze Private Equity i Venture Capital» [Les fonds private equity et venture capital], [dans:] *Biuletyn euro info dla małych i średnich firm*, kwiecień 2004, p. 17.

4.1. Activité des investisseurs actifs

En principe, l'activité des actionnaires dépend de leur position au sein de la société. Les investisseurs en position dominante, ou majoritaire, peuvent – grâce à leurs prérogatives – diriger la politique de la société et influencer les décisions prises par les organes de la société. Cela peut se produire, par exemple, à travers les nominations de membres du directoire et du conseil de surveillance. Quant aux actionnaires qui ne bénéficient pas à eux seuls de la position majoritaire ou dominante, ils doivent nouer des arrangements afin de faire adopter leurs propositions et d'obtenir une influence décisive sur l'activité de la société. Les actionnaires actifs agissent surtout en exerçant les droits qui leur sont accordés par les dispositions du Code des sociétés commerciales, en particulier le droit de mettre en cause toute décision concernant la société. De telles interventions leur permettent de protéger leurs intérêts en tant qu'investisseurs. Pourtant, il est bon de souligner que des litiges éventuels produisent toujours des effets négatifs pour toute la société, car ils peuvent mener à une paralysie de son activité.

4.2. Coopération du directoire avec les actionnaires actifs

Dans la réalité polonaise, comme dans les autres pays, la position du directoire dépend du morcellement de l'actionnariat. En effet, plus on a d'actionnaires avec un faible nombre d'actions, plus il est facile pour le directoire de coopérer avec des investisseurs stratégiques ou moyens. Le directoire, vu que l'exercice de ses fonctions est formellement indépendant des propriétaires, ne devrait nouer aucun accord informel, même si on observe parfois ce type de comportement. En principe, une question problématique est l'interdiction de donner des procurations aux agents de la société. L'art. 412 § 1 du Code des sociétés commerciales (la disposition introduite par l'amendement du Code) stipule qu'un membre du directoire et un employé de la société ne peuvent pas être représentant d'un actionnaire lors de l'assemblée générale. Cependant, conformément au § 2 de cet article, la disposition du § 1 ne concerne pas une société cotée. Par conséquent, la règle d'*incompatibilitas*, issue de l'art. 412 § 3 de la version antérieure du Code, a été, en vertu du nouvel ordre légal, restreinte uniquement aux sociétés non publiques.

4.3. Mesures appliquées à l'égard de/par les actionnaires

Les actionnaires jouissent surtout de leurs prérogatives : le droit de vote, le droit de mettre en cause les décisions, le droit au dividende ou bien le droit à l'information. Dans une moindre mesure, les actionnaires ont bénéficié jusqu'ici des privilèges suivants : le droit de demander une convocation de

l'assemblée générale ou le droit de demander de mettre des questions à l'ordre du jour. Le recours à d'autres mesures, à savoir planification d'un partage ou vente d'un paquet d'actions, est plutôt lié à une logique d'action choisie par un actionnaire et au nombre de ses parts. En ce qui concerne la coopération avec un investisseur, un tel dialogue est possible dans le cas des actions nominatives. De telles opérations sont pourtant plus difficiles en cas d'émission par la société des actions au porteur, et surtout en cas de leur dématérialisation[29].

A lui seul, le directoire est voué à l'échec en cas d'attaques des actionnaires actifs. Cependant, les interventions du directoire peuvent réussir, s'il collabore avec d'autres actionnaires. Il est alors admissible de différer les convocations d'assemblées, de partager les actions, de lancer une nouvelle émission d'actions en tant qu'actions privilégiées et de ne pas fournir d'informations exhaustives.

Est-ce que le directoire peut rester neutre ou est-ce qu'il peut être sous pression d'une offre publique d'achat? Il semble que les membres du directoire peuvent agir de façon neutre. Pourtant, le comportement du directoire relèvera des intentions d'un nouvel investisseur, concernant l'avenir des actionnaires. Voilà pourquoi les relations entre un futur investisseur et les membres du directoire, aussi bien que l'attitude de deux parties envers des transactions, sont si importantes.

4.4. Sources d'informations pour les investisseurs

L'obligation d'information est imposée aux sociétés par les articles 5, 6 et 7 du Code des sociétés commerciales, la loi sur la circulation d'instruments financiers et la loi sur l'offre publique. Le Code des sociétés commerciales exige, entre autres, que la société annonce la convocation de l'assemblée générale, la prise d'une résolution portant sur un changement essentiel de l'objet social (art. 416 § 3), la prise d'une résolution portant sur le rachat forcé d'actions (art. 418 § 2a). Le Code exige aussi que la société annonce le droit de souscription d'actions (art. 434 § 1) et le plan de fusion de sociétés, ou de restructuration de la société. L'obligation d'information sur le marché public découle des dispositions de la loi sur la circulation d'instruments financiers. Un autre exemple du droit dans ce domaine, concernant des sociétés cotées, sont les « Bonnes pratiques des sociétés cotées à la Bourse de valeurs mobilières » qui visent à augmenter la transparence et à faciliter l'accès aux informations exactes sur la

[29] Por. M. K a c h n i e w s k i, P. P i ł a t, J. S i a t k o w s k i, B. T r o p a, «Oferta dla firm średnich – finansowanie małych i średnich przedsiębiorstw poprzez fundusze inwestycyjne i publiczny rynek kapitałowy» [L'offre pour les PME par les fonds d'investissement et marché réglémenté], [dans]: *Finansowanie rozwoju małych i średnich przedsiębiorstw*, Polska Fundacja Promocji i Rozwoju Małych i Średnich Przedsiębiorstw, Warszawa 2000.

situation financière, la stratégie, les plans d'investissement, la structure de propriété et les liens de capitaux. Des changements cruciaux se sont produits en matière de la communication entre l'émetteur et l'investisseur. En effet, il est recommandé aux sociétés de mener une politique d'information efficace et transparente en ayant recours à des méthodes disponibles et à de nouvelles technologies permettant, entre autres, de suivre en direct les délibérations de l'assemblée générale via une connexion Internet ou via d'autres moyens de communication électronique. Il est également recommandé aux sociétés de maintenir des sites Internet (non seulement en langue polonaise, mais aussi en langue anglaise) sur lesquels elles devraient publier des informations sur les dividendes et autres bénéfices en faveur des actionnaires.

Parmi les inconvénients, il faut noter la suppression de la règle *comply or explain* qui imposait à une société une déclaration, rendue avec les comptes annuels, confirmant l'application des règles de gouvernement d'entreprise ou justifiant le non respect d'une bonne pratique. Le nouveau Code de bonnes pratiques ne l'exige pas. Cette approche peut surprendre, car dans d'autres codes de bonnes pratiques en Europe cette règle est toujours en vigueur. En plus, elle est conforme à la directive 78/660/CEE[30] stipulant qu'une société cotée sur la base de la directive 2004/39/CE[31] est obligée de fournir, outre les comptes annuels, des informations confirmant l'application des règles de *corporate governance*.

L'investisseur intéressé par une société peut collecter toutes les informations nécassaires. Il suffit de visiter le site de l'émetteur et de retrouver les publications concernant la société. Les sites Internet des émetteurs fourniront également de nombreuses informations, qui ne sont pas nécessairement incluses dans les comptes et rapports. En plus, les informations qui se trouvent sur les sites Internet sont d'habitude plus à jour que celles figurant dans les comptes et rapports.

Pour répondre aux besoins de leurs clients, également des agences de courtage publient des informations sur les sites Internet. Le grand nombre des agences de courtage et leur concurrence accrue sur le marché les poussent à élargir leur offre de façon à satisfaire les investisseurs bénéficiant de leurs services et à être plus compétitives sur le marché.

Les sites Internet des agences de courtage permettent de prendre connaissance de statistiques détaillées concernant des sociétés, de comparer leurs potentiels, de suivre en direct des sessions, etc. ; et tout cela pour faciliter aux investisseurs la prise de décision et, bien évidemment, pour tirer en même temps des profits de la gestion de comptes de courtage et des commissions y afférentes.

[30] J.O., L 122 du 14.08.1978, avec changements ultériours.
[31] J.O., L 145/1 du 30.04 2004.

4.5. Le PE façe au code des sociétés commerciales

Les fonds PE peuvent également être établis dans le respect du Code des sociétés commerciales. La société anonyme et la société en commandite simple en sont les formes les plus répandues. Conformément aux dispositions du Code, une société à responsabilité limitée (couramment S.A.R.L.) peut être établie par une ou plusieurs personnes afin de réaliser tout objectif licite. Il est donc possible de constater qu'une activité à haut risque puisse aussi être réalisée dans le cadre de la structure légale d'une S.A.R.L. Cela n'est pourtant qu'une supposition théorique. Dans la réalité polonaise, cette structure légale n'est pas utilisée en pratique pour créer des fonds à haut risque et cela pour plusieurs raisons.

Tout d'abord, la structure de gestion d'une S.A.R.L. n'est pas adaptée à l'exercice de ce type d'activité. En effet, conformément au Code des sociétés commerciales, une société doit posséder la direction et, d'habitude, un Conseil de surveillance, ce qui complique la structure de gestion. Les fonds de pension ouverts, qui sont les investisseurs les plus importants sur le marché d'aujourd'hui en Pologne, ne peuvent pas licitement investir dans les parts de sociétés à responsabilité limitée. Le troisième et le plus gros problème est l'inefficacité de l'imposition. En effet, les S.A.R.L. sont assujetties à l'impôt sur le revenu.

Aussi, des revenus réalisés par les participants à un fonds seraient-ils sujets à une double imposition – au niveau de la société et au moment de la distribution auprès des participants. De pareils problèmes concernent également la création de fonds sous forme de société anonyme. Cette forme, pourtant, a un certain avantage sur une S.A.R.L. Les actions d'une société anonyme peuvent être cotées sur le marché réglementé et il est ainsi possible d'amener des fonds de pension ouverts à investir. La forme d'une société anonyme est caractéristique pour les fonds dont les actionnaires principaux sont de grandes corporations, des compagnies d'assurances, des banques ou justement des fonds de pension. Cette forme offre aux actionnaires un accès plus facile aux informations concernant la société. La position légale des investisseurs est aussi clairement définie en ce qui concerne leurs droits et leurs obligations envers le fonds et elle permet une collecte plus facile de capital, elle assure également une participation des actionnaires à des prises de décisions d'investissement.

Cependant, le problème de la double imposition n'est pas du tout résolu. « CMI Management SA » est un exemple de la mise à profit de la structure légale d'une société anonyme. La société mentionnée est cotée en Bourse de Varsovie et ses actions offertes au public en 2001 ont été acquises tout d'abord par des investisseurs institutionnels.

La société en commandite simple est une société de personnes, caractéristique pour des personnes physiques et pour des institutions financières moins importantes. Celles-ci fournissent 99% des moyens financiers et exercent dans ce type de structure une fonction de commanditaires. Elles ont aussi une responsabilité limitée à concurrence de leur apport et 75% à 85% des bénéfices du fonds leur sont garantis. Le fonds est géré par un groupe de spécialistes hautement qualifiés qui exercent une fonction de commandités qui sont responsables sans limites des dettes de la société. Dans les structures d'une société en commandite simple et d'une société en commandite par actions, il est possible de remarquer certaines analogies avec des structures typiques de fonds à haut risque qui agissent comme des société de type « limited partnership ». Ainsi, un commandité peut être considéré comme un homologue de « general partner » responsable de la gestion d'un fonds, et un commanditaire (un actionnaire dans une société en commandite par actions) comme un homologue de « limited partner » c'est-à-dire un investisseur du fonds. Néanmoins, un contrat de gestion avec un acteur externe n'est pas conforme à la nature de la société.

La société en commandite simple et la société en commandite par actions ne sont pas imposables en vertu des dispositions de la loi sur l'impôt sur le revenu des personne morales (CIT) et de la loi sur l'impôt sur le revenu des personnes physiques (PIT). Conformément à l'art. 1 § 2 de la loi CIT, les dispositions de cette loi sont applicables aux organismes sans personnalité morale à l'exception notamment de la société en commandite simple et de la société en commandite par actions. Conformément à l'art. 5 § 1, les revenus au titre de la participation à une société n'étant pas une personne morale, y compris à une société en commandite simple et une société en commandite par actions, sont joints aux revenus de chaque associé proportionnellement à son apport. Faute de justificatif contraire, les parts sont considérées comme égales les unes aux autres. Cette règle est également applicable à la répartition de charges fiscalement déductibles, de dégrèvements fiscaux, d'exonérations fiscales, à l'abattement sur le revenu et à l'assiette imposables au PIT. Grâce à l'adoption d'une telle méthode d'imposition pour les organismes mentionnés ci-dessus, la double imposition de ces deux types de sociétés n'existe pas.

Malgré les formes décrites ci-dessus, les fonds PE sont d'habitude considérés comme n'étant pas réglementés directement par la loi polonaise. Les barrières les plus importantes pour le développement du marché à haut risque, excepté le manque de structure organisationnelle et légale appropriée pour les fonds PE, sont les suivantes : le manque de possibilités d'allocation du capital dans des fonds PE par de grands investisseurs institutionnels, le manque d'accès au capital pour les petites et moyennes entreprises, une faible efficacité du marché boursier, le manque de mécanismes de promotion de petits fonds d'amorçage qui investissent dans de jeunes entreprises étant dans la phase initiale de développement, une petite offre d'entreprises d'investissement attractives du point de vue de fonds PE.

L'activité de fonds à haut risque en Pologne exige des changements institutionnels, légaux et fiscaux, à l'instar des pays à économies de marché développées. Afin de construire les mécanismes de ce marché dans la réalité polonaise, il faudrait prendre en considération les propositions de changements suivantes :

– changement de régulations d'investissement, qui consisterait à permettre aux investisseurs institutionnels nationaux d'investir dans des fonds à haut risque, à définir un véhicule d'investissement pour des fonds à haut risque dans un espace légal et fiscal, à augmenter la limite d'investissement pour les fonds de pension ouverts de certificats d'investissement, à promouvoir les investissements à haut risque parmi des conseillers en investissement et des investisseurs, à stimuler le développement d'apporteurs alternatifs de capital à haut risque, soit le développement de fonds de fonds (angl. *Fund of funds*), agissant en tant qu'intermédiaires financiers entre des investisseurs institutionnels et des fonds à haut risque ;

– changements fiscaux, qui consisteraient à diminuer l'impôt sur les revenus du capital (surtout sur le dividende) pour les investisseurs individuels, à éliminer la double imposition pour les fonds à haut risque fonctionnant comme une S.A.R.L. ou une société anonyme, à exonérer de la TVA sur les charges de gestion et sur les revenus du capital ;

– développement de programmes de capital gouvernementaux : utilisation de moyens publics comme un levier pour le financement privé, développement de programmes de capital publics afin de diminuer un déficit du capital dans la phase initiale du développement d'entreprises, évaluation continue de l'efficacité des investissements de fonds public et de fonds publics-privés ;

– stimulation du développement de réseaux d'« anges des affaires » (angl. *Business Angels*)[32] par la création de réseaux locaux et régionaux de BA, dont le rôle sera d'associer des fonds à haut risque avec des entrepreneurs cherchant du capital, et par le développement d'une coopération entre un réseau de BA et des incubateurs de technologie, des écoles supérieures ou bien des organismes de recherche et de développement.

Cette liste reste néanmoins pas exhaustive.

[32] Por. A. J a n k o w s k a, «Sieci Business Angel oraz inwestorzy Business Angels jako podmioty wypełniające lukę na rynku kapitału podwyższonego ryzyka» [Le réseau BA et les investisseurs BA comme les participants qui remplissent la lacune sur le marché du risque élévé], *Biuletyn e-msp*, marzec 2004; «Anioły biznesu i ich rola we wspieraniu rozwoju przedsiębiorstw» [BA et leur rôle dans le soutien du dévéloppement des entreprises], *Nasz rynek kapitałowy*, lipiec 2004.

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FINANCIAL LEASING AND ITS UNIFICATION BY UNIDROIT: LEASING IN THE POLISH CIVIL CODE OF 1964/2000

1. Application of the contract of leasing conception in economic practice in Poland in the 90's of the XX century

Leasing has been becoming more and more popular in the market oriented economies together with the conviction, that it is a promising legal form of crediting economic activities from the profits of the financing party (*lessor*) himself. This way he could acquire for instance the technological line (*installation*) for bread production, machine park to product car elements or a truck to transport goods. For that purpose he does not have to have his own financial means in a sufficient amount. What he has to prepare is a credible business plan, which he presents to an entrepreneur who bought those elements and gave them to the user (*lessee*) for use in exchange of the payment. That payment covers also the price of purchase.

Even though it is true that in the legal doctrine it is indicated that the beginnings of leasing reach ancient times, but in serious terms we might talk about the new kind of contract from mid XXth century. It was the United States Leasing Corporation in San Francisco, which in 1952, as a first real leasing company, signed a contract later called a leasing one. It concerned the giving to use the production means in grocery industry. It was quickly noticed that more profitable and less risky is, instead of giving a bank credit, to purchase the given in the example production means or objects to supply services (i.e. trucks – *cars*) with a view of concrete entrepreneurs. Those entrepreneurs would use their own profits to pay the price of the acquired things and would pay for using them (a rent).[1] All the time the thing would be owned by the financing party and would stay under his constant control. That is the reason why leasing companies became to arise in consecutive European countries: in England – in 1960

[1] About economic aims and functions of leasing J. P o c z o b u t, in: *System prawa prywatnego*, t. 8; *Prawo zobowiązań – część szczegółowa* [Private Law System, Vol. 8, Obligations – Detailed Part], ed. J. Panowicz-Lipska, C. H. Beck, Warszawa 2004, p. 254–255.

Mercantile Credit Company Ltd, in France – in 1962 Banque de l'Intoschine, Locofinance S.A., in Germany – also in 1962 Mietfinance.[2] The legal framework was slowly built, for instance in France – the law of 1966 on credit-bail, in Spain – a decree of 1977 about financial and credit instruments and investments, in Belgium – a decree of 1967 about enterprises operating in financial lease, in the United States of America – a law of 1985 about leasing of movables (Uniform Personal Property Leasing Act of 1985 and Art. 2A of Uniform Commercial Code, introduced by the amendment of U. C. C. of 1987 and amended again in 1990), in Russia – the regulation of Civil Code of 1994 and 1996 and a law of 1997 about leasing. At last it was succeeded to agree a more or less unified understanding of the new contract for the needs of international trade and the UNIDROIT Convention on International Financial Leasing was concluded in Ottawa in 1988.[3]

Poland, due to its political and economic policy at that time, did not participate formally in preparations nor did it sign that Convention. Nevertheless the economic reforms which begun end 80's of the XXth Century resulted in the interest in leasing, especially because of the fiscal reasons. Important was the possibility of adding the cost of leasing to the costs of economic activity which resulted in lowering the income tax. First publications appeared, which popularized leasing as innominate contract (being outside legal regulations), which could be well of use for the development of the economy.[4]

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[2] Compare H. L i t w i ń c z u k, "Leasing finansowy w prawie niemieckim" [The financial leasing in German Law], *Przegląd Podatkowy* 1991, No. 4.

[3] J. P o c z o b u t, "Koncepcja umowy leasingu w projekcie konwencji UNIDROIT z 1987 r." [The conception of leasing contract in the draft of UNIDROIT convention of 1987], *Państwo i Prawo* 1988, No. 4; "Konwencja UNIDROIT o międzynarodowym leasingu finansowanym" [The convention of UNIDROIT on International Financial Leasing], *Problemy Prawne Handlu Zagranicznego* 1992, Vol. 16.

[4] J. K r a u s s, "Umowa leasingu w prywatyzacji likwidacyjnej przedsiębiorstw państwowych" [Leasing contract in privatisation based on liquidation of State enterprises], *Przegląd Ustawodawstwa Gospodarczego* 1991, No. 8–9; J. M a r c i n i u k, *Umowa leasingu i jej zastosowanie w handlu zagranicznym* [Leasing contract and its adaptation in interanational trade], Warszawa 1982; K. S z c z e p a ń s k i, *Leasing w Polsce* [Leasing in Poland], Warszawa 1992; K. K r u c z a l a k, *Leasing i jego gospodarcze zastosowanie* [Leasing and its economic practice], Gdańsk 1993; P. P o d r e c k i, *Leasing* [Leasing], Kraków 1993; about roots of leasing and its application in economy, see: J. P o c z o b u t, *Umowa leasingu w prawie krajowym i międzynarodowym* [Leasing contract in domestic and international law], Warszawa 1994; W. J. K a t n e r, "Umowa leasingu a odpowiedzialność odszkodowawcza" [Leasing contract and civil liability], *Studia z prawa prywatnego, Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej* [Memorial Book offered to Prof. Biruta Lewaszkiewicz-Petrykowska], Wydawnictwo Uniwersytetu Łódzkiego [Łódź University Press] 1997; L. S t e c k i, *Leasing* [Leasing], Toruń 1999; bibliography before and after amendment to the Civil Code of 2000, see: M. P a z d a n, *Kodeks cywilny, komentarz* [Civil Code, Commentary], ed. K. Pietrzykowski, C. H. Beck, 3. ed., Warszawa 2003, Vol. II, p. 300–302.

Such a positive thinking appeared to be so strong, that using the solutions of the UNIDROIT Convention, in 2000 the amendment to the civil code was held, regulating the contract of leasing.[5] This happened after the first decade of experiences in introducing real economic reforms in Poland. It was the new political reality, which started in 1989 with the amendments to the Constitution and the new government which rose owing to "Solidarność" – the social movement.[6]

2. Evolution of the understanding of leasing in the Polish legal system – the meaning of UNIDROIT Convention

Before leasing became a contract regulated in the civil code, it functioned in practice. It was differently understood. At the beginning, similar to other countries, it was hardly differentiated from hire and tenancy. It was even considered to be totally useless because of its minor differences with hire that it could be treated as a kind of hire. It was believed that its substance is to use a foreign thing for a specific period of time and the fact that a rent contains the price of purchase of the thing divided into installments is not enough to justify the new type of contract.

The help in separating the contract of leasing came from rather unexpected side. The crucial element of economic reform in Poland was, beginning from 1990, the privatization program of several thousands state companies, all together well above nine thousands. Part of them was wholly sold to private hands and a part was transformed into capital partnerships with the selling of shares and stocks. There was also a large part of smaller enterprises which the employees wanted to buy for their own. They didn't have, however, the sufficient capital to pay the price.

As a result, the law on privatization of 1990 (and later the presently binding one of 1996) foresaw such a way of privatization, which allowed giving the company for use to its employees for the period of 10–15 years. During that time

[5] Journal of Law [J. of L.] 2000, No. 74, item 857.

[6] After the amendment to the Civil Code of 2000 see: M. P a z d a n, "Kodeksowe unormowanie umowy leasingu" [The Civil Code regulation of leasing contract], *Rejent* 2002, No. 5; J. P o c z o b u t, *Umowa leasingu* [Leasing contract], Warszawa 2002; J. P o c z o b u t, "Die Regelung des Leasingvertrages im polnisches Zivilgesetzbuch-Abriss" [Regulation of leasing contract in the amendment to the Polish Civil Code], [in:] *Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht*; J. P o c z o b u t, in: *System prawa prywatnego…*; A. K i d y b a, *Prawo handlowe* [Commercial law], C. H. Beck, 11. ed., Warszawa 2009; beyond in commentaries to the Civil Code, ed. K. Pietrzykowski (by M. Pazdan) and ed. E. Gniewek (by W. Dubis).

they paid for the use such an amount that they paid off the value of the company and at the end of the contract could become the owners of that company. Such a contract was shortly named leasing (of the employees).[7] The substance of leasing was combined with the contract to use a thing (a company) in exchange of remuneration for the specific period of time and later on to pass the ownership of that thing to the user. Such an understanding of leasing survived until today in various societies, even though the Civil Code states differently and such an understanding is not in compliance with UNIDROIT Convention.

The UNIDROIT Convention exerted a paramount influence on the legal regulation of the leasing contract in the Polish Civil Code. This code dates from 1964, and in 1990 it was broadly amended and adjusted to market economy reforms, especially in the sphere of ownership law. Among later amendments from 2000 the new title XVII was introduced in the specific part of the third part of the code, entitled: contract of leasing – Art. 709^1–709^{18}. Under the influence of UNIDROIT Convention (Art.1) the regulation covers only financial (capital) indirect leasing, with the possibility of appropriate application of regulation to direct leasing. Operational leasing stayed outside the regulation, which according to the position of the jurisprudence stayed as innominate contract and is not leasing in the understanding of the Civil Code; nonetheless, the rules referred to the contract of leasing can be applied to it.[8] Faulty is however to state that defining the leasing in Art.709^1 of the Civil Code made the division to financial and operational leasing invalid on the base of Polish law.[9]

There are various kinds of well known world wide leasing which are not regulated in Polish law, such as revolving leasing, individual leasing, blanket leasing and single leasing in transport (vehicle or track leasing, fleet leasing), sale and back leasing. Their application is connected with freedom of contract rule which is reflected in Polish Civil Code in Art. 353^1.[10]

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[7] Compare on that subject especially M. P a z d a n, *Kodeks cywilny*, p. 316; S. W ł o d y k a, *Prawo umów handlowych* [Commercial contract law], ed. S. Włodyka, 2. ed., C. H. Beck, Warszawa 2006, item 8.3.4.; earlier S. W ł o d y k a, *Strategiczne umowy przedsiębiorców* [Strategic contracts of entrepreneurs], Warszawa 2000; also W. D u b i s, *Kodeks cywilny, komentarz* [The Civil Code, Commentary], ed. E. Gniewek, publ. C. H. Beck, 2. ed., Warszawa 2006, p. 1117.

[8] Decision of the Appellate Court in Poznań of 1 March 2006 I ACa 990/05; Decision of the Supreme Court of 28 May 2008 II CSK 31/08.

[9] A. K i d y b a, *Prawo handlowe* [Commerial Law], C. H. Beck, 11. ed., Warszawa 2009, p. 912.

[10] The regulation states that: "The party to the contract may arrange the legal relationship as they deem proper on the condition that the contents or the purpose of that contract are not contrary to the nature of the relationship, with statutory law, and the principles of community life;" on the subject of other types of leasing see also *Prawo gospodarcze prywatne* [Economic private law], eds. T. Mróz, M. Stec, C. H. Beck, Warszawa 2005, p. 586.

3. Concept, parties, legal character of leasing according to the amendments to the Civil Code of 2000

Art. 709^1 introduced by the amendment to the Civil Code states: "By the contract of leasing, the financing party shall assume the obligation to acquire, within the scope of activities of the enterprise, a thing from the designated transferor, on conditions specified in the contract, and to give that thing to the user for use or for use and for collection of fruits for a definite period of time, and the user shall assume the obligation to pay the financing party, in agreed installments, the pecuniary remuneration equal to at least the price of or remuneration for the acquisition of that thing by the financing party."

In comparison to UNIDROIT Convention, Art. 709^1 of the Civil Code does not contain the requirement to acquire by the financing party the thing, which is to be given for use to user, by the knowledge of the transferor (Art. 1 § 2b of the Convention), because of the rights of financing party regarding the transferor (Art. 10 § 1 of the Convention); in the Civil Code such a requirement is replaced at least partly by Art. 709^8 § 2.[11]

Things are the objects of leasing – movables and immovable properties. It is controversial whether whole enterprise can be the object of leasing, according to Art. 55^1 of the Civil Code, which states that "an enterprise as an organized complex of material and non-material components designed for carrying on an economic activity."[12]

The parties to the contract of leasing are: the financing party who is a lessor and the lessee called user. The financing party must be an entrepreneur within the scope of activities of his enterprise. It is often a financial institution, a joint-stock company with capital linked with a bank. The user is usually also an entrepreneur because the contract serves him to conduct his own economic activity (for instance production, services, commercial) but that is not necessary.[13] That is why the consumption leasing is also distinguished, where consumer is the user.

The person of transferor (mainly seller) who transfers the object of leasing is also linked to the contract of leasing. The financing party buys that thing with the aim to give it for use to the user (*lessee*). The contract is concluded in a specific way because of the fact that the user provokes it and intends to start the production of certain things; he is competent in it and chooses an adequate

[11] Compare J. P o c z o b u t, *System*…, p. 255–256.

[12] Compare the decision of the Supreme Court of 10 November 2000 IV CKN 164/00; Decision of the Supreme Court of 4 December 2008 I CSK 224/08; UNIDROIT Convention uses the word "equipment" and not "a thing".

[13] Differently the UNIDROIT Convention which covers contracts of leasing only between entrepreneurs.

technological equipment. The financing party buys it and concludes a leasing contract with the user who assembles machines in his own or rented production hall.

In order for the contract of leasing to be valid, it must be concluded in a written form, under pain of nullity, according to Art.709^2 of the Civil Code.[14]

The concluded contract of leasing is determined by UNIDROIT Convention as a separate type of contract, bilaterally obliging, mutual, for value, *solo consensu*, time limited, close to the contract of hire and tenancy, connected with using a foreign thing for a definite time.[15] There is, however, no rent for using a thing as a periodical and repeatable payment but a remuneration which contains a price of purchase of a thing. The feature of financial leasing is to conclude a contract for the period of amortization of a thing at one user, as a rule longer than three years (as a rule up to 10 years) and the contract cannot be dissolved before that period without financial consequences for user. He is obliged then to pay the whole agreed payment. Taking such rules about leasing in regulations of the Civil Code confirms the rules of UNIDROIT Convention; this will be closer touched in Part VI.

4. Content of contract of leasing – parties' rights and obligations

The contract of leasing is a mutual contract with rights and obligations for both parties. There are two basic obligations on the part of financing party: the obligation to acquire a thing from a designated transferor according to the conditions described in the contract of leasing,[16] and then to give that thing to the user for use or for use and for collection of fruits for a definite period of time stipulated in the contract of leasing.

The basic obligation of the user is to pay the remuneration to the financing party. It is assumed to be a single disbursement of money but divided into installments.[17] The installments are paid according to the contract and most often they depend on the income of the user from his economic activity which is related with the thing given to lease, for instance with the sale of products

[14] If in the contract there appears to be an option of ownership (Art. 709^{16} of C. C.), what will be discussed later, and it concerns the immovable properties, then the contract of leasing with such an option, for its efficacy must be concluded in a form of a notary deed. Compare W. D u b i s, *Kodeks cywilny, komentarz*, p. 1119.

[15] Decision of seven judges of the Supreme Administrative Court of 4 June 2001; Decision of the Supreme Administrative Court of 12 September 2001 III SA 1890/00; Decision of the Supreme Court of 27 October 2004 III CK 414/03.

[16] Compare the second thesis of the Decision of the Supreme Court of 2 October 2003 V CK 241/02; likewise Art. 1 § 2b of the UNIDROIT Convention.

[17] Compare the decision of the Supreme Court of 6 April 2005 II CK 656/04.

produced on leased machines. The remuneration might be reduced if the disbursement of the financing party is limited as to the value of the leased thing.[18]

The remuneration covers the price of purchase of a thing, the cost of concluding the contract of sale and release that thing, for instance the assembly, the rate of the credit together with the interest rates if the purchase of the thing required from the financing party to conclude a credit contract with the bank. The remuneration covers also the fee for the use of the thing by the user with the profit of the financing party as well as all other commercial profits, taxes and fees resulting from conclusion of the contracts.[19] All the above makes leasing an expensive way of acquiring a thing to use.

If the tax regulations allow the user who is an entrepreneur to add the costs of leasing to costs of the conducted economic activity, if only partly, then the financial effects of the expensive leasing are not burdensome and pay. Paying to the financing party the remuneration from incomes gained from the economic activity which is conducted owing to the thing received in leasing one may develop the economic activity and have a profit even if before he didn't have savings which would allow starting that activity independently. The contract, even though expensive, might be economically very profitable for the user in a longer perspective.

Besides the enumerated above obligations of the parties of the contract, there are also the additional obligations, as follows: the user shall be obliged to maintain the thing in proper condition, in particular, to provide maintenance and make repairs necessary for maintaining the thing in a non-deteriorated condition, taking into consideration its wear and tear due to proper use, likewise to bear the burdens related to the ownership or possession of the thing (Art. 709^7 § 1 of C. C.). If the contract of leasing does not stipulate that maintenance and repairs are to be performed by the person having specified qualifications, the user shall forthwith notify the financing party of the need to perform an essential repair of the thing (Art. 709^7 § 1 of C. C.). The user is obliged to enable the financing party to examine the thing to the extent specified in paragraphs 1 and 2 of that Art. (§ 3).

According to the Art. 709^9 of C.C. the user shall use the thing and collect fruits thereof in the manner stipulated in the contract of leasing or, where the contract does not stipulate such manner, in the manner corresponding to the features and designation of the thing. If the contract of leasing stipulates, that the user shall be obliged to incur the costs of insurance of the thing against its loss during the leasing period, in the absence of a contractual provision to the contrary, the costs shall encompass the insurance premium on commonly accepted conditions (Art. 709^6 of C. C.). The user shall forthwith notify the

[18] Compare the decision of the Supreme Court of 4 December 2008 I CSK 224/08.

[19] Compare the decision of the Appellate Court in Poznań of 13 May 2003 I ACa 204/03; Decision of the Supreme Court of 6 April 2005 III CK 656/04.

financing party of the loss of the thing (Art. 709^5 § 2 of C. C.). If the thing is lost due to the circumstances beyond the liability of the financing party, and after having been released to the user, the contract of leasing shall expire (Art. 709^5 § 1 of C. C.). That rule will be mentioned below.

Without the consent of the financing party, the user cannot make changes in the thing, unless they result from the designation of the thing (Art. 709^{10} of C.C.). The user cannot, without the consent of the financing party, give the thing for the third party for use. In the case of non-performance of that duty, the financing party may terminate the contract of leasing with immediate effects, unless the parties agreed the term of notice (Art. 709^{12} of C. C.).

The financing party shall forthwith notify the user of the transfer of the thing. In that case the acquirer shall enter into the relationship of leasing in place of the financing party (Art. 709^{14} of C. C.).

The rights of the user connected with the liability for the defects of the thing of leasing are regulated in a very interesting way. The first, the financing party shall release the thing to the user in the condition in which it was when the transferor released it to the financing party, who is not liable towards the user for usefulness of the thing for the purpose agreed (Art. 709^4 § 1 and § 2 of C. C.). The second, in accordance to the UNIDROIT Convention and to the Polish Civil Code, together with the thing, the financing party shall be obliged to release to the user the copy of the contract with the transferor or the copies of other documents in his possession which pertain to the contract, in particular, the copy of the documents received from the transferor or the producer and guaranteeing the quality of the thing (Art. 709^4 § 3 of C.C.). These are needed to the user, because "the financing party shall not be liable to the user for defects of the thing, unless such defects arose due to the circumstances for which the financing party is liable." As of the date of concluding the contract between the financing party and the transferor, by operation of statutory law, the financing party's rights of claims against the transferor and related to the defects of the thing shall devolve upon the user, except for the financing party's right to withdraw from the contract with the transferor (Art. 709^8 § 1 and 2 of C.C.). The user may demand the reduction of the price, which shall influence on the amount of remuneration due to the financing party, or may demand the removal of the defect or may demand the delivery, instead of defective thing, the same thing free of defect, and also he may demand the redress of damage resulting from the delay (Art. 709^8 § 2 of C. C. and Art. 556, 560 § 1, 561 § 1 and 2 of C. C.).[20] In accordance to the Art. 709^8 § 3 of C. C. the user's exercise of the rights mentioned above shall not affect his duties arising from the contract of leasing, unless the financing party withdraws from the contract with the transferor due to the defects of the thing.

[20] Compare Art. 8 § 1 and Art. 10 of the UNIDROIT Convention.

The user may demand that the financing party renounces the contract with the transferor due to the defects of the thing, if the financing party's right to renunciation ensues from the provisions of the law or the contract with the transferor. The financing party cannot renounce the contract with the transferor due to the defects of the thing without the user's making a demand to that effect (Art. 709^8 § 4 of C. C.). It is the only such regulation in whole Civil Code, that about the use by the party of the contract from the right rising from that contract decides a third person, who is towards the contract of sale of the thing to the financing party.[21]

5. Right of the user to buy the ownership of the leasing object

As I mentioned at the beginning, leasing, at the start of the process of privatization of the state owned companies, was considered to be a way of acquiring the ownership of a property of these enterprises. That was an obvious misunderstanding, as the substance of the contract of leasing is the definite use of the thing, and not acquiring it to own it after a certain period of time for which the contract was concluded.[22]

The mentioned misunderstandings were reflected in the jurisprudence, for instance in the verdict of the Supreme Court of 4th February 1994 III ARN 84/93 "it was stated that a contract which a final effect is to transfer by the financing party the ownership of the thing to the user after paying the fees in installments, reflecting the price of sale of the thing […] has features of the capital (financial) leasing."[23] Only during following years it occurred not to be proper. In the content of contracts concluded still then, when leasing was a innominate contract (before 2000) the jurisprudence started to require the explicit presence of the clause foreseeing the possibility of acquiring the object of the contract for the property of the user and on the financial conditions also described in that contract. The lack of that clause caused the absence of claim to transfer the ownership of the thing after the period for which the contract to use the thing was concluded.[24]

To avoid any doubts for the future, Art. 709^{16} appeared in the Civil Code. This regulation states: "If he financing party assumed the obligation to transfer, after the lapse of the leasing period specified in the contract, the ownership of

[21] Compare Art. 10 § 2 of the UNIDROIT Convention.

[22] That also results from Art. 1 § 1 and § 2 of the UNIDROIT Convention; likewise § 2A-103(1g) of the American Uniform Commercial Code, Art. 665 of the Russian Civil Code.

[23] Similarly faulty the Supreme Administrative Court in the decision of 21 June 1996 III SA 550/95.

[24] Verdict of the Supreme Court of 7 February 2000 I CKN 949/99; Verdict of the Supreme Court of 30 June 2004 IV CK 519/03; compare W. J. K a t n e r, Commentary to the Verdict of the Supreme Administrative Court of 21 June 1996 III SA 550/95, "Glosa" 1997, No. 4.

the thing onto the user without any additional performances, the user may demand that the ownership of the thing be transferred to him within one month after the lapse of that period, unless the parties agreed another period."

The transfer of the ownership of the thing onto the user is not the content of the contract of leasing itself but of the additional clause put either directly in the contract or in the annex to the contract while it lasts. This clause constitutes *accidentalia negotii* of the contract and is called an option of ownership or the option to become an owner. It gives to the user the right constitutive, owing to which he may declare in the course of the month from the expiry of the contract of leasing that he wants to profit from his right and that declaration might cause the transfer of the ownership of the movable. That is the legal sense of the option. There are also views that the option of ownership constitutes the preliminary contract unilaterally binding;[25] that is a controversial view.

In the case of immovable properties the declaration is not enough, there always have to be a contract concluded in the form of the notarial deed.[26]

The transfer of the ownership does not combine with any performances of the user, because he paid the price for the thing in the remuneration in the course of the contract of leasing. If one should pay for the transfer of ownership according to the contract, it would not happen in the frames of Art. 709^{16} of C. C.[27] The transfer of ownership according to the contract of leasing is surely not an effect of sale or of donation.[28]

6. Special obligations of the user to pay full remuneration, as a result of UNIDROIT Convention solutions

In the case of a traditional contract of hire its expiration after the period of notice causes the expiration of the right of a hiring person for rent for further period. The contract of leasing characterizes of several situations, in which the

[25] J. K r a u s s, *Prawo handlowe* [Commercial law], ed. J. Okolski, 2. ed., Warszawa 2008, p. 705–706.

[26] It is a general rule of the Civil Code in Art. 158: "The contract obliging to transfer an immovable property shall be concluded in the form of a notarial deed. The same shall apply to the contract transferring ownership which is concluded in order to carry out an earlier obligation to transfer the ownership of immovable property; that obligation shall be specified in the deed."

[27] That is why it is incorrect to name the right to transfer the ownership by the "option of purchase", because the contract of sale (purchase) is not concluded, compare W. D u b i s, *Kodeks cywilny, komentarz*, p. 1129; but compare proposal of J. P o c z o b u t, "Projekt regulacji umowy leasingu w polskim kodeksie cywilnym" [Draft of contract of leasing in the Polish Civil Code], *Przegląd Legislacyjny* 1997, No. 3; also M. P a z d a n, *Kodeks cywilny, komentarz* [The Civil Code, Commentary], ed. K. Pietrzykowski, C. H. Beck, 3. ed. Warszawa 2003, p. 315.

[28] M. P a z d a n, *Kodeks cywilny, komentarz*, p. 334.

early expiry of the contract causes the obligation of the user to pay at once to the financing party all remaining amount of remuneration, due for the rest of the period for which the contract was concluded. The reduction of this amount may result only from profits which the financing party received due to paying installments before the agreed term. The regulations of the Polish Civil Code stay under the influence of the standard of UNIDROIT Convention from Ottawa.

The first such situation is the loss of the thing taken already into possession by the user, due to circumstances, which the user does not take liability for (Art. 709^5 § 1 of C. C.). In such a case the contract of leasing expires. According to Art. 709^5 § 1 of C. C. "if the contract of leasing expired due to the reasons [presented above] the financing party may demand that the user forthwith pay him all the installments stipulated in the contract and not having been paid yet, reduced by the benefits the financing party obtained as a result of the payment of the installments before their due date, as the result of the expiration of the contract of leasing, and due to the insurance of that thing, likewise he may demand that the user repair the damage." The application of this regulation with the possibility of self insuring from severe liability to pay the remuneration was reflected in the jurisprudence of the Supreme Court.[29]

Second such situation occurs in the case of renouncing from the contract because of the defects of the thing. The characteristic features connected with guaranty for the defects of the thing were already mentioned on the basis of Art. 709^8 § 1–4 of C. C. According to Art. 709^8 § 5 of C. C. "If the financing party renounces the contract with the transferor due to the defects of the thing, the contract of leasing shall expire. The financing party may demand that the user forthwith pay him all installments stipulated in the contract and not having been paid yet, reduced by the benefits the financing party obtained as a result of the payment of the installments before their due date, likewise as a result of the expiration of the contract of leasing and the contract with the transferor." The practical application of the above regulation appeared in the verdict of the Supreme Court of 12 April 2006 III CSK 20/06.

Art. 709^{15} of C. C is the general regulation concerning the right of the financing party to demand the payment of full remuneration. This article has the direct relation to decisions of UNIDROIT Convention (Art. 13), in the situation of termination of the contract of leasing due to the reasons lying on the side of the user. According to this regulation "where the financing party terminates the contract of leasing due to the circumstances for which the user is liable, the financing party may demand that the user forthwith pay him all the installments stipulated in the contract and not having been paid, reduced by the benefits the financing party obtained as a result of the payment of the installments before their due date and of the dissolution of the contract of leasing."

[29] Compare the decision of the Supreme Court of 26 May 2008 II CSK 31/08.

Before Art. 709^{15} appeared in the Civil Code, in the jurisprudence it was considered whether it is possible to obtain the same effect as the one given by the present regulation by agreeing to pay the full due amount[30] and by the construction of the contractual penalty. It is foreseen in Art. 483 § 1 of C. C. According to this regulation: "It may be stipulated in the contract that the redress of the damage resulting from the non-performance or an improper performance of a non-pecuniary obligation shall take place by the payment of a specified sum (contractual penalty)." The above was accepted[31] and presently is also being accepted on the basis of the regulations about leasing in the civil code when searching for a new understanding of the term non-pecuniary obligation (i.e. as renouncing from the contract).[32]

The different character from the previous cases has the obligation to pay the remuneration, even if the contract was not terminated, but it is not performed pursuant to the expectations of the user. According to Art. 709^{3} of C. C. "if, within the time limit set, the thing is not released to the user due to the circumstances for which he is liable, the agreed terms of payment shall remain unchanged."

7. Conclusions

The presented above review of legal regulations about leasing done in Polish Civil Code shows clearly that most of the crucial resolutions of the UNIDROIT Convention of 1988 were taken over. The contract of leasing in Art. 709^{1}–709^{17} of C. C. means the indirect financed leasing.

According to Art. 709^{18} of C. C. the provisions of the contract of leasing shall apply respectively to direct financed leasing, so then when the owner of the thing being the object of leasing, most often in practice its producer, is the financing party at the same time (the financing party).

The other distinguished in practice types of leasing are not legal institutions in the meaning of Polish Civil Code, likewise pursuant to UNIDROIT Convention. Uniquely towards the operational leasing the jurisprudence of the Polish Supreme Court and Appellate Courts decided to take a quite unanimous position about a possible use to that type of leasing the regulations of the Civil Code

[30] Compare the decision of the Supreme Court of 8 November 2007 III CSK 205/07.

[31] Decision of the Appellate Court in Warsaw of 10 August 2004 I ACa 1564/03; Decision of the Supreme Court of 13 July 2005 I CK 67/05.

[32] Compare especially the decision of the Supreme Court of 20 October 2006 IV CSK 154/06, also Decision of the Supreme Court of 22 June 2006 V CSK 139/06; Decision of the Supreme Court of 18 August 2008 I CSK 354/07, comparison with Art. 709^{15} of C. C. contains the decision of the Supreme Court of 15 May 2008 I CSK 548/07; differently the decision of the Supreme Court of 18 August 2005 V CK 90/05.

about the contract of leasing, treating it similarly – but not same – to the contract named leasing in the Civil Code. It results from existing construction similarities of the contract between the sides in both types of leasing: financed and operational, as well as the meaning of operational leasing in economic practice.

Despite fears from the side of the legal doctrine, whether introducing the regulations on leasing to the Civil Code in 2000 was not too fast, after 10 years of binding of these regulations the decision of members of parliament at that time should be positively estimated. The text of the regulations about the contract of leasing was verified in practice. Also situating it after the contract of hire and tenancy was proper. The best evidence that these regulations are quite well is their high use in economic practice, without the need of modifying them for the whole period of binding. That is also the result of following the example of the decisions of UNIDROIT Convention when constructing the regulations of civil code on the contract of leasing. Even though the Convention concerns the international leasing it found itself true in its solutions and needed also for the domestic leasing.

SECTION III B

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THE BALANCE OF POLISH COPYRIGHT

The tradition of Polish copyright is very deep-rooted. The first Polish Copyright Act has been adopted in 1926. It has been an original creation, in many aspects also very pioneer. At the same time it has continued traditions and tendencies characteristic for European systems, originating from German and Roman traditions. It has been accompanied by specific circumstances, which in general constituted also one of the biggest national misfortunes. As you probably know, the Polish state has been reborn after I World War after more than one hundred years of non-existing. At this time Polish territories have been divided among powerful European countries and these territories have been subject to their civil law and in consequence – also to their copyright. In the result, creation of Polish Copyright Act of 1926 has been supported by experiences coming form French, German, Austrain and Russian law.

Authors of this Act have made some assumptions, valid and actual even today. What is characteristic, these concepts have been formulated in the country starting its life after long break and in the situation of deep economic crisis.

Nevertheless, the authors of the first copyright act decided, that bad economic situation doesn't justify lower standards of protection. In spite of objections, mainly of author's environment, they decided to create the act of high standard. In the consequence the definition of "the work" has been provided in a very broad way. What's more, the synthetic definition of this phrase has been created. It even encompasses industrial works and technical works. The second fundamental feature of this act was long time of economic protection, which took the whole author's life and fifty years after his death. This constituted the biggest controversy, because most systems being in force at that time, provided shorter terms of protection. The next feature was presenting the issue of economic copyright in analogy to ownership. The author has been vested with the exclusive right to use the work within all known and future fields of exploitation, unless the act clearly provides exceptions. These exeptions couldn't be interpreted extensively, they also coulndn't constitute the basis for analogies. The Polish Copyright Act provided also broad protection of personal copyright, treated as perpetual, non-transferable

and non-renouncable. After author's death execution of the protection has been provided by entities pointed by the autor and in case of lack of such entities, by categories of author's closest relatives enumerated by the act. The protection has been specified as universal, which means it existed irrespective of existance and duration of economic copyright.

Since 1920 Poland has been a member of Bern Convention, at the beginning in its Berliner, later in Roman wording. The Act of 1952 has continued these wordings, except for the period of economic copyright protection. It has been provided for a shorter term of 20 years after author's death and starting with 1976 (due to accessing Universal Convention in its wordings of 1952 and 1967) it has been extended up to 25 years after author's death.

The act being in force at this moment, that is the Act of February 4, 1994, which has been amended several times, continued the tradition created by the Act of 1926. These tendencies have been evolved and adjusted to today's technical and exploitation conditions, in particular in the light of new scopes (fields) of exploitation, needs of so called information society, as well as to regulations resulting from international agreements, in particular directives of The European Council and Parliament, which are binding Poland as the member of European Union.

With regard to the time period of economic copyright protection, it has been taken as a rule, that the protection period takes 50 years after author's death. Next, together with implementation of the directive on period of protection of economic copyright, it has been extended up to 70 years after author's death. At the same time the way to calculate this period with regard to audiovisual works provided by the directive has been implemented.

Adopting the rule, that extension of period of economic copyright protection of works, concerned even these works, which protection period calculated on the basis of previous act expired, has a very important meaning as well. The extension concerned however only the use of works based on provisions providing extended protection.

Technical condidtions of use of works are changing all the time and development of the law on over national level, resulting from international agreements and directives of European Union causes, that the existing act is being the object of relatively frequent amendments, aimed at implementation of the rules resulting thereof and current adjusting to changing technical and exploitation conditions. It in particular concerns the issues of computer programms, data bases, period of protection of economic copyright, provisions on cable, satelite and international exploitation, droit de suite, scope of exceptions considering the needs of information society, execution of economic copyright.

The existing act concerns not only copyright, but neighbouring rights as well: right of performing artists, producers of phonograms and videograms and of broadcasters.

The conception of the essence of neighbouring right differs from the conception of the essence of copyright.

The essence of copyright has been created according to the Roman model characteristic for ownership: the author is vested with the exclusive, effective *erga omnes* right to use the work, dispose the work within any fields of exploitation and the right to remuneration for use of work, except for exceptions provided by the act.[1] These exceptions, specified in the chapter of the act regulating allowed use, have been pointed by enumerating situations, when it is allowed to use the work in a specified way without author's permission, although with the reservation of author's right to remuneration or without the remuneration's payment. Limitation of the essence of economic copyright has been described in the act by the way of enumeration of specific cases. At the same time there is a rule, that allowed use cannot infringe normal use of work or be in contrary with just interests of the author (the three step test).[2]

With regard to neighbouring right, its essence has been based on closed enumeration of fields of exploitation, which use is being encopmased by the exclusive, effective *erga omnes,* right. However, with regard to use of a carrier entered into circulation within these fields, this right is being reduced to the right of remuneration.

The element characteristic for the law existing in Poland, caused by the need to create the balance in relations between the author and professional – in most cases the entity using works or artistic performances – is a number of special provisions, limiting the freedom of concluding agreements by *iuiris cogentis* provisions or provisions, which guarantee the author legal minimum of rights or provisions aiming at creating the balance except for the situation, where the parties decided contrary.

The most important meaning has the obligation to enumerate fields of exploitation in agreements, as well in agreements transferring economic copyright, as in license agreements. The transfer of economic copyright in whole or in part, under the pain of invalidity, must be executed in written form only. Agreements concernig use of works cannot refer to fields of exploitation unknown at the time of the agreement. At the same time the act provides the author with a number of rights, which cannot be transferred, renounced nor executed. It causes, that the transfer of copyright in whole, is not possible in Polish law.

The act is regulating the status of works created by employees. The employer acquires the copyright at the time of work delivery, within the agreement's purposes and parties unanimous will.

[1] Art. 17 of the Copyright Act.
[2] Art. 35 of the Copyright Act.

The status of computer programs has been regulated in a very specific way. The regulation of this category of works has been provided consistent with the directive on computer programs protection.

The issue of audiovisual works is also very specific. Regulations concernig this works consist of two aspects: rights of the producer of audiovisual work and rights of co-authors of this work. This regulation is being the object of many controversies among producers of audiovisual works and societies representing authors and performing artists. The interests of the author are protected by the presumption of acquiring the rights in works used in the audiovisual work. The author or the performing artist is obligated to proove, that the right to use his work (artistic performance) within exploitation of audiovisual, have not been transferred to the producer of the audiovisual work. On the other side, with the purpose to create the balance of relations autor (artist) – producer of the audiovisual work, it has been guaranteed by the act, that co-authors of the audiovisual work are vested with non-transferable, non-resignable and non-executable right to remuneration, proportional to incomes from exploitation of audiovisual work using the contributing work. In the original wording of the act, the right to this remuneration has been guaranteed only in favour of main co-authors of works contributing to the audiovisual work: director, camera operator, authors of literary works and composer. This wording has been however recognized as inconsistent with the Constitution by the Constitutional Tribunal (due to inconsistency with equity and social justice rules). As the consequence of this decision, this regulation has been replaced by the new one, providing that all co-authors of audiovisual work are vested with the right to remuneration. This change has many severe consequences. First of all there is a necessity of individually made investigation, who is the autor of the particular audiovisual work. Additionally, authors of works used in audiovisual work, not having the character of contributing works, have been deprived of the right to remuneration. Considering that even broadly understood creative cooperation by the audiovisual work constitutes the basic feature of co-authorship, the proper selection of the group of righholders may be very hard. In any case, there is a need to provide such selection with regard to every audiovisual work.

The most innovative regulation of Polish copyright concerns collective societies (CS). In Polish doctrine and jurisdiction there is an opinion of neccesity for CS acting as an intermediary between authors (rightholders of economic copyright) and entities using works and objects of neighbouring rights. Traditionally, such societies have been managing entrusted rights using civil instruments, for example ability to dispose economic copyright, in particular transfering certain package of rights, custody, agency, eventually with regard to rights, which have not been entrusted with, they have been acting as *negotiorum gestor*. In this last case, they could however only provide collection of remuneration and its division considering the rule of equity with regard to entities entrusting their

rights to CS's management. Such situation seems to be very severe for entites making use of copyright. On the basis of general rules of civil law, such entities don't have any possibility to acquire the right to works (artistic performances), which haven't been entrusted. In particular obligation acts, for example licence agreements enabling specified use of works, are effective *inter partes*. They don't however protect the entity using the work from claims of rightholders. The copyright doesn't recognize the possibility of acquiring copyright from unauthorized entity. The specific indication of this problem are so called *orphan works*. The statutory regulations regarding CS's status, are solving these problems in significant part, maintaining the balance between interests of rightholders and entities using their works or objects of neighbouring rights, enabling at the same time legal access to these values.

The act introduced the institution of CS and gave to this institution the specific status, in particular by: imposing specific duties, vesting with specific privileges making execution of CS's duties easier and creating requirements, which need to be met in order to become the CS. It needs to be added, that this idea adopted by Polish law, differs from traditional position of collective societies. First of all, CS according to the definition of Polish law is not a commercial partnership nor other kind of entity pursuing commercial activity.[3] Traditionally it should be organized as a society in the meaning of the Polish Act on societies, which means it is a voluntary, self-governing, autonomous and permanent gathering with non-gainful purpose, functioning on democratic basis, consisting in particular of equall position of its members, first of all with regard to active and passive voting right in the society. The Copyright Act has added another requirement – it has to be society gathering authors, performing artists, producers or radio and television organizations, which the statutory purpose is collective management and protection of copyright and neighbouring rights they have been entrusted with and execution of rights resulting from the law.[4] The CS's status is being granted to a society by the Ministry of Culture and National Heritage (MKiDN). This status however cannot be obtained within the system provided by the Act, which means as the result of fulfilling statutory requirements. It needs a permission granted on licensing basis. Granting permission is dependent on MKiDN's opinion, whether the society applying for the license guarantees proper management of rights.[5] Such regulation allows for dependence of the licence on evaluation of perspectives, which the particular organization is able to provide with regard to properly made collective management. This means, that MKiDN's opinion, whether the society applying for the management licence is able to guarantee the proper organizational resources, stuff, experience

[3] Act of April 7, 1989 on societies, *Law Journal*, No. 20, item 104 as amended.
[4] Art. 104 sec. 1 of the Copyright Act.
[5] Art. 194 sec. 2 point 2 i sec. 3 of the Copyright Act.

within this particular unit of management of rights, whether there is another organization able to provide the same management but in a better way, what the relations with another organizations active on the market are going to look like constitutes basis for the Ministry's decision on granting the licence for collective management. Properly provided collective management is the requirement, which makes using rights granted to the collective society dependent on. MKiDN is statutorily granted with the right to supervise the activity of the society and in case of CS's fulfilling its obligation not properly and if even summoned to cease further breaches, doesn't comply with this summon, it may overturn the given licence. It results with depriving the organization of the CS's status and in consequence, depriving of privileges it has had.

The statutory obligation of the CS is, as it has been said, properly provided collective management. It is the term coming from the civil law, consisting of synthetic obligation to act according to the law and purposes of CS, that is, according to the Act, to social and economic affairs, social coexistence rules (fair trade) and generally accepted customs. The act in particular imposes the duty of equal treatment of their members and other represented entites.[6] CS cannot, without any important reason, refuse collective management,[7] as well as it cannot, without any important reason, refuse granting permission to use works or artistic performances.[8]

Specific rights of CS are consisting of: information claims, which allow to demand anyone, who has the information, to reveal them and to provide any data and documents necessary to estimate the value of the claim. This claim doesn't need substantion, that the entity being subject to this claim has infringed copyright.[9] CS is additionally vested with legal presumption, that it is authorized to claim for protection and that it may act before the court. In both cases, that is in case of information claim and of presumption, they are working for CS within the scope of its licence, it means within categories of works and fields of expoitations encompassed by the licence. The significant right of CS is the right to apply for approval of Tables of Remunerations by the Copyright Commission.[10] The approval means that the Tables become the object of supervision. The approval means, that amounts of remunerations resulting from the approved

[6] Art. 106 sec. 1 of the Copyright Act.

[7] Art. 106 sec. 3 of the Copyright Act.

[8] Art. 106 sec. 2 of the Copyright Act.

[9] Art. 105 sec. 2 of the Copyright Act.

[10] See Art. 108 sec. 3 of the Copyright Act. This provision has been recognized by the Constitutional Tribunal (decision of January 24, 2006, decision No. SK 40/2004) as inconsistent with Constitution, due to the fact, that the participation of organizations using works and objects of neighbouring rights, in proceedings before the Copyright Commission, has not been guaranteed. Even today this provision has not been replaced with the new one. The draft is being worked on in the Parliament.

Tables become semiimperative. In the consequence, provisions less beneficial for the authors, than these resulting form the approved Tables are invalid and the appropriate provisions of the Tables replace them.[11]

These rights make CS's claims easier in a significant way. In practice the organizations are dealing with many problems by proving the use of represented works, but also the scope of this use. The decision approving the Tables is also very important. With the approved Tables, CS doesn't have to prove the basis for collection of due remuneration.

Existing of the specific system of supervision provided by MKiDN and the system of approvals of Tabes of Remuneration is suggesting a question regarding acceptability of supervision of CS's activity basing on general rules of competition. This question concerns in particular claims for remuneration based on approved Tables of Remuneration. This issue is very controversial, in particular acting within the obtained permission for collective management, where MKiDN is statutorily authorized to provide supervision. According to the Office of Competition and Consumer Protection's standpoint, CS should be with this regard treated as any other commercial entity.

Very important meaning for the balance between the rights and obligations with regard to copyright, have provisions of law regulating liability for economic copyright infringements. The existing provisions of the Polish act with this regard have been influenced by the awareness of significant scope of copyright infringements and in particular dangers with this regard resulting from possibilities given by bigger and bigger accesibility of electronic devices. Such devices enable recording, copying, storaging, transfering and changing works and objects of neighbouring rights. It has resulted with extension of civil and criminal protection. These ideas have been significantly ahead of the Directive on enforcement of copyright. In the result, the implementation concerned only details and procedural provisions.

The characteristic features of Polish law constitute provisions vesting CS with the right to provide collective management based on statutory representation. In most important spheres of collective management, CS's authorization is resulting straight from the law. It concerns minor works in radio and television broadcasts,[12] introducing works to the public in such a way, that anyone may have access at the time and place of his own choice,[13] all kinds of works being the object of reemission[14] and claiming remuneration due to co-authors of audiovisual works.[15] In case of radio and television rights and use of works at the time and place of own choice, the CS's authorization may be excluded by an

[11] Art. 109 of the Copyright Act.
[12] Art. 21 sec. 1 i 2 of the Copyright Act.
[13] Art. 21 sec. 2^1 of the Copyright Act.
[14] Art. 21^1 of the Copyright Act.
[15] Art. 70 sec. 2^1 of the Copyright Act.

agreement. With regard to reemission and audiovisual remunerations, it cannot be the object of transfer nor waiver. These provisions make realization of CS's obligations within these fields easier.

The law existing in Poland provides extended criminal liability, which is playing a big role in practice and civil liability. With regard to civil liability, the rightholder may in particular claim for refraining from further infringements, removal of consequences thereof, return of acquired advantages and compensation. Instead of compensation the rightholder may claim for doubled and in case of perpetrator's guilt, tripled amount of appropriate remuneration, which would be due at the time of the claim, if the use was legal. Irrespective of the above, the court may decide on unlawfully produced objects or devices (that is means and materials) used for production. In particular the court may decide to destroy, withdraw from the circulation or grant on account of due compensation.

Specific issues

1. The Polish copyright doesn't diversify protection of different kinds of works. The rule is, that every work constituting manifestation of individual creativity, established in any form, irrespective of its value, purpose or form of expression, constitutes the object of protection.[16] In particular the requirements of placing the copyright note on photographic works, material establishment of choreographic and cinematographic works and shortening the protection period of these works, which have existed in the previous text of the act, have been removed. There is also no limitation with regard to utility works (models for industry). The exemption constitute: a separate regulation regarding protection of computer programs – regulated according to the Directive on protection of computer programs,[17] audiovisual works, in the field of presumption of acquirement of rights to exploit works used in audiovisual work by the producer[18] and rights of co-authors of audiovisual work to remuneration proportionate to proceeds received from screening the audiovisual work in cinemas, remuneration for the reproduction of the audiovisual work on the copy for individual use and broadcasting of the work on television or radio or through other means of public presentation of works and for the rental of copies of audiovisual works and their public presentation.[19] To the above exceptions we should also add limitations resulting from exceptions constituting so called allowed use provided by the act, which are consistent with the Directive on copyright in information society.

[16] Art. 1 sec. 1 of the Copyright Act.
[17] Art. 74–77[2] of the Copyright Act.
[18] Art. 70 sec. 1 of the Copyright Act.
[19] Art. 70 sec. 2[1] of the Copyright Act.

2. The protection applies only to the manner of expression; discoveries, ideas, procedures, methods, principles of operation and mathematic conceptions are not protected.[20]

3. The Polish act doesn't provide any minimal criteria for the protection. The rule *de minimis non curat praetor*, known also as "kleine Muenze" is not known to the Polish act. It has been confirmed by judicial decisions of the Supreme Court made during between the two wars period, as well as by later decisions of this court. In the decision of March 5, 1971[21] the court has decided, that copyright is not dependent on value of the created work; even creations constituting minor values, but featured by the element of creativity, may by the object of copyright protection.

4. Provisions on allowed use provide however limitations with regard to permitted use, with or without the obligation to pay due remuneration. The consent or remuneration is not necessary with regard to:

– use of the work, which has been already disseminated, for the purpose of private use, except for building constructions according to other authors' plans, unless it applies to renovation or reconstruction;[22]

– transitory or incidental reproduction of works, such reproduction having no independent economic significance, but constituting an integral and fundamental part of manufacturing process, the sole purpose of which is to enable transmission of work through the data transmission between third parties by an intermediary;[23]

– disseminating through a group antenna or cable network the works broadcasted by another radio or television organization through satellite or terrestrial networks, if it is done within the framework of concurrent, integral and free dissemination of radio and television programmes and it is designated for a specific group of receivers living in either a single apartment building or single houses including up to 50 households;[24]

– receiving works by means of devices used for receiving radio and television programms by owners of these devices, even if such devices are located in public place provided, that it is not connected with obtaining of material benefits;[25]

– disseminating in original or in translation, for informative purposes through the press, radio or television reports on current events having been already broadcast,[26] short excerpts from reports and current articles on political,

[20] Art. 1 sec. 2^1 of the Copyright Act.
[21] Decision No. CR 593/70.
[22] Art. 23 and 33^5 of the Copyright Act.
[23] Art. 23^1 of the Copyright Act.
[24] Art. 24 sec. 1 of the Copyright Act.
[25] Art. 24 sec. 2 of the Copyright Act.
[26] Art. 25 sec. 1 point 1a, point 2–5 of the Copyright Act.

economic or religious issues, reviews of publications and disseminated works, speeches delivered at public meetings and proceedings, except for collection of speeches of a single person, short summaries of disseminated works;[27]

– quoting in the reports on current events of works made available during such events, however within the limits justified by the purpose of the information;[28]

– using disseminated works in original or in translation and making copies of fragments of disseminated works by research and educational institutions, for teaching purposes or in order to conduct their own research;[29]

– providing by libraries, archives and schools free access to copies of disseminated works within the scope of their tasks, making or mandating making copies of disseminated works, in order to supplement them, maintain or protect own collections, making the collection available for research or learning purposes through information technology systems terminals (endings) located at the premises of those entities;[30]

– quoting in works constituting independent whole, fragments of disseminated works or minor works in full, within the scope justified by explanation, critical analysis, teaching or the rights governing the given kind of creative activity;[31]

– performing in public any disseminated work during religious ceremonies, school and academic events or official state ceremonies, other than advertising, promotional or election events provided, that it is not directly or indirectly connected with any material benefits and the artists do not receive any remuneration;[32]

– publicly made exhibition of an artistic work by the owner of a copy of this work provided, that it s not connected with any material benefit;[33]

– disseminating works permanently exhibited on commonly accessible public roads, streets, squares, gardens, although not for the same use;[34]

– disseminating in catalogues and printed publication for promotion of works exhibited in commonly accessible collections, such as museums, galleries, exhibition halls, within the limits justified by information purposes, in radio and television reports on current events;[35]

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[27] Art. 25 sec. 1 point 2–5 of the Copyright Act.
[28] Art. 26 of the Copyright Act.
[29] Art. 27 of the Copyright Act.
[30] Art. 28 of the Copyright Act.
[31] Art. 29 sec. 1 of the Copyright Act.
[32] Art. 31 of the Copyright Act.
[33] Art. 32 sec. 1 of the Copyright Act.
[34] Art. 33 point 1 of the Copyright Act.
[35] Art. 33 point 2 of the Copyright Act.

– using disseminated works for the benefit of handicapped provided, that such use is directly related to their handicap, that it is not a profit-gaining activity and that it is proportionate to the nature of the handicap;[36]

– using works for the purpose of public security or for the purposes of administrative, court or legislative proceedings and any reports thereof;[37]

– using disseminated works for the purposes of advertising of a public exhibition or public sale of works, within the scope justified by the promotion of the exhibition or the sale, excluding any other commercial use;[38]

– using works in relation with presentation or repair of equipment.[39]

The following cases of allowed use are permitted provided, that the author receives due remuneration:

– including disseminated small works or fragments of larger works for teaching and research purposes in textbooks and reading books[40] and in anthologies;[41]

– disseminating published artistic and photographic works in encyclopaedias and atlases, if it is difficult to get in contact with the author; the author shall have the right to remuneration;[42]

– making available for informative purposes disseminated current articles on political, economic and religious issues, unless there is a clear provision that any further dissemination thereof is prohibited, current comments made and photographs taken by reporters, in such way that anyone can access them at a place and time of his own choice; if the remuneration has not been paid on the basis of the agreement with the rightholder, it shall be paid through the appropriate CS;[43]

– preparing and providing paid access to single copies of fragments of works, not bigger that one publishing sheet, by information and documentation centers; the author or the appropriate CS shall be authorized to collect due remuneration for the paid access to copies of fragments of works from the centers.[44]

Using works within the limits of allowed use (either with or without remuneration) is permitted on the condition, that the author and the source have been named, that is the title and other information identifying the work should be shown in a manner applicable to existing circumstances.[45]

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[36] Art. 33^1 of the Copyright Act.
[37] Art. 33^2 of the Copyright Act.
[38] Art. 33^3 of the Copyright Act.
[39] Art. 33^4 of the Copyright Act.
[40] Art. 29 sec. 2 of the Copyright Act.
[41] Art. 29 sec. 2^1 of the Copyright Act.
[42] Art. 33 point 3 of the Copyright Act.
[43] Art. 25 sec. 4 of the Copyright Act.
[44] Art. 30 of the Copyright Act.
[45] Art. 34 of the Copyright Act.

SECTION III C

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THE PROHIBITION OF AGE DISCRIMINATION IN LABOUR RELATIONS

1. The principle of non-discrimination is enshrined in Poland through international and internal legal acts. The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised especially by United Nations Covenants on Civil and Political Rights[1] and on Economic, Social and Cultural Rights,[2] as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms.[3] Poland is signatory to all of these acts. Convention No. 111 of the International Labour Organisation (ILO) which prohibits discrimination in the field of employment and occupation was also ratified by Poland.[4]

Polish Constitution of the 2nd April 1997[5] establishes a general principle of equal treatment. According to its Art. 32, all persons shall be equal before the law, all persons shall have the right to equal treatment by public authorities and finally "no one shall be discriminated in political, social or economic life for any reason whatsoever." This general principle has been precised and accompanied by the specific procedural guarantees in the realm of labour relations in the Polish Labour Code.[6] The non-discrimination provisions of the Polish Labour Code implement the EU Directives. As it concerns age discrimination, the Labour Code implements the Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[7]

The principle of non-discrimination in labour relations is established in Art. 11^2 of the Labour Code which states that employees shall have equal rights resulting from the identical performance of the same duties; this shall apply in particular to the equal treatment of men and women in the area of employment.

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[1] Dziennik Ustaw [Journal of Laws – J. of L.] 1977, No. 38, item 167.
[2] J. of L. 1977, No. 38, item 169.
[3] J. of L. 1993, No. 61, item 284.
[4] J. of L. 1961, No. 42, item 218.
[5] J. of L. 1997, No. 78, item 483.
[6] J. of L. 1998, No. 21, item 94 with later amendments.
[7] Official Journal of EC, L 303, 02/12/2000.

More specifically, the reference to the principle of non-discrimination based on age is expressed in Art. 113 of the Labour Code which states that any, direct or indirect, discrimination in employment, especially based upon sex, age, disability, race, religion, nationality, political views, convictions, trade union membership, ethnic origin, sexual orientation as well as upon the character of employment (for a determined or an indefinite period, full-time or part-time employment) – shall be prohibited.

Art. 18^{3a} § 1 of the Labour Code states that employees should be treated equally with regard to concluding and terminating employment contract, the terms of employment, promotion and access to vocational training aimed at upgrading their professional qualifications in particular independently of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, religious convictions, sexual orientation or due to employment for a determined or an indefinite period or on a full-time or a part-time basis.

The Labour Code provides also for definitions of direct and indirect discrimination and harassment, establishes the exceptions from the general principle of non-discrimination and regulates the question of the burden of proof in discrimination cases.

Among the most important obligations of the employer cited in Art. 94 of the Labour Code, it is also mentioned in the § 2b) that the employer is obliged to counteract discrimination in employment, particularly due to sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, religious convictions, sexual orientation or due to employment for a determined or indefinite period or on a full-time or a part-time basis. In the scope of this obligation, according to Art. 94^{1} of the Polish Labour Code, the employer is obliged to get the employees acquainted with the legal provisions concerning the principle of equal treatment.

The Polish Labour Code does not only prohibit the discrimination in individual relations of work. It also relates to the validity of the autonomous sources of labour law. Art. 9 § 4 of the Labour Code states that clauses of collective labour agreements and other collective accords based on legislation as well as of internal regulations and statutes that regulate the rights and obligations of the parties of the employment relationship which infringe the principle of equal treatment in employment are not binding.

The non-discriminatory provisions are also to be found in the Law of 20 April 2004 on employment promotion and labour market institutions[8] (later called Law on employment promotion). In relation to the functioning of employment agencies (chapter six) it states in Art. 19c that: an employment agency shall not discriminate against the persons for whom it seeks employment or other paid work on the grounds of their sex, age, disability, race, ethnic origin,

[8] J. of L. 2008, No. 69, item 415.

nationality, sexual orientation, political views, religious convictions or trade union membership.

The labour market services rendered free of charge by the district and province employment offices for the unemployed and persons seeking employment should be provided for on equal terms irrespective of sex, age, disability, race, ethnic origin, nationality, sexual orientation, political beliefs and religious convictions or a trade union membership (Art. 36 § 4 point 3). The reference to the non-discrimination principle is also made in different provisions of the Law on employment promotion as for example relating to the establishing by the regional authority of the criteria on the basis of which the work permits for foreigners not being EEA citizens are delivered. According to Art. 10 § 5 of the above-mentioned Law, these criteria cannot include discriminative requirements on the grounds of sex, age, disability, race, nationality, ethnic origin, sexual orientation, political beliefs and religious convictions as well as membership in a trade union or in an employers' organisation.

On the 10th August 2009, Polish Council of Ministers has presented the proposal of the new Law on implementation of certain European Union provisions on equal treatment[9] (further called Law on equal treatment) which aims at consolidating different existing anti-discriminatory provisions and reinforcing the legal instruments in this field. This draft responds to the critical assessment of the European Commission which reproached Poland the improper implementation of directives on non-discrimination, i. a. the Directive 2000/78/EC.[10]

2. The assessment which age groups are protected against discrimination comes from the analysis of the legislation as well as of the governmental programmes. As it is clear from the governmental programme "'Solidarity of generations' – actions to increase professional activity of persons in the age 50+" issued by the Council of Ministers on the 17th October 2008[11] the special importance is attached nowadays in Poland to combating discrimination of older persons on the labour market. The protection, according to this programme, is granted to persons over fifty or even over forty five.

The second group of persons which are granted special protection on the labour market are young persons under twenty five (or twenty seven if they are

[9] Proposal available on the website of the Ministry of Labour and Social Policy, http://www.mpips.gov.pl

[10] Infringement No. 2006/2445, letter of the Commission of 15 December 2006, SG-Greffe (2006) D/207993. Critical opinions about the implementation of non-discrimination directives in Polish Labour Law were also formulated in the literature, see for example I. B o r u t a, "Zakaz dyskryminacji w zatrudnieniu – nowa regulacja prawna" [The prohibition of discrimination in employment – new legal regulation], *Praca i Zabezpieczenie Społeczne* 2004, No. 2, p. 2–8.

[11] Published on the website of the Ministry of Labour and Social Policy, http://www.mpips.gov.pl.

graduates of schools of higher education). The Programme of professional activation of graduates called "First Job" which aims at improvement of employment situation of young people is being carried out since 2002.[12]

These two groups of age are granted rules of preference in relation to seeking and continuing employment. According to Law on employment promotion (especially its Art. 49), special instruments of support on the labour market are offered to young persons who are under twenty five (or twenty seven if they are graduates of schools of higher education) and on the other hand to older people who are over fifty or in certain situations over forty-five. These instruments are such as for example financial incentives for employers seeking to employ them or a larger access to vocational training. These rules of preference have been established in alignment with the above-mentioned governmental programmes and are also confirmed by the draft National Plan of Actions for the Employment presented by the Ministry of Labour and Social Policy in April 2009.[13]

In the context of protection against discrimination, attention should be drawn to Art. 39 of the Polish Labour Code which interdicts the employer to dissolve the employment contract by notice if an employee is in such an age that within four years or less she/he will be entitled to the retirement pension (unless an employee is entitled to the full disability pension). This provision assures stability of the concluded employment contract but on the other hand, it may discourage employers to conclude contracts with persons in the pre-retirement age. In result, it is ambiguous as to its protective character. Following this argument, the government has thus proposed to shorten this protection period to two years.[14]

3. The explicit prohibition of discrimination is expressed in the Labour Code in relation to active labour relationships. The prohibition in the light of the Law on employment promotion concerns also the stage of searching employment, among others through the employment agencies or public employment offices. Polish Law on occupational pension schemes[15] does not include an explicit prohibition of discrimination. However, according to Art. 5 § 1 of this Law, any employee who is employed by the given employer not shorter than three months may participate in the occupational pension scheme unless the agreement concluded on the level of establishment with the employees' representatives states differently. It must be

[12] *First Job – The Programme of professional activation of graduates elaborated by the Ministry of Labour and Social Policy in January 2002*, http://www.mpips.gov.pl.

[13] P. 24, http://www.mpips.gov.pl.

[14] See, the governmental programme "'*Solidarity of generations' – actions to increase professional activity of persons in the age 50+*" issued by the Council of Ministers on the 17th October 2008, published on the website of the Ministry of Labour and Social Policy, http://www.mpips.gov.pl, p. 18.

[15] J. of L. 2004, No. 116, item 1207.

indicated that such an agreement cannot include any discriminating clauses which in such a case would be automatically not binding.[16] Art. 5 § 1a of the Law on occupational pension schemes excludes employees who are over seventy from participation in the occupational pension scheme.

The draft Law on equal treatment consolidates the situations in which the discrimination is prohibited and extends it beyond the scope required by the Directive 78/2000/EC. It is provided for in Art. 5 § 1 of the draft Law that it is forbidden to discriminate for any reason in particular on the grounds enumerated in this article (age included) especially in relation to access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; to the possibility of undertaking the professional activity, to the conditions of undertaking and continuing the business or agricultural activity as well as in relation to the employment on the basis of the civil law contracts. The same draft provision prohibits discrimination in relation to membership in trade unions, employers' organisations, professional corporations and non-governmental organisations and making use of benefits related to the membership in these organisations. Furthermore, the above-mentioned provision prohibits discrimination in relation to the access to instruments and services offered by the labour market institutions as well as to instruments and services offered by other institutions acting in favour of employment, development of human resources and in order to prevent joblessness. Finally, according to the draft provision, the prohibition also covers social security, healthcare, education, access to and supply of goods and services which are available to the public, including housing. It must be mentioned that the new Law will not repeal the anti-discriminative provisions of the Labour Code which shall still regulate equal treatment in active labour relations.

4. The anti-discriminatory provisions of the Labour Code relate to employees in the meaning of its Art. 2 which states that an employee shall be a person employed on the basis of a contract of employment, an appointment, an election, a nomination or a cooperative contract of employment. The Polish Labour Code provisions do not relate to the situation of the self-employed persons. However, the non-discrimination provision that concerns the services of the employment agencies relates not only to the search of employment but also of "other paid work."[17] This provision protects thus also against discrimination in the phase of recruitment to the jobs based on civil law contracts by the intermediary of the employment agencies. The proposal of the above-mentioned Law on equal treatment mentions as covered by the non-discrimination principle also any

[16] Compare Art. 9 § 4 of Polish Labour Code.
[17] Art. 19c of the Law on employment promotion.

professional, economic or agricultural activity as well as employment on the basis of civil law contracts.[18]

5. The definitions of the direct and indirect discrimination are precised respectively in Art. 18^{3a} § 3 and § 4 of the Labour Code. Both definitions of discrimination make reference to the prohibited criteria enumerated in Art. 18^{3a} § 1 of the Labour Code, that is sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, religious convictions, sexual orientation or due to employment for a determined or an indefinite period or on a full-time or a part-time basis. The criterion of age is thus one of the forbidden criteria. Both concepts are based on the definitions of direct and indirect discrimination provided for in the Art. 2 § 2(a) and (b) of the Directive 2000/78/EC.

The direct discrimination in the light of Art. 18^{3a} § 3 of the Labour Code occurs when an employee for one or several grounds referred to in § 1 has been, is or would be treated in a comparable situation less favourably than other employees. As to the indirect discrimination, according to Art. 18^{3a} § 4 of the Labour Code, it occurs when an apparently neutral provision, criterion or practice provoke or may provoke disadvantageous disproportions or put at a particular disadvantage all or an important number of employees belonging to a group distinguished by one or several grounds referred to in the cited provision of Art. 18^{3a} § 1 of the Labour Code in relation to access to employment and dismissals, conditions of employment, promotion, access to vocational training unless this provision, criterion or practice is objectively justified by a legitimate aim to be achieved and the means of achieving that aim are appropriate and necessary. The Labour Code prohibits also instruction to discriminate persons on any of the above-mentioned criteria treating this act as one of forms of discrimination in conformity with Art. 2 § 4 of the Directive 2000/78/EC.

Art. 18^{3a} § 5 point 1) of the Labour Code states that harassment is one of forms of discrimination and refers to the grounds enumerated in Art. 18^{3a} § 1 of the Labour Code. As it was earlier indicated the criterion of age is one of these grounds. The concept of harassment parrots the definition set up in Art. 2 § 3 of the Directive 2000/78/EC and is defined as an unwanted conduct with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

6. The exemptions from the prohibition of discrimination are provided for in the Labour Code. The scope of these exemptions corresponds with the allowed derogations from the Directive 2000/78/EC.

[18] Art. 5 § 2 point 2 of the Law on employment.

Firstly, according to Art. 18^{3b} § 2 of the Polish Labour Code, the principle of equal treatment is not infringed by certain actions in case these actions are proportional to the attainment of the legitimate objective of the differential treatment of the employee' situation. These actions consist in a) refusal of employment of an employee for one or several reasons enumerated in Art. 18^{3a} § 1 of the Labour Code if the type of employment or the conditions of carrying it out cause that the reason or reasons indicated in this provision constitute a genuine and determining occupational requirement for the employee, b) change in employment conditions in relation to the time of work by notice given to the employee if this change is justified by the reasons which do not concern employee with no relation to another reason or reasons enumerated in Art. 18^{3a} § 1, c) use of means which differentiate the legal situation of the employee on the grounds of protection of parenthood or disability, and finally d) the use of criterion of the period of previous employment while establishing the conditions of employment and dismissal of employees, the principles of remuneration and promotion as well as the access to training aiming at improvement of professional qualifications what justifies the difference of treatment of employees for the grounds of age.

As it may be seen, Polish Labour Code establishes a catalogue of actions which do not constitute discrimination. Such an approach should be criticised as too narrow because it is not possible to enumerate *a priori* all the situations in which the employer may differentiate the situation of the employee in a justified way.[19]

Secondly, according to Art. 18^{3b} § 3 of the Labour Code, the principle of equal treatment is not infringed by the actions taken during a certain period of time which aim at ensuring the equality of chances for all or for an important number of employees distinguished by one or several reasons enumerated in Art. 18^{3a} § 1 of the Labour Code by diminishment of existing inequalities for the advantage of these employees in the scope of this provision. The positive actions are therefore allowed to promote certain age groups of employees as the criterion of age is one of the criteria enumerated in the latter article.

Thirdly, it is not expressly stated in any statutory act that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.[20] However, in different statutory acts in Poland age

[19] Compare L. M i t r u s, *Wpływ regulacji wspólnotowych na polskie prawo pracy* [The impact of European Community regulations on Polish Labour Law], Kraków 2006, p. 199.

[20] Compare Art. 6 § 1 of the Directive 2000/78/EC.

limits may be found. Such statutory acts as Law on civil service[21] and Law on higher education[22] may be cited as an example.

Similarly, in the absence of the explicit provision stating that the non-discrimination provisions on age do not apply to the armed forces,[23] the age limits of service are found in statutory acts concerning these sector like the Law on professional military service.[24] The explicit exemption of the armed forces from the prohibition of age discrimination is provided for in the draft Law on equal treatment.[25]

7. According to Art. 18^{3b} § 2 point 4 of the Labour Code, the use of the criterion of period of previous employment while establishing the conditions of employment and dismissal of employees, the principles of remuneration and promotion as well as the access to training aiming at improvement of professional qualifications may be a specific reason justifying the difference of treatment of employees for the grounds of age. It seems that this specific ground justifying age discrimination is not thoroughly compatible with the EU Law. As it is underlined in the literature[26] the use of the criterion of period of previous employment is not always justified. It may constitute an example of indirect discrimination on grounds of age as the period of employment of women is often shorter for the maternity reasons.

The general grounds of justification apply to age discrimination. The general grounds which justify discrimination stem from different provisions of the Labour Code. It may be summarised as following: a) objective reasons (Art. 18^{3b} § 1), b) in case of indirect discrimination, the use of the provision, criterion or practice which is objectively justified by a legitimate aim to be achieved and the means of achieving that aim are appropriate and necessary (Art. 18^{3a} § 4), c) actions which are proportional to the attainment of the legitimate objective of the differential treatment of the employee' situation (Art. 18^{3b} § 2), d) refusal of employment of an employee for one or several reasons enumerated in Art. 18^{3a} § 1 of the Labour Code if the type of employment or the conditions of carrying it out cause that the reason or reasons indicated in this provision constitute

[21] Art. 71 § 2 point 1 of Law of 21 November 2008 on civil service, J. of L. 2008, No. 227, issue 1505, provides for the possibility to dismiss the civil servant with the three months' notice if he/she attains the age of 65 and is entitled to retirement pension.

[22] Compare Art. 127 § 2 of Law of 27 July 2005 on higher education which states that employment contract of professors expires in case of attainment of seventy years.

[23] Compare Art. 3 § 4 of the Directive 2000/78/EC.

[24] Art. 111 point 5 of Law of 11 September 2003 on military service of professional soldiers, J. of L. 2008, No. 141, issue 892.

[25] See Art. 2 point 2 of the draft Law on equal treatment.

[26] L. M i t r u s, *op. cit.*, p. 200.

a genuine and determining occupational requirement for the employee (Art. 18^{3b} § 2 point 1).

8. The legal consequences of the breach of age discrimination law depend on who is responsible for this violation and on which stage of employment the act of discrimination has been committed. If a would-be employer commits this act on the stage of recruitment or an employer during the employment contract, the victim of discrimination may bring action to the labour court and may claim compensation the maximum amount of which is not limited but should correspond to the suffered damage. On the other hand, according to Art. 18^{3d} of the Polish Labour Code, the amount of such compensation should not be lower than the minimum monthly wage in Poland which is established every year.[27] Moreover, the employee who considers herself/himself discriminated may terminate the employment contract without notice for the serious breach of contractual obligation by the employer as it is provided for in Art. 55 § 1^1 of the Labour Code.[28] If the discrimination consists in unlawful dismissal, the former employee may additionally bring action for reinstatement in employment to the labour court. The proceedings before the labour court are free of charge for the plaintiff unless the requested compensation exceeds 50 000 PLN.[29]

Protection against retorsions from the employer are provided for in the Art. 18^{3e} § 1 of the Polish Labour Code according to which the use by the employee of any complaints or proceedings in order to enforce the principle of equal treatment cannot be the reason for a disadvantageous treatment of the employee as well as it cannot result in any negative consequences for the employee, especially it cannot be the ground for dismissal of the employee. The same protection against retorsions is granted to the employee who has offered support in any form to the above-mentioned employee (Art. 18^{3e} § 2 of the Polish Labour Code).

It should also be noted that the employer is responsible for the acts of harassment committed by another employee, as in the light of Art. 94 § 2b) of Polish Labour Code, the employer is obliged to counteract discrimination at the workplace whereas in the light of Art. 15 of the Labour Code to guarantee safe conditions of work to the employees. The responsibility of the employer does not exclude the possibility to bring civil action directly against the person who has committed the given act of harassment. Moreover, if the harassment results in the infringement of personal goods like for example dignity or health, an

[27] For the year 2009 it amounts to 1276 PLN.

[28] See also *Kodeks pracy. Komentarz* [Commentary to the Labour Code], ed. Z. Salwa, Warszawa 2008, p. 72.

[29] Art. 35 § 1 of Law of 28 July 2005 on costs of justice in civil cases, J. of L. 2005, No. 167, issue 1398.

employee may bring a civil action to the Regional Court in order to obtain compensation according to the civil law rules.[30]

The administrative proceedings are applicable in case the administrative organ commits an act of age discrimination especially while delivering an individual decision within the scope of the Law on employment promotion.

As to the criminal proceedings, the violation of non-discrimination principle may fall under the scope of Art. 218 § 1 of the Polish Criminal Code[31] which states that an employer or an employer's representative who being responsible for employment and social security issues maliciously and persistently infringes employee's rights related to employment relationship or social security is subject to the penalty of fine, delimitation of freedom or imprisonment up to two years.

The Labour Code does not establish any criminal sanctions for the violation of the non-discrimination principle. However, the penal provisions are provided for in the Law on employment promotion. The offences described in these provisions are pursued by the State Inspection of Labour. Firstly, according to Art. 123 of the Law on employment promotion, anyone who refuses to employ a candidate on the free post of employment or of apprenticeship on the grounds of one of the criteria enumerated in this Article, age included, is subject to a fine not lower than 3000 PLN. The same penalty is provided for in case a person who conducts an employment agency does not respect the prohibition of age discrimination (or discrimination based on other criteria enumerated in this article).

If provisions of statutory acts are contrary to the constitutional principle of equal treatment, these provisions may be declared null and void by the Constitutional Court. The request may be lodged apart constitutional organs such as the President of the Polish Republic, The Prime Minister, The Ombudsman etc. also by among others the central organs of trade unions, employers' organisations and professional organisations if the contested statutory act falls within the scope of activities of these organisations.[32]

Moreover, any individual who considers herself/himself victimised by the breach of the principle of equal treatment may lodge a constitutional complaint to the Constitutional Court. These proceedings aim at controlling the conformity of provisions of a statutory act with Constitution if these provisions were basis of the final judgment or an administrative decision in an individual case.[33]

It is should also be mentioned that according to Art. 9 § 4 of the Labour Code, clauses of collective labour agreements and other collective accords based on legislation as well as clauses of internal regulations and statutes that regulate the rights and obligations of the parties of the employment relationship which

[30] Compare H. S z e w c z y k, *Ochrona dóbr osobistych w zatrudnieniu* [Protection of personal rights in employent], Warszawa 2007, p. 291–292.

[31] J. of L. 1997, No. 88, issue 553.

[32] Art. 191 of the Constitution.

[33] Art. 79 § 1 of the Constitution.

infringe the principle of equal treatment in employment are not binding. The collective labour agreement with such illegal clauses cannot be registered at the official register of collective labour agreements.

According to Art. 18^{3b} § 1 point 3 of the Labour Law the burden of proof in discrimination cases is reversed, that is the employer has to prove that the difference of treatment was due to objective reasons and there was no breach of the principle of equal treatment. Persons who consider themselves wronged should only make their statements probable before a court. This privilege obviously does not apply to criminal proceedings.

9. The participation of trade unions and NGOs in the civil proceedings is regulated in the provisions of the Polish Code of Civil Proceedings.[34] The general provision of Art. 8 of this Code states that any social organisation which is not aimed at carrying out commercial activities may bring suit and take part in the proceedings already initiated acting for protection of citizens' rights but only in case when a provision of law allows such an action.

According to Art. 61 § 4 of the Polish Code of Civil Proceedings, any social organisation the goals of which cover equal treatment and non-discrimination, defined as unjustified direct or indirect differentiating of citizens' rights and duties, may upon an interested person's consent bring suit on behalf of that person, as well as it may enter upon a plaintiff's consent to proceedings initiated by the plaintiff in her/his support. Trade unions are covered by the general definition of social organisation of Art. 8 of the Code.

As it concerns the administrative proceedings, before the organs of administration, in the light of Art. 31 of the Code of Administrative Proceedings,[35] the social organisations are guaranteed the right of bringing action and participating in the proceedings in support of a person if it is justified by their statutory aims and reflects social interest. An organ of administration opening proceedings concerning another person is obliged to inform thereof a social organisation if it considers that this organisation may be interested in participation for the reason of its statutory aims and this participation is justified by the public interest. Besides, a social organisation which is not party to the proceedings may present its opinion if an organ of administration allows it.

In the proceedings before the administrative courts, according to Art. 25 § 4 of the Law of 30 August 2002 on Proceedings before the Administrative Courts,[36] the social organisations are entitled to bring suits on behalf of an individual person and participate in support of him/her in cases concerning legal interests of this person.

[34] J. of L. 1964, No. 43, issue 296 with later amendments.
[35] J. of L. 1960, No. 30, isse 168 with later amendments.
[36] J. of L. 2002, No. 153, issue 1270.

10. Age discrimination is prohibited at all stages of employment. As to the recruitment process, the employment offers or advertisements cannot include requirements which infringe the principle of equal treatment. According to Art. 36 § 5e of Law on employment promotion, public employment office is not allowed to accept such offers neither to announce them to the public. Any discriminative requirements or criteria should not be included in application files, mentioned in job interviews or guidelines for selection as well as in notices of refusal. Polish Law not only prohibits any direct reference to the criterion of age but also a reference to sex or marital status which in fact is indirectly related to age (for example young married women).

11. The age discrimination is also prohibited in relation to working conditions. However, some elements of employment conditions may vary in relation to the length of service.[37] The conditions of remunerating in establishment may be established in a collective labour agreement or in the lack of a collective agreement in an internal regulation if the employer employs at least 20 employees or finally in the employment contracts. These acts may provide for different components of remuneration which depend on length of service like bonuses for the length of service with the given employer, jubilee awards. The internal acts may also provide for the higher amount of the retirement money, the minimum amount of which is legally fixed at the level of a monthly wage (see Art. 92^1 § 1 of the Labour Code).

As to the length of vacation, it depends on the overall length of service of the employee and amounts to 20 days if the employee has a total length of employment shorter than 10 years and 26 days if the total length of employment is at least 10 years.[38] The collective labour agreements or individual employment contracts may establish longer vacation periods also proportionally to the length of service with the given employer.

At present, Polish Labour Code does not provide specifically for flexible conditions of employment for the older persons. However, older employees may make use of the flexible instruments available for all employees such as for example an individual timetable of the working time or a transformation of the full time contract into part-time work. The planned reform of the labour legislation (Programme "Solidarity of generations") in order to make the work of the employees after the age of fifty more flexible includes such facilities as the possibility to change the daily timetable, the right to have "micro-breaks" after having accomplished more complicated tasks, limits of work after hours or at

[37] In relation to the influence of the length of service on remuneration see *Kodeks pracy. Komentarz* [Labour Code. Commentary], ed. L. Florek, Warszawa 2005, p. 238.

[38] Art. 154 § 1 point 1 of the Polish Labour Code.

night, more varied daily working time.[39] The programme of employment promotion of persons over fifty also attaches big importance to the further education on the job available for older persons and includes the increase of funds to finance the training of persons over forty five.[40]

12. Attainment of certain age cannot be a sole reason to terminate the employment contract. Moreover, in the light of Art. 36 § 1 and § 1^1 of the Polish Labour Code the period of notice in cases of employment contracts for indefinite period depends on the length of service with the given employer (also previous employments in case of legal transfer of the undertaking) so indirectly it gets stronger with age. In case of the dismissal which is judged to be unlawful or unjustified, the compensation adjudged by the labour court corresponds to the remuneration for the period of notice (Art. 56 of the Polish Labour Code). As the periods of notice depend on the length of service, the compensation for the termination of employment contract is in consequence age-dependent.

The protection against dismissal is reinforced in relation to employees in the pre-retirement age. As it was already indicated, according to Art. 39 of the Labour Code, persons who shall reach the retirement age in less than four years, are protected against the employer's notice of dismissal if their lifelong period of employment entitles them to the retirement pension at this age. This provision does not preclude the possibility to dismiss the employee without notice due to his/her fault.

However, the employer may modify by notice the conditions of work or remuneration even if the employee is in the pre-retirement age if it is necessary for the reason a) of introducing of the new system of remunerations, b) of a loss of capability to exercise the work what is proved by the medical certificate or finally c) of the loss of competencies which are necessary to exercise the job without employee's fault (Art. 43 of the Labour Code). In such situations the employer is not obliged to maintain the contractual remuneration after the modification of work conditions or wage was approved of by the employee. Otherwise, the employment contract is terminated with the expiry of notice period. Contrarily, if the notice of modification of remuneration or work conditions to the employee in the pre-retirement age takes place within the procedure of collective dismissals, such an employee is entitled to the maintenance of the contractual remuneration till the end of the protection period.[41]

The right of the employer to dismiss the employee for the reason that he/she reached the retirement age being entitled to the retirement pension was contro-

[39] See above-mentioned programme *Solidarity of generations*, p. 14.

[40] *Ibidem*, p. 16–18.

[41] Art. 5 § 6 and 5, 5 point 1 of Polish Law of 13 March 2003 on collective dismissals, J. of. L. 2003, No. 90, issue 844.

versial for many years and analysed by the Supreme Court on many occasions. In the judgment of 19 March 2008 (I PK 219/07), Polish Supreme Court has judged that reaching of the retirement age and obtaining the right to the retirement pension may not justify the notice of the employment contract as these circumstances have no relation to work, in particular do not relate to the usefulness of the employee or do not reflect any interest of the employer in dismissal. The notice of the employment contract in case of retired persons should be therefore based on such grounds as for example long absences, improper fulfillment of tasks, reduction of employment.

The earlier judgments of the Supreme Court pointed out as one of reasons justifying the notice of employment contract "the attainment of the retirement age."[42] The judgment of 19 March 2008 was contrary to the previous judicial decisions. It states that the notice of employment contract based on attaining the employment age or obtaining the right to the retirement pension is unjustified, infringes the prohibition of discrimination on grounds of age and when it concerns women entitled to the retirement pension in the lower age, it also infringes the prohibition of discrimination on grounds of sex. It should be noted that the judgment of 19 March 2008 of the Supreme Court has been followed by the important resolution of the Supreme Court of 21 January 2009 taken in the enlarged composition of seven judges (II PZP 13/08), in which the Supreme Court has stated that the mere fact of reaching the retirement age and acquiring the right to the retirement pension may not be the only reason of notice of the employment contract by the employer.

On the other hand the age-dependent loss of capability may justify the dismissal of the employee (see the above-mentioned judgment of the Supreme Court of 19 March 2008). This reason should be mentioned in the notice of dismissal and in case of recourse to the court by the employee is subject to the judicial verification.

13. The anti-discrimination legislation in Poland has been developed in recent years in order to fulfill the obligations related to the membership in the European Union. However, the implementation of anti-discrimination directives (Directive 78/2000/CE included) was not fully approved of by the Commission of European Communities which considered it as insufficient. As a result, Polish government has prepared a proposal of Law on equal treatment. This draft Law consolidates the anti-discrimination legislation and reinforces the competencies of the institutions responsible for the protection of equal treatment, i. e. the Ombudsman and the Government's Plenipotentiary for the Equal Treatment. The proposal goes beyond the actually binding EU Law, extending the age-

[42] See, for example, the resolution of the Supreme Court of 27 June 1985, III PZP 10/85, OSNCP 1985, No. 11, position 164.

discrimination prohibition to the larger scope, already proposed in the draft EU directive,[43] covering also social security, healthcare, education and access to the goods and services. This trend should be particularly appraised.

Moreover, the labour and social security legislation will also be modified in next years in order to implement the governmental programme 50+ which aims at increasing professional activity of older persons. This programme has been issued as the remedy to the low percentage of employment of persons over fifty in Poland[44] in comparison with other European Union countries and includes important changes in relation to older persons' situation as increase of funding for the labour market programmes, making the work conditions more flexible and exempting the employers from certain financial charges while employing older persons. One of the aims of the programme consists also in limiting still existing incentives to earlier retirement as earlier retirement age for certain social groups or the payment of pre-retirement benefits.

Finally, an important issue related to the prohibition of age discrimination concerns the difference in retirement age between men and women (respectively 65 and 60) still existing in Polish legislation.[45] As a result of this difference, women withdraw much quicker from the labour market and are more prone to the loss of work. The lower retirement age also leads to the lower retirement pensions. For these reasons the Ombudsman has brought an action for nullity to the Constitutional Court of the provision establishing the difference of retirement age as contrary to the constitutional principle of equal treatment.[46] The judgment of the Constitutional Court is thus awaited as one of milestones in age anti-discrimination policy in Poland.

[43] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.

[44] Only 29,7% of persons over 55 were employed in year 2007 in Poland, see above-cited programme *Solidarity of generations*, p. 4.

[45] See Art. 24 point 1 and Art. 27 point 1 of the Law of 17 December 1998 on retirement and disability pensions from the Social Security Fund, J. of L. 2004, No. 39, issue 353.

[46] Case K 63/07 pending before the Constitutional Court.

SECTION III D

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THE LAW APPLICABLE ON THE CONTINENTAL SHELF AND IN THE EXCLUSIVE ECONOMIC ZONE

Specific questions to consider in relation to national legislation, case law or other policies and practices

1. General/Descriptive

1.1. Is your country a party to the 1982 United Nations Convention on the Law of the Sea?

Poland is a party to the *1982 United Nations Convention on the Law of the Sea* (UNCLOS). Polish Parliament agreed to the ratification of the Convention and *Agreement on Part XI* on July 2nd 1998.[1] Consequently, the Convention and Agreement on Part XI was ratified by the President and came into force in Poland on December 13th 1998.[2]

1.2. Is or was your country party to the 1958 Convention on the Continental Shelf?

1.3. Did your country adopt legislation to implement the 1958 Convention (if a party)? Was this legislation amended after 1982?

Poland is also a party to the *1958 Convention on the Continental Shelf*, which was ratified on May 22nd 1962.[3]On December 17th 1977 the Parliament of

[1] Statute with the agreement for the ratification found in the Dziennik Ustaw [Journal of Laws – J. of. L.] 1998, No. 98, item 609.

[2] Ratification found in J. of L. 2002, No. 59, item 543.

[3] Ratification found in J. of L. 1964, No. 28, item 179.

the Polish People's Republic adopted the *Act on the continental shelf of the Polish People's Republic*, which came into force on January 1st 1978.[4] Polish continental shelf was defined as part of the Baltic Sea seabed and subsoil of the submarine areas situated outside of the Polish People's Republic's territorial sea.[5] The external boundaries of the Polish continental shelf were provided for in the international treaties or, in absence of those, by the Council of the Ministers by means of an ordinance. Poland has signed bilateral treaties delimiting the continental shelf on the Baltic Sea with the Union of Soviet Socialist Republics on July 17th 1985,[6] with the Kingdom of Sweden on February 10th 1989,[7] and with the German Democratic Republic on May 22nd 1989.[8]

Also, on December 17th 1977 the statute on the territorial sea of Polish People's Republic was introduced.[9] According to that act the territorial sea was the maritime area of the width of 12 nautical miles measured from the coastline or from the baseline closing Polish internal waters at the Bay of Gdańsk. The statute provided for Polish sovereignty over the territorial sea, the airspace over such waters, as well as the seabed and the subsoil of the territorial sea. It also safeguarded the right of innocent passage for foreign ships through that area.

Both of the acts, concerning the Polish continental shelf and Polish territorial waters, were repealed with the introduction of the *Act on Polish Maritime Areas and Marine Administration* (*the Maritime Act*) on July 1st 1991.[10]

1.4. Has your country adopted national legislation with respect to its maritime boundaries?

The *Act on Polish Maritime Areas and Marine Administration* (the *Maritime Act*) is a comprehensive statute on Polish maritime boundaries.[11] Art. 2 of

[4] Act of December 17th 1977 on the continental shelf of the Polish People's Republic, J. of L. 1977, No. 37, item 164.

[5] Art. 1.1 of the act on the continental shelf of the Polish People's Republic.

[6] Treaty between the Polish People's Republic and the Union of Soviet Socialist Republics concerning Delimitation of the Territorial Sea (Territorial Waters), the Economic Zone, the Marine Fishery Zone and the Continental Shelf in the Baltic Sea, signed on July 17th 1985, J. of L. 1986, No. 16, item 85.

[7] Treaty concerning the Delimitation of the Continental Shelf and the Fishery Zones between the Polish People's Republic and the Kingdom of Sweden concluded on February 10th 1989, J. of L. 1989, No. 54, item 323.

[8] Treaty between the Polish People's Republic and the German Democratic Republic concerning the Delimitation of Marine Areas in the Bay of Pomerania from May 22nd 1989, J. of L. 1989, No. 43, item 233.

[9] Act of December 17th 1977 on the territorial sea of the Polish People's Republic, J. of L. 1977, No. 37, item 162.

[10] Act of March 21st 1991 on Polish Maritime Areas and Marine Administration (the Maritime Act), J. of L. 2003, No. 153, item. 1502

[11] *Ibidem*.

the statute enlists Polish maritime areas, i.e. internal waters, territorial sea and exclusive economic zone. Internal waters and territorial sea are considered to be Polish territory. Part II of the statute consists of special provisions on each of the maritime areas.

1.5. How wide is the territorial sea? If jurisdiction over any area of water or seabed beyond the territorial sea is claimed, what is the name and size of that area and what is the nature of the claim?

The *Maritime Act* establishes the territorial sea of 12 nautical miles' width measured from the baseline of that sea which is constituted by the low-water line along the coast or the outer limit of the internal waters. The external boundary of the territorial sea is a line every point of which is at distance of 12 nautical miles from the nearest point of the baseline. The exceptions from that rule are the roadsteads situated wholly or partly outside that line, which are included within the territorial sea. The boundaries of the roadsteads are given in the ordinances adopted by the Council of the Ministers on February 22nd 1995.[12] Currently, there has been prepared a draft of the statute amending the *Maritime Act* from 1991.[13] One of the amendments considers the improved method of constituting the baseline. On the basis of this new proposal the exact route of baseline will be established by the Council of Ministers by means of the ordinance. Additionally, to preclude the introduction of the baseline beyond the borders of the Polish territory, the draft requires taking into account the international treaties delimiting the national boundaries on the Baltic Sea in the process of establishing the baseline.

The Act provides for the right of innocent passage for foreign ships through the Polish territorial sea, which is defined as continuous and expeditious, and not prejudicial to the peace, good order or security of the Polish Republic.

Section 3 of the *Maritime Act* introduces the exclusive economic zone of the Polish Republic which is situated beyond and adjacent to the territorial sea and includes the waters, the seabed and its subsoil. The outer limit of the exclusive economic zone is defined by international treaties or, in the absence of those, by the Council of the Ministers by means of an ordinance. Art. 67 of the *Maritime Act* enlists the bilateral treaties delimiting Polish exclusive economic zone: a treaty between the Polish People's Republic and the Union of Soviet Socialist

[12] The ordinance of the Council of Ministers from February 22nd on delimiting the boundaries of the roadsteads for ports of Świnoujście and Szczecin, J. of L. 1995, No. 20, item 101.

[13] Draft from June 18th 2009 of the act amending to the statute on spatial planning and development and other statutes, available in Polish at http://bip.mi.gov.pl/pl/bip/projekty_aktow_prawnych/projekty_ustaw/ustawy_budownictwo_i_gospodarka_przestrzenna/proj_ust_prawo_bud_zagosp_przestrz/px_uzasadnienie_18_06_09.pdf.

Republics from July 17th 1985,[14] a treaty concerning the Delimitation of the Continental Shelf and the Fishery Zones between the Polish People's Republic and the Kingdom of Sweden from February 10th 1989,[15] and a treaty between the Polish People's Republic and the German Democratic Republic from May 22nd 1989.[16] Final agreement on the delimitation of the exclusive economic zone between Poland and Denmark has not been achieved. Pending the conclusion of the treaty provisions of the Act of December 17th 1977 concerning the Polish marine fishery zone will be used for defining the boundaries of the exclusive economic zone subject to the condition that the term "Polish marine fishery zone" will be understood to mean Polish exclusive economic zone.

1.6. Has your country claimed an extended continental shelf? If so, what national legislation relates to that claim?

The *Maritime Act* does not mention among the Polish maritime areas the continental shelf. The reasoning behind that omission was the fact that the Polish Republic does not claim extended continental shelf. According to Art. 56.3 of *United Nations Convention on the Law of the Sea* the rights with respect to seabed and subsoil in the exclusive economic zone are the same within the continental shelf. Therefore, the Polish Republic has already safeguarded its rights to the seabed and subsoil of the shelf within the boundaries of the exclusive economic zone. Following prof. J. Gilas, there may be seen inconsistency in the legal regime concerning the Polish continental shelf.[17] On one hand the comprehensive *Maritime Act* does not establish Polish continental shelf, whereas the earlier bilateral treaties with coastal states on the Baltic Sea have provision on delimitation of the continental shelf.[18]

Another maritime zone provided for in UNCLOS that has been omitted by the *Maritime Act* of 1991 is the contiguous zone. The above-mentioned draft of the statute amending the *Maritime Act* of 1991 adds the Polish contiguous zone to the list of Polish maritime areas. According to the new proposal, the zone is 12 nautical miles wide with its external boundary being a line every point of which is at distance of 24 nautical miles from the nearest point of the baseline. The rationale for the introduction of the zone is the need for better protection of Polish interests and its maritime boundary. In the zone the competent Polish authorities have the right to prevent infringement of its anti-terrorist, fiscal,

[14] See n. 6.
[15] See n. 7.
[16] See n. 8.
[17] J. G i l a s, "Status obszarów morskich," [in:] *Prawo morskie*, Vol. 1, ed. J. Łopuski, 1996, p. 419.
[18] See n. 6, 7 and 8.

immigration or sanitary laws and regulations. Also, authorities are authorized to punish infringements of the above if they happen on Polish land, internal waters, territorial sea and on the contiguous zone, or when the obligation to punish stems from EU law or any other international treaty Poland is a party to.

2. Observations

2.1. Discuss/describe the general nature of the laws referred to above. Consider, for example, whether the legislation is simply a claim to boundaries or is part of an *Ocean Act or Law* approach to deal with integrated ocean and coastal usages.

Maritime law has an international character. During the last 30 years Poland ratified over 30 international conventions and other treaties relevant to the full implementation of the main principles of the "new law of the sea" the safety of navigation and the protection of the marine environment.[19] The marine spatial planning (MSP) connected with maritime activities in Poland is regulated by a complex set of international, regional (Helsinki Convention and HELCOM recommendations), European Community (EC) and national law.

National legislation applicable is partially specific for maritime activities and partially of general nature. A dual approach to maritime areas management of Poland consists of: sectoral approach (e.g. fishing, shipping, marine spatial planning) and integrated approach (e.g. environmental protection, nature conservation, general principles of coastal and marine spatial planning, as well as construction permits).

The problem with the good practice of managing space of the marine environment is that it is done on a single-sectoral basis, mainly without a plan-based approach and with little or no consideration of objectives from other uses or conservation requirements that may be conflicting. The lack of an integrated approach that pays attention to the heterogenic characteristics of marine space,

[19] E.g. the United Nations Convention on the Law of the Sea (UNCLOS), done in Montego Bay on 10 December 1982 and Agreement Relating to the Implementation of Part XI of the United Convention on the Law of the Sea of December 1982, done in New York on 28 July 1994. Poland is a party to the 1982 UNCLOS, see n. 1 and n. 2; The Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention 1992), Diplomatic Conference on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, Finland, 9 April 1992; The United Nations Convention on Biological Diversity (CBD), Rio de Janeiro 1992, J. of L. 1995, No. 118, item 565; The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR); The Agreement on the Conservation of Small Cetaceans of the Baltic and North Sea (ASCOBANS 1991). For Poland ASCOBANS entered into force 1996, www.sejm.gov.pl.

leads to conflicts among users, and between human use and the natural environment.

Particularly, in the marine zones where neighboring states are required to cooperate to achieve an integrated management at a broader ecosystem level across the Baltic Sea, a common language – and to some extent also a set of principles (precautionary principle, sustainable development, responsibility to protect the marine environment) that underpin the application of marine spatial planning – is necessary to make marine spatial planning effective and sustainable over time.

2.2. Is this legislation purely related to a boundaries claim or does it contain other elements? Is it related to any broader spatial planning/management policies or laws?

The above-mentioned *Act on Polish Maritime Areas and Marine Administration* (the *Maritime Act*), which applies to Polish maritime areas: internal waters, territorial sea and exclusive economic zone, is not solely related to a boundaries claim.[20]

According to the Art. 17 of the *Maritime Act:* "In the exclusive economic zone, the Polish Republic shall have: (1) sovereign rights to explore, manage and exploit the natural resources, whether living or non/living, of the seabed and its subsoil and the water superjacent to them and the right to conserve those resources, as well as sovereign rights with respect to other economic undertaking in the zone; (2) Jurisdiction with regard to: (a) the establishment and use of artificial islands, installation and other structures; (b) marine scientific research; (c) the protection and preservation of the marine environment; (3) Other rights provided for under international law. Polish law relating to the protection of the environment shall be in force in the exclusive economic zone."[21]

The legal basis for marine spatial planning of sea areas is provided in the *Maritime Act.*[22] These regulations concern all of the Polish sea areas: the internal sea, the territorial sea and the EEZ. According to the *Maritime Act*, preparation of the draft spatial planning of a sea area is the responsibility of the territorially competent Director of the Maritime Office. The draft plan,[23] together with a forecast of its environmental impact, is submitted for approval to the minister

[20] *Ibidem*.

[21] The internal waters of Poland – 1 885 km², territorial sea – 8 682 km², exclusive economic zone – 22 634 km².

[22] Art. 37a and 37b of the *Maritime Act*.

[23] Plans concerning the internal sea waters and territorial sea (except for EEZ) must be agreed upon with the coastal municipalities neighbouring with the sea area, for which the plan is prepared.

responsible for matters of building, spatial management and housing, who – before accepting the plan – must obtain agreement from: the minister responsible for matters of maritime economy; the minister responsible for matters of agriculture; the minister responsible for matters of environment; the minister responsible for internal affairs and the Minister of National Defence (Art. 37a). After the draft plan has passed through the whole agreement procedure, the minister responsible for matters of building, spatial management and housing publishes the plan in the form of a ministerial ordinance (rozporządzenie).[24]

2.3. Is the legislation affiliated with a policy or an action plan or similar management instrument?

Nowadays, marine spatial planning, policy, action and relevant marine management instruments are very closely connected with the European Community law. On 10th of October 2007, the European Commission adopted the *Blue Paper* proposing an Integrated Maritime Policy (IMP) for the EU, and a detailed *Action Plan*. The European Council endorsed the IMP and the *Action Plan* on 14th December 2007. The *Marine Strategy Framework Directive* (MSFD) is the environmental pillar of the IMP. It requires Member States to achieve good marine environmental status by 2020, to apply an ecosystem approach, and to ensure that pressure from human activities is compatible with good environmental status.

European Union Member States are also required to cooperate, with third countries where they share a marine region or sub-region and use existing regional structures for coordination proposes (*Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU*[25]). Maritime Spatial Planning (MSP) is a key instrument for the IMP. It helps public authorities and stakeholders to coordinate their action and optimizes the use of marine space to benefit economic development and the marine environment. The *Roadmap for Maritime Spatial Planning* aims to facilitate the development of MSP by Member States and encourages its implementation at national and EU level. It sets out key principles for MSP and seeks, by way of debate, to encourage the development of a common approach among Member States.

In Polish legislation the marine spatial planning is regulated through the *Maritime Act.*[26]

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[24] Detailed regulation concerning the required scope of the spatial plans of sea areas in their textual and graphic parts, including particularly the spatial planning materials, cartographic studies, nomenclature and documentation of spatial planning work should be determined in a separate ordinance of the minister responsible for matters of building, spatial management and housing.

[25] COM(2008) 791 final.

[26] Regulations concerning spatial planning of sea areas are contained in Chapter 9 (Art. 37a and 37b) and in Chapter 8 (Art. 37 § 4) of the *Maritime Act*. They have been added to the Act in

On a national level, according to the *Maritime Act*, the spatial plans of sea areas shall determine:

– the predestination of internal sea waters, territorial sea and EEZ;

– the limitations of the use of areas covered by the plan, taking into account the requirements of nature protection;

– the distribution of public aim investment;

– the directions of development of transport and technical infrastructure;

– the areas and conditions of environmental and cultural heritage protection.

In general the *Act on Spatial Planning and Management*[27] of 2003 has only a minor provision for sea-use planning. It ensures the participation of the Maritime Administration as an important stakeholder in the co-ordination process of local land use plans, municipal studies of conditions and directions of spatial development, and of the voivodship's spatial management plans as far as planning the technical belt, protective belt and the space of harbours and ports is concerned. The relations between sea use plans and terrestrial plans are not covered in this document.[28]

For the most of the projects located in the EEZ the procedure based on the spatial plan (if it exists) includes:

– *Erecting and Use Permit* (Director of Maritime Office when plan exists, Minister when there is no plan);

– *Contract for Use* (Minister);[29]

– *Permit for Construction* (Voivod).

Permit for Erecting and Use[30] is a kind of a permit for erecting the structures in the selected part of a sea area and for using it for the aims of the project. It must be obtained from the territorially competent Director of the Maritime Office after consultation with the Ministers of Agriculture, Culture and National Historical Heritage, Defence, Economy, Environment, and the Minister of Internal Affairs

2003 and slightly amended in 2005. They regulate planning of the sea use space and of a neighbouring terrestrial strip called the "coastal belt". Poland intends to transparently change its national planning law to give maritime spatial plans legal status and develop such plans for all Polish waters.

[27] J. of L. 2003, No. 80, item 717.

[28] Some "planning" the sea space might be done according to Polish law by ordinance of the sectoral ministers and authorities i.e. closed military areas are enforced by the Navy, and NATURA 2000 areas are enforced by the Minister of Environment outside the planning system.

[29] The Contract for Use is in fact a lease contract. By definition, all Polish sea areas within the territorial sea and internal sea waters are the property of the State and cannot be sold, therefore the lease is given for a limited period. The contract contains the amount of the annual rent, the calculation of which is defined by law. Stipulations of the the *Erecting and Use Permit* are an integral part of the Contract. Of course the Contract cannot be drawn for sea areas located in the EEZ, since by international law, though their use is controlled by the coastal State, they are not a part of its territory.

[30] Pozwolenie na wznoszenie i wykorzystywanie sztucznych wysp, konstrukcji i urządzeń.

and Administration. The permit has the status of an administrative decision. The maximum period of validity of the Erecting and Use Permit is 5 years.

Plans for the spatial development of marine internal waters, territorial sea and EEZ, are to be accepted by ministerial ordnance by the minister responsible for matters of building, spatial management and housing, in agreement with the ministers responsible for matters of maritime economy, agriculture, environment, internal affairs and the Minister of Defence. When accepting the plan the minister should take into account EIA and valid permissions issued prior to the acceptance of the plan.[31]

When there is no approved spatial plan for the area, the *Erecting and Use Permit* is issued exclusively by the Minister of Maritime Economy (except for cables and pipelines in the territorial sea and internal sea waters, for which an Erecting and Use Permit is issued by the Director of Maritime Office) after consultation with the Ministers of Agriculture, Culture and National Historical Heritage, Defence, Economy, Environment and Internal Affairs and Administration; the scope of consultation does not include coastal municipalities, NGOs and public consultation.

A list of reasons for which the Erecting and Use Permit may be refused is provided; however still there is no procedure for granting the Permit to one applicant when there are several applications for the same area.

When the project concerns any kind of mining, a mining licence must be obtained. This licence is issued by the Minister of Environment in agreement with the Minister of Infrastructure. The holder of the licence must also obtain an Erecting and Use Permit and sign a Contract for Use.

In the case of projects located in the EEZ, for which the *Erecting and Use Permit* is required, other than those concerning cables and pipelines, a fee equal to 1% of the value of planned project must be paid before the Permit is given to the applicant.

There is no specific legal procedure for trans-national co-ordination of sea use plans.

2.4. Describe any institutions that are established by the legislation. What kind of institution is responsible for the regulation of the maritime zones up to or beyond 200 nautical miles?

From the administrative point of view Poland is divided into 16 voivodships from which 3 are located on the coastal area: West-Pomeranian, Pomeranian and

[31] These are permissions for building and use of structures/installations located in the sea area, issued, depending on type, location and existence of a spatial plan, by the minister responsible for matters of maritime economy or by the territorially competent Director of Maritime Office.

Varmian-Masurian. However, according to the existing law there is one institution responsible for the coastal zone management. On behalf of the State and under the Ministry of Infrastructure, the Marine Office is a body which conducts governmental policy and is responsible for administration as well as spatial planning protection and development (according to the *Maritime Act*). Marine Offices are located in Szczecin (west part of the coast and Szczecin Lagoon), Słupsk (middle coast) and Gdynia (east coast, Gdańsk Bay and Vistula Lagoon). The inspectorates which carry out flag State control and port State control operate under the auspices of the Marine Offices and the Inspectorate of Maritime Environmental Protection.

Marine administration of Poland responsible for Marine Spatial Planning	
National Level	Minister of Infrastructure (minister responsible for maritime economy)
Regional Level	Marine Offices: – Gdynia – Słupsk – Szczecin

Responsibility for marine spatial planning is the same for all sea areas (internal sea waters, 12-nm territorial waters and EEZ). The plans should cover sea areas only – no extension into coastal land. Draft spatial plans are to be prepared by the territorially competent Director of Maritime Office.

2.5. What kinds of rights are or have been claimed and/or exercised within this zone?

According to the UNCLOS and the *Maritime Act*, the following methods of utilization of EEZ should be taken into account:

– industrial installations/plants (offshore wind parks with cables and connections with land, including their safety zones, which put a variety of diverse limitations especially on shipping, fishing and anchoring);

– other cables: power, telecommunication together with safety zones, which put limitations especially on anchoring, some fishing techniques, location of other ways of using the sea area (e.g. mining);

– oil/gas pipelines from platforms to coast with safety zones;

– aquaculture and safety zones for navigation and fishing (requirements regarding environmental pollution);

– areas of nature protection (a range of various limitations on all other ways of sea area use, depending on the quality and vulnerability of the marine protected areas);

– areas important for fishing (limitations especially on the usage of seabed);

– navy training areas with safety zones (periodical limitations of navigation and fishing);

– dumping areas (ammunition, wastes) with safety zones (limitation of the most of the other sea area uses).

2.6. Is there any kind of unifying metaphor or theme (e.g., as discussed above, "health of the oceans") and, if so, has it changed since 1982?

The activities in the framework of *UNESCO's Marine Spatial Planning Initiative* are an attempt to deal with the needs of the "health of the oceans". The action program for this Initiative includes the development of a web-based network for the exchange of good practices on marine spatial planning, and more importantly, the development of a manual with guidelines and principles providing a step-by-step approach for the implementation of ecosystem based marine spatial management.

From the regional point of view, a good environmental status of the Baltic Sea can be achieved by combating eutrophication, reducing the risks from hazardous substances, reducing the adverse effects of human activities of the Baltic Sea PSSA, preserving and increasing biodiversity, and improving environmental awareness, research and monitoring. The conception of HELCOM BSPA should support the Baltic Sea PSSA to reach a good environmental status. HELCOM recommended the establishment of the BSPA during last 15 years (recommendation 15/5 HELCOM), but neither comprehensive spatial planning, nor effective operational measures exist according to the functioning of BSPA.

Threats to the Baltic Sea marine environment from international shipping are: impacts from accidents (spills, collisions); operational discharges (oil, noxious liquid substances, sewage, air emissions, introduction of harmful aquatic organisms and pathogens through ships' ballast water); physical damage to marine habitats or organisms (anchor damage, ship strikes of marine fauna, harmful effects from anti-fouling system). In spite of that, in European Community legislation and marine environmental policy the most important issue is to achieve "good marine environmental status of the Baltic Sea", because the Baltic Sea is like a "Common European Sea".

An environmental status means the overall state of the environment in marine waters, taking into account the structure, function and processes of the constituent marine ecosystems together with their natural features, as well as physical and chemical conditions including those resulting from human activities in the area concerned. The integral parts of the European

Marine Waters are *Marine Regions*: the Baltic Sea, the North East Atlantic Ocean and the Mediterranean Sea. *Marine Strategy Directive* established a framework for development of Marine Strategies designated to achieve good environmental status in the marine environment by the year 2021 and to ensure the continued protection and preservation of that environment and the prevention of deterioration. *Marine Strategy Directive* is a part of the Polish legal system.

3. Sectoral Resource Management

3.1. Has legislation been adopted with respect to specific resource management and regulation? More specifically has it been adopted or changed with respect to:

– energy (wind or other sources of ocean energy)

In Poland the development of offshore wind energy has just started. The main issues of *Energy Policy of Poland until 2030*[32] include: energy security, economic competitiveness and environmental protection. In 2005, the *Polish Law on Energy Act*[33] from 1997 was amended to introduce an obligation for all renewable energy producers, regardless of the size of the installations, to obtain a license from the Energy Regulation Authority.

– mineral resources

The right to the exploration, extraction and utilization of mineral resources in Polish maritime areas is held by the State. These kinds of activities require a licence from the Minister of Environment. The investigation, prospecting, exploration and extraction of mineral resources shall be subject, *mutatis mutandis*, to the regulations relating to geological research, the extraction and utilization of minerals, and the protection of the marine environment, safety of navigation and life at sea (Art. 34 the *Maritime Act*).

– genetic resources

In the Polish national legislation there are no special provisions concerning marine genetic resources.

[32] www.mg.gov.pl.
[33] J. of L. 2006, No. 89, item. 625.

– fisheries

The international legal framework for the European Community fisheries law is the UNCLOS, the UN FSA,[34] the FAO Code of Conduct for Responsible Fishing[35] and the Compliance Agreement.[36] The European Union has built its own legislation at the regional level on the basis of the IMO Conventions and resolutions. Accession of Poland to the EU in 2004 resulted in the full harmonization of the Polish legal regulations for fisheries with the EU legislation.

The most important EU regulations on fisheries are:

– Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy;

– Council Regulation (EEC) No. 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy;

– Council Regulation (EC) No. 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound;

– Council Regulation (EC) No. 1198/2006 of 27 July 2006 on the European Fisheries Fund.

Currently, the European Commission is working on a new management plan for cod, which, according to the Commission, will address the main weaknesses of the current plan (developed by the former IBSFC), notably the poor scientific advice on catch forecasts and the failure of the TAC and quota system to reduce fishing mortality to sustainable levels. It is envisaged that the plan will define management targets for the two cod stocks, revised harvest rules, and measures limiting the fishing effort. The plan should also include additional control measures to ensure efficient enforcement of the management measures.

The intention of the future cod management plan is to tighten harvest control rules based on fishing days limitations. The other control measures that have been or will be implemented for a better protection of cod population are:

– obligation of cod landings in designated ports;

– requirement that any quantity of cod caught is weighed in the presence of controllers when first landed, before being transported;

– requirement of information on the identity of the vessel, the port of landing, the estimated arrival time and the quantity of cod on board to be landed subject to certain quantity and vessel conditions; and

– obligation of notification of entry into or exit from specific areas.

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[34] The United Nations Fish Stock Agreement (FSA) entered into force on 11 December 2001; see also: the United Nations General Assembly document A/Conf.210/2006/1.

[35] The FAO Code of Conduct for Responsible Fishing, http://www.fao.org.

[36] The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1995, http://www.fao.org.

The Ministry of Agriculture and Rural Development and the Department of Fisheries in the ministry are the competent bodies for the fisheries management in Poland. The three Regional Inspectorates of Fisheries, located in Szczecin, Słupsk and Gdynia, are responsible for the management, monitoring and surveillance of fisheries at the territorial level. Established in 2004, the Fisheries Monitoring Centre in Gdynia is responsible for the operating the VMS (Vessel Monitoring System) and fisheries reporting system (catch and landings reports).

The development of Polish fisheries is closely linked to the European Union Common Fisheries Policy.[37] The main areas of assistance specified in Poland's 2007–2013 Development Plan are:

– adjustment of fish production in line with the state of resources and modernization of the fleet (public aid for owners of fishing vessels and fishers affected by fisheries' permanent or temporary effort adjustment plans; financing of equipment and the modernization of fishing vessels; improvement of safety on board, working conditions, hygiene, product quality, energy efficiency and selectivity);

– investments in inland fisheries, aquaculture and fish-processing development (support for traditional aquaculture activities important for preserving and developing both the economic and social structure, and the environment; promoting diversification towards new species and production species with good market prospects; investments in the construction, extension, equipping and modernization of inland fishing facilities; producing or marketing new products; applying new technologies or developing innovative production methods; and producing high quality products for niche markets);

– measures of common interest (collective actions; protection and development of aquatic fauna and flora; fishing ports, landing sites and shelters; development of new markets and promotional campaigns; modification for reassignment of fishing vessels; and

– sustainable development of fisheries-dependant areas (in order to maintain the economic and social prosperity of these areas, promote the quality of the

[37] In 2004–2006, Poland benefited from structural assistance under the European Community structural FIFG fund. The National Development Programme for Poland 2004–2006 focused in principle on fishing fleet adjustment measures and investments in the fish processing sector. In 2006, a new Polish Development Plan and National Strategy for Fisheries Development were elaborated for 2007–2013. Major restructuring efforts will have to be made in order to improve the competitiveness of the sector. Poland will attempt to reach targets in the areas of: achieving a lasting balance between the fish stocks and their exploitation; strengthening sectoral competitiveness and developing economically viable businesses, market development, improvement of product quality and technological modernization; and support to the economic development of regions dependent on fisheries and provision of measures helping to alleviate the social costs of restructuring with respect to fishermen.

coastal environment; and promote national and transactional cooperation between fisheries areas).

The most important national regulation on fisheries are:

– the *Law on Sea Fisheries* - basic national legal regulation;[38]

– the *Ordinance on minimum fish sizes and closed seasons – the detailed conditions for carrying out fisheries activities*;[39]

– the *Law on Organization of Fishery market and financial support for fishery trade*;[40]

– the *Ordinance on the Sectoral Operational Programme "Fisheries and fish processing 2004–2006*".[41]

– aquaculture

The Polish water management strategy is adopted from the Water Framework Directive (WFD). The register of protected areas was prepared, as mentioned in the WFD. The WFD requires the realization of new holistic environmental quality norms entitled *good status*. According to the Art. 4 (1) a *good status* for surface and groundwater and for protected areas should be achieved by 2015.

– maritime transport

In the field of maritime transport Poland is strictly connected to international law and European Community legislation (*Third Maritime Package*).[42] The Polish legislation: the *Maritime Code*[43] and *Act on Maritime Safety*[44] provides a legal basis for ship inspections and the relevant activities of maritime administrations, including port state control and a minimum level of training for seafarers as well as maritime transport in general.

– communication

According to the *Public Profit Activity and Voluntary Act 2003*[45] the Polish administration is obliged to cooperate with non-governmental organizations and other registered organizations and agencies, and should together identify and establish facilities to solve the problems and promote activities on a local level.

Over 50 central, regional and local authorities, economic and social stakeholder organisations and NGOs have been directly informed and asked for proposals to the

[38] J. of L. 2004, No. 62, item 574.
[39] J. of L. 2004, No. 172, item 1806.
[40] J. of L. 2004, No. 34, item 291.
[41] J. of L. 2004, No. 197, item 2027.
[42] www.europa.eu.
[43] J. of L. 2001,No. 138, item 1545.
[44] J. of L. 2006, No. 99, item 693.
[45] J. of L. 2003, No. 96, item 873.

plan (MSP). The information and call for proposals have been also published on the web page of the Maritime Office. It is intended to maintain the resultant stakeholder network throughout the whole process of work on the plan.

– scientific research

Polish national legislation concerning marine scientific research remains in line with the Convention on the law of the sea. The high sea areas do not exist in the Baltic Sea because of its size.[46] No freedom of scientific research may be there exercised.

According to Art. 28 and Art. 29 (1) of the *Maritime Act* the foreign entities entitled to conduct marine scientific research in the Polish maritime areas are: foreign states, competent international organizations, and foreign natural and juridical persons.

According to Art. 30 of the *Maritime Act* the foreign entities conducting scientific research in the Polish maritime areas shall be required to:

– ensure the participation of Polish representatives in the research, including their presence on board research vessels and at other installations;

– inform the Minister of Infrastructure (minister responsible for maritime economy), at his request, of the results of conducted research;

– enable the Minister of Infrastructure (minister responsible for maritime economy), at his request, to have access to all data and samples derived from the research;

– inform the Minister of Infrastructure (minister responsible for maritime economy) without delay of any major change in the research program;

– remove the scientific research installations and equipment without delay once the research is completed, unless a separate licence to leave them has been obtained.

According to Art. 29 (1) of the *Maritime Act* the appropriate administrative board entitled to grant consent for the research project to be carried out in the exclusive economic zone is the Minister of Infrastructure (minister responsible for maritime economy).

Consent for scientific projects in the exclusive economic zone may be withheld by the Minister of Infrastructure (minister responsible maritime economy) after obtaining the opinion of the Minister of Environment. According to Art. 29 (2) of the *Maritime Act* the Minister of Infrastructure is entitled to withhold consent if the research project:

– relates directly to the natural resources of the zone;

– involves drilling into the seabed, the use of explosives or the introduction of harmful substances into the marine environment;

[46] The Baltic Sea is composed of the internal waters, the territorial sea and the exclusive economic zones of the coastal states. The high seas may exist if the distance between the opposite coast is longer than 400 nautical miles.

– involves the construction and use of artificial islands, installations and structures.

According to Art. 29 (2) of the *Maritime Act*, the minister, after obtaining the opinion of the Minister of Environment, may also refuse to issue a licence or revoke a licence if the scientific research threatens to pollute the environment.

With regard to Polish natural and juridical persons the Maritime Act does not set the requirement of obtaining consent in order to conduct scientific research. According to Art. 31 (1) of the *Maritime Act* they may engage in scientific research in Polish maritime areas without a licence. However, they must inform the Director of the competent Marine Office about the geographical areas and methods to be used for the research 14 days before the research is begun as well as after the research is concluded.

According to Art. 31 (2) of the *Maritime Act* scientific research which involves fisheries of marine organisms must be conducted in accordance with the requirements of the appropriate fishery regulations. According to the *Act of Fishery*,[47] fishing marine organisms for scientific aims is permissible after obtaining a licence from the competent District Inspector of Marine Fishery (Okręgowy Inspektor Rybołówstwa). An application should be submitted no later than one month before the day on which the research is expected to start and should involve the precise description of:

– the intended scope and geographical area of the research and the means to be used;

– the species of marine organisms to be hauled;

– the intended size of the hauls and the duration of the research cruise;

– the identifying marks of the research vessel.

During the course of the research, the licence must be on board the research vessel.[48] The researcher is bound to provide the District Inspector of Marine Fishery with the final results and the conclusions of the research within three months after completing the project.[49] The Inspector may revoke the licence if the regulations on marine fishery have been strikingly violated.

3.2. How is investment and the need for financial security(ies) addressed? How, if at all, has the private sector addressed this issue (contracts?, loans/credit?) Has there been any case law in connection with investments?

The costs of preparing the marine spatial plan of the sea area and of preparing the forecast of environmental impact are covered by the State budget, or by

[47] Art. 22 of the *Act of Fishery* 2004, J. of L. 2004, No. 62, item 574.

[48] Art. 24 (3) of the *Act of Fishery*.

[49] Art. 25 of the *Act of Fishery*.

an investor – if the determinations of the plan are a direct consequence of conducting his investment.

3.3. How is the area as "work space" (labour/employment law) regulated? How is it addressed, if it is, in private sector employment relationships e.g., contracts, collective bargaining arrangements?

According to the provisions of the *Labour Code*.[50]

3.4. Has any preventative action taken place, e.g., creation of marine protected areas? If so, was this in connection with the LOSC or MARPOL?

Poland is *inter alia* a party to the: UNCLOS,[51] MARPOL 1973/78,[52] CBD 1992,[53] the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992,[54] the Ramsar Convention,[55] the Convention concerning the Protection of the World Cultural and Natural Heritage1972,[56] the Bonn Convention,[57] and ASCOBANS.[58]

A. International level

The Baltic Sea as special area. Under the MARPOL 73/78 a Special Area is a sea area where, for recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution is required. Special Areas are designated for the enclosed and semi-enclosed sea by prescribing operational discharges of oil. For a designation of Special Areas under MARPOL, both environmental and navigational circumstances have to be taken into account. The Baltic Sea is a Special Area.[59]

[50] J. of L. 1998, No. 21, item 94.
[51] J. of L. 2002, No. 59, item 543.
[52] J. of L. 1987, No. 17, item 101; Annex VI to MARPOL 73/78 was ratified in 2005.
[53] J. of L. 1995, No. 118, item 565.
[54] J. of L. 2000, No. 28, item 346.
[55] J. of L. 1978, No. 7, item 24–25.
[56] J. of L. 1976, No. 32, item 190.
[57] In Poland this Convention entered into force on 1 May 1996, www.sejm.gov.pl.
[58] For Poland ASCOBANS entered into force 1996, www.sejm.gov.pl.
[59] According to MARPOL 73/78 the Baltic Sea is a *Special Area*: Annex I *Regulations for the Prevention of Pollution by Oil* – the Baltic Sea is the area with strict controls on discharge of oily wastes; Annex II *Regulations for the Prevention of Pollution by Noxious Liquid Substances* – the Baltic Sea is an area in which there are strict controls on tank washing and residue discharge procedures; Annex V *Regulations for the Prevention of Pollution by Garbage* the Baltic Sea one of

All state-parties can take protective measures in Special Areas only for the reason of prevention of sea pollution under MARPOL 73/78. The measures that could be taken in the Special Area are established according to the existing instruments.

The Baltic Sea as PSSA. In 2005 the Baltic Sea has officially been classified by the International Maritime Organization as a Particularly Sensitive Sea Area. PSSA is protected by the Associated Protective Measures (APM). Under the PSSA, a state can propose associated protective measures which may include "any measure that is already available in an existing instrument or any measure that does not yet exist but that should be available as a generally applicable measure and that falls within the competence of IMO".[60]

The PSSA Baltic Sea Area comprises the proper Baltic Sea, the Gulf of Bothnia, the Gulf of Finland and the entrance to the Baltic Sea bounded by the parallel of the Skaw in the Skagerrak at 57º 44.8' N, as defined in regulation 10 (1) (b) of Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78),[61] excluding those marine areas within the sovereignty of the Russian Federation, or subject to the sovereign rights and jurisdiction of the Russian Federation as referred to in Art. 56 of the UNCLOS.

B. Regional level

The Baltic Sea as BSPA. The most important and most ecologically valuable habitats in the Baltic Sea region are recommended for protection under the auspices of the Helsinki Commission (HELCOM).[62] They are separated into three categories: landscape types and large biotope complexes, coastal biotope types, and marine/brackish-water biotope types.

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the special areas in which there are strict controls on disposal of garbage; Annex VI established the Baltic Sea as a *SOx Emission Control Areas* (SECA) with more stringent controls on sulphur emissions from ships. Poland ratified all of MARPOL 73/78 Annexes. Annex VI in 2005; J. of L. 2005, No. 202, item 1679.

[60] Res A. 982 (24) *IMO Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas* (PSSAs) 2005; MEPC.136 (53) 2005, http://www.imo.org.

[61] International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 1973/1978 (and Annexes I–VI)) Poland is a part to the Convention and Protocol. Instruments of accession were deposited on 2 October 1983. In Poland, MARPOL entered into force on 1 July 1986 (J. of L. 1987, No. 17, item 101). Poland ratified the Annexes I–VI of the MARPOL 1973/78 Convention. The MARPOL 73/78 Conventional system was incorporated with The Law of Poland of the Prevention of Pollution of the Sea from Ships. It was adopted and published in l995.

[62] Designation of the Baltic Sea Area as Particularly Sensitive Sea Area (PSSA) – outcome of HELCOM HABITAT 4/2003 and HELCOM MARITIME 1/2003, HELCOM HOD 11/2003, Document 5.2/2; Designation of parts of the Baltic Sea area as Particularly Sensitive Sea Areas (PSSA), HELCOM HABITAT 4/2003, Document 3.1/5.

According to HELCOM recommendation 15/5, the Commission recommended to the Governments of the Contracting Parties to the Helsinki Convention:

> […] that management plans be established for each BSPA (Baltic Sea Protected Area) to ensure nature protection and the sustainable use of natural resources. These management plans shall consider all possible negatively affecting activities, such as: extraction of sand, stones and gravel; oil and gas exploration and exploitation; dumping of solid waste and dredge spoils; constructions; waste water from industry, municipalities and households; intensive agriculture and intensive forestry; aquaculture; harmful fishing practices; tourism; transport of hazardous substances by ship through these areas; military activities…"

C. European Community legislation

The Baltic Sea in NATURA 2000 Network. For the development of spatial plans for sea areas it is important to know which parts of the sea areas are or may be endangered by given activities. Economic activities which significantly disturb the habitat structure, should not be carried out in areas with exceptionally high value of nature as NATURA 2000 Network areas of protected habitat according to *Habitat Directive* and to the *Red list of Marine and Coastal Biotopes and Biotope Complexes of the Baltic Sea, Belt and Kattegat*.[63]

D. National Legislation

National Parks and other legal forms of protection marine environment

In national legislation, provisions concerning marine protected areas, coastal zone management and marine spatial planning are included within:

– the Environmental Protection Law Act 2001;[64]

– the Nature Conservation Act 2004;[65]

– the Martime Act;

– the Act on Access to Information on the Environment and its Protection and on Environmental Impact Assessment 2000;[66]

– the Water Law Act 2001;[67]

– the Hunting Law Act 2001;[68]

– the Maintenance of National Character of Strategic Natural Resources of the Country Act 2001;[69]

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[63] www.europa.eu.

[64] *The Environmental Protection Law Act*, J. of L. 2001, No. 62, item 627.

[65] *The Nature Conservation Act*, J. of L. 2004, No. 92, item. 880.

[66] *The Act on Access to Information on the Environment and its Protection and on Environmental Impact Assessment,* J. of L. 2000, No. 109, item 1157.

[67] *The Water Law Act*, J. of L. 2001, No. 115, item 1229.

[68] *The Hunting Law Act*, J. of L. 2001, No. 125, item 1366.

[69] *The Maintenance of National Character of Strategic Natural Resources of the Country Act*, J. of L. 2001, No. 97, item 1051.

– the Act on Wastes 2001;[70]
– the Act on Packing and Packing Wastes 2001.[71]
The coastal and marine protected areas of Poland are:

Woliński National Park. Apart from its scientific, protective and cultural functions, the Woliński National Park serves educational purposes. The 11,7 km long Wolin cliffs are part of the 45 km zone of active cliffs on the Baltic Sea coast.

Słowiński National Park. The park preserves the most beautiful part of the Baltic Sea southern coast, with the biggest sandy dunes in Europe, which move under the influence of strong, stormy winds. The National Park was founded in 1966 and because of its unusual natural and scientific values UNESCO declared it a World Biosphere Reserve in 1977. Since 1994 the Słowiński National Park and the adjacent Baltic coastal zone waters have been part of the HELCOM Baltic Sea Protected Areas.[72]

Słupsk Bank. The environment of the area is of a unique, nearly natural state, as has been documented through research. It has a considerable biodiversity and has a decisive function in the transfer of species between the southern part of the Baltic Sea and the waters further north. This area is well separated from sources of pollution and therefore remains in largely natural condition. The seabed has a diverse sessile vegetation and bottom fauna created by communities of *Mytilus edulis* and *Gammarus salinus*. The autumn race herring spawning grounds are situated around it. Still present in the area are plant species extinct in the Gulf of Gdańsk or not even noted in other regions of the Polish zone.

***Nadmorski Landscape Park*.** The Puck Bay is a terrestrial and marine part of the Nadmorski Landscape Park. The location of the Puck Bay between mainland Poland and the Hel Penisula, especially in the case of the Inner Puck Bay, creates good conditions for the development of varied, rich communities of flora and fauna. The Puck Lagoon habitat is one of the most differentiated in this part of the Baltic Sea. It is the spawning site for fifty species of ichthyofauna, which takes place throughout almost the whole year. In 1994 the Nadmorski Landscape Park itself was proposed for inclusion in the Baltic sea protected Areas system. It has also been put on the World Wide Fund for Nature (WWF) list of protected areas.

[70] *The Act on Wastes*, J. of L. 2001, No. 62, item 628.
[71] *The Act on Packing and Packing Wastes*, J. of L. 2001, No. 63, item 638.
[72] www.helcom.fi.

The forms of protection of the Baltic Sea as a Marine Protected Area in international and regional Law

	Clearly Defined Area	Particular Sensitive Sea Area (PSSA)	Special Area	Baltic Sea Protected Area (BSPA)
Establishment	Art. 211 (6) of the UNCLOS	Resolution A.720 (17), A. 885 (1), A. 927 (22), A. 982 (24) of the Assembly of the International Maritime Organization (international custom)	Annex I, II, V and VI of MARPOL 1973/1978	Recommendation 15/5 of the Baltic Marine Environment Protection Commission (HELCOM – BSPA), adopted 10 March 1994, having regard to Art. 13, §b) of the Helsinki Convention; www.helcom.fi
Definition	–	Marine Area, which – in accordance to the IMO – demands intensive protection, especially against shipping dangerous for the environment	Marine area with a requirement for an intensive protection against oil pollution	According to HELCOM Recommendation 15/5, coastal-mixed land and marine, or marine area, which demands intensive protection against all the activity dangerous for the environment
Location and size	In the area of the Baltic Sea EEZs	The Baltic Sea Area (without the Russian Federation waters)	Baltic Sea Area	It should preferably have a minimal size of 10 km² for terrestrial parts and/or 30 km² for marine/lagoon parts
Criteria for designating and/or establishing	Ecological, Oceanographic, Natural Resources Protection, Shipping-related	Ecological, social, cultural an economic, scientific and educational	Ecological Oceanographic Shipping-related	Ecological, social, cultural and economic scientific and educational
Protection Regime	As in the case of "Special Area"	Ban of dropping of the vessels' litter Use of designated waterways Pilotage compulsory	Ban of dropping of the vessels' litter Installation of the receiving devices	Ban on a conduct of a specified activity Ban on dropping of litter from the land

4. Enforcement of Jurisdiction

4.1. Does your country enforce legislation/rights in these areas and, if so, how does it do so?

The *Maritime Act* does not provide a clear indication of the legal status of spatial plans for sea areas. However, the use of the word "decides" in § 2 of Art. 37a, suggests that they are hard law, rather than merely indicative documents.

4.2. Are national courts given jurisdiction in these areas? If so, in what form is this granted? Has it ever been exercised?

After publishing the ministerial ordinance, the plan comes into force. There is no time limit for its validity. Consequently, possible disputes can be settled in the Central Administrative Court (Naczelny Sąd Administracyjny) in accordance with the Code of Administrative Procedures (Kodeks postępowania administracyjnego) as well as in the Constitution Tribunal (Trybunał Konstytucyjny). Disputes on specific decisions on a sea area use can be settled in accordance with the Code of Administrative Procedures.

4.3. What institutions or agencies are responsible for enforcement of jurisdiction in theses areas?

Specific decisions on the use of a sea area, issued by the maritime authorities or any other legally competent authority must conform with the decisions/solutions of the plan. Actions or decisions in conflict with the solutions of the plan would be illegal. If such illegal actions appear, the territorially competent Director of Maritime Office can, by an administrative decision, fine the offender up to an amount of 1 000 000 SDR (Art. 55 of the *Maritime Act*). The decision has the rigour of an immediate enforcement. Activities can be stopped and court proceedings start in accordance with provisions of general law and Construction Law.

5. Reflection

Please include a brief reflection on what you perceive to be the interests of your country and private sector actors in connection with this topic and what you see as the main issues in the future.

Threats stemming from global problems and their solutions are at the center of attention of the international society. Their complex character necessitates cooperation among countries, international organizations, and non-governmental organizations. The cooperation involves all levels – regional, sub-regional and international. One recent form of this type of international cooperation considers the network of protected marine spatial planning.

Discussing marine spatial planning requires stepping out of traditional thinking. Maritime areas are and should be treated as a unity, regardless of national or international borders.

All human activities and natural processes are connected. The problem is insufficient attention to the long-term, large dimensional coastal processes. There is a need to have one authority responsible for protecting and managing the marine and coastal areas of the Baltic Sea. As we can observe, protection and management through dialogue and cooperation at national, regional and local level is very difficult in practice. It is a classic example of conflict of interests.

International public law as well as European Community law, which are the basis for the creation of marine spatial planning in Polish EEZ, create a mosaic of different instruments, agreements, action plans and programs, strategies and memorandums, which are both, of global and of regional character. The use of marine spatial planning must be based on the principle of cooperation among the all interested actors. The concept of marine spatial planning has been successful due to flexible, integrated management with appropriate measures and tolls and the simultaneous protection and exploitation of resources.

Poland still has a wide range of sectoral legislation and the need for a coordinated MSP approach has not yet arisen given the relatively low levels of conflicting maritime activities. In practice marine spatial planning is not too developed: no formal spatial plan for maritime areas has yet been adopted so all the activities are authorized by individual decisions. It seems there are no major problems in the application of this legislation, although some of the requirements are often neglected.

To develop and execute effective and efficient marine spatial planning, application and operation of well organized and appropriate data-management is required. There is a need to clarify the roles and responsibilities of different governmental institutions in environmental policy "in action." Polish law does not provide any regulations on monitoring and review of sea-use plans. This is one of many weaknesses of existing law on sea-use planning.

The vision of marine spatial planning and marine policy must be cohesive. The current picture is one of a variety of different means that are striving to achieve "fragmentary" goals. Effective integrated marine spatial planning for the exploitation of marine resources based on maintaining equilibrium between preservation of the values and goodness of the sea and oceans, as well as meeting the economic needs of many communities must be developed in a timely manner.

SECTION IV A

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INTERNATIONAL LAW IN DOMESTIC SYSTEMS

1. Constitutional and legislative texts

1.1. The provisions of the Polish Constitution that refer to international agreements or treaties

Several provisions of the Polish Constitution of 2 April 1997 refer directly to treaties. They concern two essential issues, the procedure to conclude a treaty and the position of duly entered treaty in domestic legal order. The treaty-making process is governed generally by the Constitution, the Law on International Treaties of 14 April 2000 and the implementing regulation of the Council of Ministers (governmental act) of 28 August 2000. The Constitution determines the division of treaty-making power between the President, the Government and the Parliament (there are two Chambers: the Sejm (lower) and the Senate (upper)). Under Art. 133 para. 1 (1), "The President of the Republic, as representative of the State in foreign affairs, shall ratify and renounce international agreements, and shall notify the Sejm and the Senate thereof." Pursuant to Art. 146 para. 4 (10), to the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, in particular, "shall conclude international agreements requiring ratification as well as accept and renounce other international agreements." The powers of the Parliament are specified in the provisions on ratification.

The Constitution distinguishes four modes of ratification, two modes for the ratification of the treaties delegating to an international organization or international institution the competence of organs of State authority in relation to certain matters. Their ratification by the President requires – under Art. 90 of the Constitution – prior consent given in a national referendum or by both Chambers of the Parliament in a form of a statute passed by qualified majority. The clause is understood to apply to the European integration process, e.g. the Accession Treaty to the EU of 2003 was ratified under this procedure. Art. 90 of the Constitution reads:

> 1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.
> 2. A statute, granting consent for ratification of an international agreement referred to in para. 1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
> 3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Art. 125.
> 4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

There are also other categories of treaties which have to be ratified with prior consent granted by statute (i.e. by both Chambers of the Parliament). They are enumerated in Art. 89 para. 1:

> Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute – if such agreement concerns:
> 1. peace, alliances, political or military treaties;
> 2. freedoms, rights or obligations of citizens, as specified in the Constitution;
> 3. the Republic of Poland's membership in an international organization;
> 4. considerable financial responsibilities imposed on the State;
> 5. matters regulated by statute or those in respect of which the Constitution requires the form of a statute.

The statute expressing the consent of the Parliament is passed by the majority usually applied to statutes. No special qualified majority is required in the Parliament.

The fourth mode – so called simple ratification – covers the treaties which are not enumerated in Art. 90 and 89 para. 1 and require the ratification by the President on other grounds. Pursuant to Art. 89 para. 2, "The President of the Council of Ministers (the Prime Minister) shall inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute." Art. 89 para. 2 provides for a soft form of parliamentary control, and it sometimes happens that the Parliament objects the choice of the mode of ratification to a particular treaty.

All the other treaties are concluded on the consent of the Government. The Constitution refers to them in the above mentioned Art. 146 para. 4 (10).

The mode of conclusion of a treaty determines its effects in domestic legal order. Therefore the Constitution contains the intertemporal clause in Art. 241 para. 1. According to it, treaties previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws shall be considered as treaties ratified

with prior consent granted by statute and shall be subject to the provisions of Art. 91 of the Constitution, if they cover the matters mentioned in Art. 89 para. 1 of the Constitution.

The position of a duly entered treaty in internal law is governed i.a. by Art. 87, 88, 90, 91, 188 of the Constitution. Art. 87 para. 1 provides that:

> The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.

Art. 88 para. 3 requires that:

> International agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute.

According to Art. 91 para. 1:

> 1. After promulgation thereof in the Journal of Laws of the Republic of Poland [J. of L.], a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
> 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.
> 3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

The other important provision of the Constitution in regard to treaties is Art. 188 on the competence of the Constitutional Court (which is called in Poland Tribunal). The Court is granted the power to adjudicate on the conformity of statutory law to ratified treaties whose ratification required prior consent granted by the Parliament and the conformity of acts of central State organs to ratified treaties. According to Art. 188:

> The Constitutional Tribunal shall have jurisdiction regarding the following matters:
> 1) the conformity of statutes and international agreements to the Constitution;
> 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
> 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes […].

The Constitution provides for preventive constitutional review of the conformity of a proposed treaty to the Constitution (the control takes place before ratification). Art. 133 of the Constitution allows the President to request a ruling, thereon, from the Constitutional Court. In case of a negative ruling, the Constitu-

tion must be amended or the agreement must be either renegotiated or abandoned. *A posteriori* review, when a treaty enters into force is possible through preliminary questions submitted by the courts[1] or by the subjects enumerated in Art. 191 of the Constitution (i.e. by the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators) or by a constitutional complaint.[2] The review is limited and must not overstep the limits of application of a given measure. The review of the Constitutional Court concerns the substantial and formal (procedural) conformity to the Constitution and does not exclude reviewing i.e. the constitutionality of the statute of the Parliament granting the consent for ratification.[3]

There are also some incidental provisions of the Constitution which refer to international treaties or to the other sources of international obligations (e.g. Art. 27 which reads: "Polish shall be the official language in the Republic of Poland. This provision shall not infringe upon national minority rights resulting from ratified international agreements;" Art. 56 para. 2 reads: "Foreigners who, in the Republic of Poland, seek protection from persecution, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party."). Art. 55 of the Constitution on the prohibition of extradition of a Polish citizen is worth noticing in that respect. The provision was recently amended to allow surrender on the grounds of the European Union law (European arrest warrant) or to the International Criminal Court.

1.2. The provisions of the Polish Constitution that refer to customary international law or other sources of international law

The 1997 Constitution – unlike previous regulations – adopted some general rules on application and the position of international law in the domestic legal order. First of all Art. 9 of the Constitution declares generally that "the Republic of Poland shall respect international law binding on it." The provision is

[1] E.g. Art. 193 allows any court to refer a question of law to the Constitutional Court as to the conformity of a normative act to the Constitution, ratified international agreement or statute, if the answer to such question is necessary to enable it to give judgment.

[2] Art. 79 para. 1 of the Constitution reads: "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution."

[3] Up till now there were only three cases of constitutional review of treaties. In 2000 the Constitutional Court rejected the complaint on the ground that the treaty had been executed (judgment of 24 October 2000, SK 31/99), see point 2.3. The Court allowed the control in two other cases: the judgment of 11 May 2005 (K 18/05) on the EU Accession Treaty (brought under Art. 191); the judgment of 18 December 2007, SK 54/05, on Art. 32 of the Protocol No. 4 to the Europe Agreement (constitutional complaint).

contained in Chapter one of the Constitution entitled: "Republic," which sets forth general principles on which the State is based. Over the years Art. 9 has acquired actual legal meaning. The judges[4] used to invoke it as a legal basis for domestic effects of treaties (non-ratified treaties, provisional application under Art. 25 of the Vienna Convention on the Law of Treaties[5] etc.) and the other sources of international law, in particular customary law and the decisions of international organs or organisations. The confirmation of the legal effects of Art. 9 is found in the judgment of the Constitutional Court of 11 May 2005 (K 18/05) on the EU Accession Treaty of 2003. The Court declared that "Art. 9 expresses an assumption of the Constitution that, on the territory of Poland, a binding effect should be given not only to the acts (norms) enacted by national legislature, but also to the acts (norms) created outside the framework of national law-making authorities. The Constitution accepts that the Polish legal system consists of multiple components/elements." Consequently, all Polish authorities, including the judges, should give full effect to international law i.e., they should develop an interpretation of national law as "friendly" as possible to international law.

1.3. Legislative provisions or regulations that call for the application of international law within the Polish legal system

The application of international law in the Polish legal order is authorised not only by the Constitution by also by various kinds of references contained in particular statutes or governmental regulations. For example Art. 68 para. 4 of the Road Traffic Law of 20 June 1997 and the Regulation of the Minister of Transport and Marine Economy of 7 October 1999 on homologation of the vehicles authorize the application of particular OECD and UN European Economic Commission's regulations and standards. The Aviation Law of 3 July 2002 refers to binding acts of international organisations constituted under ratified treaties, including ICAO (Art. 3). Art. 2 of the Law on Trade in Strategic Goods, Technologies and Services of 29 November 2000 prohibits international

[4] The finding of the Court conforms to the opinion of the scholars who have participated in the drafting of the Constitution. E.g. R. S z a f a r z wrote in 1997 that Art. 9 "expresses the principle of […] Polish legal order in respect to the norms of international law and establishes a presumption of automatic, even if only indirect, incorporation of those norms into that order" – „Międzynarodowy porządek prawny i jego odbicie w polskim prawie konstytucyjnym" [International Legal Order and Its Reflection in the Polish Constitutional Law], [in:] *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym*, ed. M. Kruk, Warszawa 1997, p. 19.

[5] See the judgment of the Supreme Administrative Court of 2003 (I SA/Łd 1707/02), discussed below point 2.2.

trade infringing restrictions arising from "treaties and other international obligations."

2. Treaties and other international agreements

2.1. Court's definition of a "treaty" and distinguishing legally-binding international texts from political commitments

Polish courts may refer to the Law on International Treaties of 2000 to define a "treaty." Art. 1 of the statute provides that "international treaty" means an agreement between the Republic of Poland and another subject or subjects of international law, governed by international law, whether embodied in a single instrument or in more related instruments, regardless of its name and regardless of whether it is concluded on behalf of the State, the government or the minister in charge of a department of the government administration competent for matters regulated by the treaty in question." The definition is based on the Vienna Convention on the Law of Treaties of 1969, however, it contains some additions. Besides the Vienna Convention, with its own definition, as a ratified treaty forms part of the Polish law and is applied by courts.

There are very few instances of the courts' attempts to establish the legal character of an international act. They reveal rather superficial examination of the instrument at stake. One of the examples is the judgment of 23 December 2008 of the Regional Administrative Court. The Court found that the decisions of the Mixed Commission EC/EFTA No. 1/2000 and No. 1/2001 are actually the international agreements. The Court noticed that the Law on International Treaties of 2000 does not expressly regulate the situation in question, if amendments to the attachments to a treaty are done by the body established under such treaty, i.e. Mixed Commission. Nevertheless, "taking into account the broad definition of a treaty contained in that Statute (Art. 2 point 1) and that the consent of the Republic of Poland to be bound by a treaty may also be expressed "by signature, exchange of instruments constituting a treaty or by any other means allowed by international law" (Art. 13 para. 1 of the Statute), so also by means provided for in Art. 15 of the Common Transit Procedure Convention (by means of the decision adopted by the Commission), it is proper to assume that the principles on publication of international treaties, contained in Chapter 5 of the above cited Statute, apply equally to the amendment of the attachment to a treaty (Convention) forming its integral part and provided for by international law."[6]

To establish legal effects of the Charter of Fundamental Rights of the European Union the Constitutional Court (18/04 of 11 May 2005) have not referred to the definition of a treaty, but to the academic opinion. The Court rejected

[6] I SA/Go 912/08, see also point 6.3. below.

constitutional control of the Charter since it is "an agreement whose nature is closer to a declaration than binding legal act. Its provisions are thus not legally binding. On the legal plane they do not confer any rights on individuals. They may not – as a sole basis of their rights – invoke rights enumerated in the Charter" (see *Prawo Unii Europejskiej. Zagadnienia systemowe* [The Law of the European Union. The system], ed. J. Barcz, Warszawa 2003, p. 377).[7] In the same judgment the Court found that the framework decision of the EU Council 2002/589 on the European arrest warrant is not a reviewable act since it „has features of simplified intergovernmental agreement – and as such does not require ratification."[8] It has to be implemented in Polish law, and the constitutionality of this legislation could be controlled instead. On the contrary, the Court controlled the constitutionality of the Final Act of the Athens Conference finding that it forms "the integral element" of the Accession Treaty. The Court neither referred to the provisions of the Treaty nor to international law or academic writers.[9]

2.2. Law applicable to issues of treaty law

To decide the issues of treaty law the courts apply both international law (in most cases not going deep into details) and Polish law. Some courts properly distinguish between the spheres of application of international law and internal law. Sometimes the courts give precedence to international law, in a case of a lacuna they apply domestic law. Or the courts may mitigate legal effects of a treaty towards individuals by reference to general principles of law recognized in domestic law.

The most important examples are the judgments of the administrative courts in which they refer to the Vienna Convention on the Law of Treaties (there are more than 300 cases). The courts referred i.a. to Art. 4, 11, 15, 16, 18,[10] 24–28, 31–33, 59 and 70 of the Vienna Convention, in the majority of cases in a superficial manner. In the judgment of 30 May 2005 (III SA/WA 492/05) the Regional Administrative Court in Warsaw held that "despite the lack of formal

[7] The judgment of 11 May 2005 (K 18/05) on the EU Accession Treaty, para. 18.8.

[8] *Ibidem*, para. 18.9.

[9] *Ibidem*, para. 19.

[10] Eg. the Regional Administrative Court in Rzeszów (SA/Rz 521/05) did not take into account the argument of a party that the state organs under Art. 18 of the Vienna Convention (obligation not to defeat the object and purpose of a treaty prior to its entry into force), are bound to interpret national law friendly to European law, even before the Polish accession. Similarly, the judgment of the Supreme Administrative Court (FSK 1115/07).

denunciation of the Europe Agreement [The Association Treaty[11]], it has to be recognized as terminated, according to the provisions of Art. 59 para. 1(b) of the Convention. Due to the entry into force of the Accession Treaty – signed in Athens on 16 April 2003 – it has to be considered as a treaty referred to in Art. 59 of the Vienna Convention, terminating the provisions of the Europe Agreement on 1 May 2004." The Regional Administrative Court in Lublin in the judgment of 7 June 2002 (I SA/Lu 1048/01) referred to the Convention as an additional argument to decide that the agreement in question, ratified in a simplified procedure, is binding upon Customs authorities and individuals. In the judgment of 19 December 2006 (I SA/Gd 885/05), The Regional Administrative Court in Gdańsk referred to Art. 11 and 16 of the Vienna Convention and to Art. 2 of the Law on International Treaties of 2000 to find that the convention on the avoidance of double taxation between Poland and Iran had not entered into force since the parties had not exchanged the ratification documents. The Regional Administrative Court in Warsaw in the judgment of 22 August 2007 (I SA/Wa 312/07) found the reference in the treaty of 1993 to the earlier two treaties concluded between the parties as not effective pursuant to Art. 70 of the Vienna Convention. The Court found that the latter two treaties had been terminated.

The most interesting, however, seems to be the decision of the Supreme Administrative Court of 26 March 2003 (I SA/Łd 1707/02) rejecting the application of the Vienna Convention to the domestic law issues. The Court held that "possibility of provisional application of a treaty under Art. 25 para. 1 of the Vienna Convention on the Law of Treaties […] relates to international law and as such is not able to overrule the conditions of the application of an international treaty in internal legal order." On the other hand, "since the parties to the Agreement agreed on its provisional application since 1 January 1999 (Art. 38 para. 2 of the Agreement), to refuse the application before the Agreement is published and ratified would infringe upon Art. 9 of the Constitution, which requires the Republic of Poland to respect international law binding on it."

The same reasoning is visible in the judgment of the Supreme Administrative Court of 7 December 1999 (V SA 726/99). The Court refused to recognize the effects of the Armenian rejection of succession in respect to the bilateral free visa movement treaty between Soviet Union and Poland. The court referred instead to general principles of law (principle of legal certainty, protection of legitimate expectations of individuals) to find that since the Armenian note on the succession was not officially published the individuals may not be obliged to posses visas (see below point 2.8.).

[11] The Treaty Establishing an Association between the European Communities and their Member States, on the one part, and the Republic of Poland, on the other part, done in Brussels on 16 December 1992; J. of L. 1994, No. 38, item 11.

The other examples concern the treaty interpretation, they are discussed below in point 2.7. One example, however, should be emphasized, the decision of the Supreme Court of 2003 (I KZP 47/2) in an extradition case where, after having confirmed its competence to interpret a bilateral treaty on extradition in accordance to the rules of the Vienna Convention, the Court actually applied the methods of interpretation used in Polish criminal procedural law.

2.3. International agreements not formally approved as treaties through the constitutional ratification process

The Council of Ministers may conclude agreements of an executive nature. Particular Minister may also enter into such agreements, however, the Minister will need the consent of the Council of Ministers (see Art. 146 para. 4 (10) of the Constitution cited above). Those agreements obviously do not require ratification of the President or any involvement of the Parliament in the treaty-making process. They, however, remain outside the system of "the sources of universally binding law" (they are not enumerated in Art. 87 of the Constitution). Accordingly, such agreements only bind organizational units subordinated to the Government or to a particular minister, and cannot have any direct effect on relations outside the system of public administration. In particular, as the Constitutional Court confirmed (e.g. K 33/02, the "Bug-River judgment" of 19 December 2002; Ts 168/03 of 14 January 2004), non-ratified agreements cannot create any rights, claims or obligations of individuals and, in principle, cannot be directly enforced by the courts. These treaties have to be implemented through legislation, statutes, regulations or executive orders passed by the government or the Ministers. There is a risk, as many authors point it out, "that the Parliament does not adopt the statute required in time or that it changes its content comparing to the agreement."[12] Implementing legislation, however, could be reviewed in regard to its conformity to the Constitution. That may lead to indirect constitutional control of a treaty. It is however doubtful whether in case of omission individuals could request implementation. According to the Constitutional Court individuals may not invoke Art. 9 or 91 of the Constitution, since they do not create any individual rights or freedoms. The Court expressly excluded the possibility to use constitutional complaint to control failure to act of the State organs in such cases (Ts 168/03 of 14 January 2004, para. 3; SK 12/98, judgment of 8 June 1999).

But when the treaty is implemented it may give rise to legitimate expectations of individuals. In the judgment of 19 December 2002 concerning the so

[12] W. C z a p l i ń s k i, *International Law and the Polish Constitution*, [in:] *Constitutional Essays*, ed. M. Wyrzykowski, Warsaw 1999, p. 301.

called Bug River claims[13] (K 33/02) Constitutional Court held that: "Although the Polish Committee of National Liberation was not a constitutionally legitimate organ of a sovereign State, the agreements concluded by the Committee with the governments of the Soviet Republics – Lithuania, Belarus and Ukraine (the so-called "republican agreements," which were not promulgated in the Journal of Laws), together with the intergovernmental agreement of 21 July 1952, created legitimate expectations of Polish nationals as regards the domestic legal regulation of compensation for the loss of property beyond the Bug River. The agreements allowed the Polish legislator unfettered discretion as to how to regulate the issue of compensation." The Court added that the agreements "cannot *per se* constitute the legal basis for a substantive right of repatriates for compensation" since, as not ratified nor promulgated treaties, they did not constitute "a part of the internal legal order of the Republic of Poland." However, the Court found that the agreements: "gave rise to legitimate expectations of the Polish citizens that internal law would regulate financial settlements due to the loss of property in the aftermath of the Second World War. This issue ought not to have been neglected in internal law, and the Polish legislature has been trying to establish specific compensation mechanisms for many years. Given the existence of such expectations and their realization in internal law, the issue of financial settlements concerning the property left outside current Polish borders cannot be viewed only in the context of 'making good the injustice committed' in the period of the totalitarian state – as it is the case with reprivatisation." The judgment of the Constitutional Court confirmed that non-ratified treaties are not irrelevant for internal law. It reaffirmed the obligation of State organs to carry out binding international agreement even if, it does not belong to the domestic legal order. In other words, the Court confirmed the principle of respect of international obligations enshrined in Art. 9 of the Constitution.

The non-fulfilment of the State's obligation contained in a non-ratified treaty, in such cases, may lead to compensation complaint under Art. 77 of the Constitution[14] and Art. 417[1] of the Polish Civil Code establishing responsibility for legislative acts or their omissions. The failures of the State's organs to

[13] Under republican agreements Poland undertook to compensate those who had been "repatriated" from the former Polish provinces, the "territories beyond the Bug River" and had had to abandon their properties. Since 1946, Polish law has entitled those repatriated in such circumstances to compensation in kind. However, the number of the people involved was huge (around 1 240 000) and up till 1990 not all of them were compensated. The law adopted in 1990 even reduced their chance to be compensated. In such circumstances Polish Ombudsman addressed the Constitutional Court arguing that this situation violates i.a. the Constitutional principle of certainty of law, principles of reliance or the protection of legitimate expectations.

[14] Art. 77 reads: "Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights."

implement republican agreements were one of the first cases dealt by the courts under these provisions.

Some courts gave effect to non-ratified treaties due to a clause authorizing application of an international agreement inserted in particular statute. Probably, they assumed incorporation effect of the reference. E.g. the Supreme Administrative Court accepted the effect of such statutory reference in the judgment of 17 May 1999 (OSA 2/98). The case concerned the expropriation decisions of the Minister of Finance taken as a result of the execution of the indemnity agreement of 1960 concluded by the signature after the Second World War between the Governments of the United States of America and Poland (the treaty concerned property claims of the US citizens towards Poland). The Treaty provided that in the period of 30 days after its coming into force, the Government of the People's Republic of Poland shall pay the sum of $ 40 000 000 in order to compensate all financial claims against the Polish Government put forward by US citizens, be they legal or natural persons, by reason of nationalisation or other ways of expropriation of their property, which had taken place before the coming into force of the Treaty. The American Government has been obliged to pay proper compensation and forward a proper note of release to the Polish Government, which should protect it from further claims. The citizen who took part in the procedure was obliged to waive all its property rights signing specific declaration. The Court found that the estate in question had not become State property on the basis of the treaty since the treaty was not ratified; the transfer of the property requires statutory form to be valid. However, the Court accepted the effect of the treaty derived from the Law on Registering the Rights of the State Treasury in Land Registers of 1968. Art. 2 of the said Statute authorized the Minister of Finance to pass administrative decisions confirming the transfer of real estate to the State Treasury on the grounds of an international agreement regulating reciprocal financial claims. These decisions allowed for registering the ownership rights in the Land Register. The Statute referred generally to agreements concluded by the Polish Government with governments of the other States. According to the Court, there was no reason to maintain that the notion of "an international agreement" should have been understood as "an international agreement that had been ratified and promulgated in the Journal of Laws." On the contrary, one should reach the conclusion that a statute was adopted by the very reason that international agreements regulating reciprocal financial claims because of their rank were not a sufficient legal basis for registering the transfer of real estate property from the citizens of foreign countries to the State Treasury in Land Register. The decision which was based on the Statute which referred to non-ratified treaty was a valid ground for registration of the State ownership of the property. Moreover, the case demonstrates that the court fully recognised the effects of the performance of the treaty. It took the

declarations submitted by individuals as fully effective, i.e. depriving them their property rights.

The same reasoning is visible in the decision of the Constitutional Court of 24 October 2000 (SK 31/99) rejecting the constitutional complaint i.e on non concordance of the discussed indemnisation agreement of 1960 to the Constitution. The Court held that the said treaty had been executed and his legal effects are irreversible. To rebut legality of some of its obligations would amount to disrespect of international obligations contrary to the Constitution. As a result the declarations (which were not obligatory) remain effective.

There are also the judgments explicitly refusing to acknowledge the effects of general reference to treaties on non-ratified treaties. The Supreme Court in its judgment of 29 November 2000 (I PKN 107/00)[15] considered the effect of the reference contained in Art. 1 para. 2 of the statute on Private International Law of 1965. Under Art. 1 para. 2, the statute is not applicable if an international agreement which the Republic of Poland is a party to, provides otherwise. The Court decided that this provision could not form the legal basis for applying the Polish-German agreement on the rules applicable to Polish citizens delegated by the employer to work in Germany, since it was not ratified. Art. 1 para. 2 of the statute "cannot infringe on the general rule enshrined in Art. 87 and 91 of the Constitution which stipulate that a ratified international agreement is a source of generally binding law. This rule cannot be overruled by an ordinary statute that broadens the scope of international agreements considered to be the sources of generally binding law by including non-ratified agreements therein."

The decisions discussed above demonstrate that the domestic effects of a non-ratified treaty depend strongly on specific circumstances of a case.

2.4. Legal effects of ratified treaties

Under the Constitution of 1997 it is no more contested that ratified treaties, after their promulgation in the Journal of Laws, are accepted into domestic law. The courts refer in that regard to Art. 87 and 91 of the Constitution and repeat their formulas. Ratified treaties become universally binding law (Art. 87 of the Constitution). Art. 91 para. 1 clearly establishes the principle of direct applicability of all ratified treaties. One of the consequences of that principle is that treaty provisions are regarded as conferring rights or obligations on individuals

[15] In an earlier judgment of 29 December 1999 (I SA/Po 3057/98), the Supreme Administrative Court refused to acknowledge the direct effect of a reference contained in Art. 80 para. 1 of the 1989 Customs Law with respect to a non-ratified treaty (Agreement on Provisional Application of the Additional Protocol No. 4 to the CEFTA Agreement). The Court did not comment on its finding, neither considered the legal character of the above-mentioned agreement, nor the effect of its provisional application.

and, consequently, could be applied by the courts as an independent legal basis for judicial decisions.[16] However, the courts should, at first, endeavour to interpret the statute so as to avoid a conflict with the treaty and find a way to apply both simultaneously. If amicable interpretation is impossible, the conflict must be resolved in favour of the treaty. The courts apply the treaty norm and set aside the conflicting statutory norm without submitting the relevant question to the Constitutional Court[17] or waiting for the amendment or repeal of the statute.

Art. 91 para. 1 of the Constitution defines three conditions for direct application of a treaty norm: the treaty should be ratified, promulgated in the Journal of Laws and the norm should be suitable for direct application (not requiring any further implementation). In other words, a treaty provision has to be formulated in a manner allowing the courts as well as other State authorities to apply it without waiting for any further legislation (self-executing norms, discussed in point 2.5.).

The place of ratified treaty in a legal system depends on the procedure it was ratified (discussed below point 4.1.). Under Art. 91 para. 2 in case of conflict, a treaty ratified upon prior consent granted by statute has precedence over statutes.

2.5. The doctrine of self-executing and non-self-executing treaties

The concept of self-executing treaties had become well established in Polish judicial practice long before the 1997 Constitution entered into force. However, we will confine ourselves to the developments taking place under the current Constitution which Art. 91 para. 1 reflects the concept itself.

In the majority of cases the courts more or less repeat the formula of Art. 91 para. 1 In the judgment of 21 November 2003 (I CK 323/02) the Supreme Court referred to the conditions of direct applicability in the following manner: "The so-called formal condition is that the treaty must be duly ratified and published

[16] E.g. in the judgment of 30 November 2005 (II OSK 964/05) the Supreme Administrative Court considered whether the refusal of the State organs for the foreigner permitted to stay on temporary basis in Poland and not satisfying the criteria set out in the statute for permanent residence infringe upon Art. 8 of the European Convention on Human Rights.

[17] Pursuant to Art. 193 of the Constitution, "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court." At the beginning Art. 193 was a source of controversy between the Constitutional Court and the lower courts. The Constitutional Court interpreted the term "may" as obligation of the lower courts to submit such questions. The prevailing interpretation of this provision is nowadays that the lower courts should submit to the Constitutional Court the questions on conformity of any legal acts with the Constitution. They may adjudicate independently on the other issues, however, they may refer the question to the Constitutional Court. See L. G a r l i c k i, K. W ó j t o w i c z, M. M a s t e r n a k-K u b i a k, *op. cit*., p. 7–8.

in the Journal of Laws. The substantive condition requires the completeness of the treaty provision that enables its operation without any additional implementation."

In the judgment of 19 December 2002 on the Bug River claims (K 33/02) the Constitutional Court held that the provisions of the so-called republican agreements have non-self-executing character. "The structure of those agreements and the scope of obligations accepted thereby do not allow to recognize them to be a direct legal basis for compensatory claims of the repatriates and their heirs." Those provisions required transposition into internal law. According to the Court, a treaty norm could be applied directly if it contains all normative elements essential for its judicial application (a norm has to be complete). The Court added that such a view is confirmed by Art. 91 para. 1 of the Constitution stipulating that an international agreement shall be applied directly, unless its application depends on the enactment of a statute.

Much broader reflection on the concept could be found in the judgment of the Supreme Administrative Court of 8 February 2006 (II GSK 54/05) concerning the domestic effects of Art. 33 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The provision reads: "The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date." According to Polish law of 1972 the patent was protected only for 15 years. The Court explained that two elements are decisive for direct application and direct effect of a treaty norm (the direct effect was understood by the Court as a right of an individual to invoke a norm against State organ or other individual). One is the intention of the parties to a treaty and its terms (the way the rights or obligations are formulated). The second is the constitutional regulation on incorporation of international law into domestic legal order.

The Court found that in view of the wording of Art. 33 of the TRIPS, it was not the intention of the signatories to make its application dependent upon further transformation into domestic law. Moreover, Art. 1 leaves the discretion to the parties to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. They are obliged to adopt special law only if they want to afford more extensive protection than is required by the Agreement. Also the wording of the other provisions of the Agreement indicate that they are addressed directly to individuals. Art. 33 takes directly into account the situation of the owner of a patent. It has to be read in conjunction with the principle of immediate patent protection enshrined in Art. 70 para. 2. This provision as well does not require any further implementation, hence, it could be directly applied.

Responding to the argument of the applicant that Art. 33 is not complete because there are issues not regulated in Polish law, e.g. registration, fees, procedures for extension of a patent protection over 15 years etc. the Court

answered that Art. 33 satisfies the criteria of precision, clarity and completeness. Rejecting the argument of the applicant the Court emphasized that "the requirement of completeness of an international norm has to be referred to the norm itself, precisely, to its scope. Art. 33 regulates solely the period of the patent protection and in this respect the regulation is complete. It does not require to be complemented by domestic law, because the term of the patent protection could be fixed under this provision, if the protection was not extended by domestic law. Not the whole subject matter of a norm has to be exhaustively regulated in international law and in domestic law, but the norm of international law itself has to be complete."

The Court dealt then with constitutional requirements, referring again to Art. 91 para. 1 and 2 of the Constitution (ratification, promulgation etc.). The Court held that "the direct application of international treaty to internal relations is excluded if "its application depends on the enactment of a statute." This dependence may result equally from the will of the treaty parties or from the lack of qualifications of a treaty norms." In this manner the Court tried, as it seems, to reconcile two main elements distinguished at the beginning of its reasoning.

More stringent conditions of precision and completeness are applied to criminal responsibility. The Supreme Court addressed this issue in the judgment of 19 April 2004 (V KKN 353/00) concerning Art. 1 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949. The Court found that Art. 1 was drafted in a manner that excludes its direct application by criminal courts. The wording of that provision indicates that it was directly addressed only to the State, establishing its obligation to adopt a corresponding penal norms. Under Art. 91 para. 2 of the Constitution, direct application of an international penal norm is only possible when that norm, in addition to defining the crime, determines as well the penalty. Limitations on the self-executing effect of international treaties in the area of criminal law result from the particular characteristics of that branch of law. Legal norm establishing criminal responsibility, either domestic or international, must be drafted in a precise and complete manner.

2.6. Private parties and treaties

The concept of self-executing treaties is closely bound up with a right of private parties to invoke and enforce treaties in litigation. In the resolution of 19 February 1997 (I KZP 37/96) the Supreme Court noted that there are no obstacles "to recognize that the provisions of ratified international treaties could be, and even should be, directly applied in the Polish internal legal order – particularly in the area of individual rights and freedoms. This assertion con-

cerns all treaty norms that, due to their nature, are suitable for direct application. In the legal writings, these international provisions are qualified as self-executing, i.e. creating immediate entitlements for citizens and apt to be applied by the State bodies, especially by the courts and administrative organs."

In the judgment of 10 September 1997 the Appellate Court in Warsaw (I ACz 813/97) held that "international agreements are obliging both the ratifying States and individuals whose spheres of activity are regulated. Therefore, it is not necessary that the parties – in the private contract – recall the provisions of the binding international agreement as a basis for resolving the disputes between them and satisfying the judicial decision."

In the decision of 21 November 2003 (I CK 323/02) the Supreme Court confirmed that "international agreement provisions are effective not only with regard to the States, but may provide an independent ground of claims for damages raised before domestic courts (so-called self-executing norms)."

Ratified treaties are universally binding law with the established position in a hierarchy of legal norms. They could be invoked before domestic courts by private parties against the other private parties or State's organs, including constitutional complain to the Constitutional Court (Art. 77 para. 1 of the Constitution). On the other hand, State's organs may apply treaty norm against individuals.[18] The courts do not apply different tests to determine standing and private rights of action when the issue involves a treaty than they apply when a party is relying on a statute or other domestic law. However, the court must establish whether the invoked norm has an adequate legal rank, whether it is contained in a duly ratified and officially published international treaty and whether its provisions meet the criteria of direct applicability. Once those questions are answered in the affirmative, the court would not differentiate between the legal effects of international and domestic norms. The violation of a treaty constitutes an unlawful act and triggers such legal consequences as are provided for violation of similar domestic law. An important remedy was introduced in the 2004 Amendment to the Civil Code (Art. 417–421). New provisions extend the scope of the State's civil liability for unlawful actions or omissions of public authorities or agents. An affected private party may sue the State for damages for the breach of ratified treaties, including European Union's secondary law. At the moment it is uncertain whether the concept of unlawful act or omission could encompass other binding norms of international law, e.g. customary law.

[18] E.g. in the judgment of 15 February 2007 the Regional Administrative Court (III SA/Wa 4280/06) held that the landlord who made the property lease for diplomatic purposes (for the Embassy) is not under Art. 23 para. 2 of the Vienna Convention on Diplomatic Relations exempted from taxes (VAT).

2.7. Treaty interpretation[19]

There are some cases of the Supreme or Regional Administrative Courts, where the courts interpret international agreements referring to Art. 31–33 of the Vienna Convention on the Law of Treaties. They ground this reference either in a universally binding character of the Convention under Polish law (as the result of Art. 87 para. 1 and Art. 241 para. 1 of the Constitution) or customary character of the rules on interpretation contained in the Convention. For example the Regional Administrative Court in the judgment of 12 December 2008 **(**I OSK 538/08) held that the Prague Convention on mutual recognition of education degrees does not apply to distance learning. The Court invoked "universal principle of treaty interpretation" contained in Art. 31–33 of the Vienna Convention.

The courts sometimes notice that a treaty has a double character, it is an internal law act and the act of international law as well, but their underline that it has to be interpreted according to the rules of international law interpretation. The judgment of 23 September 2004 of the Regional Administrative Court (I SA/Bk 206/04) may serve as an example. The Court referred broadly to the principles of the Convention and used them carefully in its reasoning.

The courts have never checked whether the Convention is binding on all the parties to the treaty in question. Sometimes if their refer to the rules contained in the Vienna Convention, they finally apply internal law rules, e.g. the decision of the Supreme Court of 2003 (I KZP 47/02) in an extradition case, where, after having confirmed its competence to interpret a bilateral treaty on extradition, the Court made direct reference to methods of interpretation utilized in the Polish criminal procedural law.

There are also many cases where the courts interpreted treaties without reference to any particular rules.[20] The Supreme Court in the ruling of 2004 (IV CK 495/03) noticed that "it results from the literal meaning of Art. 11, Section 1 of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 14 November 1975 that, where a TIR operation has not been discharged, the customs authorities shall not have the right to claim payment of the sums due from the guaranteeing association unless, within a period of one year from the date of acceptance of the TIR Carnet by those authorities, they have notified the association in writing of the non-discharge." The Court relied also on the purpose of the TIR Convention, indicating that "the periods defined in Art. 11 of the Convention, on the one hand, should facilitate

[19] See also points 4.3., 6.1.

[20] E.g. the judgment of 28 February 2007 (V CSK 441/06) in which the Supreme Court interpreted Art. 74–76 of the Convention on Contracts for the International Sale of Goods of 1980; the resolution of the Supreme Court (I KZP 30/08) on execution of criminal penalty under foreign court judgment within a framework of the European arrest warrant, in which the Court interpreted the Strasburg Convention on the Transfer of Sentenced Persons of 1983.

the trade and speed of transport under TIR carnets, and on the other, have a positive impact on the efficiency of the procedure concerning customs duties." In another judgment of 2004 (I CKN 23/99), the same Court observed that commentators disagree about the meaning of Art. 40 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988, to which Poland made a reservation. That is why the Court accepted the meaning of Art. 40 which "results directly from the wording of this provision." In the ruling of 1999, the Supreme Court (I CKN 23/99) took into account, when interpreting Art. 13 of the Hague Convention on the Civil Aspects of International Child Abduction of 1980, the general notion of the "well-being of the child," as defined in the Convention on the Rights of the Child of 1989. In the ruling of 2000, the Supreme Court (III CKN 1254/00) stated that when Poland adhered to the Hague Convention of 25 October 1980, mentioned above, it assumed an obligation to respect the main purpose of the Convention, which is to secure the prompt return of children wrongfully removed to or retained in any contracting state. The Court's decision explicitly referred to the purpose of the Convention.

2.8. Deference to the political branches on treaty matters

Since ratified treaties enter into the domestic legal order, there is a presumption that they are known to the courts. The judges are not obligated to submit the treaty matters to the opinion of the political or legislative branches. Several provisions of Polish law provide for specific procedure of voluntary request for the opinion. E.g. under Art. 1116 of the Code of Civil Procedure courts are invited to request information from the executive branch on the scope and substance of diplomatic immunities. Under Art. 1113 of the same Code, any court may request the Ministry of Justice to provide information related to the text of a foreign law or to the judicial practice of foreign countries. Such information, however, has no binding authority. Besides, the procedure does not apply directly to the treaty interpretation or other treaty matters. Moreover, the independence of the judges is guaranteed under Art. 173 and 175 of the Constitution and the European Convention on Human Rights (emphasized strongly in the judgment of ECtHR of 24 November 1994 in the case Beaeumartin v. France on the obligation to submit preliminary question of treaty interpretation to executive branch).

In practice, the courts sometimes ask for or use the information obtained from the executive branch on international treaties. One of the examples is the judgment of the Supreme Administrative Court of 7 December 1999 (V SA 726/99) concerning i.a. the opinion of the Ministry of Foreign Affairs submitted earlier in the deportation proceedings before the Ministry of Interior against Karine Galstyan, the Armenian citizen. On the basis of the information obtained

the Minister of Interior decided expulsion. The Ministry of Foreign Affairs explained that by diplomatic note of 30 June 1997, the Armenian Embassy informed the Polish government that the Republic of Armenia did not consider itself to be a successor to the treaty between Poland and the former Soviet Union on abolition of visas. The Polish government accepted this note and informed Armenia that the treaty ceased to be in force as between Poland and Armenia. In the opinion of the Polish Ministry of Foreign Affairs, this exchange of notes was sufficient to conclude that the treaty could not be applied in the Polish legal order. The Court rejected this reasoning and ruled that the exchange of notes, as such, could not have any effect in the internal legal order because it did not meet the requirement of official publication in prescribed form. Also the Foreign Minister's declaration was not published and, as a consequence, not binding for Polish courts adjudicating on the legal status of the Armenian citizen in Poland.

In the judgment of 16 July 2003 the Supreme Administrative Court (III SA 3042/01) rejected the opinion of the vice-director of the department in the relevant Ministry, on the application of the Chinese treaties on the avoidance of double taxation to Hong Kong, on the ground that the opinion was not given by the authoritative organ. It should be signed by the Minister to be relied on. The Court submitted the case to the reconsideration by the lower court.

2.9. Reservations

There is nothing in Polish law to exclude the power of the courts to decide whether a statement attached by the government or legislature during treaty approval is a reservation or determine the scope or legality of a reservation. However, there is no relevant case law. In practice the courts considered Polish reservations to a treaty, nonetheless without examining their legality. Eg. the Supreme Administrative Court in the judgment of 9 October 2008 (I GSK 1057/07) interpreted the concept of "a person leaving Polish customs area" contained both, in Polish law and in Polish reservation to Art. 9 para. 2 of the attachment C to the Convention on Temporary Admission done at Istanbul on 26 June 1990. The Court referred to the text of the reservation in the official Announcement of 21 May 2002 published in the Journal of Laws.[21] Since the reservation was officially published there was no need to discuss its validity.

2.10. Reference to treaties to which the state is not a party in interpreting or applying domestic law

[21] See also the judgment of the Supreme Court (IV CK 495/03).

The courts sometimes make a reference to treaties to which Poland is not a party in interpreting or applying domestic law, including constitutional matters. They use it as an additional argument to proof the existence of international standard in the area in question. For example they invoked the Revised Charter of Social Rights or the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 1997 (e.g. the judgment of the Constitutional Court of 23 April 2008 (SK 16/07) on the freedom of expression and medical ethics, referred to below point 4.3).

3. Customary international law

It could be said that the direct application of international customary law is well grounded in the Polish case law, beginning by the judgments of 22 October 1925[22] on diplomatic immunities and of 2 March 1926[23] against Czechoslovakia on state immunity. In the judgment of 15 May 1959 (CR 1272/57) the Supreme Court held that "Polish courts generally may not adjudicate in the litigations against foreign States by authority of binding international custom which excludes to sue foreign State before domestic courts."[24] In the judgment of 10 October 1979 (III CRN 139/79) the Supreme Court dealt with diplomatic immunities. It held that "under Art. 1111 para. 1 of the Civil Procedure Code members of the diplomatic staff of the representations of foreign States in PRL [the Polish Peoples Republic] are exempted from the jurisdiction of Polish courts and they cannot be sued, whereas the lawsuit against such persons should be dismissed (Art. 1099 of the Code)." In the judgment of 18 May 1970 (ICR 58/70) the Supreme Court found that "in international relations, precisely in the relations between the subjects of civil law belonging to different States, first of all the provisions of international law, either relevant conventions or customs, are applied. Only when there are no norms like those the national law or foreign law should be applied."

The Constitution of 1997 does not address directly the relationship between domestic law and customary international law. The prevailing opinion of the scholars is that customary law is automatically incorporated into the Polish legal order. This view found its solid basis in Art. 9 of the Constitution. Besides, some specific bases for direct application of customary law could be found in statutes, e.g. the provisions of Criminal Procedure Code or Civil Procedure Code refer to jurisdictional immunities of diplomats (Art. 1111 para. 1), the Law on Excise Duties of 2004 (Art. 25 para. 1), the Law on Local Taxes or Duties of 1991

[22] Orzecznictwo Sądów Polskich, 1926-V, nr 342.
[23] Orzecznictwo Sądów Polskich, 1926-V, nr 418.
[24] Similarly, the judgment of the Supreme Court of 26 March 1958 (2 CR 172/56).

(Art. 13 para. 2) and the Road Traffic Law of 1997 (Art. 77 para. 3) – concern the taxes or duties exemptions for diplomats.

Diplomatic immunities and State immunity are the main areas of the application of customary law. However, the court practice under the present Constitution is limited. One example of the application of customary international law is the judgment of the Supreme Court of 11 January 2000 (I PKN 562/99) on the jurisdiction of Polish courts in respect to foreign States. The case concerned the legality of the dismissal of the employee by the Embassy of Chile. The Supreme Court held that Polish courts have jurisdiction in cases brought by Polish citizens against foreign Embassy on questions of legality of the dismissal. No reasons were given for this statement except for a laconic reply that the State immunity does not encompass State's acts of a private law character. The Court had not deferred to the government or legislature on the existence or content of customary international law in respect to State immunity, nor had relied on Art. 9 of the Constitution.

In the judgment of 13 November 2003 the Supreme Court in the case M. Rotwand v. the Polish Treasury and the Treasury of the Russian Federation – the Russian Federation's Embassy (I CK 380/02) confirmed the position taken by the lower courts in the same case on the jurisdiction of the Polish courts. The Court held that the Russian State, as a party to the contract on the exchange of the land property of 8 October 1960, "did not act as a subject of diplomatic relations but as a private party (*acta jure gestionis*) whose acts were not covered by jurisdictional immunity. The substance of the present case is to decide on the validity and effectiveness of that contract on the basis of civil law. This matters are adjudicated only by civil courts. It follows from the very nature of the case, which essence is to adjudicate on the legal status of the real estate, that the decision rendered by the court, under no circumstances may infringe upon sovereignty of the foreign State (State immunity), protected by the Vienna Convention on Diplomatic Relations of 18 April 1961 […], nor diplomatic immunity of the diplomatic post or representatives." In the other case concerning the same parties and the same real property the Appellate Court discussed i.a. the legal status of the trade representations of the Soviet Union (judgment of 14 June 2004, I ACa 1707/03). The Court found that the Russian trade representation was established in Warsaw upon the decision of the Russian Government and the consent of the receiving State (Republic of Poland). It had conducted its functions for many years, i.a. through entering into legal transactions. "In consequence, it has to be considered that the constant practice, an international custom had existed, and the said representation was the organ of the Soviet Union acting abroad." The Court further noticed that "the Embassy as a permanent diplomatic mission is the organ of the foreign State which represents it directly in the relations with other States. The Embassy does not possess legal personality in the internal law of the receiving State. However, it performs acts (with some exceptions) in the name of and on behalf of sending State. There was a custom and constant practice also in that area."

In a recent case of Winicjusz Natoniewski v. Federal Republic of Germany, the Court of Appeal in Gdańsk (judgement of 13 May 2008) tried to determine the reach of State immunity for acts contrary to international law. Referring to the above mentioned judgment of 11 January 2000 (I PKN 562/99) the judges confirmed that the sovereign State immunity still applies to the acts carried out in the exercise of public powers (*acta de jure imperii*), even if they are contrary to international law. They held that the immunity may be invoked in tort proceedings involving alleged German war crimes committed in the Second World War. The Court noticed that such a finding stems as well from the interpretation of the EU law by the European Court of Justice in a similar case C-292/05 Irini Lechouritou and Others v. Dimosio tis Omospondiakis Dimokratias tis Germanias. The European Court of Justice explained that "civil matters" within the meaning of the provision of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (and the regulation of the Council No. 44/2001) do not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State. Since the action brought by Mr Natoniewski is not a civil matter the case had to be dismissed. The judgment, however, is not final. In a cassation procedure Mr Natoniewski argued strongly for *jus cogens* character of the norm breached and the evolution of customary international law shows that the State's acts in breach of *jus cogens* norm are not recognized as *acta de jure imperii*.

4. Hierarchy

4.1. Rank of treaties and customary international law in the hierarchy of legal norms

The position of a treaty within the Polish legal order depends on the procedure of its conclusion. For these purposes treaties could be divided into ratified and non-ratified. As mentioned above, non-ratified treaties, although they bind the State, do not possess normative character and they are outside the legal order (i.e. universally binding norms).

The rank of a ratified treaty depends on the procedure of ratification. Ratification is the competence of the President of the Republic. There are four modes of ratification:

1. ratification upon prior consent granted by statute under Art. 89 para. 2;
2. ratification upon prior consent granted by statute under Art. 90 para. 2 (applied to treaties delegating state powers on international organization);

3. ratification upon prior consent passed by national referendum Art. 91 para. 3;

4. ratification without the consent of the Parliament, so called simple ratification.

The first three categories of treaties enjoy a suprastatutory rank. The rank of treaties ratified under Art. 89 para. 2 and under Art. 90 para. 2 is grounded in Art. 91 para. 2. This provision provides clearly that "an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes." (It is worth noticing that a treaty ratified upon prior consent granted by statute has under the Constitution higher rank that that statute.) This means that treaties take precedence as well over all sub-statutory instruments, in particular, regulations passed by the Council of Ministers and other State organs. In other words, in a case of irreconcilable conflict a treaty norm prevails over statutory or sub-statutory norm, whether prior or subsequent to the treaty.

The Constitution was silent on the rank of **treaties concluded upon prior consent passed by national referendum**. Their position was discussed by the Constitutional Court in the judgment of 11 May 2005 on the constitutionality of the Polish Accession Treaty to the European Union (K 18/04). The Accession Treaty was ratified under Art. 90 para. 3. The Court gave a straightforward answer, that the position of such treaties is equal to treaties ratified upon prior statutory consent.[25]

The position of treaties ratified without the consent of the Parliament, i.e. under Art. 89 para. 2 is still not clear. *A contrario* from Art. 91 para. 2, such treaties cannot take precedence over statutes. The Constitutional Court confirmed this logic in the judgment of 14 January 2004 (Ts 168/03, para. 3). On the other hand, it could be argued that their respect is guaranteed under Art. 9 of the

[25] The Court explained that statutes authorizing the ratification of an international agreement are adopted with observance of the appropriate procedural requirements governing the decision--making process within the Sejm and the Senate. These requirements, as regards the regulation contained in Art. 90 (1) and (2) of the Constitution, which refer to international agreements concerning the delegation of competences of Polish public authority organs to an international organisation or international organ, are significantly strengthened – in comparison with the ratification mentioned in Art. 89 of the Constitution. In the discussed field, the Sejm and Senate function as organs representing the Nation-sovereign, in accordance with the principle expressed in Art. 4 (2) of the Constitution. The reference to a sovereign decision of the Nation is even more intensive and direct where consent for the ratification of an international agreement concerning the delegation of certain competences is not expressed by statute (Art. 89 (1), read in conjunction with Art. 90 (2), of the Constitution) but rather *via* the procedure of a nationwide referendum (Art. 90 (3)).

Constitution. In consequence, they should prevail over statutes. There is no confirming practice and the views of scholars remain divided.[26]

The provisions of treaties must conform to the Constitution (Art. 91 para. 2 in conjunction with Art. 188 of the Constitution). The Constitutional Court may review the constitutionality of a treaty that has already been ratified, published and become a part of the domestic legal order. If the Constitutional Court finds that a treaty is, indeed, unconstitutional, it cannot invalidate that treaty as such, but its judgment would bar application of that treaty in domestic relations. Such a ruling would also impose an obligation on the competent authorities to take necessary steps to amend or renounce the treaty.

This stance was confirmed in the judgment of the Constitutional Court of 11 May 2005 (K 18/04) on the EU Accession Treaty. The Constitutional Court emphasized that given its supreme legal force provided for in Art. 8 para. 1,[27] "the Constitution enjoys precedence of validity and application within the territory of the Republic of Poland." The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorization or consent granted (in accordance with Art. 90 (3)) *via* the procedure of a nationwide referendum, as guaranteed by Art. 91 (2) of the Constitution, in no way signifies an analogous precedence of these agreements over the Constitution. It seems obvious that the same logic would apply to a conflict arising under any other norm of international law, including customary law or the decisions of international organizations.

The Constitutional Court added further that in a case of an irreconcilable inconsistency appeared between a constitutional norm and a Community norm (what obviously could be applied by analogy to all other international law norms), the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications of the European Community or international law provisions; or, ultimately, on Poland's withdrawal from the European Union (from the treaty).

The example of the resolution of the irreconcilable conflict between international law and national constitutional law was given, however indirectly, by the judgment of the Constitutional Court of 27 April 2005 (P 1/05) and its consequences. Actually, the judgment did not concern constitutionality of the international norm itself, but the legislation implementing it.[28] The Court made clear

[26] For discussion see L. Garlicki, K. Wójtowicz, M. Masternak-Kubiak, *op. cit*., p. 8.

[27] Art. 8 para. 1 reads: "The Constitution shall be the supreme law of the Republic of Poland."

[28] In judgment of 11 May 2005 the Court emphasized that the Framework Decision on the European arrest warrant and the surrender procedures between Member States may not be reviewed from the perspective of its conformity with the categorically formulated provision of

that, should a conflict between the implementing norm and the Constitution arise, unconstitutional statutory provisions would be annulled and the treaty or the decision would not be implemented until a constitutional amendment had been adopted. The treaty itself is thus affected. The case in question concerned the EU Framework Decision on the European Arrest Warrant of 2002. It was implemented in 2004 by an amendment to the Polish Code of Criminal Procedure. The amendment provided for extradition of every person, including Polish citizens, demanded under the European Arrest Warrant procedure by another EU member state. The Constitutional Court held the amended provisions of the Code invalid as contrary to Art. 55 para. 1 of the Constitution which forbade any extradition of Polish citizens. However, the Court allowed the application of the invalid provisions of the Code for the next 18 months (under Art. 190 para. 3 of the Constitution[29]) and indicated that, during this period, the Parliament should adopt a constitutional amendment. Such an amendment was adopted at the end of 2006. The above mentioned judgment showed that Art. 190 para. 3 can play useful role in resolving constitutional conflicts in a manner compatible with the requirements of international law.

4.2. Doctrines developed to reconcile or conform domestic law to international law

The main doctrine developed to reconcile domestic law with international law is the doctrine of friendly/or sympathetic interpretation. It was first not even named but applied by the courts to avoid conflicts. There are many examples of the indirect application of treaties in Polish practice, that is to say, application for the purposes of interpretation of domestic law.[30] A judgment of 11 January

Art. 55 (1) of the Polish Constitution, given the generality of this Framework Decision and the solely directional nature of its disposition.

[29] Pursuant to Art. 190 para. 3: "A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act […]."

[30] See e.g. the decision of the Supreme Administrative Court of 3 September 1997 (III RN 38/97) in which the Court interpreted the Code of Administrative Procedure in the light of Art. 6 ECHR finding that whenever there were serious doubts regarding the admissibility of a recourse, the Court should proceed on the merits since the purpose of the Code seen in the light of Art. 6 of the Convention is to allow the citizen to fulfill its right to be heard by an independent tribunal; judgment of the same court of 4 February 1997 (III RN 59/96), interpreting the statute of the Supreme Administrative Court in such a way as to provide for judicial control of an administrative refusal to send a pensioner for spa treatment; decision of the Supreme Court of 11 January 1995 (III ARN 75/94), in which the Court held that the decision to reject a plea for exemption from court costs should be especially carefully assessed in order to exclude barring the individual from access to justice; similarly, the Supreme Administrative Court judgment of 5 December 2001 (II SA 155/01) concerning a journalist's access to official documents; judgment of 13 November

1995 of the Supreme Court should be highlighted in that regard since it formulated a general guideline concerning the application of the European Convention of Human Rights. The statement was later on repeated by many other judgments:

> Since the accession of Poland to the Council of Europe, the case law of the European Court of Human Rights in Strasbourg should be applied as an essential source of interpretation of the provisions of the Polish domestic law.[31]

It is also worth mentioning the position of the Constitutional Court towards the EC/EU law before Polish accession in 2004 (judgment of 29 September 1997 (K15/97)). Adjudicating on the conformity to the Constitution of the provision of the Civil Service Law of 1996 requiring women to retire at the age of 60, the Court examined the provision in the light of the treaties binding upon Poland and also in the light of the EC law. The Court observed that Poland was not bound by the EC law as yet, however, the Europe Agreement of 1992 (Art. 68 and 69) obliged Poland to take all the necessary efforts to ensure the consistency of its law with the law of the EC. In the present case, it meant the protection of the worker at work. This obligation lies not only with the government and the Parliament but also with courts. They were obliged to interpret Polish law in a way which served, at best, the implementation of the obligation to ensure consistency of the two legal orders. The Constitutional Court repeated this statement in a judgment K2/02 of 28 January 2003. The case concerned the concordance to the Constitution and Art. 10 of the ECHR of the statutory prohibition to advertise and to promote alcohol beverages. The Court confirmed the principle of friendly interpretation towards the EC law. But, the Court derived it not only from Art. 68 and 69 of the Europe Agreement but also from Art. 91 of the Constitution. According to the Court, the direct application of treaties referred to in Art. 91 para. 1 of the Constitution encompasses the application of the treaty to establish the constitutional standard of the judicial review (what means the interpretation of the Constitution). Moreover, to allow

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1997 (I CKN 710/97) of the Supreme Court in which the Court interpreted the Unfair Competition Law of 1993 in the light of Art. 8 of the Paris Convention of 1883 on industrial property protection as revised by the 1967 Stockholm Act. In the judgment of 17 November 2004 the Supreme Administrative Court held that the concept of pattern, model or sample in the Customs Code of 1997 "has to be understood in the context of Art. II of the International Convention to Facilitate the Importation of Commercial Samples and Advertising Materials of 1952 […] using in that regard the criterion of 'negligible value.' " In the judgment of 22 November 2007 the Supreme Court interpreted Polish Transport Law of 1984 in conformity with the Convention on the Contract for the International Carriage of Goods by Road (CMR) of 1956, and to interpret the provisions of the said Convention the Court referred to the relevant judgments of French, Austrian and German courts.

[31] III ARN 75/94.

interpretation of the domestic law contrary to the principles of the EC law would violate the principle of the rule of law.

More often than Art. 91 para. 1, Art. 9 of Constitution is viewed by the courts as a basis of the obligation of friendly interpretation. The Supreme Administrative Court e.g. in the judgment of 26 August 1999 (V SA 708/99) held that formally Polish accession to the Geneva Convention on Refugees of 1951 by the act of the President of the Republic did not amount to ratification. (Actually, it was ratified but the official document referred to accession). Because of that it was not directly applied by the Court. However, the Court found that Art. 9 of the Constitution obliges the State organs to interpret, as far as possible, domestic law in conformity to international law. Consequently, the Court interpreted the Code of Administrative Procedure and the Aliens Law in such a way that failure to observe a time-limit set in the said statutes could not be the reason to refuse to grant refugee status to an alien. Thus, the meaning of the provision was compatible with the spirit and object of the Convention which provided for refusal to grant refugee status only if the conditions specified therein were met.

The doctrine of friendly interpretation was recently developed by the Constitutional Court (judgment of 11 May 2005 (K 18/04)). The Court referred to European law, but its standing by logic could be applied to international law in general. The judges noted that Art. 9 of the Constitution and general principles of international law require respect for international law, Polish law (including the Constitution) should be interpreted in a manner "friendly" towards obligations resulting from international law and European law. There are, however, certain limits:

> The principle of interpreting domestic law in a manner "sympathetic to European law," as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realized by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.

4.3. Use of international law to interpret constitutional provisions

As shown above, international law is often used by Polish courts to interpret domestic law, including constitutional provisions, especially those guaranteeing individual rights. Since many provisions of human rights treaties were reproduced almost verbatim in the text of the Constitution the Constitutional Court often finds that a statute is contrary both, to the Constitution and the treaty. E.g. in a judgment P 9/04 of 31 January 2005 the Court held that the provisions of

Customs Law of 2004 were contrary to Art. 2 of the Constitution in conjunction with Art. 15 para. 3 (3) of the International Covenant of Civil and Political Rights of 1966. In the judgment of 11 May 2007 (K 2/07) the Court invalidated several dispositions of the Lustration Law of 2007 as contrary to the Constitution and the European Convention on Human Rights. Recently, it often happens that the Constitutional Court strikes down the statute as unconstitutional and finds it not necessary to examine separately its conformity to the human rights treaties. E.g. in the judgment of 27 June 2008 (K 51/07) on reorganization of intelligence and counter-intelligence services the Court found it not necessary to refer to Art. 6 para. 2 of the European Convention on Human Rights and Art. 14 para. 2 of the UN Covenant on Human Rights since the right to fair trail is enshrined in Art. 45 para. 1 of the Constitution. However, the Court had to establish the standard of the right protected by the Constitution. In that regard it has to refer to human rights treaties and interpret the constitutional provision in line with those treaties.[32] Similarly, in the judgment of 10 July 2008 (P 15/08) concerning the constitutionality of the provisions of the legislation on public meetings and demonstrations, penalizing the lack of notification of the so called spontaneous assembly. The Court referred broadly not only to **the case law of the European Court of Human Rights but also to the OSCE guidelines**[33] finding that Art. 57 of the Constitution encompasses all those standards. The judges emphasized that: "The standards of the Convention may and should be used for construction of the constitutional standard to adjudicate upon its breach by the norms which the court controls" (para. 10). As the result the law on petty offences has to be interpreted in the light of those standards too to exclude criminal responsibility in specific cases.

In the Judgment of 3 June 2008 (K 42/07) on principles for making case records accessible in the course of preliminary proceedings, the Constitutional Court relied broadly on the **jurisprudence of the European Court of Human Rights** in Strasbourg to find i.a. that it confirmed a broad access of the suspect to case records. The Constitutional Court shared the view that an obligation arising from this jurisprudence guarantees the suspect access to the evidence contained in the records of preliminary proceedings to an extent that is necessary to assess the grounds for a temporary arrest. The right to defence should be the decisive factor in the choice of the part of case records to be made accessible to the temporarily arrested person and their defence counsel.

[32] Similarly the other courts, e.g. the judgment of the Supreme Court (II KK 187/07), of 9 January 2008

[33] Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Peaceful Assembly of 29 March 2007.

All materials of preliminary proceedings justifying the motion of a public prosecutor in this respect have to be freely accessible. In the judgment of 23 October 2007 (P 10/07) on the entitlement to early retirement for man the Court relied on both, jurisprudence of the European Court of Human Rights and the **European Court of Justice**.

The other example is the judgment of the Constitutional Court of 30 September 2008 (K 44/07) on permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened. To conclude that the obligation to counteract terrorism and the therewith connected necessity of weighting values, such as public security and rights and freedoms of the individual, does not authorise the establishment of more liberal assessment standards than those normally applied, the Court analyzed relevant international acts, **including non-binding, documents of the United Nations and of the Council of Europe**, e.g. UN global strategy on counter-terrorism of 8 September 2006, Security Council resolutions, in particular resolution 1267 (1999) and its successor resolutions, resolutions 1373 (2001) and 1540 (2004), Plan of Action, Secretary General report of 2006 "Uniting against terrorism: recommendations for a global counter-terrorism strategy" (A/60/825), the European Convention on Human Rights of 1950, the European Convention on the Suppression of Terrorism of 1977, amended by the Protocol of 2003, Council of Europe Convention on the Prevention of Terrorism of 2005, resolutions and declarations of the Committee of Ministers and the Parliamentary Assembly, e.g. Guidelines on Human Rights and the Fight against Terrorism of 2002, Opinion of the European Commission for Democracy through Law (Venice Commission) on the Protection of Human Rights in Emergency Situations of 2006 etc.

In the judgment of 23 April 2008 (SK 16/07) on the freedom of expression and medical ethics the Constitutional Court interpreted Polish law in the light of the Council of Europe Convention on Human Rights and Biomedicine of 1997, **signed but not ratified by Poland** and **non-binding document** of the World Medical Association – the International Code of Medical Ethics and the numerous judgments if the European Court of Human Rights.

In the judgment of 18 December 2007 (SK 54/05) to establish the content of the right to good administration the Constitutional Court drew inspirations from the provisions of the **non-binding documents** – Art. 17 I 20 of the Code of Good Administration of the EU Parliament of 2001 and Art. 41 of the Charter of Fundamental Rights of the European Union (judgment para. 2.6).

In the judgment of 1 July 2008 (K 23/07) the Constitutional Court found support i.a. in the **Universal Declaration on Human Rights** to prove that on the

ground of the Constitution nobody can be forced to assembly or to be the member of the trade union (negative assembly right).

Obviously, non-binding documents were used by the Court as a source of guidelines which should be followed within the framework of domestic law.

4.4. The doctrine of *jus cogens* and recognition of hierarchy of international law norms

Polish courts had no opportunity to adjudicate on *jus cogens* norms of international law (the *jus cogens* argument was put on in a still pending case of Winicjusz Natoniewski v. Federal Republic of Germany, see point 3. above). They had not pointed yet any higher status for any specific part of international law, human rights or UN Security Council decisions.

5. Jurisdiction

5.1. Universal jurisdiction over international crimes

Art. 113 of the Criminal Code is by some commentators viewed as providing legal base for universal jurisdiction. Since the provision refers to international treaties, it rather reflects the principle *aut dedere aut iudicare*.[34] Art. 113 reads: "Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements." Recently the Government has decided to submit the proposal to the Parliament to add to Art. 113 the following formula – "or an offence prosecuted under the Rome Statute of the International Criminal Court done in Rome on 17 July 1998." Taking into account Polish international obligations its innovative character seems doubtful. Probably the main purpose is to make clear that the most heinous international crimes are covered by the provision.

There is no case law concerning Art. 113.

5.2. Jurisdiction over civil actions for international law violations committed in other countries

[34] T. O s t r o p o l s k i, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* [Principle of Universal Jurisdiction in International Law], Warszawa 2008, part I 5.3.–5.5.

There is no case law concerning civil actions for international law violations that are committed in other countries. There is no specific legal base for such cases. Probably, they could come under Art. 1096 et seq. of the Code of Civil Procedure.

6. Other International Sources

6.1. Non-binding declarative texts

Non-binding declarative texts are used by the courts in interpreting and applying domestic law (see point 4.3. above). For example the Regional Administrative Court asked to interpret several bilateral conventions on the avoidance of double taxation made the recourse to **the OECD Model Convention and the Commentary** to it, as the context of those conventions which has to be considered in the process of interpretation. The Court referred to the context in the meaning of Art. 31 of the Vienna Convention on the Law of Treaties. The Court noticed that the Model Convention is not a source of law, however, it has an important role in interpretation of the conventions on avoidance of double taxation based on it. "Some States view the Model Convention and its commentary as auxiliary means of interpretation or guidelines while the others see it as a context or additional means of interpretation. According to the OECD Council's recommendations Member States are obliged to apply the OECD Model Convention as a base for negotiations, unless one of the negotiating States had made specific reservations or had special reasons not to apply the OECD Model Convention. In such cases subsequent Model Conventions and Commentaries form part of a context, and not a supplementary means in the meaning of Art. 32 of the Vienna Convention."[35]

6.2. Decisions of international courts or tribunals

Except for EU law and the decisions of the European Court of Human Rights there are no cases where the courts have been asked to apply or enforce a decision of an international court or tribunal. The Polish legal order is only partially prepared to execute the decisions of international courts or tribunals. Recent amendments to the Code of Criminal Procedure of 1997 made it possible to reopen a domestic case due to a decision of international court or tribunal. Under Art. 540 para. 3, domestic judicial proceedings that were terminated by

[35] Judgment of the Regional Administrative Court of 9 September 2009 (III SA/WA 310/09), similarly, judgment of the Supreme Administrative Court of 19 June 2009 (II FSK 276/08).

a final decision can be reopened for the benefit of the convicted person, if such a need arises out of a decision of international organ acting on the basis of the treaty ratified by Poland. There is no similar provision in civil procedural law. Art. 401 of the Code of Civil Procedure provides that a party to civil proceedings terminated by a final judgment on the merits can request that these proceedings be reopened, if the Constitutional Court has found that the law on the basis of which this judgment was given was unconstitutional. These provisions were criticized and caused controversy between the Supreme Court and the Constitutional Court. In 2005 the Supreme Court, refused to reopen civil proceedings asked by the successful applicant in the proceedings before the European Court of Human Rights (Podbielski and PPU Polure v. Poland, application No. 39199/98, judgment of 26 July 2005). The Supreme Court had no doubts that "a judgment of the ECtHR in the complainant's favour does not constitute a ground for reopening of a case. A civil case can be reopened if the proceedings have been tainted with one of circumstances expressly listed in Art. 401. A judgment of the [Strasbourg] Court is not listed in the provision. Hence, as the complainant's request has not been based on a statutory ground, it must be rejected."[36]

As the administrative law is concerned, Art. 145, 145a, 146 and 147 of the Code of Administrative Procedure specify situations in which administrative case can be reopened. They do not contain any specific reference to international law. Such reference could be found instead in the recently amended Tax Law of 1997. Under Art. 240 para. 1 (10), the tax case could be reopened if "the final result of the procedure of mutual agreement or arbitration, under a ratified treaty on the avoidance of double taxation or other ratified treaty, Poland is the party to, has impact on the content of the passed decision." Art. 240 para. 1 (11) adds that the case could be reopened if "the judgment of the European Court of Justice has impact on the content of the passed decision."

The decision of international court binds the State organs on international plane and could be executed through different means. It often happens that as a consequence of the decisions of the European Court of Human Rights the law is amended (Kudła v. Poland on the lack of domestic remedy against excessive length of proceedings, Broniowski v. Poland on the effects of the republican agreements, Hutten-Czapska v. Poland on the excessive burdens incumbent on the property owners towards tenants etc.).

The decisions of the international courts are the sources of obligations, but they do not form universally binding law. Hence, they have no rank in domestic legal order.

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[36] The Supreme Court, judgment of 19 October 2005 (V CO 16/05). See M. K r z y ż a n o w s k a-M i e r z e w s k a, *The Reception Process in Poland and Slovakia*, [in:] H. K e l l e r, *A Europe of Rights*, Oxford 2008, p. 580–581.

6.3. Decisions or recommendations of a non-judicial treaty body

Polish courts obviously apply directly European Union law, including regulations, directives and decisions of the EU institutions. They rely as well on non-binding recommendations in a manner consistent with the EU law. Apart from the EU law, there are cases in which the courts have been asked to apply or enforce a decision or recommendation of a non-judicial treaty body. One of the examples is the judgment of the Supreme Administrative Court of 4 February 1999 (VSA 1058/98) rendered before the Polish accession to the EU. The Court quashed the decision of the administrative organ rejecting preferential custom treatment on the basis of the Polish Customs Law. The Court found that the **decision 4/96 of the Association Council**, the organ established by the Europe Agreement of 1992, should be applied instead. The Court based its decision on the general wording of Art. 91 of the Constitution and Art. 3 of the Customs Law. Both provisions refer to the precedence of application of ratified treaties. They do not mention the decisions of the bodies set up under the treaty. It seems that the Court understood that the decision derived its effects from the duly ratified treaty.

The Administrative Courts often refer to the **recommendations of the Committee of Ministers of the Council of Europe**. For example the Supreme Administrative Court in the judgment of 18 August 2009 (II FSK 591/08) noticed the soft law character of the Recommendation No. R (91) 1 on Administrative Sanctions of 13 February 1991, however, considered the case interpreting Polish law in the light of the Recommendation.[37] The Supreme Administrative Court in the order of 25 May 2009 (II FZ 131/09) referred to the Recommendation R (89) 8 of 13 September 1989 on provisional court protection in administrative matters. In the resolution of 21 April 2009 (II FPS 9/08) the Supreme Administrative Court referred to "recommendations of the European soft-law," particularly to the Recommendation CM/Rec (2007) 7 of 20 July 2007 on Good Administration.

There are also many decisions of the Supreme Administrative Court (e.g. V SA 1757/96 of 3 October 1997; I SA/Gd 314/97 of 27 January 1999) finding that the **interpretation given by the World Customs Organization** (WCO) under the competence set out in Art. III (d) of the Convention Establishing a Customs Co-operation Council of 1950 ("to make recommendations to ensure the uniform interpretation and application of the various Customs Conventions") is binding upon Polish customs authorities (because the Convention itself should be observed). In relevant cases the Courts refer to the Harmonized Commodity Description and Coding System (HS) implemented by HS Convention of 1983,

[37] Similarly e.g., judgment of the Regional Administrative Court of 6 August 2009 (III SA/Kr 461/09).

which came into force towards Poland on 1 January 1996. The HS is maintained by the WCO through the Harmonized System Committee.[38]

The most interesting seems, however, the judgment of 23 December 2008 of the Regional Administrative Court (I SA/Go 912/08) rendered under the directives of the cassation judgment in the same case of the Supreme Administrative Court (I GSK 1084/07). The case concerned the domestic effect of the amendments of attachments to the Interlaken Convention on the Common Transit Procedure of 1987 made by the **decisions of the Mixed Commission EC/EFTA** No. 1/2000 and No. 1/2001. The Court invoked the *pacta sunt servanda* principle as reflected in Art. 26 of the Vienna Convention of the Law of Treaties and Art. 9 of the Constitution to find that the amendments/or decisions were binding upon Poland on international law plane. Nevertheless, they could not produce any legal effects in domestic law. The decisions in question were, in the opinion of the Court, the treaties and they had to be applied in domestic law according to that law (i.a. Art. 87, 91 of the Constitution). The official publication is an important requirement to invoke treaties against individuals. The decisions were not published, therefore they had not entered into the domestic legal order, they could not be directly applied as a universally binding law. Respectively, they could not become sole basis for customs obligations. There are also several judgments of the administrative courts presuming e.g. binding character of the Decision of the Common Committee EFTA – Poland No. 1 of 1997 (published in Journal of Laws). The judgments do not discuss the character of the decision.[39]

[38] E.g. judgments the Regional Administrative Court in Warsaw of 7 May 2009 (V SA/Wa 3045/08); 6 May 2009 (V SA/Wa 3050/08); 29 April 2009 (V Sa/Wa 3049/08).

[39] E.g. decisions of the Regional Administrative Courts: III SA/GI 461/04 of 8 November 2005; I SA/Bd 739/06 of 7 February 2007; I SA/Bd 247/08 of 16 July 2008.

SECTION IV B

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SITUATION OF THE FOREIGN VOTERS IN POLAND

Foreign voters can be rarely found either in Polish polling stations or the electoral legislation of Poland. Nevertheless this scarce presence there are some provisions and practice that will be described below.

1. Definition of a foreigner

Polish law adopts broad but simple definition of "foreigner" based on the negative criterion of citizenship, as follows: "A foreigner is anyone who does not hold Polish citizenship" (Art. 2 of the Act of 13 June 2003 on foreigners).

As the lack of Polish citizenship is a deciding factor, the citizens of foreign countries living permanently abroad, but holding Polish citizenship as their second citizenship, may not be recognised as foreigners.

In principle, the provisions of the above law on foreigners are not applied to the four following categories of foreigners:

– personnel of diplomatic or consular missions;

– citizens of the Member States of the European Union, of the European Free Trade Association (EFTA), and of the Swiss Confederation and their families, who join them or stay with them;

– foreigners who have applied for protection or a covered by protection (refugees);

– repatriated persons and their closest family members.

The first three categories of persons have acquired privileged status under universally accepted principles of international law, and adopted by Poland through ratification of the relevant treaties. The last category is distinguished in national law and covers foreigners who have been given certain privileges (regarding travel documents, access to public schools, health care, and using cultural goods), owing to their Polish ethnic origin.

As regards the law applicable to foreign voters one has to refer to the Art. 37 of the Constitution of the Republic of Poland. Pursuant to this article:

1. Anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution.
2. Exemptions from this principle with respect to foreigners shall be specified by statute.

Therefore, the guiding principle is that a foreigner who resides in Poland, is subject to Polish law, just as any other Polish citizen. The limitations of this jurisdiction may result from bi- or multilateral international agreements concerning e.g. the status of diplomatic or military staff. In some situations, and with regard to certain specific elements of the foreigner's legal status, Polish law may also refer to the legislation of the country of origin of a given foreigner: e.g. a foreigner, or citizen of another European Union Member State permanently residing in Poland, has the right to vote in the municipal council elections, when entitled to such a right under the law of the country of origin.

2. Principles of the status of foreigner – voting rights

A foreigner living in Poland cannot participate in the elections – with the exception for European Parliament elections, which will be mentioned later. As to the principle, contained in Art. 62 of the Constitution, only Polish citizens have voting rights in elections held in Poland. This solution is typical for Polish provisions regarding the system of state. Both before and after World War II, possessing voting rights was closely linked with citizenship. The only exception was the parliamentary electoral law of 1991, which granted the right to vote in elections to the *Sejm* (lower chamber of Parliament) and the *Senate*, to stateless persons who had resided in Poland for at least 5 years. This provision has been in force for only two years and was not retained in the new election law of 1993.

Since May 2004, when Poland gained membership of the European Union, limited voting rights have also granted to the EU citizens. In accordance with Art. 19 of the Treaty establishing the European Community, every citizen of the Union[1] residing in a Member State of which he is not a national, shall have the right to vote and to stand as a candidate in municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.

[1] Despite its name, the citizenship of the European Union is not a supranational equivalent of citizenship of a state. Under the current state of law, it is rather a group privilege had by all citizenry of the EU Member States. No obligations are linked to the EU citizenship, whereas the catalogue of rights is of a very limited nature and includes the following:

– the right to move and reside freely within the territory of the Union;

– the right to vote and the right to stand in local and European elections in any Member State chosen as a place of residence;

– the right to protection by the diplomatic or consular authorities of other Member States when in a non-EU Member State;

– the right to petition and to apply to the bodies of the Union.

In the elections for municipal councils and the election of the municipal executive organs: *wójt* (in rural communities) or mayor, as well as in the European Parliamentary elections, the right to vote is bestowed on foreigners-EU citizens, permanently residing in Poland and that enjoy the same rights in the Member State of their citizenship. In the case of elections to municipal councils and the election of a *wójt*/mayor, there is an additional requirement to register a foreign voter in the permanent register of voters maintained in each municipality, no later than 12 months prior to the date of the election. Foreign nationals who possess the right to vote in municipal council elections, also have the right to vote in local referenda.

EU citizens are also eligible for election as candidates in the municipal council elections and for the European Parliament. They do not, however, have the right to stand as a candidate for the office of *wójt*/mayor.

As regards possible period of settlement in a given country needed to acquire electoral rights, such condition exists in Poland. In Polish legislation, the requirement for a minimum domicile period of one-year applies to foreigners-citizens of other EU Member States, who want the right to vote and to stand as a candidate in local elections. The requirement is formulated indirectly, through the obligation to register in a roll of voters not later than 12 months before the date of the election (see above). These registers are maintained by the municipals offices, on which the residents of a given municipality are listed. The obligation to register is, therefore, identical to the requirement to reside in Poland for one year prior to the election. It is worth noting that these provisions are generally of a liberal nature, without any further requirements, such as an uninterrupted period of residence in Poland.

The rationale behind the requirement of domicile is to ensure that only legitimate residents of the given municipality can participate in its elections. The point at issue is to protect the interests of the local community and to prevent election irregularities. One-year residence in the given municipality is deemed a sufficient safeguard.

Polish law differentiates between the situation of foreigners with respect to national and local elections. The nature of affiliation to the local community is different than that of nationality. The self-governing community (*gmina*) is defined by the criterion of residence and Art. 16 of the Constitution states that "the inhabitants [...] shall form a self-governing community in accordance with the law." The objectives of the community are centred on meeting the principal needs of its inhabitants. Those foreign nationals residing within its territory are concerned with the same problems of public transport, maintaining order, basic education or health protection as their Polish neighbours, as such naturally become members of the community and can participate in the election of their representatives to the public bodies governing these matters. The same view was voiced by the Constitutional Tribunal in its judgment of 11th May 2005, in case K 18/04:

The Constitution, being "the supreme law of the Republic" does not make the affiliation to a self-governing community conditional upon holding Polish citizenship. Belonging to a given community is decided by the place of residence (as a centre of living activity) which represent a fundamental bond in this type of communities. In elections to local authorities of territorial units (particularly in municipalities) the issue at stake is not the implementation of sovereign rights of the Nation but rather these of the community of residents. The latter represents the foundation of local self-government and whose membership encompasses all residents of a given self-governing unit, including foreigners – citizens of the European Union.

Nationality is created, in principle, with the acquisition of citizenship of a given state. It is the citizenship itself which involves political rights, including electoral rights. Pursuant to Art. 4 of the Constitution of Poland: "Supreme power in the Republic of Poland shall be vested in the Nation" – where, "the Nation" is construed as a community of citizens vested with rights and obligations towards their state. The essence of the bond created through citizenship, results in the right of citizens to co-decide the direction of their state, and to exercise their sovereign rights through the act of voting. A foreigner who is not a member of the collective Sovereign is excluded from participating in the exercise of sovereign power.

Long term settlement gives no right to claim electoral capacity in Poland. In accordance with Polish legislation, simply residing in Poland for a long time and creating personal and economic ties with Poland are not sufficient premises for acquiring election rights. These ties may, however, provide the basis for applying for Polish citizenship – and with it, the full spectrum of civic rights, including electoral rights.

Foreigners living in Poland can be differentiated with respect to the voting right on the basis of their citizenship. Following the provisions contained in the Treaty establishing the European Community, Polish legislation grants limited electoral rights to foreigners – EU citizens. This privilege has the *de facto* feature of reciprocity; namely, it is given only to the citizens of those states in which Polish citizens are entitled to the same rights. In view of this element of reciprocity, it may not be considered as discrimination against non-EU foreign nationals.

It has to said with regard to offering voting capability to selected foreign nationals, that granting political rights to persons is an element of a sovereign (legal) *imperium* of any state. Providing that relevant regulations do not infringe upon binding international standards, then countries are free to shape their election legislation, including granting electoral rights to persons other than their own citizens.

It is a separate matter, as to whether in exercising these electoral rights, the citizens of other countries infringe upon the legislation of their countries of origin.

3. Procedure applicable and practice of foreign voting

According to the data from the Office for Foreigners, in June 2009, there were ca. 115 000 foreigners in Poland, including more than 25 000 EU citizens intending to reside for long time. In previous years, these numbers were similar.

According to the same source, in the period 2001–2009, an average of around 2000 foreigners per year were granted Polish citizenship. Such numbers constitute less than 2% of the number of foreigners, legally staying in the territory of the Republic of Poland. Nevertheless, it should be noted that this percentage is actually somewhat lower, because some of the new citizens are descendants of Polish emigrants, permanently residing abroad, who want to restore ties with their ancestral homeland.

Election statistics show the real scale of a problem. According to the data from the National Election Office, in the last local government elections in November 2006, 187 foreigners having the right to vote had registered in the relevant electoral register. The right to stand as candidates was taken up by 6 foreigners residing in Poland, and one of them was elected to the municipal council.

In June 2009, in the election to the European Parliament (EP), 368 foreigners registered as voters, could participate. Two foreigners stood for election to the EP , although they were not successful.

Unfortunately in case of these two elections there is no data on how many foreigners have actually made use of their right to vote.

Given the number of foreign nationals involved in Polish elections for last twenty years there is no surprise no list including only foreigners has ever been submitted in any election carried out in Poland. Furthermore Polish law does not include recommendations neither to include nor to not include foreigners on a list of candidates, and there were no postulates to introduce such provisions either.

According to Polish law there are no obstacles for a foreigner living in Poland to participate in elections in his country of origin. In fact the law does not regulate the issue of exercising electoral rights in the country of origin by residing foreigners. Therefore, the only limitations in this respect can result exclusively from the legal provisions of the country of origin.

Similar situation applies to participation in election campaigns in the country of origin by the foreigners residing in Poland. Polish law does not regulate the issue of such participation. In principle, the only limitations of these activities result exclusively from the legal provisions in the country of origin.

As regards campaigning in elections held in other states, it should be noted that any pronouncements and activities constituting elements of such a campaign, are assessed in line with the provisions of Polish law. Thus, a foreigner may be brought to trial before a Polish court, where the provisions of Polish law

are breached in the course of such a campaign, e.g. those which prohibit the inciting of racial discord between nations or are intended to protect people against insults.

It seems that with respect to offences against elections the situation will be different. In Chapter XXXI, the Polish Penal Code penalises a number of acts which adversely affect the organisation, conduct or participation in an election, although this catalogue is a closed list and principally limited to elections that take place in Poland. Therefore, these acts would not apply to offences relating to foreign elections. The only exception from this exclusion could be offences, relating to elections to the European Parliament carried out in other Members States of the Union.

As it was already mentioned above, citizens of the European Union, that are permanently residing in Poland and that have the right to stand in their individual Member States, may present themselves as candidates for municipal (local) councils, i.e. the bodies of the basic territorial units deciding about local matters.

The Polish electoral law covering elections to local government, pursuant to the provision of Art. 4 (3) of Directive 94/80/EC, lays down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections, including an additional requirement for a one-year period of domicile in the municipality; namely, that the foreign voter or candidate must have entered in the register of voters, not later than 12 months before the date of the local elections.

The citizens of the Union do not, however, have the right to stand as candidates for the position of a directly elected *wójt*/mayor of a municipality. The *wójt*/mayor is an executive organ of the municipality, and the provisions of the EC Treaty allow the Members States to restrict access to these public administrative functions, to their own citizens. It is an expression of respect towards the sovereignty of Member States. The Polish legislation used this possibility and have restricted the right to exercise the function of *wójt*/mayor only to Polish citizens (Art. 26 § 2a of the Act of 8 March 1990 on local government).

As regards a chance for certain *commutarianism* being adopted following the pressure of foreign inhabitants the figures given above had to be recalled. Both the number of foreigners relative to the total population, and their voting activity are low. Hence, the lack of any relevant experience of this issue as well as any theoretical studies on this topic. If specific *communitarism* is to be understood as a tendency to regard, in certain conditions, the customary standards of foreign communities as being equivalent or prevailing over Polish legal standards, such a phenomenon does not seem probable. Both the legislation and jurisprudence are based on the principle, of the absolute primacy of statutory law over customary (common) law. Attempts made by members of ethnic minorities (Polish citizens) to invoke religious or customary standards contrary to Polish regulations, have been explicitly dismissed by Polish courts.

SECTION IV B

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THE CONSTITUTIONAL COURT AS A POSITIVE LEGISLATOR

1. Preliminary remarks

It is more than evident that the constitutional court – in the European system – has a considerable impact on the legislative process. The classical separation of powers, based upon the Montesquieu's model, cannot be considered sufficient to describe the reality or – more accurately – the infrastructure of the modern state of law. Owing to the channelled system of constitutional review, the constitutional court cannot be directly classified as one of the legislative or judicial organs, however broadly understood. Nonetheless, the Kelsenian concept of constitutional justice involves a distinct division between the legislative power and prerogatives of the constitutional court:[1] in this perspective the constitutional court does introduce some changes to the legislative system, but acts only as a negative legislator. It is not the competence of the constitutional court to make laws or to bring into the legal order any normative elements, which have not been established before under an appropriate legislative procedure; therefore, the constitutional court may not replace the legislator in this process. The constitutional review is based on a coherent structure of a hierarchical legal system and the constitutional court has to operate within this order, drawing its own competence from the constitutional legislator. Judgments passed by the constitutional court cannot contain anything that has not been already proclaimed by the supreme norm laid down in the Constitution, whereas the role of the constitutional review will always be limited to the application of

[1] Cf. H. K e l s e n, *Istota i rozwój sądownictwa konstytucyjnego* [The Essence and the Development of the Constitutional Justice], Warszawa 2009, published by Biuro Trybunału Konstytucyjnego (transl. B. Banaszkiewicz). In Kelsen's opinion "The institution of constitutional jurisprudence not only does not contradict the principle of separation of powers, but – on the contrary – it confirms it" (p. 40) and further "…a negative legislator, i.e. the constitutional court, is in its operation essentially determined by the constitution, and it is in this very moment that its function is the same as the function of the courts in general: it involves mostly application of law and – in this sense – effective exercise of the judicial power […]. The structure of this organ is not determined by any other rules than those which apply to the organization of courts or, generally, to the organs exercising executive power".

law – although placed at the highest level of the normative hierarchy – and cannot involve creation of norms.

This apparently clear and simple model of constitutional review, strictly determining the position of the constitutional court, seems difficult to defend, as proven by the long-established, nearly a hundred-year tradition of constitutional justice in Europe. The model loses its coherence in two dimensions: firstly, in the area of the court's competence to create this normative sphere which, in turn, creates the model of constitutional review, i.e. the very constitutional norm. Secondly, the conception lacks coherence from the point of view of the constitutional court's prerogatives with regard to the norms which are subject to review, i.e. the statutes. In both these dimensions there are elements that require revision of our ideas concerning the position of the constitutional court, which is formally regarded – as postulated by the Kelsenian model – as an organ with a competence of a "negative legislator" only.[2]

My analysis will attempt to identify which factors play a role in revising our idea of the constitutional justice. I will also try to establish whether the modern tendencies are an involuntary and dangerous deformation of the function of constitutional justice or – on the contrary – may be treated as inevitable consequence of the adopted model of constitutionality of law, and the stimulating mechanisms – as inscribed into the "nature" of this organ?[3]

2. What is the function of the court as a positive legislator?

The opinion that the modern constitutional court more and more often performs legislative functions, replacing the legislator in its role of the lawmaker, is

[2] Such an approach is still considered obligatory in all official documents of the Polish Constitutional Tribunal, cf. e.g. the position presented in "Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego" [Information on important problems arising from the activity and jurisprudence of the Constitutional Tribunal] in 2008, Warszawa 2009, p. 15: "The constitutional principle of separation of powers excludes, in consequence, participation of the Constitutional Tribunal in the exercise of legislative power and imposes a self-restraining approach when evaluating petitions and complaints questioning the normative solutions adopted by the legislator." See also judgment of 19 July 2007, K11/ 06.

[3] In the Polish literature this issue has been long discussed, cf. e.g. R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* [Lawmaking judgments of the Constitutional Tribunal in the jurisprudence of Supreme Administrative Court], Lexis Nexis 2008; K. Gonera, E. Łętowska, "Wieloaspektowość następstw stwierdzania niekonstytucyjności" [Multi aspects of effects of the judgment on unconstitutionality of legal provisions], *Państwo i Prawo* 2008, No. 5, p. 20 and following. See also L. Garlicki, *Ewolucja ustrojowej roli i kompetencji polskiego Trybunału Konstytucyjnego* [Evolution of the structural role and competence of the Polish Constitutional Tribunal], ed. M. Zubik, Warszawa 2006; M. Safjan, "Skutki prawne orzeczeń Trybunału Konstytucyjnego" [Legal effects of the judgments of the Constitutional Tribunal], Państwo i Prawo 2003, No. 3.

quite frequent in the doctrine of constitutional justice. It also entails a more general conclusion: that of a gradual transformation of parliamentary democracy in the "judicial" democracy or – even – in the "judicial government".[4] Without going into detail, it is worth reflecting how – theoretically – the constitutional court takes over the prerogatives of a positive legislator. Most generally, we should assume that the role of a positive legislator implies creation of new normative content in relation to the existing legal state: either with respect to the very model (i.e. the constitutional norm), or to the legal acts (lower rank legislation) which undergo constitutional review. Although the methods and mechanisms of positive impact may vary substantially, they usually remain somewhat "concealed", never being openly proclaimed or clearly expressed in a legal solution, as it would transgress the boundaries of the ethos and ideology of constitutional justice.

The first part of this paper will present indirect positive impact connected with the conception of the constitutional court as a negative legislator, while the second will look at the positive influence, having a different form, much more profound than just the "positive reflex" of a negative ruling. In the last chapter I will attempt to evaluate these tendencies.

3. Indirect positive impact – effects of "negative legislation"

The opinion that the constitutional court – when declaring a normative act unconstitutional – exerts a direct impact on the existing legal order is certainly banal. *A posteriori* review may be exercised in many ways and the procedures adopted in this respect in various systems may differ substantially. The Polish model – like some other in Europe – envisages a procedure initiated both under the so called abstract review (that is – not connected with a concrete case) by a constitutionally defined group of legitimized bodies,[5] and – as in the case of

[4] See Alec Stone Sweet, *Governing with judges. Constitutional politics in Europe*, Oxford University Press 2000; M. D a v i e s, "Government of Judges. An Historical Review", *American Journal of Comparative Law* 1987, No. 35, p. 559 and following; *Judicial Discretion in European Perspective*, ed. O.Wiklund, Kluwer Law International 2004.

[5] **Art. 191 ust. 1.** The following may make application to the Constitutional Tribunal regarding matters specified in Art. 188:1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights, 2) the National Council of the Judiciary, to the extent specified in Art. 186 § 2; 3) the constitutive organs of units of local self-government; 4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations; 5) churches and religious organizations; 6) the subjects referred to in Art. 79 to the extent specified therein**. 2.** The

concrete review – a procedure initiated through an individual application to the Constitutional Tribunal[6] or through a question of law submitted by a court in a pending case.[7] In the last two cases the question of unconstitutionality is connected with concrete court proceedings: either closed with a final judgment (individual petition) or still pending. The type of review procedure, however, is not important for the character of the judgment passed by the constitutional court. In both categories the ruling is always abstract: it contains an *in abstracto* evaluation of constitutionality of a legal norm. In the Polish model, the judgments passed by the Constitutional Tribunal always refer to the law not to the facts (the Tribunal's verdict expresses its evaluation of the law not of a given court's decision).

If a normative act is declared unconstitutional, its provisions which were questioned by the Tribunal become void and, consequently, eliminated from the legal system. However, the "negative" effects of such a decision cannot be reduced to this simple statement because the impact exerted by a judgment declaring unconstitutionality of an act is far more complicated. A negative decision not only eliminates a legal norm from the system (negative effect) but also – and not infrequently – makes an impact on other provisions of law by modifying their present meaning (positive effect).

Firstly, no provision acts in legal vacuum. Therefore, elimination of a constitutional provision does not necessarily create a loophole in an area of law which was so far governed by the now unconstitutional provision, but it fills this "loophole" by enlarging the scope of other provisions. It is, therefore, nothing else but a (positive) amendment to the content of a legal norm; what is more, the amendment affects a different norm than the one which was reviewed and eliminated. Thus, elimination of e.g. a special law (*lex specialis*) by its very nature increases (positive effect) the scope of application of a general law (*lex generalis*), which is expressed in a well-known formula *lex specialis derogat lege generali*.[8]

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subjects referred to in § 1 sub § 3–5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

[6] **Art. 79. 1.** In accordance with principles specified by legal act, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a legal act or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution. **2**. The provisions of § 1 above shall not relate to the rights specified in Art. 56.

[7] Art. 193: Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or legal act, if the answer to such question of law will determine an issue currently before such court.

[8] We can quote here numerous examples e.g. elimination of a provision regulating statutory limitation of claims for specific relationships, which may lead to an application of a general norm (in different wording) in the scope of statutory limitation. (cf. judgment of 1st September 2006

Secondly, up to an extent in which there are retroactive consequences of a constitutional court judgment, the impact of the "negative legislator" will – by its nature – imply not only a simple elimination of a provision *pro futuro*, that is a ban on application of the unconstitutional norm in the future, but also an opportunity to modify the legal status (legal relations) – which is an essentially legislative function – in the past. In the Polish system the scope of influence of retroactive effects is controversial. Likewise, Polish law does not differ between a simple incompliance with the Constitution and invalidity of norms, as it is the case especially in the German system. The express wording of the Constitution, however, states very clearly that retroactive application of norms may undermine the decisions issued earlier (before the judgment was passed) by the public authority (i.e. courts and administrative organs) on the basis of the provisions found unconstitutional.[9] This creates a context of legal fiction which assumes that when a given (court or administrative) decision was issued, the provision of law (which was only later declared unconstitutional) was not in force. In result, a given legal situation can be evaluated according to different criteria (i.e. without taking into account the unconstitutional provision) and a new decision may be issued in the case in question (positive effect).[10]

Thirdly, it is possible – at least theoretically – to consider effects of a "negative decision" by the constitutional court whereby the former provisions, which were later replaced with new ones, come back into force and are then declared unconstitutional.[11] This would imply filling a loophole not with other currently binding provisions of law (e.g. general norms, cf. section 1), but with the norms earlier derogated by the very legislator. Assuming that such a hypothesis is correct would mean that the consequences of a constitutional judgment are *par excellence* positive, they enter the area of legislative prerogative because they bring back to life the norms which the positive legislator wished to eliminate from the system. Although this variant is rejected by most of the Polish doctrine,

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related to Art. 442 of the Civil Code SK 14/05, OTK ZU 2006/8 A/97); elimination of a provision reducing compensation may lead to an application of a general law concerning compensation (see judgment of 23 September 2003 related to Art. 160 Code of Administrative Procedure K 20 /02, OTK ZU 2003/7A/76).

[9] Cf. Art. 190 § 4: A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or legal act, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

[10] In the Polish system the scope of application of Art. 190 § 4 is broad and concerns all judgments, not only convictions but also civil judgments and administrative decisions.

[11] Cf. *inter alia* R. H a u s e r, J. T r z c i ń s k i, *op. cit*., p. 102 and following; P. R a d z i e w i c z, "Restoration of a legal provision in result of a judgment passed by the Constitutional Tribunal", *Przegląd Sejmowy* 2005, No. 3, p. 121 and following.

it cannot be totally abandoned since it was applied in at least one of the judgments of the Polish Constitutional Tribunal.[12]

Fourthly, the Polish system has a specific legal mechanism connected with declaration of constitutional unconformity of a normative act; it essentially consists in the possibility of adjournment of the effective date of a judgement passed by the Constitutional Tribunal.[13] This means that an unconstitutional normative act will be eliminated from the system only after the period specified in the judgment lapses (the period however may not exceed 18 months), and not – which is a rule – from the date of the judgment publication in the Official Gazette of the Republic of Poland.[14] This solution may be seen as a mechanism investing the Constitutional Tribunal with the function of positive legislator. Unlike in the case of a typical judgment, the constitutional court orders to apply certain provisions (positive effect), which were in this case declared unconstitutional, by setting a date until which the questioned normative act may temporarily remain in force. No other organ, except for the constitutional court, may order application of norms declared unconstitutional, which is paradoxical considering that the fundamental role of any constitutional court is to eliminate unconstitutional legal act and not to let them remain in force. Such solution raises doubts when applied in practice and is considered controversial; however, it is also difficult to deny the grounds which justify its validity. The main argument is the prevention of negative consequences for the legal system, which might occur if the provisions declared unconstitutional immediately lost their binding force, e.g. if the "loophole" created after derogation of unconstitutional provisions was filled with other provisions, which would generate yet a greater nonconformity

[12] Cf. judgment of 20 December 1999, K 4/99 concerning pension regulations. In this judgment the Constitutional Tribunal directly ordered restoration of the provision which was earlier in force, and did not contain elements considered unconstitutional. In the opinion of the Constitutional Tribunal […] declaration of material (related to the content of the provision) incompliance with the Constitution makes the provision void. In consequence, the amended provisions have to be quoted in the wording they had up to the date of promulgation of the amending provisions declared unconstitutional […].

[13] Cf. Art. 190 (3) of the Constitution. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a legal act or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

[14] Cf. Art. 190. 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. 2. Judgments of the Constitutional Tribunal regarding matters specified in Art. 188 shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*.

with the Constitution than further (prolonged) application of the provisions of the questioned normative act.[15] Irrespective of the correctness of such a solution, the consequences caused by the postponement of the effect of a judgment undoubtedly resemble the function of a positive rather than a negative legislator.

To recapitulate the analysis of the possible consequences of the most typical judgments of constitutional courts, such as those declaring unconstitutionality of a normative act, we should note that it is not always easy to draw the boundaries between the functions of the constitutional court as a positive or negative legislator. This phenomenon is not at all new and it essentially corresponds with the pure Kelsenian model, it is even quite a natural consequence of introduction of this model – provided we do not forget the banal truth that the laws do not operate in isolation, and therefore a legal norm decoded from the system is always an effect of application of inferential rules taking into account the relations between different provisions of law, often originating from different normative acts. It is therefore quite obvious that elimination of one element from a complex legal structure changes this structure in its different segments and may influence the content of the legal norm which is ultimately decoded from the system.

In the next part I will look at these mechanisms in constitutional jurisprudence which exert a much greater impact on legislation, and in some cases make it even possible to change the content of normative acts.

4. Direct forms of impact exerted by the constitutional courts vs. normative acts

4.1. Interpretation of the Constitution

As it was mentioned earlier in this paper, in constitutional jurisprudence, we may observe the positive impact on the normative acts either in relation to the constitutional model (constitutional norm which is the basis of review), or in relation to a norm which is subject to constitutional review.

The first situation (impact on the content of the constitutional norm) is strongly associated with a phenomenon defined in the European literature as judicial activism. This mechanism consists in open and creative interpretation of constitutional norms, especially those which have the form of the so called fundamental rules and general constitutional clauses. It is characteristic for each Constitution to employ a large number of "open" norms having undefined

[15] Cf. e.g. judgment related to parking fees the in cities of 10 December 2002, P6/02, OTK ZU2002/7A/91. The provisions establishing parking fees were found unconstitutional, but their immediate expiration could have caused total chaos in the capital city created by the drivers who would not have to pay any parking fees. The Constitutional Tribunal decided to defer the effective date of the judgment, giving the legislator a chance to pass new regulations.

(fuzzy) normative scope, expressing fundamental legal values and creating "axiology of the Constitution". This search for a normative content hidden in the general, undefined constitutional expressions, as well as decoding other – more precise and concrete – norms out of them, setting limits to the application of rules and establishing a special "hierarchy" between the colliding rules and values – is inscribed into the nature of interpretation of the Constitution and is closely connected with the essence of the function of each constitutional court.[16] This process is widely described in the contemporary legal literature and the reader can only be referred to some well-known titles.[17] Against the phenomenon of judicial activism or creativism, there appears a thesis of a "living constitution," which – being subject to the dynamic interpretation of the constitutional court – evolutionally changes its content, adapting its rules and values to the changing social context, in an attempt to meet the new challenges and expectations, but also to face the threats posed to a man by the contemporary world, and absorb the new phenomena and needs generated by the development of mechanisms governing the society or by the constant development of science and technology. The constitution exists therefore through creative constitutional jurisprudence, which gradually and evolutionally shapes its content, ensuring stability of the rules expressed therein.[18] One of the important – although often neglected – arguments supporting judicial activism is the pursuit of, what is sometimes called, normativisation of the constitution, and consists in drawing – from open, generally formulated rules – concrete normative content, without which the constitution would be merely an act of purely ideological proclamation, non translatable into concrete rights, freedoms but also duties (obligations). Radiating of the constitution and constitutionalization of the legal system by decoding concrete content from the axiology expressed by the rules and clauses, however, inevitably invests judges with prerogatives, which bring their activity

[16] Cf. Ch. F. Z u r n, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge University Press 2007, p. 264 ("If however, any organ with the power of constitutional review is introduced into the system and if the protection – elaboration dynamics is unavoidable, then the authorized constitutional review organ will be ineluctably involved with the generation of general and prospective constitutionals norms, and thereby undermine the classical conception of the separation of powers".)

[17] See first of all R. D w o r k i n, *Biorąc prawa poważnie* [Taking the laws seriously], Warszawa 1998; R. A l e x y, *The Argument for Injustice. A reply to legal positivism*, Oxford University Press 2004; J. R a w l s, *Teoria sprawiedliwości* [A theory of justice], Warszawa 1994.

[18] It would be difficult to assume that this thesis is commonly accepted, cf. e.g. fundamental opposition against the interpretative assumption so formulated by the Judge Atonin Scalia: "A change occurred in the last half of the 20th century, and I am sorry to say that my Court was responsible for it. It was my Court that invented the notion of a 'living Constitution'. Beginning with the Cruel and Unusual Punishment Clause of our Eighth Amendment, we developed the doctrine that the meaning of the Constitution could change over time, to comporte with the evolving standards of decency that mark the progress of a maturing society" (see *Mullash of the West: Judges as moral arbiters*, Warszawa, August 24, 2009. Lecture delivered upon invitation by the Commissioner for Citizens' Rights).

closer to the creational functions of law.[19] This short study is not able to answer the question about the character and nature of the process of decoding the content from undefined constitutional norms. This answer could vary considering the difference of the research perspective: in a purely formal analysis we are always confined to mere explanation indicating the boundaries of judicial "interpretation," which remain in this perspective only a process of application of norms, not their creation. In the theoretical, philosophical and sociological analysis, the constitutional court lays down norms, which it decodes from the rules and values included in the undefined constitutional expressions. However, if we do not want to lose this process in the essay devoted to the function of the constitutional court as a positive legislator, it should be included in this analysis.

The Polish constitutional court is characterized by quite a large scope of judicial activism. In the first period of the Tribunal's activity, especially after 1989, the scope of activism was determined by a given historical context connected with the fall of a totalitarian system and a necessity to re-build the structures of a democratic state of law.[20] The fundamental political transformation, in the period when adequate constitutional norms were still missing,[21] practically pushed the constitutional court towards substantial creativity, which consisted in decoding the standards of rights and freedoms – which were not directly expressed in the constitutional norms – from the axiology of a new democratic system. The judgments which laid down such standards in fact complemented the existing constitution, and the rules formulated in the judgments of the Constitutional Tribunal were later anchored in express provisions of the new Constitution. The key role here was that of the "rule of democratic state of law," introduced shortly after the fall of the communist system. From this very rule, the jurisprudence derived, among others, such fundamental rules as the right to the protection of human life before birth,[22] the right to trial,[23] the right to protection of privacy,[24] ban on retroaction,[25] the rule of protection of duly

[19] This is concisely described in an essay by Mauro Cappelletti: "And judges do not make those choices through any powers of mystical divination: the law is not revealed to them, but decided by them. If judges are the mouths of the law, they are also – to some inevitable extent – the writers of the script" (cf. "Some Thoughts on Judicial law-Making," [in:] *Mélanges en l'honneur d'Imre Zajtay*, Tubungen 1982, p. 100). See also E. McW h i n n e y, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review*, Dordrecht 1986, p. 89 and following.

[20] See especially W. S a d u r s k i, *Rights before Courts. A Study of Constitutional Courts In Post-communist States of Central and Eastern Europe*, Springer 2005.

[21] After 1989 till 1997 (when the new Constitution came into force) to a large extent, the provisions of the old, communist Constitution were still binding, only partly amended by the new Constitution, which introduced, among others, the rule of democratic state of law.

[22] Cf. judgment of 28 May 1997, K 26/96,OTK ZU 1997/2/19.

[23] Cf. e.g. judgment of 7 January 1992, K8/91, OTK ZU 1992, part I, p. 76–84; of 27 June 1995 K4/94, OTK 1993, part II, p. 297–310.

[24] Cf. judgment of 24 June 1997, K21797,OTK ZU 1997/12/23.

acquired rights,[26] rules of the so called decent legislation,[27] protection of business in course and legal security,[28] or principle of proportionality.[29] Most of these rules belong to the cannon of universal democratic values, adopted expressly in the constitutions of most democratic states. However, we are justified to pose a question whether the constitutional court was authorized to create these rules and to introduce them to the system on the basis of a general and template-like constitutional norm, which expresses the principle of the democratic state of law. From the historical perspective, the process of system transformation, within which creativity of constitutional court and its pro-democratic determination was a factor which substantially determined the pace and direction of the changes, I have no doubt that the social and political revolution justified such an attitude of the constitutional court. Nonetheless, the answer to such a question may be different if we look at this phenomenon unemotionally and analyze acceptable limits of judicial interpretation, which clearly transforms into the creation of norms of constitutional importance. Can relativization of these limits be justified, taking into account the historical aspect, political context and aspirations of the society? At this moment we may well put this question but will have to leave it without a definite answer.

In the period which followed proclamation of the new Constitution, the significance of the "rule of democratic state of law" decreased. Many of the rules decoded by the jurisprudence from the democratic state of law, were directly included in the Constitution. Although the scale and direction of judicial activism changed, the nature of the phenomenon of "creation" of norms of constitutional significance did not. Under the binding constitution, the role of the key principle – which is the basis for creative pursuit of judicial perfection, like in the jurisprudence of other constitutional courts, especially the Federal Constitutional Court of Germany – is performed by the rule of the protection of

[25] Cf. e.g. judgment of 22 August 1990, K7/90, OTK 1990, p. 42–58 (concerning pension benefits to employees).

[26] Cf. judgment of 25 February 1992, K3/9, OTK 1992, part 1, item 1 (concerning acquisition of the property of the communist party).

[27] This rule, also in the light of the present Constitution is not expressed directly and is based solely on constitutional jurisprudence. The constitutional court has derived from this rule – among others – an order for legal provisions to be clear and understandable, cf. e.g. judgment of 15 December 2008, P57/07, OTK ZU 2008/10A/178.

[28] Cf. judgment of 15 July 1996, K5/96, OTK ZU 1996, part II, p. 16–28 (concerning customs duties). Jurisprudence based on this rule a precise order to pass new tax solutions no later than one moth before the commencement of fiscal year, since citizens should not be surprised during the fiscal year with changes not envisaged earlier by the tax regulations.

[29] Cf. e.g. judgment of 26 April 1995, K11/94, OTK 1995, part I, item 12 (formula of proportionality adopted in the jurisprudence was then *de facto* incorporated in the text of new Constitution of 1997).

inviolable human dignity.[30] This rule was recently applied in the judgment on unacceptable use of certain preventive measures in the combat against terrorism,[31] and earlier it was the basis for eviction of an illegal tenant.[32] Another example is a judgment in which the constitutional court found significant normative content in the rule of protection of the common good. This principle was one of the grounds to declare unconstitutional the solutions adopted in the national health system, due to a lack of transparent rules of availability of medical services offered by the system of public health care.[33] In the process of decoding rules (and – *de facto* – their creation) and finding a new normative content, the quality of the argumentative process applied by the constitutional court becomes increasingly important. Growing expectations in respect of the quality of the arguments used by the court are not only a test for the correctness of the judgments but also pose real limits to judicial arbitrariness.

In the process of decoding the rules of the system, the constitutional court essentially avoids adopting a way of interpretation which would lead to imposing a certain vision in the sphere of social and economic policies, which in turn would direct the activities of the parliament and government towards some specific legal solutions. It is pretty evident, however, that a modern European state, member of the European Union, has strongly determined directions of social and economic solutions, in which the fundamental rules of the system and the protection of fundamental rights clearly overlap with specific solutions in the social, economic or fiscal sphere.[34] In such perspective, all solutions of social or economic nature adopted in the system may acquire a constitutional dimension

[30] Cf. *inter alia* F. R y m a r z, "Zasada ochrony przyrodzonej i niezbywalnej godności człowieka w orzecznictwie Trybunału Konstytucyjnego" [The Principle of the Human Dignity in the Jurisprudence of the Constitutional Jurisprudence], *Przegląd Sądowy* 2003, No. 6, p. 3–22; *Godność człowieka jako kategoria prawna* [The Human Dignity as the Legal Notion], ed. K. Complak, Warszawa 2001.

[31] Cf. judgment on prohibition of preventive shooting down a passenger aircraft with innocent passengers aboard dated 30 September 2008, K44/07, OTK ZU 2008/7A/126.

[32] Cf. judgment on eviction of 14 December 2007, K 26/05, OTK ZU2007/11A/153.

[33] Cf. judgment of 7 January 2004, K14/03, OTK ZU 2004/1A/1.

[34] Cf. such provisions as Art. 20 of the Constitution (A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland); concerning social security of a retired employee.

Art. 67: A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute.

Art. 76: Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute.

and push the constitutional courts (like the European Court of Justice[35]) to look for concrete, more and more detailed answers in the rules such as e.g. prohibition of all discrimination, protection of social rights or the rule of economic freedom.[36] These tendencies may be enhanced by the fact that a broad catalogue of general rules related to social and economic rights and defining the economic system following the rule of "social market economy" (Art. 20 of the Constitution) are introduced to the constitution. Against the background of such constitutional constellation it is difficult to avoid confusion of the creative and interpretative function and inevitable tendency shown by the constitutional court to enter – creatively – the sphere of programme conceptions which not so long ago were exclusive to the prerogatives of the positive legislator. If these rules are not to remain a pure ideology and constitutional decorum, expressing the "wishful thinking" attitude of the authors of the Constitution, the constitutional court by turning rules into norms, and seeking at least a minimal normative content in the so called programme norms[37] will at the same time exert an increasingly stronger influence on the directions of state policy in these sphears.

To conclude, we can say that the modern constitutional court transforms into a "positive legislator" first and foremost in the process of interpretation of general and undefined constitutional norms. However banal is the thesis that the interpretative attempts – always anticipating the application of law (not only *clara* but *omnia sunt interpretanda*) and seeking concrete normative content – are getting closer to the process of lawmaking. In the case of interpretation of constitutional norms, the area left to the discretion of the constitutional judge is far greater. This occurs especially when the process of interpretation of rules

[35] In jurisprudence of the European Court of Justice this tendency is very clear especially with regard to a broadly understood rule prohibiting discrimination, whose application in judicial practice leads to a considerable interference with the sphere of social solutions in Member States (e.g. with regard to employment contract), cf. application of non-discrimination rule in the European law; C. Mc H u g o, *Positive Action and Race Discrimantion: Challenges for the European Cour of Justice*, Firenze 2005; D. M a r t i n, *Egalité et non-discrimnation dans la jurisprudence communautaire. Étude critique à la lumière d'une approche comparatiste*, Bruxelles 2006, p. 588 and following.

[36] Application of these general rules in the European law is associated with a usually creative, lawmaking role of the European Court of Justice, see e.g. J. P. P u i s s o c h e t, « Des Traités et des Juges: la Fonction de la Jurisprudence dans l'élaboration du droit communautaire », [in:] *Problèmes d'interprétation à la mémoire de Constaninos N. Kakouris*, Bruxelles–Bruylan 2003, p. 303 et suiv. Cf. S. W e a t h e r i l l, "The Constitutional Competence of the EU to deliver Social Justice, " ERCE 2006, No 2, p. 135.

[37] Such attempts to decode positive normative content from the so called programme norms are made by jurisprudence, cf. e.g. judgment concerning the law on National Health Fund of 7 January 2004, K14703, OTK ZU 2004/1A/1; protection of consumer (bio-fules) of 21 April 2004, K33/03, OTK ZU 2004/4A/31; protection of tenants judgments of 12 January 2001, P11/98, OTK ZU2000/1/3, and of 19 April 2005, K 4/05, OTK ZU 2005/4A/37; social market economy of 29 January 2007, P5/05, 2007/1A/1.

is inevitably connected with the so called *moral choices*, where certain values, which are not directly expressed in the system or moral preferences of the judges themselves, become reference points. In Poland, like in many other countries, the most typical case is the judgment on admissibility of abortion on the so called social grounds,[38] where the field of choice was placed on the top of the system, touching the fundamental notions related to the definition of a person on the one hand, and those of human autonomy and privacy on the other.

Now, we will discuss another form of the impact exerted by the constitutional court on the content of law – this time – the subject of constitutional review.

4.2. Interpretation of laws. Interpretative rulings

Many European constitutional courts apply in their practice not only the classical judgments declaring unconstitutionality of a normative act, but also other forms of rulings, which are inconsistently defined as interpretative, conditional or partial judgments (the latter review a norm only up to a certain extent).[39] It is quite difficult here to talk about precise classifications or definitions since these terms have not been defined and, what is more, they are not envisaged by the constitutional norms, while different meanings are ascribed to them. Their common denominator is a situation in which the act under review remains in force but with a modified normative content. In this way we can reach our goal which is to restore the constitutional character of the norm under review, without strong interference with the legal order, which always and inevitably entails direct declaration of unconformity with an act placed on a higher hierarchical level.

The Polish constitutional practice has also developed another kind of judgments, which are not directly envisaged by the Constitution or by The Constitutional Tribunal Act. In its most typical form, the Tribunal adopts one of the following formulas: "provision X complies with the Constitution under the condition that it will be understood in the following way…," or "provision X understood as follows … complies with the Constitution" or "provision X understood in the following way … does not comply with the Constitution…".

[38] Cf. judgment on constitutionality of the law on abortion.

[39] Polish literature in this field is relatively broad, cf. e.g. A. Mączyński, *O tak zwanych wyrokach interpretacyjnych Trybunału Konstytucyjnego. Teoria i praktyka wykładni prawa* [So called the Interpretative Judgments of the Constitutional Court Theory and the Practice of the Law Interpretation], ed. P. Winczorek, Warszawa 2006; J. Trzciński, "Orzeczenia interpretacyjne Trybunału Konstytucyjnego" [Interpretative Judgments of the Constitutional Tribunal], *Państwo i Prawo* 2002, No. 1; A. Józefowicz, "Orzeczenia interpretacyjne Trybunału Konstytucyjnego" [Interpretative Judgments of the Constitutional Tribunal], *Państwo i Prawo* 1999, No. 11.

The so called partial judgments usually go further because they directly determine the normative elements included in the provision, which do not comply with a hierarchically higher act (e.g. "provision X up to an extent in which it envisages that … does not comply with the Constitution").

In all the cases mentioned above, the review norm remains in the system, which means that the content of the provision is changed (positive effect) without the need of direct legislative interference. In this way the constitutional court – metaphorically speaking – takes a shortcut, skipping the legislative stage which – typically – involves replacement of the defective norm with a norm that is structured correctly by the legislator. There is no doubt that the constitutional court acts in this case as a positive legislator.

However, the problem is not free from fundamental controversies, which have been expressed in the literature, and have even become a source of conflict between the Supreme Court and the Constitutional Tribunal.[40] The Supreme Court, opposing this practice of the Constitutional Tribunal, argues that the process of interpretation is strictly connected with the process of application of a given norm, and not with the procedure of its evaluation from the point of view of its conformity with a hierarchically higher act. Interpretation of law is the competence of common courts. Therefore, the view according to which a binding norm cannot be interpreted in a given way breaks into the prerogatives of the courts and can even limit their independence, whereby the courts are subordinate only to the Constitution and to the legal acts.[41] Counterarguments stress the essence of the prerogative of the Constitutional Tribunal, which, when analyzing constitutionality of a norm, cannot be restrained in its right to interfere with the legal order in a narrower scope (interpretative judgment), if it can do so in a much broader scope (*argumentum a maiori ad minus*). Elimination of a concrete normative meaning of a norm (and consequently, elimination of one or more possible meanings of a given norm) may be compared to a "laparoscopic surgery" versus an operation which always leaves a scar, i.e. an open wound. The "wound" is a loophole in the legal system and usually has complicated consequences with regard to the retroactive effects of a norm definitely eliminated from the system, which could have been avoided by accepting an interpretative judgment.[42] This problem is clearly illustrated by the fundamental conflict

[40] Cf. e.g. speech delivered by the President of the Constitutional Tribunal at the General Assembly of the Constitutional Tribunal in 2003.

[41] Cf. Art. 178 of the Constitution: Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

[42] Generally, the effects of an interpretative judgment may be more complicated. It seems for example that also in this case it is possible to undermine judgments and decisions passed earlier on the basis of an erroneous, unconstitutional interpretation of a given provision (Art. 190 (4) quoted above applies). It is also different in the case of partial judgments which consist in elimination of a fragment of a reviewed normative act.

between the two court instances, which arose in connection with an interpretative judgment related to an important provision of the Civil Code regulating the liability of the State for the damage inflicted to an individual by public functionaries (notion larger than public servants).[43] Issuing an interpretative judgment, and therefore avoiding derogation of a Civil Code provision, the Tribunal established a totally new regime of *ex delicto* liability for damages of the State, on the basis of an objective condition of illegality and eliminating the fault of the functionary as a condition of public authority liability. This interpretation, although in compliance with a norm of the new Constitution (Art. 77 (1)),[44] essentially opposed the interpretation adopted for nearly forty years in the court practice, especially in the practice of the Supreme Court. The latter interpretation was consistent about the fact that the fault of the direct culprit (functionary) is a necessary condition of the liability. This system did not allow any longer to maintain the State liability based on the condition of fault, but this does not mean that the line adopted by the Constitutional Tribunal was right. Perhaps it would have been right to declare–instead of the interpretative judgment – a full unconstitutionality of the provision of the Civil Code under review, and leave it to the legislator to adopt expressly a new norm of great importance for the interest of an individual and for realization of the legal guarantees expressed in the Constitution. This issue is now subject of polemics in the literature whereby it seems that interpretative judgments should not be treated as a method of changing a well-established and stable line adopted in the judgments by common courts. The subject of review and evaluation of constitutionality should be a norm understood in a way which results from the present court practice. The constitutional court would aspire to a role which never belonged to it if it was trying to reverse – by means of interpretative judgments – the established tendencies in the judicial practice, even if in effect we would obtain such an interpretation of a norm in the court practice which could not be made compliant with the Constitution. In such a situation, there is no other way out than to apply an instrument of review going further, i.e. a judgment declaring a norm entirely unconstitutional (we have to accept that an unambiguous court interpretation excludes in consequence the search for other meanings of the norm). In the judgment of the Constitutional Tribunal discussed above, the atypical character of the situation consisted in the fact that the earlier, long-standing court interpretation lost its validity when the new Constitution entered into force. It is justified to propose the so called "secondary constitutionality of a norm," i.e. a provision which originally conformed to the Constitution and became unconstitutional

[43] Cf. judgment of the Constitutional Tribunal of 4 XII 2001 in the case SK18/00, OTK ZU 2001/8/256.

[44] Art. 77 of the Constitution 1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.

after the Constitution was changed. Such was the case of interpretation adopted in the judgments related to the necessity of the condition of fault for the liability for damages caused by the functionary in the light of the previous provisions of the Constitution. We can accept that since 1997 the directive of interpretation of law in compliance with the Constitution led to a fundamental reform of this interpretation, which the Constitutional Tribunal has done in its judgment, creating a *de facto* new norm on the state's liability in the Civil Code.

4.3. Signalization

A specific form of the impact exerted by the constitutional court on the legislator is the so called signalization, which contains concrete proposals with regard to a domain, in which the practice clearly showed the need for urgent legislative intervention. Signalization is not a normative project, nor it is a binding opinion of the Constitutional Tribunal, and it is not directly connected with a given case, subject of the proceedings. It directs the legislator's attention to the problems of general nature, which cannot be presented on the grounds of the constitutional court when deciding about a concrete case.[45] The opinions about the purpose and usefulness of signalization are not unanimous. Can the constitutional court express – by means of signalization – a wider content than the one presented so far. An answer to this question is not unambiguous. On the one hand, there is little point in claiming that it would repeat the content earlier expressed in the judgments, while on the other hand, if we adopt a different opinion, it is easy to transgress a boundary, beyond which there are only automatic, positive proposals of legislative character, which may provoke accusations of political involvement of the court. Correctly structured signalization should always operate with unique certain parameters of future solutions resulting from constitutional regulations, and never ready-made normative solutions, if we want to respect the principle according to which the constitutional court must never replace the legislator in the choice of economic or social policies. As we mentioned above, it is difficult to apply this assumption in practice because certain constitutional criteria open up a broad area of freedom of evaluation. In my opinion, signalization should be treated as an instrument of an extraordinary character. Although I am not entirely certain about its usefulness, either, I would see it only with regard to such cases in which unconstitutionality of legal solutions in a certain domain results from legislative loopholes, and therefore is a consequence of what is defined as "legislative omission." The Constitutional Tribunal in Poland, like most constitutional courts, cannot declare

[45] Cf. e.g. signalization concerning protection of tenants of 29 June 2005, OTK ZU 2005/6A/77 and constitutional status of junior judges (court officers before formal appointment to the post of judge) of 30 October 2006, OTK ZU 2006/9A/146.

a legislative omission in its judgment, and therefore it has no measures to force the legislator to fill the normative loophole.[46]

5. Conclusions

The modern constitutional court, with its complex legal instrumentarium of impact on the legal system, becomes an increasingly active actor in the field of legislative activity. Parallel to the process of constitutionalisation of the legal system is a process of serious narrowing of the area of legislative freedom on the side of legislative bodies. The capacity of the Kelsenian *Grundnorm* being a point of reference for the hierarchic review of law is considerably enlarged, because the new constitutional norm has entered the spheres which it has never entered before in the traditional constitutions of the 19th c. and the beginning of the 20th c. A special role in this respect is played by the human rights, which are now strongly supported not only in the system of constitutional norms but also on the level of international acts, which most often have direct application in the national legal order and are hierarchically placed higher than the internal law. From this point of view, the principle of equal treatment has gained great popularity. Broadly understood, this principle may justify extensive interference of the constitutional court in the legal system and sometimes may have a form of express orders directed to the legislator to shape the legal relations in a concrete way.[47] In the contemporary, more and more integrated Europe, which is building a homogenous system of legal standards, in many domains, the role of the courts grows stronger and stronger, especially that of supranational courts, i.e. the European Court of Human Rights and European Court of Justice, in positive definition of what is the necessary component of the binding law. Towards the EU member states, the European Court of Justice plays a role of a specific

[46] Only the Hungarian constitutional court has such a prerogative… The constitutional court may find unconstitutional a provision showing e.g. legislative omissions. Unconstitutionality results from a lack of some specific element e.g. arbitrary omission by the legislator of a certain category of entities, which might benefit from given legislative preferences. See also, among others, judgment of 3 December 1996, K 25/95, of 9 X 2001 Sk8/00, of 16 XI 2004, P 19/03. There exist, however, a specific solution in the Polish law which allows to treat legislative omission by the common court as a premise for universal liability for compensation by public authority. Legislative omission may be treated as manifestation of the so called normative lawlessness, and thus constitute a premise for compensation liability of the State pursuant to an express provision of the Civil Code, cf. Art. 417. Cf. L. B o s e k, *Odpowiedzialność państwa za bezprawność legislacyjną* [State Liability for the Illegal Normative Acts], Warszawa 2007.

[47] Cf. M. S a f j a n, "Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania" [Horizontal Effects of the Fundamental Rights: the Contractual Freedom and the Principle of the Equal Treatment], *Kwartalnik Prawa Prywatnego* 2009, No. 2, p. 297 and following.

constitutional court of the European Union, and its judgments adopted especially in the preliminary reference proceedings and concerning interpretation of the European law, become an automatic source of obligation for the national legislator to such an extent, in which they decode from the European norm the necessary elements, which must be taken into account by the national legislator in the process of implementation of the EU rules.[48] Naturally, this function of the ECJ may be effectively exercised only in co-operation with national court instances, especially those of higher level i.e. with the supreme courts but also common courts, which play a role of the European Union courts. We must not therefore neglect the fact that in modern times it is not only the process of constitutionalization but also that of europeanization of law, which defines the boundaries, within which the positive legislator can move and determine the direction of adopted legal solutions. Apart from the interpretative directive ordering the interpretation of law in compliance with the constitutional norm, there is now a directive on interpretation in accordance with the European law (an interpretation friendly to the European law, a consequence of a widely adopted rule of community law being supreme to the national laws).[49] The consequences drawn here are sometimes quite far-reaching. The national court, denying application of a national norm which is contradictory to the European law or interpreting creatively a national norm in the spirit of a European norm *de facto* applies in the legal system a new, earlier non-existent, norm, thus becoming in a way a positive legislator on the level of a specific case. The process of hierarchical review of law, together with all its consequences, is now being systematically dispersed and decentralized in comparison to the Kelsenian model. In effect we note that never before the courts of the continental Europe have exerted such a strong impact on shaping the positive law as at the present level of European integration.

[48] Cf. broad literature on quasi legislative activity of ECJ, among others L. B u r g o r g u e-L a r s e n, « Les juges face à la charte. De la prudence à l'audace », [in:] *Face à la charte des droits fondamentaux de l'Union Européenne (sous la direction L. Burgorgue-Larsen)*, Bruxelles, p. 4 and following; M. V r a n k e n, "Role of the Advocate General in the Law – making process of the European Community," *Anglo-American Law Review* 1996, No 1, p. 39 and following; M. C a p p e l l e t t i, "Some Thoughts on Judicial Law-Making," [in:] *Mélanges en l'honneur d'Imre Zajtay*, Tubingen 1982, p. 97; O. D u e, "The Law-making Role of the European Court of Justice Considered in Particular from the Perspective of Individual and Undertakings," *Nordic Journal of International Law* 1994, Vol. 63, p. 123 and following. Cf. e.g. characteristic text of K. J. A l t e r and L. R. H e l f e r, "International Courts have in their DNA the capacity to be expansionist lawmakers" (Nature or Nurture? Judicial Law Making in the Euopean Court of Justice and the Andean Tribunal of Justice, Northwestern Law, Public Law and Legal Theory Series, No. 09–16, 2009, p. 24).

[49] Cf. especially judgment of 11 May 2005, K18/04, OTK ZU 2005, 4A/37; judgment of 17 July 2007, P16/06, OTK ZU 2007/7A/79.

Returning to my original question whether we are faced with the real *judicial government* which, having abandoned the traditional function of the arbiter and administrator of justice, actually aspires to governing, we may give this question a partially positive answer, unless we equal the exercise of power mostly with the legislative competences as it probably is in the structure of the state of law. However, we cannot at the same time neglect, at least potentially, threats to the model of a democratic state in which the will of the representatives of the nation should have a decisive role. The judges invested with ever greater power have to accept ensuing responsibility for the future of our democratic systems. It must be accompanied by the sense of self-restraint and humbleness towards the society which entrusts them with such a broad scope of power. This, however, is a topic for quite a different essay.

SECTION IV C

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HUMAN RIGHTS – UNIVERSAL AND NORMATIVE? (A FEW REMARKS FROM THE POLISH PERSPECTIVE)

1. Preliminary remark – the report's perspective

1.1. The report's title charts an extremely hazy perspective. The very notion of "human rights" is unclear. Is it a philosophical concept or a legal one? And if only the latter, then which one: **the one defined by acts of international law** or by one of the doctrinal interpretations?

If it were the question of legal acts, their universalism which is not unequivocal either.

Most often the universal dimension concerns – geographically – the UN acts, binding on the UN or world "scale." But for instance the European Convention on Human Rights is perceived rather as a regional act, even though in Europe it can now be treated as a universal one. Perhaps it is the question of axiological-cultural universalism, which has a bearing on particular regional acts? Human rights themselves are divided into generations, recognized according to the time of their appearance in the history of ideas and in international circulation and to the intensity of their effect (their own mechanisms ensuring particular laws, their execution and diverse methods of shaping the standards of behaviour).

Human rights are directly and indirectly concerned with by several treaties, international agreements, generally speaking, of acts recognized as international law; they differ in character, in subjective scope, in range, and they function (and bind) differently as sources of law. They are concerned with different groups of people – from the point of view of "universalism" – women, children, employees, migrants, aborigines, foreigners, the handicapped, etc. In this case universalism can be understood as protecting "someone," who can be treated as more or less universally perceived population. Human rights acts may concern protection "against something," against certain practices (tortures, discrimination of all sorts, etc.). One can then talk about "universalism," referring the term to the subject of threat. However, universalism may concern not only the subject, object and scope of the act, but, for instance, their "common core" within the framework of compared acts concerning human rights. Most often we talk about universalism of human rights in this sense, having in mind their rooting in man's dignity.

One can also talk about "human rights" having in mind the universality not of regulations but of the practical standard, determining the actually existing protection. In this case it will be possible to associate the notion of "universalism" with the question of place, time and reasons of diversity (universalization) of the standard.

Secondly, the notion of "universalism" has its own dimension in time and space. This, nest to the static dimension, when one describes and analyses the "existing state" (descriptive approach), there exist a dynamic dimension which refers to the course of the universalization of human right in different regions and epochs.

Thirdly, the binding effect also comprises a range of possible meanings. One can speculate whether it is the question of the "binding" of particular acts (types of acts) concerning human rights (where and how, with what effect, according to which model they are implemented in countries' systems) or of implementation, or of the "obligation to apply" (for whom, in relation to whom, in what way, with what consequence in case of violation of that obligation).

That is all – to limit ourselves to the problems *grosso modo* behind the wording of the title of the present paper.

The magnitude of problems[1] behind the "universality and the binding effect" of human rights demands choices and limits. The national report is only a substance for the general report, which will be presented at the congress of comparative law in Washington. The questionnaire which has been sent does not make it any easier to decipher the concept of the report or the suggestions concerning the expectation as to the choice of problems included in the national report.

1.2. For about twenty years Poland has been undergoing a systemic transformation consisting in coming closer to European democracies. Human rights (the UN pacts) and the European Convention have played and are still playing the part of axiological yeast. Thanks to human rights, Poland – and possibly also other countries of central and Eastern Europe – universalize (axiologically and ideologically) their own legal system. Reaching a definite level of protection of human rights is the condition of the access to the Council of Europe. In this situation, I present three issues in the present report (apart from the information – point 2 of the report – depicting the "state of things" concerning the implementation by Poland of acts of international law, including the acts regulating human rights). Therefore I write about human rights as a tool, thanks to which the Polish legal system has gained a category of fundamental constitutional rights. In the process of transformation, particularly in the

[1] Compare Ch. T o m u s c h a t, *Human Rights. Between Idealism and Realism*, Oxford 2008, p. 1–7.

Nineties, human rights played an important part as a factor adding dynamism to the transformation (points 3 and 4 of the report are devoted to that issue).

The remaining two parts (points 5 and 6) deal with specific conditions and obstacles to saturation of the social practice with the standards human rights. I believe that the description of the implementation of particular acts or the analysis of their contents are considerably less important than pointing out the causes actually influencing their applying in practice. I concentrate on the European Convention on the Protection of Human Rights and Fundamental Freedoms. It is the only act provided with an extensive mechanism – accessible to victims and at the same time having a direct influence on the states (state organs) which have violated human rights. Fore the reason of that feature it is an act which **has the greatest chance of exerting a real influence on the improvement of the social practice with regard to human rights.** I consider this improvement to be the main goal which should be served by the internationally undertaken initiatives whose aim is to work out and implement normative acts and acts regarding human rights.

2. Acts of international law concerning human rights and the Polish legal system (information)

2.1. Standpoint of the Constitution. The Polish Constitution of 1997, Art. 87 provides (a monistic model) that ratified international agreements are incorporated into the legal system (general incorporation), where they appear as one of the generally binding sources of law. Acts regarding human rights belong to the category which the Constitution itself (Art. 89 § 1 points 2 and 5) defines as requiring ratification. According to art. 91, after the ratification and promulgation, the ratified agreement is applied directly, "unless its application depends on issuing an act" (i.e. if the agreement is not self-executive). Furthermore, in Art. 91 § 2, the Constitution stipulates that an agreement ratified in agreement with an act has a higher force than the act but not higher than the Constitution. Furthermore: Art. 9 of the Constitution specifies that Poland observe international law by which she is bound; Art. 188 § 1 says that the Constitutional Tribunal examines the conformity of international agreements to the Constitution (i.e. it examined the conformity to the Constitution of the Treaty of Association with the EU);[2] before ratifying it, the President may apply to the Constitutional Tribunal to examine the agreement's conformity to the Constitution – Art. 133 § 3. There has been no practice so far of exercising this right.

[2] Verdict of the CT of 11.05.2005, sign. K 18/04, Zbiór Orzeczeń TK No. 51/2005, item 49.

2.2. Poland ratified UN human rights pacts and the European Convention. In 1977: the Pact on Civil and Political Rights and the Pact on Economic, Social and Cultural Rights; the Convention on the Protection of Human Rights and Fundamental Freedoms was ratified in 1993.

2.3. The Constitution of 1952, previously in force, did not regulate clearly the place of international law (including human rights) in the system of sources of law and their relation to domestic law. In practice international law did not act as a factor which dynamized the domestic law system. Courts did not apply international law (including human rights) directly, pledging obedience first of all to domestic law.

3. Human rights as a substitute for the human rights of an individual in the pre-transformation period and the source of constitutional inspiration in Central and Eastern Europe

In Poland (and this regularity can probably be attributed generally to all post-communist countries) human rights became at a certain point a substitute means of conveying the values, which in the countries of mature liberal democracy are protected by fundamental laws. In Western Europe it was the very principal laws and the experience in applying and executing them which paved the way for human rights in their normative shape. Without a fixed concept of the rule of law and fundamental laws, the European Convention on Human Rights would not have come into being. In Poland it was the other way round. The Constitution of 1952 (altered in this respect only in 1997 by the Constitution which is presently in force) did not include civil rights and freedoms in the form of fundamental laws as subjective rights, which would serve citizens, who could refer to them in court. The Polish constitution of 1952 was rather a paternalistic manifesto of the authorities' good intentions towards the society. It did not create instruments standing at the disposal of the citizen looking for protection of his constitutional freedoms and rights. No claims issued from it and there were no organs to which one might take legal proceedings for violating the constitution. There was no judical review of the administration (it was introduce in Poland only in 1980). There was no constitutional judicature, either (it was introduced in 1986). That accustomed the courts to the lack of criticism towards the legislator and the organs of administration. It was true even when the legislator clearly went beyond his accorded competences and the administration (not infrequently arbitrarily) interfered with the rights and freedoms of the individual. In that situation it was precisely the human rights – in particular the Pact on Civil, Political and Personal Rights and later also the European Convention that paved the road along which rights of the individual came to Poland.

In Western Europe fundamental rights found their way to constitutions thanks to the idea of the rule of law and the development of intellectual culture, inspired by that idea. On the other hand, it came to the voting the European Convention of Human Rights in 1950 because in advanced European democracies there existed – well anchored in their constitutions – fundamental rights of the individual. In Poland things were different. In the pre-transformation period, human rights first became a slogan for political opponents of the previous regime, and then it came to the ratification of pacts (1977) and the European Convention (1993), finally, after some more years, to reach constitutionalization (1997) of the fundamental rights of the individual in the Constitution itself.[3]

Thus the road to fundamental constitutional rights in Poland led through human rights – which is an example of characteristic reception (universalization!) of the European thought and legal culture. Universalization and prescriptivism of human rights in **Europe became the source of constitutional inspiration – for the use of domestic legal systems** – for the Central and Eastern part of that continent.

4. Human rights taking root in the consciousness of the players of the legal life

4.1. I shall start with a digression. In 1983 there appeared one of the most notorious rulings of the Polish Supreme Court,[4] both controversial and widely commented on. It denied the dismissed state functionaries all judiciary protection, leaving them only the possibility to appeal to their superior. This attitude met in Poland at the time with universal criticism from the scientific circles. Commentators condemned the ruling which was not a credit to the legal thought, especially because of its formalistic and evasive substantiation. Not only was the ruling wrong, but in fact it reversed the advancement of law. Yet nobody had the idea to quote directly Art. 14 of the Pact on Civil and Political Rights (at that time it had been ratified by Poland, in 1977), providing the right to a court hearing as the right granted to each individual. Commentators knew both the Human Rights pacts and the fact of their being ratified, as well as the contents of those acts, but they did not use that argument, criticising instead the specific ruling of the court.[5] For it was not a tradition in the Polish legal thinking to be able to attack efficiently on any ground anything that issued from an act. The constitution lacked principal rights

[3] The evolution in other post-communist countries has run the same course.

[4] III AZP 11/82.

[5] E. Ł ę t o w s k a, J. Ł ę t o w s k i, *Commentary to verdict of SC of 1.III.1983*, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1984, item 1c.

and human rights were not considered a real factor shaping the establishment's way of thinking or the judges' mentality.

In 1991 the Polish Supreme Court happened to judge a similar problem as in 1983. The question was whether in a case of moving a judge to a different court (the National Judiciary Council decides on that and its ruling is conclusive) – the judge is entitled to the protection of the court or not. Answering the question in the affirmative, the SC substantiated its stand:[6]

> The right to enjoy the protection of an independent court, or – to put it differently – **the right**, accessible to all on equal principles, **to a fair trial, in front of an impartial, independent court, is the characteristic feature of each democratic rule of law. … the possibility to enjoy judiciary protection is a permanent value, independent of influences of favourable circumstances or an economic crisis, social relations, state of law-abidingness or civil awareness. No consideration and especially the argument referring to the realities of a historic period may justify restriction of the access to court, just as no reasons may justify restriction of rights and freedoms…**

The Supreme Court's ruling from 1991 is only nine years apart from the previous one – but in the way of thinking – they are separated by a whole epoch. And it was not the Constitution which decided about that (as it has regulated the rights of the individual on the constitutional level as subjective rights only since 1997). The reason of the change, visible in the judicature of the Supreme Court was the awareness that human rights are a real borderline for the common legislator's freedom; also there appeared awareness that courts have the duty in their interpretation to be governed by the judicature (standard) issuing from human rights.

4.2. In the judicature of the highest judiciary instances in Poland in the period preceding the accession to the system of the Council of Europe and before voting of the Constitution, first the Supreme Court (and only later the Constitutional Tribunal!) started in the Nineties referring in their judicial decisions to human rights, the European Convention and even to Strasburg's judicial decisions,[7] treating it as a source of interpretative inspiration. It took two forms: either it induced courts to revise the hitherto existing interpretation (re-interpretation), or, sensibilizing them axiologically, it induced new, own interpretations "in the new spirit." Thus the European Convention, not binding in Poland at the time, inspired criticism towards the common legislator[8] and universalized its axiological premisses, influenced the legal system.

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[6] III AZP 9/92.

[7] Compare I ARN 45/93, ARN 49/93, I PRN 43/91, II AZP 28/92, III ARN 18/94.

[8] As examples of pre-access judicature one may quote: the judicature of the Constitutional Tribunal: K 8/91, 7.01.1992, OTK 1992 part 1, item 5; K 14/91, 11.02.1992, OTK 1992, part 1, item 7; W 3/94, 13.06.1994, OTK 1994 part I, item 26; the Supreme Court: I PZP 9/92, 10.04.1992, OSNCP No. 2/1992, item 210.

4.3. After the ratification of the EC (1993), since the Constitution at the time in force (from 1952; it was in force until 1997) and the constitutional practice did not provide clear solutions concerning the hierarchy of domestic or international law, nor did they pronounce themselves in favour of a direct application of international law by courts (the presently binding Constitution of 1997 contains both principles *expressis verbis*), **the Supreme Court declared the Convention (acting *ex proprio vigore*) to be the binding model**. It did so in the verdict I ARN 45/93, 7.2.1994, which stated: "Norms of international law may and should be applied in the domestic legal proceedings and they do not require any additional transforming actions. However, it concerns only such norms ... in which ... the possibility of such application issues from their content or other premisses accompanying the concluding." In a different ruling, the Supreme Court[9] quoted directly Art. 8 of the EC, as well as the necessity to make the assessment whether the prohibiting regulations issued (concerning the consumption of alcohol in public places), did not constitute excessive interference (**the principle of proportionality**, previously unknown in Polish judicature) from the point of view of Art. 8 § 3 EC, as they contained regulations "whose contents were excessive, arbitrary, irrational, unnecessary in a democratic society, infringing the fundamental civil rights and freedoms or human rights." In further rulings the Supreme Court stated that "from the moment of Poland's accession to the Council of Europe, **the judiciary of the European Court of Human Rights in Strasburg may and should be taken into account with the interpretation of Polish law**" – III ARN 75/94, 11.1.1995, OSNAP No. 9/1995, point 106.

4.4. Establishing in Poland the institution of the Commissioner for Human Rights (functioning from 1988) was important also for the promotion of human rights. Firstly, because the Commissioner used in her activity the standards defined in acts of international law (Pacts on Human Rights, the European Convention) as the standards with which to assess the Polish law, its interpretation and practice.[10] Thanks to that, critical remarks, contained in the Commissioner's official addresses to the parliament and the administration, disseminated by the media, promulgated the standards of human rights and placed the local practice in opposition to them. Secondly, the Commissioner drew attention to the discrepancy between the formal binding of human rights acts and the practical results of that binding. That peculiar, practical "agnosticism" in the perception of human rights in Poland, has not been

[9] III ARN 18/94, 8.04.1994, OSNAP No. 4/1994, item 55.

[10] Compare also A. K l i c h, "Human Rights in Poland: the Role of the Constitutional Tribunal and the Commissioner for Citizens' Rights," *Saint Louis-Warsaw Transatlantic Law Journal*, 1996.

overcome to this very day. The Commissioner[11] stressed very strongly that "she observes alarming agnosticism … lack of knowledge or conviction that the contents of the Constitution (Pacts) have to be taken into account when making law and applying it 'on a daily basis'; that the Constitution (Pacts) have to be a decisive criterion for the assessment whether a specific action can be considered 'proper' or 'improper'. … During her work in 1990, the Commissioner, willing to work towards the improvement of that state of things, endeavoured (especially when making general addresses) to point out the discrepancy between the Polish law and practice and the European standards. The reference to those models of proceeding concerns also the European Convention of 1950, not binding as yet, to which Poland is aspiring to accede. Against the background of the Convention there exists extensive judicature of the European Tribunal which the Commissioner endeavours to use, including in her addresses references to the European standards. It is to accustom the addresses' recipients to the thought of the existence of those models and to break their routine as expressed in their attitude of acceptance of the existing reality, shaped by the current practice and low rank regulations."

4.5. Promotional activities of that kind, carried out by the Supreme Court, the Highest Administrative Court, the Constitutional Tribunal and the Commissioner, supported by the opinion-forming academic circles, were in Poland in the Nineties the factor which initiated the changes in axiology, shaping the interpretation of law. It has probably also to do with the circumstance that at the time a group of new judges, coming from the academic circles, more open to the problems of human rights, started work in the courts of the highest instance (it was with their rulings that the changes started). Nevertheless, it must not be concealed that there exist political and ideological groups Poland who question the legitimateness and the need of axiologizing of the legal system, making use of human rights:

> The conflict is inevitable between our legal-natural philosophy of common good and the liberal religion of human rights. The conflict is inevitable with the false religion, usurping the status of the religion *de facto* … It is a religion which has its fundamentalists who look for the absolute rules of their faith in their own feelings and not in codified principles. Fundamentalists who strive to overthrow democracy (the nation's sovereignty) and to establish the ideological rule of supranational institutions"… Bearing in mind the fact that in the form of Human Rights we have to do with an attempt at a destruction of Christian civilization and its institutions, the Christian-National Union has opposed in the Parliament the recognition of the Strasburg Court of Human Rights as fit to determine the binding force of Polish acts or verdicts of Polish courts.[12]

[11] Biuletyn RPO-Mat. No. 9/1991, p. 31, Biuletyn RPO-Mat. No. 5/1990, p. 17.

[12] M. J u r e k, "Prawa człowieka czy troska o naród i ludzi" [Human rights or a concern for nation and people], *Sprawa Polska* 1992, No. 12, p. 1. The author was a deputy Speaker of the Parliament in the years 2006–2007.

4.6. Presently in the judicature of supreme courts: the Supreme Court, the Highest Administrative Court and the Constitutional Tribunal,[13] the EC is applied as a model influencing the interpretation and assessment of the correct interpretation of Polish law. However, it is an open question whether it happens in all cases when it is both possible and desirable. Certainly the practice of lower courts does not fill one with optimism in that respect: the inspirational activity of the EC is felt but faintly here to this very day. That means that human rights standards, formed by the European Convention, do not work "universally" within the Polish judicative. They are more visible in the practice of the courts of the highest instances, although here too one can notice a break-up of the consistent trend supporting the thesis about the universal and prescriptively binding character of human rights acts.[14] Presently one feels certain regression of the interest in the problems of human rights among the players of the legal life – it is partly caused by the fact that presently the attention of courts is drawn more by the problem of the application of European (community) law, which also the Polish courts need to get accustomed to; at the same time, committing an error in that area brings further reaching and faster initiated consequences than possible violation of human rights.

5. Difficulties with universalization by Polish courts of the standards of the European Convention

5.1. Tradition requires that the legal system be perceived as a hieratic and monocentric structure, functioning within the state borders. Meanwhile, contemporarily, instead of the hieratically built monocentric model, there appears (at least it is clearly visible in Europe) a multicentric model. It is characterised by a multitude of centres of decision with regard to the making and interpretation of law. Moreover, it is a cross-border model. In our times, in one country, one territory, there coexist, entirely legally, with regard to making, applying and **interpreting** law – external, borderless centres, proper for several countries. Not only does that disturb the traditional vision of legal order but also

[13] P. M i k ł a s z e w i c z, *Human Rights Scrutiny of International Law by Polish Constitutional Tribunal*, University of Trento, Department of Legal Sciences, Faculty of Law, 2008.

[14] Compare the SC resolution of 20.12.2007, I KZP 37/07, where the Supreme Court ruled that the absence in the Constitution of 1952 of a clear reference to international law (despite the existence of the binding *tempore criminis*) a proper regulation in human rights pacts, ratified already at the time, is an obstacle to applying those laws. The ruling concerned the delicate question of criminal courts during the martial law applying the rules established while breaching the principle of *lex retro non agit.* The resolution met with definite criticism in legal literature. It has to be added that the Supreme Court's opinion concerns the judgement of the events from a quarter of a century before.

additionally entangles it in ideological and political questions (disputes about sovereignty). The multicentric character of law and its interpretation is at present not only a fact, but indeed a necessity, and that is so because of the international cooperation and inspection (the common market). That situation requires tools making that coexistence possible: settling collisions, resolving conflicts, conducting the dialogue, without disturbing the very principle of several centres sharing the same field. In this respect, **the art of interpreting law gains a new dimension and new goals which it must meet. It now includes not only (1) the explanation of law (clarification), (2) not only the co-construction of the legal system (getting out norms from the legal system, within the decision-making margin of the subject which interprets that law, operating according to the rules which make that system – *Rechtsfindung*), but (3) but the duty to reach the final goal which those interpretational efforts are to serve (e.g. the effet utile, the order of a friendly interpretation of the community law**). The incorporation of the interpretation's goal into its notion, particularly when the goal is the respect of certain principles, considered crucial for the European order, shaped by the community law – takes diverse forms of appearance against the background of the community law (effet utile, direct efficiency of the community law, complete harmonization, granting domestic courts the status of community courts with particular duties, etc.). That universalization of the goal of interpretation concerns also the duty of interpretation in the domestic order in the way favourable towards the respect for human rights. For there exists a conflict between a particularistic interpretation of law and the global outlook of the European Court of Human Rights which can be overcome thanks to a true interpretational dialogue between local centres and the Court of Human Rights.

5.2. Incompatibility of the inspection of violation of human rights against the background of the European Convention and the inspection of constitutionality – an obstacle in the dialogue between the Court of Human Rights in Strasburg and the Constitutional Tribunal

The subject of review by the Court of Human Rights in Strasburg is violation of human rights by any of the domestic authorities (the legislator, the executive, and the courts). The review concerns only the ascertainment of violation and the assessment if it has its source in the violation of human rights and freedoms defined by the European Convention as the subjective rights of the individual. The role and competences of the Polish Constitutional Tribunal are different. The Tribunal examines the congruity of the Polish regulations with the Polish Constitution (inspection of the legislative). However, the activity of the executive and the courts is exempt from its inspection. Thus the object of assessment by the Constitutional Tribunal (assessment of the positive law itself, of the regulations) is different from the assessment by the European Court of Human Rights (assessment of the results of the behaviour of the legislator, the

executive, and the courts, which take the form of the violation of the subjective rights of the individual). The consequence of the Constitutional Tribunal's ruling is a disqualification of the regulations and their removal from the legal system. The consequence of the European Court of Human Rights' ruling on the other hand, is the ascertainment of the defective behaviour of the state ("the individual is right, not the state") and – a facultative granting of a financial compensation to the wronged person. On the other hand, the consequence of the ruling concerning violation of human rights is not any direct change in the legal system of the country where the violation has occurred.

The Constitutional Tribunal is bound to the European Court of Human Rights with a ratified international agreement. That is why the Tribunal interprets the contents of the Constitution through the ECHR standards. The ECHR judicature is quoted in the Constitutional Tribunal's rulings as a co-determinant (along with the Constitution itself) of the inspection standard. Nevertheless, it occurs that the standard defined by the Constitution is higher than that of the European Court of Human Rights. That is the case of the right to a court hearing (Art. 45 of the Polish Constitution and Art. 6 of the ECHR). In such cases the Constitutional Tribunal contents itself with the inspection of constitutionality, taking the higher standard as the measure with which to evaluate. However, the subject of review is different in the case of the Constitutional Tribunal and that of the European Court of Human Rights; the review of constitutionality concerns the conformity of law with the Constitution; with regard to the ECHR inspection – it is violation of the subjective right of the individual, protected by the Convention.

The Polish constitutional complaint,[15] although filed by the wronged person him/herself, does not tally as to its subject and range with the complaint filed in Strasburg. For it is always a complaint "against the regulation" and not against the verdict based on it. Thus if in the Polish Constitutional Tribunal a constitutional complaint has been filed containing the charge of unconstitutional applying of the law (the court and not the legislator has violated human rights) – then the Tribunal must dismiss the complaint as it has no competence to consider it. That situation justifies of course a complaint to Strasburg. The difference between the competences of the Polish Constitutional Tribunal and the ECHR contains a trap for someone looking for protection. Usually he does not know if the reason of the violation of his subjective right (the wrong sustained) is a faulty regulation or an incorrect application of a good one. If he then thinks that the reason of the violation rests with the law – he should (in order to exhaust the domestic procedures) first file his complaint in the CT and then go with his

[15] This makes the Polish model of the constitutional complaint different from e.g. the German, where the constitutional complaint concerns – as in Strasburg – the violation of the rights of the individual.

case to Strasburg. If his judgement is wrong (i.e. if the CT rules that the proceedings of the court are the reason of the violation – he will miss the deadline to take his case to Strasburg as the deadline will be counted from the date of the verdict and will run out while the case – to no effect – is dealt with by the CT. On the other hand, if directly after receiving the verdict or the administrative decision he files a complaint in Strasburg (convinced that it is the case where the Polish court and not the legislator is "guilty") – he can risk being accused of not having exhausted the internal procedure which is the necessary condition to take a case to Strasburg. In this case the wronged person – due to taking his case to the Court of Human Rights too soon – will miss the time limit within which he may take his complaint to the Constitutional Tribunal. The trap is not an illusory one: see the Szott-Medyńska versus Poland[16] case where precisely that situation took place.

An ECHR ruling concerns – firstly – the consideration whether any of the rights issuing from the European Convention has been violated with relation to the applicant. Secondly, the direct result of the assessment that this was indeed the case is awarding (facultative) the wronged person a financial compensation for such violation. However, the domestic law of the country which the ruling concerns has to introduce into the domestic order (the legal system, the functioning of the state organs and the courts) such changes which will prevent violations in future. The ECHR verdicts should be executed by domestic authorities as carefully as possible (it is a complex problem in itself). The domestic system should also reverse the consequences of the violation with respect to the injured party (e.g. institute proceedings *de novo*). The necessity to undertake these actions (both within the scope of prevention and specifically) is, in my opinion, a constitutional responsibility of the state authorities, issuing from the duty to respect the international obligations taken on (concerning the respect for human rights). Thus drawing conclusions from the ECHR verdict is a domestic matter: considering the scope, adequacy, necessity and proportionality of the steps undertaken (concerning the change of legal regulations, application of law, including interpretation, instituting specific proceedings *de novo*, organization of courts). That is precisely how the question of relations between the ruling of the ECHR and domestic courts is presented in the verdict of the Polish Constitutional Tribunal of 18th October 2004, P 8/04.[17] In accordance with that verdict, using the contents of the Convention to reconstruct the inspection model, a direct indication in the conclusion of the judgement – the reference to the European Convention – was abandoned. "It was done also in order to avoid the suggestion

[16] Case No. 47414/99, verdict of 9.10.2003.

[17] It is an interpretation similar to the one applied by the German Constitutional Tribunal (verdict of 14.10.2004, 2BvR 1481/04). It is interesting that the German and Polish verdicts were returned within four days from each other.

that the Constitutional Tribunal had been inspecting the situation from the point of view of the violation of a particular individual's rights – in the event where it had not been doing so because that kind of inspection in this case ought to be carried out by a common court of law and – possibly – by the Court of Human Rights."

5.3. Absence in internal law of legal consequences of a verdict concerning violation of human rights by Polish authorities

In the Polish legal system, the regulation of consequences of a verdict concerning violation of the European Convention by Poland is clearly regulated only for those situations in which the source of the violation were criminal law proceedings (Art. 540 § 3 of the code of penal proceedings). There is no similar regulation in civil or judicial-administrative law proceedings.[18] Worse still, when it comes to civil cases, in the case of the Supreme Tribunal's judicature there is a visible tendency to negate the successive consequences of verdicts stating violation of human rights by Poland (when the source of the violation resulted from the action of the judicative). It is not a question of the argument whether in such cases the proceeding or a part of it should be instituted *de novo* and what tools, existing *de lege lata,* are suitable for this, or whether in each case these tools are identical and whether (in which cases and on what principles) all action should be limited to compensatory restitution. On the other hand, it is unacceptable that the court which committed the qualified (by the Tribunal of Human Rights) violation of human rights should treat the verdict, returned in Strasburg, as a non-effect occurrence.[19] From that point of view the deliberate standpoint of the Polish Supreme Court, for example, refusing all restitution activity (despite the available possibilities of interpretation)[20] after the verdict from the Court of

[18] There exists only a Project concerning the change of the administrative courts system and of the act on proceedings in administrative courts (print No. 2001) – at present with the Justice and Human Rights Commission – it provides instituting a trial *de novo* in the case of the Court in Strasburg ruling that the verdict of the administrative court has violated human rights.

[19] The Constitutional Tribunal (in the ruling of 18.10.2004, P 8/04, OTK ZU No. 9 of 2004, item 92) stated: "the respect of Poland's international obligations and care for the cohesion of the legal order (shaped as much by the domestic law as – in the degree which is constitutionally accepted – by international agreements and by supranational law), requires that there be no discrepancy between law (contents of the regulations, legal principles, legal standards) shaped by different centres of judgement on the binding force of the law, and organs applying and interpreting law. The ECHR ruling concerning an individual case .... and deciding (as a result of inspection proceedings in Strasburg) about violation by Poland of the standard issuing from Art. 6 of the European Convention (the right to a fair trial) towards the initiator of those proceedings, must thus have an effect on the assessment of regulations carried out by the Constitutional Tribunal. It is the question if the inspection of those regulations whose application … has been considered violation of human rights."

[20] E. Łętowska, Commentary to verdict of SC of 19.10.2005 (V CO 16/05) EPS 1(4)(2006), 45.

Human Rights concerning violation of the Convention by the verdict of the Supreme Court – must cause criticism.[21] In fact it means a refusal of a dialogue serving the universalization of human rights.

6. The problem of historical revindication and human rights

6.1. In the countries undergoing a transformation, the premisses of the dialogue, the fulfilling of which is the duty of the ECHR itself, are equally important for the universalization of human rights. In comparison with the earlier period, at present the ECHR is characterized by bigger activism of its own and at the same time by less tolerance towards legislators and domestic courts. That means that **the ECHR presently tends to exert more pressure on domestic powers, promoting universalization of its own vision (scope, shape, contents) of human rights. The Court of Human Rights has a detailed competence, a subsidiary one at that; it rules only about violation of subjective rights expressed in the Convention and only after the exhaustion of the domestic proceedings. The less efficiency in the protection of human rights in the domestic practice, the bigger quantitative influx of cases to Strasburg, paralyzing the efficiency of that international court.[22] The ECHR is thus truly interested in a dialogue with the domestic courts, in order to sensitize them interpretatively to the problems of the protection of human rights – for then the number of cases directed to Strasburg will decrease. The only trouble is that one may have the impression of certain brusqueness with which the ECHR treats interpretative efforts of the domestic centres.**

6.2. The problem is – as one might suppose – insufficient knowledge of the ECHR itself concerning the specific character of some particular but systemically important phenomena. Among them is historical revindication which the ECHR has not encountered before. A characteristic feature of "new democracies" – and of Poland among them – is taking to Strasburg complaints about violation of human rights, most often of property, with reference to such historical revindication. Those are cases where what is questioned is the deprivation (limitation) of property (as a rule it concerns real estate), as a result of the post-war change of the political system. From the point of view of present standards of human rights these are undoubtedly cases of violation of Art. 1 of

[21] M. K r z y ż a n o w s k a-M i e r z e w s k a, "The Reception Process in Poland and Slovakia," [in:] *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford 2008, p. 581.

[22] It can be acknowledged accurately that the system of the European Convention of Human Rights has become a victim of its own success. Compare S. G r e e r, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge 2006, p. 316–326.

the second additional protocol of the ECHR. Those cases are a problem for the ECHR, making the effective dialogue with domestic centres of interpretation more difficult. These matters are very difficult for Western lawyers to understand as they have not encountered such phenomena at all. They concern the situation where now, after many years, there is an intention to repair historical changes, e.g. in the scope of the confiscation of property, nationalization or other forms of taking property into the public sector, executed after the second world war, within the framework of the construction of the socialist system. At the same time different historical processes are treated alike. One has to mention the nationalization, the agrarian reform, the effects of the Polish borders being moved West (which involved, for example, the exodus of the German population from Poland and abandoning real estate on the Polish territory), the consequences of the migration of people from the Polish borderlands in the East, which had been incorporated into the Soviet Union, the consequences of the resettlements of people by foreign armed forces, the problem of the Jewish and abandoned property, and also the specific problem of the so called Spätaussiedler (people who, as autochthons of German descent, were able to leave Poland in the Seventies). The confiscation of property was carried out both in a statutory and in an administrative way. In the light of the standards of the time, those acts were sometimes legal (which does not mean that they can be considered as such at present); on the other hand, at times they violated even the contemporary law. At times the confiscation of property might be taken as matching even the present standard if it had not contained promises of compensation, made at the same time (later either not kept or kept only partly). In many cases, people seeking compensation today, present completely unverified titles of property (the problem occurs in the well known case of Broniowski versus Poland)[23]. In many cases, complaints filed in Strasburg remain in conflict with the rights of other persons. The degree of legal complexity of those cases, the consequence of the lapse of time exceed significantly the current experiences of the ECHR, concerned with excesses of "bad administration" or errors of courts or the legislator. In the case of historical revindication we face processes happening on a huge scale, within the space of several scores of years during which an axiologically different economic policy was consciously conducted. Standards of property protection concerning those cases of historical revindication must be considered from the perspective of history and with due respect to situational diversity of the cases, collectively referred to as historical revindication. Yet one has the impression that the Tribunal treats domestic partners with nonchalance. It can be observed, say, in the incomplete and superficial reports on the attempts to solve the problem in the domestic forum. Description of the course of cases, presented according to the chronology of individual decisions, do not provide

[23] Verdict of 24.06.2004.

information what purpose those decisions served. Consequently, drastic errors are committed, e.g. in the scope of insufficiently thorough inspections of the premiss of subsidiarity.[24]

6.3. Tardy handling of revindication accounts and a failure to fulfil the obligations undertaken in the past towards the repatriates is an obvious breach of the Convention by the Polish authorities and that tardiness requires compensation. However, ascribing Poland the responsibility for the violation of property and also for the damage to that property caused by the actions of the Soviet or German authorities (certain situations concerning the claims the repatriates or the displaced) is less self-evident. Doubts are raised also by the making equal the situation of the persons who have not received anything yet (i.e. those towards whom the state simply did not fulfil its duties) with those who received certain compensation, realized (true, partially only), in the period of forty years after the war. The assessment of the size of compensation ought to be more thorough. For instance, for the property left outside the borders of the country (the Bug river property) the claimants demand compensation also in cases when the removal of property was carried out not by the Polish but by the Soviet authorities, prior to people's relocation to Poland (this theme appears in the Broniowski case). In several categories of revindication cases over the years, the courts (e.g. the Supreme Court in Poland) worked out a standpoint which was a compromise between contradictory axiological demands which ordered to evaluate critically the "former" law, very critically – the excesses of "former" practice and at the same time to limit the restitution aspirations in the name of legal safety and – last but not least – of measuring economic interests of all concerned. Knowledge of those efforts would have led the ECHR to understand better the problems of revindication, to establish a dialogue and by the same token to universalize the standards of the protection of property applied by the European Court of Human Rights and the domestic courts.

7. Instead of summing up

Human rights are far from exhausting their potential. First of all they are being confronted with new challenges: punitive prosecution of violation of

[24] Thus in the case Zwierzyński versus Poland, where the superficial approach to the procedure and domestic verdicts resulted in an incorrect decision with very costly consequences. The ECHR ruled that the right of property had been violated by the Polish state and damages were awarded to a person whose dispute with the owner had not been concluded. The error in the assessment of the existence of the premiss of subsidiarity could have been noticed had the report on the domestic proceedings been more careful. Of course, it is the duty of the domestic authorities to indicate such errors. Nevertheless, the problem arises whether the ECHR is not obliged, *ex officio*, in the name of reliability of its own procedure, to more caution.

human rights, the problem of terrorism, the pressure on the state to undertake positive actions concerning the fulfilling of human rights, which means considerably broader and more expensive activities than just refraining from interference with those rights or removing dangers they face (negative actions). However, human rights at the same are drawing into their orbit much larger circles of the social life players (the growing importance of non-governmental organizations). Universalization of human rights demands that all authorities be active promoting and carrying it out, while axiologically consolidating interpretation of law applied in the spirit of human rights becomes the instrument of that universalization.

SECTION IV D

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PUBLIC-PRIVATE PARTNERSHIP IN POLAND (WITHIN THE CONCEPT OF ADMINISTRATIVE CONTRACTS)

1. Concept

The concept of public-private partnership (PPP) first appeared in Polish literature between years 2000 and 2002 having a meaning of a new institution. This was an institution to realize the public tasks while having a situation of shortage of budgetary means.[1] Currently Art. 1 subsection 2 of the Act of 19 December 2008 on public-private partnership[2] contains the legal definition of PPP: "The subject of public-private partnership is a joint realization of undertaking, based on division of tasks and risk between the public and private party." It is worth taking a note, that the Act could not be applied for a long time due to a lack of delegated law.

Earlier Art. 1 subsection 1 of the Act of 28 July 2005 on public-private partnership[3] defined PPP as: "According to Act the public-private partnership

[1] See generally H. G a w r o ń s k i, *Zakres regulacji umownych w partnerstwie publiczno-prywatnym* [The Scope of Agreable Relations in Public-Private Partnership], A. P i s z c z, *Partnerstwo publiczno-prywatne jako wyraz kontraktualizacji administracji publicznej* [Public-Private Partnership as an Example of Contractualization of Public Administration], M. R ę k a w e k-P a c h w i c e w i c z, M. W ę n c l i k, *Partnerstwo publiczno-prywatne jako sposób realizacji zadań publicznych w układzie trójsektorowym* [Public-Private Partnership as a Way of Realization of Public Tasks in the Three-Level Sector] – all articles in: *Umowy w administracji* [Contracts in Administration], eds. J. Boć, L. Dziewięcka-Bokun, Wrocław 2008, p. 217 and following, p. 255 and following, and p. 281 and following; W. G o n e t, *Partnerstwo publiczno-prywatne – niewykorzystana szansa na realizację zadań w sektorze publicznym* [Public-Private Partnership – Unrealized Chance to Perform Tasks in the Public Sector], „Przegląd Prawa Publicznego" 2008, No. 7–8, p. 6 and following; H. W a l c z a k-Z a r e m b a, "Kilka uwag na temat umowy o partnerstwie publiczno-prywatnym" [Some Remarks About Contract on Public-Private Partnership], [in:] *Ewolucja prawnych form administracji publicznej. Księga jubileuszowa z okazji 60. rocznicy urodzin Profesora Ernesta Knosali* [Evolution of Legal Forms of Public Administration. Anniversary Book for the Professor Ernest Knosala], eds. L. Zacharko, A. Matan, G. Łaszczyca, Warszawa 2008, p. 307 and following.

[2] Journal of Laws [J. of L. – Dz. U.] 2009, No. 19, item 100.

[3] J. of L., No. 169, item 1420.

means cooperation based on the contract about public-private partnership. This cooperation of public and private party serves the realization of public task if it is conducted according to rules defined in the Act."

The PPP is generally considered from a point of weakness of its existing construction. We rather do not distinguish between institutional and contractual PPP. As a special type of PPP the Act of 19 December 2008 defines a contract about establishing a capital company, limited partnership (company) or mixed joint-stock and limited company (Art. 14 subsection 1).

Practice and binding law consider the differences between PPP of a concession type and PPP of a public procurement. The Polish system of law generally does not know the classic public (administrative) contracts.[4] The contracts of PPP are not looked at in such categories. Contractual PPP in legal literature is considered rather as a financial tool than as work contracts or services contracts. However some academics think that PPP contract "has many features of actions typical for administrative contract."[5] We do not have statistics regularly updated about the economic importance of contractual PPPs. Surely it is not wide.

[4] M. M o ż d ż e ń-M a r c i n k o w s k i: *Introduction to Polish Administrative Law*, Warszawa 2009, p. 122, D. R. K i j o w s k i: "Umowa administracyjna w części ogólnej polskiego prawa administracyjnego" [Administrative Contract in the General Part of Polish Administrative Law], [in:] *Nowe problemy badawcze w teorii prawa administracyjnego* [New Research Problems in the Theory of Administrative Law], eds. J. Boć, A, Chajbowicz, Wrocław 2009, p. 283–284 and A. K u b i a k, "Koncepcja umowy administracyjnej (na tle projektu przepisów ogólnych prawa administracyjnego)" [The Concept of Administrative Contract (on the Background of the Draft of the General Provisions of Administrative Law], *Państwo i Prawo* 2009, No. 4, p. 46 and following, see also A. K u b i a k, "Perspektywy rozwoju form konsensualnych w polskim prawie administracyjnym" [Perspectives of the Development in Relation with Consensual Forms in the Polish Administrative Law], [in:] *Umowy w...* [Contracts in…], p. 78–80; about perspectives of administrative (public) contract in Poland – see also J. B o ć, "O umowie administracyjnoprawnej" [On Administrative Contract], [in:] *Umowy w…*, p. 29 and following.

[5] See Z. C i e ś l i k, *Umowa administracyjna w państwie prawa* [Administrative Contract in the State Respecting the Rule of Law], Zakamycze 2004, p. 113. Other authors present contrary opinion, see for example E. S t e f a ń s k a, "Wybrane aspekty realizacji zadań gospodarczych sektora publicznego przez podmioty prywatne w społeczeństwie obywatelskim, z uwzględnieniem charakteru prawnego umów o partnerstwie publiczno-prywatnym" [Selected Problems in Realization of Economic Tasks of Public Sector by Private Subjects in Society of Citizenship Taking in to Consideration the Legal Nature of Contracts on Public-Private Partnership], [in:] *Prawna działalność instytucji społeczeństwa obywatelskiego* [Legal Activity of Institutions of Society of Citizenship], eds. J. Blicharz, J. Boć, Wrocław 2009, p. 255–262; she regards PPP contract as a civil contract. M. M o ż d ż e ń-M a r c i n k o w s k i, *op. cit.*, p.120, noticed that "public administration bodies, in certain circumstances, must use the institutions of civil law, and they can not act in an imperious way."

2. Award

There are no legal limits to the use of PPPs, however the financing of the task coming from the state budget in an amount higher than 100 mln PLN (about 22 mln EURO) requires the consent of the minister of finance department. Thus it is needed thus to underline, that there are no legal texts to evaluate or to compare PPPs with other legal solutions before choosing a PPP. The Act of 19 December 2008 does not give an expert body which would assist public bodies in the follow up of award and/or the performance of the PPP. There awen't any project of evaluation system of PPP in Poland.

The award procedure for contractual PPP exists. This award procedure is defined by Act of 9 January 2009 – the Concession Act[6] and the Act of 29 January 2004 on public order.[7] It must be noticed, that there are no legal guarantees as to ensure that a certain amount of the contract will be handled by small and medium size enterprises, as to ensure a good architectural quality or to ensure that commercial secret will be protected during award procedure. There is a duty for the partner to respect a minimum of transparency for the award of the contracts he will sign with third parties for the performance of the PPP.

3. Performance

Minimal experience with PPP contracts does not allow to answer that there are specific clauses to PPP. It seems, that there is a visible tendency to put a risk on to the private party. There is a way of controlling the contracts by the public party. According to Art. 8 of the Act of 19 December 2008 the public party has a right to a current control realization of the task by the private party. The rules and detailed procedure of control undertaking defines the contract about PPP.

Public unit which decides to apply PPP will be obliged to submit certain information and statements to central administrative authorities. We could contemplate on the real target of this rule. As it seems, they are meant to be used to create a good pattern in a PPP area.[8]

The Act of 19 December 2008 is silent about the possibilities of termination of the contract unilaterally and the causes of the termination of the contract. In this matter one has to find the ruling in the Civil Code. The contract can be terminated if there are clauses to the contract allowing for such termination. The contract may define the cause of termination. The parties may look for repairing on the basis and in an amount defined in the contract.

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[6] J. of L., No. 19, item 101.

[7] J. of L. 2007, No. 223, item. 1655, 2008 No. 171, item 1058, No. 220, item 1420 and No. 227, item 1505.

[8] W. G o n e t, *op. cit.*, p. 10–11.

4. Remedies

We have no experience in regards to legal actions against the contractual PPP awards. There are no specific procedures or remedies rules specific to contractual PPPs. General remedies apply to contracts about PPP in court proceedings. There is no specialized judge or a board who has a jurisdiction over the award and/or the performance of the contractual PPP. If an unilateral termination is allowed, one party may do it on its own without asking a judge.

5. Conclusions and general remarks concerning perspectives of administrative contracts in Poland

Until today the Act of 19 December 2008 stays dead because non of the investment project became realized according to its rules. Reasons could be found within the shape of Act regulation, not friendly when applying PPP.[9] However it is important to mention that lack of experience when using contract form to realize public tasks is natural barrier to communize the institution of PPP. Different ideas of creating a new model of PPP are brought in against the failure.

The attitude towards the contracts with participation of administrative authorities begins to change lately in Poland. With an initiation of the Polish Ombudsman a group of experts prepared a draft of the bill – General Provisions of Administrative Law.[10]

The draft includes provisions quite new to Polish administrative law and procedure. Such provisions that stipulate the concluding of contracts by public administrative authorities with private persons/entities. These contracts, according to the doctrine of administrative law, are called administrative contracts. Such contracts could be concluded in all matters of public administration, being a subject to an administrative decision or other official activity, unless other specific provisions prevent such action (Art. 41 subsection 1). Indicated solution shall enable the successful completion of various cases where the content of a decision or other official action of an administrative authority is not entirely comprehensive in existing, defined factual circumstances by provisions of

[9] *Ibidem*, p. 6.

[10] The chairman – D. R. Kijowski, and members – J. Borkowski, W. Chróścielewski, B. Gruszczyński, Z. Kmieciak and J. Świątkiewicz, see – D. R. K i j o w s k i, "Przepisy ogólne prawa administracyjnego – trzecie podejście" [The General Provisions of Administrative Law – the Third Trial], [in:] *Prawo do dobrej administracji* [Right to Good Administration], "Biuletyn RPO. Materiały," No. 60, Warszawa 2008, p. 18 and following; the draft of a bill in English – p. 201 and following.

binding law. In parallel, it shall exclude the breaching or omission of absolute binding provisions of law.[11]

The draft of a bill – General Provisions of Administrative Law stipulates of administrative contracts (reflecting solutions implemented in German law). The contract concluded shall influence a content of legal relations of a unit (part) and public administration. Moreover, it could even replace an act or activity foreseen by provisions of law, on the condition that it is concluded in the competence of the administrative authority and convergent to general rules and proceedings appropriate to these types of cases (Art. 41 subsection 2). It could also establish the factual and legal status influencing rights or duties of parties in a case (Art. 41 subsection 3), as well as define activities and commitments that bind all parties. Taken together, they could indicate the conditions (circumstances) under which fulfillment of a commitment may be allowed as admissible (Art. 41 subsection 4). The rules established may be considered to the minimum legal regulations necessary to be officially introduced into the practice of administrative contracts. At the same time, it consists of prescription indispensable to prevent the evading of the absolute binding provisions of substantive law by means of administrative contracts, or the abuse of the special, privileged position of public bodies in such types of contracts. The last aim will be implemented by the requirement of limitation commitments, foreseen by a contract for the benefit of the administrative authority. Such commitments could be imposed on organ's partner in the act to resolve the case, or could be required from the organ's addressee before the decision is issued (Art. 41 subsection 5). Due to a regulation imposing a duty to operate within binding law, to keep a written record and a duty to achieve the appropriate objectives of other authorities, the risk of abuse of that instrument and the breach of legal order shall be diminished.[12]

Art. 42 states that a contract contrary to provisions of law, including contracts concluded against provisions requiring the resolution through the form of a general act, decision or other unilateral act or aiming at omission of or abuse of the law shall be ineffective. An "ineffectiveness" is to be decided, as a rule, by means of an administrative decision by a higher level authority to a public body being a party of the contract. In cases where this is not fulfilled by the administrative authority the other party is entitled to bring an action in law, and to the execution of the contract by the partners of the administrative authority, as would be done under administrative execution. These solutions consider an existing rule of law, regulating proceedings in the front of administrative courts and do not require a change of law. What is necessary is only a minor amendment of the Code of Administrative Procedure,[13] Tax Law[14] and the Act on

[11] "General Provisions of Administrative Law – Grounds for Draft of a Bill", [in:] *Prawo do…*, p. 248.

[12] *Ibidem*, p. 248–249.

[13] J. of L. 2000, No. 98, item 1071 with amendments.

[14] J. of L. 2005, No. 8, item 60 with amendments.

administrative execution.[15] It is important to mention, that a concept of "nullity of the contract" has been rejected and replaced instead by notion of "ineffectiveness," which is similar in its effects.[16] Polish administrative courts are entitled to review all activities in terms of public administration and claims of the indolence of administrative authorities. If the court considers the activity of the administrative authority to be in a contrary manner to the law it is obliged to adjudge its legal "ineffectiveness."

Prescription Art. 43 includes a regulation that is to serve the partners of public administration in cases, where the administrative authority evades its performance of the contract concluded. Beside an obvious claim for indemnity, it is foreseen to permit to grant interested parties a right to claim on the idleness of the authority to the administrative court. Such an entitlement does not result directly from presently binding Acts on administrative-judicial procedure,[17] therefore an introduction to such possibility in the draft project was deemed necessary, a better solution than an abrupt change of the proceeding provisions.

It should be underlined, that according to Art. 44 matters not regulated by the Act and related to the concluding, performance and notice of administrative contracts shall be dealt with on the authority of the provisions of the Civil Code.[18] Referring to the Civil Code which gives the possibility to apply general rule to withdraw from a contract when it has been concluded under the influence of error.[19] Thanks to such solution, completeness and unity of legal regulation is provided to contractual relations.[20]

Construction of administrative contracts (contracts of public law) brings a lot of advantages, however it causes some dangerous.[21] Experience gained in the area of PPP brings serious fear as to the future of such forms in Poland. However its application in life seems to be already decided.

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[15] J. of L. 2005, No. 229, item 1954 with amendments.

[16] See especially D. R. K i j o w s k i, *Umowa administracyjna…*, p. 291.

[17] See the Act of 30 August 2002 – Law on proceedings before administrative courts (J. of L. No. 153, item 1270 with amendments). In 2004, by virtue of the Constitution of the Republic of Poland and mentioned above Act, the reform of the judicial review of public administration was put in place in Poland. A two-stage administrative court proceeding was introduced. Voivodship Administrative Courts were establish as first instance courts and the Supreme Administrative Court as a second instance court, was made the court of cassation. A new, separate procedure for administrative courts (administrative-judicial procedure) was established; see – Z. K m i e c i a k, "Polskie sądownictwo administracyjne na tle systemów europejskich" [Polish Administrative Jurisdiction on the Background on the European Systems] and A. K u b i a k, "Ewolucja i ustrój sądownictwa administracyjnego w Polsce" [Evolution and Structure of Administrative Jurisdiction in Poland], [in:] *Polskie sądownictwo administracyjne* [Polish Administrative Juridiction], ed. Z. Kmieciak, Warszawa 2006, p. 1 and following and p. 53 and following.

[18] J. of L. 1964, No. 16, item 93 with amendments.

[19] D. R. K i j o w s k i, *Umowa administracyjna…*, p. 292.

[20] *General Provisions…*, p. 249.

[21] D. R. K i j o w s k i, *Umowa administracyjna…*, p. 284 and A. K u b i a k, *Perspektywy rozwoju…*, p. 82.

SECTION IV E

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CORPORATE TAX AVOIDANCE UNDER POLISH LAW

1. The concept of tax avoidance under Polish law

The terms "tax mitigation," "tax avoidance," and "tax evasion" are not defined in Polish tax law. Although the terms frequently come up in the tax law doctrine,[1] courts are not willing to use or clarify them, and rarely undertake attempts to define them.[2]

Tax mitigation (*optymalizacja podatkowa*) is understood as the legally acceptable behaviour of taxpayers, resulting in the diminishment of tax liability. Although tax mitigation is generally accepted by tax authorities, tax law in this area is usually restrictively interpreted. Tax authorities and courts often claim that provisions providing tax exemptions should be interpreted restrictively. They also claim that exemptions should be treated as exceptions to the general rule of taxation. Supporters of such a position base their views on Art. 84 of the Constitution of the Republic of Poland[3] which states: "Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute." They stress the use of the word "everyone" in the cited provision.[4] Opponents are of the opinion that Art. 84 of the Constitution should be perceived as a certain requirement directed at a legislator, namely, the requirement of levying any duties by means of a statute.[5] Moreover, taxation is

[1] See, for instance, J. G ł u c h o w s k i, *Polskie prawo podatkowe* [Polish Tax Law], Warszawa 1998, p. 107–115; M. K a l i n o w s k i, *Granice legalności unikania opodatkowania w polskim systemie podatkowym* [The Limits of Legality of Tax Avoidance in the Polish Tax System], Toruń 2001, p. 9–12.

[2] The problem does not pertain solely to Polish courts – see, for instance, A. Z a l a s i ń s k i, "Some Basic Aspects of the Concept of Abuse in the Tax Case Law of the European Court of Justice", *Intertax* 2008, Vol. 36, issue 4, p. 167.

[3] Journal of Laws [J. of L.], No. 78, item 483 as amended.

[4] See, for instance, the judgement of the Supreme Court of the 6th of April, 2001, III RN 90/00, LEX, No. 448051.

[5] See, for instance, the judgement of the Regional Administrative Court in Warsaw of the 12th of September, 2008, III SA/Wa 922/08, LEX, No. 462039.

perceived, both in legal scholarship[6] and by courts,[7] as an exception to the right of property, which – in the Polish legal order – is expressed in Art. 64 of the Constitution.[8] The authors of this text have adopted the latter view. One should add that tax incentives are the best examples of tax mitigation possibilities.

Tax avoidance (*unikanie opodatkowania*) is the diminishment of tax liability by a taxpayer who conducts interests in a way that deviates from expected standards. Tax avoidance appears to be a fully legal activity, but is often disapproved of by tax authorities. In Poland the commonly respected distinction between acceptable and unacceptable tax avoidance is rather unknown, but in fact the tax administration contests only certain types of tax avoidance. Similarly, although courts do not tend to use the term "tax avoidance" or any of those mentioned above, from time to time they issue judgements unfavourable to taxpayers. The general opinion is that if a taxpayer's legal actions result in decreased tax liability there is no legal basis to question these actions, especially on constitutional grounds.

Illegal activities aimed at the diminishment of tax liability are referred to as "tax evasion." A taxpayer who engages himself in tax evasion ignores the requirements stemming from tax law.[9] Often, his actions or failures to comply with tax law are penalised. As a result, tax evasion is sometimes treated as nearly synonymous with "tax fraud."

As in other countries, the problem does not lie in determining the meaning of the concepts presented above, but in determining their limits.

2. Constitutional background

The Constitution gives arguments both against tax avoidance and arguments which protect taxpayers, as long as their actions are legal, from tax avoidance charges.

The legislator is considerably limited when enacting anti-avoidance regulations. The principle that taxation should be based on a written statute enacted by the parliament (Art. 84 of the Constitution) is in obvious opposition to the idea of a general anti-avoidance rule (GAAR). This principle has been further developed in Art. 217 of the Constitution, according to which: "The imposition of taxes, as well as other public imposts, the specification of those subject to the

[6] See, M. K a l i n o w s k i, *op. cit*., p. 58.

[7] See, for instance, the judgment of the Constitutional Tribunal of the 21st of June, 2004, SK 22/03.

[8] K. L a s i ń s k i-S u l e c k i, "Proper Publication of Legal Texts Relevant for Taxation," *Intertax* 2009, Vol. 37, issue 6/7, p. 418.

[9] See, J. G ł u c h o w s k i, *op. cit*., p. 111.

tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be made by means of statute." General anti-avoidance rules are, by their nature, rather general or even vague. Therefore, they can be perceived as contrary to the rule of law principle expressed in Art. 2 of the Constitution[10] (for more on this topic see section 3 of this paper).

The constraint stemming from Art. 2, 84 and 217 of the Constitution does not influence that seriously specific anti-avoidance regulations.

The Constitution also restricts the role of courts in counteracting tax avoidance. Polish law belongs to the continental family of laws and differs greatly from common law systems. Separation of powers is the main rule governing constitutional order (Art. 10). Courts interpret laws and apply them, but they cannot create them. Any action undertaken by courts must have a legal basis. The principle that taxation should be based on a written statute enacted by the parliament has significantly restricted courts' activity in the battle with tax avoidance.[11] The legislature is responsible for constructing necessary means and instruments for counteracting tax avoidance.

In summary, the Constitution contains provisions seriously hindering both legislative and judicial activity against tax avoidance. Of course, such activity is not fully excluded, but the legislator must meet particularly strict requirements. The activity of courts is seriously hampered. As a result, there is no clear anti-avoidance judicial doctrine.

3. History of Polish GAAR

Poland began the creation of its current tax system in the early nineties of the 20th century, when the economy was reoriented towards a market economy. Corporate Income Tax Law was adopted on the 15th of February, 1992[12] and is still in force, though it has been subject to a significant number of amendments since then. The need for the introduction of any means that might counteract tax avoidance was noticed soon after Corporate Income Tax Law came into force.

The GAAR was developed in a twofold manner. Courts attempted to create an anti-avoidance judicial doctrine, while the legislator tried to pass the neces-

[10] The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

[11] Unlike Anglo-Saxon countries where one may notice "judicial legislation" within the sphere of means serving to counteract tax avoidance. See B. B r z e z i ń s k i, *Anglosaskie doktryny orzecznicze dotyczące unikania opodatkowania* [Anglo-Saxon Judical Doctrines Regarding Tax Avoidance], Toruń 1996, p. 5–8.

[12] J. of L. 2000, No. 54, item 654 as amended.

sary legislation. At the end of the twentieth century the courts began attempts to counter tax avoidance.[13] They relied mainly on the provisions of the Civil Code of the 23rd of April, 1964[14] concerning the circumvention of law (*obejście prawa*).

It was also towards the end of the 20th century when certain unsuccessful attempts were made to introduce GAAR through legislation. The proposal covered only the area of income taxes. Under the proposal, during the assessment of the consequences of legal actions, the intent of parties was to be taken into account, and not solely the literal wording of their contract. Tax authorities and fiscal control authorities can ignore the consequences of legal actions undertaken by the taxpayer, as long as the taxpayer could not have been expecting any economic advantages apart from decreased tax liability.[15]

A detailed analysis of the judicial doctrine shows its misconceptions. A basic error was that courts frequently expressly referred to Art. 58 of the Civil Code, which regulates the consequences of the circumvention of law. The mechanism of the circumvention is such that a person uses *ius dispositivum* in order to circumvent *ius cogens*. Parties to the transaction undertake certain actions (which are not forbidden), but which aim at reaching results forbidden by law. They act *in fraudem legis*.[16] One willing to apply this provision in the field of tax law encounters a basic obstacle, namely, tax law lacks *ius dispositivum*. All of its provisions are – using the language of a civil lawyer – *ius cogens*. Secondly, it must be underlined that Art. 58 may not be applied in tax matters because of the contents of Art. 1 of the Civil Code. The latter provision states that the Civil Code is applicable in civil matters, involving natural and legal persons. The relation between a taxpayer and tax authority cannot be perceived as a civil matter, as the Polish legal culture strongly rests upon the division into private and public law, civil law being private and tax law being public. Moreover, the relation between a taxpayer and a tax authority can hardly be perceived as a relation between natural or legal persons. A tax authority's actions, particularly, cannot be perceived as the actions of a legal person. Thirdly, treating certain actions as invalid circumvention of tax law might not be successful even if a court did not refer expressly to Art. 58 of the Civil Code. There is no corresponding provision in Polish tax law. Applying *de facto* the provisions of the Civil Code in the sphere of tax law was (and still is) unacceptable, because it

[13] See the judgment of the Supreme Administrative Court of the 7th of November, 1991, I SA/Po 1198/91, where the judicial anti-avoidance doctrine began to develop.

[14] J. of L., No. 16, item 93 as amended.

[15] See H. L i t w i ń c z u k, "Obejście prawa podatkowego w świetle doświadczeń międzynarodowych" [Circumvention of Tax Law as Perceived through International Experiences], *Przegląd Podatkowy* 1999, No. 9.

[16] See Z. R a d w a ń s k i, *Prawo cywilne – część ogólna* [Civil Law – General Part], Warszawa 1997, p. 237.

would equal to relying on *per analogiam* reasoning to the detriment of a taxpayer (obviously any measures countering tax avoidance are detrimental to a taxpayer). It is commonly accepted that *per analogiam* reasoning cannot be applied to the detriment of a taxpayer.[17] This does not differ from tax law interpretation standards common in other countries, where *per analogiam* reasoning is perceived as a threat to the basic rights of individuals[18] and is excluded even if it could efficiently combat tax avoidance.[19] If one takes into account the fact that *per analogiam* reasoning is rejected in the field of criminal law, one should assume that *per analogiam* reasoning cannot be applied in the field of tax law, even if it could limit tax evasion.

Although the references to Art. 58 of the Civil Code (or at least implicit references to the circumvention of law) were quite frequent in the judgements, it must be stressed that courts often relied on a variety of legal norms of the Civil Code, without even bothering to point out the norm being the legal basis of the judgment. Courts seemed to mix circumvention of law with ostensible transactions (*czynności pozorne*), whereby a taxpayer could be hiding other real transactions. Courts concluded that civil law cannot be used for evading or avoiding taxes.[20]

The courts' attempts to introduce GAAR through their jurisprudence reached a peak at the turn of the century. Controversies surrounding measures aimed at counteracting tax avoidance (or rather circumvention of tax law) were most common during this period. The attempts to introduce "judicial" GAAR were heavily criticized by the Supreme Administrative Court in its judgement of the 24th of November 2003 in the case FSA 3/03 (*Optimus*). It must, however, be mentioned that this was not a corporate income tax case.

The dispute concerned goods and services tax (GST). Under the Goods and Services Tax and Excise Duty Law of the 8th of January 1993[21] and the Customs Code of the 9th of January 1997[22] importation of certain IT equipment for schools was exempt from GST. Domestic sales of such equipment did not benefit from a similar exemption. This exemption was economically crucial. Schools did not conduct any economic activity. Therefore, they could not deduct

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[17] See B. B r z e z i ń s k i, *Szkice z wykładni prawa podatkowego* [Drafts on the Interpretation of Tax Law], Gdańsk 2002, p. 70; R. M a s t a l s k i, *Interpretacja prawa podatkowego* [Interpretation of Tax Law], Wrocław 1989, p. 120.

[18] See, E. Z u e l t a-P u c e i r o, "Statutory Interpretation in Argentina," [in:] *Interpreting Statutes. A Comparative Study*, eds. D. MacCormick, R. Summers, Dartmouth 1991, p. 47.

[19] See, J. V a n H o u t t e, *Principles of Interpretation in Internal and International Tax Law*, Amsterdam 1968, p. 36.

[20] See, for instance, the judgment of the Supreme Administrative Court of the 25th of June, 1998, I SA/Po 1883/97, LEX no. 35484.

[21] J. of L., No. 11, item 50 as amended.

[22] J. of L., 2001, No. 75, item 802 as amended.

input GST and would have otherwise had to bear its' economic burden. An IT equipment manufacturer, based in Poland, decided to arrange its sales in such a manner so as to make its products more attractive for Polish schools. Computers were first sold to one of two Slovakian companies (at that time this meant exportation) and then brought back to Poland (at that time this meant importation). Goods were transported Slovakia and back to Poland in the same vehicles. Tax authorities considered the business scheme presented above as a circumvention of tax law.

The Supreme Administrative Court held that there was no GAAR in force when the disputed actions took place. The Court supported the view presented in the doctrine, according to which a taxpayer cannot be required to organize his activities in such a manner so as to be required to pay the highest tax possible. The Court argued additionally that the GAAR was introduced by the legislator after the facts of the case had taken place.

Endeavours aimed at creating a judicial doctrine were significantly limited after the judgment in the FSA 3/03 case was issued. It must be pointed out that although a significant number of courts' judgements at the turn of the century used a kind of anti-avoidance doctrine partly based on civil law, the courts have never been unanimous in this regard. Some courts had rejected this specific anti-avoidance doctrine even before the FSA 3/03 judgment.[23]

Another turning point in the history of Polish GAAR took place on the 1st of January 2003. On this date the General Tax Law of the 29th of August 1997[24] (applicable to all taxes) was amended.

Art. 24a (1) of the General Tax Law, in force since the 1st of January 2003, stated that tax authorities and fiscal control authorities, in determining the content of legal action, are to take into account the consistent intent of the parties and the purpose of their activities, and not just the literal wording of statements of will.

Art. 24a (2) stated that if the parties entering into a legal transaction are concealing other legal activities, tax authorities and fiscal control authorities may derive tax consequences from the concealed legal action.

Under Art. 24b (1) of the General Tax Law if a tax or fiscal control authority demonstrates that a taxpayer concluding a particular transaction could not have been expecting significant tax benefits other than those resulting from the reduction of tax liability, an increased tax reimbursement, an increased loss on the part of the taxpayer, the authority may disregard the tax-related consequences of such a transaction.

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[23] See, for instance, the judgements of the Supreme Administrative Court of the 31st of January 2002, I SA/Gd 771/01; of the 29th of May 2002, III SA 2602/00 and the judgment of the Supreme Court of the 19th of October 2000, III RN 55/00.

[24] J. of L., No. 137, item 926 as amended (currently: J. of L. 2005, No. 8, item 60 as amended).

According to Art. 24b (2), if parties conducting legal actions referred to in 246 (1) reach an intended economic result for which other legal action or legal actions are appropriate, tax consequences are to be derived from the other legal action or legal actions.

Art. 24a (1) of the General Tax Law was criticized as redundant soon after its entry into force. It was pointed out in literature that it resembled civil law regulations concerning the interpretation of statements of will, which had to be taken into account by tax authorities even prior to the 1st of January 2003. Moreover, as Art. 24a (1) resembled interpretation principles founded in the Civil Code, its introduction could only lead to further interpretative problems.[25] Art. 24a (2) seems to have been an attempt to regulate the tax aspects of ostensible declarations of intent, known to civil law.

This rather extensive and general anti-abuse clause was partly quashed by the Constitutional Tribunal, although – as some authors pointed out – it was not significantly different from GAAR adopted in other countries,[26] and removed by the legislator from the General Tax Law, effective from the 1st of September 2005.[27] The text of the Tribunal's judgment sets very high standards for any GAAR. The Tribunal held that: "One of the elements of the principle of trust in the State and its laws, as derived from the principle of the rule of law (Art. 2 of the Constitution), is the prohibition of sanctioning – in the sense of attributing negative consequences to, or refusing to recognise positive consequences of – the lawful behaviour of legal norms' addressees. Thus, where the addressee of a legal norm concludes a lawful transaction and thereby achieves a goal which is not prohibited by law, the objective (including the tax objective) accomplished in this manner should not be regarded as tantamount to prohibited objectives." Further in the judgment, the Tribunal stressed the clear – in its opinion – difference between unlawful tax evasion and the avoidance of tax as a result of lawful transactions concluded for this purpose. The Tribunal held that the constitutional obligation to pay taxes specified by statute (Art. 84) does not constitute an obligation for taxpayers to pay the maximum amount of tax, nor a restriction on taxpayers seeking to take advantage of various lawful methods of tax optimisation. According to the Tribunal the requirement for the legislator to comply with the principles of correct legislation stems from the rule of law principle. This requirement is functionally tied with the principles of legal certainty, legal security and protection of trust in the State and its laws. The constitutional requirements of correct legislation are particularly infringed, as

[25] See M. K a l i n o w s k i, "Wykładnia oświadczeń woli oraz ich pozorność w prawie podatkowym" [Interpretation of Statements of Will and Their Ostensibility in Tax Law], *Przegląd Podatkowy* 2003, No. 1, p. 45–50.

[26] See P. K a r w a t, "Obejście prawa podatkowego" [Circumvention of Tax Law], *Przegląd Podatkowy* 2003, No. 2, p. 46 *et seq.*

[27] K 4/03.

the Tribunal continued, when the wording of a legal provision is so vague and imprecise that it creates uncertainty amongst its addressees as regards their rights and duties, by creating an exceedingly broad framework within which authorities charged with applying the provision are required, *de facto*, to assume the roles of law-makers in respect to these vaguely and imprecisely regulated issues. The Tribunal indicated a number of general clauses that were used in Art. 24b of the General Tax Law: "one could not have expected," "other significant benefits," "benefits stemming from the reduction of tax liability."[28]

The judgment of the Tribunal marked the upcoming end of legislative GAAR. Since its issue, only less extensive means partly aimed at reducing tax avoidance have been introduced. They will be highlighted in the next sections of this paper. Some courts still refer to the concepts of tax avoidance or circumvention of law (but not as often as they did at the beginning of this century).

4. Current legal provisions

Currently, only Art. 199a of the General Tax Law is perceived, on occasion, as a type of GAAR. It was added to the General Tax Law with effect from the 1st of September, 2005.

Art. 199a (1) requires a tax authority to take into account the intention of parties to a transaction and the purpose thereof, as opposed to just the literal wording of the declarations of will of the said parties.

Under Art. 199a (2) parties concluding transactions other than the ones they are pretending to conclude are subject to consequences as regards taxation, to be determined on the basis of the concealed transactions.

Under Art. 199a (3) of the General Tax Law, a tax authority is required to bring a case before a civil court to determine the existence or non-existence of a legal relation or right giving rise to tax consequences, if there is doubt regarding the evidence gathered by the said authority, concerning the said existence or non-existence of a legal relation or right.

The last of the provisions cited above was subject to proceedings regarding its constitutionality before the Constitutional Tribunal. The Tribunal held that the challenged article divided powers as regards the establishment of specific circumstances significant from the point of view of tax law between civil courts and public administration authorities conducting tax proceedings. As stated by the Tribunal: "The determination of the existence of a legal relation or right in civil, family and custodial, labour and social insurance law lies within the purview of the common courts. In turn, the making of any determinations, and

[28] www.trybunal.gov.pl.

establishment of the consequences thereof by way of administrative decisions, is a competence of a relevant public-administration organs. A common court's decision regarding the existence or non-existence of a particular legal relation or right is not of an autonomous nature, but rather constitutes a basis upon which tax cases may be resolved by the competent authorities. Such a division of competences provides a significant safeguard where taxpayers are concerned. The professional knowledge and competence residing in common-court judges favours correct adjudication in complex matters from the aforementioned branches of law, while civil proceedings ensure just procedure for private entities, as based around adversarial proceedings and the right to be heard."[29] The Tribunal did not consider Art. 199a (3) of the General Tax Law to be contrary to the Constitution.

Although Art. 199a of the General Tax Law can be perceived as an anti-avoidance provision and, probably, even as an anti-evasion provision, it is not a GAAR. There are neither plans nor advanced discussions concerning the introduction of GAAR into Polish tax law. However, certain regulations in force serve as anti-avoidance provisions aimed at combating specific avoidance cases. One may point at thin capitalization rules or the stipulations of double taxation conventions.

5. Thin capitalization

Article 16 (1) (60) of the Corporate Income Tax Law comprises rules concerning thin capitalization. They were introduced with effect from 1999 and, initially, they aimed at combating tax avoidance in cross-border transactions. Nowadays these regulations are applicable to both national and cross-border transactions. Rules on thin capitalization restrict the tax deductibility of interest payments in situations where the amount of loan financing from a shareholder, who holds at least 25 percent of the share capital, exceeds three times the level of share capital. Only interests in excess of the proportion are not deductible.[30]

6. Specific anti-avoidance measures based on EC law

The directives of the European Community (EC) sometimes expressly allow the Member States of the EC to adopt measures aimed at counteracting tax avoidance and tax evasion.

[29] www.trybunal.gov.pl.

[30] Restrictions are also applicable in the case of loans granted by one company to another company, provided that the same shareholder owns at least 25% of shares in both companies.

One may point, for instance, at Art. 15 of the Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of SE or SCE between Member States,[31] which allows the Member States of the EC to refuse the application of or to withdraw benefits provided by the directive when it appears that the merger, division, transfer of assets or exchange of shares has, as its principal objective or as one of its principal objectives, tax evasion or tax avoidance. Poland has made use of this facultative measure in the Corporate Income Tax Law.

Similar anti-avoidance measures are allowed by another directive regulating direct taxation,[32] but Poland has not introduced such measures.

7. Specific anti-avoidance measures in double tax conventions

General anti-avoidance provisions are almost non-existent in double tax conventions concluded by Poland with other states. A. Zalasiński indicates that although one such provision may be found in the Israel treaty of 1991, as part of the limitation-on-benefits clause, its use has not been reported so far.[33]

A number of provisions, usually part of tax treaties concluded by Poland, can be perceived as specific anti-avoidance provisions. These are:

– beneficial ownership clauses in provisions regarding limited withholding tax rate on passive income;[34]

– holding period for holding threshold qualifying for a limited withholding tax rate on dividends;[35]

– motive/purpose test concerning creation or assignment giving rise to passive interest payment;[36]

– switch-over clauses;[37]

– limitation on benefits clauses;[38]

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[31] OJ L 310, pp. 1–5.

[32] See Art. 5 (2) of the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157, pp. 49–54.

[33] A. Z a l a s i ń s k i, "National Report – Poland," [in:] *Tax Treaties and Tax Avoidance: Applications of Anti-Avoidance Provisions*, Rome 2010 Congress, draft.

[34] Reference to beneficial ownership is rather common in the Polish tax treaties.

[35] Art. 10 (2) of the treaty with the United Kingdom of 2005, Art. 10 (2) of the treaty with Denmark.

[36] Art. 11 (7) of the treaty with Greece of 1987, Art. 11 (8) of the treaty with Mexico of 1998, Art. 11 (7) of the treaty with Chile of 2000.

[37] Art. 24 (3) of the treaty with Germany of 2003.

[38] Art. 25 of the treaty with Israel of 1991, Art. 27 of the treaty with Sweden of 2004.

– capital gains from alienation of shares in companies with substantial real estate assets;[39]

– clauses preventing double non-taxation of pensions;[40] and

– arm's length provisions applicable to "other income."[41]

8. Final remarks

In practice, tax authorities tend to adopt the anti-avoidance approach to transactions entered into by taxpayers, setting aside the literal wording of contracts. However, neither tax authorities nor administrative courts are in possession of any clear, consistent and well elaborated judicial anti-avoidance doctrines. Their decisions and judgements might often be labelled as *contra legem* adjudication.

The problem of anti-avoidance activity in Poland is still under discussion, but there are no crystalized ideas regarding the tools that should be used. From the practical point of view, as far as anti-avoidance activity is concerned, the situation is unclear and judgements in this field are unpredictable.

[39] For instance, Art. 13 (2) of the treaty with Austria of 2004, Art. 13 (4) of the treaty with Belgium of 2001, Art. 13 (5) of the treaty with Denmark, Art. 13 (4) of the treaty with New Zealand, Art. 13 (2) of the treaty with the United Kingdom.

[40] Art. 17 (2) of the treaty with Denmark of 2001, Art. 18 (2) of the treaty with the Netherlands.

[41] Art. 22 of the treaty with Germany of 2003, A. Z a l a s i ń s k i, *op. cit.*

SECTION V A

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CORPORATE CRIMINAL LIABILITY IN POLAND

1. General questions

The legal framework for corporate criminal liability was set by October 28th, 2002 *Act of collective entities' legal responsibility for acts forbidden under penalty* which introduced explications not before familiar to the Polish legal system.[1] In legal writing following the economic and political turnover that took place in Poland after 1989 a number of arguments have been named as reasons for the necessity of establishing criminal liability of corporate entities, whereas the process of the Polish EU integration was acknowledged as the key argument for the governmental bill.[2] Despite the common acknowledgement of the rationale of the government, the manner in which the bill shaped the principles underlying fining the corporate entities was subject to much criticism. The criticism of the business circles found its expression in a motion to the Constitutional Tribunal to declare the unconstitutionality of many paragraphs of the bill. The Tribunal in its 2004 decision stated that some of the provisions of the bill will lose their binding power as not being in accordance with the Constitution. For this very reason in 2005 the Act was amended to its present form.

The concept of corporate liability applied in the Act may be defined as based on the identification theory because the actions of natural persons – members of the board of a corporate entity who commit a crime resulting in profit to that

[1] "Dziennik Ustaw" ("Journal of Law") No. 197, possition 1661.

[2] O. G ó r n i o k, "Problemy przestępczości gospodarczej w świetle zaleceń Rady Europy" [Problems of corporate crime in the light of Council of Europe Recommendations], Law and State (Państwo i Prawo), No. 9, 1991, p. 45 ff. and "Środki zapobiegania przestępczości gospodarczej w zaleceniach Rady Europy" [Means for preventing corporate crime in Council of Europe Recommendations], Law and State (Państwo i Prawo), No.10, 1992, p. 24 ff. R. D ę b s k i, O odpowiedzialności karnej osób prawnych (podmiotów kolektywnych) [On the criminal responsibility of legal persons collective entities], Legal and Economic Studies (Studia Prawno-Ekonomiczne), Vol. LV, 1997, p. 19 ff.

entity, have been recognized as legally equal to the very action of the entity itself.[3]

The act incorporates as one of its principles the assumption that the action of a natural person holding a leading position in a company may be identified with the actions of the corporate entity itself in a situation where such a person, e.g. the leading person acting on behalf or in the interest of the entity single-handedly commits a crime bringing benefit to that entity (Art. 3 pt 1 *Act of collective entities' legal responsibility…*). In each such a situation the collective entity bears responsibility for the criminal behaviour of its leading person.

If a crime bringing profit to the corporate entity was committed by a natural person who does not belong to the group of leading persons than the corporate entity may be held responsible for its actions when such a person was allowed to act by a leading person or performed their actions with the consent of a person holding a leading position. The condition under which a corporate entity may be held responsible is the affirmation that the crime was committed as a result of "at least" the lack of due diligence in recruiting the person who committed the crime or "at least" the lack of due supervision over their actions that should have been performed by the corporate entity's body or representative (Art. 3 pt 2 and 3 *Act of collective entities' legal responsibility…*). A crime committed by a natural person who does not hold a leading position is – in this apprehension – the implication of a faulty organization of the enterprise that is an organizational culpability on the part of the corporate entity. The identification theory as a basis for the corporate entity's responsibility amended in the regulations of the Act with the reservation that the condition for punishing a corporate entity for an action of a natural person is the affirmation (an allegation is not sufficient) of a link between the recruitment (selection) of an unsuitable person or the lack of supervision over their actions and the crime committed. Therefore it is necessary to prove that the natural person committed their crime as a result of the fact that the body or representative of the corporate entity at the very least neglected their duties as far as the solicitous selection and supervision and that very fact was the reason of the situation in which the natural person committed the crime. In other words the condition for criminal responsibility of a corporate entity is a "fault in selection" (*culpa in eligendo*) or a "fault in supervision" (*culpa in custodiendo*) – a constructions familiar to civil law.[4] A corporate entity therefore may be subject to criminal liability if the legal proceeding will prove that its body or

[3] J. G a r u s-R y b a, "Osoba prawna jako podmiot przestępstwa – modele odpowiedzialności karnej podmiotów zbiorowych" [Legal person as a subject of crime – models of criminal responsibility of collective entities], Prosecution and Law (Prokuratura i Prawo), No. 2, 2003, p. 58.

[4] M. F i l a r, Z. K w a ś n i e w s k i, D. K a l a, *Komentarz do ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary* [Commentary to the Act of collective entities' legal responsibility for acts forbidden under penalty], Toruń 2006, p. 56-57.

representative did not show due diligence in choosing a particular person or did not supervise them sufficiently as a result of which that person committed a crime.

2. Structural questions relating to the responsibility of corporate entities

The term "corporate entity" that bears responsibility has been defined in the Act and comprises of three categories.

The first category are state-controlled legal persons such as agencies called upon to fulfil particular tasks and state-owned companies as well as communal legal persons such as communities (*gmina*) acting as budgetary institutions and private law companies. That category encompasses also other (than state-owned or communal) legal persons such as co-operatives and capital companies.

The second category comprises of entities without legal personality that dispose of legal and litigation capability according to separate regulations. Those entities are private companies as well as social organizations.

The third category includes entrepreneurs who are not sole traders as well as foreign entities. Regarding the foreign entities it is interpreted from the text of the Act that solely those ones that have a seat of their representative in Poland belong in that category.

The notion of "collective entity" that may be held liable as a legal person does not encompass either the Exchequer nor the territorial local governments meaning the communes (*gmina*). Nevertheless commercial companies run by the Exchequer may be regarded as "collective entities" in the light of the discussed regulation.

In the commentary to the Act it is noted critically that the scope of the term "collective entity" is too broad because it encompasses all organizational entities acting within the legal system, including those whose activity is not aimed at making commercial profit.[5]

Collective entities described as above may be subject to legal persecution if a natural person acting in their name or in their interest commits one of 120 crimes named in the Act (Art. 16 *Act of collective entities' legal responsibility…*). The Act names as first economic crimes such as the abuse of trust and causing peculiar damage, economic fraud, money laundering, acting to the damage of the creditors as well as unreliable accounting. Insurance crimes are named next as well as different forms of crimes described in the Bonds and Bank Law Act. Further were named the crimes of embezzlement of rights to an invention, acting to the damage of a company by a board member, illegal trade of strategic goods and arms, money forgery, stock crimes, corruption, computer crimes, documents falsification, black marketing. Crimes against sexual freedom

[5] *Ibidem*, p. 29.

were listed separately, including forcing to prostitution. Also named were different forms of crimes against the environment and crimes involving the Genetically Modified Organisms. Further on the Act names terrorist crimes, people trading, taking part in organized crime, illegal production or possession of arms, as well as public propagation of fascism. Enumerated were also crimes of unfair competition such as giving away company secrets, organizing sales in a so-called pyramid scheme as well as crimes described within the copyright act, such as plagiarism. A separate group is represented by tax and customs crimes. Among the crimes for the committing of which by a natural person the corporate entity may be held responsible neither homicide nor causing corporal harm may be found.

A prerequisite for the legal responsibility of a corporate entity for one of the above mentioned crimes committed by a natural person is the benefit that it actually received or might have received from the crime. A material benefit is considered any increase of the assets of the corporate entity or the decrease of its debts. The Act denounces however that the real or potential benefit may be also "non-material." It is not clear what is meant by that term. In the doctrine it is indicated that this could mean the bias of potential contractors of the corporate entity, gaining knowledge of the market conditions or the disavowal of potential competitors.[6]

Corporate liability engages the person who holds the leading position which means that they are authorized to take decisions on behalf of the corporate entity as a member of the body of a legal person ("the directing mind"), as well as a person authorized to conduct internal inspections within that collective entity. The collective entity will also be held responsible for the actions of a natural person authorized by one of the above mentioned persons who acted beyond their competence when giving such an authorization. The responsibility of a collective entity arises when a crime is committed by a natural person acting on behalf or in the interest of a collective entity, if they act on approval or knowledge of a person holding the leading position. In this last case any employee or agent may be regarded as the perpetrator.

The law requires the conviction of a natural person as a condition for corporate liability. It should be emphasized that what is meant here is a forceful conviction of a natural person for committing one of the 120 crimes named in the Act. As tantamount with the conviction a probation may be regarded as well as a no contest plea by the perpetrator. The corporate entity's liability arises also when a natural person who committed a crime has turned state's evidence and due to that fact the court decided to discontinue the proceedings (probation). The absence of an enforceable court decision that recognizes the crime as being committed by a natural person excludes the possibility to initiate a criminal

[6] *Ibidem*, p. 50

action against the corporate entity on behalf of which such a natural person had acted.

A corporate entity may not free itself from liability for a crime committed by its leading person that brought it benefit (not any justification). In a case where the crime was committed by a natural person not holding a leading position, the corporate entity will not take responsibility if there is no fault on its side in selection or supervision over that person – the perpetrator. Criminal liability of a corporate entity does not rely on the allegation of fault by the organization that is the assumption that the natural person committed the crime because they were selected wrongly or that they were unsupervised by the bodies or representatives of the corporate entity. In other words in court proceedings the aim of which is to decide over criminal liability of a corporate entity it is the obligation lying upon the prosecutor to prove that the natural person not holding a leading position committed a crime as a result of negligence on the part of the corporate entity within the recruitment proceeding or in the lack of supervision over them. In court proceedings the corporate entity may also, on its own, initiate evidence to its defence arguing that it does not hold any blame either in the selection nor in supervision over the natural person who had committed the crime. It may also show the lack of causal relationship between its possible fault in organization and the natural person having committed the crime. The condition for the corporate entity to be held responsible is however proving within the court proceedings that the natural person committed the crime "as a result of at least" faulty selection or the lack of supervision on the part of the body. The responsibility of the corporate entity is therefore dependant on the establishing of a functional relationship between the fault in the company organization and the action of a natural person who in the particular circumstances could have committed a crime.

3. The sanctions against corporate entities

If the court finds that the corporate entity is responsible for the crime of a natural person that had brought or could have brought it benefit it fines the company between 1000 and 20 mln zlotys. A fine sentenced within these limits may however not be higher than 10% of an income reached in the year when the crime was committed for the actions of whom the entity is being held responsible (Art. 7 *Act of collective entities' legal responsibility…*). The court is also obliged to forfeit the material benefit, should it be even indirectly resulting from the crime (Art. 8 *Act of collective entities' legal responsibility…*). The court may also sentence the corporate entity with the prohibition from conducting its basic or supplementary activity for the period of 1 to 5 years. Such a prohibition may not however be set should it result in the bankruptcy or liquidation of the

corporate entity or a group redundancy of its employees. Other prohibitions that the corporate entity may be sentenced with include:

– prohibition from advertising the activity of the entity;

– prohibition from applying subsidies or other form of public financial support;

– prohibition from using the aid of international organizations that Poland is a member of;

– prohibition from applying for public contracts.

The court may also make its decision public which is a form of additional penalty for the corporate entity (Art. 9 *Act of collective entities' legal responsibility*...).

When sentencing with a fine as well as when putting on prohibitions the court takes into consideration two groups of factors. The first one consists of the crime-related factors that include: the scope of anomalies in the selection or supervision over the natural person, who had committed the crime as well as the scope of gained or potential benefit for the corporate entity resulting from the actions of the natural person. The second group in comprised of company-related factors: the economic situation of the corporate entity at the time when it is to be punished, the social consequences of the punishment and the influence of the punishment on the further operation of the entity (Art. 10 *Act of collective entities' legal responsibility*...).

In the commentary to the Act it is emphasized that the punishment of the corporate entity according to the guidelines is aimed at the "improvement" of the entity and leaving it with a possibility of proper functioning in the future. The guidelines for punishing that are taken into consideration by the court should lead to laying on such a fine and such a prohibition that their aliment would be felt by the corporate entity, however their scope should not lead it to be ruined.[7] In other words the fines and prohibitions should not mean the economic "death penalty" for the corporate entity. This is crucial because the criminal liability of the corporate entity does not exclude the civil responsibility for the damage done nor its administrative liability. That means that based on the regulations of Civil Code (Art. 415–449) the entity may also be obliged to pay due indemnity resulting from the actual damages accrued. The obligation to pay a certain amount of money may also arise in administrative procedure based on different regulations. In particular cases the financial aliments may be cumulated as a result of a fine, indemnity and an administrative fine. For this reason the amount of indemnity and the administrative fine should be considered by the courts when sentencing it with a fine and laying prohibitions for criminal behaviour of a natural person.

[7] *Ibidem*, p. 33, 62, 89.

4. Procedural issues

In Polish criminal procedure the rule of legality is binding, which means that the public prosecutor initiates the criminal proceedings in every case where there is a justified suspicion that a crime had been committed. This rule applies to each of the 120 crimes the commitment of which by a natural person for the benefit of the corporate entity may lead to the punishment of that entity. If the prosecutor leading the case decides that the action of the perpetrator resulted or could have resulted in benefit to the corporate entity than (s)he should inform that entity which may be subject to criminal liability for the action of a natural person (Art. 21 *Act of collective entities' legal responsibility…*). The corporate entity may put a claim for its representative to be a part of the court proceeding where the natural person is the accused, not having to wait for the proceedings against the very entity to be initiated. Since the collective entity responsibility is secondary (dependant of the conviction of the natural person) such an entity will naturally be interested in the course of the proceedings in the case against the natural person and will willingly take part in those. A representative of the corporate entity has the right to get acquainted with the files of the case against the natural person, introduce evidence, question witnesses and present its statement to the court after the proceedings are closed, as well as appeal the decision (Art. 21a *Act of collective entities' legal responsibility…*).

In a case where a natural person is convicted with a crime bringing benefit to the corporate entity the prosecutor should – in accordance with the rule of legality – file a motion for the prosecution of the corporate entity. The prosecutor does not have the discretional power to decide whether (s)he wants to prosecute the legal entity. Such a motion may also be filed by the victim of the crime committed by the natural person acting on behalf of the corporate entity. The victim must decide on their own whether they wish to file such a motion (Art. 27 *Act of collective entities' legal responsibility…*). A motion by the prosecutor, as well as one by the victim, for the prosecution of the corporate entity are legally equal to an indictment filed against a natural person. A motion for the prosecution of a corporate entity must include among others a sentence convicting the natural person for the crime that brought or could have brought benefit to this entity (Art. 29 *Act of collective entities' legal responsibility…*).

In court proceedings against a corporate entity the Code of Criminal Procedure is applied appropriately meaning that the corporate entity disposes of all the right given to a defendant (Art. 22 *Act of collective entities' legal responsibility…*). The right to legal defence of a corporate entity has therefore the very same scope and procedural warranties as the right to defence of a natural defendant. In the course of the criminal procedure a person who is a member of a body authorized to represent the entity acts on behalf of the entity. This may

not be however the person that committed the crime that caused the legal responsibility of the entity. The defending corporate entity may also authorize its defence to be conducted by a legal counsel. If the corporate entity does not authorize its representative to act on its behalf, the court will appoint it with a legal counsel (Art. 33 *Act of collective entities' legal responsibility…*).

In court proceedings the burden of proof lies on the one who is the author of the motion for prosecution (the prosecutor, the victim), which results in a situation where if (s)he does not prove to the court the guilt of the corporate entity, the court will acquit the defendant (Art. 23 *Act of collective entities' legal responsibility…*).

All those disposing of the knowledge of circumstances the confirmation of which is the condition of the corporate entity's responsibility, may act as witnesses in the proceedings. Those may be the leading persons of the entity accused, including its supervisory board, executive directors, senior managers, administrative staff, other employees and agents. The court is bound by the preceding decision convicting the natural person with the crime as a prejudicate (Art. 36 *Act of collective entities' legal responsibility…*). In court proceedings against the corporate entity the very fact of the crime being committed by the natural person may therefore not be questioned.

In the first instance the district court (*sąd rejonowy*) in whose district the crime has been committed is authorized to examine the motion for persecution in the case against the corporate entity. In a case where the crime is committed in the jurisdiction of multiple courts the case should be examined by the district court where the seat of the corporate entity is located. In the case of a foreign legal person the court of the seat of the representative of the entity has jurisdiction (Art. 24 *Act of collective entities' legal responsibility…*). An appeal from the first instance court decision may be filed by both: one filling the motion for prosecution (the prosecutor, the victim) and the corporate entity itself (Art. 39 *Act of collective entities' legal responsibility…*). An appeal to the Supreme Court (*kasacja*) may be filed solely by the Attorney General or the Ombudsman (Art. 40 *Act of collective entities' legal responsibility…*).

5. Concluding remarks

The *Act of collective entities' legal responsibility* does not only fulfil Poland's obligation to accommodate its internal regulations with international legal system but also reacts on the need to react to crimes committed by corporate entities acting through natural persons. Such a form of economic crime appears in Polish reality, however so far there has not been a trial against a corporate entity.

The rules of corporate entity responsibility introduced in the Act have been subject to criticism by the legal doctrine. It is appraised that the definition of the corporate entity is too broad. The application of the civil law construction of fault ("fault in selection," "fault in supervision") has been appraised critically.[8] It has been regarded irrational for the same deed to cause criminal liability of the corporate entity as well as civil law indemnification and administrative responsibility. Such an accumulation of three basis for legal liability may lead in certain cases to the actual liquidation of corporate entities despite the fact that the Act does not foresee an economic "death penalty" for the corporate entity.

Presently a question appears on whether any further progress in unification of the corporate entities responsibility is possible on a world-wide level. The practical application of the *Act of collective entities' legal responsibility…* relies also heavily on the education of lawyers – judges, prosecutors, attorneys, for whom the experiences of other countries, based on previously elaborated principles for such a responsibility, are of much practical value. The existing differences in solutions adopted in different countries make the exchange of experience of law in practice difficult. Presently the main goal is for the Polish Act not to become a criminal law regulation of only a symbolic value.

[8] *Ibidem*, p. 36–37.

SECTION V B

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THE USE OF ILLEGALLY GATHERED EVIDENCE IN THE CRIMINAL TRIAL

1. General theory of inadmissibility of illegally obtained evidence

1.1. Constitutional or legal regulations

The evidential law in Poland is subordinated to a range of rules which aim to provide accuracy of determination of facts in penal proceedings whilst paying respect to properties and values that deserve legal protection in all legally governed systems. These properties and values form a relatively extensive catalogue. Considerable portion of aforementioned properties and values, appearing as constitutionally protected rights of citizens, finds its reflection in the highest rank legal act of the Republic of Poland, Constitution of April 2, 1997 (Journal of Laws No. 78, item 483). This act does not contain any regulation which would directly address the domain of evidential law in the context of legal proceedings, as this is the case in relatively precise constitutional entries which regulate the procedures connected with penal proceedings (e.g. procedures regarding detention – Art. 41 § 3). As a result, the Polish Constitution lacks a direct stipulation on the prohibition of employing specific types of evidence in legal proceedings; similarly, a general rule of inadmissibility of evidence collected in violation of legal regulations, or obtained by unlawful methods, has not been established. It is only possible to talk about indirect wording in our Constitution regarding prohibition of employing specific types of evidence, and methods for obtaining them, on the basis of generic regulations (Art. 2 of the Constitution – the Republic of Poland shall be a democratic State ruled by law; Art. 7 – The organs of public authority shall function on the basis of, and within the limits of law; Art. 45 item 1 – Everyone shall have the right to a fair and public hearing of his case) or more specific regulations (for instance, expression in Art. 42 of the Constitution

regarding defendant's right to a counsel for the defence is the basis for accepting defendant's right to refuse depositions, and for respecting counsel's secrecy; Art. 53 item 1 of the Constitution, ensuring freedom of conscience and religion to everyone, leads to the prohibition of interviewing clergymen concerning facts covered by the secrecy of confession; state interest, making its reappearance in numerous regulations of the Constitution is expressed in the context of the legal proceedings as an obligation of respecting the principle of state secrecy; prohibition of using torture and other cruel, inhumane or humiliating treatment or means of punishment, expressed in Art. 40 Act 1 of the Constitution, results in inadmissibility of employing any forms of coercion against person under investigation). Polish Constitution is an important source of information regarding organising the principles of the administration of justice (Chapter VIII), including instructions on its substantive modes of activity, but Constitution's general character makes it only a kind of a blueprint for administration of justice.

Specific solutions regulating the use of evidence in the penal proceedings are contained in respective acts, and their secondary regulations issued on their basis. Principal legal act in that scope is the Code of Penal Proceeding of June 6, 1997 (Journal of Laws No. 89, item 555). Prohibitions of hearing specific types of evidence, defined in Polish legislation, or restrictions in obtaining them, or formulated procedural requirements as to evidential actions, constitute either development of general constitutional directives in the field of rights and freedoms, subject to the highest legal protection, or result from recognition of importance of other values deserving an appropriate respect. With respect to the principle of respecting family bonds and other interpersonal relations, a person closely related to defendant can refuse to provide testimonies (Art. 182 § 1 of the Code of Penal Proceeding), or withdraw from giving response to a question asked by the court, if giving such a response could jeopardize this person, or other closely related person, regarding the liability for crime, or fiscal offence (Art. 183 § 1 of the Code of Penal Proceeding). Also persons remaining in particularly close personal relationship with the defendant shall be entitled to benefit from aforementioned rights, if they are willing to do so, and investigative authority consents to this (Art. 185 of the Code of Penal Proceeding). Relying on these rights is synonymous with an absolute prohibition of the employment and reconstruction of earlier testimonies (Art. 186 of the Code of Penal Proceeding).[1] Another right respected in Poland is the restriction of incorporating evidence

[1] This prohibition is interpreted by the judicature quite broadly, considering that interrogation of a person which could, even by accident, hear those testimonies, or become familiar with them e.g. as a recording clerk, would constitute an attempt to bypass the prohibition (ruling of the Supreme Court of February 16, 1988, IV KR 13/88, *Informacja Prawnicza* 1988, No. 3–4, item 29).

coming from the diplomatic representatives of other countries.[2] Next important category of evidential prohibitions includes professional and duty-related (public service) secrets.[3]

The principle concerning evidential law binding in Poland is the admissibility of employing all kinds of evidence in the criminal proceedings, with the exclusion of those that are distinctly prohibited by law. Another working principle is the necessity of respecting procedural requirements stipulated for respective types of evidential activities.

1.1.1. General principles of exclusion / principles concerning procedural invalidity

In the Polish penal procedure there is no general sanction on grounds of violation of existing evidential prohibition, or miscarriages in evidential activities leading to an invalidity of proceedings, does not appear. Similarly, a protocol intending to eliminate faulty activity that would be common for these types of violations is non-existent. Legal consequences of violations in the domain of evidential law have been pointed to only in relation to cases of violating freedom of expression of the interrogated person, influencing someone's expression by means of coercion or unlawful threat, using hypnosis or technical means influencing psychic processes of person being interrogated, or with the intent to control unconscious reactions of the person's body regarding the investigation. According to Art. 171 § 7 of the Code of Penal Proceeding, explanations, testimonies and statements obtained in such circumstances do not constitute the proper evidence. Unfortunately, Code of Penal Proceeding does not regulate the mode of exclusion of this type of

[2] According to Art. 581 of the code of penal procedure, persons enjoying diplomatic immunity are not obliged to testify as witnesses, or appear as experts or interpreters; however, it is possible to turn to these persons' consent regarding testimonies or appearance as an expert or interpreter.

[3] Art. 180 § 1 of the Code of Penal Procedure proclaims that: "Persons obliged to keep public service secret, or professional and functional secret can refuse to give testimonies regarding circumstances covered by this obligation, unless court or prosecutor relieves these persons of the obligation of keeping secrecy." According to § 2 of this provision: "Persons obliged to keep notarial, attorney's, legal adviser's, medical or journalist secrecy can be interviewed as to the facts covered by this secrecy only in such cases where it is deemed indispensible for the interest of justice system, while circumstances cannot be established on the ground of other evidence [...]." In turn, § 3 stipulates that: "Exemption of a journalist from the obligation of keeping professional secrecy shall not concern any information enabling the identification of author of press feature, letter to editors, or other material of similar character; it also shall not concern any information enabling the identification of persons passing the information that was published, or about to be published, if the persons in respect stipulated non-disclosure of aforementioned data," unless this information concerns crime, what is mentioned in Art. 240 § 1 of the Code of Penal Procedure (among others, a homicide).

evidence, and neither it specifies the methods of dealing with the evidence excluded in such a way. Lack of unambiguous regulation leads to a substantial degree of non-uniformity in views of the doctrine. Some authors admit that such types of evidence should be eliminated by way of the resolution of procedural organ (prosecutor – at the stage of preparatory proceedings, court – at the stage of trial proceedings).[4] According to different opinions, evaluation of defectiveness of the evidential activity, and also according to a regulation of Art. 171 § 7 of the Code of Penal Proceeding, should belong to the court undertaking the evaluation of gathered evidential material.[5] However, it is hardly possible to accept such a stance, since immediate elimination of an illegal evidence is of vital importance, in order to disable classifying it as the evidence. It is justifiably stated in professional literature that the fact of placing the Art. 171 of the Code of Penal Proceeding in Chapter V of the Code: "Evidence," whose provisions are followed in every phase of the proceedings, is of no meaning.[6] If we decided to hold a viewpoint that it is up to the court to decide on the elimination of the evidence, there would be no possibility to exclude prohibited type of evidence in the situation where specific case does not even find its way to the court, e.g. due to its discontinuance on the level of preparatory proceedings. Hence, the viewpoint that the authority competent to disqualify a piece of evidence is the authority competent to pass a decision at a certain stage of penal proceedings, seems to be a most accurate one. Within the doctrine, it is possible to encounter one postulate more, i.e.: in case of necessity for elimination of the prohibited evidence at the stage of preparatory proceedings, the prosecutor intending to bring forward the charges should appeal to the court in order to undertake control of justification for excluding this evidence. It may prove to be important

[4] S. W a l t o ś, "Swoboda wypowiedzi osoby przesłuchiwanej w procesie karnym" [Freedom of speech of person being interrogated in a penal process], *Państwo i Prawo* 1975, No. 10, p. 73–74; P. H o f m a ń s ki, A. L e c i a k, "Przesłuchanie *de lege ferenda*" [Interrogation *de lege ferenda*], *Problemy Praworządności* 1982, No. 1, p. 92; D. K a l a, "Problematyka swobody wypowiedzi osoby przesłuchiwanej w procesie karnym. Uwagi *de lege lata* i *de lege ferenda*" [Issues concerning dreedom of speech of person being interrogated in a penal process. Comments *de lege lata* and *de lege ferenda*], *Palestra* 1994, No. 7–8, p. 113–114.

[5] K. K r a s n y, "Swoboda wypowiedzi osoby przesłuchiwanej" [Freedom of speech of person being interrogated], *Prokuratura i Prawo* 1986, No. 10, p. 60–61; A. Gaberle maintains that in justification of ruling, where court points out what evidence has been analysed, lack of indication of certain pieces of evidence is equal to taking into account the evidential prohibition, which forms a clear procedural situation (A. G a b e r l e, *Dowody w sądowym procesie karnym*, [Evidence in judical penal proceeding], Wolters Kluwer 2007, p. 314).

[6] A. C z a p i g o, "Dowody w nowym kodeksie postępowania karnego" [Evidence in new code penal proceeding], [in:] *Nowe uregulowania prawne w kodeksie postępowania karnego z 1997 roku* [New legal regulations in code of penal proceeding of 1997], ed. P. Kruszyński, Dom Wydawniczy ABC 1999, p. 182.

for avoiding suspicions on deliberate elimination of evidence that could be simply inconvenient for the prosecutor.[7]

Facing the lack of regulation concerning form of exclusion of this type of evidence, and the way of further dealing with an excluded evidence, doctrine holds the position that decision should be made in form of the resolution, or made evident in justification for the decision finalizing the proceedings (with a decision of discontinuance, or a ruling). Latter solution is being supported by the majority of representatives of the doctrine.

Due to lack of unambiguous regulation, it seems that the best solution of this problem shall be incorporation of a clear and distinct provision in a code, which would directly state that illegally obtained evidence, defying conditions established in Art. 171 of the Code of Penal Proceeding, is considered to be invalid, and its invalidity is by virtue of law itself.[8] Actual lack in Polish penal law system of an institution invalidating proceedings actions by virtue of law, which by July 1, 2003 was stipulated for most serious offences against the law (e.g. when court pronounced the punishment that remains unknown to the statute, or when it passed a judgement in a composition that remains unknown to the statute – former Art. 101 of the Code of Penal Proceeding), is not averse to the aforementioned solution. It is not a common view. Certain representatives of the doctrine are against disqualifying every piece of evidence that would be obtained using methods prohibited by the penal act.[9] It has also been pointed out that employing the same degree of rigour against incriminating and exonerating evidence is somewhat problematic. Some authors think that equally strict treatment of both kinds of evidence could lead to an unnecessary elimination of a valuable exonerating evidence, whilst the exclusion of illegal evidence incriminating the defendant is of fundamental importance. Other authors imply that the elimination of evidence should be done according to the same set of principles, regardless the fact whether they are to the advantage or disadvantage to the defendant. We are sharing the latter viewpoint.

Due to the lack of provision regulating handling the evidential material after the evidence has been eliminated, it would seem reasonable to simply leave material in the case files of the respective proceedings, particularly since a need might arise to use them at a later date, e.g. in the disciplinary proceedings or

[7] Z. S o b o l e w s k i, *Samooskarżenie w świetle prawa karnego (nemo se ipsum accusare tenetur)* [Self-incrimination from penal law perspective (*nemo se ipsum accusare tenetur*)], Warszawa 1982, p. 123.

[8] Similarly: A. K a f t a l, Review of a paper by Z. S o b o l e w s k i, "Zasada *nemo se ipsum accusare tenetur* w polskim procesie karnym," *Palestra* 1980, No. 4–5.

[9] Z. S o b o l e w s k i, "Dowód nielegalny w projekcie kodeksu postępowania karnego" [Illegal evidence in draft code of penal proceeding], [in:] *Problemy reformy prawa karnego* [Problems connected with reform of penal legislation], red. T. Bojarski , E. Skrętowicz, Lublin 1993, p. 315.

penal proceedings against a person who violated prohibitions of Art. 171 of the Code of Penal Proceeding.

It has also been voiced that the protocols documenting such faulty activities should be destroyed; however this notion has not been approved.

Irrespective of controversies discussed above, charge of an infringement of the regulation of Art. 171 of the Code of Penal Proceeding can constitute the basis for an appeal (Art. 438 of the Code of Penal Proceeding). Infringement of the evidential prohibition constitutes an offence against the procedural law, which leads to the correction of the decision only if respective defectiveness could have influenced the content of the decision (Art. 438 section 2 of the Code of Penal Proceeding). In rulings by the Supreme Court of November 10, 1980 and August 17, 1984[10] it has been stated that when the testimony used against statutory prohibition concerned irrelevant circumstances, or was not used in determination of facts, correction of the questioned statement is not effected. This legal basis will also be used in cases of other infringements regarding evidential prohibitions which, in scope of determining sanctions, are not covered by the regulation of Art. 171 § 7 of the Code of Penal Proceeding (e.g. interrogation as a witness of a person of close relationship to defendant, in the situation of not informing the said person of the possibility to refuse to testify, or interrogation of a person obliged to keep secrecy in scope of mental health protection in the circumstance of a person who suffers from mental disturbances pleading guilty of committing prohibited act – Art. 52 Section 1 of the Act of August 19, 1994 on mental health protection, Journal of Laws No. 111, item 535).

Elimination of faulty activities, entailing the infringement of established evidential prohibitions, is mostly undertaken in the course of an appeal, instituted by a party unsatisfied with the decision.

In case of ensuing faulty evidential activities, expressed by failure to observe foreseen formal requirements, Polish law does not provide the means to disqualify such an activity automatically. The fact that the officer undertaking evidential activity, e.g. conducting the search on premises, violated principles defined in Art. 219–230 of the Code of Penal Proceeding (for example, due to causing an unnecessary damage or inconvenience), does not diminish a legal value of the evidence obtained under such circumstance. This situation however could lead an officer in question who perpetrated an act of violation to bear duty (disciplinary) liability. In extreme cases, the liability would belong to the State Treasury. According to Art. 77 § 1 of the Constitution, "Every person is entitled to a compensation for damages, that have been inflicted by unlawful actions by public authorities." Direct basis for asserting a claim against the State Treasury

[10] OSNKW 1981, No. 4–5, item 26; OSNKW 1985, No. 3–4, item 28).

is contained in regulation of an Art. 417 of the Civil Code (Journal of Laws of 1964, No. 16, item 93).[11]

1.1.2. Obligation of establishing the truth

Among principles that form the foundations of the Polish penal law, central position is occupied by the principle of material truth. This principle entails the necessity for basing decisions made in the proceedings on factual determination, conforming to a genuine state of affairs, that is establishments of facts.[12]

A principal aim of procedural regulations is to create conditions which would maximise the possibility of detecting the true state of affairs. Treating this goal as the highest priority, Polish legislator acknowledges at the same time that truth cannot be established under all conditions and at any price. Decision on the defendant's penal liability must be reached while observing lawfulness, credibility of action, human principles, interests of social importance and other universally recognised values. This is the reason why the Code of Penal Proceeding contains specific exemptions and restrictions in attaining the truth. Evidential prohibitions express recognition of the fact that benefits resulting from establishing the truth can sometimes be incommensurably smaller than detriments that could be caused by hearing a given evidence. Therefore the principle of truth should not be considered an absolute principle.

Principle of material truth has not been regulated in the Constitution. It is directly expressed by Art. 2 § 2 of the Code of Penal Proceeding through an entry stating that "Genuine establishments of facts should be perceived as foundation for all resolutions." This directive is directly linked to the goals of penal proceedings (Art. 2 § 1 of the Code of Penal Proceeding), but also plays an important role in the construction of penal procedure, which consists of respective solutions enabling a revealing of truth.[13]

1.2. General principles of admissibility / exclusion of illegally gathered evidence in jurisdiction of Supreme Court

[11] Z. B a n a s z c z y k, [in:] *Kodeks cywilny. Komentarz* [Civil code. Commentary], ed. K. Pietrzykowski, Wydawnictwo C. H. Beck 2002, p. 903–917, along with recommended literature.

[12] A. M u r z y n o w s k i, *Istota i zasady procesu karnego* [Essence and principles of penal process], Warszawa 1994, p. 114; K. M a r s z a ł, *Proces karny. Zagadnienia ogólne* [Penal process. General issues], Katowice 2008, p. 89.

[13] In a verdict of May 26, 1983, sign. II KR 108/83 Supreme Court has accepted that "This principle should be understood as a directive for conducting the proceedings in such way that factual establishments are approximate to truth in a highest degree possible. It should also be taken into consideration that reaching factual establishments on the evidential ground allows only a certain probability level for these establishments, independently of the cognitive value of the evidential material."

Jurisdiction of Supreme Court in Poland is focused rather on explaining of reasoning behind respective evidential prohibitions, and this aspect shall be reflected upon in further parts of the hereby paper. The highest amount of statements made by the Supreme Court concerns influencing an interrogated person's freedom of speech by means of coercion or an unlawful threat.[14] Principally, there are no court decisions that would contain most general statements regarding the problem of admissibility or exclusion of illegally obtained evidence. We think that legal ambiguities, emerging around this problem, already referred to in earlier sections and presented more broadly in the sections which follow often resulting in legal disputes in doctrine, should be solved by the legislator. Supreme Court jurisdiction in this matter could imply its will to replace legislator in this process. However, entire range of problems would need to be solved in the statutory way, among others problem of including deceit in the list of inadmissible evidential methods, and finding the proper elimination mode for evidence obtained in the circumstances of violation of law.

2. Rules of admissibility / exclusion in relation to infringement of privacy law

2.1. General decisions in right to privacy and individual growth protection

2.1.1. Constitutional resolutions

In Poland, privacy law is subject to a constitutional protection. According to Art. 47 of the Constitution, "Everyone shall be entitled to a legal protection of his private life, of his honour and good reputation and to make decisions about his personal life."

Protection of private life, as well as other kinds of vital private causes, is being mentioned as one of the grounds for a decision to hear a case at non-public sitting. Art. 48 concerns respecting the autonomy of family relations along parents-children axis, while Art. 49 specifies problems of freedom and secrecy of communication and Art. 50 is established to treat the inviolability of individual lodging. It is also necessary to point to Art. 31 Act 3 of the Constitution, according to which "Restrictions in enjoying constitutional rights and freedoms can only be established in a specific act, and solely in a situation when it is necessary for the safety or public order of the democratic state, or for environmental and health protection, for public morality protection, or in the

[14] A. G a b e r l e, *op. cit*., p. 304–312.

interest of freedoms and rights of other persons. These restrictions should not transgress the freedoms and rights in their essence."

2.1.2. Statutory resolutions

As one of citizen's elementary rights and freedoms, right to privacy is in Poland guaranteed in many different ways. It consists of a whole range of statutorily guaranteed laws, among others law of respecting family life, inviolability of individual lodging, and secrecy of correspondence (and other means of transmitting information). Right to privacy is also connected with the issue of personal data security, regulated by the Act of August 29, 1997 on the protection of personal data (Journal of Laws No. 133, item 883). This act prohibits processing of data revealing racial or ethnic origin, political views, religious and philosophical convictions, affiliations of religion-, party- and union-related nature, health status, genetic code data and information on individual addictions or sexual life, simultaneously introducing many important exceptions (Art. 27 item 2).

Basically, principles of privacy protection established in an Art. 17 of the International Pact of Civic And Political Rights find their normative expression in the Polish jurisdiction, although practice of observing these solutions, often resulting from lacunae in the regulations, shows an imperfection in their application. Universal usage of personal data by the companies focused on aggressive types of electronic marketing can serve as a model example of such imperfection. It is also doubtful whether police act, enabling possibility of using interception in a quite broad manner, does not violate international regulations in this domain.

It is necessary to emphasise that an understanding and scope of right to privacy has underwent a substantial change in last few years. In times of People's Republic (before 1989) this right has been largely ignored and violated on a mass scale, especially in relation to the secrecy of correspondence (interception and censorship of mail) and transmission of information ("controlled conversations"). Political opponents of the communist system were subject to constant surveillance, including wiretapping. Present times create new kinds of threats. In the period of rapid technological development, right to privacy is universally violated by means of devices enabling easy methods of personal identification. We are being under surveillance of police cameras mounted in public space. Popular and readily available equipment facilitates eavesdropping at long distances.

Separate class of restricting right to privacy is constituted by cases of suspicion of perpetrating criminal offence. Law enforcement officers have at their disposal many possibilities of collecting information on persons within the framework of so-called operational and intelligence activities and investigative activities. Code of Penal Proceeding obliges authorities undertaking the

proceeding to establish defendant's identity, age, family and property relationships, education, profession and income sources, as well as data regarding plaintiff's criminal record (Art. 213). It also allows for the search, control and recording of the contents of conversation. Proceedings rigours provided for these activities, especially restriction of their usage to a group of sixteen major offences, with temporal restrictions and judicial review aim to minimise the results of interfering with the private sphere.

Activities of police and other specialised services, employed in connection with suspicion of committing crime and initiated before formal launching of the investigation, form distinct grounds for interference with citizen's private sphere. Due to a growing criminality, these authorities are being granted new competences on a regular basis. This process reflects conflict that arises between need to secure citizens' privacy as right subject to highest level of protection, and state responsibility for safety and social order. The problem of right to privacy has been barely mentioned here, due to formal restrictions imposed on this paper.

2.2. Search of private lodgings

2.2.1. Constitutional regulation

According to an Art. 50 of the Constitution of the Republic of Poland, inviolability of private lodgings is statutorily assured. Search of a flat, other space or a vehicle can only be effected in cases specified within an act, and strictly in a defined way.

2.2.2. Statutory regulations

In a Polish legal system, search of a flat is proceedings-related activity. Art. 219 of the Code of Penal Proceeding, which should be perceived as main regulation of the domain, enlists following material conditions for undertaking of a search: Art. 219 § 1, in order to detect or detain, or to bring up a suspected person to a court compulsorily, also in order to locate objects that could serve as an evidence in the proceedings, or those subject to a seizure, it is possible to conduct a search of lodgings and other places if there are plausible reasons for an assumption that suspected persons or objects can be found there § 2, in order to locate objects mentioned in § 1 and under conditions defined in this regulation, it is possible to conduct a search of a person, person's clothing and items. Activities similar to a search (of persons and clothing) can be conducted on the grounds of regulations determining powers of police formations that shall be enumerated in a section D of this chapter.

2.2.3. Jurisdiction and offences committed during searches of lodgings

This domain seems to be improperly regulated in Polish legal system and practically non existent in the context of jurisdiction. Legislator did not accept any concept of unambiguous prohibition of employing illegally obtained evidence, which has been followed by jurisdiction's failure to stigmatise such behaviour in an unambiguous manner. Within the doctrine it is pointed out[15] that, from the point of view of interpretation of behaviour of authorities conducting a search, Art. 227 seems to be a key element. It states that search or detainment of an object should be conducted in conformity with the purpose of such activity, with necessary degree of moderation and respect for dignity of persons under search, without causing unnecessary damage and inconvenience.

Nevertheless, it is commonly accepted[16] that infringement of requirements of Art. 227 does not make whole activity ineffective, while evidence obtained in such way retains its value for the proceedings.

However, lack of a solution for the proceedings seems to be at least partially compensated for by material regulations: penal and civil one. In case of violating person's dignity, or causing an unnecessary damage and inconvenience, officer under the reproach can bear penal responsibility provided for in Art. 231 of the Code of Penal Proceeding. Additionally, harmed person is entitled to assertion of a claim against State Treasury on the grounds of violation of personal rights (Art. 24 of the Civil Code) or causing harm (Art. 415–420 of the Civil Code), to be conducted by way of civil law proceeding.

2.2.4. Admissibility of evidence based on illegal evidence (fruit of the poisonous tree)

Due to a fact that even far-reaching case of a violation of regulations concerning search does not disqualify an evidence obtained in such way, it seems to be equally admissible to use further evidence basing on results of an illegal search, as far as it does not infringe specific regulations connected with other evidential prohibitions (e.g. interrogation of a witness with freedom of speech infringement, violation of secrecy etc.).[17]

Rather unanimously, doctrine maintains that an authority is also enabled to detain other objects than those looked after (described in a decision, or

[15] J. G r a j e w s k i, L. P a p r z y c k i, S. S t e i n b o r n, *Kodeks postępowania karnego. Komentarz* [Code of Penal Proceeding. Commentary], Warszawa 2006, electronic version.

[16] T. G r z e g o r c z y k, *Kodeks postępowania karnego. Komentarz* [Code of Penal Proceeding. Commentary], Kraków 2003, electronic version.

[17] See, for example, proceedings of a Supreme Court of April, 2008 IV KK 11/08, where Supreme Court points out that charges regarding a search of a lawyer's office are meaningless as "even admitting to a faultiness of an activity, there is no possibility for its validation."

similar document, or in any other valid form), if they were revealed as constituting, or being able to constitute, an evidence of other crime, or if the possession of those objects is forbidden.[18] However, it does not seem principally permissible to widen the scope of the activity beyond purposes pointed out in the Art. 219 of the Code of Penal Proceeding (detection, detainment, compulsory bringing up of a person, finding of an object), which does not decide in advance and unanimously on the non-admissibility of an evidence obtained in such way.

2.2.5. Impact of international jurisdiction

It seems that the impact of international jurisdiction regarding conducting of a search had the greatest influence for the formation of safeguarding system, and considerably smaller in case of working practice. As it is stressed, the quoted above Art. 227 of the Code of Penal Proceeding constitutes a guarantee standard. This does not only enforce an Art. 30 of the Constitution of the Republic of Poland, according to which natural and non-negotiable human dignity is an immovable source of freedoms and rights, obligatorily respected by public authorities, but it also stresses Art. 40 of the Constitution and Art. 3 of the European Commission of Human Rights, containing among others a prohibition of humiliating treatment. On the other hand, direct references to jurisdiction based on an Art. 3 of the European Commission of Human Rights are not often utilised in working practice (if referring to internal law system is sufficient). Nonetheless, Polish law seems to comply with the recommendations of an international jurisdiction, especially European Tribunal of Human Rights e.g. in the area of the principle of proportionality,[19] or in broadly understood notion of an "inhabited space," which practically means both the location of a business activity and a place of residence.[20]

2.3. Protection of privacy in communication sphere

2.3.1. Constitutional regulation

Pursuant to Art. 49 of the Constitution of the Republic of Poland, the freedom and privacy of communication shall be ensured and, any limitation thereon may be imposed only in cases and in manner specified by statute.

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[18] See Art. 228 § 2 that regulates mode of dealing with objects found during a search: "The same applies to objects found during a search that could serve as an evidence of other crime, subject to a forfeiture, or those whose possession is forbidden."

[19] Smirnov vs. Russia, sentence of ETHR of June 7, 2007 71362/02.

[20] Wieser and Bicos Beteilugungen vs. Austria, sentence ETHR of October 16, 2007 74336/01.

2.3.2. Statutory regulations

In relation to interference in sphere of freedom and secrecy of communication, two basic forms of limitations of this right should be highlighted, i.e. the one which has been stipulated in police acts under the so-called operational and intelligence (preliminary) activities and another one – within controlling and recording of conversation ordered as procedural activity.

In the first scenario, a model solution is provided for in Police Act of April 6, 1990 in Art. 19 (legal acts concerning other services often refer to this regulation). Accordingly, in case of preliminary investigation carried out by the Police to prevent, detect, establish perpetrators and to obtain and record evidence of perpetrators prosecuted on indictment, of intentional crime, enlisted, of the most serious crime, when other means appeared ineffective or there is significant probability of the means being ineffective or useless, the District Court, upon a written request of the Police Commander in Chief, submitted after a prior written consent of the district prosecutor with territorial competence, may, by way of resolution, order operational control. Operational control is performed secretly and consists in:

– control of the content of correspondence;

– control of the content of parcels;

– use of technical resources, which facilitate obtaining of information and evidence in secret as well as recording thereof, especially the content of telephone conversations and other information submitted *via* the telecommunications network.

It should be noted that despite literal wording of provision on 'obtaining evidence,' this issue is not obvious, and there are least two, competitive views which prevail in doctrine (see Part C, item 4).

In relation to procedural activities, Art. 237 of the Code of Penal Proceeding states that after instituting legal proceedings, the court may, on request of the prosecutor, order control and recording of content of telephone conversation in order to detect and obtain evidence for the proceeding in progress or in order to prevent committing another crime.[21] In urgent cases, control and recording of telephone conversations may be ordered by the prosecutor, who is obliged, within three days to turn to court with the motion for approval of the decision. The court issues the decision in scope of the motion within 5 days at seating without involvement of parties. Control and recording of content of telephone conversation are admissible only in cases when proceeding in progress or justified fear of committing a new crime concern firstly the enlisted and most serious crimes, secondly – in relation to a suspect, the defendant or in relation to

[21] Also, by virtue of Art. 241 these rules are used for control and record by technical means of content of other conversations or trasfer of information, including correspondence sent electronically.

an injured party or other person who may be contacted by the defendant or who may be linked to the offender of a threatening crime.

Due to the fact that control and record of conversation have been regulated in the code of criminal proceeding, it remains beyond doubt that their outcome may constitute the evidence in a case.

2.3.3. Jurisdiction in scope of infringement during control of conversations and correspondence

As it has been already pointed out in introduction, because of two fundamental manners of interference existing, they should be considered separately.

With reference to police control of correspondence, the legislator adopted the construction whereby court decisions in scope of operational control are subject to complaint to Police authority which applies for issuing such a decision. Accordingly, the provisions of Code of Penal Proceeding apply to the complaint. A person under control is not vested in such measure, hence at the moment, an independent evaluation of any infringement during application of operational control appears to be difficult, despite the fact that Attorney General presents the information on activity defined in Art. 19 to the Parliament on annual basis.

The Polish Constitutional Tribunal in ruling of December 12, 2005,[22] which seems fundamental in defining boundaries for competence of state authority in relation to a citizen when applying operational and intelligence activities, noted that these activities as such – are indispensable in countries of nowadays, threatened by terrorism or growth of organised crime. Nonetheless, interference in freedom of communication shall be protected by:

– application of the rule of proportion and decent legislation by a legislator;[23]

– making limitations only by way of act in a concrete manner and with no open general clauses used;

– observing by court, deciding on the admissibility of use of resources, of the so-called three-level assessment test, which takes into the account the following:

– sufficiently precise and concrete legal foundation;

– necessity of the interference considered from the requirements of democratic state, ruled by law;

– purpose of interference considered in Art. 8 of ETHR.

Generic principles indicated above constitute only quite general and framework criteria for assessment of motions on the application of operational control, the use of which should be expected. At the moment, the uniform and

[22] Ruling of Constitutional Tribunal of 13.12.2005, K 32/04, for: http://www.trybunal.gov.pl.

[23] Ruling of Constitutional Tribunal of 20.06.2005, K/04, OTK ZU 6/A/2005, item 64.

commonly approved practice is missing. One can see some minor changes in this scope in few recent rulings, however they do not make up for a coherent and sufficiently formed line. In a famous case in Poland concerning a medical doctor Mirosław G., against whom the Central Anticorruption Bureau applied operational control in an unlawful way,[24] the Appeal Court when overruling the decision on provisional detention, ascertained that evidence illegally gathered by investigative authorities cannot stand for grounds for an indictment. A future consolidation of that rule remains an open issue.

In relation to the control of correspondence by court, the legislator adopted a solution, according to which the announcement on decision on control and recording of telephone conversation to a person whom it concerns, may be postponed for the period of time needed for the sake of a case, however no later than till valid resolution of a lawsuit. The decision on control and recording of telephone conversation can be questioned by a complaint. A person, who is the subject of decision, in his or her complaint can demand examination of grounds and legality of control and recording of telephone conversation. Complaint on the decision issued by prosecutor is considered by the court. Similarly as in case of search, it has been recognised that any infringements which occurred during the control of correspondence do not eliminate as to the rule, the evidential meaning of obtained results.

2.3.4. Admissibility of other evidence (fruit of the poisonous tree)

In relation to eavesdropping (wiretapping) carried by the police, firstly, there are doubts already mentioned in doctrine as to the evidential meaning of obtained information, i.e. the possibility of direct use thereof. A part of Polish doctrine (among others, A. Taracha[25]) advocates – somewhat in a justified way – the adoption of a literal wording of act, others however (T. Hanausek,[26] T. Tomaszewski[27]) point to the fact that from the very substance of positioning the eavesdropping within the framework of preliminary investigation, its results cannot be of evidential character – and in this meaning, of a fundamental one.

[24] Polish legislation foresees the possibility – in urgent cases – of applying the control for five days and in pararell, to apply to the court for the so-called follow-up permission. In the case under discussion, this was interpreted as the possibility to control without a court's permission in short periods of time (interrupted by short interval) as well as some information was sought on activities outside the catalogue of the ones justifying undertaken operational control.

[25] A. T a r a c h a, *Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawnodowodowe* [Operational and intelligence activities. Forensic, legal and evidential aspects], Lublin 2006.

[26] T. H a n a u s e k, *Kryminalistyka. Zarys wykładu* [Forensic science. Outline of lecture], Warszawa 2005.

[27] Z. C z e c z o t, T. T o m a s z e w s k i, *Zarys kryminalistyki ogólnej* [Outline of general forensics], Toruń 1996.

Another group (P. Hofmański) ascertains only the dispute in doctrine on this issue and one can consider their position – albeit merely not much contributing to practice – a most accurate one.[28] The latter view appears to be shared (partially at least) by the Constitutional Tribunal of the Republic of Poland in a quoted ruling of December 2005, which concluded in its justification that "*stricte* intelligence materials, although having been recorded in writing, are deprived of official documents value and are not attributed an outstanding evidential power. They do not consist an evidence of what has been established therein, as they are not assigned the assumption of truthfulness pertinent to an official document only."

Even more complicated situation involves derived evidence (fruit of a poisoned three). Due to the lack of any general rule, one should rely on the analysis of past rulings, which have not been shaped into a more permanent tendency or line (not yet). Two rulings should be considered of most importance. The first one is a quoted ruling of Constitutional Tribunal of 2005. In their formulated objection, both Ombudsman and General Attorney considered that a particular manner of gathering information in urgent situations, i.e. with parallel application to the court for a follow-up legalization, and then – after no permission granted – for non-destruction and use of them in a criminal trial constitutes nothing else but the use of "fruit of the poisonous tree." The Tribunal however did not agree with this argumentation, noting that the court's permission (essential from the point of view of legality of preservation of information) would validate an original fault, the outcome being that illegal nature of further evidence cannot be questioned. This ruling, however, barely touches upon the problem issues. The Decision of the Supreme Court of 26.04.2007[29] seems to be more important, whereby it was stated that:

- Through "gathered evidence allowing for instituting a criminal trial or being significant for a criminal trial in progress" (Art. 19 item 15 of Act of April 6, 1990 r. on the Police, consolidated text, Journal of Laws of 2002, No. 7, item 58 as amended) one should exclusively understand evidence of committed crimes enlisted in the catalogue in Art. 19 item 1 of this Act.

[28] P. Hofmański, Z. Sadowski, K. Zgryzek, *Kodeks postępowania karnego z komentarzem* [Code of Penal Preceeding with commentary], Warszawa 2007, t. 1, s. 1066: "It is disputable whether and to what degree the information collected in this form can be directly [underlined – M. R.-R., P.G.] and evidentialy used in a criminal trial as this would indicate skipping procedural rigours defined in [...] provisions [...]. One cannot fail to note, however, that the legislator admits procedural use of intelligence materials from wiretapping in a criminal trial [...]. However this appears to be admissible only when materials had been gathered beyond a criminal trial and not for its purposes."

[29] Decision of the Supreme Court of 26.04.2007, I KZP 6/07.

• The evidence of crime gathered during operational control – defined in Art. 19, item 1 of the Police Act, by a person other that the one covered by the decision issued on the basis of Art. 19 item 2 of this Act or committed by the person covered by the Act but which concerns crimes other than contained in this Decision, can be employed in a court proceeding (Art. 393 § 1 first sentence of the Code of Penal Proceeding, used as appropriate) under the condition that a follow-up court permission is issued for carrying out the operational control (Art. 19 item 3 of the Police Act, used as appropriate).

The above points to the need for a narrow interpretation of evidential meaning of information gathered *via* operational control. They can serve (if any) only in relation to the proceeding and the person covered by the decision.

2.3.5. Impact of international jurisdiction

The aforementioned ruling of the Constitutional Tribunal points to the significance of impact of ETHR jurisdiction in scope of examining the admissibility of interference in the context of individual right protection, in particular as to:

– appropriate classification of individuals against whom operational control can be used, activities, which justify the application thereof, time and mode of issuing order;[30]

– handling gathered evidential materials, in particular the destruction or transfer of unused (not relevant to the case) ones, as well as providing adequate control means by court or attorney;[31]

– not excessive determination of secrecy of undertaken activities, i.e. also the use of the rule of proportionality;[32]

– existing control procedures for applying operational and intelligence activities (preliminary investigations) by the police services.[33]

Analysis of changes in Polish police legislation as well as in the Code of Penal Proceeding, introduced partially as a result of rulings of the Constitutional Tribunal, points that the above rules were of vital meaning from the perspective of the Polish legislator, who attempted to adopt to them the wording of provisions.

2.4. Other activities violating privacy, which can lead to infringement in the scope of evidential law

[30] Kruslin vs. France 11801/85, Huvig v. France 11105/84 of 24.04.1990.
[31] Malone vs. United Kingdom, 8691/79 of 2.08.1984.
[32] Klass et. al. vs. Germany 5029/71 of 6.09.1978.
[33] Rotaru vs. Romania 28341/95 of 4.05.2000.

2.4.1. Principles governing the search of objects and pertinent jurisdiction

Search of vehicle and traffic control. The Art. 50 of the Constitution of the Polish Republic quoted above enlists a vehicle next to house premises and room, as a search object, in relation to which a statutory foundation must be applied. Therefore, in first instance, provisions on search basing on the Code of Penal Proceeding apply (discussed above), along with safeguards described therein. The activity similar to search, brought down to a partial at least, penetration of the car interior, belongs to a traffic control, whereby aside from the Police, also other competent services appear in special cases (which shall be skipped in further part). The rights in scope of traffic control have been contained both in the Police Act where in Art 15 § 1, item 8, where the possibility of checking the type of fuel used by collecting samples of fuel from a motor vehicle tank was stipulated and in Art. 129 of Traffic Act.[34] According to this provision, a driver must obey to a physical interference of a police officer, which includes, *inter alia*:

– checking technical condition, equipment, load, dimensions, weight or axis pressure of a vehicle on the road;

– disabling a driver from using a vehicle, whose technical condition or load pose a threat to safety and order of traffic, may cause damage to a road or violate requirements of environmental protection;

– application of control and measuring devices, to examine a vehicle in particular;

– control of transportation of dangerous items and of requirements connected with this transport.

These activities, apart from their on-the-surface similarity are not, however, identical to a search, which can be undertaken – as it was already pointed out – on the basis described above.

Search of clothing and personal luggage and personal search. The institution of search (in particular of premises, but also of persons, their clothing or luggage) should be differentiated from out-of-trial activities, similar to the search, performed by police and defined as 'personal control' or 'checking the luggage and cargo' conducted in harbours and railway stations or in means of land, water-borne, airfreight transport. The legal basis of this activity is contained in police acts, i.e. the ones regulating the competence of specific public order services. The most representative example appears to be contained in Art. 15.1 item 5 of the Police Act (with corresponding competence of other formations), according to which the Police is entitled, among others, to perform

[34] Consolidated text, J. of L. 05.108.908 as amended.

personal checks and search through baggage and inspect cargo in ports and stations, as well as in means of land, water-borne and airfreight transport, in case of justified suspicion that a forbidden act subject to penalty has been committed. Pursuant to the standpoint of jurisdiction, this activity, albeit severe and infringing personal property, is in some cases justified.[35]

In both cases, finding the evidence of a prohibited deed, even if the activity was conducted in a faulty or illegal way, does not exclude the evidential value of found objects, although violation of law by a person conducting the activity may lead to incurring disciplinary or penal responsibility by this person or possibly a civil one – by the State Treasury.

2.4.2. Principles governing search, analysis of information and other manners of collecting semi-private data

It is not possible to present all infringements of the right to privacy in scope of collection of information in a criminal trial, and therefore the Authors decided to discuss the most important ones, which have been arranged in the sequence, as follows:

– examination of a witness's body;[36]
– medical and psychological examination;
– screening analysis.

Examination of a witness's body. One of the ways to gather significant information (particularly in relation to offences against life and health), which may interfere into someone's sphere of privacy is examination of body. In the Polish state of law, the examination is conducted pursuant to the "as needed" rule (Art. 207 of Code of Penal Proceeding). At the same time, if penality depends on an injured party's state of health, he or she cannot object to this kind of examination and check-up which is not related to a surgery or observation in a medical institution (Art. 192 § 1 of the Code of Penal Proceeding), unless he or she uses the right to refuse to provide testimony or is released from this duty. Additionally, always for evidential purpose (Art. 192 § 4 of the Code of Penal Proceeding) and following a witness's permission, the person can be subject to examination of body for evidential purpose. The examination of body, which may entail a feeling of embarrassment, should be done by the person of the same sex, unless particular difficulties arise; other persons of a different sex may be present only when necessary (Art. 208 of the Code of Penal Proceeding). This rule – as concordantly underlined by all commentators – is of safeguard nature and a possible presence of a person of different sex should belong to outstanding

[35] Ruling of the Court of Appeal in Warsaw of 20.11.2007, I ACa 920/07, Rejent 12/2007, p. 210.

[36] Similar activities towards the defendant were described in part II due to their relevance in the context of *nemo se ipsum accusare tenetur* rule.

cases, and above all, the person should be a medical doctor.[37] Any irregularities found during examination of body do not greatly affect the evidential value of findings, and examination protocol made in course of a criminal proceeding is subject to be revealed during a trial, even if a person undergoing such examination, denied explanations or testimony or was released from this duty (Art. 186 of the Code of Penal Proceeding). This rule has not been criticised neither in doctrine, nor in jurisdiction, although it may evoke some doubts, particularly in the perspective of benchmarking.

Medical and psychological examination. Similar rules, however different by details, are binding in relation to medical and psychological examination. The general rule is, that for evidential purposes, a witness (following his or her consent) can be subject to medical or psychological examination (Art. 192 § 4 of the Code of Penal Proceeding).

Should a question arise as to mental state of a witness, his or her mental development, ability to perceive or reconstruct observations, the court or prosecutor may order interviewing a witness by a medical doctor or psychologist acting as expert witnesses, and a witness does not have the right for objection. Similarly, if penality depends on an injured party's state of health, he or she cannot object to this kind of examination which is not related to a surgery or observation in a medical institution (Art. 192 § 1 and 2 of the Code of Penal Proceeding). On the other hand, these provisions are not applied in relation to persons using their right to refuse the testimony or being released from this duty.

Failure to meet the above criteria by the authority, does not automatically eliminate neither a fundamental nor derived evidence (fruit of the poisonous tree).

Screening analysis. For cases where the circle of suspects can be extensive and, at the same time, there is lack of premises allowing for presenting charges to specific person, a Polish legislator, following the model of international solutions, introduced the so-called screening examinations, stipulated in Art. 192a of the Code of Penal Proceeding. It has been decided in the Article, that in order to narrow down the circle of suspects or to establish an evidential value of revealed traces, one can collect fingerprints, buccal swabs, hair, saliva, handwriting samples, scent, take a photograph of a person or record his or her voice. After it has been used in case, for sake of which collection or recording took place, a collected or recorded material redundant for the proceeding shall be removed from case files without delay and destroyed. Furthermore, following a consent of examinee, the expert witness can also utilise technical means aiming at control of involuntary (subconscious) reaction of a given person's body.

[37] J. G r a j e w s k i, L. P a p r z y c k i, S. S t e i n b o r n, *Kodeks postępowania karnego*...

Editing of this provision leaves quite a lot to wish for, and this is somehow ignored by the Polish doctrine, with few exceptions.[38] First of all, the procedural position of the persons, against whom mentioned above measures are applied, is not clear. The provision was inserted into the Chapter on witnesses, whereas it literally mentions the suspects. Secondly, there is a lack of boundaries of "the circle of suspects" defined at least in general terms and established by a doctrine or jurisdiction, i.e. is it allowed to use this measure, for instance, in relation to all inhabitants of a city, voivodeship or even a country? In situation of lack of standpoint of doctrine and jurisdiction, some general rules should be applied in relation to possible irregularities arising while carrying out such activities, i.e. it should be recognised that they do not annihilate evidential meaning of both information derived from examination itself and as well as further, derived evidence. On the other hand, the analysis of such solution in the light of Constitutional Tribunal jurisdiction evokes questions on compliance of this regulation with, e.g. the rule of decent legislation.

2.5. Violation of privacy as outcome of indirect infringement of various constitutional rights

2.5.1. Search as result of unlawful arrest or take-over

As it was mentioned before, the rights of inviolability of the body or someone's premises are ensured by the Constitution, however at the same time, several provisions point to the possibility of conducting a search by a competent body. Among others, it has been envisaged by the Code of Penal Proceeding (Art. 219); Act of 24 August 2001 code on proceedings in petty crime cases (Art. 44); Act of 28 September 1991 on treasury control (Art. 11a § 1 item 2).

Statutory premises for the search involve the appearance of justified premises, that a suspect or specific items remain at the premises of conducting such activity. Conducting a search in case of absence of such a need, e.g. due to classification of crime or lack of formal conditions to perform a search, remains unlawful. A search represents an independent evidential activity, so conducting such is determined by occurrence of circumstances pointing to the likelihood of a presence at a specific place of a person or object of evidential meaning. A search carried out in absence of the premises indicated above, to some extend "using the opportunity" of other procedural activity, such as comprehension, constitutes and abuse. Should it however take place, the evidence gathered in connection to unlawful search is not deprived of procedural value and may constitute a basis for ruling, unless it is indicated by a party that procedural

[38] J. W ó j c i k i e w i c z, *Temida nad mikroskopem* [Themis over microscope], Toruń 2009, p. 38.

default, involving failure to observe statutory search requirements could have had influence on the wording of ruling (Art. 438 item 2 of the Code of Penal Proceeding). The police officer, who violated search principles in such a way, is subject to service-related sanctions. A certain departure from the requirement to verify the information on a suspect or searched object being at the search location is admissible in cases of great urgency (Art. 308 of the Code of Penal Proceeding), when facing a need to collect the traces and evidence of crime in an urgent manner. In such a case, a search often constitutes the first evidential activity and therefore cannot be based on reliable foundations of its statutory admissibility.

2.5.2. Search as a result of unlawful interrogation

In scope of procedural effects the situation embraced by the title is similar to the one described in point 2.5.1.

3. Rules of admissibility / exclusion in relation to illegal interrogations

3.1. Right to keep silent / prohibition to compel to provide evidence to somebody's disadvantage

3.1.1. Constitutional regulations

The principle to remain silent has not been expressed in the Polish Constitution *expressis verbis* however it does correspond to the principles laid down in Art. 42 by virtue of which anyone against whom a penal proceeding is carried out, has the right to defence across all stages of the proceeding. In particular he or she may chose an attorney or, following the rules defined in a act, use a court-appointed counsel for the defence. Also, each person is considered innocent until proven guilty by a lawful court ruling.

3.1.2. Statutory regulations

Polish Code of Penal Proceeding, Art. 74 § 1 accepts as general rule that a suspect is not obliged to prove his or her innocence neither provide evidence to his or her disadvantage. At the same time, a suspect has obligation to undergo certain evidential activities, such as:

– external examination of body and other non-invasive examinations: in particular, a suspect can be fingerprinted, photographed and shown in identification line-up for recognition purposes by other persons;

– psychological and psychiatric examinations and examinations linked with performing certain treatments on his or her body, excluding surgery, provided they are performed by a competent personnel of health service while observing

indications of medical knowledge and they do not pose any threat to a suspect's health, should this examination be deemed necessary; in particular a suspect is obliged – when the above conditions are met – to provide blood, hair or body excreta samples;

– collection by the police officers of buccal swab, should it be deemed necessary and in absence of fear that this would threat a suspect's or other person's health.

A vast part of these obligations also include a suspect.

Complementary to the above is Art. 175 of the Code of Penal Proceeding, which stipulates that the defendant has the right to provide testimony, however may – without stating any reasons – refuse to provide answer to specific questions or refuse to provide explanations. The defendant should be instructed on this right.

3.1.3. Position of jurisdiction towards the interpretation of scope, protected interests etc. covered by fundamental rights

Jurisdiction concerning prohibition of self-accusation or the right to remain silent is enormously extensive, hence only characteristic positions and statements have been chosen for the hereby study.

As for determination of limits for *non accusare* prerogative, this is perceived quite widely. Occasionally, and not always pertinently, the doctrine mentions simply "the right to lie." Whilst not going deeper into this discussion, a ruling of the Supreme Court of 22.09.2008[39] should be quoted whereby it has been declared that: "The one does not commit crime of providing false testimony [...], who deliberately makes untrue statements concerning important circumstances needed to achieve his or her right to defence [...]. The realisation of a right to defence which is vested in defendant [...], and which a defendant uses throughout the criminal proceeding, does not allow the activity within the limits of the same right to be recognised as an offence. These limits must encompass the entirety of testimonies and explanations provided by the defendant in course of a criminal proceeding conducted in his or her case, with no exclusion to initial stage when the defendant was interrogated as a witness." A similar interpretation was adopted by the Court of Appeal in Wrocław,[40] which noticed however certain limits shaping the defendant's freedom: "Defendant may defend with any legally admissible methods and means, using to this end facts known to him or her (presentation of contents or concealing and even falsifying thereof), as well as provisions of law, also through the interpretation for his or her advantage and in this scope the defendant is

[39] Ruling of the Supreme Court of 22.09.2008, IV KK 241/08, Biul.PK 2008/12/13.

[40] Ruling of the Court of Appeal of 26.10.2006, II AKa 289/06, LEX No. 203385.

protected by directives of principles of right to defend and *nemo se ipsum accusare tenetur*. However when a defendant is expecting the benefits of extraordinary mitigation of penalty [...], he or she must implicitly meet the requirements which were contained in this provision directly and cannot conceal certain circumstances of significant character known to him or her, dosing the information, determine their content on his or her own assessment of procedural situation, nor can he withdraw the information once delivered."

The right to remain silent and prohibition of submission of self-incriminating evidence or the absence of duty of proving innocence is not linked to shifting the burden of proof, and a demeanour (and clarifications) of defendant must undergo evaluation according to the principle of free evaluation of evidence. Hence the Supreme Court adjudicated the following in 2008:[41] "The defendant in a criminal trial is not obliged to prove his or her innocence [...]. Within the right to remain silent he or she may also refuse (without stating reasons) to provide answers to particular questions as well as to refuse to provide testimony [...] and the fact alone of using this right cannot entail any negative consequences to the defendant. If, however, [...] the defendant decided to make statements (to which he or she is also entitled), the statements are subject to the same evaluation as every other evidence." A more distinct ruling in relation to burden of proof is contained in the following:[42] "One should not refer to alleged violation of distribution of burden of proof in a criminal trial [...], when accepting by court the version which is different from the one stated by the defendant is simply the result of failing to trust a defendant and to transfer the credibility in this scope to other evidence, heard in the case, under the so-called a free evaluation of evidence." Similar conclusions have been formulated by the Court of Appeal in Cracow: "A defendant's right to remain silent, deriving from the prohibition of compelling a person to be a witness against himself means that nothing negative may result from the sole fact of remaining silent. Another thing, however, is the evaluation of evidence where one can employ only the argumentation based on the absence of contradiction, on concealment of certain details by a defendant, way of reacting etc. Hence, for instance, a defendant is not obliged to point to alibi-like evidence. If he or she makes so no sooner than in front of the court, having made statements before, then in addition to evaluation of their contents, the court may critically evaluate a late notification on such evidence and hence conclude adequately on the credibility of evidence." Finally, it must be concluded that also absence of remorse or condemnation of defendant's own deeds cannot be considered to a defendant's disadvantage:[43] "The following is inadmissible when used for aggravation «during the criminal

[41] Ruling of the Supreme Court of 04.02.2008 III KK 363/07 Prok.i Pr.-wkł. 2008/6/14.
[42] Ruling of the Supreme Court of 24.03.2003, V KK 197/02, LEX No. 77450.
[43] Ruling of the Supreme Court of 14.09.2005, IV KK 160/05 LEX No. 157196.

proceeding, a plaintiff did not bring himself to any critical auto-reflection». It is obvious that pleading one's guilty or demonstrating a critical attitude to committed crime can, and as a rule, should be perceived as attenuating circumstances. It does not mean, however, that a different attitude of an offender may constitute incriminating premises."

A slightly more complicated issue concerns executing the evidential obligations from a defendant. Pursuant to quite uniform and well-rooted standpoint of jurisdiction:[44] "Provision of Art. 74 § 2 of the Code of Penal Proceeding imposes an obligation on a defendant «to undergo» to examination, and therefore the obligation may involve bearing certain examination-related inconvenience. This provision does not however provide for the situation that a defendant is obliged to actively participate in gathering evidence against him or her [...] The fact that the defendant does not have an obligation towards obtaining a certain evidential material [...] does not mean that the provision of Art. 74 § 2 of the Code of Penal Proceeding allows for utilising such evidence for evidential purposes following the defendant's consent only. If evidential material originating from the defendant is gathered at a certain stage of proceeding [...] than it can be used even when the defendant refused to participate in a procedural activity of obtaining such material. It is also irrelevant when such evidential material suitable for comparison was created [...]." Similar attitude is attested in the following jurisdiction: [45] "Provision of Art. 74 § 2 item 2 of the Code of Penal Proceeding imposing an obligation of the defendant to become subject to, among others, psychological examinations, albeit an exception to the rule of absence, on his or her part, of the duty to submit evidence against himself, entitles the court to execute a procedural obligation of undergoing the examinations defined therein, and not only in situation when such examinations are indispensable to determine a defendant's accountability, but also when they are necessary to evaluate a defendant's personality, even if the findings could serve challenging the credibility of his or her statements. Furthermore, the refusal of becoming subject to certain examination, including a psychological one, against the obligation arising from Art. 74 § 2 Code of Penal Proceeding, in particular when it is clearly unjustified, must remain, as any other significant circumstance, considered against the entirety of evidence gathered in the case." Nevertheless, no provision of law envisages the possibility of employing coercion means against the defendant, who does not want to undergo obligatory activities (such as collecting of blood). On the other hand, the possibility of employing the coercion is mentioned in executive resolution to

[44] Supreme Court ruling of 21.07.2000, II KKN 108/00 LEX No. 50904.
[45] Supreme Court ruling of 09.01.2001 V KKN 461/00.

Art. 74 of the Code of Penal Proceeding.[46] In essence it remains contradictory to the contents of Art. 31.3 of the Constitution of the Polish Republic, which stipulates that the limitations in scope of taking advantage of constitutional freedoms and rights may be established only in act, which seems to be underestimated by both doctrine and jurisdiction.

3.2. Protection against involuntary self-accusation: tortures, coercion, intimidation, promises etc.

3.2.1. Constitutional regulation

Rules of protection against involuntary self-accusation constitute the system of safeguards foreseen by the Constitution of the Polish Republic, mainly Art. 30, 40 and 41 § 1, I. According to these provisions, the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities. No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited, and personal inviolability and security shall be ensured to everyone.

3.2.2. Statutory regulation

A general rule regulating the manner of conducting interrogation has been contained in Art. 171 of the Code of Penal Proceeding, stipulating in § 1 that an interrogated person should be enabled a free expression in scope determined by the purpose of a given activity, and following that he or she can be asked questions aiming towards complementing, clarifying or controlling the verbal expression. By virtue of § 4 of the quoted Article, no questions which might suggest the answer to a person being interrogated can be asked. Furthermore, it is inadmissible to influence a verbal expression of interrogated person by means of coercion or unlawful threat and use hypnosis or chemical or technical substances affecting psychical processes of interrogated person or aiming at control of unconscious reaction of his or her body in connection with interrogation. Most importantly however, the Polish law stipulates *expressis verbis* in Art. 171 § 7 of the Code of Penal Proceeding that clarifications, testimonies and statements provided under conditions which exclude the freedom of speech or obtained against the above bans, cannot constitute an evidence.

[46] Ordinance of the Ministry of Justice of 23 January 2005 on undergoing examinations or performing activities invloving a defendant and suspect. J. of L. 05.33.299.

3.2.3. Standpoint of jurisdiction interpreting the violation of the above prohibitions and examples thereof

In line with the standpoint of doctrine, a freedom of expression is a state whereby an interrogated person preserves a full and not impeded possibility of formulating his or her evidential statement. Its absence takes place when during interrogation some conditions arise which entail the following: an interrogated person whilst formulating his or her speech takes into the account other circumstances accompanying a procedural activity and hence his or her statement is not the expression of his or her sole will (this being impeded by said circumstances) or is in the state when he or she cannot control his or her will.[47]

The evaluation of the freedom of speech belongs to the responsibility of procedural organs. On several occasions, the Supreme Court indicated that before the evaluation of credibility of clarifications is started, the conditions of providing thereof should be examined and assessed whether they have been submitted freely. This takes place, among others, due to the fact that in line with agreed standpoint of jurisdiction, the statements which are "non free" cannot constitute evidence even if their truthfulness is unquestionable.[48] Also the Court of Appeal in Lublin was right in stating the necessity of every single thorough evaluation of a freedom of expression of interrogated person, and the defendant in particular.[49]

The most often quoted circumstances disabling the freedom of expression are mentioned in Polish doctrine next to the ones explicitly laid down in Art. 171 of the Code of Penal Proceeding, such as: the use of absolute or relative coercion,[50] going beyond the competence in scope of the use of direct coercion means or means hindering the possibility of free formulation of will;[51] the use of facts connected with an interrogated person (illness, intoxication with alcohol, intoxication, etc.),[52] as well as fatigue;[53] excessive haste in course of activities,[54] extension of the activity in time or repeated ordering thereof, and finally not

[47] T. G r z e g o r c z y k, *Kodeks postępowania karnego*...

[48] Supreme Court Ruling of 8.12.2004, V KK 227/04 LEX 141378, Supreme Court ruling of 9.01.2003, III KKN 315/01, LEX 75375.

[49] Ruling of Lublin Court of Appeal of 20.12.2005, II AKa 278/05, Pr. i P. 2006/6/30.

[50] S. W a l t o ś, Swoboda wypowiedzi osoby przesłuchiwanej w procesie karnym, „Państwo i Prawo" 10/1975, pp. 68-69

[51] M. C z e k a j, "Swoboda wypowiedzi...," p. 89–90.

[52] R. Ł y c z y w e k, "Wypowiedzi w warunkach wyłączających ich swobodę" [Providing oral statements in conditions restraining their freedom Art. 157 § 2 Code of Penal Proceeding], *Państwo i Prawo* 1974, No. 4, p. 119.

[53] T. H a n a u s e k, *Przemoc jako forma działania przestępnego* [Violence as type of offensive act], Kraków 1966, p. 165.

[54] M. L i p c z y ń s k a, *Polski proces karny. Zagadnienia ogólne* [Polish penal process. General issues], Warszawa 1986, Vol. I, p. 168.

directly prohibited by law – taking the advantage of deceit, i.e. misleading the interrogated person or offering ungrounded promises.[55]

In terms of suggestive questions, it has been often underlined that during interrogation, an examinee should assume such a position as to possibly not allow other party know his or her own judgements or feelings, preserve objectivity and impartiality. Inevitable recalling of circumstances, which have been forgotten by an examinee, should be made cautiously, and the questions themselves need to be formulated in a clear, unambiguous and comprehensible way, especially the ones concerning the examinee's age, intelligence, education, intellectual capability and environment. Jurisdiction complements this list with the following examples:

– presentation of fragments of other person's testimony does not constitute an answer suggesting question;[56]

– suggestion may involve not only asking a question (as literally indicated by the provision) but also other form of behaviour expressed by procedural organ, such as giving a lift to an injured person by Police officers to premises nearby prosecutor's office and informing that a defendant will shortly arrive, and then showing the defendant being brought in handcuffs.[57]

Further circumstance providing for inadmissibility of interrogation is coercion – understood as compelling an individual towards acting against his or her will, putting a pressure on somebody. Physical coercion is mainly done by violating someone's corporal inviolability, applying torture, which is univocally and unquestionably forbidden. On the other hand, mental coercion is meant to influence someone's inner life and constitutes a form of affecting mind, feelings and will. The most common ways of applying mental coercion include the following: extension of activities in time and repeating the order of activities in order to make defendant weary and obtain clarification, in particular (self)incriminating ones. According to the standpoint of the Supreme Court in Poland, repeated, however ungrounded from the point of view of the outcome of preliminary proceedings, interrogations of the same person on the same occasion can be treated as creating the conditions which disable the freedom of

[55] For instance: P. K r u s z y ń s k i, "Prawo podejrzanego do obrony materialnej w projektach k.p.k. (wybrane zagadnienia) [Right to defence of defendant in drafts of criminal procedure code (selected aspects)], *Palestra* 1003, No. 7–8, p. 123. Ungrounded promise involves, for example, informing the defendant on the possibility of applying extraordinary mitigation of punishment in case of pleading guilty and submitting a clarification, as interrogating person neither promised nor suggested anything. Ruling of the Court of Appeal in Lublin of 27.06.2006, II AKa 162/06, LEX 192830.

[56] Supreme Court ruling of 10.06.2005, V KK 227/04, LEX 152467.

[57] Ruling of the Court of Appeal in Katowice of 4.11.2004, II AKa 337/04, LEX 154988.

statement.[58] Although the Supreme Court had used the concept of admissible "impediment of spontaneity" in the past,[59] this idea was justly abandoned.[60] It does not mean, however, that home jurisdiction is free from controversies. In ruling of the Court of Appeal in Katowice, it was stated that it is difficult to recognise the fact of offering coffee, cigarettes or even a tranquillizer to a witness as application of means influencing his or her mental process or meeting the definition of psychical coercion.[61] It appears that the factual state (particularly in relation a tranquillizer) should be described, more caution recommended and each single case examined.

The greatest deal of controversy concerns application of deceit during the interrogation. In Polish conditions, deceit usually means misleading persons being interrogated or making inadmissible promises to them in order to obtain statements or clarifications of specific content.[62] This is an unlawful method despite no clear prohibition of application of thereof in provisions of law.[63] Jurisdiction in this area is somewhat poorer, although uniform in its essential part – deceit is prohibited. On the other hand however, when during legislative work on drafting a new Code of Penal Proceeding a "deceitful" category was introduced to the list of inadmissible questions, during the editorial stage it was removed and justified with pragmatic reasons and difficulties in interpretation. It seems to be quite symptomatic.

In relation to a threat, this should be interpreted in the light of Art. 115 § 12 of Code of Penal Proceeding, which proclaims that unlawful threat is both the threat mentioned in Art. 190 of the penal code, as well as the threat to institute or making the institution of criminal proceeding (unless it does not aim only at protection of crime inflicted law), or possibly a threat to spread information on a threatened person's or his or her relative's dignity. In principle, this issue does not evoke bigger controversies.

The next, forbidden way of influencing an examinee is hypnosis and application of chemical substances (narcoanalysis). Both these measures are

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[58] Repeatedly, starting from Supreme Court ruling of SN of 26.05.1981, IV KR 100/81, OSPiKA 7-8/1982, item 132 – repeatedly (and approvingly) voted upon: e.g. S. W a l t o ś, *Państwo i Prawo* 1983, No. 6, p. 138–140; Z. Ś w i d a-Ł a g i e w s k a, OSPiKA 7–8/1983, s. 379–381.

[59] See Supreme Court ruling of 9.02.1981, II KR 5/81, OSNPG 8-9/1981 item 102, LEX 17326.

[60] Z. D o d a, A. G a b e r l e, "Dowody w procesie karnym. Orzecznictwo Sądu Najwyższego" [Evidence in penal process. Supreme Court Rulings], *Komentarz*, vol. 1, Warsaw 1995, p. 191.

[61] Ruling of the Court of Appeal in Katowice of 17.01.2007, II AKa 421/06, KZS 2007/5/79.

[62] And, for instance: P. H o f m a ń s k i, E. S a d z i k, K. Z g r y z e k, *Kodeks postępowania karnego. Komentarz* [Code of Penal Proceeding. Commentary], Vol. I, Warsaw 1999, p. 638–639.

[63] See: T. G r z e g o r c z y k, *Kodeks postępowania karnego. Komentarz* [Code of Penal Proceeding. Commentary], Cracow 2001, p. 420.

prohibited by Polish legislation *expressis verbis,* although some practical doubts arise in this matter.

In relation to hypnosis it has been considered that it can – as a therapeutic method – constitute a way to unblock the memory and no obstacles can be seen in prohibiting this activity, naturally provided this is not used within the interrogation. On the other hand, however, the evaluation of credibility of contents of such "fresh memory" statements would be extremely difficult, albeit likely. The standpoint of the Polish jurisdiction towards the application of hypnosis has been pertinently argued in judgement of the Court of Appeal in Cracow, which notes that one can agree with the statement that application of hypnosis, and also other method enlisted in said provision is not prohibited unless it is not carried out "in connection with interrogation." "For instance one should use hypnosis to unblock a witness's memory, when as a result of (traumatic) experience, a witness [and also defendant – M. R.-R. and P. G.] is not able to recall incidents which were enrooted in his or her memory. In such a case, the purpose of hypnosis is to retrieve such memory imprint by a witness [...] however if the purpose of examination is to determine the existence of traces of incidents in memory, which constitute object of clarification, therefore the information which was used for verification of defendant's statements or other evidence, including personal evidence, then the relation between hypnosis and interrogation is not so close. The discussed provision [i.e. Art. 171 of Code of Penal Proceeding – M. R.-R. and P. G.] does not determine the degree of relation with interrogation, does not grade it, but eliminates the evidence which remains in relation; this means that the evidence is banned when is somehow linked to the interrogation."[64]

As to chemical substances, the so-called narcoanalysis, it remains beyond any doubt, that intentional administration of chemical substances to a person being interrogated with a purpose to evoke a certain state (limitation of will) during the activity, is prohibited. Another thing seems to concern the admissibility of interrogation of a person who is under the influence of various stupefying agents and additionally, has administered them himself. From a practical point of view, however, also such situations cannot be excluded where an examinee will conceal this fact (after all, remaining under the influence of stupefying agents is not always apparent), and interrogating organ will not reveal the circumstances *ex officio*. Here, the Court of Appeal in Wrocław noted that elimination of evidence due to conditions excluding the freedom of statement can be done only if this fact was established and proved in relation to a specific interrogation: "In order to apply Art. 171 § 7 of Code of Penal Proceeding, the fact that a person involved is a drug addict is not sufficient. One needs to

[64] Ruling of the Court of Appeal in Cracow of 3.07.2002, II AKa 134/02, *Palestra* 2002, No. 11–12, p. 240.

demonstrate that this particular person during a specific interrogation was in the state disabling the interrogation to take place."[65] A similar shade is contained in the statement of the Court of Appeal in Cracow: "to evaluate the credibility of witness testimony determination whether a witness is a drug addict is not essential, but the possibility of providing testimony in state of drug deprivation, as it makes a witness submissive to a person demanding the testimony to be made. «Soft» drug, a witness was referring to in a situation under discussion, does not give abstinence symptoms, and therefore is not meaningful for alleged forcing the statements."[66] Alike rules were adopted by jurisdiction in evaluation of interrogation of person under influence of alcohol. It has been noticed in one of recent decisions of the Supreme Court that although in a specific case both basing on a witness testimony and time which lapsed since the time of alcohol consumption by a witness, one can assume with a probability on the borderline with certainty that he was not sober at that time. Nevertheless – the court continues – this issue cannot be identified with an interrogation in conditions excluding the freedom of expression, as it should be considered rather as a witness's restricted capability to reconstruct memorised incidents or, in a broader sense – capability to memorise perceived activities, which undoubtedly influences solely the evaluation of evidential credibility, although does not automatically eliminates the proof.[67] Due to individual susceptibility or tolerance to alcohol it is even not possible to link evidential ban with measurable level of intoxication (expressed in promille).[68] On the other hand, working oneself to get into a state of being drunk which constrains and sometimes even eliminates the freedom of expression, understood as capability to direct someone's will whilst formulating speech, constitutes an obstacle eliminating this person from being interrogated when under influence of alcohol. A procedural organ is not allowed to use the state of alcoholic intoxication of interrogated person, when free expression of thoughts is impossible.[69]

Concluding, a statement seems to be justified here that it is decisively more secure and pertinent for a procedural organ to delay interrogation till the time when an examinee becomes sober.

One of most questionable methods (although, as one may think, sometimes the discussion is not hindered by the failure to understand the essence of organ's *modus operandi*), which are directly banned by the Polish Code of Penal Proceeding in relation to interrogation is the application of lie detector. Up to amendment of the code in January 2003, wording of the provision evoked controversy and extreme views, even leading to a complete ban of use of lie

[65] Ruling of the Court of Appeal in Wrocław of 28.01.2004, II AKa 488/03, OSA 2004/09/65.
[66] Ruling of the Court of Appeal of 15.11.2000, II AKa 197/00, KZS 2000/12/27.
[67] Decision of Supreme Court of 20.02.2008, V KK 300/07 LEX 361545.
[68] Supreme Court Ruling of 5.03.2004, V KK 314/03, OSNWK 2004/1/501.
[69] Decision of Supreme Court of 26.11.2003 III KK 506/02, LEX 82319.

detector in a penal process. After law has been amended, i.e. Art. 192a i 199a of the Code of Penal Proceeding were introduced among others, which allowed the application of this method within the framework of providing expert witness opinion or for screening examinations – it does not leave any doubts that the use of lie detector beyond interrogation is justified.

3.2.4. Fruit of the poisonous tree

As demonstrated above, clarifications, testimonies and statements provided in conditions excluding the freedom of expression or gathered against prohibitions laid out in Art. 171 § 5 cannot constitute the evidence. In relation to evidence derived from them however, the penal procedure provisions do not contain a provision which excludes "indirectly illegal" evidence from determination of facts. As a matter of fact, the doctrine has been confirming this determination for a long time quite unambiguously, whilst even admitting a kind of validation of "originally illegal" evidence, i.e. for instance corroboration of forced explanation by way of voluntary statement.[70] As it has been repeatedly demonstrated, a material unlawfulness of activities of procedural organs in Polish conditions does not automatically entail an inadmissibility of not only "indirectly illegal" but also – except from statements, clarifications or verbal opinion – "originally illegal" evidence. On the other hand, the reading of jurisdiction of the Constitutional Tribunal, in particular decoding the meaning of the principle of democratic state, ruled by law seems to be irreconcilable with accepting illegal activity of state authority organs. Up to now, however, the expression of this disapproval considers, above all, the possibility of instituting a disciplinary or penal procedure against an individual police officer, or a civil lawsuit against the State Treasury, however on procedural grounds, despite outstanding and not so many rulings, this principle has not been enrooted for good.

3.2.5. The meaning of international jurisdiction in scope of human rights

Present formulation of provision of Art. 171 corresponds with a number of international legislative acts and jurisdiction based thereupon, such as: the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[71] or Art. 3 of The European Convention on Human Rights and Fundamental Freedoms. In such spirit the interpretation of key definitions from the point of view of freedom of expression is done, as well.

[70] S. W a l t o ś, "Swoboda wypowiedzi...," p. 72.
[71] J. of L. 1989, No. 63, p. 378–379.

4. Conclusion

By presenting specific issues, the Authors have attempted to assess on up-to-date basis the legal solutions binding in Poland, point to the controversies in doctrine and jurisdiction as well as imperfections of certain legal solutions and practice in Poland, whilst referring to legal standards elaborated in international relations.

In principle, constitutional solutions are satisfactory in the degree to which they formulate the directives of a reliable trial in the area of evidential proceeding. These directives have their source in fundamental, constitutional human and social values, such as: privacy, freedom of religion, inviolability of family relations, right to defence, protection of secrets. Evidential bans which occur, are of safeguard nature and constitute a balance between various recognised values of priority prior to establishing the truth in a penal procedure. At the same time, it goes without saying that constitutional rights and safeguards are not of absolute nature. Proceedings in offence cases determine a compromise and sanction the introduction of limitation for accused persons.

It can be ascertained that in Poland a state of balance between the values of democratic state, ruled by law achieved *via* evidential proceedings in a criminal trial and means to achieve a fundamental goal, i.e. establishing a criminal offender's liability is maintained.

One should point to the fact that higher and better safeguarded standards cover the stage of procedural (both preliminary and court) proceedings. The activities preceding the institution of preliminary proceeding, led by the Police and nearly ten others specialised services, create the risk of malpractice due to lack of precisely defined competence of these organs. It needs to be emphasised that some work has been ongoing on the act on operational and intelligence activities, however despite several years which have passed since the initiative or regulating these activities in a separate legal act, the work remains on initial stage. The Authors share the view on the necessity of such act whilst recognising that the stage of pre-trial activities absolutely requires a precise regulation in order to guarantee legality of the activity of investigative organs.

SECTION VI

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CYBERCRIME LEGISLATION IN POLAND

I. Introduction: cybercrime and cybercrime legislation in Poland

1. Definitions

Computer crime and cybercrime are not legal notions in Poland. These terms do not appear in the body of substantive criminal law at all. An ancillary definition of "cybercrime" is provided by the Minister of Justice regulation concerning the European Arrest Warrant.[1] It has a narrow meaning referring to acts against the protection of computer data which are gathered, stored, processed or transmitted in the information system. Criminological definitions usually have a broader meaning and are used as an umbrella term that covers all crimes related to computer data, committed against, on and/or throughout information systems, including computer networks, especially the Internet.

As opposed to the Council of Europe Convention on Cybercrime (Art. 1), the Polish Penal Code does not comprise a definition of the terms "computer system" or "computer data," despite the fact that such terms are used in a description of cybercrime offences.[2] The said definitions are also not covered by the Act of 2008 aimed at unification of computer terminology in the Polish legal system.[3] A more general problem, still under discussion in Poland in the context of constitutional law, concerns a direct application of definitions laid down in the ratified international conventions by the courts.

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[1] Rozporządzenie Ministra Sprawiedliwości z 20 kwietnia 2004 r. w sprawie europejskiego nakazu aresztowania [Regulation of the Minister of Justice of 20 April 2004 on the European Arrest Warrant], J. of L. 2004, No.73, item 664.

[2] The National Office of the Public Prosecution Service is in favor of implementation of Art. 1 of the Convention into the Polish Penal Code. Such a position has been taken by this highest unit of the Prosecution Service during the consultations on ratification of the Council of Europe Convention on Cybercrime (Memorandum of 23 May 2008, PR I 078-53/08).

[3] Ustawa z dnia 4 września 2008 r. o zmianie ustaw w celu ujednolicenia terminologii informatycznej [Law of 4 September 2008 on Standarisation of IT-related Terminology in the Laws], J. of L. 2008, No. 171, item 1056.

2. Historical development of cybercrime legislation

As in most other countries, computer crime legislation in Poland has a relatively short history. It started to be drafted by the Criminal Law Reform Commission as an integral part of a new penal code in the early 90's.[4] First public debate on computer crime problem took place on the occasion of an international conference "Legal aspects of computer-related abuse," organised under the aegis of the Council of Europe in Poznań in 1994.[5] Three years later, most of computer-related infringements that compose "a minimum list" of the 1989 Council of Europe recommendation were criminalized under the Polish Penal Code of 1997.[6]

This code represents a "young generation" of the European criminal codes that went into force already in the Information Age.[7] Perhaps for this reason, its specific part contains a chapter entitled "Offences Against the Protection of Information," which corresponds with the proposal set forth in the literature by Professor Ulrich Sieber.[8] Originally, this chapter has included four types of offences against confidentiality, integrity and availability of computer data and systems. These were: *data espionage* (Art. 267 § 1), *computer eavesdropping* (Art. 267 § 2), *data interference* (Art. 268 § 2), and *computer sabotage* (Art. 269 § 1 and 2). A number of specific provisions, such as those on *computer fraud* (Art. 287), "unauthorised reproduction of a protected computer programme" (Art. 278 § 2), "handling of illegally copied software" (Art. 293 § 1), and *telecommunication fraud* (Art. 285) were included into the category of offences against property. A legal definition of document (Art. 115 § 14) has also been extended in order to make prosecution of *computer forgery* possible. In addition, such specific ICT-related offences like *computer espionage* (Art. 130 § 2) and "causing a general hazard as a result of interference with automatic data processing" (Art. 165 § 1 point 4) were introduced to the Penal Code.

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[4] K. B u c h a l a, *Poland*, [in:] *Information Technology Crime. National Legislations and International Initiatives*, ed. U. Sieber, Carl Heymans Verlag KG, Köln, Berlin, Bonn, München 1994, p. 382.

[5] *Prawne aspekty nadużyć popełnianych z wykorzystaniem nowoczesnych technologii przetwarzania informacji, Materiały z konferencji naukowej* [Legal Aspects of Computer-Related Abuse, Proceedings of the International Conference], red. A. Adamski, Poznań, 20–22 kwietnia 1994, Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", Toruń 1994.

[6] *Computer-Related Crime. Recommendation No. R (89) on computer-related crime and final report of the European Committee*, Strasbourg 1990.

[7] The Penal Code of 1997 went into force on 1 September 1998.

[8] U. S i e b e r, *The Legal Aspects of Computer Crime. Report at The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Havana*, Cuba, August 27 – September 7, 1990, p.16.

The list of computer offences has expanded in size pursuant the 2004 amendment of the Penal Code.[9] This legal change was related to accession of Poland to the European Union and it was aimed at harmonisation of Polish criminal legislation with the Council of Europe Convention on Cybercrime (hereinafter the CoC). In effect, three new CIA offences: *system interference* (Art. 269a), *misuse of devices* (Art. 269b), and (once again) *data interference* (Art. 268a) were introduced to the Penal Code. Simultaneously, the possession of child pornography was prohibited (Art. 202) and a wording of some already existing provisions on computer-related offences was slightly modified by inserting the term "computer data" instead of "information," or "the record on an electronic information carrier."[10] Intended implementation of the CoC has also affected procedural regulations. Some specific procedural measures envisaged by the CoC were adopted to the Code of Criminal Procedure.[11]

The most recent legal change of cyber criminal law took place in 2008 in order to implement the regulations contained in two Framework Decisions to the legal system of Poland.[12] This goal was accomplished in the case of criminalisation of *hacking* (Art. 267 § 2) and the so-called *virtual child pornography* (Art. 202 § 5) in the Penal Code.

3. Ratification of the Council of Europe Convention on Cybercrime

The Council of Europe Convention on Cybercrime is still awaiting ratification in Poland. Poland signed this international treaty on 23 November 2001 in Budapest and subsequently took steps to implement its provisions in 2004, though has not ratified it. The ratification procedure commenced by the Ministry of Justice in May 2008 is still pending due to not fully solved implementation problems. According to a memorandum obtained from the Department of International Cooperation and European Law of the Ministry of Justice, the only inconsistency concerns the child pornography regulation.[13] Art. 202 § 4a of the Penal Code sets a lower age-limit of a child protection against exploitation for pornography than it is required (as a minimum) under Art. 9 (3) of the Convention.

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[9] Ustawa z 18 marca 2004 r. (Dz. U. Nr 69, poz. 626) [The Penal Code Amendment of 18 March 2004].

[10] Art. 165 § 1 point 4 and 287 § 1 of the Penal Code.

[11] See infra, part III.

[12] Ustawa z dnia 24 października 2008 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (Dz. U. Nr 214, poz. 1344) [The Penal Code Amendment of 24 October 2008].

[13] Ministerstwo Sprawiedliwości, Departament Współpracy Międzynarodowej i Prawa Europejskiego, Notatka w sprawie zgodności prawa polskiego z Konwencją Rady Europy o Cyberprzestępczości z dnia 12 sierpnia 2009 r., DWM V 025-5/08 [Memorandum of the Department of International Cooperation and European Law of the Ministry of Justice on the Consistency of Polish Law with the Council of Europe Convention on Cybercrime].

However, in the opinion of the present author, there are some other, more significant gaps in the domestic law of Poland *vis-à-vis* the CoC. These discrepancies, which concern in particular the criminal procedure law regulations, ought to be removed before ratification of the CoC.

II. Substantive criminal law

1. Offences against the confidentiality, integrity, and availability of a computer system

All offences against computer security are within Chapter XXXIII of the Penal Code ("Offences Against the Protection of Information"). This chapter includes eight basic provisions (Art. 265–269b) protecting the main features of information security, i.e., confidentiality, integrity and availability. Besides traditional offences against secrecy of the State (Art. 265) and other official secrecy (Art. 266) there are penal provisions related to offences defined in the Council of Europe Convention on Cybercrime (Chapter II, Section 1, Title 1) as the crimes of illegal access (Art. 2), illegal interception (Art. 3), data and system interference (Art. 4 and 5) and misuse of devices (Art. 6).

Polish Penal Code provides a wide range of offences that specifically relate to a computer system and data as the objects of offending. The following offences against confidentiality, integrity and availability of computer data and systems can be distinguished:

– illegal access to a computer system (Art. 267 § 1 and 2);
– illegal interception (Art. 267 § 3);
– data interference (Art. 268 and 268a);
– system interference (Art. 269 and 269a);
– misuse of devices (Art. 269b).

Most of CIA offences are prosecuted upon the complaint of the injured person. So the criminal proceedings cannot be initiated without the injured person lodging a complaint with a state prosecution office. Since that moment these offences are prosecuted *ex officio*. However, the injured person has a right to change his/her decision and can withdraw a complaint before a trial begins, provided that the public prosecutor consents.

Only computer sabotage – Art. 269, and misuse of devices – Art. 269b are the offences prosecuted *ex officio*, i.e. pursuant public accusation. Under the legality principle, to which the Polish criminal justice system formally adheres, the police and prosecutors have a duty to investigate and prosecute all known offences and offenders. One should note that the Penal Code defines an offence as "a socially harmful act" prohibited by the criminal law. This definition allows

the police and the public prosecutor to have *de facto* discretion on the decision of whether a minor act is considered a formal violation of the law, to be labelled an offence and prosecuted.

1.1. Illegal access to a computer system

The Art. 2 of the CoC is based on the assumption that "the mere unauthorised intrusion, i.e. "hacking," "cracking," or "computer trespass," should in principle be illegal in itself."

Initially this approach was not adopted in Poland. Instead, a traditional concept of the secrecy of correspondence was used as a general basis for the protection of various kinds of information, including data stored on computers. Thus, confidentiality of digitalized information rather than integrity of a computer system was at stake, as reflected by the provision of Art. 267 § 1 of the Penal Code in its original version.[14] In principle, under this regulation an unauthorised access to a computer system *per se* did not lead to criminal liability. A hacker was subject to such liability only if after a successful infringement of security measures he had obtained information to which he was not entitled. In other words, the offence was committed when the information stored in the system and not the system itself was compromised. In effect, such violations of integrity of a computer system, as taking control over the compromised system for further attacks on other systems, or just for fun, remain beyond the scope of penal sanction of Art. 267 § 1 of the Penal Code.

This legal loophole was patched in 2008, so at present a "pure" hacking or an unauthorised access to a computer system is subject to penalty in Poland. There are even two legal grounds for that in the Penal Code. Under amended Art. 267 § 1 of the Penal Code, it is now a criminal offence to get an unauthorised access to information stored on a computer system following breaking or circumventing its security measures.[15] On the other hand, a newly established provision (Art. 267 § 2) penalizes anyone who, without authorisation ob-

[14] Art. 267 § 1 of the Penal Code before the amendment of 2008: "Whoever, without being authorised to do so, acquires information not destined for him, by opening a sealed letter, or connecting to a wire that transmits information or by breaching electronic, magnetic or other special protection for that information, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years."

[15] Art. 267 § 1 of the Penal Code as amended in 2008: "Whoever, without being authorised to do so, acquires access to information not destined for him, by opening a sealed letter, or connecting to a telecommunication network or by breaching or circumventing electronic, magnetic, computer or other special protection for that information, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years."A similar approach has been employed in Germany with Law No. 1786/2007 (*Strafrechtsänderungsgesets zur Bekämpfung der Computerkriminalität in Kraft*) in order to harmonise § 202a of the German Penal Code with the CoC (Art. 2).

tains access to the whole or any part of an information system.[16] A wording of this latter provision is very close to that of Art. 2 of the 2005 Framework decision and in fact implements it literally. However, an official justification for this legislative change has emphasised pragmatic rather then political reasons, stressing the usefulness of punishability of "pure access" as a legal weapon against distributors of spyware and other malicious software used for taking control over infected computers.[17] Because such purpose of penalisation has not explicitly been reflected in the law, there are doubts whether a legislative technique used complies with the principle of legality or not.[18]

The concept of "unauthorised access to a computer system" is an ambiguous one, and as experience based on comparative law shows, it gives a great deal of flexibility in the application of penal law, particularly if the notion of "unauthorised access" is not legally defined.[19] Such omission of the legislator opens a gate for various legal interpretations in judicial practice. Some of them might be very "innovative" in the context of rapidly changing technology. For instance, the said regulation may be used for the prosecution of "piggybacking" in a wireless environment and a number of other minor infringements of computer security that do not deserve punishment, nor intervention of the criminal justice authorities. A foggy language of criminal law is unacceptable in view of its fundamental guarantees with the principle *nullum crimen sine lege certa* in the forefront. Therefore a recent over-criminalisation of hacking under the Polish Penal Code face criticism in the literature.[20]

1.2. Illegal interception

According to Art. 3 CoC, the interception of computer data should be punished only if committed without right and by using technical means. Art. 267 § 3 of the Penal Code goes beyond the provision of CoC, criminalising the installation or use of a device or computer software in order to intercept information to which the perpetrator is not authorised. Furthermore, it refers to "information,"

[16] Art. 267 § 2. The same punishment shall be imposed on anyone, who, without authorisation, obtains access to the whole or any part of an information system.

[17] Reasoning of the draft amendment of the Penal Code of 28 October 2008.

[18] A. A d a m s k i, *Opinia do projektu ustawy z druku nr 458. Rządowy projekt ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw* [Opinion on the bill amendment of the Penal Code for the Office of Legal Analyses of the Sejm], http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=458.

[19] See: O. Kerr, "Cybercrime's Scope: Interpreting 'Access' and 'Authorization' in Computer Misuse Statutes," *New York University Law Review*, Vol. 78, No. 5, November 2003.

[20] A. A d a m s k i, „Nowe ujęcie cyberprzestępstw w kodeksie karnym – ale czy lepsze?" [New frame of cybercrime in the Penal Code – is it better?], *Prawo Teleinformatyczne* 2007, 3(5), p. 4–8.

not to computer data, and gives a more general description of the illegal act than Art. 3 CoC. In particular there is no reference to "non-public transmissions of data" or "electromagnetic emissions." Nevertheless, all forms of usage of technical means to intercept passwords, keystrokes, or information send by e-mail and through other channels of electronic communication are covered by Art. 267 § 3, provided that it is done without authorisation. An interpretation of this provision based on *argumentum a minori ad maius* would lead to the conclusion that interception of data flows, including its non-public transmissions are penalised as well. [21]

Before the 2008 amendment of the Penal Code, this provision did not mention computer programme as an instrument of offending. As a result, there were different interpretations of this issue in the literature.[22] The present wording of Art. 267 § 3 brought these controversies to an end, making a prosecution of malware-based attacks on data confidentiality possible. These may include not only the use of password-sniffers, but any piece of software placed or injected into the victim's system or a publicly accessible website in order to enable the perpetrator to acquire information not intended for him.

One of the side effects of the 2008 amendment is an overlap of § 1 and 3 of Art. 267. For instance, the one who installs a tapping device in order to intercept a conversation (§ 2), immediately acquires access to it, especially while connecting to a telecommunication network (§ 1). On the other hand, a description of the offence in question is broad enough to cover trivial or anecdotal incidents, including those which are not computer-related, such as for instance a binocular assisted voyeurism.

The penal sanctions for illegal access and illegal interception are the same. The perpetrator of these offences faces an alternative sanction of a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty up to 2 years. Such penalties apply also for a disclosure to the other person of the information unlawfully obtained in a way prohibited in § 1–3 of the Art. 267.

1.3. Data interference

Intentional manipulation of computer data is subject to extensive penalisation in Poland. Two penal provisions directly address this issue (Art. 268 § 2 and

[21] Art. 267 § 3. The same punishment shall be imposed on anyone, who, in order to acquire information to which he is not authorised to access, installs or uses tapping, visual detection or other equipment or computer software.

[22] See: W. Wróbel, [in:] *Kodeks karny. Część szczególna. Komentarz* [The Penal Code. Special Part. Commentary], ed. A. Zoll, Vol. 2, Kraków, Zakamycze 1999, p. 1009; A. Adamski, *Prawo karne komputerowe* [Criminal Law and Computers], C. H. Beck, Warszawa 2000,
p. 58.

268a). Additionally, unauthorized changing, deleting, impairing and adding of computer data constitute legal elements of some other offences, like system interference offence (Art. 269a), computer sabotage (Art. 269) and computer fraud (Art. 287).

The original function of Art. 268 § 2 of the Penal Code was the protection of an "essential" information against rendering its retrieval impossible, or very difficult one, due to the data destruction or manipulation.[23] Under this legal construction, the criminal liability of the perpetrator was dependent on the victim's assiduousness in keeping back-up copies of his data. Such limitation is not known to Art. 4 of the Council of Europe Convention, which implies that data interference offence shall be deemed as completed whenever data is altered or destroyed, regardless of whether there are back-up copies or not. An effort to implement Art. 4 of the CoC to the Penal Code was not, however, successful. The new provision of Art. 268a has, for unknown reasons, been tailored by the legislator in a way which does not fully correspond to the Art. 4 CoC. Instead of protecting data against manipulations, the wording of Art. 268a puts emphasis on the protection of access to the data itself.[24] Therefore, some authors are of the opinion that the primary function of this provision is to safeguard access to databases,[25] and not the protection of data integrity. Nevertheless, the interpretation of Art. 268a may allow for prosecution of attacks against data integrity, including incidents of malicious code infections and website defacements, even if they result only in slight modifications of data.

1.4. System interference

System interference aims at criminalizing acts of computer sabotage and the resultant loss of availability of the information service. The offence covers

[23] Art. 268 § 1: "Whoever, being unauthorised, destroys, impairs, deletes or alters a record of essential information or otherwise prevents or makes it significantly difficult for an authorised person to obtain knowledge of that information, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years." § 2: "If the act specified in § 1 concerns the record on an electronic information carrier, the perpetrator shall be subject to the penalty of deprivation of liberty for up to 3 years." § 3: "Whoever, by committing an act specified in § 1 or 2, causes a significant loss of property, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years."

[24] Art. 268a. § 1: "Whoever, without being authorized to do so, destroys, damages, removes, changes or makes an access to computer data difficult, or in a significant degree disrupts or prevents automatic processing, gathering or transmission of such data, shall be subject to the penalty of deprivation of liberty for up to 3 years." § 2: "Whoever, by committing an act specified in §1, causes a significant loss of property shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years."

[25] A. M a r e k, *Kodeks karny. Komentarz* [The Penal Code. Commentary], Warszawa 2005, p. 556.

intentional hindering of a lawful use of computer systems, including telecommunication facilities, by using or influencing computer data. Such legal regulations may criminalize various forms of denial of service attacks (DoS, DDoS) that may stop, for instance, a website from communication with other computers.

In Poland the system interference is penalised in various provisions of the Penal Code, depending on the character of the data and on the interference. The strongest protection of data and systems availability is provided by Art. 269 § 1 which concerns data of particular significance for national defence, transport safety, operation of the government, or other state authority or local government. The maximum penalty for the intentional hindering of processing or transmission of such data is 8 years of imprisonment.[26] Under this provision, a denial of service attack can be considered criminal offence mostly when directed at servers in the government domain (*gov*). However, the legal requirements concerning the sensitive nature of data that are protected under Art. 269 make the commission of this offence against a government website hardly possible.

System interference is also penalised by two other provisions, inserted in the Penal Code in 2004 in order to implement Art. 4 and 5 of the CoE Convention. Art. 269a criminalises serious hindering of functioning of a computer system or computer network under the penalty of deprivation of liberty of up to 5 years.[27] A very similar prohibition is provided by Art. 268a (*in fine*) with the penalty of deprivation of liberty of up to 3 years for anyone who seriously hinders core functions of computer systems like processing, gathering or transmission of computer data. The penalty increases up to 5 years if the offence results in a significant loss of property.

[26] 269 § 1: "Whoever destroys, deletes or changes a record on an electronic information carrier, having a particular significance for national defence, transport safety, operation of the government or other state authority or local government, or interferes with or prevents automatic collection and transmission of such information, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years." § 2: "The same penalty should apply to a person who commits offences mentioned in § 1, by destroying or replacing the information carrier or by destroying or damaging a device serving for automatic processing, gathering or transferring of information data."

[27] Art. 269a: "Whoever, without being authorized to do so, through transmitting, destroying, deleting, impairing or changing computer data, causes significant interference with functioning of a computer system or network, shall be subject to the penalty of deprivation of liberty for a term of between 3 months to 5 years."

This double protection of computer data and systems availability is a classic superfluousness of legal regulation. Therefore a proposal was made to remove one of this provision from the Penal Code.[28]

1.5. Misuses of devices (Art. 269b)

In 2004 a controversial "hacker's tools" provision of Art. 6 of the CoE Convention was implemented with considerable modifications to the Penal Code (Art. 269b). From the very beginning a main dilemma related with this regulation was how to distinguish the use, import, production, etc. of such devices for both legitimate and illegitimate purposes. During the drafting process of the CoE Convention a clause excluding criminal liability for this offence was added to Art. 6 in order to make clear that tools created for the authorised testing or the protection of a computer system are not covered by the provision. A similar exclusionary rule was not adopted by the Polish legislator.

Art. 269b (1) of the Penal Code which seeks to implement the § 1a of Art. 6 of CoE Convention consists of two parts. The first part of this provision criminalises the production, acquiring, sale and making available devices, including computer programmes, adapted for the purpose of commission of offences against computer security (267 § 3, 268a § 1 or § 2 in connection with § 1, 269 § 2 or 269a) and public safety (Art. 165 § 1 point 4).[29] This part of the provision makes no reference to the unauthorised access offence (Art. 267 § 1 and § 2), thus it is not consistent with the Convention.

The second part of Art. 269b § 1 tends to reflect the § 1b of Art. 6 of CoE Convention, but this effort is not successful. In fact, in a description of prohibited act an important normative element is missing. There is no requirement that conducts related with computer passwords or access codes have to be performed for illegal purposes, i.e. with the intent of a commission of offences indicated above. Deficient construction of Art. 269b leads to over-criminalisation of internet users. Literal interpretation of this provision, in particular a phrase "acquires of other data that allow for the access to information stored in a computer system" cover such "innocent" internet activity as googling [use of a web browser].

Misuse of devices is largely based on the concept of a preparatory offence. As such it extends the scope of criminal liability to a stage preceding an attempt of the commission of CIA offence. It also requires an offender who prepares the commission of an offence to act purposefully, i.e., with a specific intent.

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[28] A. A d a m s k i, *Opinia do projektu ustawy…* [Opinion on the bill amendment…], *supra* note 18 at 5.

[29] Art. 165 § 1 point 4 of the Penal Code prohibits intentional causing of general hazard to the life or health of many persons or property of a considerable value by interference with automatic data processing.

All conducts that are specified in § 1a of Art. 6 of the CoE Convention concern various items which have to be designed, adapted or used for the purpose of committing CIA offences. As opposed to the CoE Convention (Art. 6), Polish Penal Code (Art. 269b) does not require the specific (i.e. direct) intent for the commission of the act. Since indirect intent (*dolus eventualis*) is sufficient, theoretically any publication of exploits or other dual-use software on the web page by the one who does this "exclusively for educational purposes" would bring the author of such disclaimer before the court under the charge of violation of Art. 269b. For the same reason, computer security experts (e.g. virus analysts) or network administrators run the risk of prosecution for dealing with "hacker tools," unless they are able to prove their *bona fide*. Unfortunately, the wording of Art. 269b is not precise enough to challenge such interpretations definitely.[30]

2. Computer-related traditional offences

2.1. Computer-related forgery

There is no specific provision on computer-related forgery in the special part of the 1997 Penal Code. Polish legislator did not consider the idea of computer forgery a separate type of offence protecting legal interests of security and reliability of electronic data that have relevance for legal and economic relations. Another, more general approach has been adopted in Poland in order to provide criminal law protection of electronic documents against forgery. A legal definition of "document," included in the general part of the Code (Art. 115 § 14), was amended to enable application of traditional legal provisions on offences against documents for prosecution of their modern, electronic or digital forms. Initially, the document was defined in the Penal Code as "any object or record on a computer data carrier…". In 2004 this definition was replaced by another one ("any object or other recorded information carrier…"[31]) which provides a fertile ground for various interpretations. Generally speaking, there is no consensus among authors as how to construe a core part of this definition, however majority of them share the opinion that under the Penal

[30] K. G i e n a s, "Hak na hakera" [Catch on a Hacker], *Rzeczpospolita*, 29.07.2005; A. A d a m s k i, "Cyberprzestępczość – aspekty prawne i kryminologiczne" [Cybercime – Legal and Criminological Aspects], *Studia Prawnicze* 2005, No. 4 (167), p. 60–61.

[31] A provision of paragraph 14 of Art. 115 reads: "A document is any object or other recorded information carrier to which is attached a specific right, or which in connection with the subject of its content, constitutes evidence of a right, a legal relationship or a circumstance, which may have legal significance."

Code a document by virtue of its nature is a tangible item.[32] Since a document must have a physical substrate, computer data is not recognised as a carrier of the information, and, in consequence, is excluded from the legal definition of the document. So only electronic documents recorded on a floppy disk, CD-rom or hard drive are legally protected against forgery. Such an interpretation implies that unauthorised alteration of an electronic document during its transmission shall not be prosecuted as an offence of forgery.[33] Arguably, any other provision does not apply to this situation, including data interference offence (Art. 268a) due to its inadequate definition (see above). In this context the present regulation of computer-related forgery can hardly be find as reasonable and consistent with the international standards.

2.2. Computer-related fraud

A specific provision against computer fraud was introduced to the Penal Code of 1997. A definition of this offence provided in Art. 287 is more flexible than the model offence proposed in Art. 8 of the CoE Convention. While the latter provision puts an emphasis on the effect caused by an offender (loss of property), there is no such a requirement under the Polish law. According to Art. 287, an offence is accomplished at the moment of interference into the data processing by the perpetrator who wants to achieve a financial gain in this way. The actus reus consists in any inputting, altering, deleting of computer data or other unauthorised interference with its processing. The mental element requires specific intent (*dolus directus*) directed at acquiring a material benefit or causing damage to another party.[34] However, it is not required

[32] J. P i ó r k o w s k a - F l i e g e r, *Fałsz dokumentu w polskim prawie karnym* [Forgery of Documents in the Polish Criminal Law], Zakamycze, Kraków 2004, p. 193–194; B. M i k, "Karnomaterialna ochrona dokumentów (zagadnienia wybrane)" [Criminal Law Protection of Documents (Selected issues)], *Prokuratura i Prawo* 2001, No. 4, p. 57; J. M a j e w s k i, [in:] *Kodeks karny. Część ogólna. Komentarz* [The Penal Code. General Part. Commentary], ed. A. Zoll, Vol. 1, Zakamycze, Kraków 2004, p. 1461; M. B u d y n - K u l i k i in., *Kodeks karny. Praktyczny komentarz* [The Penal Code. Practical Commentary], Zakamycze, Kraków 2004; A. M a r e k, *Kodeks karny. Komentarz* [The Peal Code. Commentary], LEX, Warszawa 2007.

[33] A. A d a m s k i, "Buszujący w sieci. Cybernowelizacja prawa karnego" [Penetrating the Net. Cyber-amendment to the Penal Code], *Rzeczpospolita*, 27.10.2003; P. O c h m a n, "Spór o pojęcie dokumentu w prawie karnym" [Controversy over the Definition of Document in Criminal Law], *Prokuratura i Prawo* 2009, No. 1, p. 34.

[34] Art. 287 § 1: "Whoever, in order to gain material benefits or cause the other person material damage, affects automatic processing, gathering or transmitting computer data, or changes or deletes record or introduces a new record of computer data, without being authorised to do so, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5

that the intended effects have to materialize, because they do not belong to elements of this offence. For that reason a completion of computer fraud offence takes place at the moment of interfering with the data integrity or processing, irrespective of the occurrence of economic consequences of these manipulations. It was believed that such construction of the offence will facilitate prosecution of computer frauds.[35] Current research of prosecutorial practice has shown, however, that this is not the case.[36] Art. 287 constitutes the so-called conduct crime.[37] As such its provision is applied by prosecutors not as a sole but mostly ancillary legal basis of qualification of an offender's act. A factor which triggers the reaction of a victim of computer-related fraud and has an influence on the decision to prosecute this offence is an occurrence of economic loss caused by the offender. The legal provision of Art. 287 in its current shape would only reflect a *modus operandi* of the offender, not a whole criminal content of the act he has committed. For that reason one may conclude that the goal of criminalisation of computer-related fraud has not been fully achieved.[38]

3. Illegal content

3.1. Child pornography

In Poland the list of illicit acts related to child pornography is quite extensive and it includes its production, dissemination, public presentation, procuring,

years." § 2: "In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year." § 3: "If the fraud has been committed to the detriment of a next of kin, the prosecution shall occur on a motion of the injured person."

[35] K. B u c h a ł a, "Przestępstwa przeciwko ochronie informacji i oszustwo komputerowe" [Offences Against the Protection of Information and Computer Fraud], [in:] *Materiały z konferencji naukowej* [Legal Aspects of Computer-Related Abuse, Proceedings of the International Conference], Poznań, 20–22 kwietnia 1994, Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", Toruń 1994, p. 136.

[36] R. A. S t e f a ń s k i, "Oszustwa komputerowe w praktyce polskich organów ścigania" [Computer Fraud in the Practice of the Polish Investigation Organs], *Studia Prawnicze* 2006, No. 4 (170), p. 130–132.

[37] Some authors disagree with this view and argue that Art. 287 constitutes a result crime, see for instance: P. K a r d a s, "Oszustwo komputerowe w kodeksie karnym" [Computer Fraud in the Penal Code], *Przegląd Sądowy* 2000, No. 11–12, p. 71–73.

[38] A. A d a m s k i, "Oszustwo komputerowe a oszustwo internetowe" [Computer Fraud and Internet Fraud], [in:] *Przestępczość teleinformatyczna. Materiały seminaryjne*, red. J. Kosiński, Wyższa Szkoła Policji, Szczytno 2005, p. 21; R. K o r c z y ń s k i, R. K o s z u t, "Oszustwo komputerowe" [Computer "Fraud"], *Prokuratura i Prawo* 2002, No. 2, p. 32–35.

recording as well as storing and possession (Art. 202 § 3–5 of the Penal Code).[39] In addition, the law makes a distinction between acts committed for the purpose of dissemination of child pornography and for other undefined purposes, including one's own use. The first category of illegal conducts is subject to more severe punishment (imprisonment for 6 months to 8 years) than the other (imprisonment for 3 months to 5 years), however, not without exceptions.[40]

Polish law does not provide any legal definition of pornography in general, and consequently, child pornography is also undefined. The objective of child pornography offences is described in the Penal Code as "pornographic content with the participation of minor." This is a broad concept, not confined only to "visual depiction" (as determined in the CoE Convention and the EU Framework Decision) but encompassing all forms of expression, including literary works and oral presentations.[41] The only exception is a newly established provision of § 4b of Art. 202 of the Penal Code which directly refers to an "image" as an object of the offence.

Despite three legislative amendments of child pornography offences in the years of 2004–2008, Polish criminal law does not fully comply with international and European legal standards in this field. The most critical issue, also for the ongoing process of ratification the CoE Budapest Convention, is the age-limit to which the ban on child pornography applies.

In accordance with the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and

[39] Art. 202 of the Penal Code (child pornography offences). § 3: " Whoever, for the purpose of dissemination, produces, records, imports or disseminates or presents publicly pornographic material in which a minor is presented, or pornographic material associated with the use of violence or the use of an animal, shall be subject to the penalty of deprivation of liberty for from 6 months to 8 years." § 4: "Whoever records pornographic content with the participation of a minor under age of 15, shall be subject to the penalty of deprivation of liberty from one to 10 years." § 4a: "Whoever imports, stores or possesses pornographic content in which a minor under 15 years of age is presented, shall be subject to the penalty of deprivation of liberty for a term of between 3 months to 5 years." § 4b: "Whoever produces, disseminates, presents, stores or possesses a pornographic content featuring a created or processed image of a minor taking part in a sexual activity, shall be subject to the penalty of fine, limitation of liberty or deprivation of liberty up to 2 years."

[40] § 4 of Art. 202 of the Penal Code penalises recording of pornographic content with the participation of a minor under age of 15 with imprisonment from 1 to 10 years, whereas the same conduct undertaken for the purpose of dissemination of child pornography is subject to imprisonment from 6 months to 8 years.

[41] In the official Polish translation of the EU Framework Decision of 2004, the definition of child pornography differs from the original English text. The latter reads: "'child pornography' shall mean pornographic material that visually depicts or represents...," while the former points out that "child pornography' shall mean pornographic material that contain pornographic content, which depicts or represents..."

the CoE Convention on Cybercrime, in most countries, legislation on child pornography protects children under the age of 18, regardless of the age of consent to sexual activity, which is normally lower. In Poland, the age of consent is 15 and the law on child pornography protects children under 18. However, this concerns only dissemination or public presentation of child pornography and acts committed for the purpose of its dissemination, including production, recording, acquisition, storing and possessing of pornographic content with the participation of a minor. The age-limit is lower in case of recording, procuring, storing and possessing child pornography for a purpose other than dissemination (e.g. for personal use), and amounts to 15 years, which is not in compliance with the CoE Budapest Convention of 2001 (Art. 9 § 3), the EU Framework Decision of 2004 (Art. 1) and CoE Lanzarote Convention of 2007 (Art. 1).[42]

At the first glance, there are considerable differences between the scope of criminalisation of conducts related to child pornography under the CoE Conventions and the EU Framework Decision of 2004 on the one hand, and Polish criminal law on the other. Transmission, offering, supplying and making available are not explicitly criminalised in Poland, as opposed to recording, public presentation and storing which are, in turn, not covered by the European legal instruments of child protection from being sexually abused through production and proliferation of child pornography.

A closer examination of this issue would reveal that these differences are not semantically significant. For instance, making child pornography available on the Internet by uploading a file with such content to a website results in its public presentation. Making available this same file by means of an ftp server or a hard disk of a computer connected to an e-donkey file sharing system, would be recognised by a Polish judge as its dissemination in view of the Supreme Court interpretation of this term.[43] Some terms used by Polish legislator to define forbidden conducts overlap (e.g. producing and recording, possessing and storing) and one of them ("transmission"), specified in the European legal instruments is missing in Art. 202 of the Penal Code.

[42] The CoE Convention on Cybercrime of 2001 and the CoE Convention on the protection of children against sexual abuse of 2007 give the Parties the possibility to lower age-limit protection of children to 16 years or less. The EU Framework Decision of 2004 does not allow MS in child pornography offences to lower the age of protection under 18 years.

[43] The Supreme Court in a ruling dated 16 February 1987 held that dissemination of pornographic materials is meant as making them commonly available. Wyrok Sądu Najwyższego z dnia 16 lutego 1987 r. (WR 28/87), OSNKW 1987, No. 9–10, poz. 85.

The mere possession of "real" child pornography was criminalized in Poland in 2004.[44] Initially, this prohibition concerned only pornographic content with the participation of children under the age of 15. In 2005 the ban on possession was extended to the pornographic content with the participation of all minors, regardless of their age, provided that the possessor acts for the purpose of dissemination.[45] In effect, recording, procuring, possessing and storing pornographic material with the participation of children between 15 and 18 are legal if the perpetrator acts without the aim of public distribution.

Since the end of 2008 the so-called pseudo[46] and virtual[47] child pornography has been forbidden in Poland.[48] The ban concerns not only production, dissemination, storage and possession but also presentation of pornographic content. The newly adopted provision of § 4b of Art. 202 of the Penal Code reads:

> Whoever produces, disseminates, presents, stores or possesses pornographic content featuring of a created or processed image of a minor taking part in a sexual activity, shall be subject to the penalty of fine, limitation of liberty or deprivation of liberty up to 2 years.

As opposed to the European legal instruments, there are no requirements that the image should be "realistic" and concern "non-existent child." Thus, the law allows for an extensive interpretation of this provision, including both images that appear to reflect reality as well as cartoons.

Polish criminal law regulation on child pornography is rather strict in a sense that it does not exclude criminal responsibility under circumstances making it possible according to exclusionary clauses provided for by Art. 3 point 2 of the 2004 Framework Decision and Art. 9 point 4 of the CoE Convention.

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[44] Ustawa z 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń (Dz. U. No. 69, poz. 626) [The Penal Code Amendment of 18 March 2004].

[45] Ustawa z 27 lipca 2005 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego i ustawy – Kodeks karny wykonawczy (Dz.U. No. 163, poz. 1363) [The Penal Code Amendment of 27 July 2005].

[46] Pseudo child pornography takes an innocent image of a child and manipulates it (by computer or otherwise) to place the child in a sexual context. This is also known as 'morphing.' Real harm is done by pseudo child pornography because a real child's image was used in the creation process. The morphed image violates the child's dignity, reputation and right to privacy [after: M. W a l t o n, *Possession of Child Pornography. Background Paper*, New South Wales Council for Civil Liberties, January 2005, p. 6, http://www.nswccl.org.au/docs/pdf/bp2%202005%20Possess%20Child%20Porn.pdf.

[47] Virtual child pornography depicts fictitious children. A 'fictitious child' can be either a pure figment of its creator's imagination or an adult actor playing the part of a child. *Ibidem*.

[48] Ustawa z dnia 24 października 2008 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (Dz. U. No. 214, poz. 1344) [The Penal Code Amendment of 24 October 2008]

3.2. Racism and xenophobia

Poland have signed the Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer systems (28 January 2003), but did not ratified it. Four types of offences considered by the Additional Protocol are covered, at least partly, by the Polish legislation.

Dissemination of racist and xenophobic material through computer systems is partly covered by Art. 256 of the Penal Code, which foresees criminal responsibility for the public incitement to hatred on the basis of national, ethnic, race or religious differences or praising of a fascist or other totalitarian system of the state.[49] This offence can be committed through both conventional an electronic means, including web sites, chat rooms, newsgroups or discussion fora.

Threats for racist and xenophobic motives are criminalized under Art. 119 § 1 of the Penal Code with imprisonment for 3 months to 5 years.[50]

An insult for racist and xenophobic motives, if committed publicly, is condemned by the Penal Code as a specific offence (Art. 257) and sanctioned by imprisonment of up to three years.[51]

As to the last punishable conduct under the Additional Protocol (Denial, gross minimisation, approval or justification of genocide or crimes against humanity) it is partly covered by Art. 55 of the Law on the Institute of National Remembrance-Commission for the Prosecution of Crimes against the Polish Nation.[52] Under this provision, anyone who publicly and contrary to facts denies crimes which occurred in particular during the second World War (in particular the Holocaust) is subject to criminal responsibility under a penalty of a fine or the deprivation of liberty of up to three years.

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[49] Art. 256: "Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years."

[50] Art. 119 § 1: "Whoever uses violence or makes unlawful threat towards a group of person or a particular individual because or their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years." § 2: "The same punishment shall be imposed on anyone, who incites commission of the offence specified under § 1."

[51] Art. 257: "Whoever publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual shall be subject to the penalty of deprivation of liberty for up to 3 years."

[52] The Law of December 18, 1998 on the Institute of National Remembrance-Commission for the Prosecution of Crimes against the Polish Nation (J. of L., December 19, 1998), http://www.ipn.gov.pl/portal/en/32/46/Act_on_the_Institute.html

4. Infringements of copyright and related rights

In Poland two basic legal acts do criminalise infringements of copyright. These are respectively the Copyright and Neighbouring Rights Act of 4 February 1994[53] (further: the Copyright Act), and the 1997 Penal Code. Criminal law protection of legitimate interests of copyright holders in the Penal Code is limited only to computer programmes and covers two kinds of infringements: illegal copying of software (Art. 278 § 2),[54] and handling of "stolen" software (Art. 293).[55] These are *ex officio* prosecuted offences what may partly explain relatively high rates of such crimes recorded by the police statistics. The scope of criminalisation of the Copyright Act is broader and encompasses all kinds of protected works and artistic performance against plagiarism, illegal reproduction, dissemination and even purchase of illegal copies of literary, photographic, musical, audio-visual and other protected works (Art. 116–118).

Although none of these provisions employ the exact wording of the TRIPS agreement ("piracy on a commercial scale"), most of them take economic dimension into account. This usually takes form of the aggravation of penalty if a criminal act is committed for the purpose of a financial gain. For example, the Copyright Act makes unauthorised dissemination of another's work an offence (Art. 116), but whereas simple dissemination is punishable by two years' imprisonment, the penalty is raised to three years "if the perpetrator commits the act … in order to gain material benefits," and to five years if he has made the offence "a regular source of income."[56]

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[53] English translation: http://www.mkidn.gov.pl/cps/rde/xbcr/mkid/act_on_copyright.pdf.

[54] Art. 278 § 1: "Whoever, with the purpose of appropriating, wilfully takes someone else's movable property shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years." § 2. "The same punishment shall be imposed on anyone, who without the permission of the authorised person acquires someone else's computer software, with the purpose of gaining material benefit." § 3: "In the event that the act is of a lesser significance, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year."

[55] Art. 293 § 1: "The provisions of Art. 291 and 292 shall be applied accordingly to computer software." § 2: "The court may decide on the forfeiture of the item specified in § 1 and in Art. 291 and 292, even though it may not be the property of the perpetrator."

[56] Art. 116 of the Copyright Act: 1. "Whoever, without authorization or against its terms and conditions, disseminates someone else's work, in the original or derivative version, performance, phonogram, videogram or broadcast shall be liable to a fine, restriction of liberty or imprisonment for the period of up to 2 years." 2. "If the perpetrator commits the act specified in § 1 above in order to gain material benefits, he shall be liable to imprisonment for the period of up to 3 years." 3. "If the perpetrator makes the offence specified in § 1 above a regular source of income or

Under the Copyright Act (Art. 50 sec. 3),[57] terms ”dissemination” and “making available” have similar meaning and can be used interchangeably as far as spreading of protected works over the Internet is concerned. A criminal law aspect of this consideration is associated with peer-to-peer file sharing. Uploading files for their exchange or sale on the website, or making them available to other users of file sharing system may lead those who are involved in such activities to criminal responsibility under Art. 116 of the Copyright Act. It depends not only on the content of files but also on the technical features and functionality of the file-share programme used.

Each Party to the CoC is obliged to criminalise wilful infringements of copyright and related rights (Art. 10). Against this background it must be noted that Polish law penalises also some unintentional copyright infringements. This refers to the offence of unlawful dissemination of the work of another (Art. 116 sec. 1 of the Copyright Act) as well as the offence of unintentional handling of “stolen” software and other work (Art. 293 of the Penal Code, Art. 118 sec. 3 of the Copyright Act). In this connection, it can be pointed out that the level of criminal law protection of copyright and related rights in Poland surpasses those which has been set out by the international standards in this field.

III. Criminal procedure

Investigations of cybercrime require specific procedural instruments that enable law enforcement authorities to identify the offenders and collect the evidence of committed crimes. Relying on this assumption the CoE Convention on Cybercrime has introduced some new procedural measures for the purpose of improving both the criminal investigations and international co-operation in computer crime cases. By virtue of this international treaty, each Party to the CoC is obliged to adopt these measures and establish in its domestic law the powers and procedures for the purpose of “specific criminal investigations or proceedings,” relevant for an electronic environment.[58]

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organizes or manages a criminal activity, as specified in § 1, he shall be liable to imprisonment from 6 months up to 5 years.” 4. “If the perpetrator of the act specified in § 1 above acts unintentionally, he shall be liable to a fine, restriction of liberty or imprisonment for the period of up to one year.”

[57] Art. 50 of the Copyright Act: The separate fields of exploitation shall be, in particular: “[…] 3) within the scope of dissemination of the work in a manner other than as specified in Subparagraph 2 – public performance, exhibition, presentation, communication, broadcasting and re-broadcasting, as well as making the work available to the public in a manner allowing every person to have access to such work in a place and at a time of his own choice.”

[58] *Explanatory Memorandum*, 140.

As reports on implementation of the CoC indicate, a number of the CoE member states have some problems with fulfillment of this obligation.[59] Poland is not an exception in this regard, however against a comparative background, its advances in implementation of the CoC procedural provisions are relatively modest, and in some areas non-existent.

The clear example is the position taken by the Polish lawmaker with regard to the core idea of the CoC, i.e. "to adapt traditional procedural measures, such as search and seizure, to the new technological environment."[60] A legal reform consistent with the CoE Recommendation No. R (95) 13 on problems of criminal procedural law connected with information technology, was strongly recommended to the Polish legislator by some authors in the late 90'.[61] This proposal has not been taken into account by the then Criminal Law Reform Commission.[62] Instead, an opposite approach of "according application" of already in force provisions on the coercive powers (search of premises and seizure of objects[63]) to electronic evidence was adopted in the Code of Criminal Procedure (C.P.P.) amended in 2003. A newly established provision of Art. 236a of the C.P.P. provided that the regulations contained in chapter 25 of the C.C.P. (search and seizure) "shall be applied accordingly" to information systems and data, including correspondence send by electronic mail.[64]

In pursuant of this legal provision, the search and seizure of stored computer data may concern only tangible objects like computers and data carriers (e.g. hard-drives, CD-Roms, memory sticks), and can be executed by securing the data medium upon which this data is stored. As a routine, the seizure of electron-

[59] L. P i c o t t i, I. S a l v a d o r i, *National legislation implementing the Convention on Cybercrime – Comparative analysis and good practices*, Dissusion paper (draft), Version 12 march 2008, Council of Europe, Project on Cybercrime, http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/T-CY/DOC%20567%20study2-d-version8%20provisional%20(12%20march%2008).PDF.

[60] *Explanatory Memorandum*, 134.

[61] A. A d a m s k i, *Prawo..., supra* note 20 at 216. A similar proposal has been put under consideration of the Polish legislature in connection with Art. 19 of the draft CoC – see: A. A d a m s k i, *Przestępczość w cyberprzestrzeni. Prawne środki przeciwdziałania zjawisku w Polsce na tle projektu konwencji Rady Europy* [Crime in Cyberspace. Legal countermeasures in Poland and the Council of Europe Draft Convention], Toruń 2001, p. 81–90.

[62] See also: A. L a c h, *Poland*, [in:] *International Electronic Evidence*, ed. S. Mason, British Institute of International and Comparative Law, BIICL 2008, p. 695.

[63] Art. 219. § 1 of the C.C.P.: "A search may be made of premises and other places in order to detect or arrest a person or to ensure his compulsory appearance, as well as to locate objects which might serve as evidence in criminal proceedings, if there is a good reason to suppose that the suspected person or the objects sought are to be located there."

[64] Art. 236a of the C.C.P.: "The provisions of this Chapter shall be applied accordingly, to those exercising control over or using information technology systems with respect to data stored in this system or on a storage medium being at his disposal or being used, including correspondence send by electronic mail."

ic evidence takes place in the course of the search of premises or persons, and, as a rule, is carried out by the police on the basis of a warrant issued by a court or a public prosecutor. Where there is a risk of loss of evidence and immediate action is required, a warrantless search is allowed, however it must subsequently be approved by the court or prosecutor (Art. 220 § 3 of the C.C.P.).[65] Moreover, if there is a reasonable suspicion that a crime has been committed, subsequent approval by the prosecutor is not required for the search of a body, clothes and luggage of a given person as well as to the checking of a cargo stored at terminals or carried by means of transportation (Art. 15.1.5. of the Police Act).[66]

Adopted approach of "according application" of traditional regulations like Art. 219 of the C.C.P.[67] to information technology is deficient in many respects and can hardly be recognised as an attempt of transposition of Art. 19 of the CoC to the Polish legal system. Clearly, as some authors argue, such transposition was not intended by the drafters and legislature at all.[68] Undesirable consequences of this omission are threefold. On the one hand, such imprecise regulation, based on analogous application of law, provides vast opportunities for arbitrary interpretation, and hence improper application of the criminal procedure provisions. On the other hand, the lack of clarity on how to carry out computer searches and data seizures in a lawful manner would diminish the effectiveness of investigating authorities. Last but not least, uncertainty surrounding interpretation of Art. 236a of the C.C.P. may also negatively affect the situation of computer users, including respect for their right to privacy. This is particularly true as far as technically advanced methods of evidence collection, including "extended" search of computer systems are concerned.

1. Extended search of information systems

[65] Art. 220 § 3 of the C.C.P.: "In cases not amenable to delay, if the court's or state prosecutor's order cannot be issued, the agency conducting the search shall produce a warrant from the chief of the unit or an official identity card, and then apply without delay to the court or the state prosecutor for approval of the search. The person on whose premises the search was conducted should be served, within seven days of the date of the action, upon a demand from such person made for the record, an order of the court or the state prosecutor authorizing the action. The person should be instructed about his right to make such a demand."

[66] Ustawa z 19 kwietnia 1990 r. o Policji (Dz.U. 2007.43.277), http://www.ifp.pl/html/ustawa/ustawa.html.

[67] Art. 219 § 1: "A search may be made of premises and other places in order to detect or arrest a person or to ensure his compulsory appearance, as well as to locate objects, which might serve as evidence in criminal proceedings, if there is good reason to suppose that the suspected person or the objects sought are to be located there."

[68] See: Lach *supra* note 62 at 695, who speculates that "it is possible that the Polish lawmaker was of the opinion that it is not necessary to create separate coercive measures for the electronic environment."

So far, the Supreme Court had no opportunity to pronounce any ruling on admissibility of an online computer search. Opinions on this subject differ. Officials from the Ministry of Justice subscribe to the interpretation that Art. 219 and 236a of the C.C.P. provide sufficient basis for the application of such a measure.[69] On the other hand, there is a wide agreement among authors who deal with this issue that the above provisions do not constitute a legal basis for the extended search of networked information systems located outside premises named in a search warrant.[70] The major argument raised against such a possibility on the grounds of legality points out the inadmissibility of an analogous application of the criminal procedural law *in malam partem*, especially with regard to the use of coercive measures. A reference is made in this context to Art. 50 of the Constitution which recognizes the right to inviolability of the home, and stipulates that the search is allowed only in cases and in a manner specified by the statute.[71] In connection with this, it can be mentioned about the recent draft amendment of the Police Act of 1990 which proposes to include into the police surveillance measures a remote search of computer hard drives.[72]

2. Seizure of data

Although the C.C.P. does not explicitly provide so, the computer data of evidential value may be seized by making its copy. Securing electronic evidence in this way is regarded to be legally permissible as a less intensive measure of evidence collection than the seizure of data carriers or complete computer installations. Such *in bonam partem* interpretation of law is based on Art. 236c of the C.C.P. Additionally, it also corresponds to the legal principle of

[69] *Uzasadnienie wniosku o udzielenie zgody na ratyfikację Konwencji Rady Europy z 23 listopada 2001 r. o cyberprzestępczości* [Reasoning of the motion for authorisation on ratification of the Council of Europe Convention on Cybercrime], p. 7.

[70] A. A d a m s k i, *Rządowy projekt dostosowania polskiego kodeksu karnego do Konwencji Rady Europy o cyberprzestępczości* [Government's bill on implementation of the CoE Convention on Cybercime, paper presented at the conference SECURE 2003 Warsaw, 5–6 November 2003 r.], http://www.cert.pl/PDF/secure2003/adamski.pdf; A. L a c h, "Gromadzenie dowodów elektronicznych po nowelizacji kodeksu postępowania karnego" [Collecting Electronic Evidence after Amendment of the Code of Criminal Procedure], *Prokuratura i Prawo* 2003, No. 10, p. 23; A. N o w a k, "Przeszukanie i zatrzymanie sprzętu komputerowego jako procesowa forma uzyskiwania materiału dowodowego" [Search and Seizure of Computer Hardware as a Procedural Measure of Evidence Collection], *Dodatek do Monitora Prawniczego* 2005, No. 3, p. 42.

[71] Art. 50 of the Constitution: "The inviolability of the home shall be ensured. Any search of a home, premises or vehicles may be made only in cases and in a manner specified by statute."

[72] Communication presented at the 13th Conference on Network and ICT Systems Security – SECURE 2009 (Warsaw, 20–21 October 2009) by the representative of the Headquarters of the Police.

proportionality (Art. 227 of the C.C.P.), which requires coercive measures to be applied with moderation and respect for the dignity of the persons involved, and without unnecessary damage or hardship.[73] The fact that the C.C.P. does not directly allows the investigating authorities to seize data through making its copy has various consequences. It implies, for instance, that the confiscation of data and its subsequent removal from the suspect's computer system have little chance to be applied in result of "according application" of the existing legal provisions.[74] A conservative approach to handling of electronic evidence, adopted in the C.C.P., may also account for the lack of regulations governing the search and seizure of computer data in a manner compatible with computer forensic standards.[75] This, in turn, may explain why top-rank officials from the Ministry of Justice call into question the usefulness of this sort of regulations and find the current state of legislation in the field of electronic evidence fairly satisfying.[76] In view of considerable differences between expected and actual compliance of the Polish criminal procedure with the procedural provisions of the CoC, it is not easy to share this opinion. On the other hand, it should be borne in mind that from the point of view of criminal justice practitioners, simple techniques of gathering electronic evidence (e.g., seizure of hardware instead of data) have some advantages over more complex one, and are perceived as a speedy and efficient way of securing evidence material for future forensic examination. Observation of judicial practice allows for generalisation that in computer-related cases not the digital evidence itself, but the expert witness report is the key piece of evidence presented to the court.

3. Preservation of data

Preservation of stored computer data is a legal measure of crucial importance for a successful prosecution of cybercrime, because it authorises investigating authorities to prevent the deletion of specific data that are under control of other subjects and could be of relevance for a given criminal investigation. Such data, upon the request of appropriate authorities, could be ordered to be preserved for possible later access following a further disclosure order. According to Art. 16 of the CoC, the legal power of preservation of data applies both to content data (e.g. business records) and traffic data (e.g. server logs).[77]

[73] A. L a c h, *supra* note 70 at 22.

[74] *Ibidem*, p. 25.

[75] Respective recommendations are included in the *Explanatory Memorandum*, 197.

[76] *Odpowiedź sekretarza stanu w Ministerstwie Sprawiedliwości – z upoważnienia ministra – na interpelację nr 7857 w sprawie postępowania z dowodami elektronicznymi* [Response of the Secretaty of State in the Ministry of Justice – on authorisation of the Minister – to the interpellation no. 7857 on handling of the electronic evidence], http://orka2.sejm.gov.pl/IZ6.nsf.

[77] *Explanatory Memorandum*, 161

Preservation of data order was adopted in Poland in 2004, however to a limited extent. It can only be applied in relation with conducted criminal investigations to the traffic data kept by telecommunication service providers in their computer systems.

Under Art. 218a of the C.C.P.,[78] the court or public prosecutor, depending on the phase of the criminal proceedings, may issue a data preservation order addressing it to any telecom operator or service provider with the request to preserve the specified data. This measure is effective for a period not longer than 90 days and can not be extended. Apparently, time constrains prescribed for the preservation of data are becoming obsolete under the regime of data retention.

4. Retention of data

Poland, as yet, did not fully implement the Directive 2006/24/EC.[79] Nevertheless, the first step in this direction was taken in April 2009 when the obligation of data retention was imposed on telecommunication service providers.[80] The term of application of the retention of "communications data relating to Internet Access, Internet telephony and Internet e-mail'' was postponed until 15 March 2009,[81] but the legal framework for this measure is still under preparation. A "trial balloon" on the government's plans to impose strict control on the Internet traffic was released by the press in August 2009 and has aroused a strong critical reaction among ISPs and civil-liberties advocates.[82]

[78] Art. 218a § 1 of the C.C.P.: "Offices, institutions and entities running their activity in the telecommunication sector shall be obligated, upon the court or public prosecutor demand included in their order, to secure immediately, for a specified period not exceeding 90 days, computer data stored in a equipment that contains this data on a data carrier or computer system" (unofficial translation).

[79] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[80] Ustawa z dnia 24 kwietnia 2009 r. o zmianie ustawy – Prawo telekomunikacyjne oraz niektórych innych ustaw (Dz.U. 2009.85.716).

[81] Poland, like most of the EU member states, choose to take advantage of Art. 15 (3) of the directive in this respect.

[82] M. L e m a ń s k a, "Internet pod ścisłą kontrolą," *Rzeczpospolita* 20.08.2009, http://www.rp.pl/artykul/67344,351363_Internet_pod_scisla_kontrola.html; U. Z i e l i ń s k a, "Polski matrix, czyli inwigilacja na żądanie," *Rzeczpospolita* 20.08.2009, http://www.rp.pl/artykul/132583,351364_Polski_matrix__czyli_inwigilacja_na_zadanie_.html.

A recently amended Law on Telecommunication of 2004[83] prescribes a retention period of 24 months from the date of the communication. This is a relatively moderate regulation in view of the proposal raised in 2005 by a prominent member of a ruling party who wanted to extend the retention period up to 15 years.[84] The present scope of application of this measure complies with the directive and covers all types of data which were specified there. However, a partial implementation of the retention directive and an interrelation of the amended telecommunication law with the legal provisions of the Police Act and the C.C.P., have an impact on the extent of application of production orders.

5. Production order

According to Art. 18 CoC, the aim of production order is to give the competent authority the power to compel a person in its territory to provide specific stored data, or to compel an ISP to furnish the subscriber with information necessary for the criminal investigation that are in those persons' possession or control. There are similar procedural measures in the Polish legal system, however a scope of their applicability is relatively narrow and covers only telecommunication service providers. According to Art. 180d of the Law on Telecommunication, they are obliged to submit on their own expense the traffic, location and subscriber's data to the police, state prosecutor and court in compliance with the rules and procedures prescribed by other legal provisions. Respectively, corresponding regulations are to be found in the Police Act (Art. 20c) and the C.C.P. (Art. 218). Art. 20c of the Police Act allows the duly authorised police officer to obtain from the telecom operator for the purposes of detection and prevention of crime the stored traffic, location and subscriber's data. This can be done either on an oral demand of a policeman or by means of transmission of data through a telecommunication network (written application is not required). A production order addressed to the telecommunication service provider may also be issued by the prosecutor in the course of preparatory proceedings or the court during court proceedings. On the basis of a recently amended Art. 218 of the C.C.P., all entities operating in the telecommunication sector are obligated to surrender to the court or state prosecutor upon demand included in their order, any correspondence and data specified in Art. 180c and Art. 180d of the Law on Telecommunication, when the above are significant to

[83] The Act of 16 July 2004 Telecommunication Law (Dz.U. No. 174, item 1800, with amendments). English translation of not updated version is available at: http://www.wai.en.uke.gov.pl/_gAllery/86/860/Telecommunication_Law_consolidated_version.pdf.

[84] T. K ü c h l e r, *Arguments continue on eve of data retention D-day*, EUobserver, 13.12.2005, http://euobserver.com/9/20540; *Polish Plans for 15 Years Mandatory Data Retention*, EDRI-gram No.3.24, 5 December 2005 http://www.edri.org/edrigram/number3.24/Poland.

the pending proceedings. The indicated provisions of telecommunication law do not apply to the Internet service providers. Obviously, they have a legal duty to cooperate with the state authorities by disclosing their subscribers' data to them. This obligation, however, has been defined in a very general way.[85] Furthermore, neither the Police Act nor the C.C.P. make any direct reference to ISPs, hence the law does not unequivocally mandate police officers, state prosecutors and courts to order ISPs to submit data that have been already stored in their computer systems.

Despite this legal ambiguity and its critical assessment in the literature,[86] subscriber information is communicated by the ISPs to the law enforcement and criminal justice authorities on their demand.

6. Real-time collection of traffic data

Until presently, the Polish legislation does not provide a measure consistent with Art. 20 of the CoC.[87] An opposite view contained in the Explanatory memorandum to the motion for authorisation on ratification of the CoE Convention on Cybercrime[88] cannot be accepted. Its reasoning refers to the executive regulation of the Council of Ministers from 13 September 2005[89] which is inadequate in this context, both technically and legally. In the latter aspect – as a legal basis for the criminal law procedural measure.

7. Interception of content data

[85] Art. 18 (6) of the Law on Providing Services by Electronic Means of 2002 states that "the service providers provides the information on data referred to in § 1–5 to the state authorities for the needs of legal proceedings carried on by them." These are mostly personal data of the subscribers, including their electronic addresses and some categories of traffic data.

[86] A. A d a m s k i, *Przestępczość*, *supra* note 61 at 75; A. L a c h, *Dowody elektroniczne w procesie karnym*, Toruń 2004, p. 126.

[87] A. L a c h, *Dowody elektroniczne*…, p. 124.

[88] *Uzasadnienie wniosku o udzielenie zgody na ratyfikację Konwencji Rady Europy z 23 listopada 2001 r. o cyberprzestępczości* [Reasoning of the motion for authorisation on ratification of the Council of Europe Convention on Cybercrime], p. 8.

[89] Rozporządzenie Rady Ministrów z dnia 13.09.2005 r. w sprawie wypełniania przez przedsiębiorców telekomunikacyjnych zadań i obowiązków na rzecz obronności, bezpieczeństwa państwa oraz bezpieczeństwa i porządku publicznego (Dz.U. No. 187, poz. 1568).

Interception of communications is regulated by the provisions of Chapter 26 of the C.C.P. which apply not only to telephone conversations but also other forms of communications, including electronic mail (Art. 241)[90].

It can be argued that this provision enables lawful interception of all kinds of Internet-related communications, including Skype conversations, of course, as soon as such possibility becomes technically feasible.

IV. Evaluation and Summary

The focus of this report was upon the current developments in the Polish criminal law legislation aimed at its harmonisation with the European normative standards in the field of combating cybercrime, mostly – the 2001 CoE Convention on Cybercrime. The report has covered two main subject areas of cybercrime laws: substantive criminal law and criminal procedure.

The general observation that can be made on the basis on the foregoing analysis is not very flattering for the legislator. Despite substantial efforts undertook in order to implement the CoE Convention on Cybercrime to the Polish legal system, their results appear to be far from expectations. Paradoxically, they are partly below and partly above the expectations concerning comprehensive and adequate alignment of the national legislation with international law instruments.

The transposition of procedural measures provided by the CoC to the domestic law has been selective and incomplete. Such IT-specific measures as extended search of computer and data seizure were not incorporated into the C.C.P. The same concerns the real time interception of traffic data and preservation of computer data not related with traffic. The legislator can also be blamed for oversights that call into question the legality of co-operation between ISPs and law enforcement authorities in the realm of production orders.

The implementation of the substantial criminal law provisions was more successful, at least in quantitative terms. It brought to the Penal Code a number of new provisions that increased considerably, sometimes excessively, the scope of criminal law protection of some legal goods, while leaving the others poorly protected.

The present regulation of CIA-offences is redundant. Before 2008 a "pure" hacking, or unauthorised access to a computer system, has not been criminalised in Poland. At the moment, there are two hacking offence provisions and a triple ban on the system interference. Even so, not all normative standards established by the Council of Europe and the European Union instruments are fully covered

[90] Art. 241 of the C.C.P.: The provisions of this chapter shall apply respectively to surveillance and recording by technical means, of the content of other conversations or information transmissions, including correspondence transmitted by electronic mail.

by the Penal Code. The most notable examples concern the protection of data integrity and authenticity of e-documents. An erroneous design of the Penal Code provisions (Art. 268a, Art. 115 § 14) undermines legal protection of computer data and electronic documents against unauthorised manipulations. On the other hand, the vague wording of the hacking offence (Art. 267 § 2) allows for a wide application of this provision, including trivial situations that do not deserve intervention of the criminal law.

A faulty definition of "hacker's tools" offence (Art. 269b of the Penal Code) leads to ridiculous interpretations of this provision, lowering the prestige of the law in the eyes of its addressees.

As the overview of main findings of the present report indicates, the correlation between the number of penal provisions and the quality of cybercrime legislation seems to be weak, if not negative. An examination of factors that may account for such result goes beyond the scope of the present analysis. It would be reasonable to conclude that as long as the ratification of the CoC is an ongoing process in Poland, it is still possible to fill the gaps and make improvements in the binding regulations.