RAPPORTS POLONAIS

XIX^{e} CONGRÈS INTERNATIONAL DE DROIT COMPARÉ

XIXth INTERNATIONAL CONGRESS OF COMPARATIVE LAW

Vienne, 20–26 VII 2014

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Biruta Lewaszkiewicz-Petrykowska – University of Łódź, Faculty of Law and Administration
Department of Civil Law, 90-232 Łódź, 8/12 Kopcińskiego St

EDITOR
Biruta Lewaszkiewicz-Petrykowska

PUBLISHING EDITOR
Dorota Stępień

TYPESETTING
Oficyna Wydawnicza Edytor.org

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Barbara Grzejszczak

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www.wydawnictwo.uni.lodz.pl
e-mail: ksiegarnia@uni.lodz.pl
phone (42) 665 58 63, fax (42) 665 58 62

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Małgorzata Król
Professor of Law, University of Łódź

THE INDEPENDENCE OF A MERITORIOUS ELITE: THE GOVERNMENT OF JUDGES AND DEMOCRACY

This report subsequently presents the discussion of:
1. The legal order in Poland;
2. Its relevant axiological background;
3. Selected issues related to legal practice.

1. Courts and tribunals as defined in the Constitution of the Republic of Poland

The Polish legal system is a system based on statutory law, in which the Constitution of the Republic of Poland of 2nd April 1997[1] is a supreme document. Other main sources of law include parliamentary acts and other lower-rank acts (e.g. executive acts and decisions). The system is based on the tri-partite separation of powers into the legislative, the executive, and the judiciary.

Chapter VIII of the Constitution rules that the power of courts and tribunals is separated and independent from other authorities. Courts and Tribunals administer judgments on behalf of the Republic of Poland. The Polish system of the administration of justice includes the Supreme Court, common courts, administrative courts, and military courts. The law envisages at least a two-instance system for court proceedings.

The Constitution states that judges are independent in their professional practice and that they are subject only to the Constitution and statutory law. Consequently, a judge may not be a member of a political party, a trade union, or engage

[1] *The Constitution of the Republic of Poland* of 2 April 1997, adopted by the National Assembly on 2 April 1997, accepted by the Nation in a constitutional referendum on 25 May 1997, signed by the President of the Republic of Poland on 16 July 1997; Dziennik Ustaw [Journal of Laws – J. of L.] 1997, No. 78, item 483.

in a public activity being incompatible with the principles of judicial independence. Simultaneously, the state accepts an important commitment: the Constitution states that judges shall be granted work conditions and remuneration adequate to the dignity of their office and to the scope of their duties.

The fact that judges are appointed for an indefinite period of time by the President of the Republic of Poland, following a motion by the National Council of the Judiciary, is a sign of the significance of their office. The Constitution gives judges a formal guarantee of their independence by ruling that judges are not removable from their office. A judge may only be recalled or suspended from office, or transferred to another bench or position against his or her will, following a court judgment and only in the contexts defined in statutory law. A judge may be retired only when he or she reaches the age at which he or she becomes eligible for retirement, or due to bad health condition.

There is another formal guarantee of judicial independence, a norm according to which a judge may not be held criminally responsible or deprived of liberty without prior consent given by the court. A judge may not be detained or arrested, unless he or she has been apprehended at the time of committing an offence and his or her detention is essential for securing a proper course of the proceedings.

The National Council of the Judiciary

The National Council of the Judiciary guards the independence of courts and judges.[2]

The composition of the National Council of the Judiciary is a guarantee of its independence and competence. The Council includes the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, a person appointed by the President of Poland, fifteen members elected from among the judges of the Supreme Court (86 at present), common courts, administrative courts, and military courts, four members of the lower chamber of the Polish Parliament (the National Assembly), the Sejm, chosen by its deputies, and two members of the higher chamber of the Parliament, the Senate, chosen by senators. The term of office for the members of the Council is four years.

The Council's competences under statutory law, *inter alia*, are the following:

1) considering and evaluating candidates for holding a judicial position in the Supreme Court, in common courts, administrative courts, and military courts;

2) presenting to the President of the Republic of Poland applications for appointment of judges of the Supreme Court, in common courts, administrative courts, and military courts;

[2] Act of 12 May 2011 on the National Council of the Judiciary, J. of L. 2011, No. 126, item 714, henceforth referred to in this section as the Act.

3) drafting and enacting a code of professional ethics for judges, and ensuring that it is respected;

4) giving opinion on the condition of judicial staff;

5) giving opinion in cases which involve courts and judges and have been brought before the Council by the President of the Republic of Poland, other public authorities, or authorities of the judicial self-management;

6) giving opinion on drafts of normative acts related to courts and judges, and offering conclusions in such matters.

In addition, The Council performs tasks defined in statutory law, and in particular:

1) adopts resolutions with regard to applications directed to the Constitutional Tribunal to examine compliance with the Constitution of the Republic of Poland of normative acts within the scope in which they concern the independence of courts and judges;

2) considers applications for retirement of judges;

3) elects the disciplinary commissioner for judges of common courts and the disciplinary commissioner for military courts;

4) expresses opinion with regard to appointment or dismissal of presidents and deputy presidents of common courts and presidents and deputy presidents of military courts.

Common courts

The constitutional regulation related to the judges of common courts was extended in Act of 27 July 2001, Law on common courts' organisation.[3]

Common courts include: district courts, regional courts, and appellate courts. Common courts adjudicate in cases which are not restricted for other courts within the scope of civil law, criminal law, family and minor law, as well as labour and social security law. Common court judges are appointed by the President of Poland, following a motion by the National Council of the Judiciary. Each court is supervised by a President appointed by the Minister of Justice.

Appointment of appellate judges

The statute indicates the circle of lawyers eligible to apply for judicial office, including a post of an appellate court judge. It states that an eligible candidate for a post of an appellate judge is a judge of a common or a military court with at least a six-year professional experience, including a three-year period of either holding

[3] Act of 27 July 2001, Law on common courts' organisation, J. of L. 2013, No. 42, henceforth referred to in this section as the Act.

judicial office in a regional common court or a regional military court, or acting as a prosecutor in a regional prosecutor's office.

It is also possible to appoint a prosecutor to be an appellate court judge when the prosecutor has had at least a six-year professional experience of working as a prosecutor or a judge, including at least a three-year period of working as a prosecutor in a regional prosecutor's office.

It is further possible to appoint as an appellate court judge a lawyer who has been active as an advocate, a legal adviser, or a notary for at least eight years; also a lawyer who held office of the president, vice-president, senior adviser, or adviser in the State Treasury Solicitors' Office for at least eight years; a lawyer who has worked in a Polish higher education institution, in the Polish Academy of Sciences, or another academic institution and holds an academic title of professor, or an academic degree of habilitated doctor in legal studies; eventually, a lawyer who has held the judicial office in an administrative court.

In addition, a lawyer fulfilling the above-mentioned criteria may be appointed to be an appellate court judge if he or she has practiced the said professions or held indicated offices in the period of three years prior to the envisaged appointment. The aim of this provision is to safeguard that a candidate who is elected to the post shall have up-to-date experience in practicing law.

Appointment procedure for judicial office

The Act envisages the procedure for appointment of judges in common courts. Any person who fulfils the requirements set for candidates to the position of a common court judge may individually apply to be appointed for one vacant post of judicial office within a month after such vacancy was officially announced in the Monitor Polski [The Polish Monitor]. An applicant must fill in two copies of the application form for candidates for a vacant judicial position; he or she must also attach a certificate with information from the National Criminal Register [Krajowy Rejestr Karny] that he or she has had no criminal record and produce a medical statement which will certify that the candidate's health condition will be no impediment in performing professional duties of a judge. An applicant who was born prior to 1 August 1972 must also submit a vetting statement of his or her consent to disclose information related to the state's secret services' documents from the years 1944–1990, and to disclose the contents of such documents.

A candidate for a vacant judicial position, while filing his or her application, must also submit a list of the docket numbers of one hundred cases of different type in which he or she acted in his or her professional capacity. A candidate for a judicial position who is employed as a prosecutor must attach a list of the docket numbers of one hundred cases in which he or she supervised or con-

ducted preparatory proceedings, for which he or she drafted the indictment, prepared impleading documents, e.g. an admission or a defence claim, or in which he or she acted before the court, or filed the pleadings or related notices. Similar requirements are posed for an applicant who is employed as an advocate, a legal adviser, an assistant recorder, or a notary and wants to apply for a judicial position. Each of such applicants must submit a list of the docket numbers of one hundred court cases in which they acted, or a list of notary deeds of different types. A candidate holding an academic title of professor, or with an academic degree of habilitated doctor in legal studies, while filing his or her application, must submit a list of his or her publications together with relevant reviewers' opinions, copies of legal opinions that the candidate has drafted, and a description of his or her achievements in the field of teaching future professionals and in the scientific sphere.

A medical statement for a candidate can be issued by a physician and a psychologist who has been officially authorised to carry related examinations and to issue statements certifying a candidate's ability to fulfil the duties of a judge, following a detailed medical and psychological examination.

A candidate may supplement his or her application with other documents which may support his or her candidacy, in particular, such documents may include opinions and recommendations of various type.

Each new candidacy for a vacant judicial position is reported to the Ministry of Justice, to whom the President of a relevant court forwards the candidate's application form.

The Act envisages that the president of the court in which the application was filed, having confirmed that the candidate fulfilled all procedural and formal requirements posed for applicants, should administer an evaluation procedure to produce an assessment of the candidate's qualifications. Such evaluation is performed by a visiting judge-inspector with the provision that such a person must not be related to the candidate, either as a spouse or a family relative, and must not stay with the candidate in a legal or factual relation which could raise doubts with regard to the visiting judge-inspector's impartiality. In a situation where there is a number of candidates for one vacant judicial position, the same visiting judge-inspector must evaluate all such candidates, unless this should be impossible due to the number of candidates, or for other important reasons. Evaluation of a candidate includes information on disciplinary sanctions administered for the candidate and information on pending criminal or disciplinary proceedings, or a preliminary investigation against the candidate, should such facts or actions be present. Eventually, the president of the court where the application was filed presents the evaluation to the candidate. The candidate has the right to respond to the contents of the evaluation by filing his or her opinion in a written form with the president of the court within the fourteen days since the day on which the evaluation was disclosed to him or to her.

Assessment of an applicant's qualifications

According to the Act, the evaluation procedure in selecting a candidate for a judge should reveal his or her professional and subject matter-oriented qualifications. Such an evaluation of a candidate's suitability for a vacant judicial position includes a description of his or her career development, an indication of cases in which he or she acted, and of legal opinions, publications, notary deeds, or other documents, which may serve as a basis for evaluation, for a description of the candidate's work results, and for forming relevant conclusions.

Next to professional competences, the currently binding law recognises other criteria as important in an assessment of a person's suitability for a vacant judicial position. Such criteria include the candidate's personal traits, his or her ethical stance in performing current professional duties, and general professional conduct with due regard paid to politeness and the candidate's attitude towards his or her peers and other participants in legal proceedings. In order to evaluate a candidate's conduct, a visiting judge-inspector is obligated to obtain relevant information, and to get to know documents which concern the above-mentioned matters. A detailed procedure and the means applied in the course of evaluation of candidates' qualifications are defined by the Minister of Justice in a relevant Regulation.

In addition, in the case of candidates who seek being appointed for judicial office for the first time, the President of the court consults the provincial Police Commissioner to obtain further information about such persons. Information of this kind is retrieved from the data included in police information databases.

Opinion of the judicial council and the general assembly of judges

According to the Act, each candidacy for a vacant position of a judge of an appeal court or a judge of a regional court must be presented by the president of the appellate court, together with the assessment given in the evaluation process, to the judicial council of that appeal court; they council will then give their opinion on the candidate's suitability. Next, the President sets the date for a general assembly of the appellate judges, during which the candidacy will be further assessed. The general assembly of appellate judges, or, alternatively, the general assembly of regional judges will assess all registered candidates in a voting procedure and will forward to the President of the relevant appellate or regional court all registered candidacies with the information on the number of votes that each person received.

The function of the National Council of the Judiciary

According to the Act, subsequently, the President of the court will present all candidacies evaluated in the procedure described above, together with the assess-

ment of their qualifications, the opinion that they received from a relevant judicial council, and the information obtained from the Voivodeship Police Commissioner to the National Council of the Judiciary. Then, the National Council of the Judiciary will consider all candidacies for appointment as a common court judge and present them to the President of the Republic of Poland.

The oath

At the time of being appointed, a judge takes an oath in front of the President of the Republic of Poland. The wording is as follows:

> "I do solemnly swear as a common court judge to faithfully serve the Republic of Poland, to safeguard the law, to diligently perform my judicial duties, to administer justice in accordance with the law, impartially, in accord with my conscience, to respect professional secrecy protected by the law, and, in legal proceedings, to be guided by the principles of dignity and honesty;" the person taking the oath may add at the end the words: "So help me God."

Official register

A course of professional service of a judge is documented in a form of a so-called official register [wykaz służbowy]. The Act stipulates that the president of a relevant regional court, as well as the president of an appellate court, keeps a separate official register for every judge, which includes basic information on professional and personal relations of the judge, as well as data on the courses and workshops in which the judge participated, and information on other forms of professional development and circumstances indicating specialisation in particular fields of law, or in adjudicating in particular types of cases. A file known as an official register is kept following a model set in the Regulation of the Minister of Justice; on the basis of personal files kept for judges, various documents and other types of information providing data relevant for inclusion in the register.

Termination of office

Termination of office of a judge is administered with reference to the law if the judge voluntarily resigns from office. The Minister of Justice informs the National Council of the Judiciary and the President of the Republic of Poland of a judge's resignation from office.

A lawful final decision of a disciplinary court ruling removal of a judge from office, as well as a final court decision which indicates deprivation of civil rights, or the prohibition to hold a judicial office as a penalty, may lead to a judge's removal from office and his or her losing the position of a judge.

In addition, a judge's official duty expires on the day when he or she loses Polish citizenship.

Retirement

By principle, a common court judge retires on the day when he or she becomes 67 years of age. However, such a judge may declare his or her will to remain in office to the Ministry of Justice, attaching a medical statement which will certify that the person's medical condition does not make him or her incapable of performing the duties of a judge. In such a case, a judge may continue to hold office until he or she becomes 70 years old. In addition, at any time during this period, such a judge may retire after filing a relevant statement with the Ministry of Justice.

When all formal requirements have been fulfilled, a judge will retire following his or her own motion and having the right to receive not less than 75% of his or her last remuneration.

Rights and responsibilities of judges

According to the law, a judge is obligated to act in accordance with the judicial oath. A judge, both on duty and off duty, should protect the authority of judicial office and avoid any action that could affect the dignity of the judiciary or compromise public confidence in judicial impartiality.

A judge is obligated to constantly *raise his or her professional qualifications*.

A judge is obligated to respect the confidentiality of information about a case that became known to him or her in the course of his or her professional performance, except open hearings in court. The obligation of professional secrecy continues after a judge retires from office.

A judge must not engage in additional employment relations with the exception of being employed as a teacher, or for a research and didactic position, or, finally for a research post, where such employment does not impede his or her performance of judicial duties. A judge must not accept any work, or remunerated activity which could stand in conflict with fulfilling judicial duties, could compromise public confidence in judicial impartiality, or affect the dignity of judicial office.

Judges are obligated to submit a financial statement disclosing their financial standing.

The system of assessment of professional performance and professional development planning for judges

According to the Act, a judge's professional effectiveness and competences falling within the scope of the methods of professional performance and professional conduct, as well as the judge's specialisation in adjudicating different types of cases, are subject to assessment, although such an assessment may not infringe on the territory in which judges are independent.

The Act states that assessment of a judge is done with regard to:

1) productivity and efficacy of the judge's actions and the judge's work management in the context of adjudicating cases or performing other tasks and functions entrusted to the judge;

2) the judge's professional conduct, including his or her personal and work management-related manners, respect for the parties and other participants in the proceedings in the context of adjudicating cases or performing other tasks and functions entrusted to the judge;

3) the ability to phrase decisions and reasons for them;

4) the judge's professional development planning.

According to the law, the president of the relevant court should inform the judge of the outcome of the evaluation, in particular, of the results of the assessment procedure and the consequent conclusions, on the basis of which he or she should design an adequate individual professional development plan for the judge. An individual professional development plan should be designed for a period which exceeds four years.

Within the period of two weeks from the day on which he or she was informed of the results of his or her evaluation, the judge has the right to submit in a written form his or her comments together with relevant supporting reasons. Such comments are analysed by the president of a superior court, who also provides final conclusions in the professional evaluation procedure of the judge. When the judge being evaluated is an appellate court judge, the final assessment is done by the president of another appellate court.

The results of a judge's assessment is of key importance in the context of considering his or her application for promotion, i.e. for being appointed for a vacant judicial position of a higher rank.

The Regulation of the Minister of Justice of 20 December 2012 on the assessment of professional performance and professional development plan for judges[4] envisages the following principles to be applied in assessing a judge's professional performance.

[4] Regulation of the Minister of Justice of 20 December 2012 on the assessment of professional performance and the construction of an individual plan for professional development of judges; J. of L. 2012, No. 1455.

An opinion given by a visiting judge-inspector is prepared during his or her inspection on the basis of:

1) an examination of at least five selected files related to various categories of cases adjudicated during the period under evaluation and concluded with regard to their essence, and for which the reasons supporting judgment have been drafted; as well as at least five cases which have not yet been concluded, and which have been in the judge's division for the longest period of time; in addition, all cases for which undue delay has been detected;

2) statistical data on the number of cases in particular categories, which have been assigned to the judge for examination, statistics concerning the achieved results in the period under evaluation, including an indication of all concluded cases, pending cases, as well as the number of, and promptness in drafting reasons for the judgments, with a simultaneous comparison of the data with the results achieved by other judges in the Department;

3) information concerning the judge's work conditions, assistant personnel assigned to the judge, and circumstances which might impede the judge's work, or contribute to the judge's increased workload;

4) information on detected faults, administered reprimands, finished disciplinary actions and substantial complaints against the judge;

5) information on effective working time;

6) information about attended workshops and courses and other forms of professional development based on the official register and on other documents submitted by the judge.

The Regulation envisages that a judge's assessment should be done on the assessment form whose template is presented below.

Part A

General criterion	**Particular criteria**		**Results**	
			Assessment	Remarks
OFFICIAL CONDUCT	PERSONAL TRAITS	attitude to the parties (participants of the proceedings), clients	proper/improper	
		attitude to superior staff	proper/improper	
		attitude to professional peers	proper/improper	
		attitude to subordinate staff	proper/improper	

Part B

General criterion	Particular criteria		Results	
			Opinion	Remarks
Competence and efficacy	EFFICACY	clearance rate	1. average within the department 2. above average within the department 3. below average within the department	with due regard to the structure of the division and the level of complexity of the assigned cases
		length of proceedings	1. average within the department 2. above average within the department 3. below average within the department	possible reference to the average level in the district or to appeal cases
		promptness in producing reasons for judgments	no reservations/with reservations	
	EFFICIENT USE OF TIME	number of planned court sessions	1. average within the department 2. above average within the department 3. below average within the department	
		size of the division	1. average within the department 2. above average within the department 3. below average within the department	
	JUDGMENT STABILITY	affirmed/dismissed	1. average within the department 2. above average within the department 3. below average within the department	descriptive assessment
		reversed	1. average within the department 2. above average within the department 3. below average within the department	
		modified	1. average within the department 2. above average within the department 3. below average within the department	

Part B

General criterion	Particular criteria		Results	
			Opinion	Remarks
	JUDGMENT STABILITY	other	1. average within the department 2. above average within the department 3. below average within the department	
Professional conduct	BEING WELL ORGANIZED	promptness in initiating action	no reservations/with reservations	
		ability to engage in adequate actions	no reservations/with reservations	
		ability to manage evidence	no reservations/with reservations	
	CONSIDERATION FOR LEGAL RIGHTS OF THE PARTIES AND OTHER PARTICIPANTS	number of sound administrative complaints	number of complaints	
		administration of proper instructions	no reservations/with reservations	
Linguistic ability to phrase judgments, opinions and reasons (methods of professional performance)		linguistic competence and ability to use legal discourse	no reservations/with reservation	
		competence to properly construct judgments and reasons for them	no reservations/with reservation	
		ability to phrase unambiguous and transparent judgments and supporting reasons	no reservations/with reservation	
		ability to present clear, logical argumentation	no reservations/with reservation	
Process of professional development		workshops and courses attended	no reservations/with reservation	
		post-graduate studies	no reservations/with reservation	
		fulfilment of requirement under Art. 82a § 2 or 3 of Act of 27 July 2001 – Law on common courts' organisation	no reservations/with reservation	

Part C

General criterion	Particular criteria		Assessment	Remarks
Professional competence, productivity and efficacy	ORGANI-SATIONAL SKILLS	ability to perform administrative supervision	no reservations/with reservations	
		sense of duty	no reservations/with reservations	
		good planning and work mana-gement	no reservations/with reservations	
		ability to prioritise	no reservations/with reservations	
	MANA-GEMENT SKILLS	ability to make decisions	no reservations/with reservations	
		communicative competence	no reservations/with reservations	
		initiative	no reservations/with reservations	
		readiness to handle tasks	no reservations/with reservations	
		ability to execute directives	no reservations/with reservations	
Professional conduct	WORK MA-NAGMENT	promptness in initiating action	no reservations/with reservations	
		ability to engage in adequate actions	no reservations/with reservations	
		interpersonal skills	no reservations/with reservations	
	CONSI-DERA-TION FOR THE PAR-TIES AND PARTICI-PANTS	number of sound administrative complaints	number of com-plaints	

Disciplinary liability of judges

A judge faces a disciplinary action for professional misconduct, including a blatant and flagrant violation of the law and affecting the dignity of judicial office (disciplinary misdemeanour). A judge also faces a disciplinary action for his or her misconduct which happened before taking judicial office if such misconduct involved a violation of the responsibilities related to the state office which the present judge held at the time, or if the person proved unworthy of holding judicial office in some other way.

Possible disciplinary sanctions include:

1) an admonition;
2) a reprimand;
3) removal from office;
4) transfer to another office;
5) a definitive dismissal from judicial office.

A court may decide that its lawful and final disciplinary judgment should be publicised.

The disciplinary courts for proceedings against judges are:

1) in the first instance – appellate courts;
2) in the second instance – the Supreme Court.

Appellate courts adjudicate with a panel of three judges.

A disciplinary commissioner functions as a prosecutor in cases against judges of appellate courts, and against the presidents and vice-presidents of district courts. In other proceedings against judges, the deputy of the disciplinary prosecutor acts. A disciplinary commissioner is elected by the National Council of the Judiciary from among candidates put forward by each general assembly of appellate judges. A disciplinary commissioner is affiliated with the National Council of the Judiciary. The person's term of office lasts four years.

An accused judge may appoint a defender from among judges and advocates.

In principle, disciplinary proceedings are carried in open court. A disciplinary court may decide to quash the openness of the proceedings and conclude to proceed in camera for reasons of morality, state security, or public order, or in order to protect privacy of the parties, or due to other important private matters. In cases for which the openness of proceedings have been quashed, the judgement is announced in public.

Criminal liability of judges

A judge may not be detained or become subject to a criminal charge without a consent given by a relevant disciplinary court. A disciplinary court may adopt a resolution which allows to bring criminal charges against a judge when there is a substantial suspicion that he or she has committed an offence. Until a resolution allowing to charge the judge with a criminal offence is adopted, only most urgent actions may be undertaken. Detention of a judge must be immediately reported to the president of an appellate court relevant to the place of such detention. The president may administer that the detained judge be immediately released. Detention of a judge must further be immediately reported by the president of the appellate court to the National Council of the Judiciary, the Minister of Justice, and the First President of the Supreme Court.

The Supreme Court

The Supreme Court functions on the basis of a parliamentary act of 23 November 2002 on the Supreme Court.[5]

According to the Act, the Supreme Court has a judiciary supervision in the scope of adjudication related to activities performed by common and military courts. Fulfilling its function, the Court adjudicates cassations and other appeal matters, and adopts resolutions concluding legal disputes. If in the course of examining a cassation complaint a significant legal problem arises, the Supreme Court may defer judgement and forward the case to be examined by an extended panel of judges of the same court. Resolutions of the Supreme Court are not commonly binding, unless they have been granted the status of a legal principle. In all other cases they are formally binding only in the context of the case in which they were adopted. In addition, the Supreme Court examines election-related complaints, affirms validity of parliamentary elections and referenda, supervises professional self-managements of advocates, legal advisers and notaries, gives opinion on parliamentary acts, and performs other duties.

Appointment procedure for judges of the Supreme Court

Appointment for an official position of a judge of the Supreme Court is performed by the president of the Republic of Poland, following a motion by the National Council of the Judiciary.

The First President of the Supreme Court announces in the Official Journal of the Republic of Poland, The Polish Monitor, the number of judicial positions in the Supreme Court envisaged for appointment. This number is defined by the Supreme Court Board. Each person who meets the requirements set for candidates for Supreme Court judges may apply for a post within a month following the announcement. Candidacy must be reported to the First President of the Supreme Court by filing the candidate's application form for a vacant position of a judge of the Supreme Court. Unless the candidate is a judge or a prosecutor, the application has an attachment with information provided by the National Criminal Register concerning the candidate, and a medical statement certifying that the person's medical condition poses no impediment with regard to his or her performance of judicial duties.

According to relevant legal provisions, a person appointed to hold office of a judge of the Supreme Court must meet the following requirements:

1) has Polish citizenship and can fully exercise his or her civil and public rights;

[5] Act of 23 November 2002 on the Supreme Court, J. of L. 2002, No. 240, item 2052 with amendments, henceforth referred to in this section as the Act.

2) is characterised by impeccable character;

3) is a graduate of a legal department in Poland and received an MA in legal studies, or graduated from a foreign university and received a diploma officially recognised in Poland;

4) has markedly extensive legal knowledge;

5) is capable, with regard to his or her medical condition, to perform judicial duties;

6) has at last a ten-year professional experience of working as a judge, a prosecutor, a president or a vice-president, or a senior adviser, or an adviser in the State Treasury Solicitors' Office, or of working in Poland in the capacity of an advocate, a legal adviser, or a notary;

7) has worked in a Polish higher education institution, in the Polish Academy of Sciences, in a research institute, or other research centre, holding an academic title of professor, or an academic degree of habilitated doctor in legal studies.

The First President of the Supreme Court, having confirmed that the candidate fulfilled all formal requirements posed for applicants, presents the candidate together with the assessment of his or her qualifications to the relevant chamber of the Supreme Court. Then the President defines the date for the General Assembly of the Judges of the Supreme Court, during which the candidate will be presented and discussed. In a situation where there is a number of candidates for one vacant judicial position, all applications are considered during the same meeting of the General Assembly. The results of the voting of the General Assembly of the Judges of the Supreme Court, who can choose not more than two candidates for a vacant judicial position, is reported by the President of the Supreme Court to the National Council of the Judiciary.

The oath

At the time of being appointed, a judge of the Supreme Court takes an oath in front of the President of the Republic of Poland. The wording is as follows:

> "I do solemnly swear as a judge of the Supreme Court to faithfully serve the Republic of Poland, to safeguard the law, to diligently perform my judicial duties, to administer justice in accordance with the law, impartially, in accord with my conscience, to respect professional secrecy protected by the law, and, in legal proceedings, to be guided by the principles of dignity and honesty;" the person taking the oath may add at the end the phrase: "So help me God."

A refusal to take the oath means resignation from holding judicial office in the Supreme Court.

Termination of office

Termination of office of a judge of the Supreme Court takes place in the case of:

1) the judge's death;

2) the judge's resignation from office or resignation from the position of a judge during retirement;

3) a final court decision to administer for the judge a penalty in the form of deprivation of civil rights, or the prohibition to hold a judicial position;

4) a final disciplinary court decision ruling that the judge be recalled from office;

5) the judge's losing Polish citizenship.

Retirement

By principle, a judge of the Supreme Court retires on the day when he or she becomes 70 years of age; the Act envisages exceptions from this regulation related to a judge's health condition.

Responsibility to follow the principles of professional ethics

A judge is obligated to act in accord with the judicial oath. According to the Act, a judge should safeguard values connected with performing judicial duties and avoid any conduct which could affect the dignity of his or her office or compromise public confidence in judicial impartiality.

Additional employment

A judge of the Supreme Court may not remain in any other official relation or a form of employment, with the exception of being employed as a teacher or holding an academic research position.

A judge must not accept any job or engage in any other remunerated activity, which could impede his or her performance as a judge, could affect confidence in his or her impartiality, or affect the dignity of judicial office. The same principles find relevant application to judges who are off duty and retired.

Financial status

A judge submits to the First President of the Supreme Court a financial statement disclosing his or her material status.

Criminal liability

According to the Act, a judge of the Supreme Court may not be deprived of liberty or become subject to a criminal charge without consent given by a disciplinary court. Until a resolution allowing to charge the judge with a criminal offence is adopted, only most urgent actions may be undertaken. This does not apply in a situation when a judge was detained while committing a crime and the judge's detention is essential for securing a proper course of the proceedings. Detention of a judge must be immediately reported to the First President of the Supreme Court, who may administer that the detained judge be immediately released.

Disciplinary liability

A judge of the Supreme Court faces a disciplinary action for official misconduct and affecting the dignity of judicial office. A judge is also disciplinarily liable for his or her actions performed prior to his or her taking judicial office if such misconduct involved a violation of the responsibilities related to the state office which the present judge held at the time or if the person proved unworthy of holding judicial office in some other way.

The disciplinary courts for proceedings against judges of the Supreme Court are:

1) in the first instance – the Supreme Court with a panel of three judges of the Supreme Court;
2) in the second instance – the Supreme Court with a panel of seven judges of the Supreme Court.

Possible disciplinary sanctions include:

1) an admonition;
2) a reprimand;
3) removal from office;
4) a definitive dismissal from judicial office.

The Supreme Administrative Court

The Supreme Administrative Court functions on the basis of a parliamentary act of 25 July 2002 on Law on administrative courts' organisation.[6]

The Supreme Administrative Court supervises all public administration with regard to its accordance with the Polish Constitution, European Union law, and Polish statutory law. The court controls all local government bodies, professional

[6] Act of 25 July 2002: Law on administrative courts' organisation, J. of L. 2002, No. 153, item 1269.

self-management bodies, government administration authorities, and other relevant bodies in the scope of matters related to state administration. The competences of the Supreme Administrative Court include examination of appeals against lower, i.e. voivodeship, administrative courts' decisions, adoption of resolutions with the aim of elucidating legal provisions which give rise to conflicting administrative court decisions, adopting resolutions with regard to legal issues which give rise to serious doubts in an administrative court case, etc.

The procedure of appointment for judges of the Supreme Administrative Court is similar to that described above. Judges of administrative courts are independent in performing their official duties and are subject solely to the Constitution and statutory law.

Non-professional judges ("lawnicy"/"benchers")

Non-professional judges, like judges, function on the basis of the above-mentioned Act of 27 July 2001 on Law on administrative courts' organisation.

In accord with Art. 182 of the Polish Constitution, non-professional judges are lay, public members of the court, they sit as assessors in an adjudicating panel and participate in adjudicating cases of the first instance and who administer justice in such cases. They represent different professions, vary in their life and professional experience, and contribute a fresh, non-routinised perspective on the system of administration of justice.

By law, within the scope of adjudication, non-professional judges serve as members of the jury and, like judges, are independent and only subject to the Constitution and parliamentary acts. They participate in court proceedings with prerogatives similar to those granted to judges; their opinion in either a discussion or in a voting procedure related to the judgment is of the same importance as a professional judge's voice. Lay members of the jury, like judges, have the right of *votum separatum*, but they do not have to justify its use. However, non-professional judges are not authorised to preside court proceedings.

Following statutory provisions, lay members of the jury are elected by secret ballot from among candidates listed by presidents of courts, various associations, professional bodies, workplaces, as well as at least 50 citizens who have active voting rights and live within the jurisdiction of the relevant court.

According to the Act, in order to become a lay member of the jury in a common court, a person must have Polish citizenship, be able to fully exercise his or her civil and public rights, be at least 30 years of age, and not older than 70 years of age. An eligible candidate is a person of impeccable character with at least middle-level education, and one who has lived, has conducted his or her own business, or has been employed on the territory when he or she is a candidate for at least a year. Another requirement is that his or her health condition does not stay in conflict with performing the duties of a member of the jury.

Persons who are not eligible to be appointed as members of the jury include:

1) persons employed in common courts or in other courts or in prosecutor's office;

2) persons who are members of the authorities whose decisions may be subject to legal proceedings;

3) Police officers and other persons who hold official positions related to law enforcement and prosecution of offences;

4) advocates and related legal trainees;

5) legal advisers and related legal trainees;

6) members of the clergy;

7) soldiers remaining in active military service;

8) prison officers;

9) members of local municipal councils at the level of commune ("gmina"), district ("powiat"), and voivodeship.

Term of office of lay members of the jury lasts four calendar years starting with the year following the election.

A member's mandate expires in the case of a final conviction for committing a crime, or a misdemeanour, including fiscal offences. A lay member of the jury may be dismissed following a motion by the president of a relevant court in the case when the member has not fulfilled his or her duties, compromised the authority of the court by his or her misconduct, or proved to be incapable of fulfilling the duties of a member of the jury.

A non-professional judge takes an oath of the same wording as that defined for judges.

A non-professional judge's employer is obligated to let the employee take time off work in order to serve in court.

Lay members of the jury of each court elect from among their group a bench board, its chairman, and its deputy chairmen. The bench board's responsibilities include, in particular, improving the performance of the jury's members and their representation.

The role that lay members of the jury play within the system of administration of justice cannot be overestimated as long as the persons are characterised by a well-developed sense of justice, rich life experience, and legal awareness. Since 2007, there has yet been a noticeable decrease in the number of non-professional judges involved in administration of justice, which sometimes becomes subject to criticism in both the legal doctrine and in legal practice.

There are voices among the representatives of the legal doctrine that elimination of the institution of non-professional judges, if it were to happen, could result in the state's excessive influence over the system of the administration of justice due to the procedure of appointment of judges. On the other hand, however, in reality in Polish courts, lay members of the jury are not sufficiently appreciated by either judges or general public. In circulation, there are numerous

jokes and anecdotes focused on their role, and lay judges themselves will often treat their duties mainly as a source of additional income, or literally as the main means of support. Professional judges often claim that lay judges lack commitment and diligence in examining case files, and accuse them that they are not prepared to perform their duties. It is also true that professional judges' attitude is of prime importance in the context of their good cooperation with lay judges and for a definition of the scope in which such cooperation is used in forming the judgment. A professional judge should explain legal issues, initiate a discussion during the session, and encourage lay judges to be active in the process of administration of justice. However, selected practitioners are of the opinion that the institution of a lay member of a jury is obsolete, and a relic of the socialist system (which is in fact mistaken), an anachronism. Others, in turn, believe that a gradual limitation of the role that lay members of the jury play in administration of justice is unconstitutional. As P. S i t n i e w s k i claims, while analysing questionnaires completed by presidents of courts:

> The respondents were critical with regard to the very point of there being lay members of the jury and, as can be concluded from further answers, many people negatively assess the model of administration of justice a jury including lay judges. As many as 23% of the respondents believe that lay judges' participation is inexpedient due to their lack of legal knowledge. Lay judges' lack of legal knowledge is further commented on in other answers and pointed out as a negative element in lay judges' performance. In summary, 71,42% of the respondents believed that lay judge's training should focus on the field of law within which a particular non-professional judge adjudicates. A high number of respondents, 35,71%, claimed that such training should include legal regulations related to the organisation of common courts. In addition, 25% of the respondents negatively assessed non-professional judges' performance, and 3,57% assessed their performance as very bad. In addition, 35,71% stated that they believed the institution should be eliminated, although, it must be noted that the same percentage of the respondents believed that the institution should be kept without any alteration in the existing legislation. As can be seen, criticism with regard to the very institution of lay judges prevails among the respondents. The analysis continues, "In the next question we wanted to elicit judges' opinions with regard to the tasks which, they believed, a lay member of the jury should perform. Over 60% of the responding judges said that lay judges' primary task is to make sure that making decisions of life should not be blurred by the law. As it is thus not always the case that legal norms of adjudication reflect a 'public sense of justice,' the role of lay judges may be perceived as essential. But is this the only reason why their role should be perceived as positive? It does not seem so. A lay member of the jury's task is to indicate it to a professional judge, when the other excessively relies on the 'letter of the law' and disregards the assessment of a social role of the defendant while adjudicating a case. In this context, 25% of the respondents believe that the presence of lay judges in courts is necessary in order to make the courts more sensitive to the social dimension of each case. One of the respondents added that it is a lay judge's task to deepen a professional judge's life experience, which is a logical consequence of all previous comments."[7]

[7] P. S i t n i e w s k i, "Analiza wyników ankiet prezesów sądów w zakresie wyboru ławników, jakości ich pracy oraz funkcjonowania w ramach wymiaru sprawiedliwości" [A questionnaire-based

2. Axiological background

The Polish legal system envisages independence of courts and judges. It may be argued that it is an external and a formal requirement for courts and judges, i.e. that the state should secure that the requirements are satisfied by building, in this perspective, an adequate institutional system. This includes appointment procedures for judges, procedures for assessment of a judge's performance and professional development, the principles of a judge's disciplinary and criminal liability, the rules related to judges' retirement, the prohibition to transfer a judge to another official position without the judge's consent, etc. The full array of related norms constitutes a formal, institutional guarantee of the realisation of the requirement of independence of courts and judges. It is noteworthy in this context that the requirement of judicial independence may also be interpreted as a kind of call directed to judges, a request suggesting that they should themselves secure their sense of independence, that they should not yield to any political, media, or other influence, that they should develop an independent stance, a sense of responsibility, and a sense of independence of thought and assessment within themselves.

Independence of courts and judges is a *sine qua non* prerequisite for a fair trial and just adjudication.

The statutory requirements cited above, which are set for candidates for vacant judicial positions, together with the system of evaluation of a judge's professional performance, are a sign that the Polish legislator strives to construct a normative model of a judge. Such an idealised model may be defined as an ethos, or, more objectively, as an axiological paradigm of a judge.[8] Such a paradigm includes a professional element, a very important issue of professional competence (a high level of legal knowledge, constant development of professional qualifications and skills through participation in training courses and workshops, etc.), and an ethical element, i.e. character traits (impeccable conduct), personality traits, such as impartiality, diligence, sense of responsibility, communicative skills, civilised manners, etc. It may be argued that the axiological paradigm of a judge, as defined in the currently binding legal documents cited above, is used by the legislator for a construction of a judge's authority, which can be defined as *auctoritas ex lege*.[9] This kind of judicial authority is further supported by the practice to adhere

analysis of the presidents of the courts' choices with regard to the election of jurors and the quality of their performance within the system of administration of justice"], [in:] *Ławnicy – społeczni sędziowie w teorii i praktyce* [Jurors – public judges in theory and practice], ed. J. Ruszewski, Suwałki 2011, p. 78.

[8] Cf. discussion of the axiological paradigm of a notary – M. K r ó l, "Notariusz na rozdrożu, czyli o paradygmacie notariusza" [Notary at the crossroads: on the notary's paradigm], *Nowy Przegląd Notarialny* 2006, No. 3, p. 31–46.

[9] *Auctoritas ex lege* is granted, *inter alia*, to all professions of public trust, such as notaries, doctors, priests, etc.

to the code of professional conduct for judges adopted by the National Council of the Judiciary on 19 February 2003 (Act No. 16/2003). Failure to conform to the deontological norms specified in the code leads to a judge's disciplinary liability. The norms define particular duties and personal restrictions relevant for judges, which are connected with their service in administration of justice. They specify essential personal qualities, such as honesty, diligence, honour, integrity, dignity, proper conduct, impartiality and ability to resist external influence, conscientiousness in financial matters, incorruptibility, ability to successfully communicate with clients, management skills, restraint in commenting on pending court proceedings in public. The deontic norms also prohibit judges to use their professional status and prestige to promote personal interests, disallow judges to provide legal services in any form.[10] A judge adjudicates on behalf of the Republic of Poland, and, like Lot's wife, must be above suspicion. On the ethos of a judge constructed in such a way, there rests the authority of judicial actions. However, formal authority and adherence to the ethical code are just a starting point. In the perspective of social practice, it is essential that judges should really practice at least the values and patterns of behaviour verbalised in relevant regulations and deontological norms (according to the ethics of aspiration, they should do it in a degree higher than that envisaged by the law, which itself embodies the ethics of responsibility[11]). On the basis of such practice they should build their individual, personal judicial authority. This should allow to form a style of life preferred in modern society. The question whether this has already happened may be answered on the basis of relevant sociological research. Research of this type should be regularly administered and relevant results should be compared in extended periods of time.[12]

However, the prestige and the image of the court depends on a number of factors which exceed the judicial ethos and judges' individual authority. Relevant sociological research indicates that the financial and organisational aspect of the courts' functioning is also of significant importance in this context.[13] Institutions

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[10] Cf. e.g. M. K r ó l, M. U s t a b o r o w i c z, S. W o j t c z a k, M. W y s o c z y ń s k a, P. Ł a b i e n i e c, *Etyka zawodów prawniczych. Metoda case study* [Professional Legal Ethics – in theory and case studies], chapter III, Warszawa 2011, p. 5.

[11] On the ethics of responsibility and the ethics of aspiration (supererogation) see e.g. A. K. K a n i o w s k i, *Supererogacja. Zagubiony wymiar etyki* [Supererogation: The lost dimension in ethics], Warszawa 1999.

[12] Research of this type is carried out in Polish academic centres of the sociology of law, for example, *inter alia*, in the Jagiellonian University in Cracow and in the University of Warsaw. Cf. e.g. M. B o r u c k a-A r c t o w a, K. P a ł e c k i, *Sądy w opinii społeczeństwa polskiego* [Courts in the eyes of the Polish people], Warszawa 2003; A. S. B a r t n i k, *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP* [A judge or a spectator? The role of a juror in the system of administration of justice in the Third Republic of Poland], Warszawa 2009.

[13] Cf. e.g. M. A r c z e w s k a, *Społeczne role sędziów rodzinnych* [The social roles of judges in family matters], Warszawa 2009.

of the state, such as courts of justice, are often underfunded, although, fortunately, there has been a decrease in insufficient funding for the courts' buildings and their maintenance. Yet, there is still shortage of modern office equipment, shortage of funds to maintain enough staff, etc. In addition, it is noticeable that the courts are not well organised and there is a lack of cooperation between courts of justice and other institutions of various kind, for instance, aid institutions including non-governmental institutions, social work, etc. It seems that by principle, the court should provide a link integrating a chain of social activities focused on elimination of social pathologies, for which a court decision is necessary, and for which such a decision is just a first step towards elimination of a legal and social problem. As a matter of fact, the court should fit into the whole social system like a piece of jigsaw in a picture.

3. Social practice

As it has been illustrated above, legal and deontic norms currently binding in Poland do not contain definitions and do not specify the semantic scope of the criteria which are used by the decision-maker active in the process of choosing a lawyer for a vacant judicial position. For instance, it is arguable how to understand a phrase such as "a high level of legal knowledge," or what is the true meaning of being characterised by "impeccable character;" how can be decide that a person has civilised manners, or that they lack such manners; what is the essence of impartiality, and how can it be distinguished from indifference? Such issues are resolved in practice along with the application of the law, i.e. in the course of actual administrative, legal, and disciplinary proceedings. Each decided case broadens our practical knowledge of the law, which is being built "from case to case." However this increase relates to practice, and not its formal and institutional aspects. In a formal and institutional sense, a precedent does not exist in the Polish law. However, the practice of the application of law shows that decisions given in courts of higher and the supreme instance are being considered in the adjudication process at lower courts. This practice is related to common recognition of the authority of the highest courts and tribunals.

In Poland, after World War II, since 1949 there was an institution of "Guidelines for administration of justice and court practice," which were published by the Supreme Court. Together with the political changes of 1989, the institution seized to exist and became part of Polish legal history. The main aim of the Guidelines in the formal perspective, was to work towards unification of court decisions and courtroom practice and to supervise the judiciary, being the function of the Supreme Court.[14] In practice, the Guidelines served to secure the "proper" interpreta-

[14] Cf. S. R o z m a r y n, "Wytyczne wymiaru sprawiedliwości" [Guidelines for administration of justice], *Demokratyczny Przegląd Prawniczy* 1949, Vol. 6–7, p. 22.

tion of legal provisions and a "proper" qualification and assessments of legal facts and acts, which had a direct influence on administration of justice. In addition, it was often the case that the Guidelines served to fill in "loops in the law" in order to satisfy the needs and aims of the new socialist government.[15] The institution clearly served an ideological and political purpose and was used to adjust the law to the tasks and functions of the socialist state;[16] it helped to keep judges under the rule of the officially accepted ideology, which was evidenced by the fact that the institutions of the same type were introduced after World War II in all countries in Central and Eastern Europe which belonged to the Soviet bloc. The Guidelines were binding in a formal sense, which meant that disregarding them on the part of the court was a legal offence and provided a basis for a revision of the decision. The institution was evidently in conflict with the principle of judicial independence, and, what is more, with the principles of the tri-partite separation of powers due to the legislative character of many of the guidelines. It may be concluded that the institution violated the very standards of the system of statutory law. Since the 1960s, there had been a wide debate in the Polish dogmatic and theoretical legal literature focused on the role and functions of the Guidelines for administration of justice, and, in particular, on their legislative character.[17] The debate, which has been continued until recent years, has shown that the guidelines published at the time of the construction and stabilisation of the new constitution of the state had certain positive legal aspects. For instance, in the domain of civil law, they were able to remove selected purely legal issues of doubt and led to a more consistent application of the law.[18]

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[15] Cf. Z. F e n i c h e l, "Wytyczne wymiaru sprawiedliwości ustalane przez Sąd Najwyższy" [Guidelines for administration of justice as defined by the Supreme Court], *Przegląd Notarialny* 1949, No. 7–8, p. 23.

[16] Cf. L. L e r n e l l, "Nowy ustrój sądów powszechnych" [The new organisation of common courts], *Nowe Prawo* 1950, No. 10, p. 24; S. W ł o d y k a, *Organizacja sądownictwa* [Structural organization of the courts], Kraków 1959, p. 258.

[17] Cf. e.g. A. S t e l m a c h o w s k i, "Prawotwórcza rola sądów (w świetle orzecznictwa cywilnego)" [The legislative role of the courts (in light of civil law judgments)], *Państwo i Prawo* 1967, No. 4–5; J. W r ó b l e w s k i, "Sądowe stosowanie prawa a prawotwórstwo" [Application of the law in courts vis-à-vis legislative practice], *Państwo i Prawo* 1967, No. 6; M. Z i r k-S a d o w s k i, "Problem nowości normatywnej" [The problem of a normative novelty], *Studia Prawno-Ekonomiczne* 1979, Vol. XXII; M. Z i r k-S a d o w s k i, "Tak zwana prawotwórcza decyzja sądowego stosowania prawa" [The so-called legislative decision in court application of the law], *Studia Prawnicze* 1980, Vol. 1–2.

[18] Cf. A. L i t y ń s k i, *Historia prawa Polski Ludowej* [History of Law in The Peoples' Republic of Poland], Warszawa 2005, p. 47–48; quoted after: A. W a t o ł a, "Wytyczne wymiaru sprawiedliwości – geneza, podstawowe założenia i ich znaczenie dla sądownictwa powszechnego w pierwszych latach Polski Ludowej" [Guidelines for the system of administration of justice: sources, basic assumptions, and their significance for common courts in the early years of the People's Republic of Poland], *Z dziejów prawa*, 2010, Vol. 3, p. 135.

In principle, a judge's constitutional function means administering justice on the basis of norms defined by the Parliament. However, law phrased in a linguistic form inherits all features of language and can often be vague, ambiguous, and may require a clarification of a disambiguation of its content. Applying law means that a particular and concrete norm is being derived from a norm of a general and abstract character.[19] In order to perform such an operation, a judge must interpret general norms with the use of various inferential strategies relevant for the task. During such an activity, a judge will often use argumentation based on precedent, referring to ideas put forward in other similar cases, although he or she does it in an informal way. An individualised concrete norm derived in this way has its "normative and linguistic" basis. In this sense, we may detect practicing the law of precedent within the system of statutory law, including the law of Poland. It is a precedent which may be defined as "regulative."[20] It may be found in all legal systems as it is related to the specific features of legal language and, consequently, to the system of law, irrespective of its type; the feature is thus of a universal character. In turn, the criterion of normative novelty, which is based on evaluation, will on every occasion decide whether the precedent we are dealing with is of a regulative, or a legislative character. In the Polish system of law, recognition of a court decision as a precedential in a legislative sense is usually seen as a conclusion *contra legem*. In relevant Polish literature, relatively recently, court activities within a certain scope has begun to be openly referred to as legislative activities. However, the image of the reported phenomenon depends on lawyers' methodological awareness related to the legal doctrine and the accepted terminological conventions. Being in the situation of a kind of acceptance of courts' legislative activities within the system of statutory law, we are faced with the phenomenon of "positivization" of the rules derived from the judicature. In this sense we may say that a judge co-creates the law by defining new precedents, although he or she does not do it in an institutional sense, but in a strictly linguistic sense. In this perspective, it must be noted that the systems of law, both the system based on precedent, and the system based on statutory law, despite the differences that exist in between them with regard to the sources of the law, are similar. However, this assertion cannot be justified with reference to convergence theory, but only with reference to characteristics of language and legal systems. The legal doctrine perceives this phenomenon, while in the practice of the application of law a precedent is commonly used as a guideline.

Below I am quoting three decisions of the Supreme Court, which have influenced the practical application of law.

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[19] Cf. J. W r ó b l e w s k i, *Sądowe stosowanie prawa* [Application of Law in Courts], Warszawa 1972, chapter III, point 2.

[20] Cf. L. L e s z c z y ń s k i, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa* [Problems of the Theory of Law Application. Doctrine and Thesis of Judgments], chapter 7, Zakamycze 2001; M. K r ó l, "Precedent and the Law," [in:] *Rapports Polonais. Présentés au XVII^e Congrés International de Droit Comparé*, ed. B. Lewaszkiewicz-Petrykowska, Łódź 2006, p. 7–19.

Decision of the Supreme Court of 13 July 2012; III KRS 17/12, referring to selected aspects related to candidates for judicial office and their fulfilment of all the requirements essential for being appointed to the office of a judge, as well as professional qualifications as a basic criterion in the process of selection of candidates for judicial office.[21] The Supreme Court decided that:

1. A candidate for judicial office must satisfy all requirements set as necessary for persons who take office of a judge not later than on the day when their application is forwarded to the president of a relevant court.

2. In the process of selecting candidates for judicial office, the National Council of the Judiciary should treat their professional qualifications as a criterion of prime importance. However, the Council should not disregard the assessment of candidates' personal qualities. Information of these two types the Council receives from different sources; in most cases such information is provided in a descriptive form. In this context, the Council's decision to perform a general assessment of candidates, without forming a ranking based on particular criteria, seems right. It is not possible to provide a hierarchical list of the criteria used in the evaluation procedure of a candidate because such hierarchy is not envisaged in the Act. Moreover, the style in which the Act is phrased suggests that candidates' professional qualifications should be seen as the prime criterion, while other criteria are cited in a partly accidental order.

Another judgement which illustrates a practical application of the principles guiding the process of evaluation of candidates for a vacant judicial position is Decision of the Supreme Court of 13 December 2010; III KRS 18/10, in which the Supreme Court states the following.[22]

Legal provisions included in the Act on administrative courts' organisation define only certain formal requirements, which must be satisfied by persons who seek appointment for a position of a judge in, respectively, a district court, or a regional court. These requirements are minimal as their satisfaction does not guarantee that a person applying for a judicial position will be appointed to the office. In addition, setting more restrictive requirements for candidates for a position of a judge in a regional court in comparison to those set for candidates for a position of a judge in a district court, for instance with regard to the length of relevant employment, does not mean that candidates for a position of a judge in a regional court who at the same time satisfy the requirements set for applicants for a position of a judge in a district court must necessarily have higher qualifications and are more suitable in comparison with candidates who only satisfy the requirements set for applicants for a position of a judge in a district court. As a result, an advocate who has been professionally active for at least six years cannot benefit

[21] LEX, No. 1274983; J. of L. 2013, No. 427: Art. 57 § 1; Art. 57 § 2; Art. 57 § 2(a); J. of L. 2011, No. 126, item 714.

[22] LEX, No. 794796; J. of L. 2013, No. 427.

from the presumption that he or she has higher qualifications than a judge's assistant who satisfies the requirements to be appointed as a district court judge.

Here is a citation from a decision of the Supreme Court of 9 June 2005; SNO 28/05, based on the following thesis:[23]

A judge who notoriously engages in glaring violations of his or her professional duties, whose proper performance is essential for the integrity of the system of administration of justice, loses the attribute of "impeccability" of character. Considering particular the degree of the offence and the social significance of the judge's misconduct, he or she must be ready to face the most severe penalty, i.e. definitive dismissal from judicial office.

4. Conclusions

In the Polish legal system, the selection of judges for vacant positions is performed with reference to criteria which themselves add up to form an axiological paradigm of a judge. However, such criteria are not of a descriptive character; instead, they are evaluative in nature. Disambiguation is achieved along with the process of the application of law in particular contexts which require that an assessment must be provided, and through a critical comparison of different cases and factual data. Judgments are administered on behalf of the Republic of Poland and election of a particular candidate to a vacant judicial position should stay in agreement with the Polish model of a person worthy of being entrusted with such office, a model whose characteristics are reflected in the Polish binding legal norms.

[23] LEX, No. 471989; J. of L. 2013, No. 427.

Ewa Łętowska
Professor of Law, Institute of Law Studies
of the Polish Academy of Sciences, Warszawa

THE INFLUENCE OF HUMAN RIGHTS AND BASIC RIGHTS IN PRIVATE LAW

1. Introduction

1.1. "Influence of human rights (basic rights) in private law" can be presented from different perspectives. Thus the report could be devoted either to these different perspectives or just to some of them.

1.1.1. "Law" is an ambivalent notion. It comprises **several domains**: **(a) "law in action" (practice of law, shaped by the courts and the participants of legal transactions), (b) "law in books" – which comprises both bills (regulations – b1), and a system of notions, reasoning, rules and principles developed by science, which make it possible to describe and analyse (i.e. learn and systematize) legal phenomena (b2).** Within the framework of each of these three perspectives the influence of human rights and basic rights on a particular section of law (in this case on private law) can be observed. What complicates the matter even more is the fact that these perspectives remain in mutual interaction.

1.1.2. "Human rights" or "basic rights" are also far from unambiguous. They can be conceived as an ideational concept, as an act of international law (e.g. Convention on Basic Freedoms and Human Rights), as a practice (*acquis*) e.g. of the European Tribunal of Human Rights (and this standard is of a dynamic character, it is subject to changes in time). "Basic rights" on the other hand, are a subject of the EU Basic Rights Chart, but also of "constitutional rights of the individual," regulated in constitutions of particular states.

1.1.3. The influence of human rights on internal law is subject to complications in Europe at present because of interference of the Union law. The latter follows its own axiology (making the functioning of the EU market easier) which by definition has to be harmonious with the axiology of human rights. EU law affects national law more imperatively than human rights do. It forces the countries' authorities to apply it. Human rights in fact act *imperio rationis*. Their possible violation, even if stated by an ETHR verdict, gives the injured party

the right to have the damage redressed; however, it does not force a change of the country's practice violating human rights. In consequence it is sometimes difficult to assess whether a regulation, an interpretation or a view reaching domestic law through a transposition of EU law, is inspired "more" or "rather" by human rights or the EU law itself. It concerns especially private law as the one which creates the framework for the functioning of the market. The influence of EU law on domestic law, which is a separate enormous issue, thus overlaps the influence of human rights on private law. Consumer contracts are a good illustration here.

1.1.4. Another, more casuistic approach to the subject can be had thanks to **the analysis of the sources of influence ("what") and the results obtained – "what result is achieved as a result of the source's activity."** E.g. one discerns the influence of the ETHR jurisdiction concerning conditions in prisons (source of influence) on prisoners' privacy (which is a personal good protected by private law) or the influence of EU antidiscrimination law (equal treatment, absence of discrimination is a basic right) on regulations (practice or views of the science of law) of the EU member states, e.g. concerning contracts/agreements (ban on the refusal to enter a contract with certain persons) or property (limiting its object or exercising).

1.1.5. One can also stress the **question of "know-how" – i.e. by means of what methods, mechanisms or concepts human rights and basic rights gain influence on private law.**

All this depicts the scope of the subject matter, the potential behind the report's title while at the same time it explains the subjective incompleteness of the study.

1.2. "The influence" of human rights on private law refers to the cultural phenomenon described as *cross-fertilisation* within the scope of law. The term appeared with relation to public law,[1] and also in order to describe in general the influence of European law on local law.[2] Another definition of this phenomenon is the *spill-over*, or "radiating" (thus e.g. with relation to the influence of the constitution and the Constitutional Tribunal jurisdiction on private law).[3] The existence of this more general phenomenon of "influence" lay not so long ago at the foundation of the work (under the auspices of the EU) on *Common Frame of References* within the scope of private law. The aim was to elaborate "a common

[1] E. S m i t h, "Give and take: cross-fertilisation of concepts in constitutional law," [in:] *New Directions in European Public Law*, eds. J. Beatson, T. Tridimas, Oxford 1998.

[2] W. v a n G e r v e n, "The invader invaded or the need to uncover general principles common to the laws of the Member States," [in:] *Mélanges en hommage à Fernand Schockweiler*, Baden–Baden 1999, p. 593–603.

[3] E. Ł ę t o w s k a, "Promieniowanie orzecznictwa Trybunału Konstytucyjnego na poszczególne gałęzie prawa" [The Emanation of the Constitutional Tribunal's jurisprudence onto the Polish law], [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik, Warszawa 2006, p. 353–376.

denominator" with regard to notions and constructions used to analyse and systematize (acquire knowledge of) law. In this last case it is the question of influence exerted not so much on the texts or the practice of law, as – above all – on the instruments of the analysis of law (dogmatism). Thus it was *cross-fertilisation* concerning analytical instruments of private law (one of the aspects of *law in books*). In the case of *cross-fertilisation*, with which the present paper is concerned, it is a question of axiologisation affecting both *law in books*, and *law in action*. It is the axiologisation effected by human rights and basic rights.

1.3. The General Reporter presented a broad questionnaire with detailed questions. The questions were formulated objectively and finitistically according to internal systematics of private law: the influence of human rights and basic rights on "property law," "contracts," "torts" etc. Answers to these questions had been earlier handed over to the General Reporter together with a dossier (jurisdiction, cases) comprising more than 50 pages. In the present report I relinquish an exhaustive answer **to the question about the object and the results of the axiologisation of private law by human rights and basic rights. I point out, on the other hand, several obstacles that this process encounters.** Poland belongs to "young democracies." In this situation obstacles appear in the implementation of human rights and basic rights which issue from the country's own history and are products of conservative, undemocratic or uncivic axiology (of the Polish legislator, courts, doctrines at their foundation). Such obstacles[4] with the developing of a modern, democratic standard in private law are characteristic of European "young democracies" in general.[5]

2. Historic conditioning of Poland and other "young democracies"

2.1. Historical background: The façade-like character of human rights and constitutional rights under socialism. Despite the fact that the UN Human Rights Pacts have been in force in Poland since the seventies, in practice they did not play a greater part in the practice of law until more or less the nineties. The literature devoted to human rights is very abundant and comprehensive in Poland. Back in the nineties the Polish parliamentary ombudsman (of the 1st term of office) formulated a thesis on "human rights agnosticism"[6] prevailing in social life in Poland

[4] W. O s i a t y ń s k i, *Human Rights and Their Limits*, Cambridge University Press, 2009, p. 44–45.

[5] E. Ł ę t o w s k a, *Liberal Concept of Human Rights in Central and Eastern Europe*, Institute of Public Affairs, Center for Constitutionalism and Legal Culture, Warszawa 1998, p. 5.

[6] *Promotion of Human Rights in the Activity of Polish Ombudsman*, *Commissioner for Civil Rights Protection*, Materials, Warszawa 1991; A. K l i c h, "Human Rights in Poland: The Role of the Constitutional Tribunal and the Comissioner for Citizens' Rights," *Saint Louis–Warsaw Transatlantic Law Journal* 1996.

(including the functioning of courts) while the literature concerning them – was purely academic and meagre. Human rights and the constitution were given lip service at the time of real socialism. There was a lack of instruments and procedures enabling a specific human being to use them in his or her defence. International law, on the other hand, creating for its signatories obligations with regard to human rights – had no influence on the internal situation, and constitutional rights hardly existed on paper in that very constitution. Constitutions of the countries of real democracy "radiate" over the whole legal system (also in the sphere of the application of law); they define competences, limits of the individuals' rights and freedoms and procedures enabling an individual the protection of these rights and freedoms against violation. In this way they shape the axiology of the courts and the interpreters of law. Neither the constitution nor human rights in Poland before 1989 had a real practical influence on the system of internal law or on the behaviour of the courts, or the situation of the people, or on their awareness.

2.2. New difficulties in the 21st century. At the same time – which may be considered paradoxical (in view of the façade-like character of human rights in social reality) – in the seventies and eighties of the 20th century it was precisely human rights and their ideology which were a useful tool in legal discourse.[7] They were used as an argument by opinion-forming milieus (domestic and foreign) in order to put pressure on the legislator and courts which failed to notice in human rights the tool effectively shaping Polish law (or noticed it too seldom). Poland's accession to the Council of Europe (in 1991), passing in 1997 the Constitution comprising a catalogue of basic rights, subject to direct application – seemingly changed the situation for the better. For some of the obstacles in the use of human rights in Polish *law in books* and *law in action* were removed. We refer to "some of the obstacles" because there still remained a mental obstacle. It was lack of tradition and ability; judges – ruling and thus building the legal standards for the future – were not able to use the human rights axiology. What was necessary was time. Meanwhile the beginning of the 21st century brought to Europe "human rights going out of fashion" and at the same time a wave of conservatism and xenophobia, the phenomena profoundly opposed to the liberal ideology of human rights which lay at the genesis of the European Charter of Human Rights. It was caused by the loss of political attractiveness of the very ideology of human rights – as it had fulfilled its role as a tool to fight the socialist camp. Moreover, Europe's economic difficulties present at the time created a favourable climate for populist and antiliberal tendencies of all hues, Human rights in Poland, not having had the time after the change of the system

[7] E. Ł ę t o w s k a, "Human Rights as a Pillar of Transformation," [in:] *The Universalism of Human Rights*, ed. R. Arnold, Springer Vlg, 2013, p. 341–355; W. O s i a t y ń s k i, *Human Rights and Their Limits*, Chapter 1: *Short Story of Human Rights*.

to take root in law and the standards of its application faced new difficulties which shaped lawyers' attitudes. The road to this axiological rooting of human rights in the legal discourse in East and Central Europe was made slower again. This can be illustrated (as discussed below) by the problems with the accession to the European Charter of Fundamental Rights and Freedoms and by refusal of a dialogue between the Polish Supreme Court and the European Tribunal of Human Rights.

2.3. Poland ratified the **Charter of Fundamental Rights** with the reservation issuing from the Polish-British protocol,[8] which limits its direct application by the courts. Not only does this limit the practical functioning of the Charter in Poland but at the same time it means strengthening of the tendency going back to the time prior to the transformation to treat human rights as *lip-service*.

3. Legal discourse and its role in cross-fertilisation

3.1. Distortion of the public discourse as an impediment for the diffusion of human rights into the domestic system. Axiologisation of law through human rights takes place by diffusion of views, that is by a discourse. It is a legal as well as a medial and political discourse. The discourse on law is not at present shaped exclusively by lawyers' statements, based on knowledge of the legal system, such as it appears according to that knowledge. In social reality discourses function which are not necessarily conducted or induced by lawyers, even though their subjects are the different phenomena or statements emitted by the actors of legal transactions and received by those to whom they do not necessarily mean the same as to the party which emitted them. Thus there exist first of all medial discourses concerning legal matters, discourses of politicians falsifying law consciously (manipulation) or unconsciously (lack of understanding). At present the interest of other than purely legal discourses in law is much greater (law as fuel, *infotainment*, intensification of the circulation of information and political manipulation – internet, media). Anti-knowledge of law reaches further and faster and as a consciously manipulatory message. Distortion of the legal discourse obstructs the dissemination of the human rights axiology to the legal discourse and to the consciousness of its participants.

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[8] A. W y r o z u m s k a, "Polish declaration on the Charter of Fundamental Rights and the Polish-British Protocol," [in:] *Fundamental Rights Protection in The European Union*, ed. J. Barcz, Warszawa 2009, p. 98–99; R. W i e r u s z e w s k i, "Provisions of the Charter of Fundamental Rights in the light of the 1997 Constitution of RP and international agreements which are binding upon Poland," [in:] *Fundamental Rights Protection…*, p. 114–144. This is why the Charter (unlike the European Convention on Human Rights and Fundamental Freedoms) is of a minimal importance in Poland.

3.2. Human rights and basic rights, radiating on the legal system, including private law,[9] become an axiological binding agent of the interpretation of law (in this case of private law). "Radiating" is noticeable in the influence on the goals and ways of regulating (by the legislator), on judicial axiology and interpretation, on the sensitivity and abilities of the representatives of the legal doctrine. This process is accomplished first of all through the choice of appropriate methods of interpretation favourable to strengthening the human rights standards and also through the change in legal thinking, the notional instrument of law. From the theoretical side it is the problem appearing in the horizontal functioning of the Constitution, human rights and basic rights.[10]

3.3. Stance of the courts. Until now it has not been possible to overcome the Supreme Court's direct reluctance to react to the rulings of the Human Rights Court in Strasbourg. The Supreme Court has consistently refused to reopen proceedings when CRT has ruled a violation of human rights by Poland, even when it was the Supreme Court itself which was guilty of such a violation. The problem appears in the situation when the ETHR rules a violation of human rights. The Civil Chamber of the SC[11] did not make a single effort here in order to remove the stated violation, and treated the ruling of an international court *per non est* with relation to its own obligations of interpretation. In 2008 the restrictive stand was strengthened (expressed in the decision of 7 judges which binds all SC judges).[12] It was declared that the ETHR verdict in domestic proceedings produces no effect. The stance of the SC in fact means limiting of the dialogue with the ETHR in the situation where it could mean revising the SC's own verdicts.

It does not mean, however, that in the jurisdiction of both the SC and of other courts, and also of the Constitutional Tribunal, the ETHR standards are unknown or absent. When particular disputes are considered there appears an appeal to the ETHR jurisdiction. First of all it is not a rule (even when it concerns cases where such appeals might be expected); secondly, these appeals take the shape of the verbal quoting of specific verdicts, and not of a profound reflexion on what the historically present standard of the protection of human rights, issuing from the verdicts in question, is like.

3.4. The radiating of human rights and basic rights on private law takes place also through the influence of the European discourse (shaped by the European law and European science) on the set of notions – the instruments of

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[9] E. Ł ę t o w s k a, "Promieniowanie orzecznictwa Trybunału Konstytucyjnego…," p. 353–376.

[10] M. S a f j a n, P. M i k ł a s z e w i c z, "Horizontal Effect of the General Principles of EU Law in Sphere of Private Law," *European Review of Private Law* 2010, No. 3, p. 475–486.

[11] Decision SC of 19.10.2006, 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:] *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, eds. H. Keller, A. Stone Sweet, Oxford University Press, 2008, p. 581, 544.

[12] Decision SC of 7.11.2010, III CZP 16/10.

the science of private law. This is especially noticeable in the **redefinition** of the stereotypes of legal thinking, most often thanks to consumer law (i.e. within the scope of contract law). It is however a matter of argument whether these changes are the result of the influence of human rights, or rather of EU law, especially that – unlike human rights – it functions *ratione imperii.* Thanks to the transposition of consumer directives, there appeared in civil law and its dogmatics:

• The opinion on the importance concerning the stage prior to the conclusion of a contract in consumer law at present. At that moment duties of information were considerably extended in consumer law. Moreover, at present under the influence of consumer law legal importance of what the parties were saying when advertising their goods is growing. If the goods do not have these features – it will cause improper executing of the contract.

• Changes in the concept of the consensus (real consensus is required, not just a formal one).

• The duty to respect privacy and the principle of freedom of information – as limits to the freedom of contract (the *opt-in*, *opt-out* technique).

• Limiting the freedom of contracts in European consumer law (within the scope of concluding and contents of contracts – abusive clauses, inspection of their content, incidental and abstract; international private law).

• Changes of the contract typification criteria:
  – with regard to the place and way of conclusion – there appeared as a type: contracts outside the place of regular business activity, remote contracts;
  – distinguishing the type of contract with the criterion of its economic function (consumer credit, consumer sale absorbing the notion of a contract of commission).

• Limiting of the *pacta servanda sunt* rule in view of the *cooling off period*.

• Extending of the efficiency of the contract (on the example of responsibility for the product and consumer guarantee – problematics of the 99/44 directive).

• The influence of responsibility for the product on the law of torts.

4. Concepts which Polish private law owes to the functioning of human rights

4.1. Casuistic of the ETHR jurisdiction familiarizes Polish courts (Polish lawyers) with the fact that some situations, tolerated in Poland by law and the prevailing axiology, turn out to be a violation of human rights and – as such – give the wronged party a right to indemnisation. The functioning of the ETHR jurisdiction has no direct impact on the state of law (regulations). However, it has at times influence on the shaping of legal thinking and the interpretation applied by courts and – again at times – also on the changes in the contents of law. The opinion of the Constitutional Tribunal on this matter is significant:

The respect of Poland's international obligations and care for the cohesion of the legal system (shaped both by internal law and – in the scope acceptable by the Constitution – by international agreements and supranational law) require that there be no discrepancies between law (contents of the provisions, principles of law, and standards of law) shaped by various centres of jurisdiction concerning the validity of law, and the organs applying and interpreting law. The ETHR verdict referring to an individual case (in this case *Wagner versus Poland*, 2001) and determining (as a result of monitoring proceedings in Strasbourg) violation by Poland of the standard issuing from Article 6 of the European Convention (right to a fair trial) with relation to the initiator of this proceeding, must therefore have an impact on the evaluation of regulations made by the constitutional Tribunal. It concerns the monitoring of regulations the application of which in the *Wagner versus Poland* case was deemed a violation of human rights. The monitoring conducted by the ETHR does not in itself refer to the inner legal order of the state which perpetrated the violation, but to the fact of a violation of human rights with regard to a specific person. It is therefore not monitoring of regulations or norms constituting this order. It comprises on the other hand the examination of the fact of a violation of human rights and freedoms, that is to say subjective rights. Nevertheless, from this type of monitoring it may follow that the inner legal order contains norms the application of which has led to a violation of human rights *in concreto* in the case evaluated by the ETHR, and also (even though this matter remains outside the frame of the ETHR verdict) the application of which *pro futuro* may lead to such violations.[13]

4.2. Changes in responsibility for damages perpetrated by state authority ought to be credited to the influence of the ETHR jurisdiction.

4.2.1. Constitutionalization of responsibility for damage caused by public authority starting from 1997 (art. 77 par. 1 of the Constitution). Until that moment the matter had been regulated by an ordinary bill, the civil code (articles 418–421 of the c.c. and, casuistically, by other regulations, e.g. the code of administrative proceedings). Article 77 of the Constitution comprises also the responsibility for legal lawlessness – formerly provided. At present there exists a possibility (theoretical rather than practical) of compensatory responsibility also in this case. The violation of human rights may consist in the functioning of the judicative which is allowed by the ETHR and which is now also approved by article 77 of the Constitution. In order to fulfil the premise of pre-court in this case (article 417^1 of the c.c.), conditioning the compensatory responsibility – a special complaint to state a discrepancy with the law of a legally valid verdict was introduced (articles 424^1–424^{12}).

4.2.2. In several verdicts concerning the unconstitutionality of premises limiting in ordinary bills the scope of responsibility for damage perpetrated by the public authority the Constitutional Tribunal brought on a broadening of the interpretation of financial liability for damages perpetrated by the public authority (CT of z 4.12.2001, SK 18/00 – elimination of the premise of culpability of the direct perpetrator of the damage; CT of 23.9.2003, K 20/02 – the exclusion of compensation for *lucrum cessans* in the case of a damage caused by the abrogation of the administrative decision was deemed unconstitutional.

[13] CT of 18.10.2004, P 8/04.

4.2.3. Under the influence of the ETHR verdict (the lost case of *Kudła versus Poland*, 2000), a special legal regime of compensations for courts tardiness was introduced (bill of 17.6.2004 on complaint concerning a violation of the party's right to have the case examined without undue delay). Tardiness of the courts is the main reason of complaints about Poland in Strasbourg and it has a systemic character. However, compensations awarded on these grounds are small (the top limit is 5000 Euros, the average amount – 650 Euros, considerably lower than the average from Strasbourg) and they do not optimize court proceedings. At times the functioning of this special means is in itself the object of negative evaluation from the ETHR (*Jagiełło versus Poland*, 2007; *Czajka versus Poland*, 2007).

4.2.4. The protracted nature of temporary arrest and the conditions in temporary prisons and during apprehension by the police, harmful to life and health (e.g. the *Lewandowski versus Poland*, 2009; *Dzwonkowski versus Poland*, 2007), were deemed by the ETHR a violation of human rights by Poland. Similarly in many cases against Poland concerning the lengthiness of court proceedings, limitation in the effective protection by court (for the reason of high fees and the inadequate organization of legal assistance, compensations for the lack of reprivatisation, lack of facilities in the communal life for the handicapped). In all these cases the ETHR verdicts, unfavourable for Poland, signify condemnation of behaviour of the public authority which deemed practices of this kind to be legal or tolerated them. This has an impact on the extension of the scope of compensatory responsibility for the actions of the public authority; moreover, it inspires axiologically the Constitutional Tribunal and the courts.

4.3. The very notion of compensatory responsibility (for violation of human rights) is developed differently (more broadly) in the ETHR and more narrowly in Polish domestic law (where there is a lack of responsibility for the loss of chance, compensation for the sustained non-material damage is present only in enumeratively indicated cases). There is a collision between the interpretation proper to the ETHR (and EU law) with the traditional interpretation of the c.c. and the fixed dogmatic method of the Polish judge, for whom ruling "a compensation" without detailed enumeration of the damage (and proving it by the plaintiff) is profoundly alien. Thus the financial sanction ruled in Strasbourg encounters an obstacle when it is to be transferred to the internal system. This obstacle is the inadequacy of the contents of the institution (and its goal) with the notion of compensation functioning in the lawyers' consciousness and the goal of the indemnization. Financial compensation for violation ruled by international courts in general and by the ETHR in particular, is closer to Polish compensation which is still treated by Polish courts as an exception to the rule that it is material damage which is subject to compensation. This difference, by the way, is not only the reason for the difficulties when ruling a compensation for violation of human

rights by Polish courts, but also of the very acceptance of the verdicts from Strasbourg by the courts. Under the influence of the ETHR and TSUE jurisdiction – at present (both in the doctrine and in court practice) – the thought is more broadly approved that not only purely material damage is subject to reparation, but also non material harm and, moreover, moral suffering and pain. However in these latter cases it is not the question of damages, but of "compensation" for moral harm. In comparison with the situation before 1990, the number of situations in private law was increased in legislation when such compensation was envisaged. On the other hand, it occurs to courts to adjudge higher amounts than previously, as compensation for non material harm and as compensation. In the scope mentioned, the influence of the ETHR axiology (and EU law) is palpable, albeit not easily measurable.

4.4. The influence of human rights (ETHR jurisdiction) is to be credited for the appreciation of the legal protection of personal property existing in civil law (freedom, including freedom of expression, and privacy) as the instrument of protection of the constitutional (and therefore public and legal) rights of the individual.

4.4.1. Evolution of responsibility for conditions in prisons. Congestion in Polish prisons is a systemic complaint. For many years the existing space norms were notoriously broken. There is rich ETHR jurisdiction stating violation of human rights in this case. In 2008 the constitutional Tribunal in a verdict SK 25/07 contested constitutionality of such practice. And the SC with the verdict of 28.2.2007, V CSK 431/06 stated that staying in congested prison may be considered as violation of personal rights. Whereas SC of 18.10.2011, III CZP 25/11 determined that it may lead to indemnization of the harm related to it. Subsequently, the legislator effected certain changes in law, and the administration – organizational ones. The matter illustrates the existence of an interaction promoting the respect of human rights between national courts and the ETHR and the national legislator and the enforcement (Compare however below, point 4.7).

4.4.2. The influence of the ETHR standards pertaining to private life should be seen as motivation for a series of the Constitutional Tribunal verdicts questioning the limitation of fathers' rights with relation to children – in comparison with mothers' situation. Some regulations of the Family and Guardianship Code were deemed unconstitutional. Among the "gender" rulings of the CT one should point out: verdict of 28.4.2003, K 18/02 (unconstitutionality of limiting the biological father's right to judicial establishment of fatherhood); CT verdict of 17.4.2007, 20/05 (unconstitutionality of the ban for a biological father to demand the annulment of recognition of his child by another man); CT verdict of 16.7.2007, SK 61/06 (uncostitutionality of the ban on posthumous recognition of the child by the father). Moreover, in the *Różański versus Poland* case, 2006, the ETHR questioned the lack of an efficient means enabling a biological father to claim his personal rights in regard to his child in Polish law.

4.4.3. Protection of freedom (especially freedom of speech) remains at variance with another basic right – the protection of privacy. The Polish Constitution (article 14) deems freedom of press and other mass media a system founding rule. Freedom of the media is one of the foundations of a democratic society; it constitutes one of the indispensable conditions for its correct development and self-realization of its members, which makes the very social discourse impossible without the media. Their functioning remains nevertheless in obvious and inevitable conflict with privacy, that is with the constitutionally protected value. Interest of the media may assume forms which are oppressive not only from the point of view of protection of privacy but for the dignity of those described or shown. Thus there exists an obvious conflict: it is not the question of allowing for the media to be used to oppress individuals or tolerating the brutalization of public life when criticism becomes offensive, but – on the account of the protection of the individual – not to cause the freezing of the social debate and a forced silence of the media about the phenomena which avoid openness. Balancing of this compromise is very difficult (for the legislator and the courts), changeable historically and geographically, conditioned culturally. The ETHR jurisdiction has led to a consolidation of the idea concerning the necessity of increasing protection of the freedom of expression, being at conflict with the privacy of public persons (especially politicians). Nevertheless it is difficult to maintain that preferences of the protection of freedom of speech (information) have an established character, especially in Polish court practice. This goes also for the Constitutional Tribunal. For instance, verdicts concerning a prison penalty for the offence of the President – CT verdict of 6.07.2011, P 12/09, or punishment for the omission to authorize in copyright law – the CT verdict 28.09.2008, SK 52/05 – were in my opinion a failure. In both case the Constitutional Tribunal recognized the regulations providing imprisonment as constitutional. What is interesting, the SK 52/05 case later found its way to Strasburg where it was settled differently (*Wizeraniuk versus Poland*, 2011). The ETHR decision stated that a penalty for a refusal to authorize is a violation of human rights. On the other hand, however, in several other cases the Constitutional Tribunal deemed inconsistent with the Constitution the existence in Polish law of the imprisonment penalty for press torts – the Constitutional Tribunal of 5.05.2004, P 2/03, and the verdict of 1.12.2010, K 42/07.

4.5. False labelling concerning the *Alicja Tysiąc versus Poland*, 2007 verdict: lack of an efficient procedure guaranteed by the state. Poland belongs to very conservative countries when it comes to social conventions and one can have the impression that before the transformation it was less rigorous in that respect. Among other things, contrary to the situation before 1990 when abortion in Poland was allowed rather widely (also for economic reasons), now it is allowed in a case of risk to the mother's life or health and genetic defects of the child. However, even in these exceptional cases Polish doctors and courts are very reluctant to recognize

the admissibility of an abortion. This in turn causes a protest from women who have been refused an abortion. Such is the background of the case settled in Strasburg, *Alicja Tysiąc versus Poland*, 2007. The complainant was refused an abortion even though having a child she risked losing her sight. The ETHR stated that the lack of effective procedure enabling uthe complainant to obtain judicial verification of her demand was a violation of her human right. It was a dispute not about "the right to an abortion" (as claimed by the ideologically weighted criticism of the verdict) "about the right to an efficient means of protection," to reliable procedure with regard to respect of personal life.

4.6. In Poland it is not permitted to establish same sex unions, either in the form of a marriage or a partnership. Despite the lack of institutionalization same sex unions enjoy a limited legal protection. It appeared thanks to the jurisdiction of the Supreme Court, forced by the ETHR. This happened in the situation provided for in the Civil Code (art. 691), whereby a spouse or a close person living with the deceased tenant – have the right to continue the lease. Initially the Supreme Court refused to protect homosexual partners of the deceased tenant. In 2010 the ETHR ruled that Polish courts thus violated human rights (the case *Kozak versus Poland*). The SC ruled that "the person remaining in mutual life with the tenant – in the sense of the article 691 § 1 of the Civil Code – is the person bound to the tenant with emotional, physical and economic ties; also a person of the same sex" – verdict of 28.12.2012, III CZP 65/12.

4.7. Changes in the legal regime of the institution of incapacitation are an example of an interaction between the ETHR and the national authorities. In Poland the institution of incapacitation is known to civil law (art. 13 c.c.). It is ruled by the court. The incapacitated person has no ability to act in law. Irrespective of that, the Constitution provides in article 63 that an incapacitated person has no right to vote. When the reasons of incapaitation cease, the court should *ex officio* change its decision. The judicial practice in Poland was shaped so that applications of an incapacitated person to annul the incapacitation were ignored by courts – because they were made by an incapacitated person. Courts did not want to treat those applications as signals to take up the case *ex officio*. What is worse this practice was approved by the SC (decision of 14.10.2004, III CZP 37/04). In 2007 the Constitutional Tribunal (K 28/05) ruled that the lack of right to apply to start proceedings to annul or change the incapacitation by the incapacitated person was inconsistent with the Constitution (its regulations concerning dignity and freedom). Despite that courts continued that defective practice although the legislator changed the law in May 2007. Additionally in 2012 the ETHR (the case *Kędzior versus Poland*), it was stated that the courts practice violated human rights. The turn of events indicates how slowly and reluctantly, thanks to different casuistic resolutions, a change of the standard occurs under the influence of human rights. This does not mean, however, that the standard

has been reached. As we have mentioned, article 62 of the Polish Constitution deprives incapacitated persons of the right to vote. Meanwhile in the case of *Alajos Kiss* (verdict of 20.05.2010) the Human Rights Tribunal in an identical situation deemed a violation of human rights by Hungary. For the time being Poland has not changed article 62 of the Constitution.

4.8. Protection of human rights must be efficient. This criterion has a bearing on the requirements which the ETHR jurisdiction puts forward to domestic procedures – within the framework of evaluation whether national authorities perpetrated a violation of article 6 of the European Charter of Human Rights.

4.8.1. This regards also the civil procedure as the means of protection within the framework of private law. Constitutional jurisdiction, very abundant in Poland, concerning the monitoring of consitutionality of civil procedures[14] or bankruptcy law,[15] is undoubtedly inspired by precisely this standpoint of the ETHR, not always concerning a negative evaluation of the behaviour of the Polish legislator or the Polish courts. Visible here is the characteristic difference of attitudes between the Constitutional Tribunal and the Supreme Court which – less succeptible to the axiological influence of the ETHR jurisdiction – accepts only reluctantly the constitutional condamnation as a too formalistic civil procedure.

4.8.2. The domestic procedure regulations are also subject to evaluation of efficiency as an instrument of protection of authority issuing from the law of the European Union. A remark arises however concerning the functioning of the principle of equivalence. The rights issuing from the EU (community) law, raised before a court, cannot be treated less favourably than the rights issuing from the domestic law. This means however that each action of the domestic legislator and each court interpretation, aiming to raise the domestic standard of protection, will automatically extend also to the community law. From this point of view the principle of equivalence reveals its perverse functioning which has a hindering influence on interpretational creativeness of domestic courts within the scope of domestic law. It exposes the domestic system to the necessity of providing a broader scope of functioning than plannned of what was procedurally to be proivided only for the domestic subjects. It also subjects this system to the monitoring by the EU organs in that matter. The principle according to which the higher standard of the domestic procedural protection opens the way to monitoring by the ETHR from the point of view of its efficiency works in a similarly perverse way (with relation to the European Convention). In both cases the functioning

[14] "Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego" [The jurisprudence of Constitutional Tribunal and the Civil Proceeding Code], [in:] *Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego Serock k. Warszawy*, *24–26 wrzesień 2009 r.*, eds. T. Ereciński, K. Weitz, Warszawa 2010.

[15] CT of 18.10.2004, P 8/04.

(also within the scope of human rights) of the principles mentioned does not create favourable conditions for the initiative (of the domestic legislator and the court interpretation) to raise procedural guarantees of protection of civil legal rights.

4.9. Transformational justice. The characteristic feature of the states of Central and Eastern Europe are the historic vindications of property. They concern the owners' demands to recover the property of which they were deprived after the Second World War (collectivisation and nationalisation of property, forests, pharmacies etc.). It was executed in the way which was in accordance with the law at the time although not with the present constitutional standards. It concerned such fundamental issues as the agrarian reform, nationalisations, the change of the monetary system (in 1949), the limited right of the owners of immovable and flats to have them at their disposal and obtain rent for their lease and many other situations. A characteristic case of vindication is linked to the "moving" of the Polish borders to the West and repatriation of persons who left their property across the river Boh (the actual easter Polish border). The republican agreements (concluded in 1944 by the Polish government at the time with the authorities of the neighbouring Soviet republics) did not in themselves create claims for the people relocating from the USSR to Poland; nevertheless they created a justified expectation that the Polish legislator would create an appropriate mechanism of compensation. These and other historical vindications (and other situations) were reported in the name of the protection of the right of ownership. These instances were the subject of verdicts of both the ETHR and the Constitutional Tribunal.[16] The use of the pilot judgment procedure by the ETHR in *Broniowski versus Poland*[17] and in *Hutten-Czapska versus Poland*[18] resulted in adoption of schemes resolving general problems for thousands of people being in a similar position to the applicant. At the same time *Broniowski versus Poland* was the first pilot judgment issued by the ETHR. One may have critical reservations to the choice of that

[16] The Constitutional Tribunal turned out to be very reserved here, refusing to state unconstitutionality (thus with relations to the agrarian reform CT of 28.11.2001, SK 5/01; nationalization of forests CT of 6.04.2005, SK 8/0; change of the monetary system of 1949 – CT of 6.11.2008, P 5/07). Some situations (e.g. too narrow wording of the obligation to return the property with relation to which the goal of overtaking had not been realized) led to the declaration of unconstitutionality for the reason of the disproportionate invading of property CT of 24.10.2001, SK 22/01. In the matter of property left over the eastern border, CT (verdict of 15.12.2004, K 2/04) ruled that the quota limitation of compensation violated the "principle of equal protection," and that the very right was a surrogate of property, protected by the Constitution in the same way as property (CT verdict of 19.12.2002, K 33/02).

[17] *Broniowski versus Poland*, Application No. 31443/96, judgment of 22 June 2004 [Grand Chamber].

[18] *Hutten-Czapska versus Poland*, Application No. 35014/97, judgment of 22 February 2005 [Section IV], *Hutten-Czapska versus Poland*, Application No. 35014/97, judgment of 19 June 2006 [Grand Chamber], Reports of Judgments and Decisions 2006–VIII; *Hutten-Czapska versus Poland*, Application No. 35014/97, judgment of 28 April 2008 [Grand Chamber], friendly settlement.

particular (highly untypical) case as the basis of a pilot verdict. The ETHR had a tremendous impact in pushing for effective protection of property rights in different areas. There are still many issues which wait for the resolution by the PCC or the ETHR. The ETHR has to decide whether certain statutory promises of compensation made in the early communist time at expropriation should be currently fulfilled. Poland is still missing the reprivatisation law and those issues would be constantly addressed to the ETHR. Protection of property within the framework of historical vindications demonstrates that the standards of the protection of property developed by the ETHR with relations to the Convention of 1950, developed without the awareness that it might serve to evaluate historical and political occurrences from years before – are not efficient. This makes difficult the dialogue with domestic courts, better versed in local realities.

Wojciech Robaczyński
Doctor of Law, University of Łódź

THE EFFECTS OF FINANCIAL CRISES ON THE BINDING FORCE OF CONTRACTS: RENEGOTIATION, RESCISSION OR REVISION

1. One of the issues that have permanently been a subject of a lively discussion in the science of civil law is the scope of rules of *pacta sunt servanda* principle. This principle is a basis of the law of obligations, assuring the necessary stability of legal relationships. Therefore, it comes as no surprise that contemporary legal system formulate it in one form or another. *Pacta sunt servanda* principle is also declared by the Polish civil code in Article 354. This provision sets a frame of the manner in which an obligation is to be carried out, placing in the foreground the requirement to perform that duty in accordance with the provision. Thus, it is the content of the contract that determines the manner in which the contractual obligation is to be carried out, even though in the light of Article 354 § 1 of civil code, the following are also of importance: socio-economic objective of the obligation, principles of social coexistence and the established customs. These non-contractual criteria are only of ancillary character – it is the content of the contract that is of primary importance.

The positive aspects of *pacta sunt servanda* principle are most visible when the obligations are carried out under stable economic conditions. Thanks to real performance of contractual obligations, in a manner that remains in accordance with the originally accepted duties, certainty of behaviour is achieved, which is a value not to be overestimated. However, there appear situations in which – without negotiating the meaning of *pacta sunt servanda* principle – attempts are undertaken to find solutions aiming at mitigating the blade of the above mentioned principle. Discussions concerning this issue usually arise in cases of exceptional, unforeseen changes in circumstances accompanying performance of the contract.[1]

[1] J. R a j s k i, "Z problematyki funkcjonowania zasady *pacta sunt servanda* i klauzuli *rebus sic stantibus* we współczesnym klimacie gospodarczym" [From the issues of functioning of the principle *pacta sunt servanda* and *rebus sic stantibus* clause in contemporary economic climate], *Przegląd Prawa Handlowego* 2010, No. 3.

The impact of changes in the circumstances on the contract should be among the classic issues of civil law. Literature concerning this subject, both Polish and worldwide, is really extensive.[2] For obvious reasons, the interest in the possibility to modify the contractual relationship bond increases in the periods of special phenomena occurrence, which are rooted in imbalance of the contract originally concluded by the parties. If, however, in the past, the discussions on this subject were connected primarily with natural catastrophes, nowadays attention is drawn mainly towards phenomena of economic character. The global economic crisis contributed to such a state of things in the first instance, through plaguing the economies of individual countries and also a significant part of the worldwide economic system for several years.

The situation of Poland to the other European countries is a specific one, for reasons that are both economic and concerning the applied legal solutions. A significant economic circumstance is a fact that Polish economy resisted the negative economic phenomena to a great extent. The reasons for this are various, but we will not look into the crisis in its economic aspect. From the point of view that is of interest to us, a more significant is an original solution that we can find in the Polish civil code.

2. As is commonly known, Poland of the 19th century did not have its own statehood and the land was divided between Prussia, Austria-Hungary and Russia. Due to that fact, a foreign law was in force at that time, depending on who occupied the land. Additionally, on parts of the lands occupied by Russia (the so-called Polish Kingdom), French law was in force, which was a remnant of the Napoleonic era. As a result, Polish lands were under the influence of several jurisdictions, which later, after gaining independence in 1919, became models for a unified legal system in Poland. Among the systems that were of particular influence on the Polish jurisdiction, were German and French laws. Bürgerliches Gesetzbuch civil law (the German civil code) and Code Napoleon (the French civil code), were the points of reference while creating Polish legal regulations. Particularly, the code of obligations of 1933 is seen as a result of these works, which became an example of the civil code that was created in 1964.

It is necessary to point out here that when it comes to the problem of this analysis, the Polish law took a different way to the already mentioned European legislations. If in the above mentioned codes, *pacta sunt servanda* rule was a rule that was rigorously followed, a solution was introduced into the cod of obligations (Art. 269) that allowed a modification of a contractual relationship on the grounds of a court's ruling in case of – as it was then versed – an extraordinary event. This was truly an innovative solution that adapted into the Polish legal order the idea of *rebus sic stantibus* clause. This solution was characterised by originality and

[2] See e.g. A. B r z o z o w s k i, *Wpływ zmiany okoliczności na zobowiązania w prawie polskim (na tle prawa niektórych państw obcych)* [Influence of changes of circumstances on obligations in the Polish law (in the light of selected foreign countries)], Warszawa 1992.

that feature remains valid until today. Originally, an equivalent of Art. 269 of the obligation code was not introduced into the Polish civil code that was based on the western examples, even though it was enacted right in the middle of the communist era. It was found that in case of economy that was centrally planned and detached from the market rules, there is no room for unforeseen circumstances. As it appeared, however, due to the permanent crisis of the then existing economic model, it is necessary to restore a solution allowing the legal system to react in situations that are unexpected and violating the principles of contractual balance. This solution was to be Art. 357^1 of the civil code that was introduced in 1990 as a course of the amendment.[3] The provision reads as follows: "If, due to extraordinary change in relationship concerning fulfilling the obligation, it would be connected with undue hardship or one party would be at a risk of a gross loss and which was not foreseen by the parties while concluding a contract, court may, having considered the interests of both parties and in accordance with social coexistence, decide on the manner of performing the duty, the amount of compensation or even decide on terminating the contract. By terminating the contract court may also, if needed, decide on settlement of the parties, considering the principles set out in the preceding sentence." It is worth noting that initially, between 1990–1996, there was also another provision (§ 2), which excluded the possibility of an entrepreneur referring to Art. 357^1 of civil code if a settlement should remain in connection with managing his enterprise. This restriction was lifted, however, under criticism formulated in the legal literature.[4]

In the initial period of the restored solution, it was applied primarily in cases of events that had a character of natural disasters. A rather sceptical approach was given both in the literature and jurisdiction, to the possibility of applying this provision in case of economic changes. Soon it appeared, however, that the changes in social, political and economic system resulting from the fall of communism, became "the extraordinary change of relationships" in themselves, as stipulated by Art. 357^1 of civil code. The jurisdiction of the Polish Supreme Court in this area is rather extensive.[5]

Together with economic stability, the meaning of *rebus sic stantibus* clause began to weaken. It was only the above mentioned world economic crisis resulting in serious changes in the power of Polish currency following the fall of the Lehman Brothers bank in 2008 that became the impulse to resume a lively discussion concerning this issue.

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[3] See W. R o b a c z y ń s k i, "Powrót klauzuli *rebus sic stantibus*" [The return of *rebus sic stantibus* clause], *Palestra* 1991, No. 11–12.

[4] See A. B r z o z o w s k i, [in:] *System prawa prywatnego* [Private Law System], t. 6: *Prawo zobowiązań – część ogólna* [Vol. 6: Law of Obligation – general part], Warszawa 2009, p. 971–972; E. B a g i ń s k a, "Klauzula *rebus sic stantibus* – współczesne zastosowania" [*Rebus sic stantibus* clause – contemporary application], *Gdańskie Studia Prawnicze* 2010, Vol. XXIV, p. 180.

[5] See f.ex. Supreme Court, Dec. 2, 1998, I CKN 972/97; Apr. 22, 2005, III CK 594/04.

3. Thus, the Polish law constructed its own model of the legal system's reaction in the face of a fundamental change of circumstances. In order to make a certain simplification in considerations, usually a reference is made to adapt *rebus sic standibus* clause in Article 357[1] of civil code. It seems, however, that this provision cannot be interpreted as a contractual clause nowadays. In terms of Polish law, the discussed solution does not constitute a contractual clause in its traditional understanding. Neither does it seem possible to talk about a clause that is simply tacitly accepted by entities concluding contracts in case of a change in circumstances. A solution included in Article 357[1] of civil code should thus be understood not as a contractual clause, but as exceptional statutory authorisation for court to intervene in the content of the contractual relationship that ties the parties. So as to maintain a certain tradition, it is allowed to use the term *rebus sic stantibus* as it is deeply rooted in the science of law.

As is well-known, in various legal orders, there evolved several fundamental theories that justify a revision of a contractual relationship in case of a change in circumstances. The following are of particular importance: a German concept "Wegfall der Geschäftsgrudlage," French "theorie de l'imprévision," or the one formed on the basis of common law "frustration of contract." One should also not forget about the tendency to broadening the interpretation of the notion of inability to provide, which aims at constructing a concept of the so-called economic inability (*wirtschaftliche Unmöglichkeit*).

The need to find appropriate solutions both in the science of law and in judicature, is justified by the lack of appropriate statutory construction. Whereas in Poland, due to the applicability of Article 357[1] of civil code as an exceptional statutory authorisation, there is no need to construct other theoretical justifications of the change in circumstances on the contract. Thus, Polish regulation constitutes a specific solution that is best fitting the needs of Polish economic turnover. This expresses the realisation of the *rebus sic stantibus* concept, even though due to the aforementioned reasons, I would opt for a cautious use of the traditional understanding of the *rebus sic stantibus* concept. It needs to be emphasised, however, that applicability of Article 357[1] of civil code does not undermine the principle of *pacta sunt servanda* as the main regulation of performing obligations. It may be also said that the possibility of modifying obligations on the basis of Article 357[1] of civil code is rather a supplement to the statutory rules of performing contracts than a contradiction to the principle of *pacta sunt servanda*.[6]

4. Let us now analyse Article 357[1] of civil code, which will allow us to evaluate the meaning of the solution it includes from the point of view of legal system needs to react to the crisis phenomena. Obviously, listing the conditions of appli-

[6] See W. R o b a c z y ń s k i, *Sądowa zmiana umowy* [Judicial change of contract], Warszawa 1998, p. 68–70.

cations from Art. 357[1] of civil code is of primary interest here. These conditions could be defined as follows:

a) obligation results from the contract;

b) extraordinary change of relationship between concluding the contract and performing it;

c) violating the balance of the contract, i.e. excessive difficulty in meeting the provisions of the contract or a threat of gross loss;

d) unpredictability of the influence of a change of relationship on the obligation.

Annotation a) Applying Art. 357[1] of civil code is only possible with reference to those obligations that result from the contract. Not only the stipulations of the provision support this viewpoint, but also the clause *rebus sic stantibus*, the concept of which was shaped on the basis of contracts. In Polish law, the Supreme Court attempted to apply this construction to the non-contractual obligations.[7] However, it was greeted with criticism in the legal literature, following which the Supreme Court waived this view.[8]

In the light of Article 357[1] of civil code, it does not in fact matter who is a party of the contract. Hypothetically, a court's interference in the contractual relationship may concern contracts concluded by all entities. In practice, however, in case of contracts concluded by professionals, with consumers in particular, court will be more rigorous when evaluating the other conditions, even more so since the discussed provision orders to include the rules of social coexistence.

Annotation b) The basic premise of Article 357[1] of civil code is extraordinary change of relationship. The notion "extraordinary change of relationship" requires defining what "a change of relationship" is and under what circumstances it may be classified as extraordinary.

It is often emphasised in the literature that a change of relationship means a change of external conditions under which a contract is performed. These are not conditions concerning a specific part of a contract, e.g. illness, bankruptcy, factory fire. These are circumstances concerning the entire class of subjects or a significant area.[9] These changes are based on re-evaluation of the currently existing

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[7] Supreme Court, Nov. 26, 1992, III CZP 144/92.

[8] See f.ex. L. J a w o r s k i, "Klauzula *rebus sic stantibus*" [*Rebus sic stantibus* clause], *Prawo Spółek* 1998, No. 9, p. 35.

[9] See W. R o b a c z y ń s k i, *Sądowa zmiana umowy*, p. 92–93; P. M a c h n i k o w s k i, [in:] *Kodeks cywilny. Komentarz* [Civil code. Commentary], eds. E. Gniewek, P. Machnikowski, Warszawa 2013, p. 562–563.

Different opinion: M. B i e n i a k, "Nadzwyczajna zmiana stosunków jako przesłanka zastosowania art. 357[1] k.c. – próba definicji" [Extraordinary change of relationships as an conditio to apply Article 357[1] of civil code – an attempt to define], *Studia Prawnicze* 2009, No. 4, p. 82–83. See also M. B i e n i a k, "Klauzula *rebus sic stantibus* – możliwości jej aktualnego zastosowania (uwagi na

obligations and functioning of the contract in a completely new light. It is not suffice to claim the change of relationship, however. This change is to be of extraordinary character. In the literature and jurisdiction it is emphasised that the term "extraordinary" means not frequent, unusual and exceptional. Thus, it is only when we qualify the change of relationship as extraordinary, may we consider any further conditions of the *rebus sic stantibus* clause. These could be circumstances of various character. Obviously, the fore changes would be those connected with catastrophic natural changes: earthquakes, hurricanes, tsunami, floods, disastrous droughts. Also significant disruptions of social life cannot be ruled out, such as wars, riots, strikes, blocks of all kinds, terrorist attacks, *etc.* It needs to be stressed, and that was mentioned earlier, that an extraordinary change of relationship may also mean perturbations of economic nature, connected with crisis phenomena in particular. In many cases, circumstances treated as extraordinary may also be – from a different perspective – seen as force majeure (*vis maior*). Even though these circumstances may be related or even identical, their function remains different. If *rebus sic stantibus* clause enables the modification or termination of a contractual bond by court, force majeure is a circumstance that releases the debtor from responsibilities in case of improper or insufficient performance of their obligations.[10]

Annotation c) Violating the balance of the contract is a result of an extraordinary change of relationship. We assume that in case of each contract a consensus between the parties is reached. Thus, the contract is a result of a compromise, an understanding of divergent interests between the parties. The contract is also a result of a cooperation.[11] An extraordinary change of circumstances results in violating the balance. As a result, a court's interference is made possible, so as to achieve the balance of the contract.

The above mentioned violation of balance may take the form of an excessive difficulty in performing the obligations or a threat of a gross loss. An excessive difficulty applies to a debtor who may be in a position to perform his duty, but these would require such efforts that no prudent participant may demand in such a situation. These particularly include technical, organisational or logistics difficulties, but also these of economic nature (the necessity to gather disproportionate funding). Whereas the threat of a gross loss is connected solely with the effects of an economic nature. This may affect any of the parties. In case of a significant change of circumstances, it may appear that one or the other party may have to engage in fulfilling the obligation such funding, goods or services that in relation to the value of the other party's services, the balance of performing the contract

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tle art. 357^1 k.c.)" [Rebus sic stantibus clause – possibilities of its current use (remarks in the light of Article 357^1 of civil code], *Monitor Prawniczy* 2009, No. 12, p. 641.

[10] E. B a g i ń s k a, *op. cit.*, p. 182.

[11] W. R o b a c z y ń s k i, *Sądowa zmiana umowy*, p. 77–80.

proves negative and to such an extent that the term "gross loss" applies for that particular party.

Obviously, the term "gross loss" is of an evaluative character and in every case court must assess individually whether this loss would be of such a character. It should be remembered, however, that not in each case a loss may mean the necessity to intervene in the content of contractual bond. It needs to be remembered that introducing a mechanism correcting the content of a contract should take place – due to the necessity to maintain the certainty of behaviour – exclusively in cases where the scale of effect of relationship on the obligation is of such a kind that it exceeds the so-called normal contractual risk. The term of normal contractual risk is not used in the Act, it is a concept elaborated in the science of law and legislation. It means that every honest contractor should be aware of certain changeability of exterior conditions and the possibility of the economic value of a transaction being influenced by it. Such phenomena as fluctuations, variability in demand and supply, floating exchange rate, etc. are normal phenomena that have always accompanied the economic life. The contracting party must be aware of these phenomena and cannot in every case demand the revision of contractual provisions. This would place turnover at undesired destabilisation of turnover. It is only when the scale of the above mentioned phenomena reaches such intensity that the sense of the originally concluded contract becomes questionable, one may consider applying Article[1] of civil code, obviously only when all other provisions stipulated in it have been fulfilled. A similar approach is applied when referring to Article 358[1] § 3 of civil code, which provides for judicial indexation of cash benefits (there will be more on indexation in this work).

Annotation d) In order to apply *rebus sic stantibus* clause, it is necessary for the change of relationship between the parties to be unpredictable. It needs to be stressed that – despite certain doubts that one may have reading the content of the provision literally – there is an agreement concerning the fact that it refers to an objective lack of possibility to foresee the influence of changes in circumstances on the obligation and not to a lack of subjective anticipation of this fact by the parties.[12]

While constructing this condition, the legislator is of the opinion that if there is a possibility to foresee the influence of changes on the circumstances, then the parties may include this risk in their contract, thus eliminating in advance the negative influence on the economic sense of the contract. Clearly, it may happen that the parties may have foreseen the outcome of certain events, however it was not possible to have foreseen that the actual outcome will be even more far-reaching. In such cases, applying Article 357[1] of civil code will not be excluded – so it seems – it will be possible to apply it in part that places it out of any predictability.

[12] See P. M a c h n i k o w s k i, [in:] *Kodeks cywilny*..., p. 565; M. B i e n i a k, "Klauzula *rebus sic stantibus*…", p. 640–641.

5. Fulfilling the conditions of Article 357[1] of civil code creates a possibility for the interested party to apply to court for an appropriate demand to modify the contractual relationship. Polish legislator does not require the submitted request to be preceded by an attempt to renegotiate the contract. Obviously, the parties may reach agreement at any time and change the provisions of the contract (except for the cases that are non-negotiable and concern public procurement). In such cases, it is the contractors themselves who establish how the balance of their contract is to be restored. If, however, for any reason, reaching an agreement in this matter proves impossible, then the possibility of applying to court opens up.

The legislator does not impose too strict rigors of modification of the contractual relationship. Modification criteria are stipulated very generally, which provides the flexibility desired in extraordinary circumstances. As can be seen from the above quoted content of Article 357[1] of civil code, court is to consider the interests of parties (both parties) and be guided by the principles of social life. In the Polish law, the social life principles function as certain extralegal measures to assess social behaviour and an indicator of a manner in which an obligation is fulfilled, similarly to, e.g. the principle of good faith and trust on the basis of German civil code ("Treu und Glauben" – § 242 BGB). The necessity to consider the interests of both parties is obvious as it is impossible to allow a situation in which the whole burden of unfavourable phenomena that constitute an extraordinary change of a relationship would be borne by just one party.

In order to restore the affected balance of the contract, court may – first of all – change the amount of a settlement or the manner in which it is to be performed (for instance the time limit). As a final solution, a possibility to terminate the contract is provided (in the provision there is a term that court may "even decide to terminate the contract"). In case of terminating the contract, it may be necessary to also decide on settlements between the parties, especially in cases when the settlement has partly been carried through. While determining the settlements, court is also to consider the interests of both parties, guided by the principles of social coexistence.

6. The conditions presented above as for the application of Article 357[1] of civil code may justify the application of *rebus sic stantibus* clause also in the face of phenomena of economic character.[13] Assuming that in a given situation we are dealing with 'abnormal' crisis situations rather than with 'normal' fluctuations of a market situation, it could be concluded that an extraordinary change of relationships in the understanding of the discussed provision is taking place.[14] It is worth emphasising, that this extraordinary change should be expressed in phenomena of

[13] See A. B r z o z o w s k i, [in:] *System prawa prywatnego*, p. 980–982; E. B a g i ń s k a, *op. cit.*, p. 181; R. S t r u g a ł a, "Ingerencja sądu w stosunek zobowiązaniowy na podstawie art. 357[1] k.c." [Court's intervention in the relationship of obligation on the basis of Article 357[1] of civil code], *Państwo i Prawo* 2010, No. 8, p. 47 and following.

[14] See f.ex. Appeal Court of Wrocław, Jan. 24, 2013, I ACa 1362/12.

deeper nature than just a change – even a serious one – of currency exchange rates. Just a change in the value of money itself, if relevant, justifies the use of the so-called court indexation on the basis of Article 358[1] § 3 of civil code, which will be discussed later on, than the clause *rebus sic stantibus*.[15] If, however, the crisis phenomena mean a fundamental market change that are additionally connected with, for instance, a wave of bankruptcies of many companies, due to which a market collapse takes place, then we may assume the extraordinary change of relationships is arising. Such phenomena may be compared to a crisis that Poland was experiencing by the end of the communist era in the eighties of the 20th century. As was mentioned earlier, Polish judicial system was inclined to accept such phenomena as an extraordinary change of circumstances. Such a change may influence the contract, leading to violating its balance.[16] We could say that violating the contractual balance stands out as the first met condition of Article 357[1] of civil code that leads to searching for answers to a question whether this violation resulted from the change of circumstances that was of extraordinary character.

It should be added here that the Polish judicial system accepts also changes in the legal system, including those concerning taxes, as the extraordinary change in relationships as stipulated by Article 357[1] of civil code. Serious changes, e.g. in VAT rates, may significantly undermine the economic sense of an obligation.[17]

However, it should not be forgotten here that applying the mechanism of *rebus sic stantibus* requires determining the unpredictability of the influence of the change in relationships on the obligation. If certain economic phenomena can be predicted and their influence on the contractual relationship is also to be predicted, court will refuse its intervention into the content of the obligation. Expecting the occurrence of certain economic phenomena, the parties may calculate the risk connected with that fact in the provisions of the concluded contract, appropriately spreading the contract risk.[18] Applying Article 357[1] of civil code is not then justified. Assuming otherwise could lead to undermining all contracts concluded during the times of occurrence of crisis phenomena, which would also lead to extending the market chaos. The above mentioned question of unpredictability is crucial in practice. Taking it into account undermined the possibility of applying Article 357[1] of civil code in the so-called option contracts that were concluded prior to the market collapse in the year 2007. It could be said that these contracts were concluded by enterprises with the banks precisely in order to be able to respond flexibly to the changes in exchange rates in crisis situations. Thus it is hard

[15] Supreme Court, Feb. 25, 2004, II CK 493/02.

[16] R. M o r e k, [in:] *Kodeks cywilny. Komentarz* [Civil code. Commentary], ed. K. Osajda, Vol. II, Warszawa 2013, p. 99.

[17] Supreme Court, May 16, 2007, III CSK 452/06; Nov. 22, 2007, III CSK 111/07; Jan. 17, 2008, III CSK 202/07.

[18] Supreme Court, May 10, 2006, III CK 336/05.

to justify appointing the extraordinary change of circumstances in relation to these contracts, if the possibility to change a relationship was an assumed in advance reason for which such a contract was concluded in the first place.

7. It is worth noting that a solution similar to the Polish one was included in the Principles of European Contract Law (PECL). Although Article 6.111 paragraph 1 of PECL accentuates the meaning of *pacta sunt servanda* principle, yet in Article 6.111 §§ 2 and 3 there is a possibility to revise the contractual relationship. However, contrary to the solution accepted in the Polish law, Article 6.111 of PECL requires the parties to undertake an attempt to change the content of the contract by renegotiation. It is only when renegotiations fail that a request to court to terminate the contract or modify it would be justified. It is possible also that the other party could claim compensation for damages caused by refusing the other party participation in renegotiations or by carrying them out in bad faith, i.e. in a manner that remains contrary to the principles of good faith and honest turnover. It should be expected that a solution suggested by PECL may reflect in the legal orders of the European Union members, even more so due to the fact that the worldwide economic crisis leads to seek such solutions. Contrary to the Polish law, however, this is just a proposition that perhaps will be included in the European Civil Code in future.

On the other hand, current solution, similar to the one accepted in Poland, is included in Article 1467 of Italian civil code. This provision gives grounds to terminate a contractual relationship in a situation when as a result of exceptional and unpredictable events, it would become too difficult to perform the contractual obligation (*eccessiva onerosita*). It is worth noting that Article 1467 paragraph 2 of Italian civil code rules out the possibility to quote that provision when the event remains within the frames of risk that the parties should be aware of while concluding the contract. This provision is also accepted in interpretation of Article 357^1 of civil code, even though it was not stipulated *expressis verbis* there.[19]

8. Accepting a solution described in Article 357^1 of Polish civil code results in considerations connected with the search of a solution that is of interest to us from the point of view of the concept of inability to provide, recognised as economic inability to provide, are currently not undertaken. It needs to be noted, however, that in the period after the repeal of Article 357^1 of civil code, attempts to theoretically justify using this concept, the influence of the change in relationship on the obligation were undertaken.

A solution was then proposed, according to which conditions concerning economic inability were arranged in a manner analogous to the former Article 269 of obligation code, that is they corresponded to – in their basic shape – to the conditions of current solution stipulated in Article 357^1 of civil code. Certainly, it was

[19] W. R o b a c z y ń s k i, *Sądowa zmiana umowy*, p. 39.

such propositions that allowed to "store" the idea of *rebus sic stantibus* between 1965–1990, which resulted in adopting the currently existing solutions.[20]

Currently, majority of cases where one could trace back the concept of economic inability to provide may be resolved on the basis of Article 357[1] of civil code. This does not, however, mean that this concept should be completely rejected. It needs to be remembered that the theory of inability does not ensure such flexibility as is expressed by the *rebus sic stantibus* clause. The result of subsequent inability to provide is termination of obligations (Article 475 § 1 of civil code) and that leaves no place for modification of the obligation and adjusting the contractual provisions to the changed conditions.

9. Apart from the *rebus sic stantibus* clause in its general form, the Polish law also provides for special cases of court interference into the content of an obligation. Of particular importance here is Article 632 § 2 of civil code that includes a possibility to increase a flat-rate remuneration in contracts for specific works (also in contracts for construction works) in a situation when in case of a change of relationships that was impossible to foresee, payment of a flat-rate only would threaten the contractor with a loss, especially in cases of the necessity to carry out unexpected additional works.

On the other hand, in case of contracts for public procurement, Polish Act of January 29, 2004 – Public Procurement Law – provides (Article 145 § 1) that in case of an unexpected change in circumstances resulting carrying out the contract being not in public interest, the ordering party (entity that has public funding at their disposal) may withdraw from the contract. In such a case it is not a question of restoring the disturbed balance of a contract. The only solution is terminating the legal relationship that binds the contractor with the ordering party. It is necessary to point out, however, that in the light of a dominating opinion, also in cases of public procurement it is possible to apply the mechanism of the *rebus sic stantibus* clause and thus applying to court with a request on the basis of Article 357[1] of civil code.[21]

10. Polish civil code knows yet another solution that may be applied in a case of economic situation change that results with a change in currency value.[22] It is indexation of cash benefits. It may take a two-fold character: contractual or judiciary

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[20] See B. L e w a s z k i e w i c z-P e t r y k o w s k a, "Niemożliwość świadczenia następcza" [Follow-up inability to deliver], *Studia Prawno-Ekonomiczne* 1970, Vol. IV, p. 82–83.

[21] District Court of Białystok, Oct. 25, 2011, VII GC 127/11. See also W. R o b a c z y ń s k i, "Zmiany okoliczności a stabilizacja umowy w sprawie zamówienia publicznego" [Changes in circumstances and stabilisation of a contract in public procurement], *Finanse Komunalne* 2005, No. 10; P. M a c h n i k o w s k i, [in:] *Kodeks cywilny…*, p. 561.

[22] See T. M r ó z, "O wykonywaniu świadczeń pieniężnych w warunkach zmiany okoliczności" [On delivering cash benefits under the change of circumstances], *Palestra* 2000, No. 2–3, p. 7 and following.

indexation. It is a rule in the Polish law that cash benefits are accomplished by their face value. This rule (the so-called nominalism principle) is specified by Article 358^1 § 1 of civil code. According to this provision, if a subject of an obligation since the moment it has been determined, is a given sum of money, accomplishing this duty should take form of a face amount payment. However, in case of changes in the currency value after the obligation has been established, the parties may apply a contractual value by introducing into the contract the so-called indexation clause which is provided for in Article 358^1 § 2 of civil code. According to this provision, the parties may stipulate in the contract that the amount of cash benefit will be determined according to another measure of value than money. This stipulation is done by introducing into the contact the so-called indexation clause. The Act does not limit the parties in their choice of measure in a given case. Most frequently, it will be the so-called currency clause that refers to the contract currency relation to other currencies. It is worth noting here that currently, civil code does not favour Polish currency as a object of provision. The parties are free to choose. Applying currency clause in the case when the object of provision is Polish currency may, however, lead to unreliable results due to the recurring phenomenon of fluctuation that do not reflect the actual market situation. Another form of security may be the metallic clause (it refers to primarily to gold), commodity clause (grain, fuel, raw materials, *etc.*) or index clause that provides a measure that in this case becomes a variable of several different base measures.

Applying the index clause depends, however, on a previous decision made by the parties in this respect. In case the parties do not provide such a contractual mechanism, civil code also provides the so-called court indexation of cash benefit. Article 358^1 § 3 of civil code is the basis. This provision reads as follows: "In case of a significant change in the purchasing power of money after the obligation has been concluded, court may, having considered the interests of both parties, in accordance with the principles of social coexistence, change the amount or manner of accomplishing the payment, even though they may have been provided for in the contract." We should note that in this case – as opposed to the *rebus sic stantibus* clause from Article 357^1 of civil code – the same code does not require a change of relationship to take place that would be of extraordinary character. A "significant" change in the value of money suffices here. The level of relevance of this change remains to be assessed by court, yet the literature emphasises that in case of court indexation, similarly to the *rebus sic stantibus* clause, the mechanism of modification of the obligation should only be started when the level of change in the purchasing value of money reaches the limits of the above mentioned usual contract risk.

It should also be noted here that court indexation of a cash benefit cannot take place at the entrepreneur's request and not only against a natural person that is also a consumer, but also against another entrepreneur. Prohibition to quote Arti-

cle 358[1] § 3 of civil code by the entrepreneur, results from Article 358[1] § 4 of civil code. As a consequence, in economic turnover contractual indexation clauses are of less value than court indexation.

As can be seen from the above comments, there are certain similarities between the *rebus sic stantibus* clause in Article 357[1] of civil code and court indexation in 358[1] § 3 of civil code. These similarities incline some authors to apply terms such as "a grand *rebus sic stantibus* clause" (Article 358[1] § 3 of civil code). I am of the opinion, however, that similarities between these constructions are more of a "technical" character and they differ on the merits. Only the solution provided in Article 357[1] of civil code realizes the *rebus sic stantibus* idea clause as understood traditionally, thus leading to a transformation of the already existing contractual obligation. Court indexation means that it is only a technical operation of an accounting character, which allows to make the amount of a benefit more real but not leading to any change in the merits of the contractual relationship.[23]

[23] See also W. R o b a c z y ń s k i, *Sądowa zmiana umowy*, p. 180 and following; A. M a l a r e w i c z, "Wpływ zmiany stosunków na wykonanie zobowiązań" [Influence of changes in relationship on delivering obligations], *Monitor Prawniczy* 2005, Vol. II, No. 12, p. 587–588.

Tomasz Sokołowski
Professor of Law, Adam Mickiewicz University, Poznań

CONTRACTUALISATION OF FAMILY LAW

I. General part

1. Contractualisation of family law can be either substantive or procedural. Substantive contractualisation means contractual arrangements on formation, content and dissolution family relations that may be derogative of the legal default regime. Procedural contractualisation means either contractual arrangements on private jurisdiction or recognition of family agreements by State courts.

The possibility and scope of contractualisation depends from the character of Polish legal system, in which the Constitution is the fundamental source of law. The high position of the Constitution caused a strong position of the Constitutional Court which plays an essential role as a control body upon legislation. The Constitutional Court Judges work very intensively, explaining contradictions in legal acts or ruling upon constitutionality or unconstitutionality of provisions of legal acts.[1] Because of the division of powers we do not have a system of precedence. The judgements of the Supreme Court have not a value of legal source, but many of those judgements are widely discussed by the doctrine (in the same mode we aim to treat the judgements of the ECJ and the ECHR).

Since Poland has ratified many international treaties (the provisions of which refer to family law matters) and is a member of the European Union, appropriate international agreements and other applicable statutory instruments creating European law currently constitute elements of the Polish legal system, and therefore are also sources of family law. First of all the European Convention on Human Rights and Convention on the Rights of the Child are recognized as a legal source of the Polish legal system and theirs provisions can be directly applied in family law.[2]

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[1] M. S a f j a n, "The Constitutional Court as a positive legislator," [in:] *Rapports Polonais. XVIII*th *International Congress of Comparative Law*, ed. B. Lewaszkiewicz-Petrykowska, Łódź 2010, p. 247 and the following ones.

[2] E. Ł ę t o w s k a, "Human rights – universal and normative? (a few remarks from the Polish perspective)," [in:] *Rapports Polonais…*, p. 267 and the following ones.

2. Family law constitutes a separate branch of law and is regulated in a separate act Family and Guardianship Code [hereinafter referred to as FGC] legal relations resulting from matrimony and parenthood. Originally, the basic conception of the Polish law system was a division of two separated branches of family law: matrimonial law (the conclusion of marriage, the rights and duties of spouses, property relations, divorce, separation), Decree of 25 September 1945 and family law (a child's origin, parental rights, a child's adoption, maintenance, alimony and palimony duties), Decree of 22 of January of 1946. Only the first legal act had private law character, while the second was much more close to public (administrative) law. In 1950, due to much more political than substantial reasons, all these matters was combined and put together into the new Family Code, which survived only to 1964, when the new Family and Guardianship Code was adopted. This Code has 10 areas of regulation: the conclusion of marriage, the rights and duties of spouses, matrimonial property relations, a child's origin, parental authority, a child's adoption, maintenance, alimony and palimony duties, divorce, separation, the guardianship of an orphan or handicapped person.[3]

The provisions of the first book (General part) of the Civil Code from 1964 (hereinafter referred to as CC)[4] are also of fundamental importance for Polish family law, and some institutions of general civil law are directly applicable in family law matters. Some other general civil law institutions, however, are not, due to certain differences in approach, such as a different conception of the contents and meaning of an act in law such as the conclusion of marriage, or the declaration of fathering of a child or a different interpretation of the general conception of a defect in a declaration of will or intention to marry. Similarly, the general principle of freedom of contract is not applicable in family law at all, despite the general freedom for spouses to enter into civil contracts between themselves for the purpose of civil law transactions. Saying this is of course a huge simplification of the problem of the latter case, which arises from the difficulty to demarcate a "matrimonial" and a 'civil law' contract between spouses. This issue, however, in not a subject of this article.

The Family and Guardianship Code has no special part of general provisions. In consequence, Polish family law uses, to a significant extent, the civil law method of regulations, although with significant exceptions. Several general clauses are characteristic of family law. In particular the clause on 'a child's well-being' (welfare of the child, the best interest of the child) creates a system of state control, which demonstrates much more of a feature of an administrative method of

[3] T. S m y c z y ń s k i, "Prawo rodzinne" [Family Law], [in:] *System Prawa Prywatnego* [System of Private Law], ed. T. Smyczyński, Vol. 11, Warszawa 2009, p. 68 and the following ones.

[4] Act of 23 of April 1964, Journal of Laws [hereinafter referred to as J. of. L.] 1963, No. 16, item 93.

regulation than of a private law method. This same feature characterises the area of a child's origin, parental authority, child's adoption and alimony duties. On the other hand, in all these areas of regulation there exist certain contractual possibilities, which – upon court control – can be arranged by spouses or parents of the child.

The autonomy of the family law method of legal regulations is also based on the fact that family relations are not always equal – in comparison to civil law relations – as children are subordinated to their parents.

The Family and Guardianship Code from 1964 was largely amended after 1989. The 15 amendments which had then been made had in affected more than half of entire Code, to the effect that the current version of the FGC seems a quite new regulation.

Last year the Commission of Codification of the Polish Civil Law decided to draft a New Civil Code and incorporate in it a Book on family law. However, what is probably going to happen is that the 'new' regulation of family law will be nothing more than a substantial re-phrasing of the existing one, making it perhaps more elaborate, but its major features will remain unchanged.

3. Family law issues have also been regulated – apart from strict family law – in other legal acts, which sometimes do not have a civil law character, but, for instance, that of administrative law, and they should be treated as "laws on family." These include the following: the Law on Birth, Death and Marriage Records – the Act of 29 September 1986 as amended;[5] the Act on the Change of Names and Surnames of 15 November 1956 as amended;[6] the Code of Civil Procedure (hereinafter referred to as CPC), and in particular Articles 425–452 regulating proceedings in marital cases, Articles 453–458 regulating matters between parents and children, Articles 561–605 regulating non-litigious proceedings in family, custodian and guardianship matters, Articles 1081–1088 regulating the enforcement of maintenance, alimony and palimony, and Articles 598^{1}–598^{15} regulating matters concerning removal of a child or a ward; Private international law – the Act of 4 January 2011.[7]

4. The impact of family relations in tax law is not very broad in Polish law. First of all, if both spouses have the community property regime (which is a legal regime in Polish family law) they have a privilege of being treated as the only one "matrimonial subject" of taxation. It means that they can merge their incomes as one entire value for taxation.[8] However this tax liability last after divorce.[9]

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[5] J. of L. 1986, No. 36, item 180.

[6] J. of L. 1963, No. 59, item 328.

[7] J. of L. 2011, No. 80, item 432.

[8] Art. 6.1 of Act from 26 July 1991, Tax law [Prawo podatkowe], J. of L. 2012, item 361.

[9] Art. 110 §1 of Act from 29 August 1997, Tax regulations [Ordynacja podatkowa] J. of L. 2012, item 749.

On the other hand, the number of children in a family has no significant influence on the tax liability because this feature of a family is treated as a private circumstance. As a result, for example, in the case of two families of a similar income, of which one is a one-child family, while the other has six children, the total tax liability of both will be not very much diversified.[10]

However, the State and local community government support a large network of institutional assistance for families. These institutions, however, offer much more of advising assistance than significant financial support.

The financial condition of low-income families has no meaningful influence on the state financial assistance. Parents are responsible for ensuring adequate health care and living conditions available to their children. If they do not have sufficient financial resource, the court order may limit their parental authority or even deprive them of it. However, before that happens, if at all, the entire family must first receive professional assistance (article 109 in con. with 111 § 1a FGC).

5. Constitutional protection of family institutions is very broad. The Constitution from 1997 is one of the basic sources of family law.[11] The Constitution contains basic principles concerning marriage and family. The provision of Article 18 of the Constitution states: "Marriage is a union of a man and a woman." However, constitutional protection includes not only marriage but also a family built-up by unmarried parents living together with their child, or single-parent families. A separate issue that occurs and is discussed in the doctrine is the question whether a married couple without a child already constitutes a family or is only a married couple. The provision of art. 23 FGC seems to favour the former.

The Constitution proclaims that married couples, and the family, motherhood and parenthood, are to be placed under constitutional protection and care of the Republic of Poland.

Equality between men and women is expressed in Article 33 of the Constitution. It may be underlined that the major feature of Polish family law is the very long tradition of equality of wife and husband, the principle of which has been present in Polish legal statutes already for 235 years, since late 18th century. In 1778, the full legal equality in parental authority matters between wife and husband was established in the Code of King Stanisław August (the last of Polish

[10] Tax allowance in account year per month on first and second child = 23 euro, on third child = 34 euro and tax allowance on each next child = 46 euro (art. 27f. 1. Act from 26 July 1991, Tax law). As result tax allowance on one child family is 23 euro, on two children family is 46 euro, on three children family is 80 euro, on six children family is 217 euro.

The height of average monthly reward in December 2011 in Poland was 4015 zł (Monitor Polski [Official Journal – O.J.] 2012, nr 26). The value of 4015 zł is about 1003 euro. On year: 12 x 1003 = 12 036 euro (for two spouses: 24 072 euro), tax rate = 18%.

[11] J. of L. 1997, No. 78, item 483.

Kings).[12] Unfortunately in this same years, Poland's three neighbors: Austria, Prussia and Russia performed the first (of three) Partition of Poland, by which the Polish state lost not only independence, but also a chance to put the new and modern Code into practice. The three occupants established their own three systems of old fashioned family laws. The general tradition of such equality has nevertheless survived in social and court's practice on the area of former Polish's territory during this period of 125 years.

6. Legal protection of one's family life is expressed in Article 47 of the Constitution. The source of the right of parents to raise their children and to their right of decision of religious education is article 48 of Constitution, which regulates such rights of parents as bringing up their children in accordance with their own convictions. On the other hand, article 48 of Constitution also imposes an obligation on parents to respect the degree of maturity of a child in the course of such upbringing (upbringing is understood here as education and control). Upbringing has also a moral and religious context. Article 53.3 of the Constitution gives parents two rights:

1) right to ensure their children moral and religious upbringing,

2) right to teach them in accordance with their own convictions.

On the other hand, the child has its own right of conscience. The Constitution directs parents to respect: – a child's freedom of conscience, and child's belief and as well as the older child's convictions (article 48.1). In the Polish legal system there are 4 kinds of freedom: freedom of thought (intellectual activity and expression), freedom of conscience (individual sense and decision of right and wrong values), freedom of belief (religion, faith), freedom of convictions (exactly definite religious confession). A juvenile child can independently decide of his or her attendance of religious or "non religious" classes if he or she reaches an appropriate degree of maturity. Differently than in many other legal systems, regarding this particular case, the precise age when a child reaches an appropriate maturity age is not established by Polish law. Under Article 48.2 of the Constitution, the limitation or deprivation of parental rights may be effected only in occasions specified by statute and only on the basis of a final court judgment.

7. The family's right to special assistance appears in accordance of Article 71 of the Constitution: the State in its social and economic policy, must take into account the well-being of the family. Families finding themselves in difficult financial and social circumstances have the right to special assistance from public authorities. This right applies particularly to families with numerous children and single parent families.

The legal system offers special assistance to mothers (especially single mothers). Mother has a right to assistance of the state. In compliance with that

[12] E. B a g i e ń s k a, *Zbiór praw sądowych Andrzeja Zamoyskiego* [The Code of Andrzej Zamoyski], Poznań 1986.

provisions a mother, both before and after giving birth, has the right to special assistance from public authorities.

As well the State has the duty to protect the child's well-being. When the 19th century was a time of struggle for equality of spouses, the 20th century was a time of awakening of protection of child's best interests (and as will be indicated below, the 21st century is a time of protection of these all interests altogether). The protection of a child's well-being as an obligation of the State has been regulated by Article 72 of the Constitution. This is also the most important rule of the entire family law system. The protection of the child's welfare runs before the protection of the entire family. Such protection is done before both, the civil and the criminal, courts and in the course of international cooperation as well as via the activities of the Commissioner for the Protection of Civil Rights [Rzecznik Praw Obywatelskich] and the Commissioner for Children's Rights [Rzecznik Praw Dziecka], and of the State prosecutors.

II. Substantive contractualisation

1. The Polish civil law has only one major general clause: the principle of community life rules (article 5 CC). Some other general clauses concern specific branches of civil law like the freedom of contract in contract law (article 353^1 CC). The family law system has a different legal character. The solid frame of family institutions is constructed by *lex imperfecta* but the contents is built by same general clauses.

The prior one is the principle of child's best interest (the welfare of child, child's well being). The other clauses have little lesser meaning, like the "family welfare," "public interest" or the principle of community life which plays a limited role in the area of divorce regulation. Within that framework, the persons constituting the Polish family may behave towards each other in their own manner. That manner of individual behaviour corresponds with spouse's individual ideas, convictions and private opinions on family life.

Within the framework of family law institutions, the persons constituting the family may behave towards each other in their own manner. That manner of individual behaviour corresponds with spouse's individual ideas, convictions and private opinions on family life. However, this also means that they has no competence to change the general rules of family law in a contractual way. The contractual principle of freedom of contract does not apply to family law.

Two different scopes of relation appear: the rules of the relationship between spouses and their child and the rules of the relationship between spouses. The last area has a civil law character if the matter is not connected with child's affairs and within this scope spouses can arrange their own model of relationship.

2. Maternity and paternity are the benchmarks for determining the descent of a child. A mother, under the law, is a woman who has given birth to a child (and not, e.g. the so-called genetic mother). Maternity, in turn, determines paternity of a given man. If a child is born of the marriage, paternity is determined in the course of the presumption that the child is of the mother's husband. This presumption, however, may be rebutted in the course of proceedings for denial of paternity. If there is no man indicated as the father of the child due to the rebuttal of the presumption or because the child has been born out of wedlock, there are two possibilities: admitting paternity of a child or establishing paternity before a court.

If the name of the mother of the child has not been entered on the certificate of birth or if there are fictitious parents' names entered on the certificate, it is possible to establish paternity and maternity before a court. But if a woman's name has been entered on the certificate of birth as a mother, it is necessary to rebut her maternity first. If the father of the child is not known, it is possible to admit paternity voluntarily or to establish it before a court. The paternity of the man may be established if it is proven that he is the biological father. The Polish legal system provides complete equality of a legal situation of both marital and extramarital children.

3. Parents are entitled to parental authority. Relations between parents and children are referred to an unborn child, small child, teenager and an adults. The regulation on *nasciturus* is now being researched into (articles 8 and 446^1 CC),[13] whereas the situation of a small child and a teenager has been regulated under parental rights, and the situation of parents and adult children is regulated under Articles 87 and 91 of k.r.o.

Outside of parental authority is the separated institution of contacts between parents and child; contacts are recognized as an object of duties and rights of parents and duties and rights of child.[14] The issue of the child's surname has been regulated separately.

Parental authority encompass, in particular, the duties and rights of parents to exercise care over the child and his or her property and bringing up the child who in turn is obliged to obey his or her parents.

Parental authority may be exercised only by adults who have full capacity to enter into legal transactions. Minor parents of a child do not have parental rights. But they have a wide scope of rights concerning exercising direct care over

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[13] The large new problem of medical "prenatal" terapy can be soluted *per analogiam* to provisions of parental authority, J. H a b e r k o, *Cywilnoprawna ochrona dziecka poczętego a zastosowanie procedur medycznych* [Civil law protection and medical therapy of unborn child], Warszawa 2010, p. 481.

[14] Amendment from 6th of November 2008, J. of L. 2008, No. 220, item 1431, in force from 13th of June 2009.

the child. Parental authority is also created when the child is adopted in the course of complete adoption.

Under Article 95 § 3 FGC, parental authority is established to protect the child's interest. The main attributes of parental authority include: providing care for the child – the most elaborate element, taking care of the child's property, and representation.

Providing care for the child is composed of five component parts: raising, guiding, taking care of the child's environment, taking care of the child, and coordination of the child's development. In order to raise the child, parents should personally shape the child's personality. Raising is, in turn, composed of six component parts: shaping emotional attitudes (emotionality, sensitivity, sense of dignity and self-respect), shaping the outlook and system of values, developing intellectual talents and practical skills, acquainting the child with the content of law and social coexistence principles (public policy), developing conscientiousness and discipline, and shaping the child's independence.

Guiding the child, in turn, means deciding about the environment in which the child should spend time, and it includes: specifying the place of the child's stay and residence, taking the child back from unauthorised persons, entrusting the child's care to other persons temporarily, regulating the child's lifestyle, supervising the child's behaviour, deciding about the child's participation in activities in extra-family environments, choosing the field of education, selecting and supervising information acquired by the child, and providing holiday recreation.

The care for the material environment of the child should provide the child with proper material conditions and should include the following elements: providing proper accommodation conditions, making useful things available to the child, and removing threats to life and health.

The care for the child's person in the physical aspect refers to the fulfilment of the child's current needs and is composed of: feeding and nursing the child, treating the child medically, and making decisions about operating on the child.

The care of the child's property encompasses the following three elements: administering the child's property (this includes a number of legal acts and to some extent *de facto* acts as well), disposing of the net income from the property, and accounting for the property's administration. Finally, representation of the child includes: legal acts in the name and on behalf of the child and acts in court proceedings.

Matters concerning parental rights are settled by the competent guardianship court for the child's residence, but in the event of a threat to the minor's interest another type of court may react immediately or even settle the case *in camera*. All officials, not only police officers, but in particular teachers, physicians, school nurses (that is persons who meet the child in his or her typical environment) who notice any irregularities indicating that the child has been, e.g. abused, starved, and/or severely neglected, are obliged to inform the guardianship court of that fact.

Interference with parental rights is always an exceptional measure and it should be done only when the applied measures will definitely improve the child's situation. Court intervention may, depending on the threat to the child's interest, take three forms: the limitation of, the suspension of, or the deprivation of parental rights.

4. Contacts are the legal institution separated from parental authority. Both parents and the child are obliged to and have a right to keep in touch with each other and their relatives. Those contacts include: the contact with the child such as visits, meetings, taking the child outside the permanent residence, getting in touch directly through physical conversations with specific persons, i.e. face to face contact (and not just by phone), correspondence, and keeping in touch by using other methods of distance communication, including electronic methods (telephone), radio communication or talking via the Internet. In the event that the parents, or one of the parents, must separate from their children, they should, together, decide about the mode of keeping in touch with the child. If they cannot arrive at a consensus, the guardianship court will settle the dispute.

5. Alimony, palimony and maintenance are legal relations as a result of which the obligation to provide means of support is created and the obligation may result from marriage, kinship and adoption. Maintenance of relatives refers to direct relatives and siblings. The obligations of a divorced spouse in this respect (Article 60 FGC) constitute a sort of continuance of the obligation to support one's family (Article 27 of FGC).

A duty to maintain may also exist between an adopted child and adoptive parents bound by incomplete adoption (in the case of a complete adoption, the adopted child becomes a "adoptive's own child"), and between stepfather and stepchild, and it burdens a father of an out of wedlock child on behalf of the child's mother (Articles 141–142 of FGC).

The premises of alimony, palimony and maintenance claims result from the needs of the entitled person and abilities of the obliged person. In general, the entitled person must live in want, but this requirement does not refer to minor children.

Due to a special function of alimony, palimony and maintenance, a number of special and exceptional elements have been introduced to provide broad legal procedural protection of the rights of persons entitled to such benefits. In the case the execution of alimony, palimony and maintenance turns out to be ineffective, the benefit is paid out by the special Alimony, Palimony and Maintenance Fund.[15]

6. The civil law liberal method is not applied on a large scale to parental authority relation which appears as a multilateral legal situation (form) built by three legal bilateral relations having completely different character.

[15] J. of L. 2007, No. 192, item 1378.

The first relation is the vertical, administrative law relation between parents and the State: family courts act in name of the State as the controlling organ having support from various administrative agencies (some researchers recognize administrative agencies as the structure independent of the court).

The second vertical relation exists between parents and their child (despite a different problem regarding the character of the horizontal "internal parental relation" between parents). Although the parents–child relation has a private law character it has no "civil law" but "parental law" character, being based on the natural subject rights of the parties. This relation has no feature of equality, because a small child has no freedom of behaviour in the sense of free legal capacity to decide of his or her affairs. On the other hand the parental custody upon the child is controlled by the State.

The third relation is vertical and has a pure civil law character: it occurs between parents (or one of them) and third parties in connection with any matter relating to the exercising custody of the child. Because parents have autonomy in this area *vis a vis* their social surroundings they have the typical civil law subject right and any other person has a duty to respect the sphere of autonomy.

Parental authority as a whole cannot be contractually transferred to anybody. However, the institution of temporary vesting of a few-hours care of a small child to another person is quite common, especially if both parents work outside their family house or in other similar situations. During holiday the care of children can be vested to qualified guardians of children.

7. Neither anonymous nor discrete birth of any child has any legal effect on the area of parenting. It means that as long as such a child is not adopted, the legal relations between child's mother and father exists. Because the adoption can be decreed as well in case when the parents are unknown, the adoptive parents become legal subjects of parental authority. However the natural (genetic parents) still have a right and duty of contacts. Practically, it seems to be a very seldom case that they really could find their natural child and decide to contact with him or her.

The legal consequences of agreements on artificial insemination or using of gametes or embryos are not separately regulated.[16] After a long parliamentary dispute none of the few projects was passed as a final legal act. Despite the lack of such regulation the Ministry of Health decided to issue a decree on the regulation of accessibility and medical aspects of a medically assisted procreation. As a result, it is necessary to apply general FG Code's rules of maternity and paternity. In consequence, the mother is a woman who has given birth to a child (art. 61^9 FGC) and her husband is presumed a father if he agreed on assisted procreation

[16] M. Nesterowicz, M. Wałachowska, "Contract on surogate motherhood in Polish law," [in:] *Rapports Polonais…*, p. 25 and the following ones.

(art. 68 FGC).[17] In a case of a medically assisted procreation given to non married persons, the presumption of paternity does not applied.

8. Parents can conclude contracts with civil effect in regard of the content of educational choices, particularly upon divorce or separation. If a child does not live with both parents, they should reach a compromise, first of all in a contractual manner, when it comes to educational choices concerning the child. They can arrange any compromise even if the court has decided this same matters in a different way. Practically, the compromise is in force as long as parents can fulfil their own arrangement. In the case of a divorce or separation, the same possibility is still available. With regards religious education, there are no court cases because of multireligious tradition of Polish culture. As was said above, Polish law recognizes the fact that a child very quickly reaches the age of being capable of deciding for himself or herself, and making independent decision on religious matters. The issue of a child's personal decision regarding school career is approached and recognised in a similar way.

The general feature of the Polish society is a much higher level of individual personal freedom of each person than it seems to be in many European countries.

As well parents can conclude contract in regard of the housing of the child, but the civil effect of such contract is weaker than court solutions. Because the detailed provision of art. 58 FGC obliges the court which issues a divorce decree (or separation decision) to decide upon parental authority, each divorce (or separation) decree contains a decision of the child's housing as an obligatory element. Also the amendment to art. 58 FGC, namely the new § 1a reads: "The court may delegate the exercise of parental authority to one of the parents, limiting parental authority of other parent to specific rights and duties in relation to the child. The court can leave the whole parental authority to both parents, if they file a unanimous application, if presented in an agreement referred to in § 1, and if it is reasonable to expect that they will co-operate in matters concerning the child."[18] However, even if both parents are granted the whole parental authority, only one of them has the basic right and duty of "executing the regular care upon the child." It means that the dwelling of such a parent is the place of housing of the child (*domicilium necessarium*). It is necessary to underline that the meaning and scope of the term of "executing the regular care upon the child" is an object of a very wide discussion.

Art. 58 § 1 FGC in 2nd sentence states: "The court has a duty to take into account the parental agreement about the method of executing parental authority and provide the contacts with the child after divorce, if it is harmonious with child's welfare."[19]

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[17] Amendment from 2008.

[18] Amendment from 2008.

[19] Amendment from 2008.

Because the housing of the child is an important element of parental authority only one of divorced parents can be granted it. However, no obstacles occur to organize a different arrangement of this same matter in a contractual way. Such contracts may remain in force as long as parents can co-operate. On the other hand, court decision always remains in force, giving same sort of handicap for the parent who has been granted "the executing of regular care." Since the change of the court's decision usually requires a real long and burdensome proceeding (with a weak perspective for a better result) the only reasonable tactic of the other parent who has no right and duty of "executing of regular care" is to arrange a reasonable compromise in a contract. Such behavior creates sufficient results as long as the "first parent" offers reasonable cooperation. It is no doubt that any real unreasonable attitude and behavior of the parent having the regular care must be recognized as inappropriate execution of parental authority. If such inappropriate behavior threatens the welfare of the child, the court can change its original decision in the matter (this, however, requires a long proceeding) and may, eventually, issue an order limiting parental authority, or, in a situation drastically harmful to the child, adjudicate deprivation of such parent's parental authority.

9. Parents can't dissolve the parent–child relation, in a contract between them or with the child. The rights and duties of parental authority and contacts are absolutely binding. However, although any discontinuation of these bonds in prohibited, the legal sanction in the event of such behaviour has a special "family law" character.

Exercising of parental authority and contacts with an adolescent child requires cooperation of both sides. As a result, both parties (parent and child) can, and usually do, arrange in contractual manner, way the most comfortable arrangement (but always "proper" from the legal point of view).

The arrangement of both parents upon exercising parental authority and contacts, which can be recognized as a directly harmful to the welfare of the child, is strictly prohibited.

10. Under Article 23, sentence 2 of the Family and Guardianship Code, a family is concluded by marriage, which is a permanent legal union of a man and a woman. Unions of persons of the same sex cannot be treated as marriages. A marriage has four main features. It is: monogamous, totally equal (egalitarian), and permanent, but dissolvable.[20]

The family may also be incomplete and composed of a single mother or a father and a child. A union of persons who have not contracted a legally binding marriage is treated as a concubinage and they are treated as families if the children of cohabiting partners are brought up in them.

[20] J. G a j d a, "Pojęcie małżeństwa" [Marriage], [in:] *System Prawa Prywatnego*, p. 68 and the following ones.

The institution of marriage as a permanent legal union of a man and a woman appears as only one institutional form. Any other forms like partnerships are not recognised by law. Marriages may be contracted in two kinds of acts in law: lay marriages, and denominational marriages (concordat religious marriages).

There are two kinds of obstacles to marriage: "absolute" and "relative." Unlike in the case of relative obstacles, the "absolute" obstacles to marriage make it completely impossible for the court to issue a exceptional permission to marry. There are 4 such obstacles – marriage cannot be concluded between: brothers and sisters (siblings) and persons related in a direct line, persons who are already married, persons bound by adoption, or with person having total incapacitation.

The other obstacles have not so strict character and the court may grant permission to contract a marriage. There are also 4 obstacles: the lack of age requirement, which is the age of 18 years (a woman who has attained 16 years of age can be granted a court's permission to marry), affinity, partial incapacitation, mild mental illnesses or mental deficiencies.

A marriage terminates by the death of a spouse, divorce and, very seldom, by annulment of marriage. It is also presumed that if one of the spouses is declared dead, the marriage has been dissolved at the date of his or her declared death.

Any substantive or formal conditions to enter into a marriage relation are strictly prohibited and recognized by law as nonexistent. The promise of an adult person not to marry before reaching the age that is higher than the legal marriageable age, is recognized as a declaration without any formal effects. In consequence, such promise or declaration has no legal effect.

The decision of entering into a marriage is fully independent. Polish family law is free from the reminder of the substantive, formal or procedural condition necessary to enter into marriage, such as the requirement to ask the consent to the marriage from the chieftain, the family council or grandparents.

11. The positive ground for a decree of divorce is the permanent and irretrievable breakdown of marriage (marital cohabitation).[21] The breakdown of marital cohabitation takes place when one of the spouses ceases to fulfil marital functions, in other words it is the breakdown of emotional, physical and economic bonds between the spouses.

There are also three negative grounds for divorce which constitute obstacles for having a decree of divorce issued. The court may not dissolve the marriage if: the divorce conflicts with the interest of the child, the divorce conflicts with social coexistence principles (public policy), and the petitioner is fully at fault for the breakdown of cohabitation. However, regarding the last obstacle, there are some cases in which the divorce may be decreed despite the fault.

[21] W. S t o j a n o w s k a, "Rozwód" [Divorce], [in:] *System Prawa Prywatnego*, p. 538 and the following ones.

There are special procedural regulations which impose facultative mediation and evidentiary limitations: children of the spouses who are under 17 cannot be witnesses in the case. Further, sole recognition of the claim as well as mere admission of circumstances inadmissible. However, in the event when spouses have no minor children of the marriage, the hearing of evidence may be limited to the hearing of the parties only, provided the respondent accepts the claims of the petitioner. The court, upon the motion of the parties in the course of the proceedings to secure claims, settles the most important matters concerning the family, which is breaking down, i.e.: maintenance obligations, how the parental authority over the children of the parties is to be exercised and, based on the parental agreement (oral or in writing), decides upon the manner in which the duty and right of contact with the child are to be exercised.

12. A husband and wife have equal personal and proprietary rights and duties resulting from the bonds of matrimony. In accordance to art. 23 FGC personal (non-proprietary) rights and duties, which exist solely between the spouses include: cohabitation, fidelity, mutual assistance, co-operation in the interest of the family, choosing the surname which is to be adopted by the spouses and paternity of their common children.

All these rights and duties do not have a civil law character, but only family law features. It means that it is not possible to enforce such martial behaviour like living together or to have sexual intercourse. The fulfilment of such behaviours always depends only on the free decision of either of the spouses. Also, the prohibition of adultery has no typical civil law sanction but only has effects on divorce regulation as well as in sphere of inheriting after a spouse. Only the duty of support the family has a typical civil law character, being a civil law financial obligation. If the spouses cannot reach a consensus, either of them may bring the matter to court – Article 24 FGC.

Proprietary rights and duties of the spouses may be either strictly proprietary or connected with non-proprietary elements. The latter refer to the following: contributing to the fulfilment of the material needs of the family, collateral responsibility for those obligations, and representing the spouse. The fulfilment of the needs of the family may refer to gainful employment or running a household or bringing up children. Spouses are bound by the principle of "equal living standard." If one of the spouses fails to provide for the family, a court may order that his or her remuneration, in full or in part, be paid to the other spouse (Article 28 FGC). Persons bound by the bonds of matrimony are also entitled to use the accommodation, furnishings and other dwelling equipment belonging to another spouse (Article 28^1 FGC).

13. It is impossible neither to opt in nor opt out substantive conditions to dissolve a matrimonial relation. The regulation which provides that there is one and only one ground for a divorce (durable breakdown of marital cohabitation) is of

absolutely mandatory character. The court has a duty to recognize the unquestionably permanent and irretrievable breakdown of conjugal life. The duty to indicate if and who is at fault for the breakdown is not absolute. When both spouses decide not to determine the fault, the court has no competence to recognize this issue.

Although there is no legal connection between the post-divorce agreement and the matter of fault, it is a field for informal barraging. During the divorce procedure the major part of evidences are given by spouses. Therefore, it is possible to reach some compromise between spouses regarding evidence, and the evidence of faulty behaviour in particular.

The legal results of a divorce are divided into 2 groups: the elements of legal position of the common child and the legal personal position of each spouse. After divorce the legal position of the child consists of 4 elements: parental authority, contacts, alimony and *domicilium necessarium*. All of them must be dealt with in harmony with the best interest of the child and, theoretically, there is no connection between these elements and legal grounds for divorce, or the consequences of a divorce.

During the process of negotiating the content of a parental agreement, spouses can also discuss their attitudes and future conduct when it comes to the divorce proceeding in the future. Although it is strictly forbidden to bring into account any substantive or formal conditions to dissolve the marriage, the practical possibility of informal compromise is recognized.

Although discontinuation of marital bonds is prohibited, the legal sanction for doing this has a special "family law" character. The special "family law sanction" lies at the foundation of the court decision granting a divorce, or adjudicating custody, alimony etc. Sometimes this family law sanction does not apply at all.

14. The spouses can conclude an agreement on post-divorce support. As well they have competence to propose the division of property and the court is practically bound to adjudicate the division in accordance of the joint proposal of the spouses. From the legal point of view, the two areas: the division of common property and the post-divorce support are clearly separate and have each a different character. However, from the economic point of view, the result of the division of property shapes the financial condition of each of the spouses, and constitutes the essential basis for the alimony claims.

The post divorce maintenance depends only on a very detailed statutory regulation of Article 60 FGC. The former spouses have an obligation to support each other if one of them lives in want. If none of the spouses was at fault for the breakdown of marital life cohabitation, the duration of the alimony duty is limited to five years time. The spouse who was at fault for the breakdown of the marriage is not entitled to alimony from the no-fault spouse.

If both spouses have been found at fault, each of them has a claim on ground of want, but the duration of the duty is not limited. What is more, a divorced

spouse, despite a lack of want, may demand palimony or alimony if he or she is not at fault for the breakdown and the fault burdens only the obliged spouse.

Although it is strictly prohibited, in practice there occurs a possibility of a "covered" compromise of spouses. They may arrange a unanimous motion of no-fault divorce in exchange for another compromise when it comes to the division of property.

Because of the non-formal character of such compromises, they do not produce any civil law effect and one of former spouses can suit the other for alimony despite the covered compromise (even a few days after the divorce).

III. Procedural contractualisation

1. Spouses can individually resolve or settle their conflicts within the frame of the existing institution of marriage. Because under Polish family law marriage has dual character (being a public law as well as private law institution), the dissolution of marriage always requires a court judgment (which is in fact a result of thorough deliberations of the all circumstances). From that point of view, any individual arrangement is very welcome, but also carefully scrutinized by the court.

In-court procedures are applied. Prior to the amendment of 2005,[22] in each divorce trial, before the date of the first court sitting, the court had a duty to conduct a conciliatory session and try to persuade spouses to reconcile. At present, the court can direct spouses to professional mediation if in course of the proceeding it recognizes that there still exist a possibility that the marriage may function correctly (article 436 § 1 CPC).

The court has also the duty of suspending the proceeding if it takes conviction, that there still exists a possibility to maintain the conjugal life (article 440 § 1 CPC). Such suspension can happen once only in the course of the entire divorce proceeding. However, a suspension of the proceeding is not allowed if marital cohabitation has already stopped.

The proceeding is undertaken on the motion from one spouse, however not earlier than after three months from the suspension (article 428 § 2 CPC). In default of such motion within a year from the suspension date, the court discontinues the proceeding.

2. Out-of-court mediation is also applied. The court can direct spouses to mediation in every phase of the proceeding. The aim of the mediation is to obtain amicable settlement of all controversial issues (article 4452 § 1 CPC). The institution of mediation is generally (in the civil law mode) regulated in the CPC in Articles 183^1–183^{15} CPC, and provisions of the divorce procedure (article 436 § 2 CPC)

[22] Amendment from 10th of December 2005, J. of L. 2005, No. 172, item 1438 in force from 10th of December 2005.

make a reference to these general provisions of mediation, accordingly. However, the different character of family matters must be preserved.

The mediation is organized out of court. Pursuant to Article 183^2 § 3 CPC,[23] non-governmental organizations, acting within the scope of their statutory tasks, as well as universities can keep registers of mediators and create centers for mediation.

Family mediation concerns all matters relating to the fulfillment of the maintenance or future alimentation for child or spouse, if applicable.[24] It also includes parental agreement upon parental authority and contacts as well as all property matters. This is the same scope of issues which are decided in a divorce judgment. Mediation can also concern different issues, especially housing.

However, the court is never formally bound by such agreement of spouses; the only one exception concerns the division of common property.

3. Family mediation can have either conciliatory or controversial character. The conciliatory mediation aims to achieve reconciliation of spouses only. Controversial mediation has only one aim, i.e. arriving at a decision settling controversial matters. Nevertheless, the character of mediation can change when it is still in progress, as a result of the evolution of personal relations between spouses. Mediation always contains elements of help and elements of advising and it offers various methods of conduct. However, a correctly led mediation should not aim at a final result of the interaction between spouses, but should consider all possible solutions of the family situation (especially, an unexpected, and never earlier considered, chance of reconciliation). The basic aim of mediation is to create sufficient room for reaching an agreement, in which spouses can either achieve reconciliation or at least agree a solution of controversial post-divorce matters.

Mediation mast be fully voluntary, both at the moment when it starts, and all the time throughout its process (Article 183^1 § 1 CPC). No penalty clause is allowed.

The court should inform the spouses of the availability of mediation. The court may also the spouses to attend an information session if it recognizes that there still is a possibility of correct functioning of the marriage. Because of the voluntary character of mediation, the absence of either of the spouses does not cause any sanction (however, because the court has no duty to inform parties of that feature, it usually fails to notify that circumstance).

4. Spouses are free to indicate any adult and reasonable person to act as their mediator. When the court refers spouses to mediation, it will also appoint a mediator, who may also be selected from the list of active court's mediators. A court

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[23] Amendment from 16th of September 2011, J. of L. 2011, No. 233, item 1381, in force from 3rd of May 2012.

[24] T. S o k o ł o w s k i, "Rozwód" [Divorce], [in:] *System Prawa Prywatnego*, p. 684 and the following ones.

mediator must be a professional with pedagogical including elements of psychology, sociology or law. A mediator also must have practical skills of conducting mediation in family matters (Article 436 § 4 CPC 436).[25] If spouses have are familiar with the list of court's mediators they can make a choice independently at the beginning of the procedure of mediation.

All results and statements made during mediation must be supervised by the court. The court has the competence to use such results as elements on which its final judgment is grounded. With respect to that, there is a substantial controversial issue regarding the legal character of the written agreement of spouses. The problem concerns a situation when the court uses only same parts of the parental agreement, or generally works out its judgment based on those parts, ignoring the remainder of the agreement. The question is whether the remaining part of the agreement has a *inter partes* legal effect or/and whether it can play an important function during the process of detailed interpretation or execution of the court's ruling.

5. As was described above all results and statements made during mediation must be supervised by the court. From the legal point of view, the court can endorse the entire agreement as a whole and incorporate it without changes into final judgment (such possibility is a controversial question and is a subject of jurisprudence dispute). In practice, the court uses or works on only on some parts of parental agreement.

During the judicial review, first of all the court applies the principle of 'the best interest of the child' and after that comes the principle of legal equality between parents (former spouses). As was indicated above the institution of parental authority has near 40 elements and this structure is used as a standard during judicial review.

Family agreements prepared outside the scope of ADR are very rare. However the legal character of such contract is the same like agreements reached through ADR. During judicial review the court applies the same principles.

The mediator cannot be partial and must not be related to either of the spouses to avoid a conflict of interests. Article 183^3 CPC, states that "Mediator should keep impartiality." In case of mediator being partial, a spouse can raise objections to the court or motion to change the mediator.

All results and statements made during mediation must be supervised by the court. In fact, the court cares much more about the substantial contents of the agreement than the accuracy of the mediation process. At any time the court can *ex oficio* change its earlier decision, based on a claim referring to the principle of 'the best interest of the child'. As was indicated above the principle of 'the best interest of the child' is of absolutely essential importance to all child's matters.

[25] Amendment from 17th of December 2009, J. of L. 2010, No. 7, item 45, in force from 19th of April 2010.

In consequence, no elements of the parental agreement that are contradictory to or conflicting with child's welfare may be considered by the Court or included in the final judgment.

6. The Polish family law has a long tradition of protection of the best interest of the child, which started with the Act on adoption of 19th of July 1939. As well Polish State put forward in 1978 the very first draft of the UN Convention on the Right of the Child.[26] No solution in family cases even given by the ECHR, if its level of protection of child welfare is lower than the Polish standard will not influence Polish family law.

There are, however, some really difficult problem in connection with some judgments of the ECHR. Some of the ECHR rulings in family cases appears to be too one-sided and directed to only one human rights factor, namely the human rights of an adult person, while the Court seems to present insufficient understanding of the dual character of family law cases (and family situations) arising from the dual structure of the rights of a child.[27]

The influence of judicial decisions of the ECHR would be of more significance only if the Court recognized the priority of the protection of child welfare in connection of the protection of "child's human rights" before of the protection of human rights of an adult person. It is high time to recognize a child as a subject in its rights, capable of human rights protection equal or higher to the protection guaranteed to an adult person. What is more, a child is also subject to another system of protection: the protection of child welfare.

A child, even very small and seemingly unimportant, is entitled to a full scale right of protection of his or her privacy and family life. What is most important, from the moment a child is born, these two spheres of child's protection, that of privacy and that of family life, practically overlap. Over time, as the child grows, these two will gradually start to differentiate. The most significant feature of today's family law institutions is that they apply to or influence the already existing as well as the future situation of a child.

As a matter of fact some judicial decisions of the ECHR tend to be at a very early stage of a theoretical reflection which is too one-sided.[28] In some family law cases,

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[26] T. H a m m a r b e r g, "The Best interest of the child – what it means and what it demands from adult," [in:] *Children's Rights and Human Development*, ed. J. C. Willems, Antferp–Oxfort–Portland 2010, p. 582.

[27] The line of Strasbourg jurisprudence somewhere is not consequent: e.g. judgment of the ECtHR of 26 February 2002 in Fretté v. France (36515/97) which properly recognized the necessity of protection of the child's well being in compare with judgment of 22 January 2008 in E.B. v. France (43546/02) which appears as a example of the approach without the application of the principle of child's welfare protection.

[28] S. Chloudrhry, J. Herring notice that Strasbourg jurisprudence is not developed in such careful analytical style like cammon law jurisprudence does, S. C h l o u d r h r y, J. H e r r i n g, *European Human Rights and Family Law*, Oxford and Portland, Orgon 2010, p. 39.

the Court is inclined to first protect the human rights of an adult individual, without sufficiently addressing the child welfare. As said above, a child must be protected both as an individual being (a subject of human rights) and as a child involved in family relationships and as a child as a subject to human rights.[29] When all the above factors are combined and taken into consideration by the ECHR, its decisions may turn out more beneficial for child welfare. As can be seen from above, in any deliberations over family law cases, each of the three factors: child's welfare, child's human rights and human rights of an adult person, should be addressed. As it happens, currently it is the protection of the rights of an adult individual which seems to be the only one of the three taken into account in the making of judicial decisions. Such an approach can be no means considered sufficient.

[29] In addition, another problem is connected with the issue of protection of entire family welfare in relation with CHR system and Charter of Fundamental Rights, H. S t a n f o r d, "EU family law: a human rights perspective," [in:] *International Family Law for the European Union*, eds. J. Meeusen, M. Pertegás, G. Straetmans, F. Swennen, Antwerpen–Oxford 2007, p. 103.

SECTION II B

Michał Wojewoda
Doctor of Law, University of Łódź

PROOF OF AND INFORMATION ABOUT FOREIGN LAW

Polish law – as it stands on the books – does not devote too much attention to the problems of ascertainment, proof and application of foreign law. There are few statutory rules and they touch upon very basic issues only. Still, the problem is covered by abundant literature with most commentators (including judges of the Polish Supreme Court) taking similar views. These views will create the main point of reference for the current Report.

There exists, however, a darker side of the problem. Not infrequently 'the law in action' does not follow theoretical guidelines. Lack of sufficient training in private international law, unwillingness to make efforts to ascertain the content of foreign regulations and reluctance to embark on the task of understanding and applying the rules of an 'alien' legal system ('fear of the unknown' syndrome) – such considerations are often present in a day-to-day courts' practice in Poland. They lead to situations when a civil case with a clearly visible international element is solved according to the *lex fori* with no reference to conflict of laws issues. What is more, the above attitude seems to be present not only in courts, where it usually meets with tacit endorsement of professional counsels representing the parties, but also in non-judicial practice.

I. Conflict of Laws Rules

Conflict of laws rules in Poland are to be found both in domestic and international sources. The most important piece of national legislation is the statute of 4th February 2011 on Private International Law (hereinafter 'the PIL Statute'),[1] which replaced the former statute of 12th November 1965. The non-domestic sources, which in fact enjoy precedence over national law in their respective spheres of application, are various international conventions (bilateral and multilateral) as well as the conflict-of-laws regulations of the European Union.

[1] Dziennik Ustaw [Journals of Law – J. of L.] 2011, No. 80, item 432.

Despite the lack of a clear provision in this respect, it is universally agreed and have never been disputed by the Polish doctrine, that conflict of law rules – whatever their origin – should be mandatorily applied if a given situation has links with more than one legal system. From the constitutional point of view, all rules of private international law (both domestic and international) are a part of Polish law which ought to be observed and applied *ex officio* in any judicial or extrajudicial proceedings.[2]

Polish private international law consists predominantly of bilateral conflict rules which – employing various connecting factors – indicate the law applicable to particular types of issues. Depending on the factual situation, the governing legal system may be either Polish or foreign law. Similarly, in those cases when parties are free to choose applicable law, their choice may result in the application of either local or foreign provisions.

Taking into account that the most popular connecting factors in personal matters – such as capacity, family or succession issues – are nationality, domicile or habitual residence, cases concerning foreign nationals and/or persons living outside the territory of Poland are often decided according to foreign law (provided that the court has jurisdiction to hear the case). Moreover, it is not surprising that the applicable law will often be the law of one of the neighbouring states.

In commercial cases, on the other hand, it is the law of countries with which Poland maintains strong business links that is frequently applied. One has to remember that in such cases, in the absence of parties' choice, personal law of one of the contractors is usually applicable.[3] Thus, it may well be the law of a foreign business partner.

There is also a number of cases concerning traffic accidents that took place abroad when foreign law (*lex loci delicti*) applies pursuant to Art. 3 of the Hague Convention of 1971 on the Law Applicable to Traffic Accidents.

Summing up, according to the data provided by the Polish Ministry of Justice for the purposes of writing this Report, the greatest number of requests for information on foreign law were made in recent years with regard to:

- in succession matters: the law of Germany or of the United States;
- in family (matrimonial) matters: the Ukrainian law;
- in commercial matters: German, Italian or Spanish law.

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[2] See P. R y l s k i, "Stwierdzenie treści prawa obcego i obcej praktyki sądowej w polskim postępowaniu cywilnym" [Ascertaining the contents of foreign law and foreign court practice in the Polish civil procedure], [in:] *Aurea praxis aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego* [Aurea praxis aurea theoria. Book in honour of Professor Tadeusz Ereciński], eds. J. Gudowski, K. Weitz, Vol. I, Warszawa 2011, p. 1307; W. P o p i o ł e k, M. Z a c h a r i a s i e w i c z, "Poland," [in:] *Application of Foreign Law*, eds. C. Esplugues, J. L. Iglesias, G. Palao, Munich 2011, p. 280.

[3] See Art. 4–8 of the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union 2008, L 177/6.

Although the inquiries with the Ministry of Justice (which constituted the basis for the above generalization) are not obligatory, they are definitely the most popular tool used to ascertain foreign law in courts' practice (see *infra* II.C.1) and therefore the statistics presented here seem quite representative.

II. Foreign Law before Judicial Authorities

A. Nature of Foreign Law

The Polish legal system operates upon a basic assumption of the equality of laws of all countries.[4] There is no general rule which would give any precedence to the local (Polish) system and thus the application of foreign law should not be treated as an exception.[5] The decision as to which law is applicable should be taken impartially in each and every case on the basis of relevant conflict rules.

Foreign law is treated on equal footing as Polish law. It is considered as 'law' and not merely as a problem of facts. At the same time, the external character of foreign rules is specifically acknowledged. It is well accepted that Polish courts will sometimes decide the case according to substantive rules enacted by a foreign legislator. Still, the sovereignty of the Polish judge is not affected since the application of foreign law is based on the imperative command of a conflict rule, which – whether found in the PIL Statute, some international treaty or in one of the European Union regulations – will always possess the authority of a constitutional source of Polish law. Thus, one must come to a conclusion that it is the will of the Polish lawmaker that constitutes formal grounds for applying in Poland legal provisions enacted in another country.

Notwithstanding the points mentioned above, it has to be remembered that there are certain restrictions concerning the application of foreign rules before Polish courts.[6] The most important role in this respect is played by the *ordre public* exception (Art. 7 of the PIL Statute). According to this provision, foreign law shall not be applied if its application would lead to a result that is contrary to the fundamental principles of the Polish legal order.

B. Application of Foreign Law

Art. 1143 §1 of the Polish Code of Civil Procedure (hereinafter 'PCCP') makes it clear in its first sentence that foreign law in Poland is always applied

[4] 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. 266.

[5] M. P a z d a n, *Prawo prywatne międzynarodowe* [Private international law], Warszawa 2012, p. 82.

[6] See T. E r e c i ń s k i, J. C i s z e w s k i, *op. cit.*, p. 290 ff.

by the court *ex officio*. If relevant conflict rules point towards a foreign legal system making it applicable in a given case, the court is obliged to apply that law on its own motion. This statutory obligation is not circumscribed by any additional condition. In particular, the application of foreign rules is not subject to reciprocity in relations with states whose law is to be applied, nor does it depend on any formal request by the parties. Naturally, it is quite common that the parties would express their views as to which law is applicable (especially if there are doubts concerning the final outcome of the choice-of-law reasoning), but parties' opinions are not binding upon the court.

The judge must always take an independent decision based on the content of relevant choice-of-law provisions. Also in cases where the parties are free to choose the applicable law, the court should *ex officio* verify the effectiveness and validity of such choice in the light of the underlying conflict rule. It may also happen that the parties would change or revoke their original choice (even during court proceedings). Still, it must be kept in mind that the will of the parties may play some role only at the stage of ascertaining which law is applicable. Once it is established that the case is governed by a particular (foreign) legal system, the judge must proceed to apply the provisions of that system *ex officio*. Sometimes – when *renvoi* comes into play – the court will first check the conflict rules of foreign law, otherwise it will proceed to the merits of the case applying relevant substantive provisions.

C. Ascertainment of Foreign Law

The same provision of the PCCP (Art. 1143 §1 first sentence), which makes it obligatory to apply foreign law whenever conflict rules so require, determines also the question of ascertaining the content of foreign law. It is again the court that is encumbered with the task of getting to know what is the position of foreign applicable law with regard to the dispute at hand. The court, on its own motion, must take all possible steps to ascertain the applicable rules of the foreign system.

This does not mean, however, that the '*iura novit curia*' principle is accepted in Poland with regard to foreign law. The prevailing doctrinal view holds that the obligation to act *ex officio* does not amount to a (fictitious) presumption that the court actually knows foreign rules and regulations.[7] On the contrary, in practical terms it may be taken for granted that a Polish judge shall not be familiar with foreign law and therefore its contents must be proved by appropriate means. This marks an important difference with the situation when domestic law is applicable. Here the '*iura novit curia*' principle is fully operative and it leads to a conclusion that Polish law must never be subject to proof (thus, even expert legal opinions

[7] See W. P o p i o ł e k, M. Z a c h a r i a s i e w i c z, *op. cit.*, p. 279.

that are sometimes submitted in course of disputes based on Polish law are treated exclusively as private views of the plaintiff or the defendant).

Unlike the internal law, foreign rules will have to be identified and ascertained in a special process that will be inspired, or at least closely monitored, by the judge. This process shows close resemblance to regular evidentiary proceedings undertaken to establish facts relevant for a given case. Still, it is argued that proof of foreign law will have a distinct nature. Three main differences are usually mentioned here.[8] Firstly, the methods of ascertaining foreign law are not limited to means of proof envisaged by procedural law for proving facts. Secondly, the roles of the court and the parties are totally different. And last but not least, the consequences of wrong ascertainment of foreign law will differ in comparison to errors made in taking factual evidence.

All the above points deserve additional commentary – the first two are dealt with immediately below and the problem of potential faults while proving foreign law will be presented in part III of the Report in the context of judicial review.

1. As far as means of proof of foreign law are concerned, the PCCP expressly mentions only two possibilities. These are:

(i) the request to the Ministry of Justice concerning the text of foreign law and information on foreign judicial practice (Art. 1143 §1 PCCP second sentence), and

(ii) the expert opinion (Art. 1143 § 3 *in fine* PCCP).

At the same time, Art. 1143 § 3 PCCP makes it clear that the court may also avail itself of 'other means' of ascertainment. There are, for instance, special methods envisaged in various international instruments such as bilateral and multilateral conventions as well as the European Union law.[9] The *communis opinio* holds that in fact any possible source of information on foreign law may be utilized. Consequently, a non exhaustive list of informal possibilities which are open to the judge includes:

– consulting official journals, case law publications, various commentaries, academic textbooks, monographs and other legal literature;

– exploring Internet sources, especially official databases containing legal texts and/or relevant judgments of foreign courts.

It is also conceivable that the court will use its private knowledge acquired in former cases, during professional training, through personal contacts with foreign lawyers or otherwise. It is expected, though, that the court would always inform the parties of the source of its knowledge and whenever possible it should attach to the case dossier a copy of relevant documents so that the parties could comment and present their views. It is also recommended that when looking for the best way of finding the contents of foreign law in a given case, the court should

[8] See P. R y l s k i, *op. cit.*, p. 1319.

[9] These methods are presented in more detail in part V below.

consider more than one method. The final choice ought to be based on such considerations as reliability, efficiency and cost.[10] The value and the subject matter of the case should also be taken into account.[11] On the other hand, it is admitted that speed and immediacy plays a relatively smaller role in cases with an international element than in purely domestic disputes. One has to accept that arriving at the right decision will normally take more time when foreign law applies.[12] Regrettably, not always are the above considerations strictly followed in practice.

The only means of ascertainment that should not be utilized, as wholly inappropriate, is the questioning of witnesses or of the parties themselves. These methods are commonly used when establishing the facts of the case. At the same time, it is clear that no formal testimonies will be accepted in the process of ascertaining the content and meaning of foreign rules. Persons having specialized legal knowledge in a given field may be summoned as experts but not as witnesses. And the parties are naturally welcome to help the judge with proof of foreign law, just as they are free to comment upon all court's findings in this respect, but they should never be called to formally testify to that.

The expert opinion on foreign law is rarely used in civil proceedings in Poland despite its clear advantages. It may help the court not only with finding all the applicable rules but also with understanding and interpreting them in the actual circumstances of the case (the expert will have access to the whole case dossier). There are no special requirements with regard to persons acting as potential experts, except that they should possess sufficient expertise on the subject. Experts may be individual persons – either Polish nationals or foreigners – such as academics knowledgeable in foreign law or private lawyers with practical experience. It is equally possible to make inquiries to a scientific institute (domestic or international) with a view to acquiring their opinion.

The rules on civil procedure require that experts be impartial. They should be released from their duty (also upon party's request) if there are reasons to believe that their opinion may not be fully objective e.g. when there are family or business links or other close liaisons with either party.

The main reason why expert opinions are not very often used in practice seems to be practical difficulties in finding a good expert and potentially high costs, especially when an international institute is asked for assistance.

Despite the prevailing view, which finds support in the Supreme Court case law,[13] that the request to the Ministry of Justice should be used only after the court has

[10] P. R y l s k i, *op. cit.*, p. 1320–1321.

[11] M. M a r g o ń s k i, "Ustalanie treści obcego (czeskiego) prawa w sprawie o wyrównanie szkody doznanej w wypadku komunikacyjnym" [Ascertaining the contents of foreign (Czech) law in a case for damages concerning a traffic accident], *Glosa* 2013, No. 3, p. 86.

[12] Cf. T. E r e c i ń s k i, J. C i s z e w s k i, *op. cit.*, p. 281.

[13] See e.g. the Supreme Court judgment of 5 October 2012, IV CSK 68/12.

explored other possible means of ascertaining foreign law, this particular method appears to be a default choice in a majority of cases. There is a special department in the Ministry of Justice which gathers information on foreign law through various channels (see *infra* V.5). Depending on availability, the Ministry shall provide legal texts as well as other materials which might help to solve the relevant legal issues. The formal procedure requires that the inquiry to the Ministry of Justice be accompanied by the case dossier. This allows for additional commentaries or hints by the Ministry to be given to the court in order to avoid serious mistakes in the choice-of-law reasoning, such as forgetting about the *renvoi* mechanism or applying the PIL Statute when international conflict rules are applicable. Still, the legal texts or recommendations provided by the Ministry are not binding upon the court when deciding the case. All gathered materials as well as possible comments from the parties must be independently assessed by the judge so that a substantive judgment is handed down. This judgment, based on foreign law, may still be subject to control if an appeal is lodged by either party. Such appeal could concern any mistakes that influenced the final decision of the court including potential faults in ascertaining, interpreting and applying foreign law (for judicial review, see *infra* III).

It is admitted that one of the vital problems (difficult to resolve in practice) is the reliability of information on foreign law. There are no institutional methods of checking whether texts provided by the parties, found on the Internet or even sent by the Ministry of Justice are accurate and up to date. Similarly, it is hard to establish whether a decision of a foreign court cited as a point of reference is really a leading case or, possibly, an aberration from a long established line of judgments. Some of these problems may be avoided when special tools are employed with regard to proof of foreign law, such as the London Convention or the European Judicial Network, as they involve communication with competent institutions of the state whose law is applicable. These methods, which are definitely more reliable, are commented upon in more detail in part V below.

2. The second peculiarity of ascertaining the content of foreign law in judicial proceedings in Poland is the distribution of tasks between the court and the parties. It is well established that the main responsibility in this respect lies with the court and there is no obligation of the parties whatsoever to participate in the process of proving foreign law. Case law of the Polish Supreme Court is very consistent on this issue.[14] The parties are not obliged to provide information on foreign law and they must not be sanctioned in any way for not helping the court. On the other hand, the parties are always welcome to assist the judge by providing relevant information or by verifying the reliability of materials already gathered. They may

[14] See e.g. the judgments of the Supreme Court of 3rd March 2011, II PK 208/10 and of 14th July 2010, V CSK 7/10.

also present – throughout the time of proceedings – their views on how foreign law should be applied in a given case. Parties' rights in this respect are not always exercised in practise. Sometimes it is a result of the adopted tactics. A party to civil proceedings (especially the defendant) is not always interested in a prompt judgment. Similarly, any mention of foreign law can be intentionally avoided for fear of an unfavourable solution offered by an 'alien' legal system. However, if a party decides to be active, appropriate steps can be taken at any stage of the proceedings. Assuming that parties' arguments concerning foreign law (its applicability or its contents) are accurate, the court should not dismiss them on the grounds of late submission. It does not matter, either, that the initial position of the party in question was completely different. The problem of applicability of foreign law, its contents or its interpretation can be raised as late as in the party's final speech before the court of first instance or even in the course of appellate proceedings.[15]

Ascertaining foreign law by the court may entail certain costs. The most obvious ones are the costs of translations (even texts provided by the Ministry of Justice are often in original language). Expert opinions may prove quite expensive too, especially when a foreign institute is asked for assistance. All expenditure provisionally covered by the court will ultimately be treated as a part of the case costs to be apportioned between the parties according to the final outcome. Normally, these costs will be paid by the losing party and if there is no clear winner, they will be divided proportionally.

D. Interpretation and Application of Foreign Law

If a Polish court comes to a conclusion that foreign law is applicable in the case at hand, efforts should be made to solve the case exactly in the same way as it would be done in the country of origin. With regard to all substantive issues that await resolution, the Polish judge should follow, as far as possible, the approach normally adopted in the applicable legal system. This presupposes that when familiarizing themselves with texts of foreign regulations the judges should apply methods of interpretation typical of the system in question. If necessary, recourse should be made to legal commentaries and/or to relevant case law of foreign courts. It would be a clear mistake to use local interpretation methods or to apply analogies based on solutions adopted in similar cases under Polish law. It has to be kept in mind that even if the wording of applicable foreign regulations is identical with Polish law, there might still be differences concerning the interpretation and application of a given rule.

One of important implications that follow from the above remarks is the conclusion that also in cases when a gap in foreign law is encountered, the judge

[15] See the Supreme Court judgment of 9th May 2007, II CSK 60/07.

should embark upon the task of filling such gap in exactly the same way as it would be done in the country of origin. Local methods are prohibited.

This way of reasoning is rather unanimously accepted in legal writings.[16] It also finds support of the Supreme Court whenever problems of interpretation and application of foreign law appear before that court.[17] However, the day-to-day reality is less encouraging. The access to foreign materials is often limited. Not infrequently must the court solve the case relying only on a bear text of a foreign statute with no supplementary materials. What is more, the judge will normally not be able to read and understand the text in its original version. Translations into Polish language are used. Since there are no dedicated court interpreters who would specialize in translating legal texts, a risk that a gist of legal controversy may simply be lost in translation is relatively high (all texts in foreign languages which are used as evidence in civil proceedings must be 'processed' by certified sworn translators – they are not legal specialists, though, but people with general linguistic competence).

E. Failure to Establish Foreign Law

If the application of conflict rules results in a conclusion that foreign law is applicable but – despite court's efforts – the contents of foreign law is not established in reasonable time, then Polish law becomes applicable as a substitute legal system pursuant to Art. 10 section 2 of the PIL Statute.

It is universally acknowledged that the above provision must not be an excuse to avoid the application of foreign law. The recourse to the *lex fori* is the *ultimum refugium* to be used when all efforts made by the court with regard to proof of foreign law have failed.[18] One has to remember that this possibility was introduced in order to avoid the denial of justice. The solution is based on the assumption that if the court has jurisdiction and there are no formal obstacles which would thwart the proceedings, the case should end with a substantive judgment. This judgment must always be based on some legal system and the use of local law is a natural choice when rules of a generally applicable foreign system are not accessible.

It should be pointed out that Art. 10 section 2 of the PIL Statute is a general clause whose sphere of application was intentionally left unclear.[19] The open ended

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[16] See T. E r e c i ń s k i, J. C i s z e w s k i, *op. cit.*, p. 283 ff.

[17] Cf. the Supreme Court judgment of 5 October 2012, IV CSK 68/12.

[18] Cf. P. R y l s k i, *op. cit.*, p. 1334.

[19] Cf. P. C z u b i k, "Klauzula generalna przewidująca 'rozsądny termin' dla ustalenia treści prawa obcego – rzekome czy rzeczywiste niebezpieczeństwo dla praktyki notarialnej" [The 'reasonable time' clause for ascertaining the contents of foreign law – an imaginary or real threat to the notarial practice], *Nowy Przegląd Notarialny* 2012, No. 3(53), p. 11.

character of the provision in question results from the referral to 'reasonable time' during which foreign law should be ascertained. In an attempt to make the use of the above rule more predictable following remarks can be made:

– Art. 10 section 2 must not be relied upon unless the court has undertaken serious efforts with regard to finding the content of foreign law; the absolute minimum seems to be the inquiry with the Ministry of Justice resulting in a negative response;

– the 'reasonable time' criterion should be seen in the special context of proceedings involving international elements where foreign law turns out to be applicable; it is submitted that in such proceedings the necessity to thoroughly assess all circumstances of the case and to apply foreign rules in a proper manner should be given precedence over a need for a prompt solution (in urgent situations temporary measures based on domestic law may be taken).[20] By and large, such cases may be expected to last longer than disputes of purely internal character where Polish law applies;

– in assessing how much time should be devoted to establishing the contents of foreign law, the subject matter of the proceedings and its value should be taken into account;

– the court shall not be excused from its obligation to ascertain foreign law even if the parties express their readiness to revert to the Polish system as a substitute option (the situation is naturally different if – further to relevant conflict rules – the parties are free to choose local law as applicable also during court proceedings).

Some authors observe[21] that difficulties with ascertaining foreign law should not be validly raised in relation to legal systems of the Member States of the European Union, especially now when the European Judicial Network has become operational (see *infra* V.2). One can also find a more radical view that in all situations when a legal system of a country with which Poland has diplomatic relations applies, Art. 10 section 2 of the PIL Statute should never come into play.[22]

In any event, it is clear that courts must not give up their efforts to ascertain the contents of applicable law too easily. Art. 10 section 2 of the PIL Statute does not provide a legitimate way to circumvent the conflict of laws mechanism making it possible to try an international case according to the *lex fori*.

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[20] See T. E r e c i ń s k i, J. C i s z e w s k i, *op. cit.*, p. 281.

[21] M. C i c h o m s k a, "Metody ustalania treści prawa obcego a Europejska Sieć Sądownicza" [Methods of ascertaining the contents of foreign law and the European Judicial Network], *Polski Proces Cywilny* 2012, No. 2(7), p. 307.

[22] See P. C z u b i k, *op. cit.*, p. 8, 10.

III. Judicial Review

A. Conflict of Law Rules

Any defects in the interpretation or application of conflict of law rules may constitute the basis for an appeal to the court of second instance. As it was already mentioned, private international law regulations are a part of Polish law and thus all errors relating to their use by the court are treated exactly in the same way as other errors in law.

In practice several different types of mistakes may appear. The most evident ones will include:

– applying conflict rules of the domestic PIL Statute when an international convention or an EU regulation should be used;

– wrong characterization of the claim resulting in identifying the applicable law on the basis of conflict rules devoted for a different sort of problems (e.g. treating the case as contractual when conflict rules for delicts should rather be used);

– faulty interpretation of a conflict rule leading to the application of an inappropriate legal system;

– an error concerning one of general mechanisms of private international law such as *renvoi* or the *ordre public* clause.

B. Foreign Law

As an introduction, it should be pointed out that all potential mistakes with regard to applicable foreign law would also constitute – by itself – an offence of Polish law. That is because all such mistakes can be treated as a breach of private international law of the forum whose rules require that foreign law be applied correctly.[23] However, it is universally accepted in Poland that errors in applying or interpreting foreign law may, and in fact should, be invoked directly. They are all errors in law and as such they are subject to revision in appellate proceedings.

Moreover, since the appeal model adopted in Poland requires total reappraisal of the case merits, the court of second instance should take into account, *ex officio*, also those substantive errors that are not indicated by the appellant.[24]

It can be added that mistakes concerning foreign law will not be different from those which appear in domestic cases with regard to Polish substantive

[23] T. E r e c i ń s k i, J. C i s z e w s k i, *op. cit.*, p. 294–295.

[24] P. R y l s k i, *op. cit.*, p. 1339.

provisions. One could mention here, for example, choosing a wrong set of applicable rules, applying provisions which are no longer in force, wrong interpretation of foreign law or an incorrect filling up of a legal gap in the applicable legal system.[25]

C. The Supreme Court Appeal

In both types of cases – including breaches of conflict rules and breaches of foreign law – there might be a possibility to lodge an appeal to the Supreme Court for the cassation of the decision of the court of second instance. This is an extraordinary type of appeal under Polish law. Generally, there must be a good reason for the case to be heard by the Supreme Court (these reasons are listed in the PCCP). There are also certain negative conditions barring cassation in some types of cases. Consequently, the first stage of review proceedings in the Supreme Court involves a general (formal) appraisal of the case in order to grant or deny leave to appeal.

The material grounds to lodge a cassation – to be assessed at the second stage of review – are also rather limited. In cases with an international element, the cassation may be successful if a fault in applying or interpreting the law is alleged and proved by the appellant. Such fault may concern either rules of private international law or the substantive provisions of foreign law. In the latter case, it will normally be the task of the appellant to present necessary justification and to prove the alleged fault in the application of foreign law (otherwise no leave to appeal will probably be granted).[26] This may involve a private expert's opinion that would authoritatively explain the way in which foreign law should be applied. If necessary, the Supreme Court may take required steps to ascertain foreign law by itself in order to review the case on its merits and to rectify faulty judgments of lower courts. In practice, however, if the arguments of the appellant are persuasive, the case will be sent back for reappraisal to the court of second instance with some binding guidelines. These guidelines will normally highlight the most important legal points to be reconsidered, including problems of foreign law.

Summing up, it has to be stressed that the sheer fact that private international law issues are at the bottom of an appeal – either to the court of second instance or to the Supreme Court – will mark no practical difference during appellate (cassation) proceedings.

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[25] Cf. T. E r e c i ń s k i, J. C i s z e w s k i, *op. cit.*, p. 298.

[26] Cf. W. P o p i o ł e k, M. Z a c h a r i a s i e w i c z, *op. cit.*, p. 283.

IV. Foreign Law in Other Instances

Due to a constant increase of the cross-border relations in civil matters, which is observed in Poland, problems of ascertainment, interpretation and application of foreign law become more and more popular also in non judicial proceedings. Conflict rules are addressed to all persons and thus they should be observed not only by courts. In fact, there is a number of institutions that become involved – in their various capacities – in private law cases with foreign element.

Regrettably, no special rules have been put in place to facilitate access to foreign law in such instances. The Code of Civil Procedure as well as relevant international instruments apply only in judicial proceedings. No other bodies may avail themselves of special procedures which are designed to help ascertain the contents of foreign law (see *supra* II.C and *infra* V).

The most important instances when foreign law may prove applicable outside the courtroom settings are briefly presented below.

1. Civil Registry

As far as public bodies are concerned, private international law issues are most commonly present in the activities of the Civil Registry. It is an administrative authority entrusted with various tasks with regard to civil status of natural persons. To take some examples, Civil Registry Officers shall evaluate the capacity of spouses to enter into marriage, are competent to receive declarations of paternity with regard to illegitimate children or may assist in the process of making a will (testament).

It is not unusual anymore that foreign elements would appear in the course of such activities. Typically, it will be a non-Polish nationality of the interested person that causes private international law questions. Since nationality is a popular connecting factor in family matters, foreign law can prove applicable. Surprisingly, though, there are no special procedures nor any officially authorized methods available to Civil Registry officers that would help them find the applicable foreign rules. The Ministry of Justice turns down potential requests to provide the text of foreign law since Art. 1143 PCCP does not apply in non judicial proceedings. That is why an unofficial tool is sometimes employed in practice whereby inquiries are made with local diplomatic posts of the countries whose law is applicable. It is to be remembered, though, that such addressees are under no obligation to provide legal information and when they do, it is only out of international courtesy.[27]

[27] Cf. M. M a r g o ń s k i, "Metodyka ustalania treści obcego prawa spadkowego" [The methodology of ascertaining the contents of foreign succession law], *Przegląd Sądowy* 2009, No. 6, p. 76.

2. Notaries

Another typical group of situations where problems of foreign law may turn up is the daily practise of notaries. Notaries in Poland are qualified private lawyers performing certain public functions (Latin notaries). In particular, some legal acts, transactions or declarations must be made before or at least be authorised by a notary. Sometimes a special form of a notarial deed is necessary.

In all such situations notaries are obliged to make sure that acts performed before them are not illegal and are not effected *in fraudem legis*. This principle applies with regard to all activities undertaken under Polish law, but it is not clear to what extent it should be used in cases with an international element.[28] It is submitted that notaries should know and apply conflict rules which are in force in Poland. They ought to be prepared to advise their clients whether Polish or foreign law applies in the situation in question. However, the notary is not expected to know foreign law. Thus, they may refuse to assist in a legal transaction if they cannot secure its legality and correctness.[29] It is possible, though, that a notary will be ready to make a (private) effort to ascertain the contents of the relevant legal system (in order not to lose clients).[30] Sufficient knowledge of foreign law will make it possible that a legal act in question is performed in a respective notarial form. Still, no formal help in this respect is offered to notaries by the Polish legislator.[31]

3. Arbitration

Similarly, there exist no special regulations concerning proof of foreign law in arbitration proceedings. If a given case is to be decided according to foreign rules, the arbitrators will not enjoy any of the official possibilities which are open to the state judge. In particular, no assistance from the Ministry of Justice will be available or the possibility to use the London Convention and the European Judicial Network (see *infra* V). Nevertheless, as it becomes clear from the experience of one of the permanent courts of arbitration in Poland (the court attached to the Polish Confederation Lewiatan), foreign law is hardly ever invoked in arbitration proceedings.

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[28] M. P a z d a n, "Czynności notarialne w międzynarodowym prawie spadkowym" [Notarial activities in the international law of succession], *Rejent* 1998, No. 4(84), p. 100.

[29] A. O l e s z k o, "Stosowanie prawa obcego przez polskiego notariusza" [The application of foreign law by a Polish notary], [in:] *II Kongres Notariuszy Rzeczypospolitej Polskiej. Referaty i opracowania* [2nd Congress of Notaries of the Republic of Poland. Papers and Essays], Poznań–Kluczbork 1999, p. 212.

[30] See M. P a z d a n, "Czynności notarialne…", p. 100–101.

[31] A. O l e s z k o, *op. cit.*, p. 210–212.

4. Counsels

Finally, a couple of words should be said with regards to advocates, legal counsels and other private lawyers, whose role consists in advising or representing their clients. Whenever they come across private international issues in their professional practice, e.g. when preparing a contract or drafting a will in a case where foreign law applies, they will normally take recourse either to Internet sources, various databases and library materials or they will try to use unofficial contacts with their counterparts in other countries to obtain sufficient legal feedback. Again, it has to be repeated that there are no institutionalized methods whatsoever that could be utilized in this respect.

V. Access to Foreign Law: Status Quo

1. General Remarks

The Republic of Poland participates in various international schemes concerning information on foreign law. Generally they are based on multilateral or bilateral conventions but there is also a relatively new mechanism – the European Judicial Network – that was introduced by the European Union in recent years. All these schemes are used as means of acquiring knowledge about foreign law in cases with an international element but they are designed to help the state courts only. As it will be explained below, the central role in the whole process is always played in Poland by the Ministry of Justice.

It should be remembered that the same channels of communication are utilized when information on Polish law is requested by other countries. Still, it is worth adding that the Polish Sejm (the lower chamber of Parliament) runs also a special on-line database[32] where all legal acts enacted in Poland from the year 1918 until today (both binding and obsolete) can be accessed free of charge. Those who visit the website can use an automated search engine to find the particular texts, but no acts are delivered on individual demand and no hints concerning interpretation of Polish law are given. All texts are available exclusively in Polish language. The particular texts are accompanied by a bibliographic note explaining, among other things, when a given act entered into force and if it is still binding. Consolidated versions are also available with regard to those acts that underwent revision.

Another important internet site that should be mentioned here is the official database with decisions (judgments) of selected state courts of all levels (with the exclusion of the Supreme Court).[33] The search engine makes it possible to look

[32] http://isip.sejm.gov.pl (last accessed on November 27, 2013).

[33] http://orzeczenia.ms.gov.pl (last accessed on November 27, 2013).

for decisions of a particular court, to track down decisions concerning a given legal problem or to find an individual case identified by its official index. The number of judgments available to the public (in both civil and criminal cases) is still growing and currently it exceeds 33 thousand.[34] Still, only the original Polish version of the decisions and their motives is published. A similar service concerning case law of the Supreme Court is available.[35] There is also a separate database with judgments of administrative courts.[36]

Alongside public databases, there are many commercial ones (run on-line or available on CDs) which provide information on Polish law. These databases would normally contain both legal texts, court decisions, commentaries, articles as well as templates of typical contracts, court petitions and other legal motions. At least some portion of the materials will normally be accessible in selected foreign languages such as English or German. The translations are not officially authorized but they are quite reliable. The fees for using such databases depend on the type and scope of required access.

2. European Judicial Network

Being a member of the European Union, Poland participates in a project called the European Judicial Network. It is based on the Council Decision of 28 May 2001[37] but the initiative got a new impetus following the amendments introduced by the Decision of the European Parliament and of the Council of 18 June 2009 (effective as from 1 January 2011).[38]

The objectives of the network are two-fold. On the one hand, basic information on national laws of particular Member States is made available to the general public through a special internet site[39] where relevant data is available in 22 languages of the European Union. On the other hand, judicial cooperation in civil and commercial matters is facilitated, as between the Member States, by establishing a special system of exchange of legal information. The network consists of many contact points which are established internally in all Member States. In Poland, the responsibilities of a contact point have been assigned to the Ministry of Justice. Acting in this capacity, the Ministry provides information on Polish law on request from other contact points, but at the same time it gathers information on foreign law when it is needed in Polish courts. The network was meant

[34] The database last accessed on November 27, 2013.

[35] www.sn.pl/orzecznictwo (last accessed on November 27, 2013).

[36] http://orzeczenia.nsa.gov.pl (last accessed on November 27, 2013).

[37] Council Decision 2001/470/EC.

[38] Decision 568/2009/EC of the European Parliament and of the Council.

[39] Originally http://ec.europa.eu/civiljustice, now https://e-justice.europa.eu (last accessed on November 27, 2013).

to be flexible as well as reliable. Accordingly, there are no formal requirements concerning languages or methods of communication between contact points and the reliability of the system is guaranteed by designated (experienced) judges who are involved in the activities of contact points. Interestingly, the participation of associations of other legal professions has been also envisaged in the network.

It still remains to be seen how the new possibilities will be explored in practice. For the time being, it seems that local judges in Poland are not sufficiently acquainted with the functioning of the network (cf. *infra* V.5).

3. London Convention

Another important international instrument that has been applicable in Poland for more than 20 years is the 1968 London Convention on Information on Foreign Law.[40] It allows Polish courts to request legal information from abroad whenever law of another participating country proves applicable in a case at hand. Here again, it is the Ministry of Justice that acts as an intermediary who will pass the local court's request to the competent institution of another state. Taking into account that the number of signatories applying this international act counts 45, the London Convention seems to be a mighty instrument.

But the reality is not so encouraging. There are certain drawbacks that make the whole system rather unpopular. The request must be prepared in the official language of the addressee, which involves translations. Only the traditional methods of communication are used, which makes the process slow, especially that not all countries react with desired urgency. Finally, it has to be remembered that the request is not accompanied by the dossier of the case so replies are often very general and not really tailored to the facts of the dispute. It is observed that in some instances the internet search for a text of applicable law may bring similar results as a lengthy procedure of the formal request under the Convention.[41]

4. Bilateral Treaties

When presenting, from the Polish perspectives, the instruments allowing for the exchange of information concerning various legal systems, one should also mention bilateral acts i.e. the consular conventions as well as numerous agreements on judicial cooperation in civil (and criminal) matters. Over the past years Poland has signed such conventions with some 30 countries. There is also one special instrument devoted exclusively to proof of foreign law, which is the treaty of 1986 between Poland and Belgium on the exchange of legal information.

[40] Poland ratified the London Convention in 1992.

[41] Cf. M. C i c h o m s k a, *op. cit.*, p. 302.

All the above international agreements provide for the possibility of requesting information concerning the legal system of the other contracting state. This will ensure access to legal texts and – in some cases – also to case law or other materials that can help with the interpretation of foreign rules.

5. The role of the Ministry of Justice

An important factor in all cases when information on foreign law is officially gathered in Poland is the involvement of the Ministry of Justice. To be more precise, it is the Department of International Cooperation and Human Rights that will process all inquiries concerning foreign legal systems. It is a regular practice that the Polish court seized of the case where foreign law applies would address the Ministry of Justice on a general procedural basis of art. 1143 §1 PCCP and the Ministry would then be free to choose the best way of gathering requested information. Sometimes bilateral treaties are put into operation and in other cases the European Judicial Network is utilised. Some authors assert, though, that the Ministry must not decide for itself and it should always turn back to the court for clarifications if an international instrument is to be used.[42] This definitely holds true with regard to the London Convention which must be always expressly invoked by the very court that makes an inquiry and where some additional conditions specified by the Convention (e.g. translations) must be met at the time of preparing the original request.

As far as statistical data is concerned, in the year 2012 the Ministry of Justice received 988 court inquiries regarding foreign law. The majority of cases concerned European legal systems (659), then the laws of various North American (138) and Asian (108) countries, with the rest distributed between the states of Africa (37), South America (32) and Australia (14). In 2013 (until October), the number of requests reached 1171 (which reflects the ongoing intensification of international relations in civil matters). The regional distribution of cases follows roughly the same pattern as in the preceding year – Europe (791), North America (157), Asia (134), Africa (41), South America (34) and Australia (14).[43]

It has to be added that sometimes, in more standard cases (e.g. when the capacity of a foreigner to marry is at stake), the Ministry of Justice will be able to provide requested information from its own archives without launching any extended search.

As a final remark it must be reiterated, that whatever materials are received by the court from whatever source, they must be always critically analyzed as to

[42] *Ibidem*, p. 308–309.

[43] All data based on information received from the Ministry of Justice for the purposes of this Report.

their suitability in the dispute at hand. What is more, as far as the substantive solution is concerned, the court should take the approach that would conform, as far as possible, to the attitude adopted in the country of origin. One has to remember that every case where foreign law applies should ultimately be solved *aliena lege artis*.

VI. Access to Foreign Law: Further Developments

The remarks in this final part of the Report will be rather subjective as they reflect personal beliefs of the author. These beliefs are based on the author's professional experience as a legal counsel and on his academic involvement as a university teacher. The conclusions can be made in several points:

1. In relation to the present situation concerning access to foreign law in Poland, no serious reform seems necessary. As far as judicial authorities are concerned, a few methods of ascertaining foreign law are expressly envisaged and regulated by the law but at the same time the judge is invited to use any other means in order to acquire sufficient knowledge of the applicable legal system. This solution is satisfactory. As it is argued below, it is not the law but the awareness and attitude of judges that should be changed so that the challenge of applying foreign law is properly tackled.

Admittedly, the use of expert's opinions could be more popularised. It has to be realised that especially in complex cases when foreign law applies, the court will hardly be able to hand down a correct judgment if no assistance is provided from an impartial expert, with an inside view of the applicable legal system, who is given full access to the facts of the case. To this end experience of other European countries (e.g. Germany) could be used where experts on foreign law are often invited to assist in the proceedings. Possibly, some international courses could be organised – under the aegis of the European Union or otherwise – to train potential experts, to make them understand their role in international cases and to teach them proper methodology of writing opinions on foreign law.

2. In case of non judicial bodies – such as Civil Registry – some reform of the law could probably be undertaken. Still, it appears that what would do here is the extension of the sphere of operation of Art. 1143 PCCP whereby all public institutions, competent in cases where international elements may turn up and where foreign law might apply, are allowed to make inquiries to the Ministry of Justice.

3. As far as private lawyers (including notaries) are concerned, it seems that they should develop their own ways of getting information on foreign law – either obtaining it from the Internet, the official or commercial databases, or acquiring it through a network of professional connections with lawyers from other countries.

4. Also in the course of proceedings before arbitral tribunals, there appears to be no compelling reasons to introduce major changes. Parties that decide for

arbitration ought to be aware that institutionalised methods of proof of foreign law are not available here. At the same time they should know that other ways are still open. And although the task of ascertaining foreign law would normally lie with the parties and not with the arbitration court, this outcome is not surprising. Arbitration proceedings are generally less restrictive. It is to be remembered that powers of the arbitral tribunal are limited both in relation to proving facts as well as ascertaining applicable law. Still, it is quite possible that the arbitrators themselves will possess sufficient knowledge of foreign law. Such knowledge will often be a good reason for appointing a particular arbitrator (arbitrators attached to permanent courts of arbitration in Poland are often people with good command of foreign languages and with considerable experience acquired abroad under foreign legal systems).

It should not be overlooked, either, that the parties to arbitration proceedings may decide to have their case decided not according to some national law of a given country but rather *ex equo et bono* pursuant to Art. 1194 §1 PCCP.

5. As far as conflict rules in Poland are concerned it does not seem proper to change them in a way which would reduce the number of cases where foreign law applies. The *lex fori* approach is not the right answer for the challenges of present times. Indeed, private international law could be simplified in many respects but this does not mean that there should be extra privileges for the law of the forum.

6. What is really necessary, in the opinion of this author, are serious changes concerning the formation and training of professional lawyers. They should be taught to accept the simple truth that various national laws are equal and that the local system does not enjoy any precedence over foreign law. They should be well trained in private international law and be able to identify the applicable legal system whenever an international element appears. In the ideal world, they should be accustomed to actively looking for information on foreign law by utilising modern techniques, especially by exploring available internet sources. They should also be proficient in using electronic databases and various search engines.

It is clear that all such skills take time and effort to develop. Thus, it seems necessary to adapt, accordingly, the university curricula and internship programmes as well as various schemes of on-going training addressed to fully fledged professionals. Lawyers should be aware how important the command of foreign languages is and what benefits may be taken from learning comparative law. The current situation in Poland is not satisfactory in this respect. Suffice it to say that in most law schools private international law is not a compulsory subject. Also special training programmes for future advocates and legal counsels do not cover conflict of laws issues. As a result, it is quite possible that a legal professional admitted to the bar in Poland will not be aware that sometimes the Polish court is obliged to solve the case according to foreign law, let alone helping the judge with finding what that law is.

Maksymilian Pazdan
Professor of Law, Silesian University, Katowice
Koźmiński University Law School, Warszawa

Maciej Zachariasiewicz
Doctor of Law, Koźmiński University Law School, Warszawa

THE EFFECTS OF CORRUPTION IN INTERNATIONAL COMMERCIAL CONTRACTS

I. The civil law consequences of corruption in general

1. Corruption as a criminal offence in Poland

1.1. Corruption in a public sector

Polish criminal legislation concerning corruption is extensive.[1] The Penal Code of 6 June 1997 (hereafter: k.k.),[2] already at the moment of its enactment, contained rules combating the corruption in the public sector. These rules penalize bribery of a person who performs a public function. The core provisions are Articles 228, 229 and 230.[3] Their main parts are reproduced below.

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[1] On the Polish anti-corruption legislation in English see in general: J. B o j a r s k i, "The responsibility for handling proceeds of corruption in Polish criminal law," *Journal of Financial Crime* 2002, Vol. 10, No. 2, p. 146–152; i d e m, "Combating fraud and corruption in Poland," *Company Lawyer* 2007, Vol. 28, No. 9, p. 286–287. See also e.g. Phase 3 Report on Implementing the OECD Anti-bribery Convention in Poland, June 2013 (available at www.oecd.org).

[2] Ustawa z dnia 6 czerwca 1997, Kodeks karny, Dziennik Ustaw [Journal of Laws – J. of L.] 1997, No. 88, item 553 with later changes.

[3] The translation of the provisions of the Polish Penal Code is based on the translation provided by International Money Laundering Information Network (available at www.imolin.org). The translation was however changed were necessary in order to reflected recent amendments made to the Code.

Article 228

§ 1. Whoever, in connection with the performance of a public function, accepts a material or personal benefit or a promise thereof, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

§ 6. The penalties specified in § 1–5 shall also be imposed on anyone who, in connection with the performance of a public function in a foreign country or an international organization, accepts a material or personal benefit or a promise thereof, or requests such a benefit, or subjects the exercise of his official duties upon receiving it.

Article 229

§ 1. Whoever gives a material or personal benefit or promises to provide such a benefit to a person performing public function, in relation to that function shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

§ 5. The penalties specified in § 1–4 shall also be imposed on anyone who gives a material or personal benefit or promises to provide such a benefit to a person performing public function in a foreign country or an international organization, in relation to that function.

§ 6. A Perpetrator of the crime specified in § 1–5 shall not be subject to penalty, if a material or personal benefit or its promise thereof have been accepted by a person performing public function, but the perpetrator has informed the criminal authorities of that fact and has revealed all the relevant circumstances of the crime, before the authority had learned of the crime.

Article 230

§ 1. Whoever, claiming to have influence in a state, local agency, or an international or national organization, which exercises control over disposition of public funds, or causes a perception of others or strengthens such a perception as to the existence of such influence, undertakes to intercede in settling a matter in exchange for a material or personal benefit or for a promise thereof, shall be subject to the penalty of deprivation of liberty for a term of between 6 months to 8 years.

Variation of these rules concern acts of "lesser significance,"[4] benefits of considerable value, situations in which perpetrators breach of public function constitutes also violation of law, and those, in which official subjects the exercise of his official duties upon receiving a benefit. These variations can lead to less or more severe penalties.

The notion of the person performing a public function is defined in Article 115 § 19 k.k. added to the Penal Code by an amendment of 13.6.2003.[5] It reads as follows:

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[4] The act of a lesser significance, as defined in Article 228 § 2 k.k., encompasses situations, in which the benefit provided to the perpetrator "exceeds only to an insignificant degree the gratification, which is socially acceptable, i.e. the small, customary gifts." Cf. A. M a r e k, [in:] A. M a r e k, J. S a t k o, *Okoliczności wyłączające bezprawność czynu* [Circumstances Excluding the Unlawfulness of An Act], Kraków 2000, p. 46–47; A. M a r e k, *Kodeks karny* [Criminal Law], Warszawa 2010, p. 505; E. P ł y w a c z e w s k i, E. G u z i k-M a k a r u k, [in:] *Kodeks karny. Komentarz* [Penal Code: Commentary], ed. M. Filar, Warszawa 2012, p. 1123 (they underline that it refers to acts that are socially less harmful, because of a lower rank of the public function played by the perpetrator, or a nature of the need which is to be satisfied).

[5] J. of L. 2003, No. 111, item 1061.

A person performing a public function includes a public official, a member of the local governing body, a person employed in the organization with has a power to dispose of public funds, unless it performs only services, as well as other persons, whose powers and obligations as to public activity are defined or recognized by the statute or an international convention, which binds the Republic of Poland.

By introducing a definition of the term "person performing a public function," the Polish legislator has made a stand against the attempts of the doctrine to limit the scope of the term only to public officials.[6]

For a person to commit the crime specified in Article 228 k.k. it is enough to accept a promise of the benefit. To accept a benefit does not have to occur in any specific form; conversely, it can be expressed in any form.

The acceptance of a material benefit under Article 228 k.k. encompasses various kinds of economic contributions, such as *inter alia* gifts, assignments of claims, remission of debts, or preferential loans.[7] The benefit can be given to the perpetrator, a member of his or her family, or other person indicated by the perpetrator. Both the promise of the benefit, as well as its acceptance must be linked to performing the public function by the perpetrator.

The term "personal benefit" under Article 228 k.k. is defined broadly. It includes various benefits of non-economic value, important for the person receiving it, such as improving his or her situation or employment status, providing nomination to a scientific council of a prestigious academic journal or enhancing the position in academia, allowing for a career in mass media or otherwise gaining popularity, or being pleasurable (e.g. sexual intercourse).[8]

The crime defined in Article 228 § 1 k.k. can only be committed intentionally.[9]

Article 229 § 5 k.k. penalizes the so called "foreign bribery offence," i.e. giving bribes to persons performing public functions in foreign states or in the international organizations.[10]

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[6] J. W o j c i e c h o w s k i, *Kodeks karny. Komentarz. Orzecznictwo* [Penal Code. Commentary. Case Law], Warszawa 2002, p. 434. In favour of defining widely the term "person performing a public function" e.g.: R. A. S t e f a ń s k i, "Osoba pełniąca funkcję publiczną jako podmiot łapownictwa" [Person Performing a Public Function Acting As a Bribe-Taker], *Prokuratura i Prawo* 2000, No. 11, p. 137 *et seq.*; A. M a r e k, *Prawo karne* [Criminal Law], Warszawa 2001, p. 634–635; E. P ł y w a c z e w s k i, E. G u z i k-M a k a r u k, *op. cit.*, p. 1121. In case law see judgments of the Supreme Court of: 20.06.2001, I KZP 5/01, OSNKW 2001, No. 9–10, item 71; 18.10.2001, I KZP 9/01, OSNKW 2001, No. 11–12, item 87; 28.03.2002, I KZP 35/01, OSNKW 2002, No. 5–6, item 29.

[7] According to E. P ł y w a c z e w s k i and E. G u z i k-M a k a r u k, the "material benefit" should include any good, which may satisfy a need, if its value can be expressed in money (E. P ł y w a c z e w s k i, E. G u z i k-M a k a r u k, *op. cit.*, p. 1122). See also O. G ó r n i o k, "O pojęciu 'korzyści majątkowej' w Kodeksie karnym (problemy wybrane)" [On the Term 'Material Benefit' in the Penal Code (Selected Problems)], *Państwo i Prawo* 1978, No. 4, p. 110.

[8] Cf. L. G a r d o c k i, *Prawo karne* [Criminal Law], Warszawa 1998, p. 268; A. M a r e k, *Kodeks karny*, p. 505; E. P ł y w a c z e w s k i, E. G u z i k-M a k a r u k, *op. cit.*, p. 1122.

[9] Cf. A. M a r e k, *Kodeks karny*, p. 506.

[10] See in more detail and for the evaluation of that rule by OECD: Phase 3 OECD Report on Implementing…, p. 13 *et seq*.

1.2. Trade of influence

By an act of 13.6.2003[11] the Polish Penal Code was importantly amended. A new provision was introduced in Article 230a, which supplements the rules described above. It penalizes the so called "trade of influence." In that regard, it implements the Council of Europe Criminal Law Convention on Corruption of 27.1.1999.[12] Article 230a reads in the pertinent part:

> § 1. Whoever gives a material or personal benefit or promises to provide such a benefit in exchange for interceding in settling a matter in a state, local agency, or an international or national organization, that exercises control over disposition of public funds, which amounts to illegal influence on the decision making, shall be subject to the penalty of deprivation of liberty for a term of between 6 months to 8 years.

1.3. Corruption in a private sector

In order to respond to international obligations (Council of Europe Criminal Law Convention on Corruption, Joint Action 98/742/JHA on corruption in the private sector),[13] which require that the corruption in the private sector is combated, Polish Penal Code was amended so that a new provision was introduced in Article 296a.[14] This provision reads:

> § 1. Whoever, while performing a function of a manager of an undertaking pursuing economic activity, or being employed therein, or performing services for that undertaking, requests a material or personal benefit or accepts such a benefit or a promise thereof in exchange for abuse of his or her rights, or nonfeasance of obligations which could inflict a financial damage to the undertaking, or for an act of unfair competition or for a preferential treatment being given to a purchaser or seller of goods, service provider, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.
>
> § 2. A similar penalty will be imposed on a person who gives a material or personal benefit or promises to provide such a benefit in cases specified in § 1.

In the above-mentioned provision, Polish legislator criminalizes the so called managerial corruption, both on the passive side (act of a person who accepts the benefit – Article 296a § 1 k.k.), as well as on the active side (act of a person who gives the benefit – Article 296a § 2 k.k.). The rule introduced in Article 296a k.k. has a broad scope of application. The relevant elements of the rule include:

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[11] J. of L. 2003, No. 111, item 1061.

[12] J. of L. 2002, No. 126, item 1066.

[13] Monitor Polski [Official Journal – O.J.] L 358, 31.12.1998.

[14] On this provision see e.g.: R. Z a w ł o c k i, [in:] *Kodeks karny. Część szczególowa. Komentarz. T. II* [Penal Code. Specific Part. Commentary. Vol. II], ed. A. Wąsek, Warszawa 2006, p. 1189 *et seq.*; P. K a r d a s, [in:] *Kodeks karny. Komentarz* [Penal Code. Commentary], ed. A. Zoll, Warszawa 2012, p. 1284 *et seq.*

– a benefit and making a promise thereof;
– benefit may be economic or personal (these were described above);
– alternatives such as an act of unfair competition or of an inadmissible preferential treatment, which widens the scope of application of the rule so that it includes also acts, which are not detrimental to the interests of the undertaking;
– the potential group of perpetrators consist of managers of the undertaking, but also of persons being employed therein, or performing services for that undertaking under civil law contracts, which means that also persons serving at lower levels of management are subject to the rule expressed in Article 296a k.k.

It results from the description of the crime contained in Article 296a § 1 k.k. that imposing a penalty under this rule does not require that there exists a damage (the possibility is sufficient).[15]

Both types of managerial corruption (passive and active) require that the act is carried out with a direct intent.

The Polish legislator attempts to break loyalty between the bribe-giver and bribe-taker (both in the public and private sector) by releasing from the penalty the bribe-giver, if he denounces the crime, by providing information about the benefit or its promise to the competent authority, before the authority had learned of the crime (the so called "impunity provision").[16] The statistics show that the rule has proved relatively effective in combating corruption, at least in the local area.[17]

1.4. The scope of application of the Polish criminal law

The basic rule of the Polish international criminal law is expressed in Article 5 k.k.[18] This provision reads:

> The Polish penal law shall be applied to the perpetrator who committed a prohibited act within the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which the Republic of Poland is a party stipulates otherwise.

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[15] However, if the perpetrator's act causes a significant financial damage (defined as damage exceeding 200 000 PLN), a more severe penalty will be imposed (Article 296a § 4 k.k.).

[16] See more broadly on this issue: Phase 3 OECD Report on Implementing…, p. 14 *et seq*.

[17] According to the information provided in the Phase 3 OECD Report Article 229 § 6 was applied in 361 cases of domestic bribery in 2010, and 430 cases in 2011. See Phase 3 OECD Report on Implementing…, p. 14.

[18] Cf. J. R a g l e w s k i, [in:] *Kodeks karny. Część ogólna. Komentarz. T. 1* [Penal Code. General Part, Commentary], ed. A. Zoll, Warszawa 2007, p. 1122; P. H o f m a ń s k i, [in:] *Kodeks karny. Komentarz* [Penal Code. Commentary], ed. M. Filar, Warszawa 2012, p. 577; T. B o j a r s k i, [in:] *Kodeks karny. Komentarz* [Penal Code. Commentary], ed. T. Bojarski, Warszawa 2013, p. 44.

The scope of application of the Polish criminal law is widened by the rules expressed in Articles 109–112 k.k. Article 109 k.k. reads: "The Polish penal law shall be applied to Polish citizens who have committed an offence abroad."

This provision does not contain any limitation as to the type of crime carried out by the Polish citizen abroad. However, according to Article 111 k.k.:

> § 1. The liability for an act committed abroad is, however, subject to the condition that the liability for such an act is likewise recognised as an offence by law in force at the place where it was carried out.
>
> § 3. The condition provided for in § 1 shall not be applied to the Polish public official, who, while performing his duties abroad, has committed an offence there in connection with performing his functions, nor to a person who committed an offence in a place not under the jurisdiction of any state authority.

It follows from the last rule that the double penalization of the crime in question constitutes a condition for imposing a liability on the Polish citizen who committed a prohibited act abroad.[19] The act in question should thus constitute a crime both according to Polish law, as well as the law of the state where the crime was committed.[20]

The requirement of double penalization does not apply to public officials (as defined in Article 115 § 13 k.k.).

It might be reminded that the *iura novit curia* principle does not pertain to foreign criminal law.[21] This creates difficulties in the practical application of the rules of foreign law.

An exception from the principle of double penalization has been introduced in Article 112 k.k. (thus, it is sufficient that the committed act constitutes a crime under Polish law), according to which:

> Notwithstanding the provisions in force at the place of the commission of offence, the Polish penal law shall be applied to a Polish citizen or an alien in case of the commission of:
> 1) a crime against the internal or external security of the Republic of Poland;
> 1a) (not in force anymore);
> 2) a crime against Polish offices or public officials;

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[19] T. B o j a r s k i, *The responsibility…*, p. 245. This solution is considered reasonable. The doctrine points out that in the relevant context, one should speak of universal penalization or universal prohibition or prescription.

[20] However, it is not sufficient that the act carried out abroad possesses features of the crime according to the foreign law. It actually has to constitute a criminal and penalized act in accordance with that law. P. H o f m a ń s k i, *op. cit.*, p. 584.

[21] Cf. A. M a r e k, *Kodeks karny*, p. 300; J. R a g l e w s k i, *op. cit.*, p. 1125; K. W i a k, [in:] *Kodeks karny. Komentarz* [Penal Code. Commentary], eds. A. Grześkowiak, K. Wiak, Warszawa 2012, p. 609.

3) a crime against essential economic interests of Poland;
4) a crime of false deposition made before a Polish office;
5) a crime, which resulted, even if indirectly, in a material benefit on the territory of the Republic of Poland.

2. International conventions

Poland is a party to the following international conventions relating to corruption: United Nations Convention against Corruption of 31.10.2003,[22] The Council of Europe Civil Law Convention on Corruption of 4.11.1999,[23] Council of Europe Criminal Law Convention on Corruption of 27.1.1999,[24] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997,[25] European Union Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the EU Member States of 26.5.1997, The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Poland is not a party to the Inter-American Convention Against Corruption of 1997.

3. Specific statutory regulation

In Poland there is no statutory regulation that deals specifically with the civil law consequences of corruption.

4. Case law relating to the civil law consequences of corruption

There is a surprising scarcity of the published case law relating specifically to the civil law consequences of corruption in Poland. Nevertheless, some jurisprudence concerning general principles of civil law is relevant for the issue of the civil law consequences of corruption and will be discussed below, in an appropriate context. It is another thing that there exists a well-established practice of the civil law courts relating to forfeiture of bribes under Article 412 k.c. However, this practice – existing mainly at the level of lower instance courts – has not produced published case law. It will be referred to below.

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[22] J. of L. 2007, No. 84, item 563.
[23] J. of L. 2004, No. 244, item 2443.
[24] J. of L. 2005, No. 29, item 249.
[25] J. of L. 2001, No. 23, item 264.

5. Principles of general contract law relevant for the civil law consequences of corruption

5.1. Principles concerning "illegal" and "immoral" contracts

5.1.1. Invalidity of the contract (Article 58 k.c.)

Article 58 of the Polish Civil Code of 1964[26] (hereafter: k.c.) provides for the sanction of invalidity of a legal act (and thus a contract) that would be contrary to the rules of law or the principles of social conduct. This provision reads:

> § 1. A legal act which violates the statute or the aim of which is to circumvent the statute is invalid unless the relevant regulation envisages different consequences, in particular that the invalid terms of the legal act are to be replaced with the applicable provisions of the statute.
>
> § 2. A legal act which violates principles of social conduct[27] is invalid.

The term "statute" used in Article 58 k.c. should be understood broadly. It covers not only mandatory rules of private law (*ius cogens*) but also provisions of public law, including administrative and criminal law. Moreover, it refers also to provisions of international conventions,[28] to the extent they are self-executory.

Polish doctrine underlines that not every violation of the rules of public law leads to the invalidity of legal act, by which parties have carried out a transaction that is prohibited by these rules. The legal consequences depend predominantly on the function and purpose of the public law rules in question. It is proposed that the impact of the violation of the rules of public law provisions on the validity of legal acts should be assessed functionally, with a due consideration given to the social and economic goal, that lay behind the given rule.[29] The case law on the other hand underlines that the violation of the rules of public law can lead

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[26] J. of L. 1964, No. 16 item 93 with the later changes. In preparing the English version of the provisions of the Civil Code, the reference was made to the translation of the Code by E. Kucharska, *The Civil Code. Kodeks cywilny*, Warszawa 2011.

[27] The term principles of social conduct refers to moral principles commonly accepted in the society. A legal act that violates such universal principles should be treated as invalid. Cf. Z. R a d w a ń s k i, [in:] *System Prawa Prywatnego. T. 2. Prawo cywilne – część ogólna* [The System of Private Law. Vol. 2. Civil Law – General Part], ed. Z. Radwański, Warszawa 2002, p. 241. It is underlined that the measure should be used with a great caution. See M. G u t o w s k i, "Nieważność i inne przypadki wadliwości czynności prawnych w kontekście odpowiedzialności karnoprawnej" [Invalidity and Other Types of Deficiencies of Legal Acts in Relation to Criminal Liability], *Państwo i Prawo* 2004, No. 9, p. 73. Indeed, it is very rare that a Polish court would rely solely on Article 58 § 2 k.c. in order to find a contract invalid.

[28] M. S a f j a n, [in:] *Kodeks cywilny – tom I. Komentarz do art. 1–449[10]* [Civil Code – Vol. I. Commentary to Articles 1–449[10]], ed. K. Pietrzykowski, 7th ed., Warszawa 2013, p. 250.

[29] A specific proportionality test was even suggested in that respect. M. Safjan, *op. cit.*, p. 250.

to the invalidity of the legal act, if these rules have impact on the formation of the relationships of civil law.[30] This idea was developed in the literature, where it was pointed out that the relevant criterion is whether the public law rule aims at precluding the creation of given civil law relationships.[31]

An important category of the rules of public law, which are capable of leading to the invalidity of legal acts, is the criminal law. However, not even a violation of criminal legislation leads to the invalidity of the civil law legal act in each and every case. The Supreme Court explained in that regard that: "Article 58 k.c. applies, if the behaviour prohibited by the rules of criminal law becomes the subject matter of the obligations assumed by a legal act."[32] Nevertheless, even if the party who undertakes a legal act commits a crime by the same behaviour (i.e. by making that legal act), the violation of criminal law does not automatically lead to the invalidity of a legal act.[33] It might occur that in the given circumstances, the sanction remains a sole domain of the criminal law and is limited to imposing a criminal penalty.[34] The civil law, guided by its own principles and policies, would not necessarily step in with a sanction of the invalidity of a legal act. In particular, this could be the case, if one of the parties to the transaction was not aware of the criminal nature of the behaviour of the other party to that transaction.[35] Then, even though that other's party making of a legal act constitutes a crime, it would not influence the validity of that legal act.

The rules of criminal law that penalize corruption will often lead to the invalidity of the civil law contracts. This issue will be discussed below.

5.1.2. Forfeiture of the benefit under Article 412 k.c. (the immoral contract)

Polish law provides for a special regulation concerning the consequences applied with respect to the performance made in exchange for carrying out a criminal act or an act having immoral purpose. This category is referred to as the "immoral performance" ["świadczenie niegodziwe"]. Polish law treats as immoral a performance (giving a benefit), which was made in exchange for carrying out a criminal act or an act that has immoral purpose. In comparison to other legal systems, Polish law provides for specific legal consequences applied with respect to immoral performances (and so, with respect to immoral contracts).[36] Namely, according to Article 412 k.c., the court may decide on the forfeiture of the subject

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[30] Judgment of the Supreme Court of 16.02.2011, I CSK 305/10. Por. M. G u t o w s k i, *Nieważność czynności prawnej* [Invalidity of Legal Act], Warszawa 2012, 3rd ed., p. 254.

[31] M. G u t o w s k i, *Nieważność czynności prawnej*, 2012, p. 255.

[32] Judgment of the Supreme Court of 10.02.2010, V CSK 267/09.

[33] M. G u t o w s k i, "Nieważność i inne przypadki…," p. 72.

[34] M. G u t o w s k i, *Nieważność czynności prawnej*, 2012, p. 257.

[35] M. G u t o w s k i, "Nieważność i inne przypadki…," p. 74.

[36] P. K s i ę ż a k, *Świadczenie niegodziwe* [Immoral Performance], Warszawa 2007, p. 1 *et seq*.

matter of the performance (the benefit). The forfeited benefit becomes the property of the State. Article 412 k.c. reads:

> A court may decide that the object of the performance be forfeited to the State Treasury if the performance was knowingly made in exchange for a criminal act or an act having an immoral purpose. If the object of the performance was used up or discarded, the forfeiture may apply to its value.[37]

The above wording of Article 412 k.c. was introduced in 1990.[38] Two major changes were made to Article 412 k.c. First, the forfeiture no longer occurs *ex lege*, but requires a constitutive judgment of the court.[39] Second, the forfeiture is optional since under Article 412 k.c. the court "may" but is not obliged to decide that the benefit be forfeited.[40] Procedurally, this implies that the court can decide on forfeiture only, if the State Treasury brings an action before the court, or intervenes in the proceedings between the parties of the immoral transaction.[41] The court is not entitled to render a decision *ex officio*.

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[37] This was not the original wording adopted at the time when the Polish Civil Code was enacted in 1964. According to the original wording, the object of the performance (the benefit), or its value, forfeited *ex lege* and thus automatically became the property of the State. For the criticism of the *ex lege* forfeiture under the old version of Article 412 k.c. see E. Łętowska, "Ujęcie następstw świadczenia niegodziwego w prawie i doktrynie państw socjalistycznych" [Consequences of the Immoral Performances in the Laws and Doctrine of Socialist Countries], [in:] *Proces i Prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci J. Jodłowskiego* [Court Procedure and Law. Legal Papers. A Liber Amicorum for J. Jodłowski], Wrocław 1988; T. Sokołowski, "Wzbogacenie ze świadczenia niegodziwego" [Enrichment as a Result of an Immoral Performance], *Gdańskie Studia Prawnicze* 2000, No. 2, p. 442–443. The decision of the court ordering the party to release the property had a declaratory nature. Cf. M. Nestorowicz, [in:] *Kodeks cywilny z komentarzem. T. I* [The Civil Law with a Commentary, Vol. I], ed. J. Winiarz, Warszawa 1989, p. 392; K. Kołakowski, [in:] *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania. Vol. I* [Commentary to the Civil Code. Book Three. Obligations. Vol. I], ed. G. Bieniek, Warszawa 2007, p. 241.

[38] J. of L. 1990, No. 55, item 321.

[39] K. Pietrzykowski, [in:] *Kodeks cywilny – tom I. Komentarz do art. 1–449[10]* [Civil Code – Vol. I. Commentary to Articles 1–449[10]], ed. K. Pietrzykowski, 7th ed., Warszawa 2013, p. 1153; A. Szpunar, "Przepadek nienależnego świadczenia na rzecz Skarbu Państwa" [A Forfeiture of an Object of Unjust Performance for the Benefit of the State Treasury], *Przegląd Sądowy* 1999, No. 2, p. 16; E. Łętowska, *Bezpodstawne wzbogacenie* [Unjust Enrichment], Warszawa 2000, p. 116; M. Kozaczek, "Powództwo o orzeczenie przepadku świadczenia spełnionego w zamian za dokonanie czynu zabronionego lub w celu niegodziwym" [An Action for Forfeiture of the Benefit Given in Exchange for a Criminal Act or Having an Immoral Purpose], *Przegląd Sądowy* 2006, No. 4, p. 43; P. Księżak, [in:] *Kodeks cywilny. Komentarz. T. II. Zobowiązania* [Civil Code. Commentary. Vol. II. Obligations], ed. K. Osajda, Warszawa 2013, p. 402.

[40] K. Pietrzykowski, *op. cit.*, p. 1154; K. Kołakowski, *op. cit.*, p. 241; E. Łętowska, *Bezpodstawne wzbogacenie*, p. 126; P. Mostowik, [in:] *The System of Private Law. Obligations – General Part*, Vol. 6, ed. A. Olejniczak, p. 322; P. Księżak, [in:] *Kodeks cywilny…*, p. 395.

[41] K. Pietrzykowski, *op. cit.*, p. 1153; in case law see judgments of the Supreme Court of: 12.04.1996, I CRN 48/96; 30.05.1995, II CRN 42/95.

It may also be mentioned that Polish pre-war legislation relating to immoral contracts was based on the *in pari delicto* principle.[42]

Article 412 k.c. is criticized as a rule of a penal nature.[43] Some see it as a "foreign" element in the body of civil law rules. Others defend its role within the system of private law, attempting to propose a new interpretation that would allow to adapt Article 412 k.c. to the new social and economic conditions existing after 1990.[44] It is underlined that Article 412 k.c. plays an important function in the field of the law of unjust enrichment. Namely, Article 412 k.c. deprives the enriched party of the benefit obtained from the invalid transaction in exchange for the consciously carried out immoral performance.[45] Its merits are underlined in comparison to the *in pari delicto* principle, which is known in many countries, and which allows the enriched party to keep the benefit, although his or her immoral behaviour often does not deserve legal protection.[46] It is pointed out in this context that the aim of Article 412 k.c. is not to increase the income of the State but rather to deprive the party who has given the benefit (the so called *solvens*) of the claim for the restitution of that benefit, and at the same time – to not allow the enriched party to keep the benefit.[47]

Immoral contracts (performances) create a dilemma that was present already in the Roman law, i.e. whether to grant to *solvens* a claim for restitution of what he or she has given in performance of the immoral contract. Most of legal systems resolve this dilemma by precluding restitution. Conversely, Polish law deprives both the dishonest *solvens*, as well as the enriched party, conscious of the immorality of the transaction, of the object of that transaction (the benefit). Some underline that this solution is fair.[48]

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[42] Article 132 of the Code of Obligations of 1933 provided for a principle that the party who completed performance that was considered immoral (and so the contract was treated as invalid) could not have claimed restitution of the benefit transferred to the other party. Under Article 132, this principle applied to a person who consciously paid for committing a criminal act or an act violating rules of fair dealing, or in order to induce another to commit such an act. K. P i e t r z y k o w s k i, *op. cit.*, p. 1154.

[43] Por. P. M o s t o w i k, *op. cit.*, p. 320; W. D u b i s, [in:] *Kodeks cywilny. Komentarz* [Civil Code. Commentary], eds. E. Gniewek, P. Machnikowski, Warszawa 2013, p. 709; Z. R a d w a ń s k i, A. O l e j n i c z a k, *Zobowiązania – część ogólna* [Obligations – General Part], Warszawa 2006, p. 229.

[44] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 1 *et seq.*; i d e m, [in:] *Kodeks cywilny…*, p. 387, 390.

[45] P. K s i ę ż a k, [in:] *Kodeks cywilny…*, p. 387; K. K o ł a k o w s k i, *op. cit.*, p. 242.

[46] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 1 *et seq*.

[47] *Ibidem*, p. 280; M. K o z a c z e k, *op. cit.*, p. 22; A. R z e t e c k a-G i l, *Kodeks cywilny. Komentarz. Zobowiązania – część ogólna* [Civil Code. Commentary. Obligations – General Part], LEX/el. 2011, commentary to Article 412.

[48] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 1 *et seq*.

It is underlined in the literature that the immoral performance (*conditio obturpem causa*) constitutes a specific form of the *conditio sine causa* (benefit given in performance of an invalid contract).[49] Article 412 k.c. has a much more narrow scope of application in comparison to Article 58 k.c.,[50] which provides for the invalidity of legal acts for various reasons.[51] Article 412 k.c. is limited to extraordinary situations. It should be interpreted narrowly.[52] Article 412 k.c. provides for particular consequences, if compared to a normal *conditio sine causa* situation.

The following elements are usually listed as necessary preconditions, on which forfeiture under Article 412 k.c. depends:

– the performance should be made in exchange for a criminal act or an act having an immoral purpose (in order to trigger forfeiture under Article 412 k.c. the performance has to be actually made; i.e. it is not enough that there is merely a promise of a performance);[53]

– the performance (transaction) should be of immoral nature, i.e. the intensity of wrongfulness of the performance is sufficiently high, so that it justifies forfeiture of the given benefit;

– both parties are aware of the immoral nature of performance (although it remains controversial whether it should not be sufficient that *solvens* is aware of the immoral nature of performance).[54]

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[49] *Ibidem*, p. 125.

[50] It can be observed that every instance of an immoral performance constitutes a situation of the invalidity of the legal act, although this does not work the other way around. See *ibidem*, p. 131.

[51] W. D u b i s, *op. cit.*, p. 710; P. M o s t o w i k, *op. cit.*, p. 323; T. S o k o ł o w s k i, *op. cit.*, p. 443, 449. See also Recommendations of the Supreme Court of 19.12.1972 (III CZP 57/71, OSN 1973, No. 3, item 37).

[52] W. D u b i s, *op. cit.*, p. 710. See P. M o s t o w i k, *op. cit.*, p. 322, who underlines that Article 412 k.c. should be used cautiously.

[53] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 173.

[54] It is underlined that in this respect, the Recommendations of the Supreme Court of 19.12.1972 (III CZP 57/71, OSN 1973, No. 3, item 37) have remained relevant. See K. P i e t r z y k o w s k i, *op. cit.*, p. 1155. Cf. judgment of the Supreme Court of 12.04.1996, I CRN 48/96. Similarly E. S m a g a, "Przepadek świadczenia (art. 412 k.c.) – po nowelizacji" [Forfeiture of the Object of Performance (Article 412) – After The Amendment], *Prokuratura i Prawo* 1996, No. 1, p. 80; A. S z p u n a r, *op. cit.*, p. 15; A. K ę d z i e r s k a-C i e ś l a k, "Przepadek mienia jako instytucja cywilnoprawna (art. 412 k.c.)" [Forfeiture of Property as a Civil Law Institution (Article 412)], *Studia Cywilistyczne* 1969, Vol. 13–14, p. 146. Thus, a good faith of a party (a lack of awareness of the immoral nature of the performance) justifies a decision not to forfeit the benefit. See judgment of the Court of Appeals in Warsaw of 28.10.2005, VI ACa 490/05. However, it should be observed that a different view was also expressed in the literature. Namely, some authors argue that it is sufficient that *solvens* is aware of the immoral nature of the performance, while the knowledge of the enriched party is irrelevant (*accipiens* does not have to be aware of the immoral character of the performance, nor that he or she commits a criminal act). See E. Ł ę t o w s k a, *Bezpodstawne wzbogacenie*, p. 114; W. D u b i s, *op. cit.*, p. 710; T. S o k o ł o w s k i, *op. cit.*, 454–455; P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 213 *et seq*.

Article 412 k.c. provides for an alternative: the performance should be made in exchange for a criminal act or an act having an immoral purpose. This means that in exceptional cases, forfeiture is possible even if no criminal act was committed.[55] Usually however, Article 412 k.c. applies where an act penalized by criminal law occurred,[56] although not every performance in exchange for a criminal act justifies forfeiture under Article 412 k.c. This is the case only when the appraisal of parties' transaction is so negative that it can be treated as immoral.[57] Thus, "immorality" remains a guiding principle under both alternatives provided for in Article 412 k.c.

For the application of Article 412 k.c., it is not necessary that there exists a formal contract between the parties. A transfer of benefit without a legally binding contract may also lead to consequences stipulated in Article 412 k.c.

The bribery contract is often given as an example of the transaction with respect to which it is usually justified to apply the forfeiture under Article 412 k.c. The issue will be discussed below (point 6.1.2).

5.1.3. Restitution of the benefit in case no forfeiture was ordered

Since under Article 412 k.c. the forfeiture is optional and it can only occur if an action is brought by the State Treasury, a dilemma whether *solvens* should be entitled to restitution remain pertinent in those situations when forfeiture – for various reasons – has not been ordered.[58] In other words, a question arises whether Polish law knows the *in pari delicto* principle for situations, where no forfeiture occurred.[59] The matter is not dealt with by Article 412 k.c. Neither any other provision of the Civil Code provides for a rule that would allow to conclude that *solvens* should in principle be deprived of the restitution of the benefit from the enriched party, in cases where the performance (and the whole transaction) is to be treated as immoral.[60]

The stating point is Article 410 k.c. and 405 k.c. According to Article 410 k.c. the objects of performances in case of invalidity of the contract, should be returned under the rules relating to the unjust enrichment. Under the general rule referring to unjust enrichment specified in Article 405 k.c.[61] a benefit (ob-

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[55] See T. S o k o ł o w s k i, *op. cit.*, p. 444.

[56] Application of Article 412 k.c. is not precluded by such exemptions known to criminal law that excuse the perpetrator of a criminal act from the penalty, i.e. the minor social harm, or the circumstances excluding illegality or guilt of the perpetrator. K. K o ł a k o w s k i, *op. cit.*, p. 241.

[57] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 186–187.

[58] *Ibidem*, p. 116 *et seq.*; T. S o k o ł o w s k i, *op. cit.*, p. 448.

[59] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 116–117.

[60] *Ibidem*, p. 132.

[61] Article 405 k.c. reads: "Anyone, who without legal grounds, has obtained a material benefit at the expense of another, is obliged to deliver the benefit in kind, and where impossible, to return its value."

ject of performance) transferred without a valid legal ground should be returned to *solvens*. Article 411 k.c. provides for reasons not to make restitution. It states, *inter alia*, that the restitution cannot be requested if the person giving the benefit knew that he or she was not obliged to do so. However, this rule does not apply in a situation where the benefit was given in performance of an invalid legal act,[62] i.e. in a situation of *conditio sine causa*. Since immoral performance under Article 412 k.c. is a sub-species of the *conditio sine causa*, Article 411 k.c. cannot preclude restitution of the benefit mandated by the general rule set in Article 405 k.c.

It is believed however, that the restitution of the benefit to *solvens* whose behaviour seen as particularly inappropriate may potentially be blocked by Article 5 k.c.[63] This provision contains a general prohibition of abuse of rights. According to Article 5 k.c. a person who uses his or her right in a manner violating the social and economic goal of that right, or in violation of the rules of social conduct, should not benefit of legal protection. Article 5 k.c. may only be applied if it is justified by exceptional circumstances of the case. Polish doctrine believes that it can also be used in order to block the restitution of the benefit under the rules applicable to unjust enrichment, where such restitution would be particularly unacceptable from a moral point of view.[64]

5.1.4. Invalidation of a contract concluded by tender

If a contract is entered into as a result of a tender, where the best offer was chosen from more proposals, Article 70^5 of the Civil Code provides for a specific rule that allows to invalidate the contract.[65] According to Article 70^5 k.c. any

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[62] Article 411 reads: "One cannot request restitution of the benefit:

1) if the person giving the benefit knew that he or she was not obliged to do so, unless the performance has been made subject to return or in order to avoid a constraint or in performance of an invalid legal act."

[63] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 143–146; P. M o s t o w i k, *op. cit.*, p. 320.

[64] One example given in that regard is that of a paedophile, who gave a benefit to a minor for sexual intercourse, but later requested its restitution, alleging invalidity of the contract. See P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 146 *et seq.* The Supreme Court has opined however, that Article 5 k.c. cannot be used in order to limit the scope of forfeiture under Article 412 k.c., where such forfeiture should in principle occur. See judgment of 23.12.1980, IV CR 512/80. Moreover, the judgment of the Supreme Court of 17.05.2002 (I CKN 827/00, OSP 2003, No. 12, item 157) can be noted. In that decision, Supreme Court stated that Article 5 k.c. cannot be used to block a restitutionary claim against the unjustly enriched, because Article 411 point 2 k.c. already defines situations in which restitution can be refused (Article 411 point 2 provides that restitution is excluded if rendering a performance satisfies requirements of the rules of social conduct), and so there is no room for analysis as to whether abuse of rights took place. Cf. M. G u t o w s k i, *Nieważność czynności prawnej* [Invalidity of Legal Act], Warszawa 2008, 2nd ed., p. 464. In the mentioned case the invalidity was however caused by non-compliance with formal requirements. It is suggested that the decision does not apply to cases where the contract's invalidity is caused by immorality.

[65] This is not invalidity *ex lege*, but party's competence to request that the contract is invalidated. See W. R o b a c z y ń s k i, [in:] M. P y z i a k-S z a f n i c k a, *Kodeks cywilny. Komentarz*

participant to the tender or the organizer may request that the concluded contract is invalidated, if the party to that contract or other participant has influenced the result of the tender in a manner violating statutory provisions or the rules of fair dealing. Article 70^5 k.c. applies to both private (optional) tenders (organized by private entities), as well as, in principle, to public tenders that are obligatory under the rules of law.[66] In the latter case however, the application of the rules of Civil Code, including Article 70^5 k.c. may be overridden by specific rules of particular statutes applicable to a given type of a public tender.[67]

Article 70^5 k.c. may come into play in case of corruption, if one of the participants to the tender gives a bribe in order to influence the results of the tender. In such a case, the participant to whose detriment a corrupt decision was made may request that contract concluded with the "winner" of the tender is invalidated.

5.2. Principles concerning exceeding the authority by an agent

5.2.1. General remarks

A legal act (e.g. a contract) is effective, foremost, with respect to the person, who has carried out the act in question. Nevertheless, various situations occasionally require that in making a legal act a third person is used as a substitute.

Throughout the history various forms of substitution were created. These include in particular the following: the messenger (a person who carries forward another person's declaration of will), the indirect representation (a representative carries out legal act in its own name but on account of another), the direct representation (a representative acts in the name of the principal; a representative makes its own declaration of will, which is directly effective for the principal,

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[Civil Code. Commentary], Vol. I, Warszawa 2009, commentary to Article 70^5 k.c., para. 2; K. K o p a c z y ń s k a-P i e c z n i a k, [in:] *Kodeks cywilny. Komentarz. t. I. Część ogólna* [Civil Code. Commentary. Vol. I. General Part], ed. A. Kidyba, Warszawa 2012, commentary to Article 70^5 k.c., para. 1 *et seq*.

[66] W. R o b a c z y ń s k i, *op. cit.*, commentary to Article 70^1 k.c., para. 8.

[67] W. R o b a c z y ń s k i, *op. cit.*, commentary to Article 70^1 k.c., para. 10; W. D z i e r ż a n o w s k i, [in:] W. D z i e r ż a n o w s k i, J. J e r z y k o w s k i, M. S t a c h o w i a k, *Prawo zamówień publicznych. Komentarz* [The Law of Public Procurement. Commentary], 5th ed., Warszawa 2012, commentary to Article 14, para. 2–3. Nevertheless, the Act of 29.01.2004 on the Law of Public Procurement (J. of L. 2013, item 907), which applies to most public tenders, does not exclude application or Article 70^5 k.c. It follows from Article 146(5) of the Law of Public Procurement that Article 70^5 k.c. could be used in order to invalidate a contract concluded as a result of choosing a contractor in a public procurement tender. Interpretation of Article 146(5) raises however certain doubts as to whether it allows only the public institution or also any competitor to claim invalidation of the contract under Article 70^5 k.c. As suggested in the doctrine, the latter interpretation should be preferred. Cf. J. J e r z y k o w s k i, [in:] W. D z i e r ż a n o w s k i, J. J e r z y k o w s k i, M. S t a c h o w i a k, *Prawo zamówień publicznych. Komentarz* [The Law of Public Procurement. Commentary], 5th ed., Warszawa 2012, commentary to Article 146, para. 6.

i.e. creates legal consequences in the province of the principal). In the present report, the indirect representation will not be discussed further.

The direct representation takes two forms: the statutory representation (the source of authority is the statute, e.g. the parents of a child or other guardians), and the authority of agents[68] (a "power of attorney", where the authority is granted by the principal and it is its will which constitutes the source of authority).

Polish laws classifies types of the authority of agents depending on the scope of the authority granted to an agent. These are: general authority (a broad-spectrum power to carry out acts of the "general management"), generic authority (a power to carry out acts of a given type), specific authority (a power to carry out a specific legal act), commercial proxy (a broad spectrum power to carry out court and out-of-court acts relating to commercial activity ran by the undertaking; the scope of that power is defined by the statute, although it is granted by a declaration of will).

5.2.2. Consequences of acting without or exceeding authority of an agent

In Poland, a person who acts in someone's else name, but who has no authority or exceed its authority is referred to as a sham (alleged) representative. In practice, it is possible to encounter both examples of a sham statutory representative and a sham agent (*falsus procurator*). Polish law deals expressly only with the consequences of the latter situation. More precisely, Articles 103 and 104 k.c. provide for the effects of the ratification by the principal of the act carried out by the agent acting without or exceeding its authority, and for the liability of such a sham agent towards the third party.

Article 103 k.c.

§ 1. If a person who concludes a contract has no authorization or exceeds its scope, the validity of the contract depends on it being ratified by the person in the name of whom it was concluded.

[68] The term "authority of agents," which might have various meanings in different legal systems, is used here in order to denote the civil law concept of the authority, which has its source in a declaration of will of the principal, and which implies having a power to act in the name of the principal, but not a contractual obligation to do so. In other words, the term relates only to the external relations between the principal and agent, and the third party, but not internal relationship between the principal and the agent. Cf. M. J. B o n n e l l, "UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law," *Uniform Law Review* 2004, p. 5 *et seq*. Unlike the term "authority of agents" used in Section 2 of the UNIDROIT Principles of International Commercial Contracts 2004, the term "authority of agents" used in the present report is limited only to direct representation, i.e. an authority to act in the name of the principal.

> § 2. The other party may set an appropriate time-limit for the person in the name of whom the contract was concluded so that the person can ratify the contract within the time-limit; that person is released after the time-limit elapses.
>
> § 3. In absence of ratification, a person who concluded a contract in the name of another is obliged to return what it has received from the other party in performance of the contract and to remedy any damage which the other party had suffered as a result of concluding the contract while not being aware of the lack of authority or that it was exceeded.

According to a solution adopted in Article 103 k.c., the contract concluded between a sham agent and the third party is ineffective as from the moment of its conclusion until the ratification of the contract by the principal (or refusal of such ratification). This is referred to as the "suspended ineffectiveness" of a legal act (*negotium claudicans*).[69] In case the contract is ratified, it becomes effective as with respect to the person in the name of whom it was concluded. The suspended ineffectiveness comes to an end.

The ratification can be made in any form,[70] both by way of an express declaration as well as impliedly (e.g. if the principal commences to perform the contract). However, the doctrine advices cautiousness in finding that the ratification has been made impliedly.[71]

A refusal to ratify the contract leads to a definitive ineffectiveness of the contract. The refusal does not require any particular form.

A contract can be ratified at any time after its conclusion. In order to remove this uncertainty the third party can request the principal to ratify the contract within an appropriate (reasonable) time-limit.[72]

The third party is released after the time-limit elapses (Article 103 § 2 k.c.).[73]

In case a contract is concluded by a sham agent, the third party can in-

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[69] Cf. Z. R a d w a ń s k i, [in:] *System Prawa Prywatnego. T. 2. Prawo cywilne – część ogólna* [The System of Private Law. Vol. 2. Civil Law – General Part], ed. Z. Radwański, Warszawa 2008, p. 453; M. G u t o w s k i, *Nieważność czynności prawnej*, 2008, p. 84 *et seq*.

[70] An exception comes from Article 63 § 2 k.c. If a specific form is required for the validity of the legal act in question, then the same form is required for the ratification of that legal act.

[71] Such a conclusion would only be proper if the principal knew that a contract was concluded in its name and that its actions constitute performance of the contract (and so these actions will be treated as ratification of the contract). Cf. B. G a w l i k, [in:] *System Prawa Cywilnego* [The System of Civil Law], Vol. I, ed. S. Grzybowski, 2nd ed., Wrocław 1985, p. 764; M. P a z d a n, [in:] *System Prawa Prywatnego. T. 2. Prawo cywilne – część ogólna* [The System of Private Law. Vol. 2. Civil Law – General Part], ed. Z. Radwański, Warszawa 2008, p. 497.

[72] The appropriate time-limit is a period of time necessary under the circumstances of the case to make decision and to communicate it to the addressee. In case a too short period of time is set, the other party will only be released after the lapse of time, which in the given circumstances can be considered as appropriate. A very long period of time in any event is to be treated as satisfying a requirement of appropriate time-limit. M. P a z d a n, *op. cit.*, p. 498.

[73] The third party can prolong the time-limit. In our view, it can also shorten the time-limit, provided that the new period of time, counted as from the day when it was shortened, satisfies the requirement of appropriateness.

voke the invalidity of the contract only after its ratification is refused or after the time-limit for that ratification has lapsed.[74]

According to Article 103 § 3 k.c. the third party, with whom a sham agent has concluded a contract has two remedies:

– a restitutionary remedy for what was given in performance of the contract;
– damages claim.

A prerequisite for both remedies is the lack of ratification of the contract. This is the case, if ratification is refused or the time-limit for that ratification has lapsed. Therefore, as long as the state of the suspended ineffectiveness endures, the third party cannot bring claims based on Article 103 § 3 k.c.[75]

Article 103 § 3 k.c. does not apply, if the contract concluded by a sham agent was invalid for other reasons as from the moment of its conclusion (e.g. because it violated the statute or did not comply with *ad solemnitatem* formal requirements).

The restitutionary remedy encompasses everything that was received by a sham agent from the third party in performance of the contract. It does not depend on whether the third party knew of the lack of authority on part of the sham agent or that it exceeded its authority. Article 409 k.c. does not apply.[76]

The damages claim is available only in case the third party concluded the contract not knowing that the sham agent had no authority or that it exceeded that authority. The claim for compensation is based on the so called negative contractual interest (reliance damage). The liability of the sham agent does not depend on whether its fault can be determined. Moreover, it is irrelevant whether the sham agent knew about its lack of authority.[77]

It is argued in the literature that Article 103 should also be applied in order to deal with a situation of an abuse of authority by an agent, at least when the third party knows about that abuse.[78] An example is a legal act carried out by an agent in the name of the principal, which brings benefits only to the agent or member of his or her family (e.g. a suretyship of the agent's debt).

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[74] Judgment of the Supreme Court of 7.11.1997II CKN 431/97, OSN 1998, No. 6, item 94.

[75] To that effect, B. G a w l i k, *op. cit.*, p. 766. However, to the contrary, S. G r z y b o w s k i, [in:] *System Prawa Cywilnego* [The System of Civil Law], ed. S. Grzybowski, 1st ed., Wrocław 1974, Vol. I, p. 619, who argues that the remedies from Article 103 § 3 k.c. should be available irrespective of whether the third party has requested that the contract is ratified by the principal within a specified time-limit.

[76] Article 409 k.c. provides that the obligation resulting out an unjust enrichment, extinguishes if the person who obtained the benefit has used it up or discarded it in such a manner that he or she is no longer enriched.

[77] Cf. J. S t r z e b i ń c z y k, [in:] *Kodeks cywilny. Komentarz* [Civil Code. Commentary], eds. E. Gniewek, P. Machnikowski, Warszawa 2013, p. 257.

[78] Cf. B. G a w l i k, *op. cit.*, p. 758–772; J. S t r z e b i ń c z y k, *op. cit.*, p. 257. However, some oppose application of Article 103 k.c. to the abuse of authority. See W. R o b a c z y ń s k i, *op. cit.*, p. 985.

With respect to the statutory representation a following comment can be made. A legal act undertaken by the statutory representative which exceeds its authority does not produce effects for the principal. Thus, actions of a sham statutory representative will not have any consequences as with respect to the principal. However, it is believed that Article 103 § 3 k.c. can be applied by analogy, so that a sham statutory representative can incur liability for the harm caused to the third party as a result of acting without the authority (or exceeding it).[79]

It might be mentioned that Article 104 k.c. provides for a rule analogous to Article 103 k.c., with respect to unilateral legal acts. In that regard however, Polish Civil Code adopts a somewhat different solution.[80] The details are not necessary here.

5.2.3. Acting within the scope of the original authority

Article 105 k.c. provides for the protection of the good faith of person who enters into transaction with a former agent. Article 105 k.c. reads:

> If, after expiry of the authority, an agent carries out a legal act in the name of the principal, within the limits of the original authority, the legal act is valid unless the other party knew about the expiry of the authority or could have easily learned of it.[81]

Under a general rule provided for in Article 6 k.c., the burden of proof as to the actual or constructive knowledge of the third party rests on a person who relies on such knowledge and who derives consequences from it. Whether the agent knew or should have known about the expiry of its authority is on the other hand irrelevant for the purpose of applying Article 105 k.c.

A person has an original authority in the meaning of Article 105 k.c., if the authority existed for a certain period of time, but has later expired (e.g. as a result of being revoked or because of the lapse of time specified by the principal). Consequently, it is not possible to invoke Article 105 k.c., if the authority was never validly granted (because there existed an irregularity making the legal act by which authority was granted invalid from the outset).

Some controversy exists as to the extent of application of Article 105 k.c.[82]

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[79] Cf. B. G a w l i k, *op. cit.*, p. 768; M. P a z d a n, *op. cit.*, p. 500.

[80] Article 104 k.c. reads: "A unilateral legal act performed in another's name without the authority or by exceeding its scope is invalid. However, if a person to whom the declaration of will was made agrees to the act being performed without authority, the rules concerning the conclusion of the contract without the authority apply accordingly."

[81] If, according to Article 105 k.c., the legal act carried out by an agent within the scope of its original authority is to be treated as valid, there are no reasons to apply Articles 103 and 104 k.c.

[82] The dispute centres on the understanding of the term "expiry." Namely, it is discussed whether Article 105 k.c. covers only situations, in which the authority was granted but then expired for whatever reason (along these lines S. R u d n i c k i, [in:] *Komentarz do kodeksu cywil-*

5.2.4. Legal acts with oneself (conflict of interests)

In order to safeguard interest of the principal, Polish law prohibits an agent to undertake legal acts with itself (self-dealing). This is mandated by Article 108 k.c., 1st sentence, which provides that: "an agent cannot be the other party to the legal act carried out in the name of the principal." A similar prohibition applies in a situation, in which the agent represents two sides of the same contract. This is because an agent cannot represent two different principals who stand on the opposing sides of a legal transaction (Article 108 k.c., 2nd sentence). The term "self-dealing" covers both type of situations.

Article 108 k.c. provides for two exceptions to the above prohibition:

1) if the admissibility of self-dealing stems from the act that grants the authority to the agent (permission from the principal);[83]

2) if there is no risk of violating interests of a principal, in light of the given content of a legal act.

With respect to the second exception provided for in Article 108 k.c., one should take into account whether there exists – in light of the content of the legal act – a risk of infringing interests of the principal, and not only whether there exists a conflict of interests of the principal and the agent.

The prohibition of self-dealing contained in Article 108 k.c. is relatively unequivocal. Still, it is accepted that the consequence of violating this prohibition is merely the suspended ineffectiveness of the legal act carried out by the agent. Thus, the legal act in question is ineffective (*negotium claudicans*), but there remains a possibility of it being ratified by the principal.[84]

Article 108 k.c. has been relatively often invoked in the case law, which produced valuable interpretative guidelines with respect to the prohibition set in that provision.[85]

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nego [Commentary to the Civil Code], eds. S. Dmowski, S. Rudnicki, Warszawa 2009, p. 468), or whether it also embraces cases, when the authority has been limited by the principal (to that effect M. P i e k a r s k i, [in:] *Komentarz KC* [Commentary. Civil Code], Vol. I, Warszawa 1972, p. 249). In our view, the first proposition is more convincing.

[83] A view dominates in the doctrine that a permission for an agent to carry out a transaction with itself can be given expressly, as well as impliedly. M. P a z d a n, *op. cit.*, p. 525. However, since an exception from the prohibition of self-dealing is at stake, the authors underline that the principal's behaviour should closely be scrutinized and a conclusion as to its tacit intention should not be made lightly. B. G a w l i k, *op. cit.*, p. 770.

[84] Cf. M. P i e k a r s k i, *op. cit.*, p. 253; B. G a w l i k, *op. cit.*, p. 770–771; S. R u d n i c k i, *op. cit.*, p. 472; M. P a z d a n, *op. cit.*, p. 255; J. S t r z e b i ń c z y k, p. 261.

[85] Below are some examples of important decisions of the Supreme Court:

– 30.05.1990 (III CZP 8/90, OSN 1990, No. 10–11, item 124): "the articles of association of a limited liability company or a share company are invalid if they were concluded between a state company and an individual, where that individual acted at the same time in his or her own name and as a director of the state company,"

5.2.5. Abuse of the authority of an agent

Various instances can be referred to as an abuse of the authority of an agent. However, there are the following common denominators:

a) an agent acts within its authority;

b) agent's action brings a harm instead of profits for the principal;

c) an agent acts against the actual or hypothetical intentions of the principal.

Principal's intentions might be expressed in the contract with an agent, i.e. it will form part of the internal relationship between the agent and the principal (however, it might be noted that Polish law knows an authority of an agent, which is detached from the internal relationship).

In the present context, a behaviour of the third person is relevant. It may take various forms. First, the third party may act in collusion with the agent. Second, although not taking part in a collusion, the third party may be aware of the agent's abuse of authority. Last, the third party may not be aware, but it could have learned of the abuse had it acted diligently.

Because of the principles of independence of the authority of an agent from the internal relationship, agent's violation of the terms of the contract with a principal (which are not incorporated in an act granting authority itself), can only lead to agent's contractual liability, but does not affect the external relationship with a third party.

No deviations from this principle can be discussed, where the third party does not know about the abuse of authority and where that lack of knowledge is justified. Similarly, it seems proper to reject deviations from the principle, where the third party does not know about the abuse of authority, but it could have learned of it, if he or she acted diligently.[86]

It remains debatable whether any deviations from the principle should be adopted in other cases. Some underline that a broad deviation should be supported, when the third party knows that the agent acts to the detriment of its principal and thus abuses the authority.[87] It is believed that the independence of the authority of an agent should be preserved only when it is necessary in order to protect the third parties. If the third party acts knowing that it harms the principal, then the scope of the authority determines the content of the internal relationship between the agent and the principal.[88] A legal act should then be considered to have

– 9.03.1993 (I CR 3/93, OSN 1993, No. 9, item 165): Article 108 k.c. applies also in case where "in making a legal act, an individual acts as a member of a governing body of a legal person, which plays a role of the agent, and at the same time – in its own name on its own behalf,"

– 5.07.1991 (I PZP 25/91, OSN 1992, No. 2, item 31): "a court representative of an undertaking, who received authority from a temporary manager of that undertaking may not conclude a settlement relating to the claims of that manager, concerning his or her request to have an employment relationship with the undertaking established,"

– 23.03.1999 (II CKN 24/98, OSN 1999, No. 11, item 187): Article 108 k.c. may by analogy be applied with respect to the representation of one-shareholder limited liability company.

[86] Cf. B. G a w l i k, *op. cit.*, p. 758; M. P a z d a n, *op. cit.*, p. 527.

[87] B. G a w l i k, *op. cit.*, p. 757–759.

[88] *Ibidem*, p. 757.

been carried out without a proper authority. In such a situation, the knowledge of the third party cancels a power of the agent to act in the name of the principal, as in relation to the third party.[89]

The above seems to go too far however. Rather, it is more proper to assess the behaviour of the third party according to individual circumstances. A different conclusion should be drawn in cases when the third party is in collusion with the agent, and when it merely knows about agent's abuse of authority (but there is no evidence of collusion).

To conclude that the internal relationship directly affects the scope of agent's authority could lead to various difficulties in practice. It would put on a third party a burden to verify all the information (and even gossip) that it receives.

A third party does not have access to the changes, occurring to the internal relationship after the authority of an agent was granted and disclosed. Third party's assessment of what is beneficial or not for the principal cannot be conclusive. Such an assessment is reasonable if it is based on the whole picture of the totality of circumstances. A third party usually does not have such a whole picture.

It does not seem proper to conclude that in any case when the third party enters into a contract knowing that the agent infringes its internal relationship with the principal, such behaviour should be treated as violating rules of social conduct.

However, the matter should be viewed differently if the third party acts in collusion with the agent. Such behaviour might constitute a delict to the detriment of the principal. Even more, it might occasionally constitute also a crime prohibited by penal law. A legal act carried out by tan agent with a third party in such circumstances would be bound to fail as contrary to the statute and thus invalid for that reason.

Furthermore, we cannot exclude a possibility that in some other instances of a collusion between the agent and the third party, the transaction which was undertaken in order to implement that collusion would have to be treated as violating rules of social conduct and thus invalid under Article 58 § 2 k.c.[90]

Finally, if a third person, owing to a collusion with an agent, acquired certain rights against the principal and would attempt to bring an action to enforce these rights, such an action could be blocked by Article 5 k.c. (prohibition of abuse of rights). Article 5 k.c. could thus be used to protect the principal in certain extraordinary circumstances.

5.3. Claims of third parties under the rules of unfair competition

Obtaining an advantage by way of a bribery may cause a detriment to the competitors of a bribe-giver. Both a bribe given in a public and private sector may cause harm to competitors. In a public sector, an act may take a form of

[89] *Ibidem*, p. 759.

[90] Cf. *ibidem*, p. 757; M. P a z d a n, *op. cit.*, p. 528.

a bribe given to a public official in order to induce to take a decision in favor of a bribe-giver and to the detriment of competitors. In a commercial context, on the other hand, this can occur by way of a bribe given to a manager of a company in order to obtain a specific advantage over other undertakings, which compete for the same contract tender. Such actions could often be classified as delicts, or more specifically – acts of unfair competition.[91]

In order to target various unfair actions that cause detriment to the competitors, Polish legislator has enacted the Act of 16.04.1993 on combating the unfair competition (hereafter referred to as: u.z.n.k.).[92] Under the most general rule expressed in Article 3(1) u.z.n.k.: "An act of unfair competition is an action which violates law or the principles of fair dealing, if it puts at risk or infringes interests of another entrepreneur or a customer."

Article 3(2) u.z.n.k. provides examples of actions that can be classified as acts of unfair competition. The various types of acts of unfair competition are then specified in Articles 5–17d u.z.n.k. Article 3(2) u.z.n.k. mentions, *inter alia*, corrupting public officials. A more specific rule in that regard is laid down in Article 15a u.z.n.k. It reads:

> Corrupting a person who performs a public function is an act of unfair competition if it constitutes a crime defined in Article 229 of the Penal Code committed by an individual being: 1) an entrepreneur; 2) a person acting on behalf of an entrepreneur with the authority to represent it or with a power to make decisions in its name or exercise control over that entrepreneur; 3) a person acting on behalf of an entrepreneur, with a consent of a person specified in point 2 above.

As mentioned, corruption in a private sector may also constitute an act of unfair competition. This occurs when the crime from Article 296a k.k. (bribery in a private sector – see above) is committed with an intention (and has effect) of putting at risk or infringing interests of another entrepreneur or a customer, as understood in Article 3(1) of u.z.n.k. In particular, Article 12 u.z.n.k. provides for a specific context in which such an act of unfair competition may occur.[93] This provision reads:

> It is an act of unfair competition to induce a person performing work for the entrepreneur, on basis of the employment or other legal relationship, to not carry out, or to inadequately carry out its employment obligations or other contractual obligations, for the purpose of obtaining a benefit or causing a benefit to a third person, or in order to cause a detriment to the entrepreneur in question.

Thus, if someone gives a bribe to a managing person in order to induce that person not to perform, or inadequately perform its obligations, it may constitute

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[91] See P. D z i e n i s, W. F i l i p k o w s k i, "Cywilnoprawne aspekty korupcji gospodarczej" [Civil Law Consequences of Commercial Corruption], *Palestra* 2001, No. 11–12, p. 60 *et seq*.

[92] J. of L. 2003, No.153, item 1503 with later changes.

[93] See P. D z i e n i s, W. F i l i p k o w s k i, *op. cit.*, p. 63.

both a crime from Article 296a k.k. and an act of unfair competition described in Article 12 u.z.n.k.

Obviously, a bribe may also be given in a private sector for the purpose of carrying out an action that constitutes an act of unfair competition.[94] Article 296a k.c. specifically mentions that a crime is also committed if a benefit is given for an act of unfair competition. This can be done in order to induce various acts of unfair competition specified in Articles 5–17d u.z.n.k. The very behavior that constitutes an act of unfair competition is then a separate action from the acts of crime (giving and accepting a bribe) themselves.

An entrepreneur who has suffered detriment or whose interests were put at risk has various remedies at its disposal. Article 18 u.z.n.k. provides that an entrepreneur may request the person responsible for an act of unfair competition to:

- refrain from illegal actions;
- remove consequences of the illegal actions;
- make a statement of a suitable content and in an adequate form;
- provide compensation for the harm caused;
- hand out benefits unjustly obtained;
- make a payment for a charitable purpose.

6. Consequences of applying general principles of civil law to the bribery contract and the main contract

6.1. Bribery contract

6.1.1. Invalidity of the bribery contract

It follows from what was said above in point 5.1.1 that the contract, the subject matter of which is a bribe prohibited by the rules of criminal law, should be treated as invalid under Article 58 §1 k.c.[95] The rules expressed in Articles 228 and 229 of the Penal Code criminalize accepting and giving bribe to a person who exercise public function. Although no civil law consequences are stipulated therein, the aim of these provisions is clearly also to preclude creation of valid civil law obligations, the subject matter of which would be a bribe.

Articles 230 and 230a on the other hand prohibit to accept and to give benefit for promising to intercede in settling a matter with the public authority, while claiming to have influence there. Often, undertaking to exercise influence over the public authority involves assuming an obligation to pass a bribe to that public

[94] See T. O c z k o w s k i, *Nadużycie zaufania w prowadzeniu cudzych spraw majątkowych. Prawnokarne oceny i konsekwencje* [Abuse of Confidence in Administering Financial Affairs of Another], Warszawa 2013, para. 4.4.

[95] Cf. P. D z i e n i s, W. F i l i p k o w s k i, *op. cit.*, p. 67, who point out that a contract, the subject matter of which is a bribe, can also be declared invalid because of violation of the rules of social conduct (Article 58 § 2 k.c.) – even if no rules of criminal law were violated.

authority. Polish doctrine underlines in that respect that "it is not necessary to exercise the influence to be an accessory to the offence."[96] Rather it is enough to undertake to intercede in exercising the influence for the criminal responsibility to be imposed. The aim of these rules should also be read as to render invalid any civil law obligation, by which a bribe-taker undertook, in exchange for the material or personal benefit (e.g. payment of a "commission"), to exercise influence over a public official or other person performing public function (e.g. having that person/principal assign the main contract to the bribe-giver).

Analogically, Article 296a criminalizes accepting and giving a bribe to a person who performs a managerial function in a private undertaking. Consequently, a contract by which a manager accepts a bribe should be treated as invalid. With respect to corruption in the private sector there is no analogical provision penalizing undertaking to exercise influence. Thus, exercising influence in a private undertaking is not a crime unless that undertaking exercises control over disposition of public funds in the meaning of Article 230.[97] It remains an open question whether a contract by which an intermediary undertakes to exercise an influence (and in particular pass a bribe) over a manager of a private undertaking, against a payment of the commission, should be treated as invalid (if not because of the violation of law, possibly for the violation of the rules of social conduct – Article 58 § 2 k.c.).[98]

To sum up, it follows that both a contract, under which the bribe-giver undertakes to give a bribe to a person performing public function directly (or a managerial function in a private undertaking), as well as a contract, by which the bribe-giver provides benefit to an intermediary, who undertakes to exercise influence over the person performing public function/principal (in particular by passing a bribe to that person) for the payment of the "commission," should be treated as invalid under Polish law.

6.1.2. The forfeiture of the bribe

As mentioned above (point 5.1.2), corruption is often given as an example of a situation, in which Article 412 k.c. applies.[99] The existing case law of the Supreme Court confirms this position.[100] What is more, some authors seem to be of

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[96] J. B o j a r s k i, *The responsibility…*, p. 148.

[97] Although passing a bribe to the manager would constitute an active bribery from Article 296a § 2 k.k.

[98] According to Article 58 § 2 k.c.: "A legal act contrary to the principles of social conduct is invalid."

[99] See e.g. P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 198; P. P i e t r a s z, "Opodatkowanie dochodów osiąganych nielegalnie. Glosa do wyroku NSA z dnia 4 września 1997 r., I SA/Wr 948/96" [Taxation of Illegal Profits. A Note to the judgment of NSA of 4 September 1997, I SA/Wr 948/96], *Glosa* 2001, No. 8; U. W i l k, "Korzyści ze sprzedaży dymu" [Profits from Selling Smoke], *Rzeczpospolita* 2005, No. 9/22.

[100] Judgment of the Supreme Court of 5.03.1973, III CZP 59/71, OSN-ICPiUS 1973, No. 10, item 170.

the opinion that bribery should automatically lead to the forfeiture of the bribe,[101] although such unequivocal position was questioned by others.[102]

The application of Article 412 k.c. in practice has been subject to limited empirical studies. One of the authors, who examined case law from 2004 and the first half of 2005, concluded in that regard that 90% of the situations concerned trade in drugs, while only a small number related to corruption.[103] It is observed that Article 412 k.c. is often applied automatically, more in a manner characteristic for the criminal measures, and without sufficiently assessing all the relevant circumstances of the case. The doctrine has criticized this practice. It was pointed out that the *ratio legis* of Article 412 k.c. is not to deprive the perpetrator of the proceeds of the crime (this being the goal of the rules contained in Articles 44 and 45 of the Penal Code), but rather the forfeiture of the benefit given by the *solvens* to the enriched party, where it would be unjust for any of them to keep that benefit.[104] This is because the consequences imposed by Article 412 k.c. impair both parties of the transaction. Therefore, the application of Article 412 k.c. should depend on finding that both parties are dishonest.

A closer analysis has led some to a conclusion that there might be instances, in which the transaction involving a bribe should not be treated as immoral, and thus forfeiture would not be justified.[105] This could occur where handing out a bribe (or apparently a bribe) would not constitute a criminalized act under rules of penal law.[106] Moreover, even if handing out a bribe constitutes a crime, it would not be just in each and every case to decide that forfeiture is appropriate. In particular, it is believed that two factors can play a role. First, this could be the case where the bribe-giver was forced to give a bribe in light of the surrounding circumstances.[107] The key question is then what circumstances should there exist in order for the court to be able to conclude that a person was indeed forced to

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[101] K. P i e t r z y k o w s k i, *op. cit.*, p. 1155; W. S e r d a, *Nienależne świadczenie* [Unjust Enrichment], Warszawa 1988, p. 153.

[102] T. S o k o ł o w s k i, *op. cit.*, p. 445; P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 199–200.

[103] See M. D o m a ń s k i, *Przepadek świadczenia "niegodziwego" – art. 412 k.c. Model normatywny i empiryczny. Praktyka stosowania § 287 Regulaminu wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury* [Forfeiture of an Object of Immoral Performance – Article 412. Normative and Empirical Model. Application of § 287 of the Internal Rules of Organization Units of the Public Prosecutor's Office], Warszawa 2006 (a manuscript), p. 85 *et seq.* – cited after P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 199. Cf. A. M o ś c i c k a, "Zamiast zyskać, muszą stracić" [Instead of Profiting They Should Lose], *Gazeta Prawna* 2005, No. 156, p. 19. The press has occasionally informed about other cases where the prosecutor's office asked for the forfeiture of bribe in the civil proceedings under Article 412 k.c.

[104] See P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 202.

[105] *Ibidem*, p. 199 *et seq.*; T. S o k o ł o w s k i, *op. cit.*, p. 448.

[106] P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 199–200.

[107] *Ibidem*; who believes that to list types of cases where it would always be necessary to decide on forfeiture is generally erroneous. Similarly T. S o k o ł o w s k i, *op. cit.*, p. 444 *et seq*.

give a bribe.[108] Second, the motivation of the bribe-giver seems important for that purpose. If this motivation is not morally negative (which can take place only in very specific circumstances), the court may refrain from imposing forfeiture of the benefits given as a bribe.[109] The discretion available to the court under Article 412 k.c. allows to make a value judgment to that effect. Generally however, in Poland the benefit constituting a bribe that was given by the bribe-giver to the bribe-taker will be subject to forfeiture under Article 412 k.c.

The difficulty arises in cases when a court has not decided on forfeiture, either because it exercised its discretion to that effect, or – more likely – because it had no chance to do so (since Article 412 k.c. can only come into play if the authorities of the State claim forfeiture in civil proceedings). We will deal with this issue below (point 6.1.3).

The question arises as to whether forfeiture should occur with respect to the benefit that an intermediary is to receive for exercising its influence over the public figure, in particular by passing the bribe thereto. There is little guidance to that effect in Poland. However, in a judgment of 9.02.1984, the Supreme Court found that: "in case a person acts as an intermediary in a transaction covered by Article 412 k.c., the forfeiture for the benefit of the State Treasury applies to whatever that intermediary received or accomplished for its intervention."[110] This statement can be adopted in order to handle the situation of corruption. Consequently, even if the actual bribe is passed between the bribe-giver and the public authority, anything that the intermediary received for its intervention (e.g. commission), could also be subject to forfeiture.

A similar conclusion could be derived, if one considers that undertaking to exercise influence over public authority constitutes a crime of the trade of influence (Article 230). Under Article 412 k.c. the forfeiture might be ordered if the performance (benefit) was knowingly made in exchange for an act prohibited by law. Thus, if a commission is offered to intermediary in exchange for an obligation to exercise influence over the public authority, that commission is offered in exchange for an act prohibited by law. Article 412 k.c. seems to apply and the commission received by the intermediary could be subject to forfeiture.

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[108] E.g. this could potentially be the case, if an official demanded a bribe to render a decision, within the important investment process with a tight schedule, where a lack of the decision in question threatened the whole investment process. See T. S o k o ł o w s k i, *op. cit.*, p. 448.

[109] E.g. to save a life. See T. S o k o ł o w s k i, *op. cit.*, p. 448. An example given in the Polish doctrine concerns a bribe offered by parents of a sick child to a doctor, in exchange for giving a priority in carrying out a surgery of the child in the public medical establishment. To resign from forfeiture in such a situation is justified by acceptable motivations of the *solvens*, who would then be allowed to claim restitution of the benefit. See P. K s i ę ż a k, *Świadczenie niegodziwe*, p. 213.

[110] Judgment of the Supreme Court of 9.02.1984, II CR 424/72.

6.1.3. Return of the benefit where no forfeiture was ordered

Where no forfeiture was ordered under Article 412 k.c., but the contract is treated as invalid (which will normally be the case) the general rules on unjust enrichment apply. As explained above (point 5.1.3) this means that in principle, the bribe-giver retains a right to claim restitution of what was paid by way of a bribe, as well of the commission paid to the intermediary. However, in exceptional situations, Article 5 k.c. (abuse of a right) could be used in order to block restitution (see above point 5.1.3).

6.2. Main contract concluded between the bribe-giver and the principal

The validity of the main contract depends on whether the principal received and accepted a bribe passed by the intermediary, or at least knew of a bribe given to intermediary (and whether the bribe has influenced its decision to award the contract to the bribe-giver). If the principal received a bribe, then the main contract concluded with the bribe-giver has to be treated as invalid. Awarding a contract to the bribe-giver constitutes a part of criminal activities of the principal, who accepts a bribe. Since the bribe-giver also commits a crime, a contract that is awarded in such a context should not be upheld, if not because of violation of the statute (Article 58 §1 k.c.), then at least because rules of social conduct are infringed (Article 58 § 2 k.c.).

The situation is different if the principal awarding the contract to the bribe-giver has not received the bribe and, possibly, does not even know about the bribe given to the intermediary. In such case, even though bribe-giver could be exposed to criminal liability, the main contract between the principal and the bribe-taker should not automatically be void.

If the contract has been awarded as a result of a tender (whether in a private or public setting) Article 70^5 k.c. could also come into play. If it can be shown that he bribe-giver has influenced the result of the tender (i.e. that the decision to award the contract to the bribe-taker was somehow tainted by the fact that the intermediary received the bribe – even if the principal himself does not know of the bribe), the principal or competitors can request that the concluded contract is invalidated. The contract is not void *ex lege* but it would remain at the option of the organizer (or competitors) to seek its invalidation.

II. The civil law consequences of corruption in international contracts – case studies

Case No. 1. Contractor A of country X enters into an agreement with agent B ("the Commission Agreement") under which B, for a commission fee of USD 1,000,000 would pay, on behalf of A, USD 10,000,000 to C, a high-ranking procurement advisor of D, the Minister of Economics and Development of country Y, in order to induce D to award A the contract for the construction of a new power plant in country Y ("the Contract"). B pays C the USD 10,000,000 bribe and D awards the Contract to A.

Ques. 1.1: Can A refuse to pay B the agreed commission fee invoking the illegality of the Commission Agreement?

The Commission Agreement between A and B would be treated as invalid under Polish law. The abovementioned rules of Polish criminal law aim at preventing contracts the subject matter and purpose of which is to exercise influence over an official by passing a bribe to that official. Here, both A and B commit a crime. The contract is invalid because, the very obligation to pass a bribe assumed in the contract constitutes a crime.

The possibility of forfeiture under Article 412 k.c. should be considered. With respect to the bribe that was passed to C, the situation would most likely trigger application of Article 412 k.c. This is because the bribe constitutes a performance knowingly made in exchange for a criminal act.

However, a different conclusion has to be reached with respect to the commission fee, assuming the understanding that the commission has not yet been paid to B. This is because Article 412 k.c. applies only to situations, in which the performance was already made (the benefit has already been given to the other party). It is not activated merely because of a promise to render a performance for a criminal act.

Since no forfeiture can be ordered with respect to the commission fee, a question of whether A may refuse to pay the commission to B arises. Under Polish law, A can refuse to make that payment, since no valid contractual obligation exists.

Ques. 1.2: In the case that, although B has paid C the bribe, D does not award A the Contract, can B request the payment of the agreed commission fee from A, and can A recover from B the bribe B has paid to C?

With respect to the question of the commission fee, the answer is analogous to the one given above (ques. 1.2), i.e., first, no forfeiture can occur since the commission fee was not yet paid, and second, B cannot request the payment of the commission, because the contract, under which A was obliged to pay the commission, is invalid.

As to the bribe passed by B to C the following comments should be made. First, analogically as above, the moneys paid as the bribe could be subject to for-

feiture under Article 412 k.c., since it constitutes a performance knowingly made in exchange for a criminal act.

Second, if the forfeiture has not been ordered (for whatever reason) two alternatives can be envisaged: a restitutionary claim against B and C. For this purpose it is assumed that the bribe has indeed been paid to C and remains in the hands of C.

Under Polish law A's restitutionary claim against B would not be effective. The necessary precondition for the claim based on unjust enrichment (Article 405 k.c. *et seq.*) is that the enriched party indeed remains enriched, i.e. still holds the benefit. This conclusion is strengthened by Article 409 k.c. according to which: "an obligation to return the benefit or its value extinguishes, if the person who has acquired a benefit, has used it or lost it in a manner that he or she is not enriched any longer […]."[111]

However, A's claim against C could succeed. C is unjustly enriched at the expense of A who gave the benefit. There is no valid legal ground for such a transfer. Thus A has a restitutionary claim against C. That A has redress against C (and not B) is reinforced by Article 407 k.c., which provides: "if the person who acquired a benefit at the expense of another, transfers it to a third party free of charge, the obligation to return the benefit passes to that third person." C is such a third person in the case at hand.

> Ques. 1.3: Supposing that D, when awarding the Contract to A, did not know nor ought to have known of the bribe paid to C, can D choose to treat the Contract as effective, with the consequence that A would be obliged to perform and D to pay the price, subject to an appropriate adjustment taking into consideration the payment of the bribe?

As explained above (point 6.2), if D did not know nor ought to have known of the bribe paid to C, the Contract awarded to A is not necessarily invalid. It should be noted, that a question of the validity, as a concept adopted in Article 58 k.c., operates *ex lege*. Validity depends on certain conditions and there is no room for a party to the contract, nor a third party, to make a choice as to its effectiveness. It follows that D cannot choose to treat the Contract as valid or invalid (although it could choose to withdraw from pursuing declaration of invalidity before courts and thus effectively keep the invalid contract being performed; nonetheless, such a contract is not safe, for anyone with a legal interest can request that the invalidity is declared by a court).

A room for a choice as whether to treat the contract effective exists under Article 70^5 k.c. As noted above, Article 70^5 k.c. applies in case of tenders in private and public sector, where a tender is wrongfully influenced. If this is the case, the principal (D), as well as competitors, can choose to seek invalidation of the contract or

[111] This rule does not apply in case the enriched party, when disposing of a benefit, has acquired something in exchange for the used/lost benefit. However, in case B has passed a bribe to C it has not received anything in exchange for that bribe.

leave the contract as it is and allow it to be performed. However, Article 70^5 § 2 k.c. provides for a short time-limit to make that choice: a month from the moment when the party seeking invalidation has learned of reasons that justify it, and in any event – a year from the moment when the contract was concluded.

> Ques. 1.4: Still supposing that D, when awarding the Contract to A, did not know nor ought to have known of the bribe paid to C, can D choose instead to treat the Contract as being of no effect, with the consequence that neither of the parties has a remedy under the Contract?

See above, answer to question 1.3.

> Ques. 1.5: Supposing that A, after having been awarded the Contract, has almost completed construction of the power plant when in country Y a new Government comes to power which claims that the Contract is invalid because of corruption and refuses to pay the outstanding 50% of the price, would the parties be left where they are or would they be granted restitutionary remedies, i.e. A be granted an allowance in money for the work done corresponding to the value that the almost completed power plant has for D, and D restitution of any payment it has made exceeding this amount?

Assuming that the Contract is invalid under Article 58 k.c. (as to whether this is necessarily the case see above ques. 1.3) or has been invalidated under Article 70^5 k.c., both parties are in principle entitled to restitution of what they performed under the Contract.

A classic *conditio sine causa* situation arises.[112] According to Article 410 k.c. the objects of performances should be returned under the rules relating to unjust enrichment. Possibly, an accumulation of claims can occur. In particular, in case an object of performance was a movable or immovable (*res*), restitutionary claims based on Article 410 k.c. may accumulate with proprietary claims (*rei vindicatio*), available under Article 222 k.c.[113] The plaintiff can then choose on which claim to rely. If the performance consisted of services, their value should be returned.[114] However, if mutual benefits are to be returned, each party can withhold restitution until the other party offers the return of the mutual benefit (Article 496 and 497 k.c.).

It follows that if the contract is declared invalid, in principle, A would be granted the value of the work done with respect to the almost completed power plant, and D could claim restitution of any payment it has made. A set-off would be possible.

Potentially, D could argue that A's claim for restitution should not be allowed because it constitutes an abuse of rights (Article 5 k.c.). A, who gave a bribe, could be considered as trying to profit from its own misbehaviour. Still, A would

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[112] M. G u t o w s k i, *Nieważność czynności prawnej*, 2008, p. 463.

[113] Since the contract is invalid, under Polish law the property is considered to never have validly been transferred to the other party. See *ibidem*, p. 465 *et seq*.

[114] See judgment of the Supreme Court of 8.10.1992, III CZP 117/92.

have to return what it received as payments from D. Relying on Article 5 requires however to point at specific circumstances that justify a conclusion that abuse of rights is present.

It does not seem that in the given scenario forfeiture under Article 412 k.c. could come into play with respect to parties mutual performances.

> **Case No. 2.** A, an aircraft manufacturer in country X, knowing that C, the Ministry of Defence of country Y, intends to purchase a number of military aircraft, enters into an agreement with B, a consultancy firm located in country Y, by which B, for a commission fee, is to negotiate the possible purchase by C of the aircraft manufactured by A ("the Agency Agreement").
>
> Ques. 2.1: Supposing that C, despite B's efforts, does not buy the aircraft from A, can A refuse to pay B the agreed commission fee, invoking a statutory regulation of country Y prohibiting the employment of intermediaries in the negotiation and conclusion of contracts with governmental agencies?

For the purpose of the present question, we assume that the law applicable to the Agency Agreement is Polish law, while country Y is a different state.

Under Polish law, the Agency Agreement of the kind described in case No. 2 would be valid, unless it implied illegal influence on the decision making to be exercised in the Ministry of Defense of country Y, as understood under Articles 230–230a k.k. If such an element is not present, the contract is to be deemed valid under Polish *lex contractus*.

Interfering with the law governing the contract could occur by application of overriding mandatory rules. Since Poland is a member of EU, an appropriate basis for such intervention is contained in Article 9(3) of the Rome I Regulation.[115] This provision allows for exceptional application of the overriding mandatory rules of a third country. Since statutory rules of country Y render the performance of the contract unlawful, they could potentially be given effect under Article 9(3) of Rome I, if the Polish court would decide that it is mandated in the circumstances of the case at hand. In making that decision, the court has discretion and should take into account the factors pointed out in Article 9(3): the nature and purpose of the rules in question and the consequences of their application or non-application. There is no example of a Polish case, where Article 9(3) would have been used (same concerns its predecessor – Article 7(1) of the Rome Convention; earlier, before the Rome Convention entered into force, there also was no case, in which a Polish court would apply foreign overriding mandatory rules).[116] On a practical level, in our judgment, it is rather unlikely that a Polish court would give

[115] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. L 177, p. 6.

[116] This is not just a Polish peculiarity. A lack of case law, where Article 9(3) of Rome I or 7(1) of the Rome Convention would actually lead to application of a foreign mandatory rule, is common in other countries.

effect to a foreign statutory regulation of country Y prohibiting the employment of intermediaries in the negotiation and conclusion of contracts with governmental agencies. The matter could be different, if the case would have been decided by the arbitral tribunal.

> **Case No. 3.** A, an aircraft manufacturer in country X, knowing that C, the Ministry of Defence of country Z, intends to purchase a number of military aircraft, enters into an agreement with B, an intermediary located in country Z, by which B, for a "fee" of 5% of the contract price, is to "negotiate" the purchase by C of the aircraft manufactured by A ("the Agreement"), on the understanding that B will pay half of the "fee" to a high ranking procurement advisor of C.
>
> Ques. 3.1: Supposing that A, after C has purchased the aircraft from A, refuses to pay the agreed "fee" invoking the illegality of the Agreement, can B require payment on the ground that in Country Z not only is there no statutory regulation prohibiting the employment of intermediaries in the negotiation and conclusion of contracts with governmental agencies, but it is a generally accepted practice that intermediaries "share" their "fees" with their contact persons in the governmental agencies concerned?

For the purpose of the present question, we assume that the agreement concluded between A and B is governed by Polish law, while country Z is a different state. Such an agreement would be treated as invalid under Polish law, as its object and purpose involves paying a bribe to a high ranking procurement advisor of C (which constitutes a crime under Polish criminal law). Therefore, there is no valid legal basis for B to request payment of the fee. The fact that the agreement would be effective under the law of country Z will not change that conclusion, since it cannot override application of the *legis contractus* to that effect. Moreover, even if one assumed that the agreement between A and B would be governed by law of country Z and thus valid under the *lex contractus*, the Polish law could possibly intervene by operation of the overriding mandatory rules that render such contract invalid – at least where the case would have been heard by a Polish court.

A question could arise as to whether forfeiture of the fee could come into play under Article 412 k.c. The fee to be shared with procurement advisor of C could be classified as performance knowingly made in exchange for a criminal act or an act having an immoral purpose, and thus subject to forfeiture. However, if the fee has not yet been paid it cannot be subject to forfeiture under Article 412 k.c.

Conversely, if the fee has already been paid, application of Article 412 k.c. could be triggered. Nevertheless, some doubts arise.

First, a question arises as to whether the Polish legislator, by using the term "criminal act" in Article 412 k.c., intended it to cover actions that were carried out anywhere in the world (and irrespective of whether they are considered criminal actions in a given country), or only those that were undertaken in Poland. There is no guidance in the Polish case law or doctrine as to this issue. If the latter interpretation is preferred, and assuming that fee to be shared with a procurement advisor of C was paid in country Z, application of Article 412 k.c. would not be activat-

ed. However, since no such limitation is built in the wording of Article 412 k.c., a more appropriate interpretation might be that Article 412 k.c. applies to any situation, in which a given act constitutes a crime under Polish criminal law, irrespective of where it was carried out.

Second, it could be deliberated whether in a situation, where in a foreign country it is a generally accepted practice that intermediaries "share" their "fees" with officials, and taking into account A's intention to do business in that country, the bribe to be paid to procurement advisor of C was not really forced upon A. As mentioned above (see above point 6.1.2) being forced to pay a bribe could persuade the court not to order forfeiture under Article 412 k.c. Such a conclusion would depend on the extent to which the circumstances of the case indicate that A was indeed forced to give a bribe.

Janusz Jankowski
Professor of Law, University of Łódź

Sławomir Cieślak
Professor of Law, University of Łódź

Maciej Muliński
Doctor of Law, University of Łódź

JUDICIAL AND CROSS-BORDER MEDIATION IN POLAND

I. The notion of mediation, types of mediation and the legal basis for mediation in Poland

1. The notion of mediation

The Polish law does not provide any legal definition of mediation; however, characteristics of mediation in Poland shall be based on existing regulation. According to article 10 of the Polish Code of Civil Procedure[1] (in further remarks abbreviated to CCP) in cases, where a judicial settlement is admissible, the parties may reach a settlement in the course of mediation proceedings. The settlement as an effect of mediation conducted within civil proceedings may be reached in civil, commercial, family law and labour law matters. Mediation is also admissible in criminal proceedings, in juvenile proceedings and in proceedings before administrative courts. A specific type of mediation is provided as a device for solving collective labour disputes.

2. The existing legal basis for mediation

The most significant regulation of mediation in Poland was introduced in 2005 by the amendment to the CCP which came into effect on 10th December 2005 (articles 183^1–183^{15} of the CCP). Besides, there exist other regulations of mediation:

[1] Consolidated text: Dziennik Ustaw [Journal of Laws – J. of L.] 2014, item 101 as amended.

1) in the light of article 23a of the Code of Criminal Procedure of 1997,[2] courts and prosecutors (in preparatory proceedings) are entitled to initiate mediation in criminal cases;

2) article 3a of the Act on Procedure in Juvenile Matters of 1982[3] creates the basis for mediation in juvenile matters;

3) mediation also exists as a form of solving collective labour disputes (article 10–15 of Act on Solving Collective Labour Disputes of 1991).[4] This regulation relates to the collective labour disputes only. Mediation in individual labour disputes shall be treated as mediation in civil cases regulated by CCP and the Civil Code;[5]

4) a specific type of mediation is regulated in the Act on the Procedure before Administrative Courts of 2002.[6] According to article 116 of this Act, mediation shall be conducted by the judge or the senior court clerk in administrative court. It is the one and only exceptional situation, in which judges and court clerks may fulfill the function of a mediator in Poland.

The Polish procedural provisions indicate fundamental principles of mediation. According to these rules mediation in Poland is based on **the principle of voluntariness**, so initiative of parties or their agreement is needed to conduct the mediation (article 183^1 and 183^6 of CCP). In case the party objects, the mediation shall be discontinued (article 183^6 § 2 p. 3 and 4, see below points II.1 and IV.1). Polish provisions constitute also **the principle of confidentiality of mediation**. Mediation shall not be open to the public. A mediator shall not keep any facts disclosed to them in connection with mediation confidential, unless released from this obligation by the parties. Any proposed settlements, mutual concessions or other statements made in mediation shall have no effect when invoked in the course of proceedings before a court or court of arbitration (article 183^4 of CCP). A mediator may not testify as a witness with respect to the facts which he has learned in connection with mediation, unless the parties release him from the obligation of confidentiality of mediation (article 259^1 of CCP).

A minimum of formalism is also characteristic of Polish mediation. A conduct of mediation proceedings is not regulated. Article 183^{11} of CCP foresees only that the mediator shall promptly set the date and venue of a mediation meeting. It shall not be required to schedule a mediation meeting, if the parties agree for mediation to be conducted without a mediation meeting. This provision indicates two types of mediation – the so-called direct mediation, so the mediation conduct-

[2] J. of L. 1997, No. 89, item 555 as amended. The amendment to the Code of Criminal Procedure of 27th September 2013 (J. of L. 2013, item 1247) will enlarge the access to the mediation in criminal matters. This amendment will come into effect on 1st July 2015.

[3] Consolidated text: J. of L. 2014, item 382.

[4] J. of L. 1991, No. 55, item 236 as amended.

[5] Consolidated text: J. of L. 2014, item 121.

[6] Consolidated text: J. of L. 2012, item 270 as amended.

ed during a meeting of mediator and parties and the so-called indirect mediation, i.e. mediation without such a meeting. Obviously, both types of mediation may follow each other in the same mediation procedure.

3. Regulation on mediation as a part of public law in Poland

Provisions on mediation are first and foremost included in the acts regulating court procedures in Poland (Code of Civil Procedure, Code of Criminal Procedure, Act on Procedure in Juvenile Matters, Act on the Procedure before Administrative Courts), so regulation on mediation shall be treated as a part of public law in Poland. However, this statement does not relate to the out-of-court mediation. This type of mediation is not regulated in Polish law. A settlement concluded in out-of-court mediation and unauthorized by court is covered by the Polish Civil Code. This settlement is a type of contract regulated in articles 917 and 918 of Civil Code. According to article 917 of this Code, by the contract of settlement the parties shall make reciprocal concessions within the scope of the legal relationship existing between them for the purpose of setting aside uncertainty as to the claims arising from that relation or ensuring their performance or setting aside a dispute which exists or which might arise. Provisions of Civil Code contain the only regulation of settlement concluded in out-of-court mediation and unauthorized by court, so that settlement is covered by private law.

4. Internal and cross-border mediation

Polish regulation on mediation included in CCP and in other acts refers to internal mediation only. There exist no special provisions concerning cross-border mediation in the Polish system of law. However, the existing regulation shall be applied also to that type of mediation. Simultaneously, Poland as a member of the European Union is bound by the European regulation concerning mediation. A settlement concluded in mediation and authorized by court shall be treated as the European Enforcement Order for uncontested claims ("a settlement approved by a court" in the meaning of article 24 of Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims).[7] Polish regulation concerning mediation fulfills requirements arising from Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[8] (particularly in the scope of access to mediation, enforceability of agreements resulting from mediation, confidentiality of media-

[7] Official Journal of the European Union of 30.04.2004, L 143/15.

[8] Official Journal of the European Union of 24.05.2008, L 136/3.

tion and effect of mediation on limitation and prescription periods, see details in further remarks). However, Polish acts on mediation do not contain any reference to Directive 2008/52/EC (as required in article 12 of this Directive). See remarks in the point VI on procedure to declare foreign mediation settlements enforceable and in the point IV.7 on the implementation of article 6 of this Directive to Polish CCP.

5. Out-of-court and court annexed mediation in Poland

A court annexed mediation shall be understood as the mediation conducted in connection with a court procedure (during such a procedure). In turn an out-of-court mediation is not connected with any procedure.

Both of these types of mediation are accepted and practiced in Poland. In the light of article 183^1 § 4 of CCP, mediation shall be conducted before instituting proceedings, or, subject to the consent of the parties, in the course of court proceedings. Both types of mediation may be conducted on the basis of a mediation agreement. Besides, the court decision may also create the basis for court annexed mediation (article 183^1 § 2 of CCP). The CCP regulation first and foremost relates to the court annexed mediation; however, a settlement as an effect of out-of-court mediation may be also validated by the court in the framework of civil procedure.

6. A reference to other ADR devices existing in Poland

There exist two ADR devices regulated in Poland: mediation and arbitration. Other types of ADR (e.g. conciliation, negotiation) remain outside the Polish legal system; however, they are often put into practice (in many cases as a part of mediation). The regulation of arbitration is located in the part V of the Polish CCP (articles 1154–1217). The relationship between arbitration and mediation remains unregulated in Poland. However, provisions of CCP determine the relationship between these ADR devices and civil (court) procedure (about mediation and court procedure – see previous remarks in the point I.5). Arbitration and mediation may be initiated in the majority of cases heard in civil procedure (except social insurance matters and cases concerning a request to declare standard contractual provisions to be prohibited – it results from articles 10 and 1157 in connection with articles 477^{12} and 479^{41} of CCP). Besides, the arbitration procedure is not admissible in maintenance (alimony) cases (article 1157 of CCP).

7. A reference to (e)justice

Polish provisions on e-justice are included in article 505^{28} and following of CCP and they foresee a specific type of proceedings, i.e. electronic procedure

by writ of payment. The mentioned procedure shall consist of actions taken and recorded in the electronic communication system only. This regulation and any other devices of e-justice are not applicable to mediation and the settlement reached within mediation.

8. Statistic information

In Poland there are a number of mediators and entities providing mediation services in civil and commercial cases (Mediation Centres). There are circa 2470 registered mediators, including ca. 470 in juvenile matters, above 800 in civil cases; above 1100 in criminal cases, ca. 280 in labour law cases, ca. 410 in commercial disputes and ca. 560 in family law cases[9] (some of mediators provide mediation services in more than one category).

There exist ca. 50 Mediation Centres in Poland (*inter alia*: Polskie Centrum Mediacji, Centrum Mediacji Gospodarczej Polskiego Stowarzyszenia Sądownictwa Polubownego, Centrum Mediacji Fundacji "Partners" Polska, Centrum Mediacji przy Polskiej Konfederacji Pracodawców Prywatnych Lewiatan). Official lists of mediators and mediation centres are kept by the Presidents of Regional Courts. See further remarks (the point III) concerning legal framework of providing mediation by mediators and mediation centres.

Mediation usage statistics

Years	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
1	2	3	4	5	6	7	8
A number of mediations in civil cases initiated on the basis of the court decision (in bracket number of terminated proceedings as an effect of mediation settlement agreements validated by court):							
Regional Courts	1053 (25)	1021 (38)	1061 (54)	1349 (27)	1535 (47)	1656 (54)	1915 (93)
District Courts	395 (68)	378 (73)	394 (65)	493 (63)	661 (101)	858 (105)	929 (159)
Altogether	1448 (93)	1399 (111)	1455 (119)	1842 (90)	2196 (148)	2514 (159)	2844 (252)
A number of mediations in commercial cases initiated on the basis of the court decision (in bracket number of terminated proceedings as an effect of mediation settlement agreements validated by court):							
Regional Courts	116 (23)	101 (24)	77 (7)	141 (29)	192 (27)	376 (71)	717 (129)

[9] www.bobrowicz.pl/blog/MEDIACJE/Ilu-jest-mediatorow-w-Polsce.

Mediation usage statistics

District Courts	140 (28)	157 (40)	133 (36)	399 (69)	656 (142)	1053 (182)	1637 (293)
1	2	3	4	5	6	7	8
Altogether	256 (51)	258 (64)	210 (43)	540 (98)	848 (169)	1429 (253)	2354 (422)
A number of mediations in labour law cases initiated on the basis of the court decision (in bracket number of terminated proceedings as an effect of mediation settlement agreements validated by court):							
	33 (5)	74 (8)	107 (7)	252 (22)	195 (26)	65 (22)	284 (39)
A number of mediation settlement agreements reached in juvenile matters:							
	298	276	223	256	261	253	260
A number of mediation settlement agreements reached in family law matters:							
	127	155	216	340	439	471	559
Mediations initiated by prosecutor's decisions in criminal procedures (in bracket number of settlements reached as an effect of these mediations)							
	1447 (1074)	1912 (1438)	1506 (1225)	1296 (1042)	1217 (960)	no data	no data
Mediations initiated by court's decisions in criminal procedures (in bracket number of settlements reached as an effect of these mediations)							
	5052 (3062)	4178 (2753)	3891 (2551)	3714 (2505)	3480 (2274)	3251 (2071)	3252 (2251)

Source: the official website of Ministry of Justice, http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki.

Statistics on the usage of mediation show the growing number of mediations in Poland in the last few years (especially in civil, commercial and family law matters), however, the number of mediations in Poland in comparison with the number of cases examined by courts remains quite small (e.g. 485 769 civil matters and 87 829 commercial matters initiated in litigious proceedings in district courts in Poland in 2012).[10] Polish ADR experts are cautiously optimistic that the number of mediations will grow, however, the mediation needs a greater push from the government, lawyers, lawmakers, mediation institutions and the media in order to become a real alternative to arbitration and litigation.[11]

Relevant statistics on out-of-court mediations in Poland are not available.

[10] The official website of Ministry of Justice, http://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki.

[11] S. P i e c k o w s k i, "Using Mediation in Poland to Resolve Civil Disputes," *Dispute Resolution Journal*, November 2009/January 2010, p. 84.

II. A mediation agreement

1. Regulation on a mediation agreement

In the light of article 183^1 § 2 of CCP, meditation shall be conducted on the basis of a mediation agreement or on the basis of the court decision to refer parties to mediation. The mentioned provision foresees a particular way of conclusion of mediation agreement. The agreement may also be concluded if a party in dispute consents to mediation after the other party filed a petition for mediation. In such situation the mediation agreement consists of two separate statements of parties to a dispute: a petition for mediation filed by one party and a consent for mediation expressed by the other. Both of these statements shall be addressed to a mediator. In this case a mediator shall begin to fulfill his/her function already on the stage of a conclusion of mediation agreement.

Pursuant to article 183^6 § 1 of CCP, mediation shall commence once a mediator is served by one party a request (petition) for conducting mediation together with a proof of delivery of a copy thereof to the other party. Paragraph 2 of this article enumerates situations, in which mediation shall not commence despite delivery of a request for mediation:

1) a permanent mediator refuses to conduct mediation within one week of being served a request for conducting mediation;
2) the parties have concluded a mediation agreement in which they identify a mediator other than a permanent mediator but the chosen person refuses to conduct mediation within one week of being served a request to conduct mediation;
3) the parties have concluded a mediation agreement in which no specific mediator is identified, and if the person asked to conduct mediation does not express his/her consent within one week from being served the request for conducting mediation, or the other party does not approve of the said mediator within one week;
4) the parties have not concluded a mediation agreement and the other party does not consent to mediation.

The last mentioned situation refers to a specific method of a conclusion of the mediation agreement as described above.

2. Legal requirements relating to the form and content of a mediation agreement

These requirements are reduced to an absolute minimum (see previous remarks on a minimum formalism of mediation, the point I.2). A written form of a mediation agreement is not required, so oral form of this contract shall be treated as admissible.

The minimum content of agreement (*essentialia negotii*) is indicated in article 183^1 § 3 of CCP. According to this article, a mediation agreement shall identify

in particular the subject-matter of mediation, the specific mediator or the method of selecting a mediator. The major number of details has to be contained in a request to conduct mediation (a petition for mediation, see above the point II.1). Pursuant to article 183^7 of CCP, a request to conduct mediation shall include the particulars of the parties, the specific claim, the circumstances of the claim, signature of the party and a list of enclosures. If the parties have concluded a written mediation agreement, a copy thereof should be annexed to such request.

The consequences of a party's failure to comply with the enumerated above requirements for a request to conduct mediation are not regulated in provisions in CCP. *In opinio communis* in such a situation a mediator shall order the party to correct or supplement the request (petition).

3. The question of responsibility arising out of the breach of the mediation agreement

Pursuant to article 202^1 of CCP, if, before instituting proceedings in court, parties have concluded a mediation agreement, the court shall refer parties to mediation upon a plea filed by the defendant before defending on the merits of the case. However, Polish regulation on mediation does not foresee responsibility arising out of the breach of the mediation agreement. The lack of regulation on this question shall be treated as an important aspect of principle of voluntariness of mediation (see above the point I.2). A party may withdraw his/her agreement for mediation without any negative consequences except the court costs. In the light of article 103 of CCP, notwithstanding the outcome of a case, the court may order a party to reimburse any costs caused by unjustified refusal to participate in mediation, where the party has previously agreed to such mediation.

4. Effects of a mediation agreement on a future plead before national courts and on the limitation of claims

The only regulation of this question is contained in article 202^1 of CCP (see the previous point). However, despite this regulation, a mediation agreement and even a conducted mediation shall not be an obstacle to the processing and considering a case brought by a party of such agreement or mediation. Consequently, a mediation agreement does not create an obstacle to the arbitration procedure.

However, the initiation of mediation proceedings has got a fundamental influence on limitation of claims. Pursuant to article 123 § 1 point 3 of the Polish Civil Code, the course of limitation shall be interrupted by initiating mediation. Next, in the light of article 124 of Civil Code, in the case of the interruption of limitation by initiating mediation, the limitation shall not commence to run afresh, until the mediation proceeding is over. Lastly, according to article 125 of Civil

Code, a claim confirmed by a settlement concluded by a mediator and confirmed by a court of law shall be subject to limitation upon the lapse of ten years, even if the period of limitation of such claims was shorter.

III. The mediator

1. Requirements for a mediator in civil cases

Legal requirements for a mediator in Poland depend on the legal basis for mediation (see previous remarks in the point I.2). The most liberal conditions are foreseen in mediation in civil matters (mediation regulated by the Code of Civil Procedure). Pursuant to article 183^2 § 1 of CCP, a natural person with full capacity to perform acts in law and entitled to full public rights may be a mediator. According to article 183^2 § 2 of CCP, a judge may not be a mediator. This liberal regulation is based on the opinion that mediator's abilities are not created by knowledge but by his/her personality. Therefore, in order to make easier for the parties to undertake mediation, no specific requirements as to mediator's education are foreseen. However, in the light of article 436 § 4 of CCP, if the parties of a future mediation in marital matter have not agreed on a specific mediator, the court shall refer them to a permanent mediator with relevant theoretical knowledge, such as in a particular psychological, pedagogical, sociological or legal background, as well as practical skills of mediation in family cases.

According to article 183^2 § 3 and § 4 of CCP, non-governmental organisations, within the scope of their statutory activities, and high schools may keep a list of permanent mediators and establish mediation centres. Entering a mediator in the list requires his/her written consent. Information on the lists of permanent mediators and mediation centres is submitted to the president of the regional court. A permanent mediator may only refuse to conduct mediation for serious reasons, of which he/she shall immediately notify the parties concerned, and, where the parties were referred to mediation by a court, notify the court.

2. Qualifications required to be a mediator in criminal cases

Higher qualifications are required from mediators in criminal matters. These qualifications are regulated in the Minister of Justice Decree of 13 June 2003 on mediation proceedings in criminal cases.[12] In the light of § 3 of this Decree, a mediation shall be conducted by a trustworthy person with Polish citizenship, with full capacity to perform acts in law and entitled to full public rights. Besides,

[12] J. of L. 2003, No. 108, item 1020.

a candidate for a mediator shall be at least 29 years old with fluent knowledge of Polish, unpunished for intentional offence, he/she shall possess the skills in the scope of solution of conflicts and knowledge needed to conduct a mediation, particularly in the scope of psychology, pedagogy, sociology, resocialization or law. According to § 3 point 7 of Decree, this person shall also ensure the correct performance of mediator's duties.

The Minister of Justice Decree of 13 June of 2003 indicates also institutions entitled to conduct mediation procedures. In the light of § 2 of Decree, an institution as a candidate for a mediator shall fulfill (among its statutory activities) functions in the scope of mediation, resocialization, protection of public interest, protection of important individual interest or protection of freedom and human rights. Such an institution shall ensure organizational and personal conditions for the conducting of mediation. A trustworthy person or an institution shall file an application for an entry in the list of institutions and trustworthy persons entitled to conducting mediation in criminal cases. These lists are kept in regional courts and an application for an entry into the list shall be submitted in writing at the president of regional court with documents confirming qualifications required and enumerated in previous remarks. An interested person or institution may file an appeal against the negative decision to the president of court of appeal (§ 4 and § 5 of Decree).

Article 23a § 3 of the Code of Criminal Procedure enumerates people who are not allowed to fulfill the function of a mediator. This exclusion refers to professionally active judges, prosecutors, advocates, legal advisers, legal apprentices and other people employed in courts, prosecutors' offices and in other institutions entitled to prosecute offences. Besides, the mediation shall not be conducted in situations that create the basis for disqualification of a judge. In the light of article 40–42 of the Polish Code of Criminal Procedure a candidate for a mediator shall be disqualified *inter alia* if:

a) the case concerns him/her directly;

b) he/she is the spouse of a party to the proceedings, of the injured person, of defence counsel, of the attorney, of the legal representative, of the statutory agent of the injured person, or if he/she lives in cohabitation with one of these people;

c) he/she is related to any such person by blood or marriage, directly or collaterally, down to a relation between the children of the sibling of those listed under b), or else related to any such person by adoption, custody or guardianship;

d) he/she was a witness to the act from which the pending case arises, or has appeared as a witness or expert in the same case;

e) he/she has participated in the case as a judge, public prosecutor, defence counsel, attorney, legal representative or as the statutory agent of a party to the proceedings, or has conducted preparatory proceedings in the case. Besides a mediator shall be disqualified if there are circumstances of such nature that his/her impartiality in the given case might give rise to reasonable doubts (article 41 § 1 of the Code of Criminal Procedure).

When referring parties to mediation, the court or the prosecutor shall appoint a mediator a trustworthy person or an institution from the list indicated above. It is exceptionally admissible to appoint a mediator from beyond the list. It may only be justified the need of an effective process of mediation in a situation, in which a potential mediator (from beyond the list) has declared readiness to conduct mediation in a certain case (§ 7 of Decree).

3. Qualifications required to be a mediator in juvenile cases

Requirements for mediators in juvenile cases have been regulated in the Minister of Justice Decree of 18 May 2001 on mediation proceedings in juvenile cases.[13] Requirements enumerated in this regulation quite strongly differ from those in the Decree on mediation in criminal matters. However there also exist two categories of mediators: institutions and trustworthy persons. In the light of § 3 of Decree institutions shall be constituted for activities in the scope of mediation, resocialization, child-rearing counseling, psychological aid, psychological assessment, criminality prevention, protection of freedom or protection of human rights. Besides, diagnostics and consulting family centres existing around a country shall be the institutions entitled to conduct mediations in juvenile matters. Mediation shall be conducted by representative authorised in writing by the institution. Representatives of institutions shall satisfy conditions required from mediators in juvenile matters.

These conditions are enumerated in § 4 of Decree:

a) trustworthy person;

b) full capacity to perform acts in law and entitled to full public rights;

c) age: at least 29 years old;

d) fluent knowledge of Polish (both oral and written);

e) educational background in the scope of psychology, pedagogy, sociology, resocialization or law and experience in the field of child-raising or resocialization of youth;

f) a candidate shall possess the skills in the scope of solution of conflicts and establishment of interpersonal contacts and;

g) shall ensure the correct performance of mediator's duties;

h) received training for mediators.

The standards of that training are described in the attachment to the Decree. The training shall consist of three parts:

a) legal and organizational aspects of mediation proceedings;

b) psychological mechanisms of formation, escalation and solution of conflicts;

c) practical training of mediation skills.

[13] J. of L. 2001, No. 56, item 591 as amended.

The decree enumerates categories of people that are not allowed to fulfill the function of a mediator in juvenile matters (*inter alia*: judges, prosecutors, advocates, debt collectors, prison officers).

Regional courts shall keep lists of institutions and trustworthy persons entitled to conduct mediation. An application for an entry into the list shall be submitted to the president of regional court.

4. Mediators in collective labour disputes

In the light of article 11 of Act on Solving Collective Labour Disputes (see previous remarks in the point I.2), parties of a collective labour dispute shall together appoint a mediator. That function may be fulfilled by a person from the list established by the Minister of Labour and Social Policy. That list shall be agreed with trade unions and employers' organisations. The relevant provisions do not regulate any qualifications required from mediators in collective labour disputes.

5. Appointing a mediator

The appointing depends on legal basis of mediation (type of mediation, see remarks in the point I.2). Pursuant to article 183^1 § 3 of CCP, a mediation agreement shall identify in particular the subject-matter of mediation, the specific mediator or the method of selecting a mediator. In case of out-of-court mediation in civil, family and labour law cases the parties of a dispute shall appoint a mediator in their mediation agreement. Another regulation refers to court-annexed mediation in these cases. According to article 183^9 of CCP, when referring parties to mediation, the court shall appoint a mediator; however, the parties may choose another mediator (on the court decision referring parties to mediation see the points: I.5 and IV.2).

In the light of § 7 of Decree on mediation proceedings in criminal cases, a mediator shall be appointed by the court or the prosecutor referring parties to mediation from the list of institutions and trustworthy persons entitled to conduct mediation (see above the point III.2). Provisions do not foresee the possibility for parties of mediation to choose another mediator.

Pursuant to article 3a of the Act on Procedure in Juvenile Matters, in each stage of procedure the family court may refer parties to mediation. The family court is the only entity entitled to appoint a mediator in juvenile cases. Parties are not allowed to choose another mediator.

In the light of article 11 of Act on Solving Collective Labour Disputes (see previous remarks in the point I.2 and III.4), parties of a collective labour dispute shall together appoint a mediator.

Pursuant to article 116 § 1 of the Act on the Procedure before Administrative Courts, a mediation in the procedure before administrative court shall be conducted by the judge or by the senior court clerk employed in this court and appointed by the president of department of this court (see above the point I.2).

6. Main duties of mediators

These duties are differently regulated in particular types of mediations.

A permanent mediator in civil, family and labour cases has got an obligation to conduct mediation. Pursuant to article 183^2 § 4 of CCP, a permanent mediator may only refuse to conduct mediation for serious reasons, of which he/she shall immediately notify the parties concerned, and, where the parties were referred to mediation by a court, notify the court. A mediator shall remain impartial in conducting mediation (article 183^3 of CCP, about the duty of confidentiality see remarks in the next point). A mediator shall promptly set the date and venue of a mediation meeting. However, it shall not be required to schedule a mediation meeting, if the parties agree for mediation to be conducted without a mediation meeting (article 183^{11} of CCP, see the points: I.2 and II.5). A mediator shall draw a mediation report (article 183^{12} § 1 of CCP). The report shall be drawn both in case of the success of mediation and in the event of failure of mediation (see the points IV.5 and IV.6). Pursuant to article 183^{13} of CCP, if a settlement is reached, the mediator shall promptly submit a report to the court of general or exclusive jurisdiction to validate the settlement. If a case is referred to mediation by a court, the mediator shall file a report with the court of trial.

In the light of § 11 of Decree on mediation proceedings in criminal matters, the mediator shall establish contacts with parties of mediation (i.e. with the injured and the suspect or the accused) and set the date and venue of a meeting with each of them. Next, the mediator shall hold individual meetings with these persons and inform them about the essence and principles of mediation and their rights as participants of mediation. After that, the mediator shall hold a mediation meeting with participation of the injured and the suspect or the accused. The mediator shall also help to form a settlement between the injured and the suspect or the accused and confirm the accomplishment of obligations arising from this settlement. If the intermediate meeting between the injured and the suspect or the accused appeared impossible, the mediator may conduct mediation in an intermediate way by transmission of information, suggestions and statements from one party to the other.

Pursuant to § 13 of the Decree on mediation proceedings in criminal matters, after the end of mediation the mediator shall draw a report and submit it to the organ, which referred a case to mediation. The report shall contain:

a) the reference number;

b) the name of an institution or the first name and family name of a trustworthy person that conducted the mediation proceeding;

c) information on the number, dates and venues of individual meetings and joint meetings and participants of these meetings;

d) information on the result of mediation;

e) signature of the mediator.

A settlement concluded as an effect of mediation shall be attached to the report. In case of failure of mediation the mediator shall also draw the report and submit it to the organ, which referred a case to mediation. That report shall indicate reasons for failure of mediation.

The main duties of a mediator in juvenile matters have been regulated in § 14 and § 17 of the Minister of Justice Decree of 18 May 2001 on mediation proceedings in juvenile cases.[14] In the light of § 14 of Decree, after the reference of the case to mediation the mediator shall become acquainted with the court records of this case. Next, the mediator shall establish contacts with parties of mediation and get their consent for the participation in mediation. After that, the mediator shall hold individual meetings with these persons and inform them about the essence and principles of mediation and their roles and rights as participants of mediation in juvenile matter. Finally, the mediator shall hold mediation meeting with all participants of mediation. In the light of § 15 of Decree, if the immediate meeting between parties of mediation has appeared impossible, the mediator may conduct mediation in an intermediate way by transmission of information, suggestions and statements from one party to the other. However, educational influence of mediation may be treated by a mediator as an obstacle for conducting intermediate mediation in juvenile cases. The mediator shall also help to form a settlement and confirm the accomplishment of obligations arising from this settlement. After termination of mediation the mediator shall prepare a mediation report in writing. In the light of § 17(2) of Decree, the report shall include:

a) the reference number;

b) the first name and family name of a trustworthy person or the name of the institution that conducted mediation procedure;

c) information on the number, dates and venues of individual meetings and joint meetings and enumeration of participants of these meetings;

d) information on the result of mediation.

A settlement concluded as an effect of mediation shall be attached to the report. Pursuant to § 17(3) of Decree, the mediation report in juvenile matter shall not:

a) disclose the course of mediation meetings;

b) contain the evaluation of behavior of their participants;

c) disclose the content of their statements, unless the participant of mediation has clearly petitioned for disclosure of data enumerated above and concerning him or her.

[14] J. of L. 2001, No. 56, item 591 as amended.

The Act on Solving Collective Labour Disputes of 1991 (see the point I.2) does not enumerate any mediator's duties in mediation as a device of solving collective labour disputes.

Article 116 § 3 of the Act on the Procedure before Administrative Courts (see the point I.2) regulates the one and only duty of a mediator in mediation conducted within this procedure: the preparation of protocol. The protocol shall be drawn by a judge or by a senior court clerk as mediator. The protocol shall contain stances of parties and their arrangements concerning the solution of a dispute.

7. The mediator's obligation of confidentiality

Polish provisions constitute the principle of confidentiality of mediation (see the point I.2). According to article 183^4 § 2 of CCP, a mediator shall keep any facts disclosed to him in connection with mediation confidential, unless released from this obligation by the parties. Consequently, pursuant to article 259^1 of CCP, a mediator may not testify as a witness with respect to facts which he/she has learned in connection with mediation, unless the parties release him/her from the obligation of confidentiality of mediation. In the light of these provisions the parties of mediation are the only entities that may release a mediator from the obligation of confidentiality of mediation. Apart from the mentioned release, provisions of Polish CCP do not foresee any mediator's duty of disclosure of facts learned in connection with mediation.

Pursuant to article 180 § 1 of the Code of Criminal Procedure, persons obligated to preserve an official secret, or secrets connected with their profession or office may refuse to testify as to the facts to which this obligation extends, unless they have been released by the court or the prosecutor from the obligation to preserve such a secret. According to article 181 § 1 of this Code, such persons shall be examined at the trial in a closed session. The quoted regulation shall be applied to every mediator, who appears in criminal procedure as a witness.

8. The responsibility of mediators

This question is not regulated in any provisions concerning mediation. Consequently, the common rules of civil and criminal law (in case of commitment of offence) shall be applied to the responsibility of mediators. In particular, it is possible to apply rules of contractual responsibility. The mediator's obligations shall arise from the mediation agreement (see the point II.3). Consequences of the breach of these obligations have been regulated in the Civil Code. The fundamental basis for the potential responsibility of the mediator shall constitute article 471 of the Civil Code. Pursuant to the rule contained in this provision, the debtor shall be obliged to redress the damage arising from non-performance or from

improper performance of an obligation, unless the non-performance or the improper performance are an outcome of circumstances which the debtor shall not be liable for. In practice, responsibility of mediators may arise from the breach of principle of confidentiality of mediation or from the incorrect content of settlement concluded in the mediation (for example: the incorrect wording may create an obstacle for the enforceability of settlement).

9. Codes of conduct for mediators in Poland

Polish authorities have not enacted any official code of conduct or ethical code for mediators; however, non-governmental organisations and institutions involved in mediation create such codes for themselves. The Civic Council for Alternative Methods of Conflict and Dispute Resolution established by the Minister of Justice in 2005, adopted a code of ethics for mediators, standards of conduct for mediators and mediation proceedings and standards for training mediators.[15] The Code of Ethics of the Polish Mediators was adopted by the Council on May 19, 2008 and it contains the following rules:

The mediator should conduct mediation proceedings based on principles of parties' independence and autonomy.

I. The mediator should be guided by the good and interests of the parties.

II. The mediator should assure that the parties freely participate in mediation.

III. The mediator should conduct mediation in such a way to ensure that the parties understand the concept and objectives of mediation proceedings, the role of a mediator and the conditions of eventual settlement.

IV. The mediator should not offer his assistance in a conflict resolution in case he/she does not have a full conviction of his/her abilities that allow him to run the proceedings in a proper way.

V. The mediator should refrain from conducting mediation if he/she cannot assure his/her impartiality or cannot remove doubts as to his/her impartiality.

VI. The mediator should safeguard confidentiality of mediation proceedings, before, during the proceedings and after the proceedings.

VII. The mediator should avoid conflicts of interests with the parties and he/she should immediately remove doubts in this respect.

VIII. The mediator cannot accept or receive any benefits from the parties, except the mediator's fee. He/she should not also derive benefits from referrals.

IX. The mediator should advertise his services in a manner which is not misleading as to his/her credentials, abilities, experience, the scope of services and charged fees.

[15] S. P i e c k o w s k i, *op. cit.*, p. 84.

X. The mediator should inform the parties in a clear and unequivocal manner on his/her compensation and other costs associated with the proceedings the parties take part in.

XI. The mediator should improve and expand his/her professional skills in order to serve the parties better.

10. The role played by Mediation Centres in Poland

As it was mentioned above, the functions of Mediations Centres have been regulated in numerous provisions concerning mediation. In the light of article 183^2 § 3 of CCP, non-governmental organisations, within the scope of their statutory activities, and higher education institutions may keep a list of permanent mediators and establish mediation centres. In turn, decrees on mediation proceedings in juvenile matters and criminal cases enumerate "institutions" as a category of mediators (see above the points III.2 and III.3). The term "institution" in provisions of these decrees shall be understood as non-governmental organisations, higher education institutions, foundations and other organisations, which established Mediation Centres and conduct mediations. The "institution" as a category of mediator in practice means the representative (e.g. an employee) of such an institution as a person conducting mediation. According to different sources, there exist ca. 50 Mediation Centres in Poland.[16] Lists of Mediation Centres are kept by regional courts and they are taken into account during the court referral to mediation. In practice, the significant number of court orders referring parties to mediation indicates a mediation centre as an entity that should conduct mediation. Apart from that, the Mediation Centres in Poland hold trainings and workshops for mediators and future mediators; arrange conferences concerning alternative dispute resolutions and prepare projects of legislative acts relating to mediation.

IV. The procedure of mediation

1. Principles of mediation

Polish regulation on mediation accepts fundamental principles that constitute the basis for mediation worldwide (see the introductory remarks on these principles in the point I.2). In the light of Polish provisions the principle of voluntariness shall be treated as the most fundamental of them. This principle shall be respected in every type of mediation (so in court-annexed and out-of-court mediation in each category of cases, see points I.2 and I.5). According to the first provision

[16] www.mediacja.com/index.php/Osrodki; www.warszawa.so.gov.pl/spis-osrodkow-mediacyjnych-prowadzacych-listy-stalych-mediatorow-w-sprawach-cywilnych.html.

relating to mediation in civil cases, "mediation is voluntary" (article 183^1 § 1 of CCP). Pursuant to article 183^6 § 2(4) of CCP, despite delivery of a request for conducting mediation served by one party, mediation shall not commence if the parties have not concluded a mediation agreement and the other party does not consent to mediation. According to article 183^1 § 4 of CCP, mediation shall be conducted before instituting court proceedings, or, subject to the consent of the parties, in the course of proceedings. The consent to mediation may be withdrawn by a party till the acceptance of settlement.

The principle of voluntariness of mediation is also regulated in other acts concerning mediation. In the light of article 489 § 2 of the Code of Criminal Procedure, an application or a consent granted by a party is needed to conduct mediation in a criminal matter. According to article 3a § 3 of the Act on Procedure in Juvenile Matters, the Minister of Justice shall safeguard the voluntariness of mediation in the Decree regulating the mediation proceedings. In the light of § 11 of this Decree (see the point III.3), the consent of all participants shall be required to conduct mediation. The consent may be withdrawn in every stage of the mediation procedure.

The principle of confidentiality of mediation is described in the points I.2 and III.7. This principle shall be binding in all mediations conducted in Poland. A presence of third persons to any mediation meeting shall be prohibited. In the light of § 12 of the Decree on mediation procedure in juvenile matters, a mediation shall be conducted confidentially, in a way that prevents from third persons' access to information disclosed in the course of mediation. A breach of confidentiality is admissible exclusively with the permission of all participants of mediation.

2. The temporal framework for mediation

In the light of art. 183^1 § 4 of CCP, mediation shall be conducted before instituting proceedings, or, subject to the consent of the parties, in the course of proceedings. Provisions do not foresee temporal framework for mediation based on parties' agreement, so such agreement may be concluded any time. However, there exists a time limitation for the court decision to refer parties to mediation. Pursuant to art. 183^8 § 1 of CCP, the court may refer parties to mediation until the end of the first scheduled hearing. After the end of such hearing, the court may refer the parties to mediation only subject to a joint petition from the parties. According to article 183^8 § 2 of CCP, the court may refer parties to mediation only once in the course of proceedings. The exception to this rule is foreseen in article 445^2 of CCP. Pursuant to this provision, the court may, at any stage of a pending case, refer parties to mediation in order to amicably settle disputes concerning satisfaction of family needs, maintenance, and parental authority, right of access with children and property issues to be provided for in a divorce or legal separation judgment.

3. The course of mediation

The course of mediation procedure is not regulated (see the point I.2). This solution seems to be correct, because the success of mediation depends first and foremost on the mediator's knowledge and experience. Consequently, the conduct of mediation shall be flexible and adapted to parties' needs. So, Polish regulation on the course of mediation is limited to the indication of two ways of conducting mediation – joint meetings with participation of a mediator and all parties of a dispute (the so-called direct mediation) and individual meetings of a mediator and one participant of mediation (the so-called indirect mediation). Both types of mediation may follow each other in the same mediation procedure (see also previous remarks relating to mediation meetings in the points: I.2 and III.6).

4. The duration of mediation

This question is quite clearly and precisely regulated in Polish provisions. The regulation shall be applied to the court-annexed mediation. The time-limits of out-of-court mediation may be indicated in the parties' mediation agreement only. Pursuant to article 183^{10} § 1 of CCP, when referring parties to mediation, the court shall determine the period of such mediation of up to one month, unless the parties jointly request a longer period for mediation. In the course of mediation, such period may be extended upon a joint petition from the parties.

In turn, in the light of article 23a § 2 of the Code of Criminal Procedure, the mediation procedure shall not be continued for a longer period of a time than one month. The period of conducting mediation shall not be counted into the time of conducting preparatory proceedings (the first part of criminal procedure). According to § 8(5) of the Decree on mediation proceedings in criminal cases, the prosecutor's or court's order referring a case to mediation shall determine the deadline for mediation with respect to article 23a § 2 of the Code of Criminal Procedure.

The duration of mediation is also regulated in § 9 of the Decree on mediation procedure in juvenile matters. Pursuant to § 9, when referring a case to mediation, the family court shall determine a date of delivery of the mediation report (see the point III.3). This date shall not be later than six weeks following a delivery date to mediator of the court's order referring a case to mediation. In an extraordinary case, when the probability of conclusion of settlement is high, the court may extend the period of mediation for up to 14 days.

Provisions on mediation as a device of solving collective labour dispute and regulation on mediation within the procedure before administrative courts (see the point I.2) do not foresee any time-limits for mediation.

5. Failure of the mediation

In principle, failure of the mediation shall be understood as a termination of mediation without a settlement concluded between parties of mediation proceeding. However, the mediation conducted as a part of the procedure before administrative court (see the points: I.2, III.5 and III.6) shall not be aimed at the conclusion of settlement. In the light of article 115 § 1 of the Act on proceedings before administrative courts (see the point I.2), the mediation may be conducted by a judge or by a senior court clerk upon the application of the administrative organ or the complainant, so one of parties of these procedure. This specific mediation shall be aimed at the clarification and consideration of factual and legal circumstances of a case and acceptance of arrangements relating to the solution of a case on the basis of applicable law. The lack of these arrangements shall be treated as a failure of mediation.

The principle of voluntariness of mediation (see the points I.2 and IV.1) shall result in the lack of negative consequences of the failure of mediation for the parties and for the mediator. In case of court-annexed mediation it only has got an influence on the costs of legal proceedings and the reimbursement of these costs (see remarks in the point V.1). In the event of a failure of mediation a case shall be considered in a proper procedure. Exceptionally a failure of the mediation may be treated as a consequence of non-performance or improper performance of an obligation by the mediator (see the points II.3 and III.8). In such an extraordinary situation parties of mediation may bring an action against the mediator.

6. Success of the mediation procedure

The settlement reached as an effect of mediation shall be treated as success of the mediation procedure. However, conclusion of the settlement is not admissible in the mediation conducted in the course of the procedure before administrative court. In this specific mediation parties in a dispute may accept arrangements relating to the solution of a case on the basis of applicable law (see the point IV.5). These arrangements shall be taken into account by a court. An administrative organ as a party of a successful mediation shall, according to the accepted arrangements, change or repeal the administrative decision or undertake another proper deed pursuant to the circumstances of a case and in the scope of its competence and jurisdiction. So, the administrative organ shall reconsider a case according to the arrangements accepted by this organ and the complainant. A new administrative decision issued by an organ after the reconsideration of a case may be appealed by a complainant to the provincial administrative court.

The settlement reached in the court-annexed mediation shall be attached to the mediation report (see the point III.6).

7. Formal and substantive requirements for the settlement reached in the mediation

Provisions relating to mediation do not foresee any requirements for the settlement. However, the settlement as a contract regulated in the Civil Code shall satisfy requirements indicated in a definition of settlement, i.e. in article 917 of the Civil Code (see the point I.3). So, the settlement shall indicate the legal relationship existing between the parties of mediation and their concessions within the scope of this relationship. The settlement shall have a written form. Pursuant to article 183^{12} § 2 of CCP, if the parties reach a settlement before a mediator, this settlement shall be quoted in or enclosed to the report. The parties shall sign the settlement. The mediator shall note a party's possible inability to sign a settlement in the report. By signing a settlement, the parties consent to apply to the court for its validation, of which the mediator advises the parties (article 183^{12} § 2^{1} of CCP). This consent was introduced to Polish CCP by the amendment of 16th September 2011 (which came into effect on 3rd May 2012)[17] as the implementation of Directive 2008/52/EC (see the point I.4). Article 6 of the Directive foresees "the explicit consent" of the parties to request that the content of a written agreement resulting from mediation be made enforceable.

A mediator shall serve copies of the report on the parties (article 183^{12} § 3 of CCP). Copies of the concluded settlement shall also be served on the parties.

8. The effects of the settlement

The conclusion of settlement within the mediation shall result in the same effects as a settlement reached outside the mediation. The settlement shall regulate rights and obligations in the scope of a certain legal relationship existing between parties. However, the settlement reached in the mediation procedure shall be validated by a court on a request of a party of mediation. In the light of article 183^{15} § 1 of CCP, a settlement concluded before a mediator, once validated by the court, has the binding effect of a settlement reached before the court. A settlement reached before a mediator that was validated by appending an enforcement clause is an enforceable title (see details in the point IV.9).

In the light of article 183^{13} of CCP, if a settlement is reached, the mediator shall promptly file a report with the competent court to validate the settlement. If a case is referred to mediation by a court, the mediator shall file a report with the court of trial (see details on mediator's duties connected with the termination of mediation in the point III.6).

The settlement reached within the mediation shall also result in the mediator's fee. However, in the light of provisions relating to mediation this fee shall not depend on the success of mediation (see the point V.1).

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[17] J. of L. 2011, No. 233, item 1381.

After validation of the settlement concluded in the court-annexed mediation the court shall issue a decision to terminate civil proceedings. In the light of article 355 § 1 of CCP the validation shall be treated as a factor that make it inadmissible to issue a judgement. A court decision to terminate proceedings may be issued in camera, if the parties conclude a settlement before a mediator and the settlement has been validated by the court (article 355 § 2 of CCP).

However, the termination of a criminal procedure and procedure in juvenile matters shall depend on the court's decision based on circumstances of a case. Anyway, the court shall take the conclusion of settlement into account in the issued judgement.

Regarding the effect of arrangements accepted in the mediation conducted before an administrative court see the points IV.5 and IV.6.

The settlement reached in mediation shall not be treated as an obstacle for a new civil procedure in the same case. The filing of a complaint after the conclusion of settlement in the same case is not enumerated in article 199 of CCP as a ground of rejection of such complaint. However, in case of the defendant's allegation of a settled case (in Latin: *exceptio rei transactae*) the court shall issue a judgement dismissing an action.

9. The enforceability of the settlement

In the light of article 183^{14} § 1 of CCP, if a settlement is reached before a mediator, the court shall, at the request of a party, take prompt actions to validate the settlement reached before the mediator. So, the validation (homologation) of the settlement by the court depends on a request (petition) of a party. Provisions do not foresee any time-limitations for this petition. The out-of-court settlement shall be validated by a court of a general or exclusive jurisdiction (article 183^{14} § 1 in connection with article 183^{13} § 1 of CCP). In the light of article 27 and 30 of CCP, the court of general jurisdiction means the court in whose region the defendant's place of residence or place of registered office is located. In turn, the exclusive jurisdiction means a special court jurisdiction in particular matters indicated in article 38 and following of CCP. Pursuant to article 183^{14} § 1 in connection with article 183^{13} § 2 of CCP, if a case is referred to mediation by a court (a court-annexed mediation), the settlement shall be validated by the court of trial.

The court shall validate the settlement in camera. If a settlement is subject to enforcement, the court shall validate it by appending an enforcement clause. In such a situation the court shall apply regulation on the so-called clause procedure, i.e. the first stage of the enforcement procedure (article 776 and following of CCP). The settlement appended by the court with the enforcement clause is an enforceable title (article 183^{15} § 1 of CCP). The enforceable title is the basis for execution (article 776 of CCP).

Regardless of the enforceability, a settlement reached before a mediator and validated by the court, has the binding effect of a settlement reached before the court (article 183^{15} § 1 of CCP).

In the light of article 183^{14} § 3 of CCP, the court shall refuse to declare a settlement enforceable or validate a settlement (which is not enforceable because of its content) reached before a mediator in whole or in part, if the settlement is contrary to the law or social norms, or intends to circumvent the law, or where it is incomprehensible or contradictory. Pursuant to article 394 § $1(10^{1})$ of CCP, a grievance may be filed with the court of the second instance against a decision of a court of the first instance concerning the validation of a settlement reached before mediator. In turn, a decision of the court of the first instance concerning appending an enforcement clause and declaration a settlement enforceable may be appealed on the basis of article 795 of CCP.

V. Costs of mediation and the question of legal aid in mediation

1. Costs of mediation

Mediation entails two types of costs: a mediator's fee and his/her expenses in connection with conducted mediation. In case of out-of-court mediation the question of costs of mediation shall be established in a mediation agreement (see above the points I.5 and II).

Costs of court-annexed mediations are regulated in relevant decrees. Costs of mediation connected with civil procedure are regulated in the Minister of Justice Decree of 30 November 2005 on the evaluation of mediator's fee and expenses, which shall be reimbursed in civil proceedings.[18] In the light of § 2 of this Decree, the mediator's fee in cases concerning property rights shall amount to 1% of the value of the matter at issue, however not less than 30 PLN and not more than 1000 PLN. It is the whole remuneration for conducting mediation in a case referred by a court including all individual and joint meetings within the mediation. In cases concerning non-property rights the mediator's fee shall amount to 60 PLN for the first meeting and 25 PLN for each next meeting. The same remuneration shall relate to cases concerning property rights, in which the value of the matter at issue has not yet been estimated.

Pursuant to article 183^{9} of CCP, the court may allow the mediator to access the case files, subject to a joint petition from the parties. In the event of such allowance the mediator's fee may be increased by 10%.

The Decree enumerates also mediator's expenses connected with travels, notices to parties, spent stationery, renting a room necessary for conducting mediation

[18] Consolidated text: J. of L. 2013, item 218.

(however not more than 50 PLN for one mediation meeting). These expenses incurred in the court-annexed mediation shall be reimbursed to mediator by the parties.

According to article 104^1 of CCP, the costs of mediation conducted upon court recommendation and resulting in a settlement shall be incurred by the respective parties and shall not be recoverable (between parties in a dispute), unless the parties decide otherwise. So the parties may decide on this question in the mediation agreement (see the point II) or in the settlement reached before a mediator or in another contract concluded with a mediator.

In the event of failure of court-annexed mediation (see the points I.5 and IV.5), the costs of mediation shall be treated as a part of "reasonable costs of legal proceedings" (article 98^1 § 1 of CCP), so the principles of the reimbursement of costs of legal proceedings shall be applied to the costs of mediation. In principle, the losing party shall, upon request of the adverse party, reimburse the costs of mediation incurred by this party (article 98 § 1 in connection with article 98^1 § 1 of CCP).

Exceptionally, a part of costs of out-of-court mediation shall be included in the costs of the future legal proceedings. Pursuant to article 98^1 § 2 of CCP, where civil proceedings are initiated within three months from the date of completion of mediation which did not result in a settlement, or within three months of the validation of a court refusal to approve a settlement, reasonable costs of legal proceedings shall also include the costs of mediation in an amount not exceeding the fourth part of a charge.

In the light of article 103 of CCP, notwithstanding the outcome of a case, the court may order a party to reimburse any costs caused by their undue or evidently improper conduct. This provision shall be applied in particular to costs caused by a party refusing without due cause to participate in mediation, where the party has previously agreed to such mediation.

The mediator's fee in mediation conducted as a part of criminal procedure has been regulated in the Minister of Justice Decree of 18 June 2003 on the level of expenses of State Treasury in criminal proceedings and the manner of their assessment.[19] In the light of § 4 of this Decree, the mediator's fee in mediation in criminal cases shall amount to 120 PLN for the whole mediation. In turn, § 8 of the Minister of Justice Decree of 14 August 2001 on the level of costs of juvenile proceedings and the particular principles of their assessment,[20] the mediator's fee in mediation in juvenile matters shall amount to 187 PLN for the whole mediation.

A specific mediation conducted before administrative court shall be treated as a part of a court procedure (court-related or court-referred mediation) and consequently shall not create any additional costs.

The last type of mediation in Poland is mediation as a device for solution of collective labour disputes (see the points I.2 and III.4). According to article 11^1 of

[19] Consolidated text: J. of L. 2013, item 663.

[20] Consolidated text: J. of L. 2013, item 643.

the Act on Solving Collective Labour Disputes, parties of mediation shall incur costs of mediation in the equal parts, unless they decide otherwise. In case of documented lack of monetary means, parties in a dispute are entitled to file a petition to the Minister of Labour and Social Policy for costs to be incurred by State Treasury. The mediator's fee and reimbursement of costs to him shall be established in a contract concluded between parties in a dispute and a mediator. The lowest level of mediator's fee and simultaneously the level of his/her fee incurred by State Treasury shall be indicated in a proper decree. This question has been regulated in the Decree of Minister of Economy and Labour of 6 December 2004 on conditions of fee of mediators from the list established by the minister competent in labour questions[21] (regarding to this list see the point III.4). In the light of § 1 of this decree the mediator's fee shall amount to 388 PLN for the first day of mediation, 311 PLN for the second day and 235 for each next day of conducting mediation. The parties in a dispute and a mediator are allowed to establish higher mediator's fee.

2. The question of legal aid

The only regulation on the legal aid in mediation is included in article 111 of the Act on Solving Collective Labour Disputes. However, the costs of mediation connected with criminal procedure and procedure in juvenile matters shall be incurred by State Treasure (see the previous point). The legal aid is not provided in civil mediation. In the light of article 6 of the Act on Court Costs in Civil Cases,[22] the costs of mediation shall not be included into the expenses (in the meaning of this Act). Consequently, the costs of mediation shall not be treated as a part of court costs. So, legal aid foreseen in the mentioned Act shall not be applied to the costs of mediation.

VI. Cross-border mediation

The Polish legal system does not contain any regulation on cross-border mediation. As it was mentioned in previous remarks, the settlement reached in the mediation shall fulfill requirements established for a European Enforcement Order (for uncontested claims, see the point I.4). Besides, the Polish CCP includes provisions concerning enforceability of foreign settlements. This regulation shall be applied to the settlements reached in court-annexed and out-of-court mediation on condition of a court's approval (validation or homologation) of a settlement.

[21] J. of L. 2004, No. 269, item 2673.

[22] Consolidated text: J. of L. 2010, No. 90, item 594 as amended.

Pursuant to article 1152 of CCP, settlements in civil cases reached before or approved by courts and other authorities of foreign states become enforceable titles after their enforceability has been confirmed, provided that they are enforceable in the state of issue and are not contrary to the basic principles of legal order in the Republic of Poland (the public order clause). In the light of article 1151 in connection with article 1152 of CCP, the enforcement is confirmed on the creditor's petition by appending the enforcement clause to the foreign settlement. A petition for appending the enforcement clause shall be accompanied by the following documents:

a) a copy of the settlement;

b) a document confirming that the settlement is enforceable in the state of issue, unless its enforceability is evident from the content of the settlement or the law of that state;

c) certified translation into Polish of the documents enumerated above.

Pursuant to article 1151^1 in connection with article 1152 of CCP, an enforcement clause shall be appended by a regional court for the place of the debtor's residence or registered office or, if there is no such court, the regional court in whose area execution is to be conducted. A debtor may present to the court his stance in a case within two weeks from the delivery of a copy of a petition. The court may hear a petition in camera. The decision of a regional court concerning an enforcement clause may be appealed, and a cassational complaint may be filed from the decision of the court of appeal; moreover, re-opening of proceedings which concluded with a non-appealable decision on the appending an enforcement clause may be requested as well as a plea of the illegality of a non-appealable decision in that respect may be filed.

In the light of article 1151^3 of CCP, execution on the basis of a foreign settlement may be initiated after a decision to append an enforcement clause becomes non-appealable. Until the end of the time limit to file a grievance against the decision of a regional court or, if an objection is filed, by the time it has been adjudicated by the court of appeal, the decision constitutes the security title.

The Polish legal system does not contain any regulation on the recognition of the foreign mediation settlement, which is not subject to enforcement because of its content.

Andrzej Jakubecki
Professor of Law, Maria Curie-Skłodowska University, Lublin

THE LAWYERS' PROFESSION IN POLAND

I. Introduction

1. The concept of the lawyers' profession in Poland must be identified with the profession of an advocate and a legal advisor, being the typical professions devoted to providing comprehensive legal assistance to clients, including representation before courts. The services provided by advocates comprise offering legal advice, drawing up legal opinions, drafting legal acts, providing representation before courts (including as defence counsel in criminal proceedings) and before state authorities, as well as other actions. The range of powers accorded to legal advisors is slightly narrower, and it excludes acting as defence counsel in criminal proceedings and proceedings relating to fiscal offences. The above difference will disappear in 2015, with the exception of legal advisors engaged to perform their professional services under a contract of employment, who will still not be able to act as defence counsel in criminal proceedings and proceedings relating to fiscal offences.

2. The professions engaging in the provision of legal assistance include also notaries public, tax advisors, and patent agents. However, the scope of legal services provided by these professionals is different from the responsibilities of advocates and legal advisors.

As regard patent agents, they are authorised to represent their clients in civil proceedings involving industrial property rights cases. In these cases, similarly to advocates and legal advisors, patent agents enjoy the status of professional legal representatives, with the exception of proceedings before the Supreme Court where they have no right of audience. As regards industrial property cases, patent agents in a way compete in the market of legal services with advocates and legal advisors who are also entitled to represent parties to court proceedings concerned with the protection of industrial property. Further, as far as industrial property cases are concerned, patent agents are authorised among others to offer legal advice and consultations to clients and draw up legal opinions. It must be stressed

that contrary to advocates and legal advisors, patent agents are not required to have a law school degree.

The profession of a tax advisor is relatively new to the Polish system of legal support and while it is not a strictly legal profession, it involves provision of legal assistance. A tax advisor need not have a legal background. To the extent to which a tax advisor offers advice, opinions, and clarifications to his or her clients regarding tax obligations, such activity overlaps with one of the professional areas in which advocates and legal advisors operate. However, there can be hardly any actual competition between these professions.

Traditionally, in addition to advocates and legal advisors the legal support professions include also notaries public. Their core activity, however, is different from that of advocates and legal advisors, and it comprises drawing up agreements and effecting other legal transactions for clients, which the law or the parties require to be concluded in the form of a notarial deed. Given the dissimilar scope of legal services of the notaries public, on the one hand, and advocates and legal advisors, on the other, there is no competition between the two professional groups.

3. The legal assistance the extent of which coincides with the responsibilities of advocates or legal advisors may be also provided in Poland, upon meeting statutory requirements, also by foreign lawyers, both from the European Union and from outside of it. The regulations pertaining to EU lawyers apply as appropriate to citizens of EFTA member states. Foreign lawyers are allowed to practice as advocates or legal advisors upon being entered into the relevant register maintained by the advocates' bar council or the legal advisors' society council.

4. A separate issue arising when legal assistance is provided to the State Treasury and state bodies corporate is the existence in Poland of the State Treasury Solicitors' Office. It is a state agency established to ensure legal protection of the rights and interests of the State Treasury. The responsibilities of the State Treasury Solicitors' Office include among others exclusive and non-exclusive legal representation of the State Treasury before courts. Insofar as the State Treasury Solicitors' Office provides representation for the State Treasury in proceedings before courts, legal representation offered by advocates or legal advisors is excluded.

II. The Legal Framework

The Polish Constitution does not contain any provisions governing professionals providing legal assistance, including in particular advocates and legal advisors.

The issues of professional qualifications, practicing the profession, and self-regulation of the advocate and legal advisor professions are laid down under regular legislation. These comprise:

1) Act on Advocates of 26 May 1982 (consolidated text in Journal of Laws of 2009, No. 146, item 1188);

2) Act on Legal Advisors of 6 July 1982 (consolidated text in Journal of Laws of 2010, No. 10, item 65).

Separately for each of the two professions, the implementing legal acts (regulations of the relevant ministers) lay down provisions governing such issues as the mandatory third-party liability insurance for advocates and legal advisors, rates of fees for the services provided by advocates and legal advisors, or the description of the official robes advocates and legal advisors are required to wear when appearing before courts.

Further, advocates are also bound by the Collection of Rules of Ethics and Professional Dignity for Advocates (known as the Code of Ethics for Advocates) adopted by the Supreme Advocates' Bar Council on 10 October 1998 and legal advisors by the Code of Ethics for Legal Advisors adopted by the National Assembly of Legal Advisors on 10 November 2007. Since their adoption, both codes of ethics have been amended several times.

III. Developments of the Past Ten Years

1. Among the issues involving legal professions that generated most interest in the last ten years was the merging of the advocate and legal advisor professions and deregulation of the legal professions (including that of the advocate and legal advisor) seeking to make the qualifications required to practice the professions more accessible.

2. Today, the merging of the advocate and legal advisor professions seems equally distant as it was ten years ago. And yet, only five years ago the merging of the professions appeared very likely as intense efforts were underway in that respect at the Ministry of Justice. Apparently, the idea of instituting a single unified profession finds no support among members of the advocate and legal advisor communities.

3. In turn, as regards deregulation of the legal professions, one must note as particularly newsworthy the extension of access to the advocate and legal advisor professions which occurred in 2005, opening the way to being entered into the register of advocates without completion of professional training and without passing the advocate professional exam by those who have passed the professional exam for the judge, public prosecutor, legal advisor, or notary public, even if they have not practiced the professions at all. Under the previous regime, the above professions had to be practised for at least three years. The equivalent regulations were enacted at that time also with respect to the access to the profession of a legal

advisor. However, these changes were reversed in 2009 and the requirement of having practiced another legal profession was reinstated as the grounds for being entered into the register of advocates and legal advisors without taking the professional exam. However, the tendency towards relaxing the rules of access to the profession of an advocate and a legal advisor continues.

The latest regulations governing the above issues were enacted under the Act on Amending Acts Governing Certain Professions of 13 June 2013. With regard to the profession of an advocate and a legal advisor the changes consist in extending the range of people entitled to take the advocate and legal advisor professional exam without a prior completion of professional training. For instance, under the new regime the exam can be taken by those who were employed for three years (as against five years under the previous regulations) in positions listed under statutory regulations. The range of persons who are entitled to be entered into the register of advocates or legal advisors without previously completing professional training and without passing the professional exam was also extended.

IV. Access to the Lawyers' Profession

1. In principle, access to the profession of an advocate or a legal advisor requires a law school degree, completion of professional legal training, and passing the professional exam.

The commencement of professional legal training (being entered into the register of trainee advocates or trainee legal advisors) is possible upon passing the professional legal training entrance exam. During the term of professional legal training, the trainee does not enjoy the professional status of the advocate or legal advisor but he or she is already a member of the respective profession. However, after six months of training, the trainee advocate (or trainee legal advisor) may substitute for an advocate (legal advisor) before courts, law enforcement authorities, state authorities, local government bodies, and other institutions, with the exception of the Supreme Court, Supreme Administrative Court, Constitutional Tribunal, and Tribunal of State. The trainee may also, with an express authorisation of the advocate (legal advisor), draw up and sign submissions relating to the advocate's (legal advisor's) appearance before courts and the other authorities listed above, excluding appeals, final appeal, and constitutional complaint.

2. As regards access to the profession without completion of the professional legal training and without passing the exam, and the permissibility of taking the professional exam without a prior completion of the professional legal training, the regulations relating to advocates and legal advisors are similar.

Exempt from the requirement to complete the professional training and to pass the professional exam are among others: professors and assistant professors

(holders of a post-doctoral degree in law); those with at least three years of experience as an advisor or senior advisor of the State Treasury Solicitors' Office or a court bailiff; those with a prior professional experience as an assistant public prosecutor, court referendary, senior court referendary, court trainee, public prosecutor trainee, public prosecutor's assistant, judge's assistant, or who were employed at the Supreme Court, Constitutional Tribunal, or an international court, in particular the European Court of Justice or European Court of Human Rights, and exercised responsibilities corresponding to those of an assistant judge; those who performed activities under an employment or other contract requiring legal expertise, directly related to the provision of legal assistance by an advocate or legal advisor.

The professional exam can be taken without a prior completion of the professional training among others by: holders of doctorates in law; those with a specific prior term of employment in the position of a court referendary, senior court referendary, public prosecutor' assistant, judge' assistance or employed at the Supreme Court, Constitutional Tribunal, or an international court, in particular the European Court of Justice or European Court of Human Rights, who exercised responsibilities corresponding to those of an assistant judge; those who, upon completion of a law school, performed over a specific term activities under an employment or other contract requiring legal expertise, directly related to the provision of legal assistance by an advocate or legal advisor.

3. Advocates practice their profession as part of law firms (as sole practitioners). Advocates may also practice their profession as part of associations known as advocates' joint offices (specific type of a law firm). This organisational form of practising the profession of an advocate is not present in any other legal profession. On the other hand, an advocate cannot practice his or her profession under an employment contract. This means that an advocate must not be an employee of a person to whom he or she provides legal services; neither can he or she be an employee of another advocate or a law firm.

The framework for practising the profession by legal advisors is slightly different. Similarly to an advocate, a legal advisor may practice his or her profession as part of a law firm but additionally, unlike an advocate, he or she can provide services under an employment contract.

Besides, both advocates and legal advisors can practise their professions as part of partnerships, as discussed in detail further down.

4. A person practising as a judge, public prosecutor, notary public, court bailiff, as well as an assistant public prosecutor and assistant notary public, or undergoing the professional legal training to become a judge, public prosecutor, or a notary public may not become an advocate or a legal advisor. If an advocate or legal advisor takes up employment with administration of justice authorities, law enforcement authorities, or a notarial office, and with the State Treasury

Solicitors' Office, the right of the advocate or legal advisor to practice the profession is suspended.

5. As has already been mentioned, the Act on Advocates prohibits advocates from practising their profession if under employment. This means that they are not only not allowed to practise the profession of an advocate under an employment contract, but also that they are not allowed to be in employment at all, regardless of the nature of such employment. As regards conduct by an advocate of an additional business activity (as a supplementary source of income) not involving provision of legal services, the Act on Advocates does not provide for an express prohibition in this regard. In practice, there are cases when advocates engage in an additional business activity. However, these activities cannot be undertaken as part of the law firm. Incidentally, engaging in certain additional activities by an advocate can be deemed to infringe the dignity of the advocate's profession.

According to the Code of Professional Ethics for Advocates, no activities may be combined with the profession of an advocate that would be beneath the dignity of the profession or would restrict the independence of the advocate. The following are in particular considered to be in conflict with practising the profession of an advocate:

a) managing a third-party's undertaking;

b) holding the office of a management board member, acting as a commercial representative in companies limited by shares (with the exception of companies engaging in the provision of legal assistance);

c) acting as a professional intermediary in business transactions;

d) sharing the space in which the advocate's office is operated with a person conducting a different business if such situation were to contravene the rules of professional ethics.

It must be added that if an advocate practices the profession as part of a partnership, then the provision of legal assistance must be the sole objects of its business.

6. The Act on Legal Advisors does not expressly prohibit remaining in employment and engaging in an additional business other than provision of legal assistance. The Code of Ethics for Legal Advisors includes a general regulation whereby a legal advisor may not take part or in any other way participate in activities that would be beneath the dignity of the profession or undermine his or her trustworthiness. A draft amendment to the Code of Professional Ethics for Legal Advisors extends the prohibition to undertaking any activities restricting the independence of legal advisors and jeopardising the legal advisor-client privilege.

V. Organisation of the Profession

1. Advocates and legal advisors are organised in self-governing and self-regulating associations (bar associations). The differences between the profession of an advocate and a legal advisor result in two self-governing bar associations, one for each profession, operating in Poland. Both the professional societies have their local (regional) and national tiers.

Professional self-governing associations representing members of public-trust professions are established under general rule provided for in Article 17(1) of the Polish Constitution (professional self-governments).

The objectives of the advocates' bar association include in particular representing the advocate community (advocates and trainee advocates) and protecting rights of its members, overseeing compliance with regulations governing the profession of an advocate, ensuring professional development of advocates and trainee advocate instruction, establishment and furtherance of the rules of professional ethics.

The objectives of the legal advisors' bar association are similar to those of the advocates' bar. They include representation of legal advisors and trainee legal advisors and protection of their professional interests, collaboration in the development and application of the law, ensuring that the instruction offered to trainee legal advisors is sufficient to allow them to perform the profession of a legal advisor well, facilitating professional development of legal advisors, overseeing satisfactory performance of the profession by legal advisors and trainee legal advisors, conducting research on the operation of legal assistance.

2. Both the bars are independent of the government. The supervision over the advocates' and legal advisors' bars is exercised by the Minister of Justice, the scope and manner of such supervision being as laid down under the Act on Advocates and Act on Legal Advisors. For example, the Minister of Justice oversees monitoring by the bars' relevant governing bodies the fulfilment of the obligation to take out third-party liability insurance by advocates and legal advisors. The Minister of Justice may move the Supreme Court to invalidate unlawful resolutions adopted by the governing bodies of the advocates' and legal advisors' bars (including resolutions to suspend the right to practice the profession or to disbar an advocate or a legal advisor). The Minister of Justice may also file motions with the bars' governing bodies to adopt resolutions in matters falling within their purview. Further, the Minister of Justice appeals against resolutions of the bars' governing bodies in cases laid down under statute. The Minister also appoints admission panels to prepare professional training exams, teams to develop examination questions, panels to conduct the professional exams, and second-level appeal examination panels.

3. Advocates are members of regional advocates' bar chambers. There are 24 regional advocates' bar chambers in Poland. The governing bodies of a regional advocates' bar chamber comprise: bar chamber assembly, regional bar chamber council, disciplinary court, and audit committee.

The powers of the regional advocates' bar chambers comprise all matters of the advocates' bar chamber which the statute does not specifically assign to the bar's other governing bodies. Its responsibilities include among others maintaining the register of advocates and trainee advocates, providing training courses for trainee advocates and advocates. The disciplinary court hears and rules on cases of disciplinary liability of the bar society's members, and the audit committee exercises oversight over the bar society's financial and economic operations.

A resolution of the regional advocates' bar chambers on entering a candidate into the register of advocates or the register of trainee advocates is submitted to the Minister of Justice who can file an objection within a period of 30 days. The Minister's decision can be appealed against to the administrative court by the interested party or a governing body of the advocates' bar society within a period of 30 days.

At the national level, the governing bodies of the advocates' bar association comprise the National Advocates' Bar Assembly, Supreme Advocates' Bar Council, Higher Disciplinary Court, and Higher Audit Committee. The delegates to the National Advocates' Bar Assembly are elected by the assemblies of regional advocates' bar chambers.

The responsibilities of the National Advocates' Bar Assembly include among others setting the development objectives for the advocates' bar, deciding on the number of advocates' bar chambers, adopting regulations for elections to the governing bodies of the advocates' bar and advocates' bar chambers, and operating regulations. The responsibilities of the Supreme Advocates' Bar Council include in particular representing the advocates' bar (before state authorities), supervising the operations of regional advocates' bar chambers, overseeing the instruction of trainee advocates, opining on the regulations of the Minister of Justice relating to the rates of fees for advocates' services and to setting the minimum rates of such fees, opining on proposed legislation, submitting conclusions and recommendations with regard to the development and application of the law, and considering appeals against resolutions of the regional advocates' bar chambers. In addition, the Supreme Advocates' Bar Council adopts resolutions on such issues as: rules of advocates' professional training, operating rules for regional advocates' bar chambers, rules of establishment, operation, and dissolution of advocates' joint offices, rules of practising the profession of an advocate as a sole practitioner and as a partnerships, etc.

4. Legal advisors are members of 19 regional legal advisors' chambers. The governing bodies of a legal advisors' chamber comprise: regional chamber

assembly, regional chamber council, regional disciplinary court, and regional audit committee.

The responsibilities of the assembly of a regional legal advisors' chamber include above all electing members of the governing bodies of the regional chamber and delegates to the National Assembly of Legal Advisors. The council of a regional legal advisors' chamber represents the interests of the chamber's members, oversees satisfactory performance of the profession by legal advisors, provides professional and other training. It also maintains the register of legal advisors and trainee legal advisors. The responsibilities of the disciplinary court and of the audit committee are similar as in the case of the advocates' bar society.

The regional legal advisors' chamber council notifies each entry effected and each refusal to effect an entry into the register of legal advisors or trainee legal advisors to the Minister of Justice. The Minister can file an objection to the entry of a candidate into the register of legal advisors or trainee legal advisors. The decision can be appealed against to the administrative court. A resolution of the regional legal advisors' chamber council refusing entry in the register of legal advisors can be appealed against to the Presidium of the National Council of Legal Advisors. In turn, a negative decision of the Presidium of the National Council of Legal Advisors can be appealed against to the Minister of Justice and the decision of the Minister to the administrative court.

At the national level, the governing bodies of the legal advisors' association comprise: the National Assembly of Legal Advisors, National Council of Legal Advisors, Higher Disciplinary Court, and Higher Audit Committee.

The responsibilities of the National Assembly of Legal Advisors include among others passing guidelines for the operation of the association and its governing bodies, adopting regulations for elections to the association's governing bodies, adopting rules of professional ethics, as well as establishing principles of financial management for the association.

The National Council of Legal Advisors represents the legal advisor's community before courts, government and local government authorities, opines on proposed legislation, and submits conclusions with regard to legal regulations, coordinates and supervises operations of regional legal advisors' chambers, as well as performing other tasks as laid down under statute.

VI. Organisation of Practice

1. As regards advocates, in Poland they can practice their profession as sole (legal) practitioners, as members of an advocates' joint office, or as partners in a partnership providing legal services. Consequently, an advocate must not be employment of any law firm or a person to whom he or she provides the services.

The situation is slightly different in the case of legal advisors who, in addition to acting as sole practitioners and being members of legal partnerships, may provide their services under an employment contract. According to the statistics from the end of 2010, out of all the legal advisors practising the profession, 9392 were in employment, 1769 worked in legal partnerships, and 4026 were sole practitioners. As far as advocates are concerned, available figures (2013) show that out of all advocates (12 404), 1145 were sole practitioners.

2. As regards practising the profession in a partnerships, the regulations pertaining to advocates and legal advisors are the same. The profession of an advocate or legal advisor can be practised as part of a partnership but not as part of a company. The following partnership vehicles are available for advocates and legal advisors:

a) general or registered partnership in which advocates, legal advisors, patent agents, tax advisors, or foreign lawyers conducting a permanent legal practice under the regulations on provision of legal assistance by foreign lawyers in Poland act as partners;

b) professional partnership in which advocates, legal advisors, patent agents, tax advisors, or foreign lawyers conducting a permanent legal practice under the regulations on provision of legal assistance by foreign lawyers in Poland act as partners;

c) limited partnership or limited joint-stock partnership in which advocates, legal advisors, patent agents, tax advisors, or foreign lawyers conducting a permanent legal practice under the regulations on provision of legal assistance by foreign lawyers in Poland act as general partners.

3. As indicated by the above, not only does Polish law permit joint conduct of a legal practice by advocates and legal advisors as part of a partnership but it also allows multidisciplinary practices covering patent agents, tax advisors, and foreign lawyers. Representatives of no other professions can be partners in those partnerships. The only objects of business permitted in these partnerships is the provision of legal services.

4. The establishment and operation of the above partnerships is governed under the general regulations of the Civil Code (general partnership) and of the Commercial Companies Code (registered partnership, professional partnership, limited partnership, limited joint-stock partnership). The above partnerships are unincorporated (are not legal persons). The advocates and legal advisors acting as partners in these partnerships (rather than the partnerships themselves) are taxpayers for the purposes of personal income tax. Hence, their taxation is the same as that applicable to sole legal practitioners.

5. Since in Poland it is not permitted to conduct a legal practice as part of companies, in principle there is no issue of external ownership of legal partner-

ships. However, it must be noted that in the case of a limited partnership and a limited joint-stock partnership, limited partners and shareholders do not need to be lawyers. They in fact provide the partnership with the required capital and share in the profits. However, under statute, they are excluded from running the business of the partnership.

6. The number of partners in the largest law firms (partnerships) in Poland is around 80 advocates and legal advisors. The total number of advocates and legal advisors (including in-house legal advisors engaged under contracts of employment) in the largest law firms in Poland is around 160. In 2011, the number of law firms comprised of 20 or more advocates and legal advisors was below 38.

VII. Professional Liability

1. The liability of advocates and legal advisors relies on the generally applicable principles of the civil law. It is a liability for breach of contract (non-performance or unsatisfactory performance of an obligation) based on the provisions of Article 471 of the Civil Code. The liability under Article 471 of the Civil Code is an implied-fault based liability. This means that pursuing redress of damage, the client needs to demonstrate non-performance or unsatisfactory performance of obligations by an advocate or legal advisor, damage, and causal link between the non-performance and the damage incurred. However, the client is not required to demonstrate the advocate's or legal advisor's fault. As regards the absence of fault, the burden of proof rests on the advocate or legal advisor.

2. The above principles of liability for non-performance or unsatisfactory performance of an obligation are equally applicable when an advocate or a legal advisor practises the profession as part of a partnership. However, there are certain differences depending on the type of the partnership involved.

3. A general partnership has no legal capacity and hence an advocate or a legal advisor is a party to the agreement concluded with the client and it is the advocate or legal advisor that is directly liable for damages arising from non-performance or unsatisfactory performance of his or her obligation. Still, the other partners are jointly and severally liable for the damage caused by him or her.

4. The other partnerships (registered, professional, limited, and limited joint-stock), while unincorporated (are not legal persons) have legal capacity, and so are a party to an agreement concluded with the client. It is the partnership that is above all liable for damage caused by an advocate or a legal advisor as a result of non-performance or unsatisfactory of an obligation. The partners, including the partner causing the damage, are jointly and severally liable on a subsidiary

basis for such an obligation of the partnership. The liability is unlimited and extends to all the personal assets of the partners. However, the liability is not shared by limited partners in a limited partnership or shareholders in a limited joint-stock partnership.

5. Special regulations apply to the professional partnership. In this case, the partnership and the partner who caused the damage are liable for non-performance or unsatisfactory performance of an obligation by an advocate or a legal advisor. However, the other partners have no liability for such damage.

6. If an advocate practises his or her profession as part of an advocates' chambers, the liability for damage caused by the advocate as a result of non-performance or unsatisfactory performance of an obligation towards the client is borne solely by the chambers.[1] The basis for the liability of the chambers towards the client are the same as in the case of an advocate's liability.

7. The liability of a legal advisor performing its profession under a contract of employment towards the employer is limited under the provisions of the labour law.

8. In the practice of legal dealings in Poland there are no cases of contractual exclusion of an advocate's or a legal advisor's liability for damage caused to the client in the provision of legal assistance.

9. Advocates and legal advisors are subject to obligatory third-party liability insurance. The third-party liability insurance covers the liability of the advocate (legal advisor) towards third-parties during the term of insurance, on the grounds of damage caused by actions or omissions of the insured when acting in his or her capacity as an advocate (legal advisor). The minimum sum insured per occurrence covered by the third-liability insurance is the PLN equivalent of EUR 50 000.

10. It is an obligation of each advocate or legal advisor subject to the oversight by a bar association to take out third-party liability insurance. In practice, professional societies negotiate and conclude third-party liability insurance contracts for their members, while the insurance premiums are paid by the insured. However, an advocate or a legal advisor may conclude an additional third-party liability insurance agreement or take out individual liability insurance without assistance of bar association.

11. Suits against advocates or legal advisors for redress of damage caused in the provision of legal assistance are not too frequent.

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[1] The Resolution of the Supreme Court of 11 March 1988, I CZP 12/88, OSNCP 1989, No. 6, item 98.

VIII. Remuneration/Fees

1. The regulations of the Minister of Justice regarding the rates of fees for the services of advocates and legal advisors merely lay down fees for such services provided before judicial authorities and the minimum rates of such fees. These provisions are applied when courts award costs of legal representation by an advocate or a legal advisor in the course of proceedings. In relations between an advocate (legal advisor) and the client the fees charged for legal assistance are agreed in a contract.

2. It is not common practice for advocates and legal advisors to apply hourly rates of fees for their services. The hourly rates are applied above all by big law firms operating in the largest Polish cities. The hourly rates differ depending on whether the legal assistance is provided by a partner or a junior lawyer. As regards hourly rates applied in Warsaw, they seem to average around the PLN equivalent of from EUR 100 to EUR 200. Depending on the reputation of the specific lawyer, the rates can be higher. The rates are a matter of agreement with the client and specific figures are not disclosed to the public. Consequently, it is hard to determine specifically the ranges of hourly rates depending on the type of legal assistance provided, although the complexity of the case is without any doubt a factor in determining the lawyer's fee.

3. Many lawyers do not apply hourly rates at all but instead quote their fees for the entire service or for specific stages of the work. The fees differ depending on the input of work required and the place where the services are provided. Outside large cities, legal services are markedly cheaper. It may happen that the fee would be realigned with the client's financial resources.

SECTION III A

Mariola Lemonnier
Professeur à l'Université de Olsztyn

LA PROTECTION DES INVESTISSEURS MINORITAIRES ET LA RÉPARATION DE LEURS DOMMAGES EN POLOGNE

Ce rapport national polonais est composé de deux parties – la première indiquant la spécificité du marché des capitaux en Pologne, la deuxième partie est consacrée à la théorie et la pratique de la responsabilité civile sur le marché réglementé en Pologne[1].

I. Partie. Le marché réglementé en Pologne

1. La Bourse de Varsovie et ses investisseurs

La Bourse de Varsovie est la bourse nationale importante dans la région de l'Europe centrale et orientale et une des bourses avec la plus forte croissance en Europe. A partir du 9 novembre 2010, la Bourse de Varsovie est une société cotée à la Bourse de Varsovie. La capitalisation des sociétés polonaises pour le 22 novembre 2013 cotées sur la Bourse de Varsovie s'élève à 613 978 mln zlotys (PLN) pour 523 390 mln PLN en 2012. Actuellement, 446 entreprises sont cotées dont 52 étrangères. En comparaison en 2012, il y avait 438 sociétés cotées. La Bourse de Varsovie en tant que le marché central de Pologne[2], comprend plusieurs marchés : le Marché Principal pour les actions et les instruments financiers, le New Conect pour les petites et moyennes sociétés, le marché Catalyst – pour la négociation

[1] Le rapport sur les minorités a été déjà préssenté lors du XVI ème Congrès International de Droit Comparé à Brisbane en 2002. Le titre du rapport de M. le Prof. W. J. K a t n e r, *Rights of Minority Shareholders in Capital Companies in Poland*. Telle a été aussi la suggestion du présent rapporteur général prof. M. Gelter.

[2] Plus large le sujet – D. D z i a w g o, *Rynek finansowy – istota*, *instrumenty*, *funkcjonowanie* [Des marchés financiers – la notion, les instruments, le fonctionnement], Warszawa 2007; J. S o c h a, *Rynek papierów wartościowych w Polsce* [Marché des valeurs mobilières en Pologne], Warszawa 2003.

des obligations, enfin le marché de détail et le marché – Tresury Bond marché de gros pour les obligations d'Etat. Depuis le premier trimestre de 2012, le Groupe de la Bourse de Varsovie organise et dirige les échanges sur les marchés opérés par la Power Exchange polonais, comprend le marché de l'énergie, le marché des quotas de CO2.

Les investisseurs sur le marché sont des investisseurs institutionnels et les investisseurs individuels. En 2013 parmi les institutionnels il y a eu des fonds de pensions (OFE) avec 24% de la part du marché, 30% pour le fonds d'investissement, et des teneurs de marché environ 30% du marché. Seulement 1% du marché ont occupé les banques.

Le ratio de concentration moyen d'actions est de 39,1% sur le marché réglementé polonais. Cette tendance est en train de changer, mais le type anglo-saxon de l'entreprise avec une structure de l'actionnariat dispersé et le contrôle exercé par les gestionnaires, soi-disant société Berle-Means, n'existe pas en Pologne. Les changements dans la politique et la loi sur les finances publiques vont toutefois modifier cette situation l'année prochaine. Les fonds de pension seront inclus dans le fond de sécurité sociale et sans eux, le marché des capitaux en Pologne va peser beaucoup moins. Ce en fait le problème qui tracasse la Bourse de Varsovie et ses dirigeants maitenant. Avec les fonds de pension nous avons sur le parquet arrivée des capitaux frais par mois, ce que donne la stabilité et la garantie aux investisseurs et la fluidité du marché. De l'autre côté, les actions dans les portefeuilles des fonds de pension représentent maintenant 18% de la capitalisation de Bourse de Varsovie. Cependant, le chiffre d'affaires généré par ces institutions est d'environ 6,5% du voulme total du marché. Pour améliorer la liquidité de la bourse et débloquer de fonds de pension (OFE), près de 100 milliards PLN congelés dans des actions, cette situation pouvait améliorer la négociation dit Adam Maciejewski – Président de la Bourse de Varsovie. Cet objectif pourrait être atteint si les fonds de pension auraient prêté les actions à ceux qui veulent utiliser la vente à découvert. Cette solution cherche simplement le marché boursier[3]. En 2012, les chiffres d'affaires de parts sur le marché principal s'élèvait à 65 041 millions PLN pour les investisseurs individuels et à la même période de 129 479 millions de PLN pour les investisseurs institutionnels.

Parmi les courtiers étrangers dominent le Royaume-Uni – 57, France – 10, Autriche – 4 et les autres pays – 21. La dette des sociétés cotées est composée par le crédit ou le crédit-bail plus que par les obligations. Cela est dû au fait que le marché obligataire (autre que le marché des obligations de l'Etat) est moins développé que le marché boursier des actions et des instruments financiers[4]. Dans les

[3] M. L e m o n n i e r, *Europejskie modele instrumentów finansowych. Wybrane zagadnienia* [Les modèles européens des instruments financiers. Les questions choisies], Warszawa 2011, p. 275.

[4] S. A n t k i e w i c z, *Polski rynek obligacji i innych dłużnych papierów wartościowych* [Le marché polonais des obligations et autres titres de créance], Gdańsk 2009, p. 135.

années 2003–2010 parmi les sociétés cotées sur le marché principal de la Bourse de Varsovie ont dominé les petites et moyennes entreprises. Dans le même temps ont fait leurs débuts sur la Bourse de Varsovie aussi très grandes sociétés, avec une valeur mesurée en milliards de dollars américains. Cette tendence est retenu jusqu'à lors.

Cela démontre la flexibilité du marché polonais et prouve que le marché boursier est un lieu pour toutes les entités, de toute taille.

2. La protection des investisseurs

Membre de l'Union Européenne, mais pas de l'Union Monétaire, la Pologne est soumise à tous les règlements en la matière du marché réglementé européen. L'autorité qui supervise le marché est la **Commission de Surveillance Financière**. C'est l'organe de l'administration, financé par le budget de l'Etat, avec un mandat assez large pour l'ensemble du marché financier[5].

Commission de Surveillance Financière supervise le secteur bancaire, des marchés financiers, l'assurance, les fonds de pension, des établissements de paiement et les services de paiement, les établissements de monnaie électronique et le secteur de coopératives bancaires.

Le but de la surveillance du marché financier est d'assurer le bon fonctionnement du marché, la stabilité, la sécurité et la transparence, la confiance dans le marché financier, ainsi que la protection des intérêts des acteurs du marché. Le contrôle sur les activités de la Commision de Surveillance Financière est exercé par Premier Ministre.

D'autre part **les informations** a retenir dans le prospectus par la société sont les suivantes : le bilan pour les trois derniers exercices, ainsi que les avis de l'auditeur, les informations financières intermédiaires – pendant l'année, prévisions de résultats et les estimations selon les hypothèses développées par l'entreprise (par des facteurs sous le contrôle et le non-contrôle). Ces informations sur les prévisions elles devraient être inclues dans le prospectus, si elles sont disponibles au public. Le prospectus exige aussi les informations financières pro forma, l'information financière sur les fonds propres, sur la capitalisation et l'endettement, l'information financière non vérifiée, la déclaration de fonds de roulement et l'état des changements significatifs[6].

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[5] Comp. S. T h i e l, T. Z w o l i ń s k i, *Akcje i obligacje korporacyjne w publicznym obrocie papierami wartościowymi* [Les actions et les obligations des sociétés cotées en bourse], Komisja Papierów Wartościowych i Giełd, 2004.

[6] T. S ó j k a, *Obowiązki informacyjne spółek publicznych i odpowiedzialność cywilna za ich naruszenie* [Les obligations des sociétés cotées et la responsabilité civile en cas de leurs violation], Warszawa 2008, p. 99 ; A. R o m a n o w s k a, « Informacje poufne w świetle nowych regulacji prawnych *insider trading* » [Les informations confidentielles à la lumière de la nouvelle réglementation *délit d'initié*], *Przegląd Prawa Handlowego* 2006, no. 9.

Le responsable de l'information contenue dans le prospectus et les autres documents ou renseignements pour toute autre information relative à l'offre publique ou l'admission ou la demande d'admission de valeurs mobilières ou autres instruments financiers à la négociation sur un marché réglementé, qui donne fausses ou cache les données réelles, une influence significative sur le contenu de l'information, est passible d'une amende maximale de 5 000 000 PLN ou emprisonnement de 6 mois à 5 ans, ou les deux peines à la fois. Qui, étant responsable de l'information à la disposition du public sous la forme d'un supplément au prospectus ou note d'information, donne de faux ou dissimule les données réelles, ayant une influence significative sur le contenu de l'information est passible de la même paine[7].

3. Les sociétés étrangères

Le plus grand problème il y a actuellement avec la faillite **des sociétés étrangères**. Sont déclarée en faillite, bien sûr, non seulement sociétés étrangères cotées sur la Bourse de Varsovie. Le problème réside dans le fait que, comme elles sont soumises à l 'autre juridiction que la juridiction polonaise elles appliquent les solutions complètement étrangère à la législation polonaise[8]. Par exemple, la sociète SkyEurope n'a pas présenté des informations sur l'ouverture d'une procédure de faillite sur leur site internet – comme il s'est avéré – c'était en conformité avec la loi applicable en question. Une autre société étrangère CDEC, à son tour, a annoncé un plan visant à « annuler l'action » ce que pour les actionnaires polonais pourrait être une surprise, car une telle transaction le droit polonais ne prévoit pas.

Également cotée à la Bourse de Varsovie une société tchèque CEZ a prévu la date d'enregistrement de la dividende le jour de l'assemblée générale annuelle, ce qui a été décisif pour le paiement de la dividende. Par conséquent la Bourse n'était pas en mesure de déduire à l'avance le montant des dividendes sur le prix de l'action.

Dans tous les cas ci-dessus, à la fois la **Commission de Surveillance Financière** et la Bourse ont la pression limitée sur les opérateurs soumis à la législation étrangère. Et même si les sociétés ne respectent pas leurs obligations.

En outre, les actionnaires eux-mêmes dans une moindre mesure peuvent contrôler les activités opérationnelles de ces sociétés (y compris à participer à l'Assemblée Générale).

Tout cela signifie que les investissements dans des sociétés étrangères peuvent être plus risqués que dans les sociétés polonaises. Cela peut être très bien vu par

[7] T. N i e b o r a k, *Aspekty prawne funkcjonowania rynku finansowego UE* [Aspects juridiques du fonctionnement du marché financier UE], Warszawa 2008.

[8] M. L e m o n n i e r, *op. cit.*, p. 28 et s.

les nombreux émetteurs ukrainiens cotées avec escompte par rapport aux entreprises polonaises.

Les sanctions sur les entreprises ont ressenti en fin de compte leurs actionnaires. Pour peu servent aussi les suspentions de la négociation de leurs actions. Par exemple, en raison de la non-publication dans le délai prévu de résultats financiers semestriels et trimestriels de la société FSA à deux reprises l'automne 2012, la Commision a ordonné la suspension de la cotation des titres CDEC. Cela n'a pas changé la situation des actionnaires. Pour le moment à Varsovie sont répertoriés 52 entreprises étrangères, un quart des sociétés cotées.

L'assurance des membres du Directoire dans une société cotée (D & O Assurance) pour la responsabilité civile couvre les pertes financières causées par les membres du conseil par une mauvaise gestion de l'entreprise[9].

D & O assurance compense les pertes financières qui pourraient résulter de la mauvaise exécution des obligations par la société (en prenant une mauvaise décision soit l'absence de décision). Il s'agit de la violation des principes généraux du droit et les statuts de la société. Exemples de réclamations couvertes par l'assurance des membres du Directoire sont les suivants – mauvaise décision quant à l'orientation future de la société, dépassant le mandat, des déclarations fausses ou trompeuses, l'action au détriment de la société.

Assurance fournit également une protection juridique en cas de revendications injustifiées ou « nouvelles ». Sont assurés les dommages causés à la société et les tiers, y compris les actionnaires / associés. L'assurance couvre les frais de défense juridique dans le procès, comme dans le cas d'une allégation d'agir au détriment de la société.

II. Partie. La protection des droits des investisseurs fondée sur la responsabilité civile

La base juridique pour le fonctionnement du marché financier en Pologne constituent la loi du 29 Juillet 2005 relative à l'offre publique et les conditions pour introduire des instruments financiers dans le système de négociation organisé et sur les sociétés cotées, la loi du 29 Juillet 2005 relative à la négociation d'instruments financiers, la loi du 29 Juillet 2005 relative à la surveillance du marché des capitaux[10].

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[9] Comp. *Ubezpieczenia*, *rynek i ryzyko* [Marché de l'assurance et le risque], red. W. Ronka-Chmielowiec, Warszawa 2002.

[10] Dziennik Ustaw [Journal des Lois – J. des L.] 2005, no. 184 pos. 1539 ; J. des L. 2005, no. 183, pos. 1538 ; J. des L. 2005, no. 183, pos. 1537.

1. Importance croissante de la responsabilité civile[11]

La vraie protection des investisseurs ne dépend pas uniquement d'un nombre important d'informations adéquates et suffisantes, mais aussi des sanctions effectives contre la violation des obligations d'information.

Des systèmes juridiques modernes connaissent deux mécanismes de base pour sanctionner la réalisation des obligations d'information par les sociétés cotées. Le premier c'est le mécanisme fondé sur le droit administratif construit, entre autres, dans le système juridique polonais des compétences de la Commission de Surveillance Financière pour refuser l'approbation du prospectus d'émission lorsqu'il ne satisfait pas quant à sa forme et son contenu aux exigences définies dans la loi (article 33 al.1 de la loi sur l'offre). Ensuite pour imposer des peines financières ou exclure l'émetteur des négociations sur le marché réglementé des titres lorsqu'il néglige ses obligations d'information prévues par article 96 al.1 de la loi sur l'offre).

Le deuxième mécanisme est fondé sur le droit civil construit d'une forme particulière de responsabilité d'indemnisation pour la publication des informations fictives ou pour la réticence des informations susceptibles d'être divulguées dans le cadre des obligations d'information des sociétés cotées (article 98 de la loi sur l'offre).

1.1. Responsabilité de l'émetteur d'actions

La violation des obligations d'information des sociétés publiques est une infraction dont la société sera chargée en fonction des prescriptions de l'article 415 du code civile polonais (ci-après c.c.)[12]. En fait, il n'y a pas de doutes que la violation d'obligation d'information de la société, conformément à ce qui a été défini dans la présente analyse, remplisse des conditions d'illégalité formulées dans l'article 415 du c.c. Cette responsabilité sera fondée sur le principe de faute – intentionnelle et non intentionnelle – à la rigueur que l'imputation de la faute à la société aille de paire avec la prise en considération de la faute de son organe

[11] Sur le régime général de la responasabilité civile : W. C z a c h ó r s k i, A. B r z o z o w s k i, M. S a f j a n, E. S k o w r o ń s k a-B o c i a n, *Zobowiązania. Zarys wykładu* [Les obligations. Précis], Warszawa 1999 ; Z. R a d w a ń s k i, *Prawo zobowiązań* [Droit des obligations], Warszawa 1986 ; S. G r z y b o w s k i, *System Prawa Cywilnego* [Système du droit civil], red. Z. Radwański, t. III, cz. 1 ; voir aussi : B. L e w a s z k i e w i c z-P e t r y k o w s k a, *Odpowiedzialność cywilna prowadzącego na własny rachunek przedsiębiorstwo wprawiane w ruch za pomocą sił przyrody* [La responsabilité civile de l'entrepreneur pour son compte pour l'entreprise mise en mouvement par les forces de la nature], Warszawa 1967.

[12] M. S a f j a n, «Odpowiedzialność deliktowa osób prawnych. Stan obecny i kilka uwag de lege ferenda» [La responsabilité délictuelle des personnes morales. Situation actuelle et des commentaires de lege ferenda], *Studia Iuridica* 1994, p. 184 et s.

d'administration (article 416 du c.c.) Dans le cas de l'administration collégiale, l'engagement de la responsabilité de la société ne dépend pas du dommage résultant d'un manquement de tous les membres du Directoire. Il suffit le dommage causé par le manquement d'un des membres du Directoire agissant dans le cadre de ses compétences. Le cas échéant, il est possible de déterminer la faute de l'organe en partant de la conception de faute anonyme ou de faute organisationnelle[13].

Des membres du Directoire doivent consentir leurs efforts de diligence résultant du caractère professionnel de leur activité dans la réalisation des obligations d'information par la société (article 355 du c.c.) De principe, la mesure de diligence exigée des membres du Directoire dans cette situation sera définie d'une façon objective. Cependant, la responsabilité de l'auteur instituée par l'article 415 du c.c. provient de sa faute. Par conséquence, il faut constater que le départ du modèle de diligence appropriée de façon définitive ne décide pas encore de négligence de l'auteur du dommage. Il est toujours nécessaire de déterminer aussi si dans les circonstances particulières et compte tenu des traits individuels il ait pu agir convenablement. C'est alors seulement qu'il soit possible de porter contre cet auteur l'accusation de décision répréhensible. Compte tenu de ce qui précède, malgré la mesure de diligence exigée des membres du Directoire qui soit relativement objective, dans le cas des violations d'obligation d'information raffinées et non intentionnelles, les investisseurs peuvent rencontrer quelques difficultés en démontrant la culpabilité de l'organe de la personne morale. Cela résulte avant tout du phénomène d'asymétrie d'information. Les investisseurs endommagés ne disposent d'aucunes connaissances relatives aux circonstances du fait dommageable. En pratique, les investisseurs apprennent le plus souvent que la société avait publiée une information fausse en résultat de laquelle ils ont subi des dommages au moment où les participants au marché reçoivent une information de correction (c.-à-d. l'information sur la violation préalable de l'obligation d'information et sur la situation réelle de la société). Il faut quand même dire que les membres du Directoire sont obligés d'assurer le fonctionnement au sein de la société des mécanismes de contrôle interne appliqués pour détecter des dangers éventuels et des risques pour la société (article 369 § 1 du code polonais des sociétés de commerce, ci-après c.s.c.). Cela signifie que, de principe, le membre du Directoire ne peut pas argumenter qu'il n'est pas responsable pour la publication de l'information fautive parce que ses subordonnés ne lui avaient pas communiqué cette information et qu'en résultat il ne pouvait pas la prendre en considération lors de la réalisation de l'obligation d'information. Il faut souligner aussi que le principe du risque commercial justifié ne trouve pas

[13] T. S i e m i ą t k o w s k i, *Odpowiedzialność cywilnoprawna w spółkach kapitałowych* [La responsabilité civile pour les sociétés des capitaux], Warszawa 2007, p. 23–94.

à s'appliquer dans le champs de réalisation des obligations d'information par le Directoire, puisqu'il se réfère aux décisions commerciales du Directoire[14]. Cependant, les obligations d'information incombent à la société cotée en vertu du droit public ou en vertu du contenu de règlement publié par l'organe qui organise les négociations secondaires des actions de cette société.

Ce qui est de plus, même en supposant que le membre du Directoire ne soit pas responsable de la publication de l'information fausse, en cas de réalisation incorrecte de l'obligation d'information en résultat du manquement de la part des employés compétents la société sera chargée des dommages causés ainsi en vertu de l'article 430 du c.s.c. Il semble que dans cette situation les personnes lésées pourront invoquer la construction de « faute anonyme », s'il ne sont pas capables de prouver quels employés doivent être chargés pour le dommage causé[15].

1.2. Responsabilité d'indemnisation de l'émetteur versus principe de maintien du capital social

Indemnité payée par la société anonyme à l'actionnaire qui a obtenu les actions de nouvelle émission dans l'offre publique ou qui a acquis ses actions sur le marché secondaire sous l'influence de la violation par la société de l'obligation d'information ne constitue pas de remboursement interdit de l'apport selon l'interprétation de l'article 344 du c.s.c. et ne viole pas de principe de recouvrement réel ni de maintien du capital social de la société anonyme.

L'article 344 c.s.c interdit de rembourser l'apport pour les actionnaires, ce qui signifie par conséquence d'effectuer par la société pour le compte des actionnaires des prestations qui ne sont pas fondées sur une base juridique. Il ne trouve donc à s'appliquer dans le cas où en vertu d'autres prescriptions il existe une base pour indemniser l'actionnaire. Cette base juridique est constituée de l'article 415 du c.c. et de l'article 98 de la loi sur l'offre. L'article 344 du c.s.c. ne concerne pas la relation juridique obligataire qui se noue entre la société et l'actionnaire en rapport avec la satisfaction des conditions de responsabilité pour l'événement décrit dans les articles 415 du c.c. Dans cette relation juridique la personne endommagée en résultat de la violation des obligations d'information des sociétés cotées devient le créancier de la société. La disposition de l'article 344 du c.s.c. ne trouve pas à s'appliquer aux prestations effectuées par la société pour les créanciers.

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[14] J. D ą b r o w a, «Odpowiedzialność deliktowa osoby prawnej za winę własną lub cudzą» [La responsabilité delictuelle des personnes morales pour la faute propre soit faute d'autrui], *Studia Cywilistyczne* 1970, t. XVI, p. 3.

[15] M. S a f j a n, *op. cit.*, p. 187.

2. Responsabilité d'autres auteurs à part l'émetteur

Dans certaines circonstances, la responsabilité de l'émetteur fondée sur l'article 415 du c.c. ne constitue pas d'instrument suffisant pour protéger les intérêts des personnes lésées en résultat de la divulgation d'une information fausse. Il peut arriver que l'émetteur ne disposera pas d'un bien nécessaire pour satisfaire les revendications des investisseurs à cause de la mauvaise situation financière[16]. La situation comme ci-dessus peut avoir lieu surtout dans le cas des offres publiques de secours d'actions qui permettent à la société d'obtenir les fonds pour redresser les conditions financières de la société ou bien pour redresser les sociétés dont l'activité engendre un risque très élevé. Le cas pareil ouvre la question si les investisseurs peuvent revendiquer la réparation du dommage subi non seulement de la part de l'émetteur mais aussi de la part d'autres personnes « impliquées » dans la publication des informations fausses. Des auteurs qui entrent en jeu ce sont les membres du Directoire, les auditeurs, l'entreprise d'investissement qui a offert les actions.

On souligne que l'imputation de responsabilité pour l'exactitude de la réalisation des obligations d'information par les sociétés cotées aux autres auteurs coparticipant à la réalisation de ces obligations, et surtout aux coauteurs du prospectus d'émission, joue un rôle préventif très important. De fait, elle mobilise les auteurs susmentionnés, et avant tout les membres du Directoire, sur la question de diligence lors de la réalisation des obligations d'information par les sociétés.

Par ailleurs, dans la plupart des systèmes juridiques, y inclus le système polonais, le problème consiste en ce que de principe la société anonyme cotée est elle-même le destinataire des obligations d'information. La plupart des déclarations de connaissances comprises dans le prospectus ou dans les rapports (pertinents, périodiques) est alors imputée à la société elle-même et non aux membres de son Directoire par exemple. En conséquence, la possibilité d'engager la responsabilité d'indemnisation de ces derniers à l'égard des investisseurs en vertu de l'article 415 du c.c. pour avoir violé les obligations d'information par la société publique devient problématique[17].

Il est possible bien sûr d'envisager la qualification des actions des membres du Directoire comme complices de l'auteur de l'infraction (de la société) selon l'interprétation de l'article 422 du c.c. Outre, la question discutable si un membre de l'organe de la personne morale peut, à la lumière de l'article 422 du c.c., être

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[16] M. M i c h a l s k i, «Spółka akcyjna» [Société anonyme], *Biblioteka Prawa Spółek*, t. III, red. A. Kidyba, Warszawa 2008, p. 439.

[17] W. J. K a t n e r, «Odpowiedzialność cywilna za szkodę wyrządzoną naruszeniem tejemnicy przedsiębiorcy, zwłaszcza w razie uznania jej za informację publiczną» [Responsabilité pour les dommages causés par la violation de la confidentialité, en particulier de croire qu'il s'agit d'information publique], [dans:] *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara* [La responsabilité civile. Mélanges en l'honneur du professeur Adam Szpunar], Kraków 2004, p. 657 et s.

traité comme son complice, il convient de rappeler que la responsabilité du complice en vertu de l'article 422 du c.c. est fondée sur le principe de faute intentionnelle. Du point de vue de la personne lésée il serait donc difficile de prouver l'intention (directe ou éventuelle) d'octroyer à la société l'aide visant à violer l'obligation d'information par cette société.

Là où il est possible de démontrer la culpabilité intentionnelle des membres des autorités de la société ou bien d'autres personnes engagées intentionnellement aux actions menant à la contravention à l'obligation d'information par la société, il est admissible également d'envisager la responsabilité de ces personnes en vertu de l'article 415 du c.c. en raison de l'infraction prévue à l'article 311 du code pénal polonais. Conformément à cette dernière disposition, quiconque dans la documentation liée aux négociations des valeurs mobilières diffuse les informations fausses ou tait les informations concernant le patrimoine du soumissionnaire et affectant de façon importante l'acquisition, la vente de titres, l'augmentation ou la réduction de l'apport, est soumis à la peine privative de liberté de trois ans au plus[18].

La responsabilité des membres du Directoire de la société et de la personne responsable de tenir les comptes peut être engagée en vertu de l'article 415 du c.c. pour l'établissement des états financiers d'une manière non conforme aux normes comptables en vigueur. Par ailleurs, conformément aux dispositions de l'article 52 al.2 en rapport avec l'article 52 al.3 sous 1 du droit comptable (en rapport avec l'article 63c al.3 du droit comptable sur les comptes consolidés) les états financiers doivent être signés par la personne responsable de tenir les comptes et par le responsable de l'entité, et dans le cas où l'entité serait administrée par un organe multiple, par tous les membres de cet organe ; le refus de signature exige une justification écrite jointe aux états financiers[19]. En d'autres termes, dans le cas des états financiers établis par les sociétés anonymes au management multiple, tous les membres du Directoire sont obligés de signer les documents financiers. Des règles identiques s'appliquent au rapport d'activité de la société anonyme prévu à l'article 49 du droit comptable, sauf qu'il n'est pas signé par la personne responsable de tenir les comptes (article 52 al.3 sous 2 du droit comptable)[20].

Il est à souligner que l'obligation de signer les états financiers par tous les membres du Directoire met à part les règles de représentation admises dans les sociétés données. Cela signifie que les données communiquées dans les documents financiers reflètent l'état du savoir, imputée non seulement à la société mais aussi

[18] Comp. M. S u c h a r s k i, *Prawnokarna ochrona giełdowego obrotu papierami wartościowymi* [Droit pénal pour protéction des transactions sur les titres], Toruń 2006, R. Z a w ł o c k i, *Przestępstwa przeciwko obrotowi finansowemu. Przepisy karne z ustaw finansowych. Komentarz* [Crimes contre le marché financier. Les dispositions pénales des lois de finances. Commentaire], Warszawa 2002.

[19] K. G. S z y m a ń s k i, *Rachunkowość i podatki* [Comptabilité et impôts], Warszawa 1998, p. 392 ; T. C e b r o w s k a, *Komentarz do ustawy o rachunkowości* [Commentaire sur la loi de comptabilité], Warszawa 2005, art. 52.

[20] Ibidem.

aux membres du Directoire. Il paraît en fait que le sens de l'obligation consistant à signer les états financiers par tous les membres du Directoire, et non simplement par les personnes autorisées à représenter la société, est de traiter les déclarations de connaissances comprises dans les états financiers comme déclarations de connaissances des membres particuliers du Directoire. Aucun membre du Conseil ne peut donc se défendre en argumentant qu'il a signé les états financiers comme membre de l'organe de la société habilité à la représenter mais qu'il l'a fait uniquement au nom, tandis qu'en matière du contenu du document souscrit il a fait confiance aux autres membres du Directoire et aux autres employés de la société qui avaient participé « de fond » à l'établissement des états financiers ou du rapport d'activité de la société. Le membre du Directoire qui souscrit les états financiers erronés accepte son contenu. Il fait la déclaration de connaissances qui n'est pas vraie ou tait les informations susceptibles d'être divulguées. Cette constatation trouve aussi sa confirmation dans les Normes internationales d'information financière (International Financial Reporting Standarts). Conformément au § 6 IFRS 1 « c'est le Directoire et/ou un autre organe dirigeant l'unité commerciale qui est responsable pour l'établissement et la présentation des états financiers de cette unité »[21].

En conclusion, il semble que même la souscription par inadvertance par le membre du Directoire des états financiers établis d'une manière non conforme aux normes comptables en vigueur peut entraîner l'engagement de la responsabilité d'indemnisation en vertu de l'article 415 du c.c. au profit des personnes lésées en conséquence de cette souscription. En refusant la souscription et en attachant la justification du refus de signature indiquant le défaut des états financiers, le membre du Directoire peut exonérer sa culpabilité au cas où la publication d'une information fausse dans les états financiers ou dans le rapport d'activité de la société impliquerait l'endommagement du tiers. Ladite attitude du membre du Directoire empêchera en règle générale l'induction en erreur du tiers. Les états financiers constituent pourtant un des éléments (bien que le plus important) des informations dévoilées par les sociétés publiques en liaison avec la réalisation des obligations d'information.

La question qui se pose alors concerne la responsabilité des membres du Directoire par rapport aux autres informations communiquées dans le prospectus, dans les rapports périodiques ou dans les rapports pertinents. Le rapport semestriel et le rapport annuel (unitaire et consolidé) doivent comprendre la déclaration du Directoire ou de la personne dirigeante que « d'après leur meilleures connaissances, les états financiers semestriels ou annuels et aussi les données comparables ont été établis en conformité avec les normes comptables en vigueur et qu'ils reflètent d'une façon réelle, juste et claire la situation du patrimoine et des finances de l'émetteur et son résultat financier (et dans la cas du fonds – le résultat des opérations),

[21] A. H e l i n, K. G. S z y m a ń s k i, *Sprawozdawczość finansowa spółek kapitałowych* [L'information financière des sociétés de capitaux], FRR, Warszawa 2001, p. 8.

ainsi que le rapport semestriel ou annuel d'activité de l'émetteur présente l'image réelle du développement, des réussites et de la situation de l'émetteur, y compris la description des dangers fondamentaux et des risques » (§ 93 al.1 sous 4, § 94 al.1 sous 4, § 95 al.1 sous 5, § 96 al.1 sous 5 de l'arrêt sur les informations continues et périodiques). Par contre, l'obligation susmentionnée ne concerne pas les rapports trimestriels (§ 91 de l'arrêt sur les informations continues et périodiques).

Conformément au point 1.2 des annexes no. 1 et 3 accompagnant l'arrêt sur les prospectus, le prospectus émissif doit inclure la déclaration des personnes responsables des informations y données que « d'après leurs meilleurs connaissances et avec diligence appropriée pour assurer cet état, les informations présentées dans le document sont vraies, justes et conformes à l'état des faits et que le document ne néglige rien que pourrait affecter sa signification ». Ici, il est possible de juger à l'avance que les membres du Directoire appartiennent aux personnes responsables du contenu du prospectus d'émission. Le sens de l'obligation imposée aux sociétés cotées d'inclure ces déclarations au contenu du prospectus d'émission ou au rapport périodique se traduit par le fait que sans ce type de déclarations les documents informatifs visés ne sont pas complets. L'obligation de déposer les déclarations véridiques par les personnes soumises à cette obligation résulte instrumentalement des normes instituant l'obligation d'inclure ces déclarations dans le prospectus et dans les rapports périodiques. Aucun doute ne devra donc pas remettre en question l'engagement de la responsabilité d'indemnisation des membres du Directoire aux termes de l'article 415 du c.c. lorsque leurs déclarations ne correspondent pas à la vérité.

Les dispositions de l'article 415 du c.c. permettent également d'engager la responsabilité du contrôleur légal des comptes en ce qui concerne son avis sur les états financiers de la société qu'il a contrôlés et qui avaient été établis par l'infraction des conditions prévues aux articles 65 et 66 du droit comptable. Sa responsabilité ne concerne que son avis sur les états financiers attaché au prospectus d'émission ou au rapport périodique. Le contenu de l'avis du contrôleur légal des comptes vise directement la régularité, la diligence et l'intégralité des états financiers contrôlés (article 65 du droit comptable). Vu la mesure objective de diligence exigée de ce type du professionnel, il ne semble pas qu'un contrôleur légal des comptes puisse se décharger de la responsabilité qui lui incombe pour toute irrégularité significative en matière de l'avis qu'il a fait.

3. Responsabilité aux termes de l'article 484 du c.s.c. fondée sur le principe de faute intentionnelle

L'article 484 du c.s.c. institue la responsabilité d'indemnisation des personnes coopérant directement ou par le biais des tiers à l'attribution d'actions par la société, lorsque ces personnes ont mis dans les annonces ou dans les clauses

des données fictives ou qui diffusaient ces données d'une autre manière ou qui, en donnant les informations sur l'état du patrimoine de la société, ont omis des circonstances susceptibles d'être communiquées en vertu des règles en vigueur. Cette disposition ne concerne donc pas seulement la divulgation des informations fictives dans le prospectus d'émission (le mémorandum d'information) par les sociétés publiques, mais aussi dans les annonces de suscription utilisées par les sociétés non cotées (articles 434 et 440 du c.s.c.), dans les clauses et, comme il semble, dans les annonces volontaires et les communiqués diffusés en rapport avec l'émission d'actions. Sa fonction fondamentale consiste à élargir la responsabilité de diffuser des informations fictives en liaison avec l'émission d'actions sur certaines personnes impliquées à ce processus. Il paraît en conséquence que la question clé visant l'interprétation de cette disposition porte sur la détermination de son champs d'application personnel et du principe de responsabilité de ces auteurs. Etant donné que cette disposition touche les personnes coopérant à l'attribution d'actions par la société, elle se réfère avant tout aux opérations effectuées sur le marché primaire, donc à l'émission de nouvelles actions. Elle lie quand même la responsabilité d'indemnisation avec le dernier étape de ce processus, c'est-à-dire avec l'attribution d'actions qui peut être effectuée de façon directe ou indirecte. Il semble que dans le cas de l'attribution d'actions par la société il s'agit surtout du processus d'introduction de nouvelles actions au système dépositaire des valeurs mobilières afin d'aboutir à enregistrer des actions dématérialisés aux comptes des valeurs mobilières des personnes autorisées. Dans le cas des actions dématérialisées, l'attribution d'actions remplace en fait leur enregistrement sur le compte de titres du souscripteur (article 7 al.7 de la loi sur le marché des instruments financiers). Il est admissible de parler ici de « l'attribution » indirecte d'actions vu que tout cela se fait par l'intermédiaire de telles institutions comme le Dépositaire National de Titres (Krajowy Depozyt Papierów Wartościowych) et des entreprises d'investissement qui tiennent des comptes de titres.

Le cercle d'auteurs hypothétiquement responsables, donc ceux prenant part à l'attribution d'actions par la société, a été limité par un critère additionnel : la responsabilité est imputée exclusivement aux personnes qui ont mis en même temps dans les annonces ou dans les clauses des données fictives ou qui diffusaient ces données d'une autre manière ou qui, en donnant les informations sur l'état du patrimoine de la société, ont omis des circonstances susceptibles d'être communiquées en vertu des règles en vigueur. Sous la notion d'annonces il faut comprendre l'annonce relative à la souscription fermée (article 434 du c.s.c.), l'annonce relative à la souscription ouverte (article 440 du c.s.c.), ainsi que le prospectus d'émission et le mémorandum informatif pour la suscription publique d'actions (article 440 § 3 du c.s.c.). Ceci concerne aussi des informations rendues publiques dans le cadre des actions publicitaires entreprises pour promouvoir l'offre publique d'actions.

Il n'est pas discutable qu'aux personnes en question appartiennent les membres du Directoire de la société. En tant que membres de l'organe obligé de mener les affaires de la société, ils coparticipent à l'attribution d'actions par cette société. En même temps, ils assument la responsabilité pour le contenu des annonces relatives à l'émission d'actions, ainsi que pour toute autre information publiée à cette occasion. La responsabilité des membres du conseil de surveillance suscite, quant à elle, beaucoup plus de controverses. Les membres du conseil de surveillance contrôlent le processus d'augmentation du capital social, mais il est douteux s'il soit permis de leurs imputer « la coparticipation à l'attribution » d'actions, ce qui se traduit par une participation active à l'activité relativement technique et organisationnelle qui termine le processus d'émission d'actions.

D'après l'opinion de certains auteurs, les institutions dont l'activité consiste à recevoir des demandes de souscription et des paiements pour actions » n'assument pas de responsabilité visée par cette disposition[22]. Parmi ces institutions nous trouverons des établissements d'investissement (des courtiers en valeurs mobilières). Il faut approuver le problème présenté ainsi vu que la réception des demandes de souscription et des paiements constitue une activité distincte de l'attribution d'actions. Et pourtant, il est à souligner qu'en général des établissement d'investissement (des courtiers en valeurs mobilières) qui reçoivent des demandes de souscription et des contributions tiennent en même temps les comptes de titres sur lesquels des actions souscrites seront enregistrées. Il paraît en fait que dans le dernier cas l'établissement d'investissement devient l'acteur coopérant à l'attribution d'actions aux termes de l'article 484 du c.s.c.

Ce qui reste discutable c'est la question s'il est possible de considérer les auteurs coopérant à l'établissement du prospectus d'émission défectueux (désinformant), par exemple les auditeurs, les conseillers juridiques et financiers, comme auteurs coparticipant à l'attribution d'actions par la société. Il est clair que ces auteurs co-participaient à l'établissement du prospectus d'émission mais la classification de l'établissement du prospectus d'émission comme synonyme voire élément du processus d'attribution d'actions suscite des doutes sérieux. La notion d'attribution d'actions a dans la législation polonaise la signification bien établie et relativement étroite. Le caractère particulier de l'article 484 du c.s.c. s'oppose à l'interprétation élargie de la notion d'attribution d'actions employée dans son contenu. Il est à postuler *de lege ferenda* que la disposition en cause trouve à s'appliquer uniquement dans le cas de coparticipation à l'établissement des annonces, des clauses ou d'autres communiqués diffusés par la société en rapport avec l'émission (la vente) d'actions. Par contre, *de lege lata*, les auteurs qui coparticipent à l'établissement des informations fictives mais qui ne coparticipent

[22] S. S z e r, [dans:] A. K o n, *Kodeks handlowy. Komentarz* [Le Code de commerce. Commentaire], Warszawa 1934, p. 393 ; A. S z a j k o w s k i, [dans:] S o ł t y s i ń s k i, A. S z u m a ń s k i, J. S z w a j a, *Kodeks spółek handlowych* [Code des sociétés commerciales], t. IV, Warszawa 2004, p. 144.

pas à l'attribution d'actions n'entrent pas dans le champs d'application de l'article 484 du c.s.c. Il est pourtant admis de discuter leur responsabilité aux termes de l'article 484 du c.s.c. en tant que complices préjudiciables agissant par le biais d'un acte interdit lorsque les conditions de cette responsabilité prévues à l'article 422 du c.s.c sont satisfaites (faute intentionnelle).

4. Dommage et relation de cause à effet comme motifs de responsabilité d'indemnisation pour violer les obligations d'information des sociétés cotées

Cette partie présente le problème de calcul de la valeur du dommage résultant de la violation des obligations d'information de la société cotée et la relation adéquate de cause entre ces deux événements. Cette problématique même dans les pays dont les réglementations juridiques du marché de capital jouissent d'une tradition riche et de longue date fait naître beaucoup de doutes et de controverses. Tout est causé par le fait que la question d'impact des informations rendues publiques par les sociétés sur les décisions des investisseurs sur le marché de capital, et par la suite sur le cours des actions de ces sociétés dans les négociations organisées, est une des questions les plus difficiles en matière du marché de capital. La conséquence de cet état de choses se manifeste entre autres par le manque d'une politique univoque de l'activité législative. La législation dans les pays au marchés de capital développés, se développe en essayant de trouver un compromis entre les facilitations de preuve dont les investisseurs ont besoin pour montrer la relation de cause et du dommage et la protection des intérêts des sociétés cotées.

La législation polonaise semble refléter la problématique en question de façon encore beaucoup plus compliquée vu qu'il n'y a aucune jurisprudence en cette matière et que l'article 98 de la loi sur l'offre ne la règle pas. En effet, les questions relatives à la relation de cause à effet doivent être examinées uniquement dans le contexte des normes générales du code civil (article 361 du c.c.)

4.1. Décision d'investissement erronée comme conséquence de publication d'une information fausse

Les données concernant la situation économique et juridique de l'émetteur, l'émetteur lui-même et les actions, rendues publiques par les sociétés publiques dans le cadre des obligations d'information, constituent pour les investisseurs le facteur élémentaire qui leur permet d'évaluer correctement les actions. Très souvent, ils profitent de ces informations pour prendre des décisions d'achat ou de vente d'actions. Sous l'influence des décisions prises simultanément par plusieurs investisseurs le cours des actions formé sur le marché réglementé réagit aussi

aux informations rendues publiques par les émetteurs[23]. En liaison avec ce phénomène, on a formulé dans la littérature de référence la théorie d'efficacité informative du marché de capital qui est fortement justifiée par les études empiriques. D'après cette théorie (en sa version mi-forte qui est la plus acceptable), le prix d'actions sur le marché de capital liquide reflète toute information publiquement accessible sur l'émetteur de ces actions.

La publication par la société d'une information fictive dans le cadre de la réalisation des obligations d'information est alors susceptible d'influencer les participants au marché de sorte qu'ils prennent et réalisent des décisions d'investissement erronées. Les décisions d'investissement erronées sont prises aussi longtemps que la période de désinformation demeure valable. Elle dure en principe jusqu'au moment où les investisseurs reçoivent une information de rectification, c'est-à-dire jusqu'au moment où le marché acquiert des informations vraies sur la condition de la société. L'information de rectification ne doit pas forcement passer sous forme d'un communiqué officiel de la société ayant pour but de rectifier l'information préalable qui était fausse. La vérité sur la société peut parvenir aux investisseurs pas à pas, pendant une période plus longue, par l'intermédiaire de différents « canaux informatifs », p. ex. des articles de presse, confirmés par fragments par la société. Sur le marché à l'efficacité informative la publication de l'information rectificative engendre en règle générale une réaction convenable du cours des actions – l'augmentation ou la baisse des prix – ce qui termine la phase de désinformation et les prix reviennent à l'état représentant la condition réelle de la société.

En pratique, la décision erronée de l'investisseur porte le plus souvent sur l'achat d'actions pendant la période de désinformation à un prix gonflé résultant de la publication par la société de l'information fausse et dont le contenu reste positive pour cette société. Il n'est pas nécessaire de justifier plus amplement le fait que les sociétés publiques ont souvent la tendance de présenter leurs situations de façon démesurément optimiste étant donné que cette démarche affecte positivement tels aspects que les frais d'augmentation du capital et le niveau de rémunération des managers. Cette information présente de manière excessivement optimiste, et par cela faussement, la situation économique de la société ce qui cause en conséquence que les participants surévaluent ses actions. Dans ce contexte, la décision d'investissement erronée indique la situation où l'investisseur donné accepte de payer pour les actions un prix plus élevé que le prix qui serait fondé justement sur la situation réelle de la société.

Il n'arrive que très rarement à la société de publier une information fausse dont la signification négative pour cette société entraînera les investisseurs à prendre des décisions erronées sur la vente d'actions de cette société à un prix sous-estimé. Le problème d'achat d'action sous l'influence d'une information fausse et posi-

[23] W. D ę b s k i, *Teoretyczne i praktyczne aspekty zarządzania finansami przedsiębiorstwa* [Aspects théoriques et pratiques de la gestion financière de l'entreprise], Warszawa 2007, p. 13.

tive fera donc l'objet de nos considérations suivantes. En quelque sens, la vente d'action sous l'influence d'une information fausse et négative est pour l'émetteur parfaitement symétrique à la situation où l'investisseur achète des actions sous l'influence de l'information fausse et positive. C'est pour cette raison que tous les arguments relatifs à la situation typique d'achat d'actions sous l'influence de l'information fausse et positive trouveront également leur application dans le cas de vente d'actions sous l'influence de l'information fausse et négative.

Les réglementations de la plupart des pays du marché des capitaux développés excluent la possibilité de réclamer les dommages après la publication des informations fausses sur le marché de capital si l'investisseur n'a fait aucune transaction. Outre les difficultés de preuve hypothétiques dans ce domaine, il convient de souligner que le droit polonais, et surtout l'article 98 de la loi sur l'offre, n'exclut pas de principe le recours en dommages dans les cas pareils. C'est pourquoi la problématique de la relation de cause et du dommage subi par l'investisseur nécessite encore, le cas échéant, quelques remarques à part.

La décision d'investissement erronée n'est pas identique au dommage. En faisant référence à la doctrine, il est permis d'accepter que la décision d'investissement erronée est une conséquence objective de l'événement que le législateur relie à l'obligation de réparer le dommage – dans ce cas, de la contravention à l'obligation d'information de la société cotée. L'analyse du point de vue des droits déterminés de la personne lésée décide s'il cause le dommage. La conséquence objective détermine ce qui est le dommage – quels faits peut-on traiter comme préjudice des droits protégés par la loi. Un autre facteur encore permet d'évaluer l'ampleur du dommage. Il s'agit de la situation individuelle de la personne endommagé dans laquelle elle pourrait se trouver si l'événement nuisible n'avait pas lieu ». L'ampleur définitive du dommage est formée aussi par la théorie juridiquement définie de relation adéquate de cause (article 361 § 1 du c.c.). La relation mentionnée, sauf la fonction de condition de responsabilité d'indemnisation, détermine également l'ampleur de l'indemnisation due à la personne endommagée.

L'élément primordial du dommage subi par l'investisseur en résultat de contravention à l'obligation d'information de la société est la différence entre le prix que l'investisseur a payé vraiment pour les actions achetées (le prix obtenu pour les actions vendues) et le prix hypothétique que l'investisseur aurait payé si la contravention à l'obligation d'information de la société publique n'avait pas eu lieu. Pour être plus précis, cette différence définit la perte (*damnum emergens*) subie par l'investisseur.

Il ne semble pas qu'il soit possible de qualifier dans la législation polonaise la divulgation de l'information fausse par la société sous l'influence de laquelle l'investisseur prend la décision d'investissement erronée comme atteinte à ses droits de la personnalité, et plus précisément à sa liberté (article 23 du c.c.). L'influence de l'information fausse sur la prise de décision par les investisseurs,

compte tenu du contenu de cette information et le mode formel de sa diffusion, n'est pas suffisamment forte pour que l'on puisse admettre qu'elle interfère dans l'intégralité psychique et émotionnelle de l'individu au point d'atteindre à sa liberté. Conformément à l'article 361 § 2 du c.c. le dommage matériel comprend aussi bien la perte (*damnum emergens*), c'est-à-dire la diminution du patrimoine de la personne lésée, qu'un manque à gagner (*lucrum cessans*).

Pour évaluer le dommage et son ampleur on emploie la méthode de différenciation qui consiste à comparer l'état réel du patrimoine de la personne lésée après l'événement incitatif et l'état hypothétique qui serait survenu si l'événement incitatif n'avait pas eu lieu. La méthode prend en considération tous les effets définitifs de l'événement incitatif dans tout le patrimoine de la personne lésée dès qu'ils restent en relation adéquate de cause (article 361 § 1 du c.c.). C'est la raison pour laquelle il faut attirer l'attention sur la problématique de la relation de causalité entre la contravention à l'obligation d'information de la société cotée et le dommage subi par l'investisseur avant de passer à l'analye du mode d'évaluation de l'ampleur du dommage subi.

Conclusion

La protection des investisseurs en cas de contravention aux obligations d'information des sociétés cotées résultant de la clause déposée en vertu de l'article 51 al.5 de la loi sur l'offre et donne quelques chances pour protéger efficacement des intérêts de l'investisseur qui a remit la clause sous l'influence du prospectus défectueux. Cependant, deux circonstances limitent l'application de cette disposition. Premièrement, l'implémentation défectueuse des réglementations de la directive sur les prospectus dans le droit polonais fait naître une certaine incertitude juridique en ce qui concerne la nécessité de publier l'annexe afin de rectifier des erreurs de base et des inexactitudes du prospectus d'émission. Deuxièmement, le champ d'application de l'institution examinée a été limitée à la situation où la société publie l'annexe au prospectus d'émission. L'investisseur peut s'abstenir de la clause déposée seulement dans la situation où l'émetteur lui-même a remarqué les irrégularités des informations communiquées dans le prospectus. Le problème primordial reste la protection de l'investisseur dans la situation où l'émetteur ne voit pas de défauts du prospectus ou même s'il les voit et il n'a aucune intention de les redresser.

Les recours en dommages fondés sur les articles 484 du c.s.c. et 415 du c.c. ne donnent pas de résultats satisfaisants. Dans le premier cas, le champs d'application personnel de l'article 484 du c.s.c. est trop étroit pour que cette disposition devienne un instrument efficace de protection des investisseurs. La disposition examinée impute la responsabilité aux personnes qui participaient à l'attribution

d'actions, et cela uniquement dans le cas de publication par la société d'une information fausse résultant de faute intentionnelle. L'article 415 du c.c. peut à son tour constituer un instrument efficace des recours en dommages surtout contre l'émetteur bien que la personne lésée doit prouver la responsabilité de la personne morale. Les deux dispositions en question ne résolvent pas non plus de la difficulté fondamentale relative aux demandes d'indemnisation qui résultent de la violation des obligations d'information des sociétés. Il s'agit de la nécessité de prouver la relation adéquate de cause à effet et de démontrer la valeur du dommage subi.

Wojciech Jan Katner
Professor of Law, University of Łódź

Przemysław Katner
Doctor of Law, University of Łódź and University of Szczecin

PERSONAL GUARANTEES BETWEEN COMMERCIAL LAW AND CONSUMER

1. Introduction: The (macro)economic aspect

The taking out of credit, both short-term and long-term, by entrepreneurs to finance their business activities is a normal characteristic in the economies of developing countries. The same is true with the taking out of consumer credit (loans), as consumer credit testifies to a growing demand for both chattel (movable) property of significant value and real (immovable) property, and the accompanying transfers of funds and goods, all of which indicate and contribute to a prospering economy. On the other hand, a lack of interest in credit (either in granting or taking out) indicates an economy in difficulty and is one of the characteristics of an economic crisis. In the most recent years a number of countries, including many in the European Union (EU) have been going through an economic crisis, and even in member states such as Poland, which have managed to avoid the major effects of the crisis, one can observe an insufficient interest in taking out credit, and further that the conditions for granting credit are becoming ever more rigorous.

This situation concerns both business credit granted to entrepreneurs to finance their economic activities as well as consumer credit. Various published data indicates that the number of entrepreneurs saddled with too heavy debt is growing, and the number of 'average consumers' – either living off wages or pension/retirement benefits – encountering difficulties in making instalment payments on credit and loans is also growing. This means that the percentage of both entrepreneurs and consumers who are either behind in their payments, pay irregularly, or even have stopped making their credit payments entirely, continues to increase. Some figures indicate that as many as 10% of indebted consumers are not making their instalment payments, although it should be noted that the percentage varies according to region, population density and the social standing of the debtors.

Understandably, in such a situation banks and other institutions granting credit or loans have either restricted their grants of credit to persons in high-risk groups, or demand additional and/or more certain security for their loans and credit. Such a security can be given either by the borrowers themselves, or by persons or entities acting as security providers (for example sureties, guarantors) for the loans, obligated to make the payments in the event the debtor fails to do so. Among both groups one often can find consumers. In accordance with Article 22^1 of the Polish Civil Code,[1] consumer is a natural person performing a legal act which is not directly related to his business or professional activity, with the other party being – as is universally considered – an entrepreneur.[2] Our further attention will be directed toward credit agreements as generally defined and the possible personal securities for debts (Sections II and IV), with a particular focus on consumers as borrowers in consumer credit agreements (Section III) and security providers, particularly given in the form of suretyship (Section V) and *aval* on a promissory note or bill of exchange (Section VI), which are the most polar opposite forms of personal securities for debts.

2. The legal basis for credit agreements and personal securities for debts

2.1. Credit and loans (hereinafter referred to generally as credit agreements) as well as the security interests of the creditor-parties to such agreements are regulated by both legal acts at the level of statutes and by the terms of the agreements entered into (between the creditor and debtor as well as between the creditor and security provider). Very often such agreements are based on standard contracts prepared by or for the bank or institution granting the credit.

The basic legal act governing such transactions is the Polish Civil Code (hereinafter PCC), where the legal norms concerning loan contract can be found in Articles 720–724. The PCC also regulates certain forms of security for debts (receivables), including personal securities such as: **suretyship** (Articles 876–887); **security assignment** having its source in an assignment contract (Articles 509–517); **credit insurance** via an insurance contract (Articles 805–834); and a ***del credere* clause in a commission sales** (Articles 766, 771).[3]

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[1] Act of 23 April 1964, uniform text, Dziennik Ustaw [Journal of Laws – J. of L.] 2014, item 121.

[2] See T. P a j o r, W. J. K a t n e r, *Kodeks cywilny*, *komentarz*, *część ogólna* [Civil Code, commentary, general section], ed. M. Pyziak-Szafnicka, 2nd ed., Warszawa 2014 (commentary to Article 22^1 PCC); the amendment to Article 22^1 PCC, specifies a proper definition of a consumer, new Act of 9 May 2014 on protection of consumer's rights (not published in the moment of publishing this paper).

[3] These regulations are applied as appropriate to such clause; the issue was directly regulated by a clause in Article 591 of the Commercial Code of 1934, which was in effect until the end of 1964.

2.2. A **bank credit agreement** is regulated by Articles 69–77a of the Polish Banking Law (hereinafter PBL),[4] while a **bank loan agreement** in regulated by Article 78. The PBL also regulates **an instruction given to a bank to grant credit to a third party** (Article 77a), and contains restrictions on the application of preferential rules with respect to various entities in the granting them credit, guarantees, or suretyship (Article 79).

2.3. A consumer credit agreement is regulated by the Consumer Credit Act[5] (hereinafter CCA). This Act reflects the Polish implementation of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers;[6] the directive is repealing Council Directive 87/102/EEC, upon which the earlier Polish Act on Consumer Credit of 20 July 2001 was based.

2.4. A separate legal act sets forth the law on bills of exchange and promissory notes[7] (hereinafter LBEPN), and concerns **bills of exchange** (Articles 1–100), **promissory notes** (Articles 101–104, albeit Article 103 contains a number of references to the regulations concerning bills of exchange), **bill of exchange (promissory note) suretyship (*aval*)** (Articles 30–32, 103), and **bill of exchange (promissory note) endorsements** (Articles 11–20, 103).

2.5. In presenting the **basic legal framework for securing credit** with respect to entrepreneurs and consumers one must also mention **guarantee agreement**, which is concluded based on the principle of freedom of contract (Article 353^1 PCC), as well as **bank guarantee**, which is regulated by the above-mentioned Banking Law. Guarantee agreements are based on a construction of remittance, regulated in the PCC (Articles 921^1–921^5).

2.6. Other means of securing credit include **transfer of a claim secured by a bank guarantee** (Article 82 PBL), **confirmation by a bank of the commitment of another bank resulting from a bank guarantee** (Article 83 para. 1 PBL), and **a documentary letter of credit** (Article 85 PBL).

2.7. Another form of security can be an agreement on the **joint and several liability** of debtors with respect to a single creditor, governed by Article 366 PCC.

2.8. The **provision of a guarantee (suretyship) by the State Treasury or local government institutions** is governed by separate legal provisions. These are contained in the Act of 8 May 1997 on suretyship and guarantees granted

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[4] Act of 29 April 1997, uniform text J. of L. 2012, item 1376 as amended.

[5] Act of 12 May 2011, J. of L. 2011, No. 126, item 715 as amended.

[6] OJ L 133 of 22 May 2008, p. 66.

[7] Act of 28 April 1936, J. of L. 1936, No. 37, item 282 as amended. The Act was the result of Poland's joining three international conventions concerning the uniformity of promissory note law, ratified in Geneva on 7 June 1930.

by the Polish Treasury and certain other legal entities.[8] These issues are not dealt with in the present article.[9]

2.9. Standard (term) contracts play a special role in the regulation of credit for entrepreneurs. According to Articles 384–385 PCC, they may have a form of general terms and conditions of contracts, a model contract or rules. The conclusion of a contract takes place via the acceptance of the standard contract by the debtor (agreement by action, in other words, a contract of adhesion). In case of large amounts of credit taken out by entrepreneurs, it may be possible for the parties to negotiate the terms and reach a modified agreement, i.e. one more advantageous to the debtor than that provided by provisions contained in the standard contract. But in the case of grants of credit for small amounts, including consumer credit agreements, deviation from the terms of the standard contract is very rare. It should be noted however that in the case of such agreements entered into by consumers as borrowers or security providers (e.g. granting suretyship), the business-creditor (e.g. bank, loan institution) must not use unlawful provisions (clauses) in the standard contract which it uses (Articles 385^1–385^3 PCC).[10]

3. The essence and the *essentialia negotii* of a consumer credit agreement

3.1. It should be noted at the outset that the use of the term 'consumer credit' in the regulations is misleading; in fact it is a defect. For this issue concerns not just the taking out 'credit' in the form regulated by the banking law, but the grant of any form of financial support, whether in money or property, to a consumer. The concept of credit in the CCA is used more in the economic sense and constitutes an inclusive umbrella concept which encompasses all legal acts deemed to comport with the functions attributed to consumer credit.[11] While this reflects

[8] Act of 8 May 1997, uniform text J. of L. 2012, item 657 as amended.

[9] For more, see Z. R a d w a ń s k i, *System Prawa Prywatnego* [System of Private Law], ed. Z. Radwański, Vol. 8, *Zobowiązania – część szczegółowa* [Obligations – detailed part], ed. J. Panowicz-Lipska, 2nd ed. Warszawa 2011, p. 597–608.

[10] The use of unlawful clauses in consumer contracts is a common practice and related to all types of legal relations in which one party is a consumer; in such a case the practice can be contested in the Regional Court of Warsaw – The Court for Protection of Competition and Consumers (Articles 479^{36}–479^{45} of the Code of Civil Procedure), seeking a judgment declaring that, for example, a credit agreement or guarantee agreement with a consumer contained a prohibited clause, hence the clause is not binding on that consumer; for more see M. B e d n a r e k, *System Prawa Prywatnego* [System of Private Law], Vol. 5, *Zobowiązania – część ogólna* [Obligations – general part], ed. E. Łętowska, 2 nd ed., Warszawa 2013, p. 591–833.

[11] Cf. J. P i s u l i ń s k i, *System Prawa Prywatnego* [System of Private Law], Vol. 8, p. 397, 418; A. R z e t e l s k a [in:], *Prawo cywilne i handlowe w zarysie* [An Outline of Civil and Commercial Law], ed. W. J. Katner, 4th ed., Warszawa 2011, p. 342.

poorly on the consistency of the legal system, the roots of such a situation go back to EU law as well as the legal regulations concerning credit agreements and credit promissory contracts, both those presently in effect as well as those which used to be applied in the legal systems of some European countries.

The broad understanding of consumer credit is reflected in the references in the CCA to other agreements which fall within the act's definition of consumer credit. In particular this concerns (Article 3 para. 2 CCA): loan agreements, credit agreements as understood in banking law, consumer deferred payment agreements if one pays the costs of such grace period, credit agreements in which the creditor undertakes obligations with respect to a third party and the consumer agrees to repay the creditor for the costs of providing the agreed-upon performance, and revolving credit agreements. On the other hand, the act does not apply to some agreements which may appear to fall within the orbit of consumer credit. In particular, the act does not apply to instalment sales (regulated in Articles 583–588 PCC), leasing agreements which do not contain the obligation to transfer the ownership of the property in question at the end of the contract to the consumer (option provided for in Article 709^{16} PCC), or to credit agreements with foreign investment firms or with such firms carrying out brokerage activities in Poland (Article 4 CCA).

3.2. For these and other reasons a consumer credit agreement is not considered to be a separate type of contract.[12] It should either be classified as some type of legal agreement or be recognized as an unnamed type. This latter position is usually adopted, but the consumer credit agreement is also very close to a credit agreement, which as a form of bank credit is defined in Article 69 para. 1 of the Banking Law. In accordance with this provision a **bank credit agreement** is an agreement where a bank assumes an obligation to make available to a borrower a specified amount of funds to be used for a specified purpose, for a period stipulated therein, and the borrower assumes an obligation to use such funds in accordance with the terms and conditions of that agreement, to repay the amount of credit drawn together with interest at the agreed repayment dates, and to pay commission fee on the credit granted. Such an agreement must be in writing (*ad probationem*, Article 74 PCC) and contain in particular: the amount of credit and the designated currency, the purpose for which the credit is granted (the interest rate and commission are dependent on the purpose), the time period and conditions governing repayment, the interest rate, the method of securing the credit, the scope of bank's rights to monitor credit utilisation and repayment, the date and manner in which the credited sum will be delivered, the amount of the commission if such is envisioned by the agreement, and the conditions governing the modification or termination of the agreement. The essential conditions (*essentialia negotii*) of a bank credit agreement, i.e. those without which an agreement will not be considered to have been reached, are: the amount of credit, designation of currency, and the time

[12] A. R z e t e l s k a, *op. cit.*; J. P i s u l i ń s k i, *System…*, together with citations therein.

and manner in which the credited sums will be tendered to the disposition of the debtor, subject to the debtor's obligation to repay the creditor.[13]

3.3. The question arises whether the same above-described elements are necessary for the conclusion of a valid **consumer credit agreement**. Such an agreement, executed by a consumer within the meaning of Article 22^1 PCC,[14] is understood, according to Article 3 para. 1 CCA, as a credit agreement for a sum not to exceed 255 500 PLN (about 60 000 euro) or an equivalent amount in foreign currency (i.e. with a value of no more than 255 500 PLN on the date of execution of the agreement), by which the creditor,[15] within the scope of its business activity grants or promises to grant credit to a consumer. One can see at a glance that not only is this not a definition of a consumer credit agreement, but it is not even an attempt to define it. The legislator makes reference to a credit agreement and only indicates, in the paragraph cited above, a monetary restriction on the amount of credit available. Article 29 para. 1 of the CCA indicates that the agreement must be in written form *ad probationem*, but in paragraphs 2 and 3 of the same article directs that the consumer must immediately be given a copy of the agreement, which must be formulated in a clear and unambiguous manner. Hence one can conclude that the law requires such an agreement to be in a written form, but doesn't make its validity dependent on preserving that form.

3.4. Inasmuch as Article 3 para. 1 of the CCA refers to credit agreement, then despite the all-inclusive/umbrella character of the concept (referred to above), one cannot move about in a legal vacuum. Hence we believe that the starting point for an analysis of the elements of consumer credit agreement should be the legal norms concerning bank credit. This reasoning could rest on the provisions of Article 78a PBL, authorizing the application of provisions of banking law to consumer credit and consumer loans in areas not regulated by the CCA; i.e. precisely in the question before us. Only by recognizing a consumer credit agreement as a specific form of bank credit can one distinguish the *essentialia negotii* in such an agreement. If a consumer credit agreement is treated otherwise, by assuming it is an agreement of an unspecified and unnamed nature, then according the conditions applied to such agreements[16] it would do without *essentialia negotii* and be considered as a type of agreement concerning a consumer's obligation to return and repay financial support, close in a loan agreement of a rather unclear legal

[13] Cf. M. B ą c z y k, *System Prawa Handlowego* [System of Trade Law], Vol. 5, *Prawo umów handlowych* [Law of Trade Contracts], ed. S. Włodyka, 3rd ed., Warszawa 2011, p. 857–859.

[14] The CCA does not provide, rightly, its own definition of a consumer, referring instead in Article 5 point 1 CCA to the PCC.

[15] According to Article 5 point 2 CCA a creditor is an entrepreneur, within the meaning of Article 43^1 PCC, which in the course of its business or professional activities grants or promises to grant credit to a consumer.

[16] W. J. K a t n e r, *System…*, Vol. 9, *Prawo zobowiązań – umowy nienazwane* [Law of Obligations – innominated contracts], ed. W. J. Katner, Warszawa 2010, p. 15–16.

construction and content. This can hardly be considered as appropriate and in accordance with a consumer's interests.

Thus if a consumer credit agreement is considered as a specific form of a bank credit agreement, then as elements of the latter are set forth by the banking law, the consumer credit act sets forth **the elements of a consumer credit agreement**. In Article 30 CCA as many as 21 such elements are listed and they constitute a closed set, since the phrase 'in particular' or 'including but not limited to' is not used. In referring to the elements which determine the validity of such an agreement the following should be noted: the entire amount of the credit, the time and method for paying out the credited sum as well as the entire amount to be repaid by the consumer, established on the day the agreement is executed, as well as the conditions and time period for repaying the credit (Article 30, para. 1 points 4, 5, 7 and 8). The remaining elements constitute *accidentalia negotii*, i.e. elements which only take on the character of *essentialia negotii* when they are agreed upon and included in an agreement, but the lack of which does not affect the validity of an agreement. They include the following: the time period during which the agreement is in effect, the interest rate, including the real annual interest rate, information on the costs of the agreement, the effects of debt and lack of payment by the consumer, the means of insuring and/or securing the repayment of the credit, the consequences attached to realization of a consumer's right to pre-pay the loan, questions concerning the consumer's right to renounce or terminate the contract, as well as the right of the consumer to demand performance of the obligation from the creditor, unless the seller or servicer has performed it. Additional elements are provided for several particular types of credit: credit or loan agreements secured by a mortgage, linked credit agreements, an agreement to defer payments or change the method of making payments in situations whereby a consumer is in default of payment obligations, as well as current account consumer credit (overdraft facility) (Articles 31–35 CCA). At this point the Act of 2006 forbidding usury must be very strongly recalled, which prohibits charging interest resulting from a legal act that exceeds in one year four times the pawn loan rate of the National Bank of Poland (maximum interest).[17] If a higher interest rate is agreed upon, the maximum interest is due and this cannot be excluded either by agreement between the parties or the choice of foreign law (Article 359 para. 2^1, 2^2 and 2^3 PCC).

From the indicated elements of a consumer credit agreement it again follows that it is a credit agreement which within the consumer market it is a model credit agreement, as is bank credit agreement in accordance with the Banking Law. The earlier-mentioned reference in the consumer credit act to other agreements

[17] Since 4 July 2013 this means a maximum interest rate of 16% annually; for more see T. W i ś n i e w s k i, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Vol. III, pt. 1, ed. J. Gudowski, Warszawa 2013, p. 78.

considered as consumer credit agreements (Article 3 para. 2 CCA) does not change this principle.

3.5. Before concluding a consumer credit agreement, a creditor (as well as an intermediary arranging such credit) is saddled with a number of obligations, in particular with respect to information, which must be given in a clear, unambiguous, understandable and visible manner, that either constitute typical provisions inserted into the contract later by agreement of the parties, or aim at giving consumers the possibility to choose which type of credit they prefer, making them fully aware of their obligations and the degree of risk attendant to the obligations, often of a long-term nature, which they undertake (Articles 7–28 CCA). These obligations equally concern issues associated with providing security for credit, in other words guarantees given to a creditor by a consumer-borrower-debtor as well as by a consumer-security provider, who also needs to be aware of all the above-described information.

The obligation to provide information also is present **following the conclusion of a consumer credit agreement** (particularly in Articles 20, 21, 37, 43 CCA). One should note in particular the prohibition against the use of contract clauses waiving or limiting a consumer's rights in the event of an assignment of receivable by the creditor (Article 44 CCA). There is also a general prohibition against excluding or limiting rights guaranteed to a consumer by law. In the event of a violation of this prohibition, the provisions of the law apply, and not the contractual provisions (Article 47 CCA). These provisions also applies to consumer-security provider.

3.6. The consumer also has the right **to pre-pay all or part of the debt** established in the consumer credit agreement at any time, and the creditor cannot make such pre-payments dependent on the consumer informing the creditor (Article 48 CCA). However, in the event of pre-payment (early payment) certain consequences may attach with respect to commission specified on such occasion in the agreement, if additional conditions are met (Article 50 para. 1 CCA). Such commission may not exceed 1% of the amount of credit repaid early, if the period of time between the early repayment and the due date exceeds one year. If the period does not exceed one year, the maximum commission may not exceed 0,5% of the amount of credit pre-paid. In any case the commission cannot exceed the interest which would be due in the event the payments were made according to the agreed-upon schedule. The law provides for exceptions to this principle under certain circumstances, in which a commission for pre-payment of credit may not be charged. In particular these concern credit agreements in the form of an overdraft facility (in the consumer's current account) (Article 51 CCA).

3.7. The consumer has a general right to withdraw from the consumer credit agreement within 14 days of its conclusion, without the need to give reasons therefore (the so-called *cooling off period*). If the consumer credit agreement does not contain the necessary contractual elements required by the law, for example

the type of credit, entire amount of credit, its real annual percentage, the methods for re-payment and the effects of failure to make timely payments etc. (Article 30 CCA), the 14 day cooling off period begins to run from the time the contract is modified to contain all the required elements (Article 53 CCA). The bank is required, upon concluding a consumer credit agreement, to give the consumer on a durable medium a model declaration for withdrawing the contract. It's enough that the consumer sends the creditor such a declaration.

The consumer cannot bear any costs connected with the withdrawing from a consumer credit agreement, with the exception of the interest accrued on any amount of credit used from the date the credit was drawn down. The sum must be repaid, together with accrued interest thereon, within 30 days of making the declaration of withdrawal from the agreement (Article 54 CCA). In principle the above provisions apply even when the consumer credit agreement was concluded using a means of distance communication or away from the creditor's premises; the exception is linked credit agreement (Articles 56–58 CCA).

4. General characteristics of personal securities for debt

4.1. The legal issues connected with securing debts in Polish law have a rich history. This is evident just from a review of the list of security mechanisms contained in Section II, although for the purposes of this article we are concerned only with personal securities and there are as well proprietary securities, typical also for other legal systems, in particular pledges, mortgages and security transfer of ownership. These security mechanisms are beyond the scope of this present work, which is aimed at presenting the general characteristics of personal securities for debts and then more detailed the suretyship and the *aval*.

At the outset it should be noted that *de lege lata* in Polish law there is no distinction in the statutory provisions between personal securities given by consumers and entrepreneurs, whether as borrowers or as security providers for another person's debt.[18] The regulations do distinguish individual entrepreneurs, and those with micro-, small-, or medium-sized enterprises (according to the same criteria as in other EU Member States) who are given some preferences in obtaining credit. In the essence, the criteria for granting credit (generally small in size, for example start-up credit) are more lax than in the case of large enterprises, and often offered at a lower interest rate. The legal forms for securing such credit are, however, the same for all types of economic activity, hence essentially the same too when the debtor is a consumer. The same legal norms also concern consumers if they provide security for credit taken out by an individual entrepreneur or owner of micro-, small- or medium-sized enterprise.

[18] However, see Section VI.

According to Articles 79, 79a, 79b and 79c of the PBL, a bank cannot apply more advantageous terms, and in particular a more advantageous interest rate, than that applied by the bank to a given type of bank account agreement, bank credit agreement, or bank loan agreement, **or bank guarantees or sureties** to:

1) an entity dominating or dependent on the bank;
2) an entity acting within the same holding as the bank;
3) an entity dependent on or associated with the bank within the meaning of the Accounting Act;
4) a stockholder or member of the bank;
5) an employee, member of management board or supervisory board of the bank or bank's dominating entity;
6) an entity having capital or organizational links, with a bank's stockholder and member or a bank's member of the board, the supervisory board, or a person holding a managing position in the bank.[19]

For the above-mentioned persons, banks determine in the form of regulations the terms of granting credits, loans of money, bank guarantees and sureties. There are also additional requirements in the event of a total sum exceeding 10 000 euro per person, as to the consent of the management board and supervisory board, the total amount of all credits that cannot exceed certain limits and the Obligation to notify the Polish Financial Supervision Authority in the event an individual case exceeds 30 000 euro.[20] These provisions apply to other types of mechanisms for securing credit besides those mentioned above.

4.2. The development of personal security for debts in Poland is similar to that in other European countries. This results from the fact that Polish civil law is rooted in French (the French Civil Code), German (BGB) and Swiss (the Swiss Law of Obligations) traditions. This is further understandable in light of the fact that Poland was, from the end of the 18th century until 1918, partitioned among German (western lands), Russian (central and eastern lands) and Austrian (southern lands) administration. In the meantime part of the central lands formed the Kingdom of Poland, incorporating the earlier Duchy of Warsaw which was created by Napoleon and subject to the French civil code (the Napoleonic Code).

The unification of the law on obligations in the entire territory of Poland took place in 1933 together with the entry into force of the Code on Obligations,[21] according to which suretyship was regulated by Article 625 and the following. The Code on Obligations of 1933 was repealed by the entry into force of the

[19] According to Article 79a para. 5 PBL a person occupying a managing position in a bank is an employee reporting directly to the member of the management board, a director of a branch office and his deputy and the head accountant.

[20] An exception is made for stockholders holding up to 5% of votes in the general shareholders assembly of a publicly-traded company.

[21] Decree of the President of the Republic of Poland of 27 October 1933, J. of L., No. 82, item 598.

Polish Civil Code on 1 January 1965. Bills of exchange, promissory notes and *avals* were regulated by the Law on bills of exchange and promissory notes of 1936 (earlier mentioned in Part II), which is still in force.[22]

4.3. Guarantees in the form of agreements were possible, prior to 1990, on the basis of Article 391 PCC, which regulates the contract on third party performance. They remain in use and are called guarantee contracts pursuant to the amendment to the PCC of 28 July 1990, introducing the principle of freedom of contract in Article 353^1 PCC.[23] The same amendment also introduced the legal norms for remittance. Later the Polish Banking Law of 1997 introduced the term 'bank guarantee'. The provision of legal norms in the Banking Law for other, earlier mentioned, legal means of securing credit looks similar.

4.4. As to the remittance, according to Article 921^1 PCC anyone who remits to another person (remittee) the performance of a third party (remitter) thus authorizes the remittee to accept and the remitter to make the performance on the account of the remitting party. If the remitter declares to the remittee that it accepts the remittance, it is obliged with respect to the remittee to make the performance set forth in the remittance (Article 921^2 para. 1 PCC).[24]

A guarantee agreement is based on the legal construction of remittance, as is a **bank guarantee**, which, according to Article 81 PBL is a unilateral promise on the part of a bank-guarantor that, upon the fulfillment of the defined conditions of payment by the guarantee beneficiary (the creditor), which may be affirmed by an assertion in a defined documentary form by the beneficiary attached to the indicated payment request, the bank will render performance to the guarantee beneficiary, either directly or through the intermediary services of another bank. A bank guarantee is executed when, in the event of failure of the debtor to make payment, the guarantee beneficiary declares to the bank guarantor that it accepts the offer of the bank and wishes to realize the guarantee.[25]

4.5. A transfer of a bank guarantee is made together with a transfer of a claim secured by that guarantee (Article 82 PBL). A bank can confirm the obligation of another bank arising from a bank guarantee. In such a case, the claim arising from the guarantee can be directed against the bank which issued the guarantee, the bank which confirmed it, or against both banks jointly, until such time as

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[22] Earlier the law governing bills of exchange and promissory notes was the Decree of the President of the Republic of Poland of 14 November 1924.

[23] Such an agreement is defined as non-accessory and abstract, see J. P i s u l i ń s k i, G. T r a c z, *System prawa handlowego*... [System of Trade Law…], Vol. 5, p. 245 and following; Resolution of the Supreme Court of 28 April 1995, III CZP 166/94, OSNC 1995, No. 10, item 135, as well as judgment of the Supreme Court of 16 April 1996, II CRN 38/96, OSNC 1996, No. 9, item 122.

[24] For more, see K. Z a w a d a, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. K. Pietrzykowski, Vol. II, 7th ed., Warszawa 2013, p. 730 and following.

[25] See M. B ą c z y k, *System Prawa Handlowego*… [System of Trade Law], Vol. 5, p. 900 and following.

the creditor receives full satisfaction for the debt. This procedure is applied in cases where one bank has confirmed the obligation of another bank arising from a surety (Article 83 PBL).[26]

4.6. A documentary letter of credit, according to Article 85 of the PBL, is a document whereby a bank, acting on the request of a client but in its own behalf (a bank opening a letter of credit), commits itself in writing towards a third party (the beneficiary) to pay the beneficiary of the letter of credit the sum of money set forth in said letter, upon fulfillment by the beneficiary of all the conditions set forth in the letter of credit.[27] A documentary letter of credit must particularly contain: the name and address of the person requesting the letter of credit and the beneficiary, the amount and currency of the letter of credit, the time period during which the letter of credit is valid, and a description of the documents which must be presented to the bank by the beneficiary in order to request payment under the letter of credit. The obligation on the part of the bank issuing the letter of credit to pay the amount accredited is enforceable from the moment the beneficiary presents the documents in accordance with the conditions contained in the letter of credit. The same regulations apply accordingly to a standby letter of credits.

4.7. Personal securities are, according to the PCC and the PBL of a **causal character**, and their effectiveness depends on the validity of the undertaken and agreed upon obligations. However, securities having its source in Law on bills of exchange and promissory notes are not, in principle, dependent on cause (*causa cavendi*); the same goes for guarantee agreement in certain cases.

4.8. It should be noted that the provisions on bank guarantee and suretyship, transfer of a claim secured by bank guarantee, confirmation of the obligation of another bank resulting from a bank guarantee, and letters of credit are, with certain statutory exceptions (e.g. Articles 79a–79c PBL), of a ***iuris dispositive* character**, which means they are applicable only in the event the parties to an agreement did not provide otherwise (Article 86a PBL).

5. Suretyship (based on the Civil Code)

5.1. According to Article 876 of the PCC, **suretyship** is based on the principle that the surety commits to the creditor to perform an obligation is the debtor does not perform it. The basic characteristics of suretyship find their roots in Roman law[28] and its functions remain unchanged. Hence it is a **unilateral agreement to undertake an obligation**, which can be used to secure any debt, but usually concerns contractual obligations.

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[26] *Ibidem*, p. 911.

[27] M. O l e c h o w s k i, *System…*, Vol. 8, chapter XI.

[28] For more, see A. S z p u n a r, *Zabezpieczenia osobiste wierzytelności* [Personal securities of claims], Sopot 1997, p. 23–25.

Suretyship may be provided not only for a **monetary debt**, which is a rule, but also for a **non-monetary obligation**, either existing at the time of concluding the agreement or future one. The suretyship for a future debt must specify in advance the maximum amount of debt secured (suretyship for a future debt, Article 878 para. 1 PCC).[29] At this point it should be noted that, in accordance with Article 77a PBL a suretyship may arise *ex lege* as a result of the acceptance by a bank of an order to grant credit to a third person (in writing *ad solemnitatem*), in which case the person giving the order is obligated, unless the agreement provides otherwise, to act as a surety for the future debt of said third person. A suretyship may be granted **for a limited period of time or for an unlimited period of time**.[30] If it is for an unlimited period of time for a future debt, the surety may revoke the suretyship at any time before the debt arises (Article 878 para. 2 PCC).[31] A suretyship may be granted for remuneration (it is always so when suretyship is granted by a bank), but in practice it is often given free of charge (gratuitously). In the event no consideration is provided for in the agreement – it is gratuitous.[32]

5.2. The question arises: can a suretyship be created in relations between an entrepreneur and a consumer? The question should be answered in the positive in situations whereby a suretyship agreement is concluded and the creditor is an enterprise (for example a bank or other financial institution) and the surety is a natural person, even if the main debtor, for whom a natural person undertakes a suretyship obligation, is an entrepreneur. If the surety fulfils the conditions indicated in the aforementioned Article 22^1 PCC, such person should be deemed to have the status of consumer. In practice this doesn't mean much, however, since the B2C relationships are distinguished because of the need to provide protection to the weaker entities (individuals) in their relations with entrepreneurs, particularly in consumer sales agreements and supply or specific work contracts (Articles 535^1, 605^1, 627^1 PCC). The legal regulations concerning suretyship agreements do not provide for consumer suretyship, nor do apply to the suretyship

[29] See Z. R a d w a ń s k i, *System*..., Vol. 8, p. 567–571; compare the universally approved position of the Supreme Court in its judgments of: 25 May 1954, II C 1120/53, OSN 1955, No. 3, p. 54; of 22 July 1958, I CR 804/57, *Ruch Prawniczy*, *Ekonomiczny i Socjologiczny* [Legal, Economic, and Sociological Movement] 1959, No. 4, p. 263; see also M. S y c h o w i c z, *Kodeks*..., Vol. III, part 2, ed. J. Gudowski, p. 1004–1008 and the court opinions cited therein; so-called general or universal guaranties are more problematical, see *ibidem*, p. 569, where the author describes the favorable position of German legal doctrine of the mid- 1990s; the Supreme Court pronounced negatively on this in its judgment of 28 February 2005, V CK 827/04, *Prawo Bankowe* [Banking Law] 2006, No. 3, p. 4.

[30] As declared by the Supreme Court in its resolution of 31 January 1986, III CZP 69/85, OSNC 1987, No. 1, item 3; compare the resolution of the Full Assembly of the Civil Chamber of the Supreme Court of 16 December 1987, III CZP 91/86, OSN 1988, No. 4, item 42.

[31] L. O g i e g ł o, *Kodeks*..., ed. K. Pietrzykowski, Vol. II, p. 665.

[32] Compare Z. R a d w a ń s k i, *System*..., Vol. 8, p. 552 and the judgment of the Appellate Court of Katowice of 20 October 2009, V ACa 339/09, OSA in Katowice 2010, No. 1, item 6.

obligation undertaken by a consumer – even accordingly – the regulations implementing the EU directives on certain rights of consumers in sales contracts.[33] A consumer who acts as a surety may obtain certain rights in the event the circumstances described in the Law of 2 March 2000 on protection of certain consumer rights […][34] occur, in particular with respect of distance contracts or exceptionally to contracts concluded away from business premises.[35] While the provisions of this act listing exceptions to its application do not specifically exclude suretyship agreements nor security agreements in general, nonetheless their character and the way in which they are concluded would cause one to doubt their applicability to such agreements.

From the above it follows that there are also no provisions which would set a maximum amount or time period to a suretyship agreement concluded by a consumer; this also applies to other exceptions to the general principles and norms governing suretyship agreements in the Civil Code and bank suretyship. The restrictions with respect to sureties generally pertain to the individual's capability to provide security due to, for example, one's income, age, type of employment etc., based on an analytical framework similar to that for checking an individual's creditworthiness or the degree of risk involved in granting consumer credit (similar to seeking a loan). The applicable provisions, including those which refer to exceptions from the general provisions applicable to suretyships in the case of sureties-consumers, contain the earlier described regulations (standard contracts) provided by institutions granting credit and are of a *lex contractus* character.

Attention should be given to the provision generally applicable to suretyship agreements, but which is of special importance for a surety-consumer, that is Article 880 PCC. It requires a creditor to inform the surety immediately if the debtor is late making his performance. Article 76a of the PBL is similar as it requires in the event of delay in the repayment of credit by a borrower that the bank immediately inform, in the manner specified in the agreement, the parties who are the bank's debtors under a credit security agreement. This is of particular significance since the Civil Code does not contain the so-called *respiro* principle,

[33] Act of 27 July 2002 on special conditions of consumer sales and on changes in the Civil Code, J. of L. 2002, No. 141, item 1176; this Act was changed by the new Act of 9 May 2014 on protection of consumer's rights (yet not published).

[34] Uniform text, J. of L. 2012, item 1225; new Act on this subject was adopted by the Polish Parliament on 9 May 2014 (yet not published).

[35] Attention was drawn to this matter by T. Pajor, who also presented the position of CJEU in its judgment of 17 March 1998, C-45/96, in the case of Bayerische Hypotheken- und Wechselbank AG v. Edgard Dietzinger, E.C.R 1998, p. I-1199 (recognizing a guarantor as a consumer on the basis of the Directive concerning contracts concluded outside the premises of an enterprise; now on this subject is new Directive 2011/83/EU of 25 Octobre 2011), as well as the less favorable view contained in the CJEU judgment of 23 March 2000, C-208/98, in the case of Berliner Kindl Brauerei AG v. Andreas Siepert, E.C.R 2000, p. I-1741 (T. P a j o r, *Kodeks cywilny*, *komentarz*, *część ogólna* [Civil Code, general part], ed. M. Pyziak-Szafnicka, Warszawa 2009, p. 230, 235).

envisioned in Article 633 of the Code on Obligations of 1933, which provided that the obligations arising from a suretyship in the event of a debtor's delay would not become due and payable until one week after the notification to the surety of the debtor's delay.[36] However, there are no obstacles to including such a *respiro* provision in a suretyship agreement.

5.3. A suretyship agreement is a **consensual legal act**. Thus it takes effect by sole consistent declarations of the parties.[37] It is also of a **causal character**, inasmuch as the validity of the surety's depends on having the proper legal basis (*causa cavendi*) for granting a suretyship, which need not be expressed explicitly in the agreement or the parties' acts, but must follow from the agreement in its entirety taking into account the circumstances under which it was concluded.[38] The suretyship is a legal act between the creditor and the surety, and its validity is not affected by legal deficiencies in the legal relationship between the debtor and surety, for example, defects in the declaration of intent.[39]

5.4. Pursuant to Article 879 PCC the scope of the surety's obligation is determined each time by the scope of obligation of the debtor. However, the legal act of the debtor with a creditor taken after the suretyship is given may not increase the scope of the surety's obligations, for example by a settlement agreement between the debtor and the creditor.[40] This does not change the fact that, according to the predominant view, surety is liable for his own debt (debt arising out of suretyship agreement) and not another person's one, even though he pays another person's (debtor's) debt for which he is personally liable.[41]

From the above it follows that the obligation created under a suretyship is of an **accessory character**. This signifies the dependence of the suretyship, and its scope, on the main debt, which in principle means that the surety and debtor share the same fate with respect thereto (*accesorium sequitur principale*). This accessory character is of significance with respect to origin of suretyship, the same

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[36] A. S z p u n a r, *Zabezpieczenia…*, p. 95 and following; Z. R a d w a ń s k i, *System…*, Vol. 8, p. 576–577.

[37] Compare the judgment of the Supreme Court of 26 August 1976, I CR 339/76, OSP 1978, No. 3, item 49, with the opinion of M. Piekarski.

[38] Compare A. S z p u n a r, *Zabezpieczenia…*, p. 33–34; judgment of the Supreme Court of 3 October 2007, IV CSK 193/07, OSN 2008, No. C, item 78. Exception from this principle occurs when a suretyship is given for a person without legal capacity.

[39] See the resolution of seven judges of the Supreme Court of 30 September 1996 r., III CZP 85/96, OSNC 1996, No. 12, item 153, according to which the deceit of a debtor used to convince a person to act as surety do not have an influence on the validity of the suretyship agreement concluded with the creditor; for a concurring voice, see B. L e w a s z k i e w i c z-P e t r y k o w s k a, opinion, OSP 1996, No. 7–8, item 139.

[40] See A. R z e t e l s k a, *op. cit.*, p. 280.

[41] A. S z p u n a r, *Zabezpieczenia…*, p. 83; see the decisions of the Supreme Court of 6 December 1958, 3 CR 1063/58, OSP 1960, No. 7–8, item 188; of 3 August 1979, II CR 241/79, OSP 1981, No. 2, item 25; and of 31 January 1986, III CZP 69/85, OSN 1987, No. 1, item 3.

substance of suretyship and the main debt, the defenses available to the surety against the creditor and in the event of assignment of secured receivable.[42]

5.5. A suretyship also means that **the surety shares equal responsibility with the principle debtor**. In accordance with Article 881 PCC, in principle the surety is responsible as a joint and several co-debtor. Polish law does not recognize the principle of subsidiary (auxiliary) responsibility of a surety, according to which a creditor can demand payment from a surety only after failing to receive satisfaction from the principle debtor (a solution contained in para. 771 BGB, Article 2021 CC), or only after previously demanding payment formally (albeit outside a court procedure) from a debtor (para. 1355 ABGB).

5.6. A **declaration of surety** must be filed in written form in order to be valid (*ad solemnitatem*). This formality does not concern the entire suretyship agreement, which can be expressed by any behaviour (based on the freedom to contract – Article 60 PCC), but only the declaration of the surety. Similar provisions can be found in the German civil code (para. 766), the Austrian civil code (para. 1346), and in the Swiss Law of Obligations (Article 496). This form of declaration, besides serving an evidentiary purpose, is aimed at calling to the attention of the persons so declaring the weight of their legal obligation, and acts as form of 'caution' against making such a declaration in haste, perhaps overly trusting in the debtor's integrity. The content of such a declaration should include a word or phrase signifying the binding nature of the suretyship, so that the person declaring the intention to create a suretyship is fully aware of his or her legal obligations to the creditor. Hence a phrase such as 'I guarantee' or 'I accept responsibility' etc.,[43] should be included in the declaration. It has been appropriately postulated that the mere signature of the person granting the suretyship, without declaring his or her responsibility, is insufficient. In order to comply with the requirement that such a declaration be in writing, the signature should appear directly under the declaration, or be made electronically (Article 78 paras. 1 and 2 PCC). In the case of spouses in the legal marital property regime the consent of the spouse of the person declaring suretyship is not, as a rule, considered necessary, but if there is no such consent then the creditor may request the payment only from the surety's personal property, his remuneration for work or from his other income (Article 36 and Article 41 para. 2 of the Family and Guartianship Code).[44]

5.7. In accordance with Article 882 PCC, if the payment date of the debt is not specified or if the payment of the debt depends on termination notice being

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[42] A. S z p u n a r, *Zabezpieczenia…*, p. 80; from the judgment of the Supreme Court of 5 November 2008 (I CSK 204/08, *Biuletyn Sądu Najwyższego* [Supreme Court Bulletin] 2009, No. 3, p. 9), it appears that a non-accessory suretyship is possible, based on provisions of Article 877 PCC; the deficiencies in this reasoning are pointed out in Z. R a d w a ń s k i, *System…*, Vol. 8, p. 566–567.

[43] A. S z p u n a r, *Zabezpieczenia…*, p. 41.

[44] For more details, see Z. R a d w a ń s k i, *System…*, Vol. 8, p. 561–562.

given to the debtor, the surety may request – after the passage of six months from the granting of a suretyship or, if suretyship is given for a future debt, from the date the debt arose – that the creditor either demand payment from the debtor or give termination notice on the earliest date. The suretyship expires if the creditor does not fulfill the demands of the surety.[45]

5.8. If the creditor commences execution on the obligations arising from the suretyship, the surety can raise any defenses against the creditor both to which the debtor is entitled (especially those connected with the debtor's obligation) as well as his own ones (Article 883 PCC). With respect to the former, the surety can raise all the so-called 'ordinary defenses' which concern every legal obligation, i.e. its invalidity, limitation of claims, etc. as well as defenses arising from the particular obligation, such as premature collection or set off of the debtor's claims against the creditor.

Defenses founded on surety's personal relations with the creditor may concern the validity of the suretyship agreement, its expiration, the content of the suretyship agreement, or the set off of claims owed by the creditor to the surety arising from other legal relations between them.

The debtor's acknowledgement of the creditor's claims or the debtor's waiver of claims against the creditor do not affect the surety's rights to raise defenses (Article 883 para. 2 PCC).[46]

5.9. Expiration of the suretyship occurs with the expiration of the obligation secured by the suretyship, which derives directly from the accessory principle. Besides fulfillment of the debtor's obligation, the suretyship may expire based on: a set off, novation unless the surety decides otherwise, release from debt, placing the amount of the debt in court deposit, *datio in solutum* (with the reservations contained in the second sentence of Article 453 PCC), expiration of the principle obligation as a result of impossibility of performance (with the reservations contained in Article 475 para. 2 PCC), and change of debtor (unless the surety wishes to continue the suretyship – Article 525 PCC).

The surety remains liable in case of assignment of receivalbes by the creditor (Article 509 para. 2 PCC), as well as in case of subrogation that is taking over of paid-off creditor's claim by a third party (Article 518 PCC).[47]

5.10. Based on Article 518 para. 1 point 1 PCC, the right of the surety to demand from the principle debtor the return of the performance rendered (sum paid)

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[45] J. G ó r e c k i, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. K. Osajda, Vol. II, Warszawa 2013, p. 1811–1812.

[46] For more on this topic, see Z. R a d w a ń s k i, *System…*, Vol. 8, p. 582–585; M. S y c h o w i c z, *Kodeks…*, ed. J. Gudowski, p. 1015–1018, as well as A. S z p u n a r, *Zabezpieczenia…*, p. 103–112.

[47] Z. R a d w a ń s k i, *System…*, Vol. 8, p. 581–582.

to the creditor is widely acknowledged. If there are several co-sureties, their situation is similar to that of joint and several debtors, with recourse claims pursuant to Article 376 PCC in connection with Article 881 PCC.[48]

6. Bill of exchange (promissory note) suretyship (aval)

6.1. An *aval* constitutes additional security for a creditor being a current lawful holder of bill of exchange or promissory note (hereinafter holder). As a result of this, prior to addressing the issue of this paper, **the characteristics of a bill of exchange (promissory note)** and the prerequisite conditions for its validity should be briefly examined, followed by the characteristic features of an *aval*. Only then will we indicate the scope of application of the provisions with respect to an *aval* in the event a bill of exchange (promissory note) is given by a consumer as security for consumer credit.

6.2. A bill of exchange (promissory note) belongs to the category of securities to order, which legitimize the person named in the document as well as any other person to whom the right has been transferred by endorsement, that is, a written declaration placed on the security and containing at least the signature of the transferor (endorser) confirming the transfer of the right to another person (Article 921^9 § 1 and 2 PCC).[49] Every bill of exchange (promissory note) can be transferred by endorsement, unless the issuer of the bill (drawer) or note (maker) specifically places the expression 'not to order' or some equivalent reservation. In such a case the rights of the holder can only be transferred by ordinary assignment (Article 11 LBEPN) regulated in the Civil Code (Articles 509–517 PCC).[50]

Due to the fact that we are discussing bills of exchange and promissory notes, we have to define them. A **bill of exchange** is an unconditional order in writing addressed by one person (the drawer) to another (the drawee) to pay a determinate

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[48] Compare A. S z p u n a r, *Zabezpieczenia…*, p. 129–134 and, cited therein, the resolution of the Supreme Court of 26 August 1969, II CR 429/69, with the concurring voice of A. Ohanowicz, OSPiKA 1971, No. 1, item 4; judgment of the Supreme Court of 24 April 2008, IV CSK 39/08, cited by Z. Radwański, *System…*, p. 588.

[49] For more, compare K. Z a w a d a, *Kodeks…*, ed. K. Pietrzykowski, Vol. II, p. 747 and following; P. M a c h n i k o w s k i, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. E. Gniewek, P. Machnikowski, 5th ed. Warszawa 2013, p. 1533 and following; A. N o w a c k i, *Kodeks…*, Vol. II, ed. K. Osajda, p. 1900 and following; M. R o m a n o w s k i, *System…*, Vol. 18, *Prawo papierów wartościowych* [Securities Law], ed. A. Szumański, 2nd ed., Warszawa 2010, p. 75 and following; A. S z p u n a r, *Komentarz do prawa wekslowego i czekowego* [Commentary to Law on Bill of Exchange and Promissory Note and Check Law], Warszawa 1994, p. 10 and following; J. J a s t r z ę b s k i, [in:] J. J a s t r z ę b s k i, M. K a l i ń s k i, *Prawo wekslowe i czekowe. Komentarz* [Law on Bill of Exchange and Promissory Note and Check Law. Commentary], Warszawa 2008, p. 14 and following.

[50] For more, compare M. H. K o z i ń s k i, *System…*, Vol. 18, p. 248 and following.

sum of money to the person to whom or to whose order the payment is to be made (Article 1 LBEPN).

A **promissory note** on the other hand contains an unconditional promise of the maker (a kind of a drawer) to pay a determinate sum of money to the payee or to his order (Article 101 LBEPN); in this case there is no drawee. While securing a consumer credit the parties usually use a promissory note issued by the consumer-debtor-maker. The obligations arising from a promissory note (bill of exchange) are of an individual nature, independent of the legal basis and circumstances which cause it to be issued.[51] In the event the legal basis for the obligation (*causa*) is indicated in the promissory note (bill of exchange), the obligation will be void.[52]

Promissory notes and bills of exchange are formalized written documents which must contain strictly defined elements (Articles 1 and 101 LBEPN). In the event such elements are lacking, the document will not be considered a promissory note (bill of exchange), unless a specific legal provision provides otherwise (see, for example, Articles 2 and 102 LBEPN).[53] The defense that a promissory note (bill of exchange) is void for the above reasons may be asserted by any person whose signature appears on the document, even if said person previously acknowledged the document as a promissory note (bill of exchange).[54]

6.3. Bill of exchange (promissory note) debtors (hereinafter promissory note debtor or debtors) are the drawer (maker) – Articles 9 and 104 LBEPN, the acceptor (drawee who accepted the bill of exchange – Article 28 LBEPN), the giver of an *aval* (avalist – Article 32 LBEPN) as well as any subsequent endorser (Article 15 LBEPN).

The responsibility of the promissory note debtors is not uniformly regulated. Rather it is graduated, although in accordance with Article 47 LBEPN it is also joint and several. Nonetheless in evaluation of the subjective defenses of a given promissory note debtor with respect to the holder, one must take into consideration the category to which a particular debtor belongs (for example, when the defense of limitation of claims is raised). The general principle derived from Article 17 LBEPN is that the promissory note debtor may in principle set up against the holder, who has acquired the bill by the endorsement, only the objective defenses (that is, a formal defense asserting the lack of one of the necessary elements of a promissory note (bill of exchange), or a defense based on the contents of the note (bill)) as well as subjective defenses based on the personal relations between a certain promissory note debtor and a certain holder seeking to vindicate his rights (for example, the invalidity of the legal act between the debtor and creditor upon

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[51] Compare the judgment of the Supreme Court of 31 May 2001, V CKN 264/00.

[52] Compare A. S z p u n a r, *Komentarz*..., p. 14–15.

[53] With respect to the particular elements of a promissory note, see P. M a c h n i k o w s k i, *Prawo wekslowe* [Bill of Exchange and Promissory Note Law], p. 53 and following.

[54] Compare A. S z p u n a r, *Komentarz*..., p. 37.

which the delivery of the promissory note was based). A promissory note debtor cannot, however, set up against the holder defenses founded on his personal relations with the drawer (maker) or with previous holders, unless the holder, in acquiring the bill, has knowingly acted to the detriment of the debtor (so the lack, invalidity, or deficiency of the legal basis for issuing the bill of exchange (promissory note) does not affect the validity of the obligations undertaken by an endorser).[55]

6.4. In this light it should be observed that, in accordance with Articles 30–32 LBEPN, payment of a bill of exchange (promissory note) may be guaranteed by an *aval* as to the whole or part of its amount. This guarantee may be given by a third person or even by a person who has signed the bill (note). The *aval* is listed on the note (bill) or on its allonge. It is expressed by the phrase 'I guarantee' or by any other equivalent formula and it must be signed by the giver of the *aval*. It is deemed to be constituted by the mere signature placed on the face of the bill, except in the case of the signature of the drawee or of the drawer (maker). An *aval* must specify for whose account it is given. In default of this, it is deemed to be given for the drawer (maker). The giver of an *aval* is bound in the same manner as the person for whom he has become guarantor. His undertaking is valid even if the obligation being guaranteed is invalid for any reason other than formal defects. The avalist who paid for the promissory note (bill), obtains the rights arising from the note (bill) against the person for whom the guarantee was given, as well as against those persons who are liable to the latter on the bill of exchange (promissory note).

An *aval* hence serves to secure the obligation of a particular promissory note debtor. It is an institution separate from civil law suretyship, for which there are no applicable provisions in the Civil Code.[56] The differences consist in: the form of guarantee, the degree of its dependence on the obligations of the person for whom it is given, the prerequisite conditions for the liability of the guarantor, as well as the scope of defenses which may be raised by the guarantor, the range of recourse claims, and – in case of an *aval* – the lack of a need for specifying an upper limit to the avalist's responsibility, when the obligation of the person for whom the guarantee is given have not yet arisen (for example in case of an *in blanco* bill of exchange (promissory note) or the signing of a promissory note (bill of exchange) by the avalist prior to the person for whom the guarantee is given). It is generally accepted that an *aval* must be unconditional and that a time limit for avalist's liability cannot be imposed.

The **responsibility of the avalist** is determined applying the same conditions which determine the responsibility of the person for whom the *aval* is given. Thus

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[55] Compare *ibidem*, p. 64 and following; M. K a l i ń s k i, [in:] J. J a s t r z ę b s k i, M. K a l i ń s k i, *Prawo*..., p. 194 and following; M. H. K o z i ń s k i, *System*..., Vol. 18, p. 261 and following.

[56] Compare the judgment of the Supreme Court of 24 October 2003, III CK 35/02.

if an avalist guaranties the maker of a promissory note, he is liable to the same extent as the principle debtor, without the need to draw up a protest. The scope of the obligation undertaken by an avalist is identical to the scope of the obligation of the person for whom the *aval* is given (unless a monetary limit is designated). The dependence of the obligation of the avalist on the obligation of the person for whom the *aval* is given is nevertheless very limited, in principle a pure formal, and the obligation is of an abstract character. Thus, if the signature of the person for whom the *aval* is given is on a promissory note (bill of exchange) and whose obligation is not for any reason valid (except for formal defects, for example signing with only one's first name), the avalist will remain liable. The scope of defenses which may be available to an avalist are determined by the provisions of Article 17 LBEPN, according to which the legal relationship of the avalist with the person for whom the *aval* is given is without significance, however the avalist may rely on defenses based on his personal relationship with the holder. Thus, the situation of an avalist is assessed differently than in the case of a civil law surety, who according to Article 883 PCC may rely on the defenses available to the person for whom the suretyship was given.[57]

6.5. Thus, an *aval* is an institution which gives birth to very far-reaching and severe liability. Law on bills of exchange and promissory notes does not provide for any limitation with respect to the entities who can grant such a security. Neither do specific statutes contain such limitations. However, in determining the obligations of a consumer as an avalist,[58] the provisions of Article 41 CCA are of crucial significance, since they forbid a creditor to take from a consumer any promissory note (bill of exchange) other than one with the clause 'not to order' or an equivalent phrase, and provide for civil law remedies in case of default.[59] As was said at the outset of these considerations, such a promissory note (bill of exchange) may be transferred only by way of an assignment in accordance with the applicable civil law norms, and with the results indicated therein. Such an assignment does not create the particular legal effects which the Law on bills of exchange and promissory notes associates with endorsements. The assignor of the note (bill) is not bound to pay it and – in the case of a promissory note – the only debtor will be the maker (and his avalist (if any)). The assignee of a promissory note (bill of exchange) attains the same claim as that of the assignor.

As a consequence the maker of a promissory note is entitled to all the same defenses against the assignee which he had against the assignor at the time of

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[57] Compare P. M a c h n i k o w s k i, *Prawo…*, p. 83 and following; A. S z p u n a r, *Komentarz…*, p. 86 and following; M. H. K o z i ń s k i, *System…*, Vol. 18, p. 266 and following.

[58] The possibility for a consumer to act as a promissory note guarantor is indicated, *inter alia*, in the decision of the CJEU of 14 March 2013 in case C-419/11.

[59] This provision however does not apply in all instances of consumer credit (Article 4 CCA), e.g., it does not apply to credit agreements or loans secured by a mortgage; compare J. P i s u l i ń s k i, *System…*, Vol. 8, p. 448.

learning of the assignment. He may thus raise defenses arising from his given legal relationship with the assignor or concerning the assignment contract itself (including the lack thereof or defects therein), as well as arising from legal acts performed between himself and the assignee.[60] The range of defenses available to his avalist must be assessed in the same way. He may raise against the assignee all the same defenses which he could have raised against the assignor.[61]

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This Article refers only to certain questions connected with securing claims. It does not address the issues relating to securing claims in commercial transactions, for example in case of mergers, divisions and other transformations of companies.[62]

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[60] Compare P. M a c h n i k o w s k i, *Prawo…*, p. 109–110.

[61] J. P i s u l i ń s k i, *System…*, Vol. 8, p. 408, where he indicates that Article 41 CCA concerns both promissory notes (bills of exchange) issued by a consumer, as well as bills of exchange in which a consumer is the drawee or endorsee. In the latter situation it would seem that the endorsement of a consumer should include the clause 'not to order.' In such a case we would not be faced with the problem of not applying the general rules concerning promissory notes (bills of exchange), but the endorser-consumer would not bear responsibility with respect to subsequent holders, but only with respect to those legal entities to whom he gave his endorsement. The same could apply to avalist, who would have the same degree of responsibility as the person for whom he gave the aval (Article 32 LBEPN).

[62] For more on this topic, see W. J. K a t n e r, K. F l i s z k i e w i c z, *Mergers and other types of transformation of commercial companies with special focus on protecting creditors of merging capital companies (Polish law in light of European Union Law)*, Pravo, obchod, ekonomika II, eds. J. Suchoža, J. Husar, Praha: Leges 2012, p. 280–298.

Stanisław Sołtysiński
Professor of Law, Adam Mickiewicz University, Poznań

POLISH COMPANY LAW AND THE LAW OF SUCCESSION

I. Introduction

The interplay between the two branches of private law, namely company law and the law of inheritance, triggers important legal and social consequences. The structure of this report substantially follows an outline prepared by Professor S. Kalss, the General Reporter of Section Company Law and the Law of Succession. Her detailed list of issues suggested to be considered in national reports has been considered to the extent they are reflected in the relevant Polish laws and legal writings. In one respect, I went beyond the pale of the two branches of civil law indicated by the General Reporter. Apart from the company law and the law of succession, I have made some incursions in the domain of family law. This act of insubordination has been justified at end of this paper.

The co-habitation between the three branches of Polish law (i.e. the law of succession, company law and family law) is not always harmonious. The important effects of the death of a shareholder under company, family and inheritance laws are generally unclear despite a recent intervention of the Parliament in the Code of Commercial Companies ("CCC") aimed at clarifying doubts reflected in judicial decisions. The task facing regulators and judges is difficult, indeed. The consequences of the death of a shareholder are regulated and interpreted whilst taking into account often conflicting goals such as promoting family business, protecting the company from "succession wars," respecting freedom of contracts among shareholders whilst drafting articles of association, or supporting a weaker spouse in the event of a divorce or death of a spouse. The rapid decrease in the birth rate and growing numbers of divorces in Poland and in other EU countries sometimes bring to the surface an argument that company law rules should be shaped with the aim of promoting family entrepreneurship, thus strengthening family ties and encouraging procreation.

II. Economic importance of business succession

There are rather scanty and somewhat inconsistent statistical data regarding family businesses in Poland. So, it is impossible to present precise figures on succession within the family, intestate and testamentary succession, the number of successions that occur when the testator is still alive, etc. According to one source, about 47% of the Polish GDP is created in small and medium size companies (SMEs).[1] According to the same source, family businesses represent 78% of all Polish SMEs. These data do not take into account firms in the field of agriculture and fishery. Most recent statistical data indicate that family enterprises provide for almost 2/3 of employment.[2] Owners of 70% of family businesses declare that they plan family succession but only about 17% of them have taken preliminary implementation steps and only 5% of such enterprises are in the process of succession.[3] The same source notes that, unless this trend is reversed, 90% of existing family firms will be taken over by competitors or otherwise over the next decade.[4] This forecast seems to be exaggerated because many new firms are established by families.

Based on my own observations, orderly and full-fledged successions when the testator is still alive are very rare. As a practicing lawyer, I have encountered only three cases of a gradual and well-planned succession when parents transferred corporate powers to their sons and daughters step-by-step by way of *inter vivos* transactions. In one case, it was a peaceful and successful assignment of rights and obligations. In the two other cases, it has triggered "wars of succession" with all their adverse consequences to the successors and the inherited businesses.

III. Basic principles of Polish inheritance law

Polish inheritance law is regulated in the Civil Code of 1964[5] ("CC"). Although the Code was passed fifty years ago and in a different socio-economic system, it was largely based on legislative works prepared by the pre-war Codification Commission entrusted with the task of unification of civil laws which had been in force in different parts of Poland and which resulted from her partition at

[1] *Badanie firm rodzinnych. Raport końcowy* [Analysis of family businesses. Final report], Warszawa 2009, p. 27.

[2] Source: Firmy rodzinne [Family businesses], http://firmyrodzinne.eu/strona/ciekawostki-i-statystyki (last accessed on November 15, 2013).

[3] Ib. id.

[4] Ib. id.

[5] As published in Dziennik Ustaw [Journal of Laws – J. of L.] of 23 April, 1964, as amended.

the end of XVIII century.[6] It is worth mentioning that, unlike civil codes of other countries of the former Soviet bloc, the Polish Civil Code retained the basic legal concepts of the continental legal culture. German, Austrian and French laws remained the main sources of inspiration for legislators, judges and commentators, although a few references to the Soviet legal writings constituted a frequent form of cheap political servitude to the official socialist canon. However, the Civil Code introduced dozens of rules aimed at establishing a hierarchy of three forms of property rights whereby state ownership enjoyed maximum protection and a preferential status vis-à-vis cooperative and private forms of property. The concept of freedom of contract was severally limited but not eliminated altogether. Rules characteristic to a centrally planned economy system were removed in the early 1990s shortly after the change of the political and economic system.

According to Art. 926 § 1 of the Civil Code, an heir shall acquire the estate of inheritance on the bases of a testament or a statutory claim. The testamentary freedom is substantial. In principle, the testator may appoint as his/her successor any natural or legal person, including a foundation. The testator may appoint one or several successors. The most important limitation of the testator's freedom to dispose the deceased property rights and obligations consists in the statutory claims of his/her next of kin listed in Art. 991 § 1 of the Civil Code. The list of privileged successors includes the descendants, spouse and parents of the decedent who would be entitled to inheritance by operation of law in the event of intestate succession. The compulsory portion of the estate represents half the value of the statutory share (reserved portion) of the entitled person. In the event that a person entitled to a reserved portion of the inheritance estate is a minor or a person unable to work, the compulsory share represents 2/3 of the intestate portion of the inheritance estate. For instance, the statutory part of the inheritance estate of the surviving spouse shall not be smaller than a quarter of the entire estate (Art. 931 § 1 of the Civil Code). Hence, regardless of the dispositions made in the will of the testator, the spouse shall be entitled to obtain at least 1/8 of the entire estate (1/4 multiplied by 1/2).

In principle, the Civil Code does not define the principle of family succession. However, both the Code provisions on the reserved part of the estate and those on intestate succession are aimed at protecting the surviving family members of the deceased person. Furthermore, the Constitution declares the principle of protection of family. Inheritance rights are expressly listed among the

[6] In 1918, when Poland regained her independence, five legal systems were in force on the Polish territories. Apart from the laws of the countries which participated in Poland's partition (i.e. the German Civil Code, the Austrian Civil Code and the Collection of Laws of Imperial Russia, the provinces of the former Congress Kingdom around Warsaw retained the Napoleonic Code. A few districts in the South-Eastern Poland were governed by Hungarian common law. The process of gradual unification of Polish civil laws was completed after the Second World War.

fundamental rights protected thereunder (Art. 64^2 of the Constitution). Apart from spouses, the Civil Code provisions protect children, siblings, grandparents and other relatives of the deceased in the event of an intestate succession. The list of the persons entitled to a compulsory portion of the inheritance estate is narrower than that which enumerates the persons entitled in the absence of a will (i.e. in the event of intestate succession) but it is also aimed at protecting the closest members of the decedent's family. The Code treats equally "legitimate" children and those born out of wedlock. Indeed, both categories of children are legitimate *sensu stricto*.

A successor has the right to accept or renounce the succession. The CC grants the heir an option to accept the inheritance with limitation of liability up to the value of the inventory of the estate (Art. 1012). The deceased may disinherit his/her successor for reasons stated in the testament.

IV. Special rules on succession of farms

The Civil Code provides for no specific provisions regarding succession of business entities (e.g. shares in commercial companies and rights in other forms of business establishments), except for inheritance rules pertaining to agricultural farms. Detailed and comprehensive rules on succession of agricultural farms modify the Civil Code rules on the intestate succession. Pursuant to Art. 1059 of the CC, statutory heirs entitled to inherit agricultural farms shall meet the following criteria:

1) they are directly and on a permanent basis engaged in agricultural production, or
2) have vocational training to run the agricultural production, or
3) are minors or undergo vocational training or attend education institutions, or
4) are permanently unable to work.

There are also specific requirements regarding inheritance of farms by the deceased's grandchildren and siblings: "decedent's grandchildren who upon the opening of the inheritance meet the conditions envisaged in Article 1059, points 1 and 2, shall inherit an agricultural farm also in the case when their father or mother may not inherit the farm due to non-compliance with the conditions envisaged in Article 1059. This provision shall apply accordingly to further descendants" (Art. 1060). "The siblings of the descendant who upon the opening of the inheritance meet the conditions envisaged in Article 1059, points 1 and 2, shall inherit an agricultural farm also in the case when the descendants of the decedent may not inherit the farm due to non-compliance with the conditions envisaged in Article 1059 or in Article 1060" (Art. 1062).

The Civil Code also contains rules aimed at limiting the process of partitioning family farms and helping the successors to perform their obligations vis-à-vis

their co-heirs or persons having claims to their statutory compulsory portions of the estate (Art. 1067–1070, 1081–1082). The above-mentioned provisions apply *mutatis mutandis* to a situation when land contributed to a cooperative farm is inherited by the heir/s of a member of such cooperative.

There are no special regulations on succession of craft workshops or commercial companies in the Civil Code. The law does not allow to determine succession and disposition of any property over several generations (*fideicommissum*). There is no specific statutory prohibition on *fideicommissum* but the Code follows the principle that legal acts *mortis causa* are permissible only in the case that they are expressly authorized by law. Therefore, *fideicommissum* agreements are not allowed. However, there are a few statutory provisions on succession of shares and interests in commercial companies (corporations). They are discussed in the next sections of this paper.

V. Consequences of the death of a proprietor for his/her business in commercial partnerships and companies under the Code of Commercial Companies[7]

1. Introduction

The CCC (2000) entered into force on January 1st, 2001. The Code constitutes a comprehensive codification of commercial partnerships and capital companies (corporations). It regulates four types of partnerships (i.e. general partnership, professional partnership, limited partnership and limited joint-stock partnership) and two forms of capital companies (limited liability company and joint stock company). The first part of the CCC contains general rules applicable to all commercial partnerships and capital companies.[8] The general part of the CCC does not regulate the consequences of the death of a partner or shareholder for her/his business. The consequences of the death of the proprietor (shareholder) are regulated in subsequent chapters of the Code applicable to a given form of commercial company. Subject to a few exceptions, the rules of the Civil Code on inheritance apply to the succession of rights and obligations of members of commercial companies *mortis causa*. This follows from the principle of unity of civil law. Unlike German, Austrian or French law, the CCC follows the approach adopted in Swiss and Dutch laws. According to Art. 2 of the CCC, the matters left unregulated by the Code "shall be governed by the provisions of the Civil Code. Where required

[7] Kodeks spółek handlowych. Statute of 15th September 2000, as amended. J. of L. of 8th November 2000, No. 94, item 1037, as amended; hereinafter: Code of Commercial Companies (CCC).

[8] Some of these rules apply only to commercial partnerships or capital companies.

by the character (nature) of the relationship of the commercial company, the provisions of the Civil Code shall apply *mutatis mutandis*." Thus, the law on commercial companies enjoys only a limited autonomy. A few CCC rules on the inheritance of shares and interests in partnerships and companies only supplement the regulations of the Civil Code.

2. Partnerships

Chapter 4 of the Second Part of the CCC contains a few rules on the consequences of a partner's death. In principle, the death of a partner triggers the dissolution of the partnership, unless the partnership agreement provides otherwise (Art. 58(4) of the CCC). The Code favours continuation of the partnership despite the death of a partner. According to Art. 64 § 1 of the Code, "despite the death or declaration of bankruptcy of a partner and despite termination of the deed of partnership by a partner or his creditor, the partnership shall continue to exist among the remaining partners if the deed of partnership so provides or if the remaining partners so decide." However, the pertinent decision of the remaining partners shall be made without delay. Otherwise, the heir(s) may demand that the liquidation of the partnership be carried out (Art. 64 § 2 of the CCC).

Pursuant to Art. 60 of the CCC,

> Where the deed of partnership provides that the rights of a deceased partner are to be conferred upon his heirs jointly, but does not contain any special provisions in this respect, the heirs shall designate to the partnership one person to exercise those rights. Acts performed by other partners prior to such designation shall be binding upon the heirs of the partner. Any provisions of the deed of partnership to the contrary shall be null and void.

The rules set forth in Art. 60 are of a mandatory nature and shall not be modified in the partnership agreement. The CCC permits not only a continuation of the partnership's business despite the death of a partner but allows for two possibilities: (i) continuation of the business only by the remaining partners or (ii) continuation of the partnership with the heirs of the deceased partner.[9] In the former case, the capital share of the heir shall be calculated on the basis of a separate balance sheet which takes into account the sale value of the assets of the partnership (Art. 65 § 1 of the CCC). The balance sheet date shall be the date of the death of the pertinent partner (Art. 65 § 2). The capital share computed pursuant to Art. 65 § 2 of the CCC shall be paid in cash but assets contributed to the partnership

[9] J. S z w a j a, [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, J. S z w a j a, *Kodeks spółek handlowych. Komentarz* [Code of Commercial Companies. Commentary], 2nd ed., Warszawa 2006, p. 507–508.

by the deceased partner only for use shall be returned to the heir(s) in kind. However, if the capital share of the heir of the deceased partner shows a deficit, he/she shall make good the missing value to the partnership (Art. 65 § 4). Thus, the heirs can be excluded from membership of the partnership against compensation but they are also responsible for losses. However, they may avoid such liability under the Civil Code if they give up their entitlements to the inheritance estate. Pursuant to Articles 1031 and 1032 of the Civil Code, an heir shall be liable for the estates' debts without limitation. However, the successor may either reject the inheritance or accept it only up to the value of the net assets of the inheritance estate specified in the inventory thereof.

3. Professional partnerships

There are only a few rules regarding inheritance of shares and interest in those sections of the CCC that regulate other forms of partnerships. In professional partnerships established for the purpose of pursuing so-called free professions, the heir of the partner shall not become a member of the partnership in lieu of the deceased partner, unless the partnership agreement provides otherwise and he/she is qualified to pursue a given profession (e.g. he/she is a qualified lawyer and may offer services in the pertinent professional partnership). Otherwise, an heir is entitled to compensation under the applicable rules regarding compensation of heirs in a general partnership (Art. 99 of the CCC).

4. Limited partnerships

Limited partnerships are modelled after the German *Kommanditgesellschaft*. The death of a limited partner does not constitute a ground for dissolving the partnership. His/her successors shall designate one person to exercise their rights. Business decisions of the remaining partners made prior to such designation shall be binding on the heirs of the deceased limited partner (Art. 124 § 1). The allotment of the limited partner's share/interest among his/her heirs shall be effective vis-à-vis the partnership only upon the consent of the remaining partners (Art. 124 § 1). According to a prevailing opinion among commentators, the provisions of Art. 124 of the CCC are of a yielding nature and may be modified or excluded in the partnership agreement.[10] The deed may also exclude an heir of a general partner from membership of the partnership. However, heirs of general and limited partners enjoy the right of compensation if they are not allowed to join the partnership. The provisions of Articles 64–66 of the CCC on general partnerships apply *mutatis mutandis*.

[10] J. S z w a j a, *op. cit.*, p. 800–802.

5. Limited Joint Stock partnerships

Unlike the majority of other continental legal systems, the Polish CCC classifies a joint stock partnership as a partnership rather than as a capital company. The Codification Commission designed it as a tax transparent vehicle of doing business to be attractive for the formation of medium-size and large scale family firms patterned after the French company Michelin. Indeed, a few years after the entry into force of the CCC, several family companies were formed as limited joint stock companies. However, recently the Polish Parliament has decided to withdraw their privileged tax status and subject them to corporate income tax. The advantages of tax transparency status of the Polish limited joint stock companies have been discovered by investment firms.

According to Art. 148 § 1^4 of the CCC, the death of the sole general partner shall constitute a reason for dissolving the partnership, unless the articles provide otherwise. By contrast, the death of a shareholder does not constitute a ground for dissolving the partnership.

Pursuant to Art. 150 of the CCC, "unless the provisions of this section provide otherwise, the winding-up and liquidation of a limited joint stock partnership shall be governed accordingly by the provisions on liquidation of a joint stock company. General partners who have the right to conduct the partnership's affairs shall be liquidators, unless the statutes or a resolution of the general meeting, adopted upon the consent of all general partners, provide otherwise."

The liquidation of the tax transparent status of the joint-stock companies has prompted their members to "escape" from corporation tax by transforming their partnerships into limited partnerships.

6. Limited liability company

A limited liability company [*spółka z ograniczoną odpowiedzialnością*] is patterned after its German and Austrian equivalent (i.e. *Gesellschaften mit beschränkten Haftung*). The said business entity is classified as a capital company. Its minimum statutory capital amounts to PLN 5000 (about USD 1500). In principle, shares in limited liability companies are transferable and a shareholder may hold one or more shares. In the latter case, the shares shall be of equal nominal value and indivisible (Art. 153 of the CCC). The shareholders shall not be liable for obligations of the company (Art. 153 § 4 of the CCC). The articles of association may restrict or exclude the right of heirs of a deceased shareholder to join the company. In such a case, in order for the restriction or exclusion to be effective, the articles shall provide for the terms and conditions of compensating the heirs who are not allowed to join the company (Art. 183 § 1 of the CCC). The aforementioned rule, unlike the provisions of Art. 64–65 of the CCC that are applicable to partnerships, does not regulate the terms and conditions of compensation of an heir who is ex-

cluded from becoming a shareholder. Commentators agree that the compensation shall represent a fair value of the pertinent share and shall be paid without delay.[11]

The articles of association may exclude or otherwise limit the partition of shares among the heirs if the deceased shareholder held more than one share. The articles may also exclude or otherwise restrict the split of a single share in the case that the constitution of the company provides that a shareholder may have only one share. If the articles allow the partitioning of a single share among the heirs of a shareholder, this may not result in the issuance of shares of a value lower than the statutory nominal value (i.e. PLN 50).

7. Joint Stock company

A joint stock company [spółka akcyjna] is patterned after the German model of *Aktiengesellschaft*, although it is not a slavish imitation thereof. The share capital of a joint stock company is divided into shares of equal nominal value. The minimum statutory capital amounts to PLN 100 000 (about EUR 25 000). Unlike a limited liability company, the joint stock company may issue both registered or bearer shares (Art. 334 § 1 of the CCC). Subject to a few exceptions, the shares shall be transferable (Art. 337 § 1).

A joint stock company issues registered or bearer shares (Art. 334 § 1). The Code provisions on joint stock companies do not regulate general succession *mortis causa*. Pursuant to Art. 343 § 1 of the CCC, "a person registered in the share register or a holder of bearer share, shall be deemed a shareholder vis-à-vis the company without prejudice to the provisions on trading in financial instruments."

The new case law and commentators uphold the view that the legal title of a registered person may be challenged in court. Moreover, a general successor (e.g. an heir of a deceased shareholder) may exercise his/her corporate rights in a registered share even before registration.[12] The Supreme Court approved this view and ruled that the management board of a joint stock company may correct the share register and enter the name of a new shareholder even before the acknowledgement of inheritance acquisition or submission of a certificate of inheritance by the heir in justified circumstances.[13] Some authors defend the view that registration of a new shareholder in the share register is of a constitutive legal effect.

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[11] Compare M. R o d z y n k i e w i c z, *Kodeks spółek handlowych. Komentarz* [Code of Commercial Companies. Commentary], Warszawa 2012, p. 318.

[12] S. S o ł t y s i ń s k i, M. M a t a c z y ń s k i, [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, J. S z w a j a, *Kodeks spółek handlowych. Komentarz* [Code of Commercial Companies.Commentary], Warszawa 2013, p. 349–355.

[13] Supreme Court decision of 4th of December, 2009, III CSK 85/09, Orzecznictwo Sądu Najwyższego 2010, No. 7–8, item 113.

The statutes of a joint stock company may provide that the consent of the company is required for the transfer of registered shares. Other restrictions on transferability are also permitted, provided they do not result in an absolute prohibition thereof (Art. 337 of the CCC). The aforementioned rules apply only to transfer limitations *inter vivos* and do not extend to general succession. Hence, the statutes of a joint stock company shall not exclude heirs of shareholders from becoming members of the company. Such construction of the CCC rules is supported by the rule of strict interpretation of departures from the principle of transferability of shares in a joint stock company. The Polish CCC has adopted the German principle that the statutes of a joint stock company may include provisions differing from those stipulated in the law, if the law so allows.[14]

VI. Other Issues

1. Legal incapacity

The CCC does not provide rules aimed at protecting the shareholder who is permanently incapacitated or requires the appointment of a custodian to exercise his/her corporate rights. The legal status of persons who are partially or totally incapacitated are regulated by the Civil Code and the Family Code. A guardian is appointed for a fully incapacitated person, unless he/she is still under parental authority (Art. 13 § 2 of the Civil Code). A curator is appointed for a person who has limited capacity to perform legal acts (Art. 16 § 2 of the Civil Code). The articles of association may not provide corresponding precautions. Rules on rights and duties of incapacitated persons are of a mandatory nature. The performance of duties of guardians and curators are subject to the supervision of courts.

2. Last wills

The testator may appoint one or several heirs either to the entire estate or to a part thereof (Art. 959 of the CCC). If the testator intends to dispose of a specific enterprise or a collection of shares, he/she should oblige an heir to transfer specific assets for the benefit of a specified person (ordinary legacy). An heir, unlike the legatee, is appointed to the entire or a part of the estate rather that to concrete rights or obligations.

In principle, the appointment of an heir subject to a term or condition shall be deemed non-existent to avoid the ensuing doubts and uncertainties resulting from such dispositions. In the case that the testament or the circumstances indicate that without such a reservation the testator would not appoint the heir, his/

[14] The CCC adopted the German principle of "Satzungsstrenge" in Art. 309 § 3 and § 4.

her appointment shall be invalid. However, these sanctions shall not be applicable (i.e. the testamentary appointment is valid) if the condition had been fulfilled or not fulfilled or the time limit had elapsed before the death of the testator (Art. 962 of the CC). As a result, the Code respects to some extent reservations made by the testator. Moreover, a testamentary heir may be appointed to inherit in the event that another person entitled as a statutory or testamentary heir does not want to or may not be a successor (substitution).

The testator has very limited possibilities to retain a long-term influence on his/her company's life after his/her death. The Civil Code does not recognize *fideicommissum*. Also, articles of association may not contain stipulations contrary to law (Art. 2 of the CCC). But the last will may provide for the appointment of legacies and sublegacies. A statutory or testamentary heir may be obliged to transfer specific assets for the benefit of a specified person (legatee). The latter beneficiary may be also encumbered with a similar obligation to the benefit of a sublegatee (Art. 968 of the Civil Code).

Finally, the testator may impose on an heir or a legatee the obligation of specific performance or refrain from acting without making anyone an obligee. Thus, the testator may, for instance, impose on an heir of his/her business an order to observe concrete standards of protection of the environment or treatment of employees that are above the levels required by applicable laws.

All *mortis causa* legal acts require a statutory basis. A disposition of the property in the case of death may only be performed by way of a last will (Art. 941 of the CCC). Hence, the testator may dispose a specific asset to a beneficiary by way of a legacy (Art. 968 § 1 of the CC). Civil Code rules on transfer of an enterprise covering substantially all assets and obligations of an ongoing concern or an organized part thereof constitute *inter vivos* legal acts (Art. 55^1–55^4). In the legal literature a view prevails that, in principle, the aforementioned rules shall not apply to inheritance and other cases of general succession. However, some commentators are of the view that a legacy aimed at disposition of an enterprise "shall comprise everything that is included in the enterprise's composition, unless something else results from the content of the legal act or from provisions of law."[15]

3. How the transferor may secure his/her livelihood and influence after passing his/her business to his/her successors?

There is no specific statutory model to encourage the transfer of business before the death of the owner. However, the Civil Code regulates several legal institutions that may be used to achieve the above-mentioned purposes.

[15] Compare E. Skowrońska-Bocian, [in:] *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Vol. 1, Warszawa 2011, p. 282.

First, the owner of an enterprise or a shareholder (whether a shareholder controlling a company or not) may enter the **contract of pension** in exchange for a gradual transfer of corporate rights to her successor/s. The pensioner is entitled to obtain periodical payments in money and/or in things specified in kind (Art. 903 of the Civil Code). The retired owner (shareholder) may also consider execution of a life-annuity contract in return for a transfer of immovable property. The acquiring party (the transferee) is obliged, *inter alia*, to provide life-long maintenance and appropriate assistance during illness of the transferor (Art. 908 § 1 of the CC).

Various options are available to retiring shareholders and their successors by way of establishing personal servitudes and usufructs. An usufruct is a right *in rem* enabling the usufructuary of enjoying a thing or an encumbered right. Shares may be encumbered with a right to use it and to collect its profits. However, the parties executing usufructus may exclude specified profits of a share (Art. 253 § 2 of the CC). Usufructus provides efficient protection of the usufructuary as it constitutes an inalienable right *in rem*.

The CCC contains a few special rules on the usufructus that enable the usufructuary to retain influence on the transferred corporation. The act of the establishment of the usufructus provide, for instance, that all or some of the shares transferred to the successor, retain voting rights, the statutes do not prohibit such arrangement. In addition, the rights of the usufructuary shall be entered in the share register (Art. 340 § 1 of the CCC). All requirements of the effectiveness of the voting rights of the usufructuary may be assured by the transferor before transferring corporate powers to his successors. A deed establishing usufructus or a separate contract may provide details regarding the exercise of the retained corporate rights by the departing owner of the business.

4. The interplay and tensions among company, family and inheritance law

The permissible arrangements aimed at limiting or excluding the succession of heirs of a deceased partner (shareholder) have been described in the preceding sections of this paper. A partnership deed and the articles of association of a limited liability company may limit or exclude the joining of the commercial company by the heirs in lieu of a deceased partner/shareholder, subject to a fair compensation. The freedom of the partners and shareholders in this field is excluded only in joint stock companies where the approval of a company organ may be stipulated in the statutes only for disposition of shares *inter vivos* (Art. 337 of the CCC).[16] However, the articles of association of limited liability and joint stock companies may contain stipulations providing that shares of a deceased shareholder are

[16] S. S o ł t y s i ń s k i, M. M a t a c z y ń s k i, in SSSS, *op. cit.*, Vol. 3, Warszawa 2013, p. 287.

acquired by the company for the purpose of redemption. Hence, the remaining shareholders may avoid joining the company by unwanted co-shareholders.

The inherent conflict between the company law and the inherence law stems from the fact that a successful conduct of business within the framework of a corporation requires mutual trust among its members. Joining the company by a successor of the deceased shareholder entails the risk of participation of a person who harbours a conflicting vision of the purpose of the company or is simply unable to cooperate with the remaining shareholders. By contrast, the purpose of inheritance laws consists in protecting the successor of the estate whose interests may be also violated by the incumbent partners or shareholders. In my opinion, the contractual freedom of shareholders and partners in commercial companies to devise consequences of succession *mortis causae* should not be unduly restricted subject to a fair remuneration of the heirs. Perhaps this autonomy of the shareholders/partners should be somewhat more restricted only in joint stock companies, in particular with respect to succession of bearer shares.

Gradual and orderly succession in commercial companies should be also promoted to avoid family "wars" and conflicts among members of a corporation.

Similar challenges and conflicts arise in the event of divorce of partners/shareholders. Frequently, share contributions are financed from the resources belonging to both spouses. The Polish family law provides that, unless the spouses have entered into a special agreement regulating their marital property regime, they are subject to the joint marital patrimony established by operation of law. The joint matrimonial patrimony embraces, in particular, compensation received from employment or any business activity of both spouses and income from the community patrimony and the personal property of each spouse. The personal patrimony of each spouse consists of, *inter alia*, assets acquired before the conclusion of the marriage and those obtained by way of inheritance donation, etc.

There is an inherent conflict between the family law rules and those of the CCC. For instance, the latter rules provide that a shareholder in a joint stock company is a person that is a party to a subscription agreement or a person entered into the share register or the holder of bearer shares (Art. 343 of the CCC). In contrast, the provisions of the family law provide that shares acquired in exchange for financial or other assets belonging to the joint marital patrimony belong to both spouses and constitute their joint indivisible co-ownership. This would imply that the spouses shall exercise their corporate rights only by way of appointing a joint representative. According to Art. 333 § 2 of the CCC co-owners of a share shall exercise their rights in the company through a joint representative and they shall be jointly and severally liable for the performances attached to the share. In practice, shares financed by spouses from their statutory joint marital patrimony are exercised by the spouse who was a party to a subscription agreement or whose name was entered in the share register.

Some commentators argue that CCC rules constitute *legi speciali* and decide who the shareholder is. It is also argued that the regime regulated in Art. 333 § 1–3 of the CCC requiring spouses to exercise their joint rights through a joint representative would frequently lead to an impasse and indecision, especially in the case of conflicts between spouses. Some legal writers and court decisions try to solve this apparent conflict by distinguishing between corporate-administrative rights of a shareholder and pecuniary rights (e.g. rights to obtain a dividend and remuneration for redemption of shares).[17]

In 2005, the Polish Parliament introduced an amendment aimed at clarifying the scopes of subject-matter jurisdiction of family law and the Code of Commercial Companies. The new Art. 323 read as follows: "The statutes may provide that where registered shares are part of the joint marital patrimony it is only one of the spouses who may be a shareholder."

In reality, the above-mentioned rule did not contribute to the clarification of the law. Apart from the fact that it deals only with the registered shares, it does not explain who the shareholder is in the event the acquisition of shares is financed from the joint marital patrimony, or only one spouse participated in a subscription agreement and was registered in the share register but the statutes do not contain a stipulation allowed by Art. 322^1 of the CCC.

Despite the apparent conflict between company law and family law, I share the view of those commentators who defend the proposition that the CCC rules constitute *legi speciali.* Thus, the family law regulations should apply to the extent they do not conflict with company laws.[18]

Such interpretation reduces the risk of intra-company conflicts resulting from the joining of the partnership/company by persons who are not "wanted" by remaining partners/shareholders. Moreover, such interpretation eliminates the danger of a continuation of intra-family conflicts in the company between former spouses after dissolution of their marriage. Transformation of intra-family disagreements that have contributed to a divorce into corporate conflicts would constitute a bad policy affecting not only former spouses but also the company, its members and stakeholders.

The proposed interpretation results in recognizing the principle that regardless of the source of financing the acquisition of a share, it shall belong to an active

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[17] Compare A. K i d y b a, *Kodeks spółek handlowych. Komentarz* [Code of Commercial Companies. Commentary], Warszawa 2013; S. S o ł t y s i ń s k i, M. M a t a c z y ń s k i, *op. cit.*, p. 258–261; Supreme Court decision of May 20, 1999 explains that in the case that a share is acquired in exchange for means (e.g. money) coming from common matrimonial property the acquired right belongs to a spouse who was a party to the subscription agreement. Orzecznictwo Sądu Najwyższego 1999, TCKN/11/46/97; No. 12, item 209. Contrary: Supreme Court decision of January 4th, 2007, III CSK 238/07. The Court opined that in such a case the share belongs to both spouses.

[18] Compare M. R o d z y n k i e w i c z, *op. cit.*, p. 639; K. B i l e w s k a, "Prawa udziałowe w spółkach kapitałowych a majątek wspólny małżonków – wybrane zagadnienia" [Corporate rights in capital companies and the joint matrimonial patrimony], *Palestra* 2006, p. 101 *et seq*.

spouse who executed a subscription or other contract constituting *causa acquirendi* and was registered in the share register. The interests of the other spouse (as a rule, a person not interested in exercising corporate rights) are protected by a family law principle according to which all income, whether from the joint matrimonial patrimony or from the personal patrimonies of spouses, belongs to the joint matrimonial patrimony. In the case of dissolution of the marriage, the joint patrimony is divided equally between the former spouses, unless the court finds justified grounds for an unequal distribution thereof.

5. Foundations

The Polish Statute of Foundations of April 6, 1984[19] provides that they may be set up for purposes complying with the fundamental interests of the Republic of Poland and for realization of goals that are socially or economically useful. The Statute contains a non-exhaustive list of such purposes, in particular protection of health, development of the economy and science, culture and art, protection of the environment, etc. (Art. 1). Foundations may be established by natural persons regardless of their citizenship or domicile, as well as legal persons having their seats in Poland or abroad. The seat of the foundation shall be in Poland.

Generally, a declaration of the founder on establishing the foundation shall be executed in a notarial form, except when it is made in a will (Art. 3^1). The foundation is a corporate legal person acting on the basis of its charter (statutes) and through its management board. There is no statutory minimum or maximum duration of the foundation. The entity shall submit its annual reports on the foundation's activities to the proper minister (e.g. the Minister of Health if the purpose of the foundation consists in protection of health). The foundation is established upon its registration in the register supervised by a registration court. The founder shall supply funds for the institution's future needs.

A view prevails that foundations may not serve the purpose to maintain the family or benefit legal successors of the founder. Consequently, family foundations established for the purpose of providing benefits for the founder or members of his/her family are not allowed because such purposes are difficult to reconcile with the objective of the foundation under Art. 1 of the Statute on Foundation.[20] However, one decision of the Supreme Court implies that the aforementioned provision does not exclude the possibility of incorporation of a foundation of a "mixed" character aimed at fostering public interests and those of a given family.[21] However recent decisions of administrative courts hold that preferential

[19] As published in J. of L. 2005, No. 1398, item 167, as amended.

[20] P. S u s k i, *Stowarzyszenia i fundacje* [Associations and foundations], Warszawa 2008, p. 367; A. K i d y b a, *Ustawa o fundacjach. Komentarz* [Statute of foundations. Commentary], Warszawa 2007, p. 17–19.

[21] Decision of the Supreme Court of January 7th, I CKN 16/96, Lex Polonica No. 344753.

tax status of the foundation may not be exploited for the purpose of tax avoidance. Hence the founder and her next of kin may not be beneficiaries of tax-free services or in-kind performances offered by the foundation.[22]

The founder may influence the activities of her/his foundation. In particular, he/she may become a member of the management board. The foundation may conduct both philanthropic and business activities. Generally, income gained from the latter activities shall be used for its statutory purposes.

Polish law allows for certain equitable transactions executed for the benefit of a third party. However, our law does not recognize a trust *sensu stricto* whereby the creator of a trust transfers or is bound to hand over the control of an asset which is to be administrated by the trustee for the benefit of a beneficiary other than the trustee. Hence, I have decided to skip the last two questions formulated by the General Reporter.

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[22] Decision of the Supreme Administrative Court of February 12, 2003, I SA/Ka 2507/01, Lex No. 79316.

Beata Giesen
Doctor of Law, University of Łódź

LICENSE CONTRACTS, FREE SOFTWARE AND CREATIVE COMMONS

I. Introduction

The phenomenon of using and developing computer software in the so-called *open source* system has been evoking much interest for years among both practitioners and scientists in Poland. Despite the ongoing discussion, no unified position has been worked out concerning the issues in this area. It could be said that Polish science is rather at the onset of the process, which does not mean that some questions have not received an in-depth analysis. There are certainly many reasons for such state of affairs. First and foremost, there are no judicial decisions that would stimulate a debate, at the same time illustrating the importance of the subject matter. Practise applies standard patterns of English court orders, as is the case in other European countries. The basic obstacle in explaining the legal issues connected with the phenomenon described as free and open source software (*FOSS*) lies elsewhere. Licence contract being the basic instrument used to establish legal stand against the exploitation of copyright, is settled only partially. As a result, approach presented by science and concerning issues related to this problem is frequently far from being unequivocal. Suffice to point such issues as legal character of a licence, an obligation to mark the areas of exploitation in it, the importance of the consent of the licenser to grant sub-licences, the scope of the obligation to disseminate the work by the licensee, the right to remuneration for exploiting copyrights. Similarly, the question whether it is possible to waive or grant the authorisation to exploit copyrights remains the subject of controversy, as does the scope of authorisation of collective management of copyrights.

To present the entire whole of the subject matter that arises here would naturally go far beyond the narrow frames of this report. Therefore, it is limited to the basic questions, the list of which was indicated by the recommendation of the general reporter.

II. Legal basis

Polish legal system does not administer the legal norms that would exclusively regulate the phenomenon of creating computer software on the basis of *FOSS*. In order to enable such activities, instruments known to civil law and copyright law are applied. As a consequence, also evaluation of legal relationship rests on the general regulations of private law. In Polish law, the foundation of a licence contract is in the regulations of the Act of February 4th, 1994 on copyright and the related rights (Copyright Act).[1] It needs to be stressed that copyright act only establishes some core requirements for license contracts and leaves much room for legal practice. So, building up its final shape was left to science related to the subject.

Apart from the above mentioned Copyright Act and the related rights, also the regulations of the civil law play an important role while debating the subject matter.[2] They are applicable as complementing copyright and only to such extent that leaves them in no contradiction to its regulations. The meaning of civil code regulations may be seen on many levels. The following are the most crucial ones:

1. Regulations concerning legal actions, Articles 56–116 Civil Code [CC]). The ones of basic importance for the discussed matter are the following:

– those including the regulations allowing interpretation and applied so as to interpret the will (Article 65 CC);

– those including regulations of concluding an contract (in particular in tender mode – Articles 66–70 CC);

– those including regulations of additional provisions of a contract, such as reservations concerning requirements and deadline (Articles 84–94 CC and 110–116 CC).

2. Regulations concerning abusive contract clauses and standard form contract (Article 385^3 CC)

3. Regulations concerning carrying out obligations and on liability for failure to carry out contract's duties or for doing so insufficiently (Article 471 CC) that complement the provisions included in copyrights regulations.

III. Concepts explaining the nature of legal action that is the basis for using and developing software in FOSS system

In relevant literature, the following concepts are listed that allow to explain the nature of legal action that is the basis for using and developing software in FOSS system:

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[1] Act of February 4th, 1994 on copyright and the related laws (consolidated text of the Journal of Laws [J. of L.] 2006, No. 90, item 631).

[2] Act of April 23rd, 1994 CC, J. of L. No. 16, item 93 with amendments.

1. Waiving by the authorised entity the right to exploit the copyright that the entity is entitled to;[3]
2. Unilateral legal act that entitles to use and develop software;[4]
3. Licence contract.

Undoubtedly, the third of the listed concepts gains the highest number of followers; at the same time it is the one that uses the structure of a licence contract regulated by copyright law. However, applying this rule is only possible when the modification of software complies with the general security provisions stipulated by the copyright law (Article 1 Copyright Act).

Additionally, it is also raised in literature that relationships established within FOSS movement frequently adopt a more complex form that cannot be included within the frames of one contract. As an example, provisions included in *GNU General Public Licence* are frequently quoted. From the point of view of the regulations of the Polish law, its analysis allows to assume that it simply creates not one but two contractual relationships. Contract licence is drawn only when software modification takes place or in order to undertake its further distribution.

However, it is not necessary to draw it in order to solely use software that was legally purchased (Article 75 paragraph 1 Copyright Act). The source of obtaining the right to use software is, in this case, a contract of software that has the features of a donation.[5]

IV. Features of a contract that are relevant in establishing a relationship in FOSS system

Article 67 Copyright Act is of basic importance for the construction of a contract licence. It clearly stipulates the right of the author to grant other entities the authority to use a work. The appointed provision reads as follows: "Author

[3] J. Barta and R. Markiewicz are sceptical towards this concept. The appointed authors do not rule out the possibility of waiving property rights by the author. However, they decisively renounce such a solution due to the numerous doubts it raises in the science of the subject matter. J. B a r t a, R. M a r k i e w i c z, *Oprogramowanie open source w świetle prawa. Między własnością a wolnością* [Open source software in the light of the law. Between ownership and freedom], Kraków 2005, p. 80; B. Giesen, however, is strongly critical of admissibility of waivering copyright by the author; see B. G i e s e n, *Umowa licencyjna. Struktura i charakter prawny* [Licence contract in copyright law. The structure and the legal character], Warszawa 2013, p. 304 and further.

[4] This concept is rejected due to the fact that on principle, unilateral acts cannot become the source of commitment for other entities. Meanwhile, majority of licence formulas that are in operation, include such provisions as, e.g. GPL licence that impose certain obligations on using software, especially concerning the scope of conditions for further distribution of software for which the basis was the so-called original software. See J. B a r t a, R. M a r k i e w i c z, *Oprogramowanie open source…*, p. 82.

[5] J. B a r t a, R. M a r k i e w i c z, *Prawo autorskie* [Copyright Law], Warszawa 2010, p. 234–235.

may grant his authorization to use his work within the fields of exploitation with the specified scope, time and place of such use." Licence may take on numerous forms. It can be seen from the commonly known division into an exclusive and non-exclusive licence. Each of the appointed forms of a licence is characterised by features that are unique for this licence. Despite the obvious discrepancies in shaping the individual forms, it is possible to indicate a group of common provisions that create the core of each licence contract, regardless of the individual form given to it by the parties in a certain situation. This catalogue is created by the following elements:[6]

1. Obligation of the licenser to authorise the licencee to use;
2. Marking the work that is a subject of authorisation;
3. Marking the areas of exploitation that are to be used;
4. Agreement on the unpaid licence,
5. Provisions concerning the duration of licence entitlement,
6. Appointing a place of performing the licence rights.

1. Obligation of the licenser to authorise the licence to use

The point of a licence contract is authorisation to use. As a consequence, both parties must remain in agreement as for the indicated scope of copyright to be passed on to use. The parties' consensus ought to include the fact that the licenser will allow and enable the licencee to perform in his own interest, i.e. in the interest of the licenser, the copyright exploitation. This requirement allows to differentiate the licence contract from the contract for copyright transfer.

It should in fact be the parties themselves who determine the fact of establishing a licence. In doubt, a regulation expressed in Article 65 Copyright Act applies. The appointed provision reads that in case of no explicit provision concerning the right transfer, it is assumed that the author granted the licence.

A direct consequence of the requirement described above is the obligation of the licenser to enable the licencee the use of a subject of a licence.[7] In case of an open source licence, this usually means the necessity to guarantee access to software source code in a form that makes it possible to make the necessary copies and introduce any modifications or when the scope of competences of the authorised entity is limited to the use only, to ensuring access to software.

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[6] For more details on individual elements on licence contract in the Polish law see: B. G i e s e n, *Umowa licencyjna w prawie autorskim. Struktura i charakter prawny* [Licence contract in copyright law. The structure and the legal character], Warszawa 2013, p. 65 and further.

[7] More on the subject in *ibidem*, p. 291 and further.

2. Marking the work that is a subject of authorisation

As is the case with every contract, a licence contract requires determining the object of provisions in order to come into power. The duty to specify the work results directly from Article 41 paragraph 3 Copyright Act. According to this article, a contract concerning all works or all work of the same kind by the same author that are to be created, is understood as invalid. Therefore, it is essential to describe the work in a way allowing its identification. In case of licences drawn within *open source* movement, complying with the above described requirement does not usually raise any greater doubts.

The subject of a licence may also be copyrights to future works, i.e. such that do not exist at the moment of concluding the contract but will be created in the future.

3. Marking the areas of exploitation that are to be used

Polish law introduces an obligation to explicitly specify the areas of exploitation. In Article 41 Copyright Act it reads: "Contract about property copyright transfer or a contract to use a work, hereinafter referred to as «licence», includes the areas of exploitation that are specifically listed there." The manner of marking the areas of exploitation was to some extent objectified by practice and customs accepted in individual industries. This is of particular importance for the discussed subject. Without going into details, it may be said that the above mentioned requirement can be limited to the obligation to specify the areas of exploitation in a sufficient way. In case of licences created within *open source* system, the main core is made of the following: the right to reproduction and the right to disseminate. An additional provision in form of a reservation that carrying out the licence rights may only come into force within the frames of *open source* system, specifies the scope of the granted right sufficiently. Some of the licences include also authorisation to modify and disseminate a derivative work – software that is based on another software. Efficiency of this agreement frequently depends on a condition, i.e. it remains its force provided distribution of the software – derivative work will be done under the principles of the original licence (*copyleft* clause).

In case of the most typical *open source* licences (e.g. GNU General Public Licence), the above mentioned requirements are complied with, determining the right to: copy software, making any modifications, authorisation to multiply software in its altered form and to distribute copies of software both in its altered and not altered form.

The source of doubt may become the question concerning the consequences of non-complying with the obligation to explicitly specify the areas of exploitation.

The first stand – taken mostly by J. Barta and R. Markiewicz – takes on the form of a rigorous formula.[8] According to the appointed authors, the obligation to clearly specify should be treated unconditionally, as can be read directly in the Act, i.e. licence contract can only include these areas, and only these, which were specified sufficiently by the parties. Applying general terms, unclear ones, which do not sufficiently specify the exploited area of property copyright, entails invalidity of a contract.

The authors of another stand – the so-called liberal one, mostly M. Kępiński,[9] E. Traple,[10] A. Nowicka[11] and J. Szczotka[12] – postulate reference to the rules of interpretation stipulated in Article 65 CC, so as to, by way of interpretation, specify the scope of areas transferred to exploitation, everywhere where parties themselves did not do so explicitly. The consequence of a thesis formulated in such a way is rejecting the sanction of invalidity that would concern the contract concluded while breaching the duty stipulated by Article 41 paragraph 2 Copyright Act. Also the Supreme Court follows that direction.[13]

Finally, the third stand deserves attention.[14] According to this stand, the requirement to explicitly specify the areas of exploitation is the only prerequisite for triggering the outcome that would be a disposing effect of a licence contract, however, it does not become a requirement for the validity of a contract. In this approach, it is suffice to specify the subject being used to create the obligation to grant a licence. It is not, however, necessary to do so explicitly.

Due to far-reaching discrepancies of the ideas represented in Polish literature as far as understanding the obligation of explicit specification of the areas of exploitation is concerned, it is difficult to provide an unequivocal answer as to how, from this point of view, a FOSS *copy and disseminate* clause could be evaluated. Despite the fact that in literature, interpretation of Article 42 paragraph 2 Copy-

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[8] J. Barta, R. Markiewicz, "Obowiązek wymienienia pól eksploatacji w umowie licencyjnej" [Duty to specify the areas of exploitation in a licence contract], [in:] J. Barta, A. Matlak, *Prawo własności intelektualnej. Wczoraj*, *dziś*, *jutro* [Intellectual property law. Yesterday, today, tomorrow], PIPWI 2007, z. 100, p. 22, also [in:] J. Barta, R. Markiewicz, *Komentarz. Prawo autorskie* [Copyright Law. Commentary], 2011, p. 304 and further.

[9] M. Kępiński, [in:] *System Prawa Prywatnego* [Private Law System], ed. J. Barta, 2007, Vol. 13, p. 433–434.

[10] E. Traple, *Umowy o eksploatację utworów w prawie polskim* [Contracts for original works in the Polish law], Warszawa 2010, p. 39 and further.

[11] A. Nowicka, [in:] *System Prawa Prywatnego*, p. 96.

[12] J. Szczotka, "Naruszenie wymogu specyfikacji pól eksploatacji utworu" [Breaching the requirement of the areas of exploitation of an original work specification], [in:] *Współczesne problemy prawa handlowego*, *Księga jubileuszowa dedykowana prof. dr hab. Marii Poźniak-Niedzielskiej* [Contemporary problems of trade law. Jubilee book dedicated to Professor Doctor Maria Poźniak-Niedzielska], Warszawa 2007, p. 367.

[13] III CC 124/05, BSN 2005, No. 12, p. 8.

[14] B. Giesen, *Umowa licencyjna w prawie autorskim*…, p. 228 and further.

right Act has been a subject of a heated debate for many years, this question has never been analysed against licence contracts concluded in *open source* system. In my view, as long as the content of licence provisions sufficiently specify the scope of granted competences, which is the case in most functioning patterns (including, e.g., Section 1 GNU GPL Version 2), there are no grounds to question the validity of the concluded contract. But it has to be stressed, that in Polish jurisdiction this question isn't answered until today. It should also be added that specifying the subject of benefits that emerge from the text of a concluded contract, also contributes to the clarity of this requirement.[15]

According to Article 41 paragraph 4 Copyright Act, a contract may concern only these areas of exploitation that are known at the moment of concluding this contract.

Some authors, such as for example J. Barta, R. Markiewicz postulate introducing changes into copyright law, so that the licence granted to *open source* movements could also include these areas of exploitation that were not known at the moment of granting the licence.[16]

4. Agreement on the unpaid licence

Licences created in the *open source* system are by definition of unpaid character. This is not contrary to the Polish copyright law. According to it, a payment is not an indispensable part of a licence contract. Its character remains unchanged both when it is shaped by the parties as a payable contract and when the licenser is deprived of the equivalent in exchange for granting authorisation to exploit the property copyright. Granting a licence an unpaid character requires, however, this character to result from the provisions of a contract (Article 43 Copyright Act), which in case of FOSS licences, stems either directly from the content of a contract or from accompanying circumstances.

According to Article 44 Copyright Act, "in case of a glaring disparity between the author's remuneration and the profits of a copyright property purchaser or a licencee, the author may demand an appropriate increase of remuneration by court." Demanding remuneration increase on the basis of the above mentioned provision is applicable when a licence contract has been concluded and an author is in the position of a licenser. It is not quite clear whether Article 44 Copyright Act covers solely payable licences or perhaps it also refers to unpaid licences as well. Disregarding a detailed analysis of other problems that emerge here, it is suffice to state that a currently prevailing concept concerns the possibility of increasing remuneration may only take place when the author concluded a contract of a payable character.[17]

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[15] *Ibidem*, p. 238.

[16] J. B a r t a, R. M a r k i e w i c z, *Prawo autorskie* [Copyright Law], 2010, p. 235.

[17] E.g. J. B a r t a, R. M a r k i e w i c z, *Komentarz…*, p. 316; M. K ę p i ń s k i, *op. cit.*, p. 527;

5. Provisions concerning the duration of licence entitlement

Polish law accepts the possibility to conclude a contract for an indefinite period of time (Article 68 Copyright Act). Indeed, Article 76 Copyright Act reads that while granting a licence it is necessary to determine the time of granting the rights to the licencee, at the same time, however, a period of 5 years is specified as time frames for the licence entitlement, in case the licence does not stipulate otherwise. Thus, granting a licence a character of a free of charge contract, requires always pointing out this feature in the concluded contract.

There are no obstacles to determine the initial date of a licence by indicating a future uncertain event, as is frequently done in case of licences concluded in FOSS system. A typical example is PNU General Public Licence (GPL) where as an empowering moment enabling modification of a licence is not the moment of using software, but undertaking this modification or distributing a derivative work.[18]

6. Appointing a place of performing the licence rights

Another element of a licence is determining a place of performing its rights. Similarly to determining the time, the parties themselves who do not have to determine it, although they may and should do so. In case of no provisions in this matter, the legislator steps in by specifying the territorial scope for the licence entitlements. They are determined by the borders of a country where the licencee has his headquarters (Article 66 Copyright Act). On the other hand, the criteria allowing to establish the headquarters are provided by the Civil Code (Article 25 and 41 CC).

V. Permission to vilolate the right to integrity and to disseminate the work

Creating software in the FOSS system frequently carries with it also the necessity to modify and thus interfere with other people's work. The essence of the above mentioned system is the fact that a modified version of software should then be disseminated under the same conditions as the original software (*copyleft* clause). This clause in Poland does not encounter any resistance from the doctrine of the copyright law. Admittedly, in the science of civil law the possibility to use the condition whose realisation depends on the will of the parties and in re-

J. Szyjewska-Bagińska, [in:] *Ustawa o prawie autorskim. Komentarz* [Act on copyright law. Comment], ed. E. Ferenc-Szydełko, 2011, p. 299; B. Giesen, *Umowa licencyjna w prawie autorskim*..., p. 322–323.

[18] See B. Giesen, [in:] *Kodeks Cywilny. Komentarz* [Civil Code. Commentary], ed. M. Pyziak-Szafnicka, Warszawa 2009, p. 934 and further.

cent years this question has not raised so many doubts neither in jurisdiction nor in the doctrine of law.[19]

Further question appears concerning the agreement of the original software author to interfere with its integrity and to disseminate the work created on this basis. The scope of property copyrights for software takes on broader frames than the ones established for other works protected by the copyright. According to the content of Article 74 paragraph 4 item 2 Copyright Act, it also includes the right to decide on making translations, adjustments, alterations in the systems or any other changes done to software, while maintaining the rights of a person who made those changes.[20]

The above mentioned regulation introduces two major derogations from the general provisions. Firstly, the appointed Article 64 paragraph 4 item 2 Copyright Act – the catalogue of forms of violating the integrity of another person's software goes beyond the notion of "developing" another person's work (Article 2 Copyright Act), since it includes also cases of introducing such changes that do not constitute creativity. Secondly, it places the right to a work's integrity, or at least its significant fragment, in the sphere of property rights, which in consequence excluded it from the sphere of personal.[21] Placing the right to decide about the integrity of a work among the rights to property, makes it not inextricably linked to the author. Thus, his disposer may be both the author and another entity, e.g. an employer who, under Article 74 paragraph 3 Copyright Act, may – provided conditions stipulated there are met, become the entity that is originally entitled. Since in the Polish law only personal rights are inalienable and 'perpetually' linked to the author. As a result, it may become a subject of trade. Therefore, there are no obstacles for the author – or any other entity, e.g. employer, while sharing the work in the FOSS system, to grant the right to use also this authorisation within the frames of a licence. The author will be able to oppose the modification of software he created only when he did not transfer such right earlier on another entity, either in the form of a licence contract or in the form of a property copyrights

[19] On a condition that can be realised depending on the will of the parties in: B. G a d e k-G i e s e n, "Warunkowe umowy zobowiązujące" [Conditional binding contracts], [in:] *Zaciąganie i wykonanie zobowiązań* [Assuming and fulfillment of obligations], eds. E. Gniewek, K. Górska, P. Machnikowski, Warszawa 2010, p. 97 and further; B. S w a c z y n a, *Warunkowe czynności prawne* [Conditioned legal actions], Warszawa 2012, p. 72 and further; contrary J. Z a w a d z k a, *Warunek w prawie cywilnym* [Condition in civil law], Warszawa 2012, p. 143 and further.

[20] See more on the subject: Z. O k o ń, [in:] P. P o d r e c k i, Z. O k o ń, P. L i t w i ń s k i, M. Ś w i e r c z y ń s k i, T. T a r g o s z, M. S m y c z, D. K a s p r z y c k i, *Prawo Internetu* [Internet Law], Warszawa 2004, p. 377 and further.

[21] According to Article 77 Copyright Act, no provisions set forth by Article 16 items 3–5 apply for software, these are norms that equip the author with the right to integrity of the work, the right to decide about sharing the work for the first time and the right to supervise the manner of using this work. It should also be added that part of this doctrine raises serious objections to the fact of this solution being in contradiction to Article 6 ^{bis} of Berne Convention; J. B a r t a, R. M a r k i e w i c z, A. M a t l a k, [in:] *System Prawa Prywatnego*, p. 1089.

transfer contract. It needs to be remembered, however, that the author maintains the exclusive right to allow performing dependent copyright despite transferring all property copyrights onto another entity, unless the contract stipulates otherwise (Article 46 Copyright Act).

It also needs to be noted that under Article 74 paragraph 3 Copyright Act, the subject originally entitled to property copyrights may be the author's employer.

Similar remarks apply to the right to authorise the disposal and use of the modified software that takes on a form of a derivative work as set forth by Article 2 Copyright Act. According to the dominant view, the right to express authorisation to execute copyright of a derivative work is attributed to the category of property rights and as such may be the subject of a licence.[22] In case of software created in the context of labour relations, doubts may arise in determining the entity originally authorised. In the opinion of *Z. Okoń* – in this case, i.e. when according to Article 74 paragraph 3 Copyright Act, property copyrights are acquired originally by the employer, the author himself has no individual authorisation as for granting the right to carry out the dependent copyright. This view raises certain objections. Thorough analysis of the problem emerging here goes far beyond the frames of this work.[23]

VI. Concluding a licence contract and interpretation of wills forming its content

1. Mode of licence contract conclusion and its form

For a non-exclusive licence contract, and licences granted in the FOSS system have such a form, copyright law introduces no requirement to maintain any particular form. A written form is neither a validity condition of concluding a contract nor is it reserved strictly for evidentiary purposes (*ad probationem*). There is an agreement as for the fact that a discussed type of a licence remains in the tender mode.[24] Certain discrepancies occur when it comes to the evaluation of the roles of individual parties. Some scholars claim that in case of a suggestion to conclude a contract that is placed on websites, its trustee presents an invitation to place of-

[22] See J. Barta, R. Markiewicz, *Prawo autorskie* [Copyright Law], 2012, p. 122 and further.

[23] Z. Okoń, [in:] P. Podrecki, Z. Okoń, P. Litwiński, M. Świerczyński, T. Targosz, M. Smycz, D. Kasprzycki, *Prawo Internetu*, p. 383.

[24] For example P. Wasilewski, *Open content. Zagadnienia prawne* [Open content. Legal aspects], p. 89 and further.

fers directed at general public.[25] As a result, it is not him but the entity interested in concluding a contract that becomes a bidder by responding to the invitation. A prevailing view is the opposite one, however, attributing the role of a bidder to the entity that places a proposition to conclude a contract on his website.[26] Placing a template of a licence contract in the FOSS system is seen as an *ad incertas personas* offer.

In case of offers placed *on line*, according to Article 66^1 CC, it is assumed that the offer will be binding the moment the offeree acknowledges the receipt. This requirement means that the offeree should confirm through traditional methods of transferring information, e.g. via electronic mail, an appropriate statement. Such a conformation should actually be done at the moment of an offeree's presence on the website done.[27] In case of licences offered in the FOSS system, legitimacy of the above described procedure faces a slight resistance as in this system, as is well known, usually the need for the offeree to respond is dispensed with, assuming that the contract is concluded at the moment of accession to comply. If there is no need to submit a declaration of intent, it is even more unnecessary to expect a receipt of confirmation of an offer. Evaluation of this stand may raise certain reasonable doubts. Article 69 CC allows to conclude a contract *per facta concludentia* when either the custom or the content of the offer provides such a possibility. It is acceptable only in cases when a contract was drawn in a form suggested by an offeree at an appropriate time, i.e. during the time of being bound by an offer. Duration of this condition requires a confirmation of receiving an offer, as stipulated by Article 66^1 CC.

2. Concluding a licence contract using a template

In the FOSS system, shaping the content of a legal relationship is most frequently done using a template. Polish law does not oppose to such practice and literature is in the agreement that in the discussed *open source* licence, a contract is most often concluded using a template.[28] Civil Code regulations introduce a range of conditions which – when met – become binding for the other party. In relation to a situation when one party applies a template of a contract in an

[25] W. Dubis, [in:] *Umowy elektroniczne w obrocie gospodarczym* [Electronic contracts in economic turnover], ed. J. Gołaczyński, Warszawa 2005, p. 57.

[26] Regarding the licence contract concluded in the FOSS system, specified by P. Wasilewski, *op. cit.*, p. 92; see also W. Robaczyński, [in:] *Kodeks Cywilny. Komentarz*, p. 713 and further.

[27] W. Robaczyński, *op. cit.*, p. 712.

[28] For example J. Barta, R. Markiewicz, *Oprogramowanie open source*..., p. 141; similarly P. Wasilewski, *op. cit.*, p. 106.

electronic form, it is necessary for that template to be made public in such a way that the other party may store it and later reproduce.

Accordingly to Article 384 paragraph 4 CC, it is required for the template to be delivered at the moment of concluding a contract. This condition is considered to be met when on the website offering a given software, there is also a link to a full version of a licence contract.[29] However, it is not necessary when using a template is customary in certain relationships, which is the case in contracts concluded in the FOSS system. This derogation from a general rule does not, however, apply to – except for the only exception discussed in connection with the debated issue – consumer contracts.

From the point of view of provisions on contract templates, the phenomenon of multilingualism of contract texts becomes of more importance. This document can be drawn in any language, depending on the choice of the original licenser. The original text is of critical value here. This phenomenon may become a source of misunderstandings as for the conditions of a contract being concluded. According to Article 385 paragraph 2 CC, it is required of a template to be understood and unequivocal. The meaning of an appointed provision is limited here, however. It is applicable solely in consumer turnover. The appointed provision instructs to explain any ambiguities in favour of a consumer.

Polish law has a regulation on unfair contract terms in contracts concluded with a consumer (Article 385^1 CC). This notion relates directly to the concept of EU law (Directive 93/13). While evaluating *open source* licence from the point of view of regulations on unfair contract terms, no major reservations have been reported neither in science nor in the judicial system.

3. Interpretation of wills

There is an agreement in literature concerning accepting the general civil law's provisions of interpretation in copyright contracts. The main role in this regard is played by Article 65 CC: "Paragraph 1. The will should be explained in such a way that is requested by the social rules and customs, due to the circumstances under which it was placed. Paragraph 2. It should rather be analysed in the contracts, what was the mutual intent of parties and the aim of the contract than to base on its literal meaning."[30] It should be stressed that applying the above interpretation regulation does not exempt from inclusion in the process of interpretation particular provisions that the field of contracts is governed

[29] P. W a s i l e w s k i, *op. cit.*, p. 106.

[30] More on the meaning of Article 65 CC in the Polish law, in: W. R o b a c z y ń s k i, *op. cit.*, p. 680 and further.

by, in particular those whose subject matter is copyright. In this respect, the rule *In dubio pro auctore* is applied, which, even though never explicitly expressed in any of the Act's provisions, is commonly applied. In practice, its meaning is revealed mostly while establishing the scope of licence, i.e. the scope of areas of exploitation granted to the licencee.

VII. Copyright collective management position in the process of concluding licence contracts in the FOSS system

The source of most serious threats in the functioning of the system of concluding contracts in the open source system, is the unclear position of copyright collective management in the Polish law (a collecting society in the field of software is PRO, Stowarzyszenie Polski Rynek Oprogramowania). By making a certain simplification, two reasons of conjuncture may be pointed to: firstly, unexplained character of a contract concerning transferring the copyright to be managed, secondly: disputable competence scope concerning copyright collective management in the interest of entities that did not trust the copyrights to be managed by copyright collective management performing legal actions.

To briefly comment on the first of the indicated issues, it needs to be reminded that Polish copyright law knows two instruments enabling exploitation of property copyrights and these are a licence contract and a property copyright transfer contract. Trusting copyrights to be managed by a copyright collective management on the basis of the latter one, i.e. a property copyright transfer contract, may become a source of serious threats when it comes to maintaining the efficiency of previously granted licences in the FOSS system.[31] The legal nature of a non-exclusive licence is of crucial importance here. Seen as a relationship of nature that is exclusively obligatory, it creates an unstable construction. A purchaser of copyrights does not have to comply with the rights of licencees who base their legal position on the licences previously granted by the entity that was previously a holder of copyrights. For the record, it should also be noted that the legal character of a non-exclusive licence has not yet been decided upon yet. There are authors who assume that it is, similarly to the exclusive licence, of *quasi*-right in rem-kind.[32]

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[31] J. B a r t a, R. M a r k i e w i c z, "Otwarty dostęp a prawo autorskie" [Draw attention to this threat in open source and copyright law], [in:] *Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego. Księga pamiątkowa dedykowana Profesorowi B. Gawlikowi* [Dissertations on civil law, intellectual property and international private law. Commemorative book dedicated to Professor B. Gawlik], Warszawa 2012, p. 622.

[32] E.g. B. G i e s e n, *Umowa licencyjna w prawie autorskim…*, p. 150–151; contradictory: E. Traple states, that only an exclusive licence has a quasi-right in rem-character, whereas a non-exclusive licence creates a relationship of only obligatory nature, E. T r a p l e, *Ustawowe konstrukcje*

For obvious reasons, this construction prevents the domino effect of subsequently granted licences in a situation when the first one of the legal relationships has been breached, the one originally established between the previous holder and the entity making modifications in the FOSS system.[33]

Of basic importance is the question, under which conditions collecting societies have the right to present owners rights, and especially, under which conditions they can conclude licence contracts. This issue is a subject of many a controversy,[34] their source being Article 105 paragraph 1 Copyright Act. According to this provision, it is assumed that the copyright collective management is entitled to manage and protect the areas of exploitation included in the collective managing and that it has *locus standi* in this area. Some authors notice in a regulation formulated in this way a threat of spreading the opinion that a copyright collective management needs in fact no additional support to perform their managerial actions that are rooted in the contract concluded with the author, because the Act itself creates the grounds for that in the body of the previously appointed Article 105 Copyright Act.[35] For example, M. Kępiński sees in the previously mentioned presumption a justification for the actions undertaken by the copyright collective management, including for concluding licence contracts, also in the interest of those authors who did not conclude contracts with them concerning trusting their copyrights to be managed.[36] As a consequence, the above mentioned collective has the right to claim compensation for licence fees and also for exploitation of the rights they were not trusted with, which, we should add, is frequently done in practice. The area of the above mentioned presumption is limited solely to the areas of exploitation resulting from a permission issued by a responsible minister. The only obligation of the managing entity is demonstrating that it is in the possession of appropriate permission to carry out the managing activities in a specified area. Additionally, in case of foreign works, it is necessary to produce a contract of reciprocal representation with a specified foreign collective. The most important point of this stand is the fact that a copyright collective is under no obligation to prove their right to manage any specific works.[37] According to the appointed author, in a discussed situation, the copyright collective with no

w zakresie majątkowych praw autorskich i obrotu nimi w dobie kryzysu prawa autorskiego [Statutory property constructions in the field of property copyright and their marketing in the era of copyright crisis], Kraków 1990, p. 77–84.

[33] More in: B. G i e s e n, *Umowa licencyjna w prawie autorskim…*, p. 129 and further.

[34] See M. C z a j k o w s k a-D ą b r o w s k a, [in:] J. B a r t a, R. M a r k i e w i c z, *Komentarz. Prawo autorskie*, p. 623 and further; M. K ę p i ń s k i, *op. cit.*, p. 592 and further.

[35] M. C z a j k o w s k a-D ą b r o w s k a attacks the possibility of understanding Article 105 with particular caution, in: J. B a r t a, R. M a r k i e w i c z, [in:] i i d e m, *Komentarz. Prawo autorskie*, p. 623 and further.

[36] M. K ę p i ń s k i, *op. cit.*, p. 535 and further.

[37] *Ibidem*.

sufficient support in a contract concluded with the author of a work, operates as *negotiorum gestor*.[38] It is significant that no threat to the interest of a user is seen in this fact, since he has relevant claims at his disposal, resulting from a licence contract towards copyright collective. It is usually the copyright collective that obliges itself to fulfil any justified claims from the third parties that are reported towards the licencee in connection with exploiting the copyrights included in the licence.[39] It is not quite clear how a relationship between the entitled entity and a licencee is formed, with the licencee claiming his rights on the basis of a licence authorisation granted by a copyright collective that did not, in fact, have any legal right at their disposal.

There are numerous authors who believe that the stand presented above is unjustified. They claim that it enters the realm of an author's freedom, is a certain trick towards the entities interested in legal exploitation of their works and additionally, it may lead to breaching the rules of fair competition. In practice, it is assumed that only clear objection from the author deprives the copyright collective from any rights to grant licences authorising to exploit his works.

Meanwhile, as can be seen at least on the example of licence contracts concluded in the FOSS system, it cannot be ruled out that the author wants his work to be shared free of charge. This state of affairs leads some authors to absolute questioning the sense of Article 105 Copyright Act.[40] The others attempt at limiting its importance solely to relationships established by the copyright collective with the entity exploiting the work, assuming that the appointed legal norm introduces certain evidence facilitations both for the copyright collective and for its contractor.[41] In this approach, presumption based on Article 105 Copyright Act does not replace the title to manage. This presumption is mutable. Thus it loses its force when it has been proven that the copyright collective has never, in fact, been equipped with the competences necessary to manage. Apart from that, the scope of application of the discussed presumption is limited by the legislator himself by indicating the circumstances excluding the possibility of relying on it. According to the reading of the Act (Article 105 paragraph 1 sentence 2 Copyright Act) it is so when more than one copyright collective claims the rights to one work or performance. The more it is of no importance in a situation when it was the entity itself granting the licence, which claims that perhaps it did not conclude the management contract, but nevertheless grants the licence on the basis of provisions concerning conducting other party's affairs without being obliged to do so.

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[38] *Ibidem*, p. 524.

[39] E. Traple, *Umowy o eksploatację utworów…*, p. 326;

[40] M. Czajkowska-Dąbrowska, [in:] J. Barta, R. Markiewicz, *Komentarz. Prawo autorskie*, p. 629.

[41] B. Giesen, *Umowa licencyjna w prawie autorskim…*, p. 270 and further.

VIII. Termination of licence

1. The right to terminate the licence contract

Licences granted in the FOSS system are by definition licences granted for an indefinite period of time. Frequently, they are accompanied by a clause with no right to terminate it. Incidentally, it should be noted that a Polish template of *creative commons* licence does not include such a clause. This construction raises numerous doubts in judicature. They evolve around the question concerning legality of waiving the right to terminate an established ongoing relationship of indefinite duration. Vast majority of the doctrine is of the opinion that such decisions are inefficient.[42] There is no need to quote arguments that are normally presented so as to justify the above thesis. This case has not yet indeed been arbitrated in the Polish law. In my view, an application for recognition of provisions about waiving the right to terminate as *per se* inefficient, in unjustified. Its reservation is followed by the necessity to debate whether parties have not in fact transferred the copyrights. In the light of the Polish law it is possible, however, it is indispensable to do so in written form, otherwise is seen as null (Article 53 Copyright Act). Allowing the legal possibility to waive the right to terminate a licence contract bears with it the hazard of handling the legal terms and conditions of copyright transfer.

2. Terminating a contract in case of breaching contract terms by the licencee

The issue of terminating the licence in case of breaching its terms by one party requires a separate discussion. As is well-known, in *open source* contracts the so-called defeasance clause is frequently placed. It is a clause by force of which a licence is recognised as null when the licencee breaches the contract's terms, in particular when he disseminates software he had modified on terms differing to those his own licence had been granted on. Such a clause is to be seen in the Polish law as an acceptable one. Certainly, it should be noted that there are voices of doubt in this matter, however, they are isolated and no in-depth analysis accompanies them.[43] An *open source* licence is not a mutual one, therefore its efficiency does not depend on fulfilling a mutual performance, moreover, it does not depend on any actions undertaken by the licencee. As long as the licencee does

[42] In particular in: J. Barta, R. Markiewicz but also W. M a c h a ł a, "Wybrane cywilnoprawne aspekty licencji *creative commons*" [Selected civil law aspects of creative commons licence], *Monitor Prawniczy* 2009, No. 8, p. 423.

[43] W. Machała reports concerns in this area; Finally, the author is inclined to accept such contractual stipulation, *ibidem*, p. 423–424.

not disseminate the modified version of software, the efficiency of the performed action is not endangered. In consequence, it ought to be assumed that making the cessation of licence effects dependent on breaching the conditions of granting it does not stand in opposition to the jurisdiction of legal action.

Another issue that requires clarification is expressed in a question regarding legal possibilities that the licenser is entitled to in case of a breach in the contract terms. The provisions of the Polish civil law, except for one case that is not related to the discussed matter, do not grant the creditor the right to terminate the contract when it is not performed or performed insufficiently when the contract is of non-mutual character. Undertaking dissemination of software in violation of the licence terms and conditions should be qualified as an act of improper performance of obligations for which, according to Article 471 CC, a creditor has the right to demand compensation. Complimentary character of the licence remains irrelevant to the obligation of compensation for the licencee. The matter looks differently, however, for the question of the licencee responsibilities for software flaws. This issue shall be the subject of further considerations.

Theoretically, copyright provides a possibility of terminating a licence contract in case of breaching its terms and conditions. Article 58 of Copyright reads that the author may withdraw from the contract or terminate it when a work is made public in an inappropriate form or it undergoes changes that the author could rightfully oppose to (Article 58 Copyright Act). The creditor has the right to make use of this right only after the time he had granted to the debtor to abandon the breach expired. The issue expressed in the question whether disseminating software in violation of *copyleft* clause satisfies the conditions of termination resulting from Article 58 Copyright Act, has not been so far the subject matter of the doctrine considerations.

IX. Responsibility for flaws in software

Since within the FOSS system, dissemination software is of free of charge character, appropriate provision in CC is applied with regards to the flaws in software disseminated within the FOSS system, which cedes the responsibility for a donated item to the donor (892 CC). Thus, a licenser who disseminates software free of charge is obliged to repair the damages that have been done to the licencee for not informing him in due time about the flaws. This responsibility does not apply when the licence could clearly have noticed the flaw.

Within the FOSS system, works already existing at the moment of concluding a licence contract are understood as disseminated, therefore, it seems Article 55 of Copyright does not apply as it determines the rights of an ordering entity when the work has flaws or legal defects.

X. Granting further licences

Licence contracts for software that are concluded within the FOSS system usually include prohibition on granting sub-licences. As a consequence, the party granting the licence is always the original licenser. The role of a licence is limited to transferring the work to the third party. There is an agreement on the matter of him being solely a messenger delivering somebody else's statement of intent.[44]

Theoretically, it is possible to in the Polish law to apply a construction of a sub-licence in order to grant further licences. Article 67 Copyright Act does foresee such a possibility and it reads: if a contract does not stipulate otherwise, a licencee cannot authorise another party to use a work that is a subject of an obtained licence. Unfortunately, Polish literature does not take a clear stand on the matter of interpretation of the appointed provision. What raises doubts, is the legal character of a required permission of a licenser to grant a sub-licence. In my opinion, granting a sub-licence despite obtaining no permission to do so, has no influence on validity of the concluded sub-licence contract. This fact is of significance exclusively in relationships between the main licenser and the licencee.[45] It simply justifies the liability for damages for improper performance.

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[44] J. B a r t a, R. M a r k i e w i c z, *Oprogramowanie open source…*, p. 96.

[45] B. G i e s e n, *Umowa licencyjna w prawie autorskim…*, p. 163–164; odmiennie M. K ę p i ń s k i, *op. cit.*, p. 514 and further.

Dagmara Skupień
Doctor of Law, University of Łódź

THE LEGAL PROTECTION OF WHISTLEBLOWERS IN POLAND

1. Social and economic background

The subject of whistleblowing started to emerge in scientific discussions in Poland several years ago. The debate is more visible in the field of economics or management[1] than in the legal writing. Anyway, the literature concerning whistleblowing is not abundant.[2] The problem of whistleblowing is being thoroughly analyzed by the Stefan Batory Foundation. This non-governmental organization pursues the aim of making the society sensitive to it and of convincing the competent authorities that the promulgation of legal provisions concerning the whistleblowers' protection is necessary.[3] The Stefan Batory Foundation commanded the statistical research on the public opinion concerning whistleblowing last year.[4]

According to the result of this research, the level of the social responsibility of Poles is high. The adult Poles especially approve such employees' reactions as the denunciation to the prosecutors' office or to other public institutions of employers' acts like: the non-respecting of safety norms which endangers life or health of employees (81,4% of acceptance for the denunciation), the illegal

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[1] See i.a. W. R o g o w s k i, "Whistleblowing, czyli czego się nie robi dla pozyskania zaufania inwestorów" [Whistleblowing or anything that can be done to attract investors], *Przegląd Corporate Governance* 2007, No. 2.

[2] See for example, A. W o j c i e c h o w s k a-N o w a k, "Whistleblowing u pracodawcy – system wczesnego ostrzegania w organizacji" [Whistleblowing at the workplace – system of an early warning in the organization], *Przegląd Służby Cywilnej* 2012, No. 2, special edition, p. 53 and ff. or e a d e m, "Sygnalista w zakładzie pracy. Systemy wewnętrznego sygnalizowania nieprawidłowości z perspektywy pracodawcy" [Systems of internal sygnalisation of irregularities from the employer's perspective], *Przegląd Służby Cywilnej* 2013, No. 4, p. 10 and ff.

[3] For further details see www.batory.org.pl (last accessed on March 12, 2014).

[4] See CBOS, "Bohaterowie czy donosiciele? Co Polacy myślą o osobach ujawniających nieprawidłowości w miejscu pracy?" [Heros or telltales? What do the Poles think about persons who denunciate irregularities at the workplace?], Warszawa, kwiecień 2012.

pollution of environment (77,1%), the corruption of managers or members of the governing organs of the company (72,3%), the financial abuse or the accountancy falsification (72,3%). Persons who denunciate such situations to the public organs are perceived positively as: courageous people (34,6%), persons who care for the common well-being (27,2%), responsible persons (19,8%) or persons who act loyally to the enterprise (19,5%). There is also a high percentage of persons who declare that they would whistleblow in case of irregularities affecting the safety of other employees to the superior. However, more people declare that they would do this anonymously (40,6%) than under her/his name (28,3%). Moreover, according to the above mentioned CBOS research,[5] younger people (18–24) are generally much less inclined to the whistleblowing than the older ones (55–64).

Nonetheless, the majority of respondents are sure that the whistleblowers would encounter negative consequences from the employer such as dismissal (56,1%), mobbing, difficulties at work (12,9%) or formal punishment by the employer (7,9%). Only 4,1% of respondents present an opinion that the knowledge or experience of the whistleblower would be used by the employer to avoid the irregularities in the future. Only 1,4% of the respondents think that the whistleblower would be awarded by the employer. However, the majority of them state also that the present legal protection of whistleblowers in Poland is not sufficient and there is a common expectation that the whistleblowers should be guaranteed protection against dismissal, discrimination or other acts of retorsion from the employer.

In this context, it should be indicated that the practice of Polish enterprises encouraging whistleblowing is not very developed. According to A. Wojciechowska-Nowak,[6] only 28% of Polish enterprises have introduced internal procedures of whistleblowing.

2. Legal bases for the protection of whistleblowers

There are no special provisions (namely: no separate legal act) relating to the protection of whistleblowers in Poland. In 2009, Polish Ombudsman requested the Ministry of Labour and Social Affairs to launch the legislative initiative in order to guarantee the legal protection of whistleblowers.[7] So far, no such legislative initiative has been developed. The whistleblowers may seek protection only on the basis of the general provisions of law.

Poland has ratified international anti-corruption conventions which i.a. guarantee protection for whistleblowers within the scope of application of these acts.

[5] See *ibidem*, p. 5–6.

[6] See *Polski whistleblower nie znajdzie ochrony w sądzie pracy* [Polish whistleblower will not find protection at the labour court], Interview with A. Wojciechowska-Nowak, Programme against Corruption of Stefan Batory Foundation, 6 November 2012, http://pewp.pl.

[7] Ombudsman's letter of the 3rd March 2009, RPO-606960-III/09/RP/AF.

Poland is therefore bound by the conventions on corruption of the Council of Europe adopted in 1999. It is worth mentioning that Article 9 of the Civil Law Convention on Corruption (ratified by Poland 11.09.2002, entry into force 1.11.2003) refers directly to the employment relationships. This provision obliges the parties to the Convention to provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities. As it concerns the Criminal Law Convention on Corruption (ratified by Poland 11.12.2002, entry into force 1.04.2003), its Article 22 obliges the parties to adopt necessary measures to provide effective and appropriate protection for those who report the criminal offences covered by the scope of this convention or otherwise co-operate with the investigating or prosecuting authorities.

Poland also ratified the United Nations Convention against Corruption of 2003[8] in 2006. In relation to the protection of whistleblowers two provisions of this act should be mentioned. Firstly, art. 8 para. 4 encourages parties to establish in accordance with the fundamental principles of the domestic law, measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions. Then, according to Article 33 of this Convention, parties shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

In this context, it is also worth mentioning that according to the case-law of the ECHR, Article 10 (Freedom of expression) of the European Convention on Human Rights is applicable to the workplace. In case Wojtas-Kaleta vs. Poland,[9] the ECHR decided that the infringement of Article 10 had took place in a situation where the journalist – employee and at the same time a trade union official was given a reprimand by the employer, public television company in this case, for having criticised in public the employers' broadcasting policy.

The general principles concerning the protection of whistleblowers may also be withdrawn from the Polish Constitution of 1997. Article 54 para. 1 of the Constitution guarantees the freedom of expression which within the scope of the employment relationship gives the ground for the justified critical opinion of the employer by the employee. A general principle of equal treatment is enshrined in the Constitution according to which all persons shall be equal before the law (art. 32 para. 1) and no one shall be discriminated against in political, social or economic life for any reason whatsoever (art. 32 para. 2). The principle of equal

[8] See A. Wojciechowska-Nowak, *Ochrona sygnalistów w Polsce. Stan obecny i rekomendacje zmian* [The protection of whistleblowers. The present state and the recommendations of changes], Instytut Spraw Publicznych, Warszawa 2012, p. 7.

[9] Case No. 20436/02.

treatment and the principle of non-discrimination in the employment relationships are guaranteed by the labour code (respectively art. 11^2 and art. 11^3 of the Labour Code). As it concerns the principle of non-discrimination, it is further regulated in the Part One, Chapter IIa of the Labour Code.

Article 94 of the Labour Code enumerates the obligations of the employer versus the employee. It is worthy to draw attention to such employers' obligations as duty to evaluate the work of employees according to the impartial and just criteria as well as to enforce the principles of community life at the workplace. Article 94^3 of the Labour Code also obliges employers to combat mobbing. The breach of her/his obligations by the employer may be the just cause for the dissolution of the employment relationship by the employee for the fault of the employer without notice (Art. 55 § 1^1 of the Labour Code). In such a case the employee may demand the payment of damages by the employer (art. 55 § 1 of the Labour Code).

The employee who is a whistleblower may also rely on her/his obligation to protect the property of the establishment, to take care of the good state of the establishment, as well as to respect the principles of the community life at the workplace (Article 100 § 2 of the Labour Code). The employee is not bound by the orders of the employer if these orders are contrary to the legal provisions or to the employment contract (Art. 100 § 1 of the Labour Code).

Apart from the spontaneous whistleblowing by individual workers, we should also draw attention to the whistleblowing which is a consequence of legal duties of certain categories of employees' representatives to control the activities of the employer. Firstly, the trade unions are entitled to control the respect of the labour law provisions and the health and safety norms by the employer as well as to require the elimination of the discovered irregularities by the competent public organs (Article 23 of the 1991 Trade Unions Act).

The whistleblowing by the trade union officials is guaranteed a stronger protection. According to Art. 18^{3a} § 1 of the Labour Code, the trade union membership is one of the forbidden criteria of discrimination. The inclusion of the trade union membership in the catalogue of the forbidden criteria of discrimination results i.a. in the reversal of the burden of proof in discrimination cases. Moreover, the trade union officials under the conditions provided for in Art. 32 para. 1 of the Labour Code are also protected against the dismissal.

Social labour inspectors [społeczny inspektor pracy] are second category of employees' representatives entitled to the 'institutional whistleblowing'. The social labour inspectors are elected by the staff from the workplace trade unions' members. The social labour inspectors have large competencies concerning i.a. the control of the conformity of the workplace practice with the health and safety norms, respect of the environmental provisions as well as the respect of the labour law provisions.[10] Social labour inspectors are protected against dismissal with no-

[10] See Art. 4 of the Law of 24th June 1983 on the social labour inspection, Polish Journal of Laws, 983.35.163.

tice during their mandate and during one year after the expiry of the mandate. Their disciplinary dismissal requires the consent of the workplace trade union. Social labour inspectors may require access to premises, demand to have a view into documents and give directives to the employer in case of found irregularities. The social labour inspectors cooperate strictly with the public organs of control such as the State inspection of work or the Office of the Technical Supervision.

The board-level employee representatives in the commercial companies[11] are the second category of representatives who are entitled to supervise and to control the activities of the employer as they fulfill the duties conferred to them on the basis of the code of the commercial companies.

Moreover, the general obligation to inform the public prosecutor's office or the police relies on any person who has received an information about the criminal offence which is pursued by the public prosecutor (Article 304 of the Code of the Criminal Procedure). On the other hand an employee may be deterred from the denunciations by the potential criminal responsibility for the disclosure of the confidential information of the employer (Art. 265–267 of the Criminal Code) and by the civil responsibility for the infringement of personal goods (Art. 24 of the Civil Code).

3. The whistleblowing in the case-law of the Polish Supreme Court

The case-law of Polish courts which concerns the whistleblowing arose due to the conflicts between the employees and employers relating to the dismissal of the employee either with notice or without notice (disciplinary dismissal) by the employer. It should be underlined that the judicial control of valid grounds for the dismissal is possible only in case of an open-ended contract of employment. In case of fixed-term contracts, the labour court may only control the legality of notice. Moreover, in case of fixed-term contracts, the dismissed employee may only demand the payment of damages in case of illegality of the dismissal with notice. In case of open-ended contracts, the employee may also demand the reinstatement in work, if she/he was dismissed with notice (art. 45 § 1 and 2 of the Labour Code). However, even in case of open-ended contracts, the labour court adjudges only damages if the reinstatement in work is impossible or aimless. As the Polish Ombudsman pointed it, the whistleblower usually has no chances

[11] For details about the scope of the board-level representation in Poland see i.a. D. S k u p i e ń, "Board-level employee participation in Polish limited-liability companies," [in:] *Arbeitnehmerbeteiligung in Unternehmensorganen im internationalen Vergleich*, ed. G. Löschnigg, Vienna 2011, p. 139–161.

to be reinstated in work, as the labour courts estimate that the conflict between the employee and the employer makes it impossible or useless.[12]

According to the information delivered by the Ombudsman, the most common form of dismissal of the whistleblower is the dismissal with notice justified by the reason that his/her post of work is being liquidated.[13] In such a case, labour courts have a narrow scope of appreciation if the dismissal is justified in reality. According to the Supreme Court,[14] the liquidation of the post of work in the scope of the real organizational changes justifies the dismissal of the employee. The decisions concerning the utility of maintaining of this post belong to the sphere of employers' prerogatives and shall not be subject to the control of the labour courts. This statement was confirmed in the more recent case-law. In the judgment of the Supreme Court of the 5th September 2001,[15] the liquidation of the post of work in itself is not a sufficient justification for the dismissal. The causal link between the liquidation and the given notice should be examined. However, according to the decision of the Supreme Court, if the causal link is established between the liquidation of the post and the dismissal, the liquidation constitutes the valid grounds for the dismissal. The Supreme Court is not entitled to examine business or personal reasons of such a liquidation (decision of the Supreme Court of the 2nd February 2012, II PK 252/11). Therefore, the control of the labour court is restricted to the analysis if the liquidation of the post of work really took place and it was a truthful and not only apparent reason for dismissal.

Then, whistleblowing may also lead to the disciplinary dismissal. According to the relatively recent judgment of the Supreme Court,[16] the aim of the employee to prevent the wages discrimination by the employer is not a just ground to dismiss the employee without notice. In the circumstances of this case, the employee has discovered by a chance the unjustified disparities in wages between employees. The plaintiff had a coincidental access into documents which should have not been revealed (he received an e-mail containing confidential data by mistake). The plaintiff has distributed the data among his colleagues in order to explain the inequality in remunerations. As a consequence, he was dismissed without notice for the breach of the duty of confidence. The Supreme Court stated that the transmission by the employee to other employees of data covered by the so-called clause of confidentiality of wages in order to prevent the unequal treatment and the wages discrimination cannot constitute the valid ground for the disciplinary dismissal of the employee.

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[12] See the Ombudsman's letter of the 3rd March 2009, RPO-606960-III/09/RP/AF, p. 4.

[13] The above-mentioned Ombudsman's letter, p. 4.

[14] Judgment of the Supreme Court of the 23rd May 1997, I PKN 176/97 OSNAPiUS 1998, No. 9, position 263.

[15] Number 613/00, OSNP 2003/15/351.

[16] Judgment of the Supreme Court of the 26th May 2011, II PK 304/10.

There is a plentiful case-law concerning the dismissals with notice or without notice for the fault of the employee justified by the critical behavior of the employee towards the employer. This case-law gives indications where are the limits of the legally acceptable criticism towards employer, the surpassing of which may justify the dismissal of the employee. It may be concluded from this case-law, that the acceptable criticism must be in conformity with the law, should serve the defense of the employees' interests, be done with *bona fide*. It also should be done in a manner which is adequate and proportional to the degree of the infringement of the employees' interests.[17]

4. The scope of legal protection

The means of general protection for the whistleblowers against dismissal or mobbing under the labour code provisions are available only for persons employed on the basis of employment contracts. Employees who are helping or encouraging whistleblowers or who affirm whistleblowers' allegations may seek protection on the same basis as whistleblowers. The law does not restrict the scope of the denunciated irregularities. The whistleblowing may concern any irregularities which either constitute infringements of labour provisions, environmental norms, rules on the proper functioning of businesses, accountancy irregularities or any criminal offences.

The general provisions of law protect employees who are whistleblowers not only against dismissal but also against any unequal treatment concerning the conditions of work or remuneration, against mobbing and the infringement of personal goods. The whistleblowers who were punished with the reprimand by the employer, are entitled to lodge an appeal against this penalty to the labour court (art. 112 § 2 of the Labour Code).

The burden of proof that the dismissal was due to the whistleblowing is with the employee. According to art. 18^{3a} § 1 of the Labour Code, the employees should not be discriminated as it concerns the conclusion and the dissolution of the employment relationships, the employment conditions, the promotion and the access to training in order to improve the professional qualifications, especially for the reason of sex, age, disability, race, religion, nationality, political convictions, trade union membership, ethnic origin, confession, sexual orientation as well as for the reason of employment for the determined or undetermined period or of the full time or part time employment. The wording of the above-mentioned provision, namely of the expression 'especially' may suggest that the catalogue of the forbidden criteria is the open one. On the other hand, according to Article 18^{3b} § 1

[17] See the summary of this case-law: S. W. C i u p a, "Niedozwolona krytyka pracodawcy ze strony pracownika jako przyczyna wypowiedzenia umowy o pracę" [Unacceptable criticism of the employer by the employee as a reason for the dismissal with notice], *Monitor Prawniczy* 2002, No. 20.

of the Labour Code which concerns the burden of proof in discrimination cases, the differentiation of the employer's situation for one or several reasons mentioned in 18^{3a} § 1 of the Labour Code is deemed to be an unequal treatment unless the employer proves that the difference in treatment is justified by the objective reasons. This last provision relates thus only to the explicitly enumerated criteria.

This lack of legislative cohesion resulted in difficulties with interpretation. According to the recent judgment of the Supreme Court,[18] discrimination shall be defined as a worse treatment of the employee which is not justified by the objective grounds for the reason of characteristics or properties which concern him/her personally and are relevant from the social point of view or for the reason of employment for determined or undetermined period or the fulltime or part time employment. It results from this case-law that the whistleblowing is not covered by the scope of the reversal of the burden of proof. Also in cases concerning the mobbing which may follow the whistleblowing, it is the employee who is obliged to prove that all the legal elements of the mobbing[19] have taken place.[20]

The anonymous whistleblowing is an exception but not the rule. However, the protection of the identity of the whistleblower is provided for in several legal acts. In the realm of the controlling activities of the State Inspection of Labour (infringement of employment provisions, of environmental norms etc.), the inspector of labour may deliver a decision concerning the non-disclosure of the identity of the whistleblower if the disclosure could be harmful or risky in any way for the employee or a self-employed person. The employer in such a situation may appeal from this decision to the Regional Inspector of Labour.

If the denunciated irregularities constitute criminal offences, the whistleblower may demand the status of the so-called *incognito* witness (Article 184 of the Code of the Criminal Proceedings). The status of the *incognito* witness may be given if there is a justified risk of danger for the life, health or property in the important amount for the witness or one of his/her closest relatives.

5. The whistleblowing and the responsibility for the defamation

Public denunciations always incur for the whistleblower the risk of the penal responsibility. The whistleblower who diffuses any information on irregularities at the workplace may be held responsible, according to Article 212 § 1 of the Criminal Code, for the defamation. The offence of defamation consists of accusing someone of a conduct or properties that may degrade him/her in public

[18] See judgment of the Supreme Court of the 2nd October 2012, II PK 82/12, OSNP 2013/17–18/202.

[19] Art. 94^3 § 2 of the Labour Code.

[20] See the judgment of the Supreme Court of the 5th December 2006, case II PK 112/06 or the judgment of the Supreme Court of the 5th October 2007, case II PK 31/07.

opinion or expose him/her to the loss of confidence necessary for a given position, occupation or type of activity. The proceedings are pursued on the request of the defamed person. In case of the condemnation for the offence of the defamation, the court may adjudge the damages for the victim or for any social aim indicated by the victim. Penalties include fine or limitation of liberty (Article 212.1 of the Criminal Code). The penalty is more severe when the offense of defamation happens through the media (Article 212.2 of the Criminal Code) and it includes the fine, the limitation of liberty but also the imprisonment for up to a year. It is also more difficult for the whistleblower to liberate herself/himself from the charge of defamation if the accusation is done through the media. In case of the non-public defamation, it is sufficient to prove that the accusation was true. In case of the defamation through the media, there are two conditions to be met: firstly that the critical opinion was true and secondly that it served the socially justified interest (art. 213 § 2 point 2 of the Criminal Code).

According to the Supreme Court case-law,[21] the fulfillment of the latter condition requires that the person who commits the act of defamation pursues only the socially justified aim and is not motivated otherwise. In the legal writing an opinion was presented[22] that in order to estimate that the defamator acted in the pursuit of the socially justified aim, the following conditions have to be met: a social value has to be put at risk of damage by the addressee of the accusation, the accusator acts in order to defend this value from the potential damage, the content of the accusation is such that its disclosure may in fact prevent the infringement of the value put at risk.

It should be underlined that even if the freedom to express opinions, to acquire and to disseminate information is the constitutionally guaranteed right (see Article 54 of the Constitution), this right does not allow for the dissemination of the untruthful or defamating information.

We should separate two perspectives here: as it concerns the alleged offence of the defamation, only truthful allegations (in pursuit of the socially justified interest, in case of the defamation through the media) exclude from the criminal responsibility. In consequence, the Supreme Court[23] has indicated that the condition of the socially justified aim is not fulfilled if the accusation is not checked (uncertain) even though later it would appear to be true. The Supreme Court has judged that the defamation done with conscience that the information delivered and the alleged properties of another person are not truthful, never serves the socially justified aim.[24]

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[21] See for example The Supreme Court Resolution of the 17th April 2012, SNO 3/12 or the judgment of the Supreme Court of the 30th September 2003, III KK 176/02.

[22] See W. K u l e s z a, *Zniesławienie i zniewaga* [Defamation and insult], Warszawa 1984, p. 71–72.

[23] See the judgment of the 4th September 2003, IV KKN 502/00.

[24] See the Supreme Court Decision of the 22nd June 2004, V KK 70/04, OSNKW 2004/9, position 86.

The denunciation of the criminal offence to the prosecuting organs with the conscience that this offence has not been committed constitutes the criminal offence itself which is penalized with a fine, the limitation of freedom or the imprisonment up to two years (Article 238 of the Criminal Code).

As it concerns the labour courts' case-law, it is more favourable for the erroneous whistleblowing. According to the Supreme Court judgment of the 18th July 2012 (I PK 44/12), the critical statements about the employer and transmission of the information to the owner of the establishment about the possible irregularities is not a flagrant infringement of the employee's duties even if the charges will appear later to be unjustified. However, the allegations should be done in good faith that the irregularities exist at the workplace.

The motivation is relevant for the appreciation by the criminal courts if the offence of the defamation through the media has been committed and also for the control of the grounds of the notice or of the disciplinary dismissal by the labour courts. As it concerns the labour courts' case-law, the Supreme Court has stated that the critical opinions about the employer which are arrogant, malevolent, not based on any proofs should be treated as extending above the legally allowed limits of the criticism.[25]

6. Intervention of non-governmental organisations

Trade unions may undertake the collective dispute with the employer in order to defend i.a. trade union freedoms or to protect the work conditions (Art. 1 of the 1991 Act on the resolution of the collective disputes). It is thus possible that the collective dispute may aim at eliminating irregularities which are persistent at the workplace.

Moreover, according to Article 8 of the Code of the Civil Proceedings, the organizations the statutory aim of which does not comprise commercial activities may, in cases provided for by the specific legal provisions, bring suit or take part in the judicial proceedings already initiated in order to protect the citizens' rights. In cases concerning labour law and social security, Article 462 of the Code of the Civil Proceedings allows the non-governmental organizations in the realm of their statutory tasks, to bring suit on behalf of the employee or to take part in the already launched proceedings if the employee who is party to these proceedings consents to it in writing.

[25] See judgment of the Supreme Court of the 17th December 1997, I PKN 433/97 OSNAPiUS 12/1998, position 626.

Final remarks

The protection of the whistleblowers in Poland is not sufficient. The provisions concerning the protection of persons who make allegations on irregularities at the workplace are dispersed in different legal acts. The anonymous whistleblowing is not the rule even though the disclosure of the identity is the main deterrent for the potential denunciators according to the statistical data. The whistleblowers are, differently as in cases of discrimination, obliged to prove that the denunciations where the reason of their dismissal or of other types of retorsions by the employer. It should be recommended that at least reporting on corruption should be included in the catalogue of forbidden criteria of discrimination. The protection against dismissal is mainly guaranteed to the employees employed on the basis of the open-ended contract. The legislation does not guarantee an appropriate level of protection for self-employed persons. All the above-indicated weaknesses of the present system make necessary the adoption of the separate act on the protection of whistleblowers.[26]

[26] For recommendations see also A. Wojciechowska-Nowak, *Ochrona sygnalistów w Polsce…*, p. 17–18.

Maria Dragun-Gertner
Professor of Law, Nicolaus Copernicus University, Toruń

Zuzanna Pepłowska-Dąbrowska
Doctor of Law, Nicolaus Copernicus University, Toruń

Jacek Krzemiński
PHD candidate, Nicolaus Copernicus University, Toruń

SECURITY INTERESTS BURDENING TRANSPORT VEHICLES – THE CAPE TOWN CONVENTION AND ITS IMPLEMENTATION IN NATIONAL LAW

Within the topic of Air and Maritime Law at the International Academy of Comparative Law Congress held in Vienna in 2014 a subject of "Security interests burdening transport vehicles – The Cape Town Convention and its implementation in national law" was raised. National reporters were asked to answer different questions depending on whether their respective countries have ratified the Convention or not. Poland has neither signed the Final Act at the Diplomatic Conference in Cape Town 2001, nor ratified the Convention. Thus, Polish national reporters were asked to answer questions comparing Polish regulation on security interests with the provisions of the Cape Town Convention.

The Cape Town Convention was adopted in order to facilitate cross border transactions of sale, lease and financing of mobile equipment, mainly aircrafts and aircrafts' engines. An underlying idea behind the Convention was that unifying and harmonizing law on securities' system in those transactions will create a "win-win situation." To be precise, it was assumed that all interested parties will benefit from the new regulation: creditors – as their interests will be more protected, as well as debtors – since they will profit from better conditions offered by secured creditors. Moreover, reduction of airlines' operation costs may trigger cutback of prices to consumers. To that end an international framework for registration and enforcement of secured interest was created under the Cape Town Convention. The Convention itself has a more general application, including interests in airframes, aircraft engines, helicopters, railway rolling stock and

space assets. In fact, it was drafted as an "umbrella-type convention"[1] gathering provisions common to the mobile equipment, whereas particularities are regulated in Protocols to the Convention, most important being the Protocol on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment adopted in 2001 (the Protocol).[2] The Cape Town Convention came into force on 1st March 2006. At the time of writing this paper there were 60 Contracting Countries to the Convention, including Brazil, Canada, China, Norway, Russia, South Africa and United States of America. Noticeable, among European Union's Member States so far only Ireland, Latvia, Luxembourg, Malta, Netherlands and Spain have ratified or acceded to the Convention, despite the fact that the European Union itself has acceded to it.

1. Interests' registration system

Primarily, the Convention establishes electronic International Registry which aims to provide transparency in the priority of secured interests in aircraft objects. It enables effecting and searching registrations under the Cape Town Convention and the Protocol.[3] The International Registry is supervised by the International Civil Aviation Organization and operates 24 hours every day.[4] The priority of claims is decided upon fist-to-file basis. Thus, a registered interest enjoys priority over any other subsequently registered interest, as well as oven an unregistered interest, notwithstanding the knowledge of its existence.[5]

Comparing above solution with the Polish regulation it is worth reminding that, Polish civil law provides creditor with different methods of securing his interest, which can be divided into two categories: personal and real security rights. The former entails full of surety for debtor's obligations with all his assets, while the latter liability solely from certain assets, irrespectively of its ownership. Among personal securities there are for example: suretyship, bank guarantee, blank bill of exchange, whereas among proprietary securities for example: mortgage, pledge

[1] The expression "umbrella" Convention was used by L. S. C l a r k, "The Cape Town Convention on International Interests in Mobile Equipment ad Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines," *Journal of Air Law and Commerce* 2004, Vol. 69, p. 5; who also employs a term 'Convention plus Protocols approach.'

[2] Other two Protocols: Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, adopted on 23rd of February 2007, not yet in force; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, adopted on 9th of March 2012, not yet in force.

[3] Art. 3(1) of the Regulations and Procedures for the International Registry, 4th Edition, 2010.

[4] *Ibidem*, art. 3(4).

[5] Art. 29 of the Cape Town Convention.

(including registered pledge), right of retention, transfer of ownership for security purposes. From abovementioned forms of securities registered pledge is mostly similar to the system created under the Convention. As all pledges, registered pledge is a limited proprietary right having *erga omnes* character. It is an accessory right that follows the right which it secures. Accordingly, a creditor whose rights are secured by registered pledge may be satisfied from a movable thing irrespectively of its ownership, i.e. even if its owner is not a debtor. Registered pledge allows a creditor (pledgee) to secure his interest in a movable thing which remains in hands of pledger. Transfer of possession is not required, instead such pledge is evidenced in a special registry which is run by district courts (commercial courts).

In relation to the issue of priority generally the Polish law relies on a Latin rule of *prior tempore*, *potior iure*. Accordingly, who files for registration earlier entertains priority. Precisely, the day of filling application for registration at a court decides upon the priority among the registered interests. In cases of two applications being filled at a court at the same day it is assumed they were filed simultaneously (art. 16 of the Act on Registered Pledge and the Registry of Pledges,[6] hereinafter 'the Registered Pledge Act'). Knowledge of any previous secured creditors does not influence the creditor's priority. Therefore, in that respect the principle in the Polish legal system is not different from the Convention's solution. The same principle of priority concerns also continental hypothecation/mortgage since its priority is also defined by day of filling application for registration (art. 12 and 29 of the Real-state register and hypothecation act[7]). Moreover, all limited proprietary rights are governed by above priority rule, i.e. a limited proprietary right which has been established earlier entertains priority (art. 249 of the Polish civil code[8]), with the exception of a regular pledge (a proprietary security, which allows a creditor – pledgee to secure his interest in a movable which possession is transferred to him), that has priority over any other limited proprietary right, even if the latter was established earlier, unless the pledgee has acted in bad faith (art. 310 of the Polish civil code).

As noted above, the Cape Town Convention with its three Protocols[9] applies to interests in aircrafts (airframes, aircraft engines and helicopters), railway rolling stock and space assets. In comparison, the Registered Pledge Act does not limit the objects of security interests. Thus, all movable things may be subjected to a registered pledge, including aircrafts, railway rolling stocks and space assets. In fact in art. 41a the Registered Pledge Act itself refers to aircrafts, stating that in cases of registering a pledge in civil aircraft a court of registration files a copy

[6] The Act on registered pledge and the registry of pledges from December 6th 1996 (J. of L. 2009, No. 67, item 569).

[7] The Public land register and hypothecation Act from July 6th 1982 (J. of L. 2013, item 707).

[8] The Civil code from May 18th 1964, J. of L. 1964, No. 16, item 93.

[9] Cf. p. 2.

of a decision on registration including its number to an authority responsible for civil aircrafts registration in order to reveal that pledge in a proper registry of civil aircrafts.

Moreover, there is no special law, nor registration system concerning interests in aircrafts, railway rolling stocks or space assets. Specifically, they cannot be subjected to mortgage, which relates solely to immovable, with the exception of vessels entered in register of ships. According to the Maritime Code[10] vessels and vessels under construction can be subjected to maritime hypothecation which is a lien governed by the provisions of civil law concerning hypothecation or according to the contract for instituting a maritime hypothecation it may be a kind of mortgage.[11]

The registration system under the Cape Town Convention does not require any evidence of a legal title. Instead, it is intended to be a 'notice' system in which the interest is registered solely on basis of information provided by the registering party. No documents proving existence of legal title are necessary.

On the contrary, the Polish registration system of pledges is of a documentary type, not the notice filing system. It is a system of registration against an asset. Courts responsible for evidencing registration require a document establishing validity of titles, most commonly being it a contract on establishing pledge (other types of documents may be provided however, for example: a contract of acquiring shares in a movable subjected to registered pledge, art. 39 of the Registered Pledge Act). The registry, as well as documents provided for registration, have an open character, thus any person has a right to access information provided in the registry, regardless whether it has any legal interest in obtaining such an access. Furthermore, to facilitate availability of information there has been an electronic system established which gathers information from all courts running the registry (art. 42 of the Registered Pledge Act).

The requirement of providing document proving the validity of titles flows from the fact that the registration affects third persons. It is stated that from the day of registration nobody can plead ignorance of the data provided in the registry, unless regardless of due diligence he could not have known about it. Additionally, Polish law introduces a presumption (principle) of truthfulness of the registered information. Therefore, pledger and pledgee aiming at questioning the data revealed in the registry bear the onus of proof to the contrary (art. 38 of the Registered Pledge Act).

The Cape Town Convention creates a notion of an international interest understood as an interest in aircrafts, railway rolling stock and space assets granted by chargor under a security agreement, vested in a conditional seller under title

[10] Art. 76 and 82 of the Maritime Code from September 18th 2001, J. of L. 2013, item 758.

[11] Art. 84–88 of the Maritime Code.

reservation agreement or vested in the lessor under leasing agreement.[12] Therefore, according to the Convention, all security type interests flowing from above agreements and relating to mobile equipment may be the subject of registration.[13] However, it is left to *lex fori* to determine which type of an interest in question it is: an interest under security agreement, under conditional sale or leasing agreement. While majority of the Convention's rules apply equally to all three types of interests, there are some differences, particularly in the field of remedies allowed.

In Polish law a leasing agreement and a title reservation agreement (conditional sale) may be regarded as forms of securities in so far as they safeguard the performance in a contract of leasing or sale respectively. Contrary to a pledge, which can secure interest flowing from different contractual relationship, they do not constitute a security interest of an accessory character. Furthermore, while pledge, including registered pledge, is effective against third parties, rights under conditional sale contract, as well as leasing, have an obligatory character, i.e. they are effective solely between parties to that contract. An exception is made for conditional sale. According to art. 590 of the Polish civil code if the object is released to the buyer the reservation of ownership shall be confirmed in writing. It shall be effective with respect to the buyer's creditors if it has an authenticated (certified) date.

A general exception to the *inter partes* efficacy is made when conclusion of some contract makes impossible to fulfill partially or in whole a claim of a third party, that party may demand such contract being ineffective towards himself, provided that the parties knew of his claim or the contract was gratuitous (art. 59 of the Polish civil code). To conclude, it can be said that as far as it concerns movables all three institutions: pledge, conditional sale and leasing in an economic sense provide form of security interest. However primarily such effect is linked with rights having *erga omnes* effect, as pledge and registered pledge. A leasing agreement and a title reservation agreement (conditional sale) have an *inter partes* effect with possibility of extending it in cases of conditional sale if a reservation of title is carried out in a special form.

2. Remedies enforcement

One of the objectives of the Cape Town Convention was to introduce a greater certainty as to the remedies available in case of default by debtor. Moreover, the idea was to provide for prompt and effective satisfaction of a creditor. Accordingly,

[12] Art. 2 of the Cape Town Convention.

[13] Practitioners' Guide to The Cape Town Convention and The Aircraft Protocol, The Legal Advisory Panel of the Aviation Working Group, 2011, p. 9.

Chapter III of the Convention lists available remedies, allowing for any additional ones permitted by the applicable law, including any remedies agreed upon by the parties as long as they are consistent with the Convention's mandatory provisions.[14] Thus, a variety of possibilities is opened for the parties. Specifically, in case of a security agreement the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Art. 54 take possession or control of any object charged to it, sell or grant a lease of any such object or collect or receive any income or profits arising from the management or use of any such object. Importantly, the Convention allows the parties to agree on private enforcement of an international interest, inasmuch as it is exercised in a commercially reasonable manner.[15]

In comparison, generally Polish law provides parties with freedom of contract (art. 353^1 of the Polish civil code), including the method of securing obligation they choose, as long as it is not contrary to a statute or principles of community co-existence (art. 58 of the Polish civil code). However, if creditor chooses to secure his right in a form of a real right, he may choose from the closed list of real rights which includes pledge. In cases of real rights security as opposed to personal security in general there is no latitude given for the parties as to choosing the enforcement method. In cases of registered pledge parties have very limited range of freedom as they may choose in a contract between defined remedies.[16]

The Cape Town Convention allows the exercise of remedies on condition of a default. Parties of the contract may choose to determine a default giving rise to remedies freely. In cases where they have not done so a default is understood as a substantial deprivation of the creditor of what it is entitled to expect under the agreement.[17]

A question whether such agreement would be held valid under Polish law has a twofold answer. In terms of a conditional sale agreements and leasing agreements, which are obligations, a principle of freedom as to what entitles creditor to exercise his remedies applies. In case of a leasing contract where parties did not contractually specify such default art. 709^{11} of the Polish civil code allows a financing party to terminate the contract without notice if despite financing party's written warning the leasing party infringes his duties. Contrary, a registered pledge is a limited proprietary right. A contractual agreement does not influence the proprietary title in an object. Only monetary claims may be secured by registered pledge.[18] Such a pledge secures also the interest on a sum of money, incidental claims specified by the parties in the pledge agreement, the cost of satisfying

[14] Art. 12 of the Cape Town Convention.

[15] Art. 8 of the Cape Town Convention.

[16] Cf. point 2 (c).

[17] Art. 11 of the Cape Town Convention.

[18] Art. 5 of the Registered Pledge Act.

the creditor falling within the amount mentioned in the entry of pledge. A security agreement which is the basis of a pledge should mention the secured claim and may determine only terms concerning relative (*inter partes*) relations between the parties.

As indicated before, the Convention provides variety of remedies for creditor who may exercise remedies provided in the Convention itself or choose to apply other contractually agreed. Among Convention's remedies we have already noted above the ones available to the creditor-chargee in a security agreement (taking possession or control of any object charged to it, selling or granting a lease of any such object or collecting or receiving any income or profits arising from the management or use of any such object).[19] Other remedies are opened for seller or lessor: termination of the agreement and taking the possession or control of any object to which agreement relates or application for a court order authorizing or directing either of these acts.[20] In those cases the Convention does not require the creditor to pay the balance of the debt exceeding the secured obligation to the debtor.

Under Polish law a creditor securing his interest in a form of registered pledge has a limited set of remedies provided to him. Priority is given to the judicial enforcement proceedings (art. 21 of the Registered Pledge Act). However, the act allows for other remedies in certain situations. If in a contract of pledge a price of a movable has been strictly set and a contract of pledge provided for such remedy, a creditor may be remedied by vesting ownership to him (art. 22 of the Registered Pledge Act). Moreover, a contract of pledge may call for sale by tender conducted by an official – a notary or bailiff. In both cases before commencement of the remedy proceedings a creditor is requested to inform a pledger about intended activity who may choose to satisfy pledgee or commence court proceedings in order to establish that the secured interest does not exist or a claim is not mature yet (art. 25 of the Registered Pledge Act). In relation to the balance payment generally all contracts (of leasing, conditional sale and registered pledge) allow for satisfaction up to the value of due interest. Nevertheless, parties are free to create their contractual relation as they wish, for example excluding the obligation of paying the balance by creditor. However, provisions on the registered pledge are of a *ius cogens* character. According to art. 23 of the Registered Pledge Act, in cases of vesting an ownership to a pledgee when the value of a movable is higher than the amount of the secured obligation a creditor is obliged to pay the balance to a pledger. He is not required to distribute the surplus among holders of subsequently ranking interests which have been registered though. In the case of a leasing agreement when the financing party terminates the contract of leasing due to the circumstances for which the user is liable, the financing party may demand

[19] Art. 8 of the Cape Town Convention.

[20] Art. 10 of the Cape Town Convention.

that the user forthwith pay him all the instalments 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 instalments before their due date and the dissolution of the contract of leasing.[21]

3. Treatment of a Security Interests under the Insolvency Procedure

According to Art. 1(l) of the Cape Town Convention, the term "insolvency proceedings" means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganization or liquidation. In the event of the insolvency of the debtor, the general rule under the Cape Town Convention, expressed in Art. 30(1), is that an international Interest remains effective if it was registered in conformity with provisions of the Convention against the debtor prior to the commencement of the proceedings. An unregistered international interest may also be effective in the insolvency proceedings if applicable non-Cape Town Convention law so provides. The meaning of effectiveness is that the property interest represented by the international interest will be recognized and the creditor will have a claim against the asset, with appropriate ranking against other holders of international interest and other creditors.[22]

If a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3) of the Protocol, the insolvency provisions of the Cape Town Convention must be read together with applicable provisions of the Protocol. According to Article XXX(3) of the Protocol, at the time of ratification, acceptance, approval of, or accession to the Protocol, a Contracting State may declare that it will apply Alternative A or Alternative B of Article XI of the Protocol, which will then apply to the types of insolvency proceedings specified by the Contracting State in its declaration. There is, however, no obligation to make such a declaration by the Contracting State and in absence of any declaration of the Contracting State, neither Alternative will be applicable.

Differently than the Cape Town Convention, both Alternative A and Alternative B, relate to a situation of an "insolvency-related event," which means either the commencement of the insolvency proceedings or the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to

[21] Art. 709^{15} of the Civil code.

[22] Sir R. Goode, Official Commentary on the Convention on International Interests in Mobile Equipment and the Luxembourg Protocol on Matters Specific to Railway Rolling Stock, UNIDROIT 2008, para. 2.120.

institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action.[23]

Alternative A is more beneficial to the creditor than Alternative B because it obliges the insolvency administrator or the debtor to 1) give possession of the aircraft object to the creditor or 2) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations under the agreement [Art. XI Alternative A (2) and (7) of the Protocol], no later than the earlier of: a) the end of the waiting period specified by the Contracting State in its declaration, or b) the date on which the creditor would be entitled to possession of the aircraft object if the Convention and Aircraft Protocol did not apply. It must be noted that unless and until the creditor is given the opportunity to take possession of the aircraft object the insolvency administrator or the debtor is obliged to preserve the aircraft object and maintain it and its value in accordance with the agreement and the creditor shall be entitled to apply for any other forms of interim relief available under applicable law [Art. XI Alternative A (5) (b)–(c) of the Protocol]. Alternative A states also that no obligations of the debtor under the agreement may be modified without the consent of the creditor [Art. XI Alternative A (10) of the Protocol] and that only non-consensual rights or interests covered by a declaration pursuant to Article 39(1) of the Convention have priority over registered interests in insolvency proceedings [Art. XI Alternative A (12) of the Protocol].

In comparison to Alternative A, Alternative B is considered to be less beneficial to the creditors. Alternative B states that within the time specified in declaration of a Contracting States pursuant to Article XXX(3) of the Protocol, the insolvency administrator or the debtor shall give notice to the creditor whether it will a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction document or b) give the creditor the opportunity to take possession of the aircraft object in accordance with applicable law [Art. XI Alternative B (2) of the Protocol]. If the insolvency administrator or the debtor does not give such notice or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee [Art. XI Alternative B (5) of the Protocol]. It is worth to realize that among 36 countries that made declaration under Art. XXX(3) only Mexico chose alternative B.

Polish insolvency procedure, which is regulated by The Act on Bankruptcy and Reorganization from 2003,[24] provides for the same principle of efficacy of

[23] Art. I(2)(m) of the Protocol.

[24] J. of L. 2012, item 1112.

the security interests even after commencement of an insolvency procedure as the Cape Town Convention. The principle is also in line with Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.[25] There are, however, some differences in their enforcement, depending on the type of the security interests. The widest range of remedies for the secured creditor provides the security in form of a registered pledge.

Since the majority of cases concerns the liquidation of the bankruptcy entity, all further considerations relates to this type of procedure. According to art. 61 of The Act on Bankruptcy and Reorganization, as of the day of courts' ruling declaring bankruptcy, the assets of the bankruptcy entity are classed as the bankrupt estate, which is used to satisfy the claims of the bankrupt entity's creditors. The bankrupt estate comprises the assets belonging to the bankrupt entity on the day bankruptcy is declared and the assets acquired by the bankrupt entity during the bankruptcy proceedings, not excluding of the secured assets. Noteworthy, Polish insolvency law establishes the presumption of the bankrupt entity's property of the assets which are in his possession on the day of bankruptcy declaration. The composition of the bankruptcy estate is determined by the bankruptcy trustee, in the way of making a list of inventory (art. 69 of the Act on Bankruptcy and Reorganization). The bankruptcy trustee also values the bankrupt estate and prepares a liquidation schedule. As of the day of bankruptcy declaration the bankruptcy entity loses his right to use and maintain the bankrupt estate (art. 75 of the Act on Bankruptcy and Reorganization).

While declaring bankruptcy, the court summons the bankrupt entity's creditors to notify their receivables in order to drawn up a list of receivables. The notification procedure is, in principle, necessary for all of the creditors. However, the court is obliged to place secured receivables on the list of receivables *ex officio*. Notification should be done in writing in two identical copies (art. 239 of the Act on Bankruptcy and Reorganization) and should be filed in the time fixed by the court.

Polish insolvency law, in particular in relation to security interest in form of a registered pledge, provides for similar remedies upon the declaration of bankruptcy of the debtor as the Cape Town Convention. Accordingly, the creditor can has the right to take over ownership or sell the secured asset (art. 327 of the Act on Bankruptcy and Reorganization). However, the secured creditor (pledgee) can take over ownership or sell the object only if the security agreement provide such remedies for the creditor (pledgee). If the secured asset is in possession of a bankruptcy trustee and the secured creditor has the right to take over the ownership of the asset, the court marks the time in which the secured creditor can make use of his right, however not shorter than one month. If the secured creditor does not use his remedy in fixed time, the asset will be sold by the bankruptcy trustee in accordance with the rules of the Act on Bankruptcy and Reorganization. If the secu-

[25] O.J. L. 160/1.

rity agreement provides only for sale of the asset and the asset is in the possession of the bankruptcy trustee, the sale is conducted by the bankruptcy trustee. It must be underlined that if the value of the asset exceeds the value of the creditor's receivables, then the creditor is obliged to pay the bankruptcy the surplus. It has to be mentioned that in some circumstances the secured creditor cannot take over possession of the secured asset, which is a part of the bankrupt entity's enterprise, even if the security agreement provide for such remedy. Such circumstances exist when it is more favorable to sell the bankrupt entity's enterprise with this asset that to sell it separately. However, in such case value of the secured asset is separated from the general purchase price of the bankrupt entity's company and is distributed to the secured creditor.

Is has to be also mentioned that the general rule of Polish insolvency law in relation to security interest states that the sums obtained from the sale of the secured assets of the bankruptcy entity are distributed first of all to the secured creditors (art. 336 of the Act on Bankruptcy and Reorganization). The remaining sums are part of the bankruptcy estate and are paid to the other creditors by the bankruptcy trustee.

It is general rule in Polish insolvency law that the agreement to which the bankruptcy entity is a party is valid and effective even after the commencement of the insolvency procedure. Therefore, in principle, no obligation of the debtor may be modified without the consent of the creditor. However, art. 127(1) of The Act on Bankruptcy and Reorganization provides for nullity (in relation to the bankruptcy estate) of legal acts that were undertaken by the bankruptcy entity one year before filling the bankruptcy request to the court, if they were gratuitous or against payment, yet value of the obligation of the bankruptcy entity widely exceeds the value of benefits. Moreover, in accordance with art. 127(3) of the Act on Bankruptcy and Reorganization, the security agreement to which the bankruptcy entity is a party is void if it was signed two months before filling the bankruptcy request to the court. The creditor, who holds the security interest, may however demand the court to acknowledge validity of the security agreement if he proves that on the day of signing the agreement, he was not aware of the grounds to declare bankruptcy.

Furthermore, the court may, on the request of the bankruptcy trustee, invalidate (in relation to the bankruptcy estate) the security interest on the assets of the bankruptcy entity, if the bankruptcy entity is not personally liable, the security interest was given one year before filling the bankruptcy request and the bankruptcy entity did not receive any benefits from it or it received grossly inadequate benefits (art. 130(1) and art. 130(2) of the Act on Bankruptcy and Reorganization). The court will nullify the security agreement irrespectively to the value of received benefit if those agreements secure the obligations of spouse, some categories of kindred or in-law's, partners or related companies.

4. General Considerations

Before adoption of the Cape Town Convention an economic benefit analysis has been carried out as to the possible implications of the international secured transactions law reform. It has been argued that the Convention with the Protocol may give rise to potential gains of different entities like airlines (including their employees, shareholders and customers), governments and their national economies, as well as manufacturers with their employees, shareholders and suppliers.[26]

The question arises whether in Poland exists a custom of conducting such an economic analysis before adoption of a private law reform. It might be argued that a general requirement of pursuing an economic analysis of every legal regulation can be derived from the Preamble of the Polish Republic Constitution which states that public institutions in Poland ought to proceed effectively and reliably.[27] Specific requirements as to economic effects assessment flow from rules on legislative technique which demand that before commencing work over any act (including the law of secured transactions, or generally private law) a research as to its social, economic, organizational, legal and financial effects should be conducted (§ 1 of the annex to the Decree on rules of legislative technique).[28] Moreover, statute of Sejm (lower house of Polish Parliament) requires that each proposal of an act has to be accompanied by a justification including foreseeable social, legal, financial as well as economic consequences (art. 34 of the Polish Republic Sejm Statute).[29] An in-depth study of economic effects is necessary for the proposals coming from the Polish Government. According to the Statute on Council of Ministers' work an Impact Assessment of Legislation is an integral part of a justification preceding a proposal.[30] Legislation Impact Assessment shall include primarily an analysis of legal act's influence on: State's budget as well as budgets of local government units, labor market, competitiveness of economy, including the functioning of enterprises and regional development (§ 10 of the Statute on Council of Ministers' work). Indispensable elements of an impact assessment are consultations with interested

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[26] A. Saunders, A. Srinivasan, I. Walter, J. Wool, "The Economic Implications of International Secured Transactions Law Reform: A Case Study," University of Pennsylvania, *Journal of International Economic Law* 1999, Vol. 20, p. 310.

[27] „Eksperci o możliwości szacowania skutków i kosztów regulacji", discussion at Expert Seminar „Sprawne i służebne państwo" which took place on 27.11.2011 r., available at: www.prezydent.pl/dialog/fdp/sprawne-i-sluzebne-panstwo/aktualnosci/art,7,eksperci-o-mozliwosci-szacowania-skutkow-i-kosztow-regulacji.html, last accessed on May 28, 2014.

[28] Decree on rules of legislative technique from June 20th 2002, J. of L. 2002, No. 100, item 908.

[29] Polish Republic Sejm Statute from July 30th 1992, Monitor Polski [Official Journal – O.J.] 2012, No. 0, item 32.

[30] Statute on Council of Ministers' work from March 19th 2002, O.J. 2002, No. 13, item 221.

partners. Since majority of act proposals is of governmental origin, they are accompanied by Impact Assessment of an empirical nature. Formal requirement of Legislative Impact Assessment does not concern however a proposals coming outside of the government, from Sejm deputies, the President of the Republic, the Senat or introduced by way of popular initiative.

As mentioned above, it is suggested that by providing better security for interests the Convention creates a "win-win scenario" as it is advantageous to both, a creditor and debtor. The idea which assumes that a stronger security interest is beneficial for both, a creditor and debtor is generally supported in Polish jurisdiction. The more confident is the creditor, the more eager is he to give a loan/credit. Effective security system influences both, availability and costs of borrowing. An example of provisions aiming at strengthening the position of a creditor are those providing a creditor secured by registered pledge with alternative remedies as taking ownership of a thing or sale of a thing by tender what is also the case of mortgage instituted on registered vessels.

Michał Balcerzak
Doctor of Law, Nicolaus Copernicus University, Toruń

DAMAGES FOR THE INFRINGEMENT OF HUMAN RIGHTS

Introductory remarks and clarifications

Before addressing in detail the issues raised in the questionnaire, it appears essential to clarify what is meant by "human rights" for the purposes of the present paper. While it is not this author's intention to dwell on theoretical background or meaning of the term, it needs to be underlined that "human rights" do not lend themselves to a simple and commonly accepted definition.[1] Yet, there is little doubt that this research project and questionnaire refers to "human rights" in a normative rather than philosophical sense, i.e. to legally recognized entitlements of law subjects *vis-à-vis* public authority within its jurisdiction.

Human rights in the normative sense may be perceived as a catalogue of norms which create obligations binding for public authorities and entrust individuals with recognized rights or freedoms. These catalogues are usually enshrined in national constitutions and international treaties (or other international law instruments). It is assumed that irrespective of being assembled in normative catalogues, human rights are to be implemented at national level, both as a matter of domestic law and practice of state organs.

"An infringement of human rights" should be understood as an act (action or omission) of state which violates at least one legal obligation binding on that state towards an individual (or other entitled subject), provided that the violated obligation resulted from the norm denominated as a "human rights norm." At this point it is crucial to distinguish between domestic and international consequences of such an infringement. Even for states with monistic approach to international law – as is the case of Poland – the same human rights norm may cause effects

[1] On terminological ambiguities and contemporary dilemmas concerning human rights in Polish legal system cf. E. Ł ę t o w s k a, "Human rights – universal and normative? (a few remarks from the Polish perspective)", [in:] *Rapports polonaise. XVIII^e Congrès International de Droit Comparé*, ed. B. Lewaszkiewicz-Petrykowska, Łódź 2010, p. 267 *et seq*.

both within domestic legal system (*pro foro interno*) and within the international one (*pro foro externo*). In the latter case we deal with the law of international state responsibility which constitutes part and parcel of public international law.[2] In this sphere the term "responsibility" is widely recognized in international law and doctrine to denote prerequisites and consequences of acts prohibited by international law (e.g. infringements of human rights norms) and distinguished from the term "liability" used with reference to damage caused by actions not prohibited by international law.

It seems evident that the questionnaire focuses on domestic consequences of human rights infringements, and more particularly on domestic remedies allowing to claim and obtain pecuniary damages in domestic law. However, the project also includes the interaction between national and international human rights law. There seems to be no limitation of the scope of the project to human rights norms as reflected in constitutional (i.e. domestic) catalogue or national legislation. The so-called "international human rights", i.e. human rights norms enshrined in instruments of international law, are equally important in defining material scope of states' obligations. However, even where norms of international law treaties are directly applicable in domestic law system (which is the case of Poland), it is understandable that they would only rarely be of use as a direct base of compensatory claims before domestic courts. More often than not, norms of international human rights law would be directly used to claim damages within international control mechanisms, the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter as ECHR) being the most notable example.

To avoid any misunderstanding it needs to be stressed that direct applicability of human rights treaties ratified by Poland is of fundamental importance. Human rights norms enshrined in these treaties may be effectively referred to both in parties' submissions as well as in judicial decisions. Polish courts do invoke and apply international human rights norms although the frequency of such references is another matter.[3] Generally speaking, the rate of referrals to human rights treaties is uppermost at the highest level of judiciary, with the Supreme Court and Constitutional Tribunal having the leading position. But notwithstanding their significance and practical application, international human rights norms would not be applied by Polish courts as a sole basis for adjudicating compensation or satisfaction.

International human rights law norms serve as a direct source of international obligations whose violation may lead to state responsibility and compensatory claims submitted to international control organs. It can be submitted that satisfying claims which originate in human rights law (both international or domestic) is

[2] For a comprehensive reference see J. Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013.

[3] See E. Łętowska, *op. cit.*, p. 275.

primarily to be sought in domestic legal order. The principle of subsidiarity is widely recognized in human rights law as such and has also many normative manifestations, including the principle of exhaustion of domestic remedies prior to recourse to international ones, as well as the right to an effective domestic remedy as provided *inter alia* in Article 13 of the ECHR.[4]

It follows that the project's focus on domestic compensatory remedies for infringement of human rights reflects the logic of subsidiarity: human rights protection starts "at home" and it is in the domestic system where any victim of human rights violation should be offered compensation and/or other forms of reparation. It is however also important to remember that this protection does not stop "at home" and includes international remedies derived from instruments of international law. Therefore the full picture of compensatory remedies for infringements of human rights needs to encompass both areas mentioned above.[5]

Liability regime – in general

Arguably, there is no separate "system" of public authority liability for violations of human rights in Poland. In particular, Polish legal system does not recognize any general (unique) remedy for human rights violations and there appears to be no tendency in this direction although the idea of introducing a "general domestic remedy" has been discussed in the context of increasing the effectiveness of procedural protection of human rights in Polish legal system.[6] In any event, liability of public authority for infringements of human rights in Polish domestic law should be perceived as a part of law of public authority liability. Compensatory remedies for violation of human rights would normally be sought on the basis of private law though compensation may also be obtained under other branches of law, i.e. criminal law (see below).

The general concept and rules of liability for damage caused by public authority has been very intensively discussed in Polish civil law doctrine, especially

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[4] Article 13 ECHR provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[5] On the law of remedies for violation of human rights see D. Shelton, *Remedies in international human rights law*, Oxford University Press, 2005, p. 22–49 (on remedies in national law) and 291–353 (on compensatory remedies in international systems of human rights protection).

[6] See M. Balcerzak, "The Improvement of Domestic Remedies in the Post-Interlaken Process," [in:] *Concepts of General Domestic Remedy and Simplified Procedure for Amending the Convention in the Post-Interlaken Process. 4th Warsaw Seminar. In memory of Professor Krzysztof Skubiszewski*, Krajowa Szkoła Administracji Publicznej, Warsaw 2010, p. 42–44 [available on-line: www.ksap.gov.pl/ksap/file/publikacje/GENERAL_DOMESTIC_EN.pdf, last accessed on March 15, 2014].

since the entry into force of the Polish Constitution in 1997 and subsequent legislative and jurisprudential changes which brought a truly new approach.[7] The origins of this attitude come from Article 77 para. 1 of the Constitution which provides: "Everyone shall have the right to compensation for any damage [szkoda] done to him by any action of an organ of public authority contrary to law."

As regards explicit legal basis for claiming damages for violations of human rights, it can be indicated that insofar as these violations caused pecuniary or non-pecuniary damage in the sense of Polish civil law, the relevant legal basis can be found in Polish Civil Code and in particular in the following provisions (as amended by the Act of 17 June 2004 on an amendment of the Civil Code and some other acts):

Article 417

§ 1. The State Treasury or a unit of local self-government or other legal person exercising public authority on the basis and within limits of law shall be liable for damage caused by an unlawful action or omission in exercising that authority.

§ 2. Where the performance of the tasks from the scope of public authority has been commissioned by virtue of an agreement to a unit of local self-government or other legal person referred to in § 1, both the performer and the commissioning unit of the self-government or the State Treasury are liable for the damage.

Article 417[1]

§ 1. If damage was caused by issuance of a normative act, the reparation of the damage may be sought after an establishment in relevant proceedings that the act is not in conformity to the Constitution, ratified international agreement or statute.

§ 2. If damage was caused by issuance of a legally valid judgment or a final decision, a person may seek reparation of the damage after an establishment in relevant proceedings that the judgment or the decision is unlawful. The above rule shall also apply in case when a legally valid judgment or a final decision was issued on the basis of a normative act that was not in conformity to the Constitution, ratified international agreement or statute.

§ 3. If damage was caused by non-issuance of a legal order or a decision and if an obligation to issue them was provided by law, a person may seek reparation of the damage after an establishment in relevant proceedings that the non-issuance was unlawful, unless the separate provisions provide for otherwise.

§ 4. If damage was caused by non-issuance of a normative act and if an obligation to issue it was provided by law, the unlawfulness of the non-issuance is declared by the court examining the case concerning the reparation of the damage.

[7] Among many authorities see M. S a f j a n, *Odpowiedzialność odszkodowawcza władzy publicznej za szkodę* [Compensatory liability of public authority for damage], Warszawa 2004; E. B a g i ń s k a, *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej* [Compensatory liability for exercising of public authority], Warszawa 2006; Z. B a n a s z c z y k, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej* [Liability for damage caused in exercise of public autority], Warszawa 2012.

Article 417[2]

If damage to person was caused by lawful exercising of public authority, the victim may seek full or partial reparation of the damage and a pecuniary just satisfaction when the circumstances – and especially the inability of the victim to work or his or her financial situation – show that it is required by the principles of equity.

The above provisions could be regarded as a general legal regime of public authority liability, including for violations of human rights. According to Article 421 of the Civil Code: "The provisions of Articles 417, 417[1] and 417[2] shall not apply if the liability for damage caused by exercising public authority is regulated elsewhere by detailed provisions."

In view of the above it can be submitted that whenever a human rights violation resulted in damage caused to an individual (or other entitled subject) by an *unlawful action or omission in exercising that authority*, a claim based on Article 417 of the Civil Code can be brought to civil court by the victim of the violation. Let us however note that it is usually non-pecuniary damage rather that material one which results from a human rights violation, with the exception of violations of the protection of property where material damage seems to be the most "natural" consequence of these violations.

Therefore it is vital to ask how can an individual or other entitled subject claim damages in Polish domestic system when an infringement of human rights resulted in non-pecuniary damage? For the sake of being precise it needs to be recalled that this question is relevant both in case of human rights guaranteed by international law instruments as well as human rights norms enshrined in Polish Constitution (i.e. its Chapter II – "Freedoms, rights and duties of persons and citizens"). In both instances human rights norms are directly applicable and may be invoked in Polish courts. Nevertheless, from the perspective of Polish civil law there is a difficulty in claiming compensation for non-pecuniary damage caused by violation of human rights, unless the violation can be considered an infringement of personal rights [*dobra osobiste*] in the meaning of Article 23 of the Civil Code. This provision sets out an open catalogue of protected interests,[8] however, it cannot be assumed that all human rights norms are covered by Article 23; in other words – some rights protected by constitutional and/or international human rights norms remain outside the scope of protected rights in the meaning of Polish Civil Code.[9] This apparently leads to a legal lacuna which can only partly be filled

[8] See Article 23 of Polish Civil Code which provides: "Personal human interests, and in particular health, freedom, reputation, freedom of conscience, family name or nickname, secrecy of correspondence, inviolability of home, scientific, artistic, inventive or rationalizing creation, remain under protection of civil law irrespective of protection provided by other provisions."

[9] See M. Kaliński, "O naprawieniu szkody wynikłej z naruszenia praw człowieka" [On reparation of damage resulting from violation of human rights], [in:] *Aurea praxis*, *aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, Vol. II, Warszawa 2011, p. 2365.

in by *leges speciales*, i.e. compensatory remedies outside the regime of civil law (see below).

There is an alternative point of view expressed in the civil law doctrine which advocates to consider all human rights as personal rights in the meaning of Article 23 of Polish Civil Code, having regard to the fact that human rights and freedoms originate in human dignity which as such should be regarded as a personal right protected by Civil Code.[10] The concept seems reasonable since there is no doubt as to the central position of human dignity as a legal – and philosophical – explanation of human rights' origins. Further arguments in favour of this concept include the fact that the catalogue in Article 23 of Civil Code is open-ended and – moreover – a possibility to claim damages for non-material damage caused by human rights violations would even go beyond what is required by the right to an effective remedy as enshrined in Article 13 ECHR (which requires an availability of a remedy to "a competent organ", not necessarily a judicial one). Although the above idea is so far not implemented in judicial practice, there are sound reasons to pursue it, at least with respect to human rights guaranteed in the ECHR and its Protocols. It must however be noted that human rights norms enshrined in international treaties should not be categorized into 'more' and 'less' important groups.[11] On the other hand, providing an individual with the right to claim compensation for non-pecuniary damage in case of every violation of international human rights norm would be far-reaching and of unpredictable consequences for the state budget.

The legal basis for claiming violation of personal rights and compensation for non-pecuniary damage resulted therefrom is Article 448 of Polish Civil Code which provides:

> In case of infringement of a personal right the court may award the subject affected by the infringement an appropriate sum as pecuniary satisfaction for harm or adjudicate upon request of the affected subject an appropriate sum for a social purpose indicated subject, irrespective of other measures necessary for eradicating the consequences of the infringement. […]

In has been generally accepted in Polish jurisprudence that claiming damages for non-material violations of personal rights under Article 448 of Polish Civil Code requires to prove defendant's fault (at least *culpa levissi-*

[10] See *ibidem*, p. 2368. The author provides arguments in favour of this approach but eventually takes a more cautious approach, arguing that this concept is not yet recognized and requires further studies, also in the context of works on a new Civil Code.

[11] This argument will not be developed here for reasons of available space but it should be underlined that human rights are usually regarded as universal, indivisible, inter-dependent and inter-related. Despite differences in their normative structure, contents of international obligations and the sometimes used division into 'generations', human rights constitute a system of state obligations and may not be picked *à la carte.*

ma).[12] Of course this requirement may seriously undermine the effectiveness of invoking Article 448 as a legal basis for claiming an infringement of human rights recognized as personal interests in the meaning of Polish Civil Code. It should be noticed that normally fault is not a prerequisite of international state responsibility for human rights violations.

Nevertheless, some compensatory claims for human rights violations me be successfully brought to Polish civil courts under this head and considered as "effective remedies" for the purpose of the ECHR. There is a notable example involving a so-called "systemic problem" identified in the case-law of the European Court of Human Rights in cases against Poland. In a number of cases Polish civil courts found a violation of claimants' personal interests due to the fact that they were detained in overpopulated cells.[13] This kind of cases gave rise to numerous complaints against Poland to the Strasbourg Court and judgments founding violations of the applicants' rights under Article 3 ECHR (prohibition of inhuman and degrading treatment). It has been only in recent years that Polish civil courts started to award compensations for violation of the claimants' personal rights, and notably their dignity and health, due to overpopulation in prisons. Following a ground-breaking judgment of the Polish Supreme Court delivered on 17 March 2010,[14] the European Court of Human Rights found that

> a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code could be considered an "effective remedy" for the purposes of Article 35 § 1 of the Convention as from 17 March 2010 and having regard to the 3-year limitation period for lodging such an action, the Court held that essentially in all cases in which in June 2008 the alleged violation had either been remedied by placing the applicant in Convention-compliant conditions or had ended ipso facto because the applicant had been released, the applicants concerned should bring a civil action for the infringement of personal rights and compensation.[15]

It follows that the compensatory claim based on the infringement of personal rights should be considered a primary domestic remedy in cases involving violation of human rights due to overpopulation in prisons. However, it should be stressed that not all applicants are successful in pursuing their rights under this head in Polish courts.[16]

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[12] See E. B a g i ń s k a, *op. cit.*, p. 416–417.

[13] See *inter alia* ECHR judgment in *Orchowski v. Poland* case of 22 October 2009.

[14] Case No. II CSK 486/09. Having examined and allowed a cassation appeal the Supreme Court restated a principle already expressed in its earlier judgment (of 28 February 207, case No. V CSK 431/06) that the right to be detained in conditions respecting one's dignity undoubtedly belonged to the catalogue of personal rights. Therefore actions infringing this right could involve the State Treasury's liability for the purposes of Articles 24 and 448 of the Civil Code.

[15] See ECHR judgment in *Kurkowski v. Poland case* of 9 April 2013, § 53, referring to the ECHR decision in *Łasak v. Poland* case of 12 October 2010, § 85 and 76.

[16] See for instance the judgment of the Warsaw Court of Appeal delivered on 4 July 2013 (ref. No. I ACa 31/13).

As has been already noted, the general regime of public authority liability has been set out in Articles 417, 417[1] and 417[2] of the Civil Code. Its basic features can be summarized as follows:

– The principle of strict liability (risk) for damages caused by an unlawful action or omission constitutes the basis of the general regime.[17] Fault used to be the basis of this regime prior to the ruling of the Constitutional Court of 2001 (case No. SK 18/00) which found such an approach as unconstitutional. An unlawful action or omission of public authorities is considered a delict [*czyn niedozwolony*] according to Polish civil law.

– With respect to liability for damage to person caused by lawful exercising of public authority, the leading principle is equity. It has been indicated that public authority liability under this head had been commonly applied to damage caused in public health care facilities, particularly in the 1990s, but nowadays it is debatable whether such strict liability should be borne by health facilities which are in fact considered 'self-governing' public health facilities [*samodzielne publiczne zakłady opieki zdrowotnej*].[18] This is important also from the human rights perspective as it is doubtful whether in the current regime the actions of public health facilities should be considered actions of public authorities and as such be attributed to state for the purposes of international human rights law.[19]

– Damage [*szkoda*] is a prerequisite of a claim for pecuniary or non-pecuniary compensation. The notion of 'damage' covers both material and non-material harm. It is necessary that the damage be caused by an act (action or omission) in exercising public authority. The public authority liability is not excluded in case of actions *ultra vires*.

Liability regime – *leges speciales*

Polish legal system provides for several remedies which could be availed of in order to compensate selected human rights violations outside the general regime of the Civil Code. Having regard to the scope of the research, the analysis is focused on two such remedies which have a compensatory nature. Thus the comments do not concern Polish constitutional complaint [*skarga konstytucyjna*] which is undoubtedly a very important remedy but has no compensatory function.

[17] See E. Bagińska, *op. cit.*, p. 217.

[18] See *ibidem*, p. 223.

[19] Cf. *Z. v. Poland* case in which the European Court of Human Rights referred to "an established case-law of the Polish courts to the effect that this liability of the State also includes liability for damage caused by medical treatment in a public system of medical care, run either by the State or by the municipalities" (judgment of 13 November 2012, § 60). The facts of the case concerned events of 2004.

Special ('tailored') remedies having compensatory nature include:

A) A complaint against undue length of judicial proceedings (including preparatory criminal proceedings as well as civil execution proceedings);

B) A complaint against damage caused by wrongful conviction and execution of punishment or manifestly wrongful detention or detention on-remand.

Ad. A)

In 2004 Polish Parliament adopted an Act on a complaint against undue length of judicial proceedings. In 2009 the Act was amended to include also preparatory criminal proceedings.[20] The Act introduced into Polish legal system a new remedy to combat unreasonable length of proceedings and at the same time to provide the injured party an adequate compensation for non-pecuniary damage which – interestingly – was not explicitly called "satisfaction" in the sense of Polish Civil Code but "a sum of money." While quite similar to compensation for non-material damage and considered as such by the Supreme Court, the doctrine of civil law does not seem to be unanimous in recognizing the "sum of money" referred to in the 2004 Act as a "pure" compensation for non-material damage.[21] Nevertheless – as provided in Article 12(4) of the 2004 Act, if the court allows a complaint it shall afford, upon the complainant's request, a sum of money in the amount between 2000 and 20 000 PLN. The award is thus obligatory if a violation of the right to have a case examined without undue delay was violated. This principle was introduced by the 2009 amendment whereas the original Act provided that any financial award was up to the court examining the complaint.

According to Article 15(1) of the 2004 Act, the party whose complaint has been allowed may – in separate proceedings – seek reparation from the State Treasury or jointly from the State Treasury and the court enforcement officer [*komornik*] – of the damage resulted from the established undue delay. Moreover, the order that allows a complaint shall be binding on the court in civil proceedings concerning reparation [*odszkodowanie*] or satisfaction [*zadośćuczynienie*] as regards the establishment of an undue delay of the proceedings (Article 15(2)).

An important feature of the complaint against undue delay of proceedings is that it can be lodged only while the delayed proceedings are pending. However,

[20] Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki, Dz.U. z 2004 r., nr 179, poz. 1843 ze zmianami [Act of 17 June 2004 on a complaint against violation of the right to have a case examined without undue delay in preparatory proceedings conducted or supervised by prosecutor or judicial proceedings, Journal of Laws [J. of L.] 2004, No. 179, item 1843, amended].

[21] See M. K a l i ń s k i, *op. cit.*, p. 2375 *et seq.*

the failure to lodge the complaint during the delayed proceedings does not in any way influence the party's right to seek reparation of the damage that resulted from the delay on the basis of Article 417 of the Civil Code, after final completion of the proceedings as to the merits (Article 16 of the 2004 Act). As follows from Article 15(1) referred to above, the party whose right to proceedings without undue delay was violated has also full possibility to seek compensation for material or non-material damage in separate proceedings, based on the general regime of public authority liability.

The remedy against undue length of judicial (or other) proceedings is a principal example of the influence of the ECHR standards on Polish law system. Its introduction was a direct consequence of the *Kudła v. Poland* judgment delivered by the European Court of Human Rights on 26 October 2000. The remedy has been recognized by the Court as "effective" within the meaning of Article 13 of the ECHR. While the interpretation and application of the 2004 Act sometimes gave rise to legal debates and disputes, it can be argued that the remedy against undue delay generally proved successful, at least insofar as it allowed an injured party to claim damages for undue delay and at the same time have the proceedings accelerated. With respect to the legal character of the compensation ("sum of money" referred to in Article 12(4) of the 2004 Act), it can be considered as having a *sui generis* character since it is aimed both at providing redress for established violation of the party's human rights, and at having punitive effect on a court (or other relevant organ conducting proceedings). The latter function of the compensation results from the fact that the compensation awarded for undue length of proceedings is to be paid from the budget of the court (or other relevant organ) which was conducting the proceedings complained of.[22]

Last but not least it should be noted that the 'special' compensatory remedy provided for in the 2004 Act concerns just one aspect of the right to fair trial guaranteed by Article 6(1) of the ECHR and reflected in Article 45(1) of the Polish Constitution, and notably the right to have a case examined by a court 'in reasonable time' (ECHR) or 'without undue delay' (Polish Constitution). The 2004 Act was drafted in direct consequence of the *Kudła* judgment and with the sole intention of providing a remedy for this particular aspect of the right to fair trial, so it would be pointless to criticize the Act for restricting the material scope of the remedy to that aspect. It goes without saying that the right to have a case examined in reasonable time has been the most problematic, i.e. the most frequently invoked basis of complaints against Poland to the European Court of Human Rights. However, it should be stressed that the remedy against undue delay is the only one in Polish legal system which explicitly allows for obtaining compensation for non-pecuniary damages. The problem arises if a party demands such

[22] See Article 12(5) of the 2004 Act.

compensation for violation of other aspects of the right to fair trial, i.e. the right of access to court, the right to have a case examined in a fair and public hearing, as well as and by 'an independent and impartial tribunal established by law'.

As was already mentioned above, not every human right can be easily considered as a 'protected right' in the meaning of the Polish Civil Code. It appears that whereas a party may successfully claim non-pecuniary damages for violation of the right to have a case examined without undue delay, he/she cannot do so in case of other aspects of Article 6(1) ECHR even if there are other domestic remedies available to an individual in cases where his/her rights under Article 6(1) are in danger (e.g. a motion for exemption from court fees if a party is not able to cover the costs himself/herself; a motion for exclusion of a *iudex suspectus*, etc.). This may be seen as favouring one aspect of the right to fair trial against the others as regards the possibility to claim and obtain non-pecuniary damages. On the other hand, since the domestic system allows for preventing or restoring the individual in his/her rights under Article 6(1), it could be asked whether non-pecuniary compensation is really essential in every single case. Be it as it may, Polish legal system explicitly allows for claiming non-pecuniary compensation for undue delay of judicial (or other) proceedings and not for other aspects of the right to a fair trial. Let us also recall that no such distinction exist when it comes to claiming compensation for material damage caused by violation of this right.

Ad. B)

According to Article 552 of the Polish Code of Criminal Procedure:

Art. 552

§ 1. An accused who, as a result of reopening of proceedings or cassation appeal has been acquitted or re-sentenced for a milder penalty, shall be entitled to compensation from the State Treasury for pecuniary and non-pecuniary damage which he has suffered as a result of having served all or part of the sentence unjustifiably imposed on him.
[…]

§ 3. A right to compensation for pecuniary and non-pecuniary damage shall also arise if a precautionary measure [*środek zabezpieczający*] has been applied […].

§ 4. A right to compensation for pecuniary and non-pecuniary damage shall also arise in the event of clearly unjustified pre-trial detention [*tymczasowe aresztowanie*] or arrest [*zatrzymanie*].

The above provision could be regarded as providing basis for claiming compensatory remedies with respect to several human rights standards enshrined in international treaties as well as Polish Constitution. The right to compensation and satisfaction for wrongful conviction provided in Article 552 § 1 of the Code of

Criminal Procedure reflects the guarantee included in Article 3 of Protocol No. 7 to the ECHR ('compensation for wrongful conviction').[23] The right to compensation or reparation for wrongful conviction differs in its scope and conditions from the general regime of Article 417 of the Civil Code, nevertheless, it clearly provides an individual with compensatory remedy if his/her conviction has been established as wrongful following a reopening proceedings or cassation appeal. Article 552 § 3 of the CCP allows for claiming compensation and satisfaction also when precautionary measures [*środki zabezpieczające*] have been wrongfully applied. These measures are usually imposed on a convicted person whose mental health or other medical condition (e.g. alcohol addiction) requires isolation in specific conditions.[24]

Although the direct prerequisite of a compensatory claim based on Article 552 § 1 and 3 of the CCP is wrongful conviction, it should be noted that these kind of claims are supposed to redress human rights violations in the broader context. Assuming that a wrongful conviction included imprisonment or other form of isolation, it is hard to argue that the person's right to freedom and security of person (Article 5(1) of the ECHR) was fully respected, even though prior to declaring the conviction as wrongful all guarantees concerning the right to freedom and security might have been observed. From a purely legal point of view however, the legality of detention does not depend whether the conviction have been later declared wrongful.[25] Nevertheless, in a broader sense and if the conviction included other penalties (or precautionary measures) than deprivation of liberty, the compensatory remedy provided in Article 552 § 1 and 3 of the CCP may indirectly concern also other human rights guarantees than the right to freedom and security of person. For instance, compensation for wrongful conviction may concern the right to free elections in Article 3 of Protocol No. 1 to the ECHR (when the court ruled on deprivation of public rights) or the right to privacy in Article 8 of the ECHR (for instance when the court imposed a prohibition of certain activities or certain kind of employment, or indicated public announcement of the criminal judgment). Needless to mention, all material loss caused by wrongful conviction is to be compensated just as non-pecuniary damage.

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[23] Article 3 of Protocol No. 7 to the ECHR provides: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

[24] See Article 93 *et seq.* of Polish Criminal Code.

[25] See P. H o f m a ń s k i, [in:] L. G a r l i c k i, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 19–59 oraz Protokołów dodatkowych* [Convention on the Protection of Human Rights and Fundamental Freedoms. Commentary to Articles 19–59 and additional protocols], Vol. II, Warszawa 2011, p. 643.

Article 552 § 4 of the CCP provides for the right to compensation and satisfaction in case of manifestly unjustified (wrongful) pre-trial detention [*tymczasowe aresztowanie*] or arrest [*zatrzymanie*]. This corresponds – or actually fulfills the requirements of – Article 5(5) of the ECHR which stipulates: "Everyone who has been a victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation." This standard is reflected also in Article 41(1) of the Polish Constitution which provides for a right to compensation for unlawful deprivation of liberty. Importantly, Article 552 § 4 of the CCP allows an individual to obtain compensation and satisfaction only for s e l e c t e d v i o l a t i o n s of the right to freedom and security of person, and notably wrongful arrest or detention referred to in Article 5(1) "b", "c" and "f". It is hardly possible to find legal basis in Polish law for c l a i m i n g d a m a g e s and executing the right provided in Article 5(5) of the ECHR when an individual claims violation of his/her rights under Article 5 para. 2 (right to be informed promptly and in an understandable language of the reasons of the arrest and any charges against the person arrested), Article 5 para. 3 (right of an arrested or detained person to be brought promptly before a judge or other officer authorized by law to exercise judicial power and be tried within a reasonable time or released pending trial), Article 5 para. 4 (right of an arrested or detained person to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his release ordered if the detention is not lawful).

It has been pointed out in the doctrine that this is particularly problematic in case of undue length of pre-trial detention contrary to Article 5 para. 3 of the ECHR, since these type of cases are not covered by Article 552 of the CCP and at the same time the complaints based on this provision of the ECHR are relatively frequently examined by the European Court of Human Rights.[26] Indeed, there is no 'tailored' compensatory remedy in cases where the length of pre-trial arrest is claimed to be contrary to Article 5(3) of the ECHR. So far there has also been no visible tendency in the practice of Polish civil courts to consider such cases under general regime of public authority liability. But such possibility has been invoked by the Polish government before the European Court of Human Rights and the latter seemed prepared to consider it as a remedy fulfilling the requirements of Article 5(5).[27] However, the Court expects the compensatory remedy against violation of Article 5(3) based on general regime to be confirmed in domestic judicial practice before considering it as effective and satisfactory.[28]

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[26] See *ibidem*, Vol. I, p. 239.

[27] See *ibidem*, with reference to ECHR judgments in cases of *Ryckie v. Poland* of 30 January 2007 and *Bruczyński v. Poland* of 4 November 2008.

[28] See the judgment of the ECHR in the case of *Wereda v. Poland* of 26 November 2013, § 55: "[…] [E]ven assuming that an action for damages could be an effective remedy in the context of a complaint about the allegedly excessive length of detention, it is first noted that this can be said to

The special compensatory remedies provided in Article 552 of the Code of Criminal Procedure do not apply in case of minors whose wrongful convictions or detentions are to be compensated within the general regime.[29]

Interaction between domestic compensatory remedies and "just satisfaction" awarded by the European Court of Human Rights

The following remarks concern the consequences of establishing state responsibility for violation of the ECHR for the availability of domestic compensatory remedies by the victim of the violation in Polish legal system. The remarks do not tackle all effects of the judgments of the European Court of Human Rights in Polish law, though it should be mentioned that the effects include a possibility to re-open criminal proceedings which is provided *expressis verbis* in Article 540 § 2 Polish Code of Criminal Proceedings. Such possibility has not been proved possible within civil proceedings – following a period of swinging jurisprudence, the Supreme Court held in 2010 that a judgment of the European Court of Human Rights does not constitute a basis for re-opening of civil proceedings.[30] Let us recall that the judgments of the Strasbourg Court cannot quash any domestic judicial decisions *per se* or oblige domestic courts to re-open proceedings, nevertheless, in some cases the re-opening of civil proceedings might happen to be the most suitable way of providing redress and apply the principle of *restitutio in integrum*. Be it as it may, the current position of the Polish Supreme Court as regards impossibility to re-open civil proceedings following the judgment of the Strasbourg Court is a valid reason for pursuing alternative ways of redress. Obviously, the most appropriate alternative to re-opening is to be found in the general regime of public authority liability, however, it is premature to say whether this option would be really feasible and effective.

The judgment of the Strasbourg Court finding a violation of the Convention by Polish public authorities usually specifies what kind of action or omission by state authorities was found to be an internationally wrongful act and caused the violation complained of. Although every act of state may be subject to the Court's scrutiny under the ECHR, it is extremely rare that the Court finds that the adoption of a domestic normative act (or the act itself) violates the Convention. But assuming that the Court finds such a violation, then it can be argued that it opens the door for the application of Article 417^1 § 1 of the Civil Code which

be the case only when that detention has come to an end and when the availability and practicability of such a remedy under the domestic system must be convincingly established, either by reference to a specific provisions of domestic law or to established and consistent practice of national courts."

[29] See Z. Banaszczyk, *op. cit.*, p. 277.

[30] See judgment of the Supreme Court of 30 November 2010 (ref. No. III CZP 16/10).

provides for the possibility to seek reparation of damage caused by issuance of a normative act after an establishment in relevant proceedings that the act is not in conformity with *inter alia* "ratified international agreement."

It is far more common that the European Court of Human Rights founds a violation of the ECHR due to a domestic judicial or administrative decision. It has been rightly suggested in the doctrine of civil law that also in this case the general regime of public authority liability would be applicable.[31] According to Article 417^1 § 2 of the Civil Code, reparation for damage caused by a (final) judgment or decision may be sought after establishing "in relevant proceedings" that the judgment or decision complained of had been unlawful. The proceedings before the Strasbourg Court should then be regarded "relevant" for the purposes of the above mentioned provision.

The very possibility of claiming damages following a judgment of the European Court of Human Rights which found a judicial decision (or, rarely, a domestic normative act) unlawful under the Convention, needs to be reviewed in the context of possible award to the applicant (victim of the violation) of "just satisfaction" under Article 41 of the Convention. Let us note that this is an optional and discretional competence of the Strasbourg Court. Article 41 of the ECHR allows the Court to award "just satisfaction" when a violation of the ECHR was found a n d "if the internal law of the High Contracting Party concerned allows only partial reparation to be made." It should be recalled that "just satisfaction" in the meaning of Article 41 ECHR might be awarded both for pecuniary and non-pecuniary damage. In practice there are two (or three) possible scenarios: the Strasbourg Court may rule that the very finding of violation "constitutes in itself just satisfaction" (option I), or may award just satisfaction for pecuniary and/or non-pecuniary damage in the same judgment which established a violation (option II), or finally, the Court may adjourn its decision as to application of Article 41 after finding a violation of the Convention (option III).

Let us review the above mentioned options in the background of Polish general regime of public authority liability. As regards option I, it appears that the Court's decision not to award any just satisfaction to the victim of a violation and considering the very judgments as "just satisfaction" is not binding on domestic courts. It is the unlawfulness of the domestic judicial ruling or decision – found in "relevant proceedings" as well as existence of damage – which is crucial in this context, and not the Court's decision under Article 41 ECHR. Nevertheless, it is uncertain to what extent the domestic court would be influenced by the fact that the Court decided not to make any awards under Article 41.

In option II – which seems to be most common in the Court's judicial practice – the victim of a violation is awarded compensation for pecuniary or (most frequently) non-pecuniary damage. For reasons of space limits it is not possible

[31] See E. B a g i ń s k a, *op. cit.*, p. 359; Z. B a n a s z c z y k, *op. cit.*, p. 349 *et seq.*

to discuss here the Court's policy and jurisprudence under Article 41. Suffice it to say that while compensation for pecuniary damage is awarded to the full extent of damage (*damnum emergens* and *lucrum cessans*) proven by the applicant and directly caused by the violation, the compensation for non-pecuniary damage is generally based on the principle of equity.[32] With regard to the possibility to claim compensation for pecuniary or non-pecuniary damage in Polish general regime of public authority liability, I share the view that an award of "just satisfaction" under Article 41 does not deprive the applicant to submit further claims under Article 417 *et seq.* of the Polish Civil Code.[33] This is justified in view of the principle of full compensation which is not in any way limited in respect of damage caused by actions of public authorities.[34] The sums awarded by the Strasbourg Court under Article 41 would in all probability need to be taken into account by Polish courts in assessing claims submitted under Article 417 *et seq.* of the Polish Civil Code.

Let us now comment on the third option mentioned above, and notably when the Court finds a violation of the Convention but adjourns its ruling under Article 41. This situation is rather uncommon though it occasionally happens in the current Court's practice. An adjournment of this kind would usually be necessary when the issues under Article 41 are not ready for decision. It is supposed that the respondent State and the applicant in such cases would submit further observations and/or enter into negotiations as to compensatory issues. The parties may arrive at a friendly settlement as regards compensatory claims. Such a settlement is subject to the Court's approval. In theory it is advisable that no claims under domestic regime of public authority liability be examined by domestic courts while the application of Article 41 is still unresolved in Strasbourg. However, following the Court's judgment which found a domestic ruling contrary to the Convention, the prerequisite of establishing unlawfulness "in relevant proceedings" is fulfilled. Thus it is hard to indicate a reason for a civil court to dismiss a claim under Article 417^1 § 2 of the Civil Code is such a situation. As a matter of fact it could be argued that the domestic proceedings should be considered as the best way to resolve the applicants' compensatory claims. This is justified by the principle of subsidiarity which is underpinning the Convention since its adoption and has recently been agreed to be included into its Preamble.[35]

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[32] For extensive analysis see K. O l i p h a n t, K. L u d w i c h o w s k a, "Damage," [in:] *Tort Law in the Jurisprudence of the European Court of Human Rights*, eds. A. Fenyves, E. Karner, H. Koziol, E. Steiner, Berlin–Boston 2011, p. 397–447.

[33] See E. B a g i ń s k a, *op. cit.*, p. 360–361; Z. B a n a s z c z y k, *op. cit.*, p. 351–352.

[34] Z. B a n a s z c z y k, *op. cit.*, p. 351–352.

[35] See Article 1 to Protocol No. 15 to the Convention adopted on 16 May 2013 (not yet in force), which shall add the following paragraph at the end of the Preamble to the ECHR: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto,

This brings us to the last point and notably a brief evaluation of compensatory remedies available in Poland under general regime of public authority liability against the current practice of the Court concerning the application of Article 41 of the ECHR. In other words, it is worth considering whether the remedies offered under general regime of Polish civil law to victims of human rights violations may successfully "replace" the awards on the basis of Article 41. Generally speaking, it is unlikely that domestic compensatory remedies would indeed induce the Court to restrict its application of Article 41 a f t e r finding a violation of the Convention. There are several reasons behind this supposition and only some of them are related to the domestic remedies themselves. The European Court of Human Rights has considerably departed from the original wording of Article 41 which stipulates – as was mentioned above – that the competence to award "just satisfaction" d e p e n d s whether the internal law of the respondent State allows for full reparation to be made. If it does allow it, then according to the literal meaning of Article 41 the Court can hardly be entitled to award "just satisfaction."

In the Court's jurisprudence of the 1970s and 80s there has been more adherence to the exact meaning of the then Article 50 of the Convention.[36] The Court usually cared to verify if domestic law allowed for full reparation if the issue was far from obvious. But over the years the application of Article 41 of the ECHR started to be more automatic in the sense that the Court seemed less interested in the literal meaning of this provision. Instead, the Court opted for elaborating its own doctrine of reparation for violation of the Convention. The Court's judicial policy is of course rooted in Article 41, however, the part of this provision referring to availability of "full reparation" in domestic law is not a priority when the Court applies Article 41 and awards just satisfaction. Arguably, the Court developed specific (secondary) rules of state-parties' responsibility under the Convention which include determination of the consequences of the violation without the necessary reference to compensatory remedies available in domestic law. This might be partly explained by the fact that the Court is fully entitled to determine the consequences of the violation of the ECHR, within the limits provided by the Convention itself as well as the rules of general law of international state responsibility. It can be expected that the Court continues to apply Article 41 of the ECHR this way since so far there seem to be no plans within the Council of Europe member states to amend this provision or introduce other changes as regards "just satisfaction." It could be mentioned however that there has been an interesting proposal to "repatriate" compensatory claims under the Convention,

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and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

[36] Protocol No. 11 to the ECHR which entered into force on 1 November 1998 slightly changed the then Article 50 and renumbered it into Article 41.

i.e. to entrust domestic courts with the competence to determine compensation for pecuniary and non-pecuniary damage following the judgment of (and instead of) the Court.[37]

Against this background it needs to be observed that availability of compensatory remedies in Polish civil law in case of damage caused by actions of public authority is not likely to radically change the attitude of the Court as to the application of Article 41. The reasons for this assumption lay more on the part of the Court itself than on the deficiencies of compensatory remedies available in Polish legal system. Nevertheless, it should be noted that so far there is hardly any domestic jurisprudence which would illustrate the application of general regime of public authority liability after a violation of human rights was found by the European Court of Human Rights in a case against Poland.

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[37] See on that proposal E. Steiner, "Just Satisfaction under Art. 41 ECHR: A Compromise in 1950 – Problematic Now," [in:] *Tort Law in the Jurisprudence*..., p. 24.

Teresa Dębowska-Romanowska
Professor of Law, University of Łódź

LIMITATIONS ON GOVERNMENT DEBT AND PUBLIC DEFICIT

1. Preface

Since the entry into force of the Constitution of the Republic of Poland of 1997, Poland has developed a system of financial restrictions referring up to the national public debt and principles of setting a State's budget deficit. Constitutional restrictions are also aimed at a protection of Polish currency (ban on covering the deficit with issue of money).

The Constitution ensures the full independence of the National Bank of Poland and Council for the Monetary Policy from other branches of power. It puts emphasis on the responsibility of these bodies for the value of Polish currency. Above standards are strengthened by preventive and warning system developed by law, which role is to make it impossible to exceed constitutional limits of the public national debt. In addition, there is a special so called "expenditure rule" (came into force in 2014) limiting the increase in State expenditures. This rule is more flexible than budgetary rules instituted in the European Union and concerning budget deficit in EU Member States as is intended to bring counter-cyclic effect.

The last rulings of the Constitutional Tribunal give the priority to the balance of the public finances over other constitutionally protected values, assuming that keeping this balance guarantees the sovereignty of State.

2. Budgetary procedure

Entitlement (and at the same time duty) to prepare the draft State budget is assigned for government. In accordance with Article 221 of the Constitution, "the right to introduce legislation concerning a Budget, an interim budget, amendments to the Budget, a statute on the contracting of public debt, as well as a statute granting financial guarantees by the State, shall belong exclusively

to the Council of Ministers." This right of legislative initiative is not restricted in any way and the government remains the main decision-making centre of the budget politics. The draft State budget submitted in the parliament is subject to follow-up works in the course of the budgetary procedure. Amendments are permitted with one exception – the increase in spending or the reduction in revenues from those planned by the Council of Ministers may not lead to the adoption by the Sejm of a budget deficit exceeding the level provided in the draft budget. It means that the matter of proposed amendments and their effects are determined by an assumed annual budget deficit. Deputies may propose amendments both individually, and in a group. The Senate [upper House of Parliament] may, within the 20 days following receipt of the Budget, adopt amendments thereto.

According to Article 219 of the Constitution, the Sejm [lower House of Parliament] shall adopt the State budget for a fiscal year by means of a budgetary statute. Budgetary statutes are an inherent element of the political system, although each one is in force for a year. Under the Polish law, annual passing the budgetary statutes is a constitutionally protected value. It is seen in fundamental stages of a budgetary procedure. The Council of Ministers shall submit to the Sejm a draft budget for the next year no later than 3 months before the commencement of the fiscal year. In exceptional instances, the draft may be submitted later. The draft State budget submitted in the parliament is subject to follow-up works in the course of the budgetary process.

The President of the Republic shall sign the Budget or interim Budget submitted to him by the Marshal of the Sejm within 7 days of receipt thereof, and order its promulgation in the Journal of Laws of the Republic of Poland. President is not allowed to refer the budget to the Sejm for its reconsideration (the veto power is not applicable). If the President of the Republic has made reference to the Constitutional Tribunal for an adjudication upon the conformity to the Constitution of the budget or interim budget before signing it, the Tribunal shall adjudicate such matter no later than within a period of 2 months from the day of submission of such reference to the Tribunal.

3. State expenditures

Public expenditures are included in budget in the different scope. For example, financing the pension system is based on social security contributions [kind of tax], paid to the public funds of special purpose (Social Insurance Fund, Agricultural Social Insurance Fund). It refers also to health benefit payments. In the light of Polish Constitution, it cannot take place freely to create that kind of funds. Budgets of that kind of funds shall be included in the State budget.

4. Limits on annual budget deficit and their bases

Limits on annual budget deficit are imposed by the law of the European Union (e.g. Article 140 of Treaty on the Functioning of the European Union), which refers to the excessive deficit procedure. Domestic law establishes indirectly limit for the deficit by prevention of an increase in expenditures. According to the previous regulations, the increase in State expenditures could not take place about more than 1% over the rate of the inflation. Current rule is about more compound character and appoints increase in expenses by referring to GDP calculated for the period of last 6 years (with GDP in year of planning and prognosis for the next year) and to the inflation. A set of corrections of main macroeconomic indicators is also applicable. As a result, expenses are supposed to grow less in the period of the economic growth and more in the period of a downturn. Moreover, if the public national debt up to GDP is expressed within the relation of 55–60%, then the government submits the draft State budget not providing budget deficit and takes the sequence of acts aimed at the spending cut. Crossing the threshold of 60% of the national debt to GDP requires also submitting the plan of lowering this indicator, because – in accordance with Article 216 section 5 of the Constitution – it shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. It cannot be overestimated, that budgetary statute shall not provide for covering a budget deficit by way of contracting credit obligations to the State's central bank. However, there is no order for the government to repay the deficit of the previous year with expenses of the current year.

As it was mentioned, the limit on the public national debt set at the level of 60% GDP arises from the Constitution. It means that it would require the same majority in the parliament as needed to amend Constitution in order change this restriction. In consequence, in contrary to the statutory solutions which are sometimes suspended, constitutional regulations remain fully effective.

If the limit on the public national debt set at the level of 60% GDP is exceeded, members of government may be held liable before the Tribunal of State.

5. State-owned public entities (mail, railways) and State budget

In respect of budgetary law, entities such as state railway or public post office are treated separately what results from their legal status as companies or state enterprises. They are liable on their own for their obligations. However, that kind of debts may be guaranteed by the State.

6. The deficit and the debt of local governments

Poland is a unitary state what influences the internal administrative division of the country. The division of financial power in unitary country is different than in federal states. Basic self-government units are communes (2479 communes in 2014). Groups of a few communes are a member of larger units – of districts (380 districts in 2014). Provinces called "voivodships" are the biggest self-government units (16). Voivodships are not classical regions, although their status is the nearest to regional units.

Budgets of self-government units are financial plans separate from State budget. Budgetary resolutions are an inherent element of the local political system, although each one is in force for a year. Under the Polish law the debt of the self-government sector is subject to restrictions.

Firstly, financing the deficit can take place exclusively from the sources indicated in the statute. Secondly, it is possible that self-government unit covers the deficit with the revenues from loans, credits and emission of bonds, but in that case the debt in the given fiscal year from the mentioned titles cannot exceed changeable rates based on: values of current incomes reduced by current expenses, but enlarged for takings from the sale of the wealth. Thirdly, the general financial situation of the State affects the limit of the debt of self-government units. If the public national debt exceeds the 55% of GDP, expenses of the self-government unit planned in the budget resolution for the following year can exceed incomes only by the sums associated with investments covered with non-refundable transfers from foreign sources.

We are watching currently growing statutory limitation on the overdraft facility of self-government bodies. If rules and regulations concerning the deficit and debt of the local government are breached, it requires rectification proceedings. It is not permitted to start new investment during this process. Self-government unit make only obligatory expenses. The lack of the repair plan initiates proceedings before the quasi-court organ of the supervision of the local units financial management.

It is worthwhile showing that contracting obligations in the way contrary to the public finance law does not result in the invalidity sanction of juridical acts. However, there may arise a responsibility for the infringement of the budgetary discipline.

Janusz Trzciński
Professor of Law, University of Warsaw and University of Wrocław

Michał Szwast
M.Sc., advocate trainee

SOCIAL AND ECONOMIC RIGHTS AS FUNDAMENTAL RIGHTS

1. Constitutional protection of social rights

The Constitution of the Republic of Poland of 2nd April, 1997 in the 2nd Chapter, under the subchapter titled "Economic, social and cultural freedoms and rights" lists a number of rights that belong to the group of social rights. The Constitution ensures protection of these rights, but the level thereof is different. Some of the social rights are articulated as subjective rights, whereas other as programme norms (in other words, principles of state policy). In the case of the latter it is often claimed that they may not serve as the basis for pursuing rights in court or by way of a constitutional complaint procedure, since they do not constitute subjective rights. Large part of social rights may be asserted only within the scope specified in ordinary acts, which results from art. 81 of the Constitution ("The rights specified in Article 65, paras. 4 and 5, Article 66, Article 69, Article 71 and Articles 74–76, may be asserted subject to limitations specified by statute"). This does not compromise their legal significance, although quite substantially enfeebles it.

Among the social rights included in the Constitution of the Republic of Poland, that have the nature of subjective rights, the following may be listed:

– employee's right to minimum level of remuneration for work (art. 65 sec. 4 of the Constitution);

– right to safe and hygienic conditions of work (art. 66 sec. 1 of the Constitution);

– employee's right to statutorily specified days free from work as well as annual paid holidays (art. 66 sec. 2 of the Constitution);

– right to work within the maximum permissible hours of work as specified in statute (art. 66 sec. 2 of the Constitution);

– right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age (art. 67 sec. 1 of the Constitution);

– right to social security for citizens who are involuntarily without work and have no other means of support (art. 67 sec. 2 of the Constitution);

– right to protection of health (art. 68 sec. 1 of the Constitution);

– right to education, free of charge in public schools (art. 70 sec. 1 and 2 of the Constitution);

– right of a family in difficult material and social circumstances – particularly one with many children or a single parent – to special assistance from public authorities (art. 71 sec. 1 of the Constitution);

– mother's right – before and after birth – to special assistance from public authorities (art. 71 sec. 2 of the Constitution);

– right of a child deprived of parental care to care and assistance provided by public authorities (art. 72 sec. 2 of the Constitution).

At the same time the Constitution of the Republic of Poland expresses a number of principles of state policy (programme norms) that refer to the realm of social and economic security of an individual. Among them the following norms should be mentioned:

– Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention (art. 65 sec. 5 of the Constitution);

– Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute (art. 68 sec. 2 of the Constitution);

– Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age (art. 68 sec. 3 of the Constitution);

– Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment (art. 68 sec. 4 of the Constitution);

– Public authorities shall support the development of physical culture, particularly amongst children and young persons (art. 68 sec. 5 of the Constitution);

– Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication (art. 69 of the Constitution);

– Public authorities shall ensure universal and equal access to education for citizens. To this end, they shall establish and support systems for individual financial and organizational assistance to pupils and students. The conditions for providing of such assistance shall be specified by statute (art. 70 sec. 4 of the Constitution);

– Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen (art. 75 sec. 1 of the Constitution);

– 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 (art. 76 of the Constitution).

Particular social rights listed in the Constitution are vested in various entities. Most of the social rights are granted to "everyone" – hence in line with constitutional terminology – to every individual, both Polish citizens as well as foreigners. However, only Polish citizens are subjects of some of them. This refers to the right to social security, also the tasks of public authorities consisting in pursuing the policy that supports fulfilment of housing needs, ensuring universal and equal access to education and equal access to health care services, apply exclusively to Polish citizens. The Polish Constitution, among the subjects of some social rights (see above) lists also: employees, children, families, mothers, pregnant women, persons with disabilities, senior citizens, pupils and students.

Entities responsible for execution of social rights are defined in the Polish Constitution as "public authorities." Based on constitutional terminology, public authorities are both governmental bodies (in particular the legislator responsible for establishing universally applicable law that ensures execution of rights guaranteed in the Constitution), as well as the bodies of local government. In other words, the term of public authorities refers to any body and institution within the structure of state power or local government, as well as those executing commissioned tasks within the scope of administration.[1]

Some obligations that result from various constitutional social rights are addressed to private entities. This refers, for example, to employee rights and certain, related with them obligations of employers (and similar entities). However, in the doctrine of constitutional law it is pointed out that employer's obligation is established only when subjective rights listed in the Constitution are specified statutorily. In other words, we cannot refer to directly horizontal effect of subjective rights related to work and specified in the Constitution because employer's obligations are established only at the level of an ordinary act.[2] This refers, for example, to the provision included in art. 66 sec. 1 of the Constitution, which reads: "Everyone shall have the right to safe and hygienic conditions of work. The methods of implementing this right and the obligations of employers shall be specified by statute." The obligations under mentioned law are addressed in the first

[1] See L. G a r l i c k i, "Commentary on art. 65 of the Constitution, note 10," [in:] *Constitution of the Republic of Poland. Commentary*, Vol. III, Warsaw 2005.

[2] See L. G a r l i c k i, "Commentary on art. 66 of the Constitution, note 4," [in:] *Constitution…*

instance to the legislator, who is responsible for specifying the manner of execution of this right in a statute.

In our opinion, the Polish Constitution does differentiate between the scope and methods of protection of social and other rights, especially personal and political rights. Personal and political rights are expressed in the Constitution of the Republic of Poland as subjective rights – therefore they may serve as the basis for individual claims against public authorities, they may be asserted in court and may serve as the basis for lodging constitutional compliant. Therefore we believe that personal and political freedoms and rights specified in the Constitution are well protected and articulated in such a manner, that an individual may use them before court, Constitutional Tribunal and other public authorities.

However, the social rights expressed in the Constitution are formulated in an inadequate way from the perspective of the possibility of building on their basis subjective right. Substantial part of social rights in Polish Constitution has been articulated as programme norms (such norms that prescribe achievement of a certain goal or pursing its achievement) – not addressed directly to an individual, but to public authorities. Therefore it is not entirely clear whether these norms may serve as the basis for individual claims against the state, for example for lodging by an individual of constitutional complaint. Significant number of representatives of Polish constitutional law doctrine assesses that no subjective rights can be derived from the provisions of the Constitution within the scope of social rights expressed as programme norms (B. Banaszak, L. Garlicki). For these reasons significant number of commentators assesses that these provisions cannot serve as the basis for submitting constitutional complaint to Constitutional Tribunal.

We believe, however, that social rights expressed in the Constitution of the Republic of Poland as programme norms addressed to public authorities are not deprived of legal significance. Every social right includes certain minimum indicated by its essence. It means that public authorities cannot establish regulations preventing execution of a given right below its minimum and are obliged to draw up regulations that ensure this right at minimum level. Therefore it should be emphasized that it may happen that public authorities infringe social rights expressed in programme norms in such a way, that an individual will be able to put forward claims against the state as a result of such violation. For example, such a situation will take place when the legislator violates programme norm by adopting an act which impedes the essence of a given social right – art. 31 sec. 3 of the Constitution absolutely prohibits limiting the essence of rights and freedoms stipulated in the Constitutions (including social rights). There is a borderline marking the minimum rights below which we are dealing with violation of the Constitution. Programme norms should be interpreted in such way, that they determine the minimum rights of an individual which are equivalent to minimum obligations contained in programme regulations and imposed on the public authorities.[3]

[3] See J. T r z c i ń s k i, "Commentary on art. 68 of the Constitution, note 7," [in:] *Constitution*...

Indicated structure gives grounds to claim that basing on the programme norms individuals may pursue their rights in court as well as by way of constitutional complaint procedure. Programme norms regarding social rights may not be interpreted only as a declaration or manifesto designating goals of public authorities, since it would be against the provision of art. 8 sec. 1 of the Constitution, which reads "The Constitution shall be the supreme law of the Republic of Poland."[4] This view was shared by Constitutional Tribunal when it pointed out that execution of a constitutional social right may never fall below the minimum as prescribed by the essence of a given right.[5]

There is also another way of differentiation between the scope of protection of certain social rights – on the one side, and personal and political rights and freedoms – on the other side. In line with art. 81 of the Constitution. "The rights specified in Article 65, paras. 4 and 5, Article 66, Article 69, Article 71 and Articles 74–76, may be asserted subject to limitations specified by statute." Such an expression limits the direct applicability of the rights indicated in art. 81 of the Constitution. In order to make an individual be able to pursue claims under these rights, it is necessary to indicate – apart from constitutional basis – also the provision of a statute which specifies a given constitutional right. In other words, the possibility of pursuing rights, referred to in art. 81 of the Constitution, is based on validity of a statute that specifies the content, subjective and objective scope as well as the manner of asserting a given right.[6]

In our opinion effectiveness of the protection of constitutional social rights is average or even – one might say – poor. The Supreme Court judicature established an opinion that most constitutional regulations within the scope of social rights have only the nature of programme norms addressed first of all to public authorities and only in the second instance to an individual. The Supreme Court emphasizes in its judicature that the principles of state policy do not generate directly subjective rights and citizen's claims, they must be specified by the legislator and do not impose on the courts the obligation to undertake actions aimed at execution of these principles by their direct application.[7]

Moreover, it might be difficult to refer to originality of Polish constitutional regulations regarding social rights in comparison to other European states. In our opinion Polish solutions in this field do not differ much (neither in positive, nor negative way) from the norms of other European states, as well as the regulations included in the EU Charter of Fundamental Rights. In European states the provisions regarding social rights have been standardised or even made uniform. We could refer to originality of constitutional regulations, if, for example, the Constitution provided for the right to work as individual's subjective right.

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[4] *Ibidem*.

[5] See judgement of Constitutional Tribunal of May 8th, 2000, SK 22/99.

[6] See, for example, ruling of the Constitutional Tribunal of January 12th, 2000, Ts 62/99.

[7] See resolution of the Supreme Court of May 19th, 2000, ref. No. III CZP 4/00.

2. Social rights in Polish legal scholarship

The Polish doctrine of constitutional law distinguishes, among other human rights, the significance of social rights and the need to protect them. The most disputable issue however is the scope of protection of these rights, namely whether these rights are individual's subjective rights that may provide the grounds for the claims against the state, or whether they are only programme norms that prescribe that state authorities should achieve or pursue a specific goal. In other words, direct legal effectiveness of social rights is the most debated issue in the doctrine. Whereas it is generally accepted in the doctrine that ensuring minimum protection of social rights is a necessary premise to apply within the principle of human dignity as expressed in art. 30 of the Constitution of Poland. It is aptly indicated in the doctrine that "man deprived of proper living conditions (food, clothing, roof over their head), as well as health care or education, lives below human dignity."[8]

Social rights are perceived in the doctrine as different from other types of constitutional social rights and freedoms, especially from first generation rights and freedoms (personal and political). While personal and political rights and freedoms always constitute individual's subjective rights, the normative structure of some constitutional social rights raises doubts in the doctrine. It is indicated that these are positive rights (rights-entitlements, providing rights), which order public authorities to undertake specific actions addressed to an individual.[9] According to the doctrine, due to the subject matter of social rights protection (e.g. employment, education, health), proper execution thereof depends to a large extent on state's financial capacities and is the subject of political decisions to determine priorities and allocation of available funds.[10] It is also pointed out[11] that there are three fundamental elements distinguishing social rights from first generation rights and freedoms. First of all, constitutional social rights leave more room to be precisely specified at the level of ordinary acts. Secondly, social rights allow more freedom to the legislator in specifying manner of execution and scope of permissible restrictions for these rights. In view of L. Garlicki, presumption of compliance with the Constitution has a stronger effect with reference to social rights than with respect to the regulations related to personal or political status of an individual. Thirdly, some of the social rights guaranteed in the Constitution may be asserted subject to limitations specified by statute, which weakens – although does not blight – their legal significance.[12]

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[8] J. O n i s z c z u k, *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne* [Social rights and freedoms and constitutional case law], Warszawa 2005, p. 47.

[9] See B. B a n a s z a k, *Prawa i wolności obywatelskie w Konstytucji RP* [Citizen's rights and freedoms in the Constitution of Poland], Warszawa 2002, p. 30–31.

[10] See L. G a r l i c k i, "Commentary on art. 64 of the Constitution, note 1," [in:] *Constitution*...

[11] See *ibidem*, note 6.

[12] See art. 81 of the Constitution.

The concept of minimum rights of an individual, which are equivalent to minimum obligations rested with the public authorities contained in programme regulations related to social rights, may be considered the most original contribution of the Polish legal doctrine to the studies on social rights (see point I of the Article).

3. Protection of social rights under other constitutional rules and principles

The Constitution of the Republic of Poland sets forth a number of measures for protection of human rights and among them also social rights. Based on art. 77 sec. 1 of the Constitution, 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. Statute may not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights (art. 77 sec. 2 of the Constitution). According to the contents of art. 78 of the Constitution, each party has the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute. Article 79 of the Constitution introduced individual's right to lodge constitutional complaint to Constitutional Tribunal. In accordance with this provision anyone 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. Moreover, as it is provided for in art. 80 of the Constitution of the Republic of Poland, everyone – in accordance with principles specified by statute – shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority. Furthermore the following constitutional principles provide for protection of human rights: everyone has the right to a fair and public hearing of a case, without undue delay, before a competent, impartial and independent court (art. 45 sec. 1 of the Constitution), at least two stages of court proceedings (art. 176 sec. 1 of the Constitution), courts and tribunals shall be separate from and independent of other branches of power (art. 173 of the Constitution), administration of justice implemented by courts (art. 175 sec. 1 of the Constitution), statutory regulation of organizational structure and jurisdiction of the courts (art. 176 sec. 2 of the Constitution), independence of judges and its guarantees (art. 178–181 of the Constitution).

We should also emphasize the general regulation provided in art. 31 sec. 3 of the Constitution which determines the scope of permissible limitations of rights and freedoms specified in the Constitution. "Any limitation upon the exercise of

constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

Various principles ensuring protection of human rights have been derived by the Polish Constitutional Tribunal from art. 2 of the Constitution of the Republic of Poland, which stipulates that "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice." Among them the following should be listed: principle of proper legislation, principle of protecting citizens' trust in the state, principle of legal certainty, non-retroactivity of the law, principle of ensuring proper *vacatio legis*, principle of protecting rights properly acquired, principle of protecting maximally established expectations, principle of specificity of legal provisions, principle of proportionality (no excessive interference). These principles were formed by Polish Constitutional Tribunal and are applied as the basis for rulings of common and administrative courts. Other constitutional principles that protect human rights include among others: principle of legality, principle of direct application of the Constitution, principle of separation of powers, principle of human dignity and principle of equality. Also key importance should be assigned to the principle of social justice, expressed in art. 2 of the Constitution, that imposes on public authorities the obligation to care for social legislation and its execution.[13]

4. Impact of the international protection of social rights

Poland is a party to a number of international agreements that refer to social rights. These agreements constitute a part of domestic legal order, are directly applicable (art. 91 sec. 1 of the Constitution) and should be respected (art. 9 of the Constitution). Among the international agreements signed by Poland with reference to social rights, the following examples may be listed: International Covenant on Economic, Social and Cultural Rights (ICESCR), European Convention for the Protection of Human Rights and Fundamental Freedoms, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union, European Social Charter, Convention on the Rights of Persons with Disabilities, Convention on the Rights of the Child, series of conventions of International Labour Organization, for example Convention No. 102 of International Labour Organization concerning Minimum standards of social security and many others. It is also worth to mention several acts from the legislation of European

[13] See J. O n i s z c z u k, *op. cit.*, p. 37.

Union that impact the issue of social rights within the Polish legal order, among others: Directive of the Council 2000/78/EC of November 27th, 2000 establishing a general framework for equal treatment in employment and occupation, Directive 2002/73/EC of European Parliament and the Council of September 23rd 2002 amending the Directive of the Council 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, or regulation of European Parliament and the Council (EC) No. 883/2004 of April 29th, 2004 on coordination of social security systems.

Application of international agreements listed above is visible in the judicature of common courts, administrative courts and the Supreme Court. With respect to the process of law establishment the most significant effect may be observed not so much in the case of the essence of social rights, as in the case of the issue of anti-discrimination policy pursuant to social rights. Poland has introduced series of solutions into its legislation that prevent discrimination in employment, for example, due to age, disability or sexual orientation, as well as a principle of equal pay for work of the same value.

Impact of the judicature of European Court of Human Rights on the Polish legislation regarding social rights is rather of marginal significance, since European Court of Human Rights in general very seldom (not only in Polish cases) pronounces violation of the Convention concerning the essence of social rights, i.e. failure to fulfil by the state the positive obligation in the scope of these rights, for example, consisting in ensuring a certain social benefit. Two examples of rulings of European Court of Human Rights in the cases against Poland with respect to execution of social rights may be discussed at this point. The violations found by European Court of Human Rights referred to anti-discrimination issues or right to fair trial, rather than to the essence of social rights.

In the judgment of November 27th, 2007 in the case *Łuczak v. Poland* (complaint No. 77782/01), European Court of Human Rights found that Poland violated art. 14 of the Convention with reference to art. 1 of the Protocol No. 1 to European Convention on Human Rights. The case *Łuczak v. Poland* refers to a French farmer, living and running a farm in Poland, who was refused access to the Polish system of farmers' social insurance due to lack of Polish citizenship, despite the fact he met all of the other requirements necessary to be qualified to the system of this insurance. What is more, Łuczak as an employer paying taxes and contributions, supported the system of farmers' social insurance. European Court of Human Rights pronounced violation of art. 14 of the Convention with reference to art. 1 of the Protocol No. 1 to European Convention on Human Rights and unjustified diversification of the legal situation in the access to farmers' social insurance system. The Court highlighted also that Polish authorities failed to substantiate the discriminatory nature of Polish legislation. European Court of Human Rights pointed out, that even if there had been very serious reasons for

excluding someone from the insurance system, such person should not have been left in a situation, in which they were entirely deprived of insurance and had their possibility of living a normal life threatened.

Important judgement of European Court of Human Rights referring indirectly to social rights is the judgement of September 15th, 2009 in the case *Moskal v. Poland* (compliant No. 10373/05).[14] Factual circumstances in the case were as follows. In August 2001 Maria Moskal submitted a request for granting her earlier retirement pension entitlement for employees who raise children that require constant care. The petitioner along with other documents required for granting retirement pension submitted also medical certificate stating that her seven-year-old son suffered from a serious disease. In August 2001 Polish Social Insurance Institution issued a decision granting the woman earlier retirement entitlement, withholding at the same time payment thereof until the time the woman gave up her current work, which the petitioner did immediately. After 10 months Polish Social Insurance Institution resumed the proceedings with reference to granting the petitioner entitlement of retirement pension. As a result of this procedure this Institution found that health condition of her son did not justify granting her the right to earlier retirement pension. Therefore Polish Social Insurance Institution issued a decision withholding payment of the benefit and revoking the previous decision on granting her earlier retirement entitlement. The decision was sustained by Polish courts.

European Court of Human Rights pronounced that in this case the principle of proportionality was not observed, which should be interpreted as a balance between protection of social interest and protection of rights and freedoms guaranteed in European Convention on Human Rights. Firstly, property right of the petitioner was established upon the moment of granting her by a body responsible for retirement administration, the right to earlier retirement based on the documents submitted by her in good faith and undoubtedly influenced petitioner's and her family's situation. Secondly, the time that passed between the moment of granting her the right to the benefit to the moment when Polish Social Insurance Institution became aware of the mistake, was relatively long and on the other hand, immediately after the mistake was revealed the decision to abandon payment of the benefit was issued very fast and with immediate effect. Due to the fact, that retirement administration body made the mistake only through its fault, without any participation of third parties, the principle of proportionality should be interpreted in a particularly restrictive manner. The Court observed, that Ms Moskal was entirely, and practically overnight, deprived of earlier retirement entitlement that constituted her only source of income, and considering country's economic

[14] See the detailed commentary to *Moskal v. Poland* case by M. Szwed, available at: www.prawaczlowieka.edu.pl/index.php?orzeczenie=dd2dfa50dc8feca1e5303a87b2c6a42db3ebe102-b0 (last accessed on January 30, 2014).

situation and age of the petitioner – she could have had serious difficulties in finding new job, having given up her previous employment. The Court found that Poland violated art. 1 of the Protocol 1 to the European Convention on Human Rights. After issue by European Court of Human Rights of the judgement discussed above, Polish Constitutional Tribunal found that the provision of art. 114 sec. 1a of the act of December 17th, 1998 on retirement and disability pensions from Social Insurance Fund – constituting a basis for withholding the payment of retirement pension in the case *Moskal v. Poland* – was inconsistent with the principle of citizens' trust in the state and law established by it, stemming from art. 2 and art. 67 sec. 1 of the Constitution of the Republic of Poland.[15]

5. Social rights in ordinary legislation

Particular social rights expressed in a general sense in the Constitution are specified at the level of ordinary legislation in several dozen, or even several hundreds of normative acts. The issue concerning the conformity of these acts with the Constitution would require in-depth analysis of the norms included in these normative acts in terms of execution of the constitutional norms. So far in the Polish literature there have been no academic studies that would be dedicated to this issue in a comprehensive manner.

It should be stressed that one of key principles of Polish constitutionalism is the presumption of conformity normative acts at the lower level in the hierarchy of sources of law with Constitution. In other words, a statute is considered compliant with the Constitution, unless Constitutional Tribunal, acting at the request of an authorised entity (never *ex officio*) in the course of a procedure provided for in the Constitution, decides it is unconstitutional. This principle is fully applicable with respect to ordinary legislation containing regulations regarding individual's social security.

In practice Constitutional Tribunal rarely pronounces non-compliance of ordinary legislation with social rights specified in the Constitution. Judgements on unconstitutional nature in this field result more often from violations of the principles of proper legislation or legislative procedures, and only in entirely exceptional cases they are based on violation of provisions stipulating specific social rights.[16] An example of such decision is the judgement of Constitutional Tribunal of May 17th, 1999 (P 6/98), which pronounced non-compliance of provisions included in an ordinance, containing working time norms, indicating it should be a subject matter of a statute and could not be governed by an ordinance.

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[15] See judgement of Constitutional Tribunal of February 28th, 2012, K 5/11.

[16] See L. G a r l i c k i, "Commentary on art. 64 of the Constitution, note 6," [in:] *Constitution*...

6. Institutional guarantees of social rights

As it was already mentioned above, entities responsible for execution of social rights are "public authorities," so all the bodies of governmental and local government administration. First of all, this obligation is imposed on the ordinary legislator, who establishes legal framework for exercising social rights, that crystallizes constitutional provisions. The legislator is responsible for passing acts that ensure sufficient scope of protection. It may be said that all branches of power guarantee social rights execution. Legislature – because it adopts acts specifying constitutional norms in the scope of social rights. Executive – and under its framework governmental and local government administration – because it ensures application of social rights. And finally judiciary, that allows an individual to pursue social rights in court – before common courts, administrative courts and the Supreme Court, and also by way of constitutional complaint procedure, and abstract control of constitutionality of the norms, initiated by state bodies listed in the Constitution.

In Poland, besides the bodies mentioned above, there have been established a number of state bodies whose range of duties includes protection of human rights, including the social rights. The following bodies should be mentioned at this point: established under Constitution – Commissioner for Citizen's Rights and Commissioner for Children Rights and established under ordinary acts – among others: Commissioner for Patients' Rights, State Sanitary Inspection, National Labour Inspectorate, Office of Competition and Consumer Protection, social assistance facilities, facilities for mothers with underage children and pregnant women, Social Insurance Institution and institutions related to it, National Health Fund. These bodies execute provisions of the acts that specify various constitutional norms referring to social rights. Above mentioned bodies are responsible for enacting statutory regulations within the scope of social rights, hence they perform executive function. Some of the bodies listed above guard execution of social rights (for example, Commissioner for Patients' Rights, National Labour Inspectorate). The ultimate guarantors of social rights are however always the bodies of judicial system: common courts, administrative courts, Supreme Court and Constitutional Tribunal. The key role is vested in the Supreme Court, which is the body exercising ultimate control in the structure of the judiciary over application of law within the range of social rights.

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The Constitution of Poland of 1997 is a relatively young act which in the field of social rights is noticeably inspired by the solutions present in older European constitutions. In the second half of the 20th century provisions regarding social rights were subject to a standardisation, covering the legal systems of specific European states. We assess that social rights in the legislations of European states are regulated in a very similar manner. Standardisation was introduced mainly through acts of United Nations, such as: Universal Declaration of Human Rights or International Covenant on Economic, Social and Cultural Rights. Vast majority of social rights listed in these acts were included in the draft of Polish Constitution of 1997.

Zbigniew Kmieciak
Professor of Law, University of Łódź

Przemysław Florjanowicz-Błachut
Specialist-assistant, Supreme Administrative Court

Robert Siuciński
Assistant, University of Łódź

THE RECOGNITION OF FOREIGN ADMINISTRATIVE ACTS (THE POLISH PERSPECTIVE)

The number of international organizations is still increasing. There were 123 international governmental organizations in 1951 (955 including non-governmental organizations), 1039 (14 752 including NGO's) in 1981 and now there is more than 8000 IGO's (more than 60 000 including NGO's). International organizations are growing also in the terms of personnel and finances.[1] As rightly observed by M. Zieliński international administrative decisions are the phenomenon of latest twenty years.[2] That changes influenced on start the discussion on global administrative law. Italian scholars indicate more than 40 areas of administrative law, from which European provisions arise (public health, maritime transport, tourism, sport, social protection, energy etc.).[3] Development of a European administrative space led to the initiation of work on the draft of solutions focusing on the frame codification of administrative procedures for the institutions, bodies, offices and agencies of the European Union.[4] We can indicate many new tendencies in the doctrine of administrative law. Thus recently, that field of law has broken many traditionally existing barriers and has become much more

[1] S. C a s s e s e, "A Global Due Process of Law?," [in:] *Values in Global Administrative Law*, eds. G. Anthony, J.-B. Auby, J. Morison, T. Zwart, Oxford–Portland 2011, p. 17.

[2] M. Z i e l i ń s k i, *Międzynarodowe decyzje administracyjne* [International Administrative Decisions], Katowice 2011, p. 18.

[3] In four volumes of work *Trattato di diritto amministrativo europeo* [Treaty on European Administrative Law], eds. M. P. Chiti, G. Greco, *Parte speciale* [Special part], Giuffrè, Milano 2007.

[4] Unprecedented example of that activity is European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union.

internationalized. The question of the recognition of foreign administrative acts is gaining in importance in the world where approximately two hundred states exist[5] and in European Union with 28 Members. The ongoing processes of globalization and Europeanization should further accelerate the development of theoretical consideration in this area.

According to the meaning of the Polish Code of Administrative Procedure (hereinafter: C.A.P.)[6] an administrative act (decision) is identified with an individual act. The substantial definition of the decision was created by scholars and case-law. According to it a decision is an unilateral, official administrative act issued by public body, dealing on concrete case of individual entity which does not result from organizational or contractual subordination to the public body which issued it and is independent from the name given by law to this act.[7] Such an approach does not include: acts on general character (regulatory acts), physical acts (especially acts or actions, other than individual decisions or orders, made within the area of public administration concerning the rights or obligations ensuing from provisions of law) and silence of administration (settlement of the case by silence). Definition of administrative act from the perspective of Polish legal system is therefore not adequate with definition adopted in Recommendation Rec(2004)20 of the Committee of Ministers of the Council of Europe to the Member States on judicial review of administrative acts (however created only for the purposes of that recommendation).

The issue of features distinguishing a national administrative act from a foreign one has hardly been addressed in the Polish legal literature. It seems that the nationality of the entity constituting the act should be considered as such a feature. National administrative acts are therefore constituted by the national bodies performing the tasks of the public administration, while foreign administrative acts by foreign bodies. This would mean both the governmental bodies (federal), self-governmental bodies (regional, local, municipal), administrative authorities of an autonomous community recognized in a given country as well as other entities, if they perform tasks in the field of public administration.

Moreover, it can be said that in order for a foreign administrative act to become the subject of interest of another jurisdiction it should, as J. Makowski

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[5] There is: 193 Member States of United Nations, 2 observers and many other entities, which status is unclear.

[6] Law of 14 June 1960, consolidated text published in Official Journal of the Republic of Poland 2013, item 267.

[7] Z. K m i e c i a k, "Poland," [in:] *Codification of Administrative Procedure*, ed. J.-B. Auby, Brussels, Bruylant 2014, p. 337. See also A. S k o c z y l a s, "Administrative Proceedings and Judicial Review of Administration," [in:] *Handbook of Polish Law*, eds. W. Dajczak, A. J. Szwarc, P. Wiliński, Warszawa–Bielsko-Biała 2011, p. 388–389 and K. Z i e m s k i, *Indywidualny akt administracyjny jako forma prawna działania administracji* [Individual Administrative Act as a Legal Form of Administrations' Activity], Poznań 2005, p. 157–159.

stated, contain an element of "foreignity." According to the aforementioned author the "foreignity" can be of a personal (an act aimed at an individual without citizenship of the given country) or territorial character (an act causing an effect in another jurisdiction).[8]

As it was mentioned, it seems that the nationality of the entity constituting the act should be the most important factor which determines an administrative act as a foreign act. Today transboundary effects of law are more often emphasized. However, the concept of national jurisdiction should still have a crucial importance for determination of foreign administrative acts. From that perspective, a significant problem is the fact that administrative law is not uniform in certain countries.[9] Provisions which are considered as administrative law in one country, should be considered as civil or constitutional law in another one.

As rightly observed by B. Kingsbury, N. Krisch and R. B. Stewart: "[d]omestic law presumes a shared sense of what constitutes administrative action, even though it may be defined primarily in the negative – as state acts that are not legislative or judicial – and even though the boundaries between these categories are blurred at the margins."[10] However, in European hard law is no definition of administrative act, furthermore some European states still have problems with defining it in national legal systems. It seems to be very difficult to create a common definition of a foreign administrative act, because "the influence of EU and global law is not strong enough to disrupt the theory of administrative acts – at least, not stronger than domestic factors which could undermine its basis."[11] In the future, general definition of foreign administrative acts and principles concerning its recognition may be indicated in international law, first in soft law (for example in recommendation of the Council of Europe) and, after creating the common accepted rules, in hard law.

The subject of enforcement of foreign administrative acts has not been undertaken in Poland. Only some elements have been identified when discussing

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[8] J. M a k o w s k i, "Prawo międzynarodowe administracyjne" [International Administrative Law], Śląsko-Dąbrowski Przegląd Administracyjny [Śląsko-Dąbrowski Administrative Review] 1947, No. 7–8, p. 4.

[9] See for example: M. M a c i e j e w s k i, "Administracyjne prawo międzynarodowe. Zagadnienia definicyjne" [International Administrative Law. Definitional Issues], [in:] *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną* [The Influence of Civilizational Changes on Administrative Law and Public Administration], eds. J. Zimmermann, P. J. Suwaj, Warszawa 2013, p. 765.

[10] B. K i n g s b u r y, N. K r i s c h, R. B. S t e w a r t, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 2005, Vol. 68, No. 3–4, p. 17 and the literature quoted there.

[11] B. G. M a t t a r e l l a, "The Influence of European and Global Administrative Law on National Administrative Acts," [in:] *Global Administrative Law and European Administrative Law. Relationship*, *Legal Issues and Comparision*, eds. E. Chiti, B. G. Mattarella, Berlin–Heidelberg 2011, p. 80.

the problems of global administrative law, international administrative acts or EU administrative law. Currently we can only indicate the distinction between national, foreign, international, supranational or global administrative act in correlation with "affiliation" of the entity constituting that act and jurisdictions of states and international organizations. Foreign administrative acts are constituted by foreign administrative authorities. International administrative acts are constituted on the basis of bilateral or multilateral international agreement between states, international organizations or other actors of international relations. According to M. Zieliński international administrative decision is individually or collectively taken form of legally binding decision of international organization facing to individuals (natural person, legal person or group of natural and/or legal persons) which can be addressee of first or second degree.[12] Supranational administrative acts are constituted by international organizations. EU administrative acts are a particular type of those acts, because they benefit fair trial guarantees (for example: parties' right to participation, to access to the files, authority's duty to give reasons of final decisions, judicial review of administrative acts).

The concept of global administrative law is still developing. Global administrative law is defined as a set of mechanisms, rules, practices and social agreements complementing them, which support or otherwise influence the accountability of global administrative authorities ensuring in particular that these authorities will fulfill the adequate standards of transparency, cooperation, justification of decisions, legality and ensuring an effective control of norms and decisions undertaken by them.[13] The idea of a 'global administrative space' expressed in break down the strict barriers between national and international orders. This concept implies departure from traditional understandings of international law in which the international is largely inter-governmental.[14] Consequently, it is very problematic to clearly define what is a global administrative act and to distinguish it from the international and supranational ones. In the light of considerations presented in this chapter global administrative acts should be constituted by global administrative bodies. That category includes formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public–private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.[15] Benedict Kingsbury, Nico Krisch and Richard B. Stewart distinguished five types of globalized administrative regulation: administration

[12] For more details see M. Zieliński, *Międzynarodowe*..., p. 23–39.

[13] See B. Kingsbury, N. Krisch, R. B. Stewart, "The Emergence…," p. 17 and M. Zieliński, *Międzynarodowe*..., p. 229–230.

[14] B. Kingsbury, "The Concept of 'Law' in Global Administrative Law," *The European Journal of International Law* 2009, Vol. 20, No. 1, p. 25.

[15] B. Kingsbury, N. Krisch, R. B. Stewart, "The Emergence…," p. 17.

by formal international organizations, administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials, distributed administration conducted by national regulators under treaty, network, or other cooperative regimes, administration by hybrid intergovernmental–private arrangements and administration by private institutions with regulatory functions.[16]

There is no general regulation on recognition of foreign administrative acts in the Polish system of law. We could, however, identify a number of areas in which such recognition does occur, such as in the case of recognition of professional qualifications, documents certifying certain skills or education (including the nostrification of the diplomas), or in the case of various types of permits. The analysis of such solutions leads to the conclusion that for the effectiveness of a foreign administrative act there is a requirement of an international law norm providing for the recognition. Such norm must be binding on Poland and, according to A. Modrzejewski, should also provide for the course of action undertaken by national administrative bodies in situation, when they exercise foreign administrative act.[17]

Examples of that kind of norms provide Law of 5 January 2011 on Vehicle Drivers.[18] Article 4 section 1 point 2 of this law provides for the recognition in Poland of international driving licences issued in other countries in accordance with the Geneva Convention on Road Traffic of 19 September 1949,[19] international or national driving licence compatible with the Vienna Convention on Road Traffic of 8 November 1968,[20] driving licences issued in EU, EFTA – parties of the Agreement on the European Economic Area or in Switzerland (the so called European driving licence), or other foreign driving licence specified in a agreement to which Poland is a party. It is worth mentioning that the recognition of European driving licenses is a result of the implementation of article 2 section 1 of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences[21] which states: "Driving licences issued by Member States shall be mutually recognised." European Union law rapidly enters new sectors of administrative law,[22] introducing in many of them superior rules of mutual

[16] *Ibidem*, p. 20.

[17] See A. M o d r z e j e w s k i, "Międzynarodowy akt administracyjny w międzynarodowym prawie administracyjnym" [International Administrative Act in International Administrative Law], [in:] *Współzależność dyscyplin badawczych w sferze administracji publicznej* [Correlation of Research Disciplines in the Field of Public Administration], eds. S. Wrzosek, M. Domagała, J. Izdebski, T. Stanisławski, Warszawa 2010, p. 126.

[18] Official Journal of the Republic of Poland 2011, No. 30, item 151 with amendments.

[19] *Ibidem* 1959, No. 54, item 321 and 322.

[20] *Ibidem* 1988, No. 5, item 40 and 44.

[21] Official Journal of the European Union L 403/18.

[22] See footnote 3.

recognition of administrative acts by the Member States. That activity speeds up the creation of the European administrative space.

Bilateral agreements can be the basis for recognition of administrative acts of another state. The Polish-German agreement of cooperation between police and border guards in the border areas signed on 18 February 2002[23] provides in Article 12 section 3, that officers of one of the parties, delegated to work on the territory of the other party are subject to the orders, instructions and disciplinary authority of their national supervisors. In the necessity of conducting of a disciplinary proceedings against a police officer stationed in Germany, the relevant part of the Polish Law of 6 April 1990 on Police could be regarded as part of the Polish international administrative law in its external dimension.[24]

From the perspective of the Articles 87–91 of the Constitution of the Republic of Poland[25] the existence of a ratified international agreement binding Poland is relevant for enforcement of the foreign, international or supranational administrative act. International agreement may directly indicate enforceable administrative acts or establish an international organization which will have the power to create enforceable administrative acts (like European Union).

We can specify examples of administrative acts which due to supranational provisions will produce effects in other countries. One of them is connected with citizenship of European Union. The Article 9 of the Treaty on European Union[26] in second sentence states that: "Every national of a Member State shall be a citizen of the Union." In this context, if one of the Member States naturalises somebody by means of administrative act, this act will produce effects in all EU Member States.

It also appears that an international custom based on the principle of reciprocity could be the basis for the mutual recognition of certain administrative acts. One could consider in this context the functioning of diplomatic relations between two countries which have not ratified an international agreement in this regard. That observation is also justifiable in accordance to the Article 9 of Constitution which states: "The Republic of Poland shall respect international law binding upon it." Application of international customs in administrative law is very limited, because public bodies shall function on the basis of and within the limits of law.

In Poland general administrative procedure is governed by provisions of C.A.P. That law recognises the rights of parties and other entities which take part in procedure, for example: entities on the rights of parties, witnesses, experts. Polish legislator does not provide intervention of foreign public administrations

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[23] Official Journal of the Republic of Poland 2005, No. 223, position 1915.

[24] M. Z i e l i ń s k i, "O pojęciu międzynarodowego prawa administracyjnego" [On Concept of International Administrative Law], *Państwo i Prawo* [State and Law] 2008, No. 9, p. 25.

[25] Official Journal of the Republic of Poland 1997, No. 78, item 483 with amendments.

[26] Consolidated version, Official Journal of the European Union 2012, C 326/13.

and international procedure for taking the evidence in general administrative procedure, but provides it in special procedures. Article 219 of Law of 27 April 2007 on Environmental Protection[27] is an example of that solution. It provides the procedure for informing the other Member State of the European Union about the possibility of significant transboundary environmental impact on its territory and a procedure of participation in proceedings to obtain appropriate permits.

According to the Article 10 § 1 of C.A.P., which established general principle of hearing of the parties, administrative bodies are obliged to guarantee the parties active participation at each stage of proceedings, and, before adoption of the final decision, they shall enable them to express opinion concerning gathered evidence, materials and lodged demands. The rights of third parties are also protected. More precise is Article 200 § 1 of the Law of 29 August 1997 – Tax Ordinance[28] which provides that before issuing a decision, a tax authority is obliged to give a party seven-day time limit to express his/her opinion on the collected evidences.

Polish Code of Criminal Procedure[29] provides in part XIII procedure in criminal cases in international relations. In that procedure it may be carried out, by way of judicial assistance, for example: taking depositions of persons as accused persons, witnesses, or experts, inspection and searches of dwellings and persons, confiscation of material objects and their service abroad, summoning of persons staying abroad to make a personal voluntary appearance before the court or state prosecutor, in order to be examined as a witness or to be submitted to confrontation, and bringing persons under detention, for the same purposes, and giving access to records and documents, and information on the criminal record of the accused.

In the moment of service administrative decisions enter into public and become to be legally binding for the administrative body which has issued them. The service of administrative acts in general administrative procedure is governed by provisions of C.A.P. (Chapter 8, Articles 39–49) and in tax procedure by Tax Ordinance (Chapter 5 of Section IV, Articles 144–154c).

The Republic of Poland has not ratified the European Convention on the Service Abroad of Documents relating to Administrative Matters. Polish legislator does not provide general regulation concerning service on the territory of foreign state, but in tax procedure an authority may apply to the authorities of a Member State of the European Union in charge of tax matters to serve a letter issued by a tax authority. Such an application should include any data that may be necessary to identify the entity to which a letter is to be served, in particular his name or business name and address. Letters issued by a foreign authority are served by a tax authority designated by the minister in charge of public finance. A party

[27] Official Journal of the Republic of Poland 2008, No. 25, item 150 with amendments.

[28] Consolidated text in *ibidem* 2012, item 749 with amendments.

[29] Law of 6 June 1997, *ibidem* 1997, No. 89, item 555 with amendments.

which place of inhabitancy or seat is outside Polish borders is obliged to appoint a representative for service in Poland. Furthermore, according to the Article 147 § 1 of Tax Ordinance a party who is going abroad for at least 2 months is obliged to appoint a representative for service. It seems that the Polish legislator is not ready to introduce provisions concerning the service of documents related to administrative procedures in other countries. Legislation at the EU level is a more possible solution.

An administrative act should be adopted within the limits of jurisdiction of certain administrative body and with respect for the principle of legality. States have international competence to dictating requirements to administrative acts. Otherwise, states would not have the power to control or react to excess of power by the international organizations. States' competence should provide the control of compliance with the law. Formal requirements for foreign administrative acts in order to be effective in other countries should be indicated in codification of administrative procedure for institutions, bodies, offices and agencies of the EU. That regulation shall be established on the basis of the Article 298 of the Treaty on the Functioning of the European Union.[30] Legislative initiative in that materia has been already taken by the European Parliament in resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union. Other independent organizations (for example Research Network on EU Administrative Law) are also working on the project of law in that sphere. That formal requirements should include the respect of the principles of procedural fairness (guarantees of impartiality of public authority, party's right to participation in the proceedings which includes not less than hearing of the parties and right to present evidences, explanation of motivation of the decision, right to appeal to another authority or to judicial review of administrative act).

In order to be effective an administrative decision must be served correctly. An administrative decision should contains: particulars of an authority, the date of issuance, particulars of the party or parties, reference to the legal basis, ruling, factual and legal reasons, instructions on applicable appellate measures – if a decision may be appealed, signature of the authorised person and his full name and official position. Decision that may be subject to an action brought to the ordinary (civil) court or a complaint filed with the administrative court shall advise a party of the possibility to bring an action or file a complaint. According to the Article 130 of C.A.P. final administrative decisions, decisions on which an administrative authority establishes immediately enforceable clause, decisions which are immediately enforceable *ex lege*, decisions which are in accordance with the request of all parties are enforceable. An administrative decision becomes final if it has been issued by the first instance body and the deadline for a measure

[30] Consolidated version, Official Journal of the European Union 2012, C 326/47.

of appeal has passed (generally 14 days), or if it has been issued by the second instance body.

It has to be noted that the enforcement of the decision may be suspended for example by administrative authority after the initiation of reopening proceedings, proceedings for annulment of the decision or after initiation of the judicial review (then the enforcement can be also suspended by the administrative court).

In case of the recipient's failure to comply with an administrative act which imposes an obligation, the administrative authority may initiate an administrative enforcement proceeding without the need to resort to a court proceeding. Generally, an action on the part of the creditor is required: serving the obligor with a admonition, the preparation of the enforcement order and sending it together with a request to initiate the execution to the enforcement authority. Law of 16 June 1966 on Enforcement Procedure in Administration[31] divides enforcement measures into two categories. The first of them is enforcement measures of monetary claims which includes: enforcement of money, wages, retirement benefits and social security as well as social pension, bank accounts, other monetary claims, the rights from financial instruments as defined by the regulations on trading in financial instruments which were recorded in a securities account or other account, assets in a money account used to operate such accounts, securities, bills of exchange, copyrights and related rights and rights of industrial property, shares in a limited liability company, other property rights, movables, real estate. The second category is enforcement measures for non-monetary obligations: a fine in order to compel to perform, replacement of performance, collection of a movable object or of real estate, emptying premises or other facilities, direct coercion. According to the Article 7 § 2 of Law on Enforcement Procedure in Administration "[e]nforcement body applies enforcement measures which lead directly to the performance of an obligation, and among several such measures – measures least burdensome to the obligor." In case of enforcement of non-monetary obligations an enforcement measure which is quite often applied is a fine in order to compel to perform.

Law of 11 October 2013 on mutual assistance for the pursuing tax claims, duties and other monetary claims[32] provides granting of the assistance to a foreign state and the use of the assistance of foreign state to investigated of monetary claims. In such cases competent authority is the Minister of Finance.

In the Polish legal system there is no general law governing matters related to the validity, efficacy and enforceability of foreign administrative acts. General procedures for the execution of foreign administrative acts should be developed

[31] Consolidated text in Official Journal of the Republic of Poland 2012, item 1015 with amendments.

[32] Official Journal of the Republic of Poland 2013, item 1289. That Law implements Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (Official Journal of the European Union 2010, L 84/1).

in international law, especially in EU law like it is in private international law – regulations Rome I and Rome II. The mechanisms for recognising court decisions developed in private international law can be a reference for the doctrinal development of recognition and execution procedures for foreign administrative acts in extent in which they could be modified in regard to specific features of administrative acts (authoritative, unilateral) and specific branches of administrative law (building law, tax law, water law).

The European Union in order to achieve the fundamental freedoms of the Treaty: free movement of goods, persons (workers, services, freedom of establishment), capital and also union citizenship in some measure forced in practice the need for mutual recognition of administrative acts of Member States and cross-border nature of some of them.

The legal basis of that trend in the Treaty, besides above mentioned Treaty Freedoms, constitutes the principle of sincere cooperation, mutual respect and support, expressed in the Article 4 (3) of the Treaty on the European Union (TEU).

Also the Article 18 of the Treaty on the Functioning of the European Union TFEU, establishing the principle of equal treatment / the principle of non-discrimination against nationals of another EU country and other provisions TFUE concerning the Inner Market: free movement of workers (Article 45 TFEU), right of establishment (Article 49 TFEU) or services (Article 56 TFEU) may imply the duty of mutual recognition of administrative acts.

The progress in this area also strengthens the case law of the Court of Justice, that points out, that the principle of sincere cooperation means, Member States should rely on mutual trust at least in areas harmonised by EU law.[33]

For example, in Council regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings the EU legislator refers to this principle in partly non harmonised area.[34]

It appears, that the trend to mutual recognition of administrative acts is also partly outcome of the federalizing character of the European Union as a supranational organization.

Through the administrative cooperation in certain sectors provided by EU law, it comes to horizontal internationalization of administrative relationships between administrative authorities of Member States.

The Republic of Poland has implemented Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties by enactment of the act of 24 October 2008 on

[33] See ECJ Cases: 46/76 Bauhuis, ECR 1977, p. 5, para. 22; 25/88 Bouchara, ECR 1989, p. 1105, para. 18; C-5/94 Hedley Lomas, ECR 1996, p. I-2553, para. 19; C-110/01 Tennah-Durez, ECR 2003, p. I-6239, para. 34; C-476/01 Kapper, ECR 2004, p. I-5205, para. 37.

[34] See recital 22 of the preamble to Regulation (EC) No. 1346/2000 (OJ L 160, 30.06.2000, p. 1–18).

amendment of the Law – Code of Penal Procedure and some other laws[35] which inserted:

1) to the Code of Penal Procedure after Chapter 66 Chapter 66a entitled 'Procedure for requesting the EU Member State to carry out a decision on a fine, penal measures in the form exemplary damages, or a pecuniary payment, or a decision obliging a perpetrator to assume costs of the proceedings', and Chapter 66b entitled "Procedure for requesting by the EU Member State to carry out a decision on financial penalties" (Articles 611fa–611fm),

2) to the Law of 6 June 1997 – *Criminal Executive Code*[36] new Article 52a,

3) to the Law of 24 August 2001 – *Code of Petty Offences Procedure*[37] new Section XIIa (entitled "*Procedure* of cases from *international relations*"), consisting of two chapters: Chapter 20a entitled "Procedure for requesting the EU Member State to carry out a resolution on retention of evidence or retention of property and execution of the judicial decision or decision of other authority of EU Member State on retention of evidence or retention of property" and Chapter 20b entitled "Procedure for requesting the EU Member State to carry out a fine, criminal measures in form of a fine [for the benefit of a special recipient] or the *obligation* to compensate the *damage* or decision imposing the *costs of proceedings* and execution of the judicial decision or decision of other authority of EU Member State on financial penalties."

The implementing provisions came into force on 18 December 2008 – 14 days since their promulgation (publication) in the Official Journal of the Republic of Poland (legal base was the Article 6 of the act of 24 October 2008).

The Republic of Poland ratified international conventions on the recognition and execution of administrative acts and on the legalisation of public documents, for example: The Convention on International Civil Aviation, signed on 7 December 1944 in Chicago – the Chicago Convention,[38] The Convention on Road Traffic, Agreement Establishing the World Trade Organization (WTO), done at Marrakesh on 15 April 1994,[39] Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards,[40] Convention on the Recognition of Qualifications concerning Higher Education in the European

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[35] Official Journal of the Republic of Poland 2008, No. 214, item 1344.

[36] *Ibidem* 1997, No. 90, item 557 with amendments.

[37] *Ibidem* 2008, No. 133, item 848.

[38] *Ibidem* 1959, No. 35, item 212 with amendments.

[39] *Ibidem* 1995, No. 98, item 484.

[40] Announcement of the Minister of Foreign Affairs of 4 December 1995 on the publication of the annexes to Agreement Establishing the World Trade Organization (WTO), *ibidem* 1996, No. 9, item 54.

Region, signed in Lisbon on 11 April 1997 (ratified by Poland on 17 March 2004). Poland is also a party of many multilateral and bilateral conventions on the legalisation of public documents.

The Republic of Poland is a party to the Hague Convention abolishing the requirement of legalisation for foreign public documents, concluded on 5 October 1961.[41] The provisions of the Convention entered into force to Poland on 14 August 2005. It was ratified by President of the Republic on 15 October 2004. The legal base was the act of Polish Parliament – Sejm – The Law of 22 July 2004 on the ratification of the Convention. The question of application of the Convention was the subject of the case law of administrative courts – judgment of Voivodship Administrative Court of Warsaw of 23 December 2008.[42]

Validation of the existence or authenticity of a foreign official documents is justified in situation, when such documents have to be used as evidence in proceedings before a court or before administrative bodies. The only provision of statute law in Polish legal order concerning foreign official (public) documents (issued by the authorities of another foreign state) is Article 1138 of the Law of 17 November 1964 – Code of Civil Procedure (C.C.P.).[43] Pursuant to Article 1138 of the C.C.P., foreign public documents that are of the same force of evidence (probatory force) as Polish public documents, with two exceptions, that are: a public document concerning the conveyance of the property right to the immovables located in Poland, or a public document doubtful as to its authenticity. These two groups of documents need legalisation.

Both scholars[44] and the courts[45] allow the application of Article 1138 C.C.P. *per analogiam* outside the civil proceedings, because the question of the authorization of foreign official (public) documents and their force of evidence has not been regulated in other legal acts, including other procedural provisions (e.g. in the Law of 30 August 2002 – Law on Proceedings before Administrative Courts or in C.A.P.).

It is not clear, if the Article 76 § 1 C.A.P., providing "Official documents drawn up in the prescribed form by competent state authorities within the scope of their activity shall constitute proof of what has been officially confirmed therein" and using the term "public authorities" covers also foreign public authorities.

Apostille proceedings is the written *procedure*. Till now Poland has not an electronic Apostille procedure. The Apostille cannot be obtained by fax or e-mail. The competent authority to issue the apostille is the Ministry of Foreign Affairs – Legalization Section.

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[41] Official Journal of the Republic of Poland 2005, No. 112, item 938.

[42] File No. I SA/Wa 394/08.

[43] Official Journal of the Republic of Poland 1964, No. 43, item 296 with amendments.

[44] See J. C i s z e w s k i, "Kodeks postępowania cywilnego. Komentarz do art. 1138 k.p.c." [Code of Civil Procedure. Commentary to Article 1138 C.C.P.], *Lex Polonica* 2012.

[45] See e.g. Judgment of the Voivodship Administrative Court in Rzeszów, 21 July 2010, File No. II SA/Rz 157/10 and decision of the Supreme Court, 16 March 2007, File No. III CSK 380/06.

Applications for the issue of the apostille or for legalisation of documents may be filed with the Ministry of Foreign Affairs personally or by a third person (no additional authorisation is required) and the application is analysed "on the spot." In case the application was filed by post or e-mail, the document certification takes circa 2–3 weeks. For every certified document is the stamp duty (fee) charged.

The procedure of issuing "apostille" is one-instance procedure and does not provide any remedies.

Certain documents have to be authenticated before issuing the apostille.

In case of notarial acts (e.g. notarial deeds, powers of attorney, certified true copies, notarial authentications of signatures) and court documents (except for copies from the National Court Register), the competent authority responsible for the certification is the president of the competent circuit court or authorised judge or judge associate. If the court documents were issued by the one of the courts of appeal, the competent authority for the certification of such documents its the president of the competent court of appeal or authorised judge.

Diplomas of higher education institutions are certified by the Ministry of Science and Higher Education. However, diplomas issued by higher art schools (Academies of Music, Academies of Fine Arts, Theatre and Film Schools) are legalised by the Minister of Culture and National Heritage.

The Minister of National Defence legalizes diplomas of higher military schools.

Medical school diplomas are legalised by the Minister of Health. Diplomas issued by the Gdynia Maritime University and the Maritime University of Szczecin are legalised by the Minister of Transport, Building and Maritime Economy.

The Matura exam certificate is certified by the Ministry of National Education.

School certificates are certified by the competent local board of education.

Master craftsman's certificates and craftsman's certificates are certified by the Association of Polish Crafts in Warsaw.

The legal base of "Apostille procedure" are following legal acts:

– the Hague Convention abolishing the requirement of legalisation for foreign public documents;

– Stamp Duty Law of 16 November 2006;[46]

– Regulation of the Minister of Science and Higher Education of 2 November 2006 on the documentation of the course of study;[47]

– Regulation of the Minister of National Education on 28 May 2010 on certificates, diplomas and other school forms;[48]

– Crafts Law Act of 22 March 1989.[49]

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[46] Official Journal of the Republic of Poland 2006, No. 225, item 1635.

[47] *Ibidem*, No. 224, item 1634.

[48] *Ibidem* 2010, No. 97, item 624.

[49] Consolidated text in *ibidem* 2002, No. 112, item 979 with amendments.

Włodzimierz Nykiel
Professor of Law, Rector of the University of Łódź
Michał Wilk
Assistant at the Tax Law Department, University of Łódź

TAXATION AND DEVELOPMENT

1. Introduction

Tax policy may support two alternative models of the construction of tax systems as far as the impact of taxes on economy is concerned. One approach favors state intervention which may serve different objectives, among others – the development of the economy. The other model would assume indifference of the state towards non-fiscal objectives of tax law. Leaving aside that dispute, which seems to be of rather political and ideological nature and concerns mainly the conflict between opposite values and political doctrines, one may observe that in contemporary tax law systems, when the state is faced with aggressive competition of other economies, it is commonly accepted to implement certain measures increasing its investment attractiveness.

An intensity of state intervention in the area of investment incentives may lead to harmful tax competition and tax havens on the edge which distort fair competition between economies and disturb fair allocation of income. On the other hand certain degree of state aid and investment incentives should be accepted, in particular when applied by developing countries and countries in transition. In our contribution we aim at assessing tax system in Poland as a whole and in details concerning tax incentives in the light of acceptable level of state intervention. This report is limited to income taxation, tax measures in the area of indirect taxes were left aside the analysis.

2. Overview of Polish income tax system

2.1. Coexistence of source and residence principles

Polish income tax system is based on a general distinction between corporate and personal income taxation. Therefore there are two separate legal acts which cover income taxation in Poland: Corporate Income Tax Act[1] and Personal Income Tax Act.[2] Polish both corporate and personal income tax system are built on parallel application of residence and source principle.

Basically companies which meet residence test are subject to unlimited taxation on their worldwide income (residence principle). In contrary non-resident taxpayers are taxable only with regard to income derived from Polish sources (source principle). Residence criteria in Polish domestic CIT regulations are set forth in Art. 3 of the CIT Act. Under that provision key circumstances for residence status of a company are seat or place of its management. There are no legal definitions of those terms, however, it does not pose any problem to determine the seat of a company referring to the provisions of the Commercial Companies Code.[3] Place of management of the company should be construed similarly to the place of effective management concept laid down by the OECD Model Tax Convention. Thus it is a place from where the day-to-day management of the company is carried out.

The same principles apply to individual taxation, however, the PIT Act apply different criteria of residence. A person is deemed a Polish resident when it has the centre of personal or economic interests (centre of vital interests) in Poland or stays in the territory of Poland for over 183 days in a given tax year.

Above-mentioned principles apply unless a respective tax treaty otherwise provides (which may be the case in particular when there is a dual residence conflict and tie-breaker rules from the treaty have to be applied).

In principle when a non-resident taxpayer carries out business activity in Poland through a branch it is subject to tax in the same manner as Polish resident. If however there is a treaty concluded between Poland and a residence state of that taxpayer, normally Art. 7 of the treaty shall allocate business profits derived by that taxpayer to Poland.

Parallel application of residence principle in Poland and source principle in the country where Polish resident derives income may cause juridical double taxation. Hence there is a need for implementing regulations aimed at avoidance of that detrimental phenomenon. In Poland such mechanisms are applied at three levels: domestic, international and EU.

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[1] Journal of Laws [hereinafter: J. of L.] 2011, No. 74, item 397, as amended [hereinafter: the CIT Act].

[2] J. of L. 2012, item 361, as amended [hereinafter: the PIT Act].

[3] J. of L. 2013, item 1030.

2.2. Taxation of inbound dividends

Dividends derived by Polish companies from foreign sources, in principle, are combined with other worldwide income and subject to 19% tax. Global income is then declared in yearly tax return and payable till the end of the third month following the end of a given fiscal year.

As mentioned above there are three different layers of instruments for avoiding double taxation of dividends: unilateral, bilateral and EU. Under general rule Polish residents deriving income from inbound dividends are allowed to deduct tax withheld at source from tax on their worldwide income, but the amount of the deduction may not exceed that part of tax calculated before deduction which is proportionally associated with foreign income (ordinary tax credit). Similar principle applies to individuals deriving foreign income.

On the grounds of CIT Act there is also a specific regulation which aims at avoiding economic double taxation. Under Art. 20(2) of the CIT Act Polish resident company deriving dividend income from a subsidiary (75% threshold of shareholding level is required) subject to tax on its worldwide income on the territory of a state bound by a tax treaty with Poland which is not an EU, EEA Member State and Switzerland may also deduct the amount of tax on profits out of which the dividends were paid. The amount of that deduction depends on the level of share of parent company in profits of its subsidiary.

Apart from unilateral measures for double taxation avoidance there is also an international tax law regime which should be always taken into consideration. Poland has entered into 91 tax treaties which generally follow either the OECD or UN Model Tax Convention or contain mixed solutions. As for tax reliefs it has to be noted that Polish tax policy does not prefer any specific method for double taxation avoidance, in Polish treaties both exemption (mainly with progression) and credit (ordinary) method are applied. Some treaties use the tax sparing credit for income derived by Polish residents from foreign sources, however, current tax policy tends to push on renegotiating such treaties in order to abolish that method of avoiding double taxation.[4] Such treaties, as seen by the Ministry of Finance, used to be improperly used for tax avoidance.

The regulation concerning allocation of dividend income in Polish tax treaties in general follows Art. 10 of the OECD MC. There are, however, certain differences in dividend taxation when compared to that provision which pertain to tax rates (one uniform rate instead of two rates, exceptionally tax exemption at source in tax treaty with Malaysia and Ireland under certain conditions)[5], replacement of holding in the capital by holding of voting rights (treaties with Ireland

[4] See: recently renegotiated treaty with Cyprus.

[5] J. B a n a c h, *Polskie umowy o unikaniu podwójnego opodatkowania* [Polish treaties for the avoidance of double taxation], Warszawa 2002, p. 221.

and the USA – the "old" treaty of 1974)[6] and lack of beneficial ownership clause (e.g. treaties with Russia, Spain, Pakistan, Sri Lanka and the "old" treaty with the USA). In the treaty with Singapore dividends are exempt from tax at source if paid to the government of other contracting state.

Being a Member of EU Poland had to implement Parent-Subsidiary Directive which affects the system of dividend taxation to a great extent. Dividends paid out by companies based in one of the EU, EEA Member States or Switzerland to a Polish company are exempt from tax in Poland if the shareholding level exceeds 10% (25% for dividends from Switzerland) and the subsidiary paying out dividends does not enjoy any general exemption from tax on worldwide income. Shares in foreign company should be held for an uninterrupted period of at least 2 years, however, that period may pass after the dividend is paid.

2.3. Outbound dividends

Dividends paid out by Polish companies to non-resident shareholders are subject to 19% withholding tax (both CIT and PIT) unless a double tax treaty otherwise provides, which is most often the case. DTT concluded by Poland follow the MC OECD in that respect limiting source taxation (usually 5% or 10%). Being the Member State of EU Poland exempts dividends paid out to shareholders (both domestic, EU and EEA based) when the shareholding exceeds 10%. That exemption applies also to dividend payments to Switzerland, however, shareholding threshold is higher – 25%. The recipient of the dividend should hold the stock directly for an uninterrupted period of two years (however, that period may pass after the dividend is paid).

2.4. Certificate of residence

Specificity of Polish withholding tax system comes down to the additional requirement of applying double taxation treaty as far as outbound passive income payments are concerned. Residence of foreign recipient of such income (that is dividends, interest and royalties) should be proved by a "certificate of residence" which is an official document issued by competent tax authority of the residence state confirming the residence of that taxpayer. Polish debtor paying out passive income to non-resident taxpayer cannot apply benefits set forth by the treaty unless it holds the certificate of residence provided by the recipient of the payment. Otherwise withholding income tax at lower tax rate or applying the exemption may be questioned by tax authorities. In general the entity making the payment would be liable for tax arrears in such case.

[6] *Ibidem*.

Polish tax regulations do not specify the form of the certificate of residence which is reasonable due to richness of various types of such documents all over the world. Generally Polish tax authorities would accept certificates in any form as long as they are normally issued in that form by a foreign competent authority. There are some doubts whether the person who pays out passive income should hold a certificate of residence of the taxpayer at the moment of payment. Although such interpretation of the law is often presented by tax authorities (and administrative courts) it should be stressed that it does not have firm grounds in neither CIT nor PIT Act. Basically it should be sufficient for the withholding agent to be able to prove the residence of the taxpayer with an official certificate at the moment of tax audit or tax proceedings. To be on the safe side, however, it is advisable to ask the recipient of the payment for the certificate of residence prior to executing the payment (no matter how burdensome it may appear).

3. Anti-tax havens and anti-harmful tax regimes rules

There is no distinction between tax havens and harmful tax regimes in Polish tax law. In fact tax havens are treated as harmful tax regimes. Under Art. 25a of the PIT Act and Art. 9a of the CIT Act taxpayers carrying out transactions with residents of countries applying harmful tax competition are bound to draft a transfer pricing documentation of such a transaction. That documentation should include information concerning:

– functions of each party to the transaction (including used assets and assumed risk);

– all anticipated expenses related to the transaction, their payment form and term;

– method of profits calculation and determination of the price of the transaction subject;

– business strategy and other factors – if that strategy or other factors influenced the transaction value;

– expected benefits for the taxpayer related to the transaction – applicable to transactions for intangible services.

The documentation obligation applies if the total amount resulting from the agreement or total amount actually paid in a respective fiscal year exceeds 20 000 EUR. Tax documentation should be submitted by taxpayers upon request of tax authorities within 7 days from the delivery of that request.

As the CIT Act explicitly refers to "states and territories using harmful tax competition" there was a question how to define them and what criteria should be used to qualify a given state or territory to that category. Polish legislator chose the most efficient solution – the Minister of Finance published an official list of

such states and territories.[7] It is clear that, as mentioned above, that list refer not only to harmful tax regimes but also (or perhaps primarily) to tax havens.

The list currently includes 37 countries and territories, i.e.: Andorra, Anguilla, Antigua and Barbuda, Aruba / Saint Maarten / Curacao, the Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Sark, Hong Kong, Cayman Islands, Liberia, Liechtenstein, Macau, the Maldives, the Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Niue, Panama, Samoa, Seychelles, Saint Kitts and Nevis, St. Lucia, Saint Vincent and the Grenadines, Tonga, Turks and Caicos Islands, Virgin Islands, Vanuatu.

Poland was not part of the Code of Conduct for Business Taxation adopted in 1997, nonetheless as a Member State (since 2004) of EU should and does abide by its recommendations. It has to be underlined that this measure is of a non-binding character, however, it does have its impact on EU Member States tax policy. Poland also participates in the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. The Ministry of Finance following BEPS recommendations, has recently pursued a new tax policy embracing:

1) renegotiating tax treaties in order to abolish tax sparing credit mechanisms, implementing specific anti-avoidance rules (e.g. main purpose test) and enhancing exchange of information clauses;

2) concluding new tax treaties including exchange of information treaties;

3) amending income tax system in order to close numerous tax planning opportunities;

4) drafting new anti-avoidance rules, in particular General Anti-Abuse Rule[8] (which is treated by the MF as an implementation of European Commission recommendations of 6 December 2012 on aggressive tax planning[9]) and CFC regulations, there is also a discussion on implementing exit taxes and limiting accessibility of advance tax rulings for tax planning schemes.

Those ideas are either being implemented for the time being or just discussed, nevertheless because of extensiveness of tax law system amendments in this extent it should be further analyzed whether MF endeavors to tightening up tax law system will not, as a side effect, lower the attractiveness of Poland as an investment destination by complicating the system, introducing new burdensome administrative obligations and increasing compliance costs.[10] At the same time introducing CFC rules may decrease competitiveness of Polish investors abroad.

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[7] Currently: Regulation of the Minister of Finance of 9 April 2013 concerning territories and countries applying harmful tax competition in corporate income tax (J. of L. 2013, item 494).

[8] GAAR, implemented in 2003, was abolished by the Constitutional Court in 2004, which found it violating the rule of law as well as the requirement of statutory imposition of taxes and thus unconstitutional.

[9] C(2012)8806.

[10] Already today rank of Poland in the Paying Taxes 2014 PwC and World Bank Group report is relatively very low (113 rank out of 189 economies), see: www.pwc.com/gx/paying-taxes/assets/pwc-paying-taxes-2014.pdf (last accessed on November 27, 2013).

4. Exchange of information

Poland has a well developed system of exchange of information provisions including regulations on a EU, international (both bilateral and multilateral) and domestic level. Being a Member State of EU Poland is bound by the 2011/16/EU Directive on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. It should have been already implemented by Member States to their domestic legal systems except for certain specific regulations (e.g. automatic exchange of information) which should be implemented till 1 January 2015.

Exchange of tax information on an international level is performed by Polish tax authorities basing on two legal bases: the Strasbourg Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988[11] as amended by the Protocol of 2010 (which has been already ratified by Poland and entered into force on 1 October 2011) and a network of bilateral international agreements: double taxation treaties and specific treaties on exchange of information (11 agreements). One observes a clear tendency to expand the network of exchange of information agreements with countries treated as tax havens. Recently Poland has concluded such treaties with: the Isle of Man, Jersey, Guernsey, San Marino, Andorra, Dominica, Grenada, Gibraltar, Belize, the Bahamas, Liberia (only first four already ratified). It is expected that in the nearest time such agreements are to be concluded also with: Monaco, Cayman Islands, British Virgin Islands, Bermuda, Turks & Caicos Islands, Montserrat and Anguilla.[12] As it can be inferred from the above in general, Polish tax policy aims at building exchange of information instruments network in order to facilitate tax audits of taxpayers involved in carrying out investments in tax havens or harmful tax regimes.

The scope of exchange of information varies and depends on the available legal basis. Tax treaties, in general, contain only a narrow exchange of information clause, specific exchange of information treaties may cover income taxes but also Value Added Tax (see the treaty with Guernsey). However, since both the 2011/16 Directive and Strasbourg Convention of 1988 provide a broad base for exchange of information it may be concluded that the type of information which may be exchanged by Polish tax authorities is rather wide. A key concept which limits the scope of information which may be subject to exchange is the "foreseeable relevance" clause found in numerous sources of exchange of information regulations.[13] Polish tax administration applies spontaneous or automatic exchange of information as well as exchange upon request. Domestic exchange of information

[11] J. of L. 1998, No. 141, item 913, as amended.

[12] Response of the Ministry of Finance to the parliamentary request No. 680 concerning foreign tax reliefs, www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=3FFF765A (last accessed on November 16, 2013).

[13] See a thorough analysis: H. F i l i p c z y k, Ł. P i k u s, D. W a s y l k o w s k i, *Exchange of information and cross-border cooperation between tax authorities. National Report for Poland*, Cahiers de droit fiscal international, IFA 2013, p. 624.

provisions mainly serve as an implementation of both EU law and international tax law obligations of Poland.

It should be noted that despite that fact that information obtained by tax authorities is subject to tax secrecy protection, such information may be made available for a number of public bodies.[14] Principally exchange of information and the access of tax authorities to tax information is not impeded by bank secrecy. On one hand the protection level of bank secrecy is relatively high, on the other hand Polish legislator implemented effective measures which enable tax authorities to obtain requested information.[15]

5. Tax incentives

5.1. General remarks

Poland in the time of transition from a centralized, socialist to a free market economy has developed a number of incentives to attract foreign direct investments. Tax incentives play an important role in the system. For the time being respective solutions include:

1) reliefs for R&D Centers;
2) Special Economic Zones regulations;
3) investment relief;
4) technological relief;
5) tax credit.

Polish tax law system does not provide any explicit tax incentives for investment in emerging, developing and low income / high poverty countries. It should be noted, however, that a number of Polish tax treaties is based on UN Model Tax Convention, which may, in effect have some indirect impact on facilitating investments in developing countries. An example of such regulations could be the tax sparing credit which may make an investment in some countries or territories more favorable (when source state decides to exempt e.g. dividend income from tax which does not preclude tax deduction in the state of residence). Nonetheless it should be stressed that using tax sparing credit by Polish residents is treated by the MF, in general, as tax avoidance and therefore its abolishment constitutes one of the elements of current tax policy.

5.2. R&D Centers

R&D Centers tax relief is an element of system of promoting innovation in Poland. Creating a Research & Development Center offers a number of benefits, including those of a purely tax character. R&D Center may create an inno-

[14] *Ibidem*, p. 618.

[15] *Ibidem*.

vation fund which is formed from a monthly contribution (not exceeding 20% of gross income derived by the Center in a respective month) treated as deductible expense. Resources accumulated in the fund may be allocated for covering R&D costs. Moreover R&D Centers enjoy tax exemption from property local taxes (real estate tax, agricultural tax and forestry tax).

5.3. Special Economic Zones

Special Economic Zones (hereinafter: SEZ) mechanism is an example of a territorial and temporary exemption provided by Polish tax law regulations. SEZ were brought into life by a Special Economic Zone Act of 20 October 1994.[16] Special Economic Zone forms a geographically separated, uninhabited part of the territory of Poland. For the time being there are 14 SEZs located throughout Poland.

Under SEZ Act the Zones are established upon a regulation of the Council of Ministers which determines the name, the area (territory), the management (a majority state or municipality owned company) and the period for which it has been established. Business activity may be carried out in the SEZ only upon a special permit issued in a form of an administrative decision by an Minister of Economy or the company managing the respective Zone.

Tax incentives provided by the SEZ Act embrace:

1) corporate and personal income tax exemption;[17]
2) real estate tax exemption.

Those incentives are dependent on maintaining the validity of the SEZ permit. Therefore it is vital to determine fundamental requirements imposed by the investors to that extent. SEZ permits encompass several different requirements which have to met by the investors in order to enjoy tax exemptions:[18]

1) level of investment expenses;
2) creation of new jobs;
3) end of the investment (project deadline);
4) maximal value of eligible costs;
5) abiding by the SEZ regulation;
6) maintaining the ownership of the assets;
7) maintaining the investment for a certain period.

It has to be noted that tax exemption for SEZ is limited. Maximum level of tax exemption is calculated separately for each taxpayer and is dependent on two principal criteria:

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[16] J. of L. 2007, No. 42, item 274 as amended [hereinafter: the SEZ Act].

[17] Art. 17(1)(34) of the CIT Act and Art. 21(1)(63a) of the PIT Act.

[18] K. G r a b o w s k a-K l i m c z a k, [in:] *Prawne i podatkowe aspekty prowadzenia działalności w Specjalnych Strefach Ekonomicznych* [Legal and tax aspects of business activity in Special Economic Zones], ed. A. Tałasiewicz, Warszawa 2010, p. 38.

– maximal intensity of regional state aid determined for a given territory (30–50% of eligible costs depending on a region)[19] and

– incurred investment costs which may be covered by the state aid.

Apart from income tax exemption entrepreneurs carrying out business activity under a SEZ permit on the territory of the Zone may also enjoy tax exemptions in real estate local tax. There are two legal bases for such exemption: the Act of 2003 amending the SEZ Act[20] and municipal council resolutions. Art. 10 of the Act of 2003 amending the SEZ Act exempts from tax buildings, structures and land used in business activity on the territory of the SEZ under a SEZ permit. The amount of the real estate tax exemption is included in the calculation of the general maximum amount of tax exemption in SEZ (see above). Moreover respective municipalities are entitled to establish additional real estate tax exemptions (limited, however, by specific regulations).

Incentives granted by Poland in a form of tax exemption for business operating in SEZ form a part of a regional state aid compatible with the common market under TFEU.[21]

Introducing the SEZ regime in Poland has turned out to be a great success. Till June 2013 the total value of realized investments was close to 89 billion PLN (approximately 21 billion EUR). SEZ have generated 188 042 new jobs and 1602 permissions have been granted.[22]

5.4. Investment relief

The mechanism of an investment relief in both corporate and personal income tax reduces tax base in income tax for entrepreneurs by accelerating depreciation of certain categories of capital assets. Taxpayers may exploit two alternative opportunities: accelerated depreciation in a strict sense (which is based on increasing of the depreciation rates) and one-off depreciation. One-off depreciation is accessible for small taxpayers and other taxpayers opening business and may cover capital assets which book value does not exceed 50 000 EUR.

Eligible assets embrace, in general, machines and technical appliances as well as means of transportation (excluding cars).

5.5. Technological relief

Technologies under certain conditions are subject to depreciation. That rule pertains to such intangibles acquired by the taxpayer which may have business

[19] For small and medium enterprises that limit is increased by 20% (small enterprises) and 10% (medium enterprises).

[20] J. of L. 2003, No. 188, item 1849, as amended.

[21] K. G r a b o w s k a-K l i m c z a k, *op. cit.*, p. 17.

[22] See: www.mg.gov.pl/files/upload/7809/Tabela%20za%20II%20kw.%202013%20r.pdf (last accessed on November 14, 2013).

application (copyrights, licenses, industrial property rights and know-how) and the expected period of their use exceeds one year. Within the depreciation time the whole amount of incurred acquisition expenses is deducted.

In addition, however, under Art. 18b of the CIT Act corporate taxpayers are entitled to deduct additional 50% of costs incurred for acquisition of new technologies defined as technological knowledge in a form of intangibles, in particular results of research and development which allows the production of new or improving the production of already manufactured goods or services. That knowledge cannot be applied anywhere in the world for a period exceeding – 5 years.

What is important the innovative character of the knowledge should be confirmed by an opinion of an independent scientific institute as understood by the Science Financing Principles Act.

5.6. "Tax credit" – Tax relief for news businesses

Under Art. 44(7a) of the PIT Act individuals opening businesses for the first time may apply for a so called "tax credit."[23] That relief comes down to the exemption in the first year following the year in which the business was started (if it was carried out at least for 10 months, otherwise the beneficial regime is applicable for next two years). However that regime cannot be treated as "tax holidays" in a strict sense as the amount of "saved" tax should be paid in the following 5 years (20% of tax per each year). It is a type of tax "credit," therefore. Similar regime is accessible to CIT taxpayers – Art. 25(11) of the CIT Act.

5.7. State aid

State aid should be seen, in its broad meaning, as an instrument for supporting private entrepreneurs (and thus the economy) by the state.[24] Such activities carried out by the state should be, however, limited in the market economy since they may lead to the distortion of the competition. Poland, as a member of the EU, is subject to EU law regulations on state aid. As a general rule set forth by Art. 107(1) of the TFEU "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." As an exception certain categories of state aid are treated as compatible with the internal market[25] and some may be so qualified.[26]

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[23] That notion should not be confused with a popular method for avoiding double taxation.

[24] A. N y k i e l-M a t e o, *Pomoc państwa a ogólne środki interwencji w europejskim prawie wspólnotowym* [State aid and general intervention measures in European Community Law], Warszawa 2009, p. 11–12.

[25] See Art. 107(2) Treaty on the Functioning of the European Union [hereinafter: TFEU].

[26] Art. 107(3) TFEU.

From the jurisprudence of the ECJ one may infer the following features of the state aid:

– benefit or advantage;
– granted by the state;
– selectivity.[27]

6. The system of corporate tax rates in Poland

Income tax rates vary depending on the category of tax (PIT or CIT), income and taxpayer (residents, non-residents). While personal income taxation is of progressive character, general CIT tax rate is flat and amounts to 19%. It applies both to resident and non-resident taxpayers carrying out business activity in the territory of Poland. In general 19% tax rate is applied to net income. As an exception when a non-resident taxpayer (either directly or through a PE) derives business income from Polish sources and does not maintain proper accountancy and thus it is not possible to determine its taxable income under Art. 9(2a) of the CIT Act an estimated net income is determined using the following ratios:

1) 5% of gross income for wholesale or retail sale activities;
2) 10% of gross income for construction, assembly and transport activities;
3) 60% of gross income for agency activities (only if agency fees are calculated on a commission basis);
4) 80% of gross income for legal and expertise services;
5) 20% of gross income for all other income sources.

Certain categories of income are subject, however, to special regimes and special tax rates. Dividends paid out to resident shareholders are taxable at their level and on their own – in a way of self-assessment. Income derived from dividends is combined with other worldwide income and subject to 19% under general rules. Dividends paid out to non-residents are subject to a special withholding regime under which a Polish subsidiary, acting as a paying agent, is obliged to calculate and withhold tax and pay it to the competent tax authority. Although also 19% tax rate is applied no expenses may be deducted. Therefore it is the gross income which is subject to tax.

The same system applies to taxation of interest and royalties – when those categories of income are paid to Polish residents, they are subject to 19% tax under general rules in a way of self-assessment. On the other hand if such income is paid out to non-resident creditor, the paying agent is bound to withhold due tax which for interest and royalties amounts to 20%. Under domestic law 20% with-

[27] A. N y k i e l-M a t e o, *op. cit.*, p. 44; J. K o c i u b i ń s k i, "Selectivity Criterion in State Aid Control," *Wroclaw Review of Law*, *Administration and Economics* 2012, No. 1, p. 2.

holding tax applies also to other categories of income (which under a tax treaty normally would be treated as business profits – art. 7 of the OECD MC) such as: fees for the following services: advisory, legal, advertising, accounting, market research, management and control, data processing, recruitment of personnel, guarantees and of similar character as well as for sports, artistic and entertainment activities. As an exception a 10% tax rate applies to fees paid out to non-residents for transport of cargo and passengers by foreign commercial sea transport enterprises (excluding transit cargo and passengers) and income derived in Poland by foreign air transport companies.

Statutory tax rates apply unless respective tax treaty or secondary EU regulations (in particular the Parent-Subsidiary and Interest & Royalties Directive) otherwise provide.

7. Trade and investment agreements

Poland is a party to 62 bilateral investment agreements (BITs) which form one of the instruments for commercial policy of Poland. These are the agreements with: Albania, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium and Luxembourg, Belarus, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Jordan, Kazakhstan, South Korea, Kuwait, Latvia, Lithuania, Macedonia, Malaysia, Moldova, Mongolia, Morocco, the Netherlands, Norway, Portugal, Romania, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Arab Emirates, USA, Uruguay, Uzbekistan, United Kingdom and Vietnam. These agreements typically contain non-discrimination provisions which preclude less favorable treatment of foreign investments and capital flows.

Poland as a member of European Union and World Trade Organization is also bound by the system of, among others, non-discrimination provisions set forth by, respectively, EU law and the Agreement Establishing the World Trade Organization.

Conclusions

Tax measures adopted by Poland forming tax investment incentives are of different character. They are either specifically aimed at attracting new businesses to particular regions (Special Economic Zones) for particular purposes (creating new jobs etc.) or have more general impact (relatively low, flat CIT tax rate, admissibility of accelerated depreciation and investment reliefs). One may also

observe a strive to make the economy more innovative and efficient which is for the time being realized e.g. by granting certain benefits to R&D Centers and entrepreneurs implementing new technologies.

As a Member of EU and WTO Polish tax policy is constrained by regulations and principles which preclude discriminatory treatment. Apart from that one may not forget about state aid limitations set forth by the primary EU law which restricts tax policy of EU Member States in the area of tax incentives.

Summing up we are of the opinion that assessing the legal system in Poland, taking into account the need of further development and drive for innovation, in general we find Polish system of investment encouraging instruments justified and desirable.

SECTION V A

Piotr Daranowski*
Professor of Law, University of Łódź

COUNTER-TERRORISM LAW

I. Introduction: Brief Overview of Poland's Experience with Terrorism and Terrorism Law

Undertaking an attempt at presenting the stages of counter-terrorism law formation in Poland, it is deemed necessary to indicate their following sequence.

The first stage, of socialist era Poland, which lasted till 1989; the second stage, dating from the moment of gaining independence in the end of 1989 and the beginning of 1990 to 11 September 2001; the third stage, being the period from the WTC attacks to Poland's accession to the European Union (on 1 May 2004); the fourth and the last stage – from the latter date till the present day.

The first stage, is characterized by an action undertaken by Polish People's Republic in order to become bound by five multilateral United Nations sector conventions which, looked at from time's perspective, have formed the body of anti-terrorist acts[1] – constituting the foundations of their full catalogue of the present

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[1] Convention on Offences and Certain Other Acts Committed on Board Aircraft, concluded at Tokyo, on 14 September 1963 – Official Journal of Laws of the Republic of Poland [Dziennik Ustaw RP – further in the text abb.: OJ] of 1971 No. 15, location 147 [OJ 1971 – 15/147]; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970 – OJ 1972 – 25/181; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971 – OJ 1976 – 8/37; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats Agents, adopted in New York on 14 December 1973 – OJ 1983 – 37/168; Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980 – OJ 89 – 17/94.

era (thirteen conventions in total[2]). That impulse of Polish People's Republic to partake in fulfilling the rules of universal jurisdiction towards acts pointed out at the conventions, was proceeded by enacting in 1969, as a part of new Polish Penal Code [further as: PPC], a clause stating *expressis verbis* the existence of duty, flowing from international treaties to prosecute perpetrators of terrorist acts – aliens – within Polish legal system.[3] Practical dimension of the conventions rule and application – meaning, the instances of penalization of the defined acts, had not occurred.

The second stage embraces the widening of the catalogue of antiterrorist treaty obligations – all universal in their character – by the subsequent three UN conventions,[4] and also after Poland's accession to the Council of Europe (on 26 November 1991)[5] – by the antiterrorist conventions of that Organization.[6]

What needs to be underscored, however, are certain autonomous changes in Polish legal system which are antiterrorist in their sole purpose. Also, it seems essential to bear in mind the practical dimension of the duty to grant EU regulations the necessary expression as a part of body of Polish law,[7] including, what seems to be obvious, the regulations which have potentially antiterrorist dimension.

Looking closely at the former, what has to be pointed out in the first place is the broadening and certification of the subject matter scope of *universal jurisdiction* clause by explicit inclusion of Polish citizens in the text of the new, established in 1997, PPC,[8] in its Article 113.[9] The said article, in its disposition

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[2] United Nations Treaty Collection – Text and Status of the United Nations Conventions on terrorism – https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml (last accessed on January 30, 2014).

[3] Art. 115 PPC stating that "Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to an alien in the case of the commission: […] 2) an offence the Republic of Poland is obliged to prosecute under international agreements." – OJ 1997 – 88/553.

[4] International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979 – OJ 2000 – 106/1123; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done At Rome on 10 March 1988 – OJ 1994 – 129/636; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixe Platforms Located on the Continental Shelf, done at Rome on 10 March 1988 – OJ 1992.

[5] OJ 1994 – 118/565.

[6] European Convention on the Suppression of Terrorism (27.01.1977) – OJ 1996 – 117/557.

[7] Europe Agreement (1991) – OJ 1994 – 11/38 – Chapter III Approximation of laws Art. 68 "The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavors to ensure that future legislation is compatible with Community legislation."

[8] OJ 1997 – 88/554.

[9] Art. 113. "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

referring to 'a Polish citizen,' constitutes a very important, from the standpoint of the realization of duty to penalize *delicta iuris gentium*, exception to the cardinal rule of Polish law, according to which a Polish citizen can be held responsible for the offences committed abroad only if the requirement of dual criminality has been met. As to the broadened circle of subjects, penalization practice of the terrorist act variants that are covered by the conventions has not been observed in the period discussed herein.

Considering the consequences flowing from the duty of the candidate State aspiring to join the EU structures to harmonize its legislation with the Union regulations of antiterrorist character, it can be stated that Polish law anticipated the Union regulations targeting money laundering[10] practices which could also serve the purpose of blocking possible acts of terrorism financing.

The fact that the Police Act has introduced "antiterrorist sub-units"[11] as one of the components of the forces – even though the essential range of their operation has not been set – can also be considered a certain special form of reference to the terrorist threat.

The UN Security Council Resolution No. 1373 opens the third stage. The duty to execute its provisions became an impulse for the deep, complex changes. However, the first action of the Republic of Poland performed after the reception of the Security Council Resolution, was posing an obvious, in the given factual state, question whether the existing body of law allows for any countermeasures against the terrorist threat, the scope and subject of which had been indicated in the Resolution,[12]

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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." Analyzing Article 113, what needs to be highlighted is that the fact Poland assumed the obligation to prosecute certain crimes regulated in the conventions does not mean that bringing the perpetrators to justice in Poland does not depend on the existence of substantive law basis in Polish law. Those substantial law foundations are set in Chapter 16 of the PPC which puts together and classifies offences named in its title – "Offences against peace, and humanity, and war crimes" – (Articles 117–126). Juxtaposition of the dispositions laid out in the anti-terrorist conventions with the Article 113 and the catalogue of crimes presented in Chapter 16 of PPC is the basis of penalization and proves the thesis that "Poland fulfilling its international obligations penalizes all the behaviors defined in the ratified treaties." See *Polish Penal Code – General Regulations – Commentary to Articles 32–116* [further as: The Commentary], eds. M. Królikowski, R. Zabłocki, Vol. II, Warsaw 2010, p. 904.

[10] Which found its expression in the Council Framework Decision 2001 /500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime – OJ L 182/1 – and in the solutions of the earlier enacted Act of 16 November 2000 on counteracting to the introduction to financial transactions of property values originated from illegal or unclear sources (OJ 2000 – 116/1216) [further as: The 2000 Act].

[11] *The Police* Act of 6 April 1990 (OJ 1990 – 30/179) – Chapter 2, Article 4.1.

[12] In general – as for the main issues tackled – the Security Council Resolution No. 1373 in its narration requires: (i) prevention and suppression of direct or indirect financing of terrorist acts

and creating a preliminary list of acts[13] along with the assessment of their adequacy.[14]

Step number two was making independent changes in the internal law which were carried out by the Polish legislator in order to execute the obligations flowing from the Resolution 1373. The outcome being the amendment to the 2000 Act[15] introduced on 27 September 2002, in its title (and content) adopting measures for "the prevention of the financing of terrorism."

In turn, the process of implementation of *the basic European Union regulations* constituted the next set of changes. Rules which concern, directly or indirectly, the actions aiming at eradicating terrorism.[16]

Its key effect was the implementation, by means of a new Act of 16 April 2004, into the PPC[17] – the resolutions of Council Framework Decision 2002/475/JHA.[18] It resulted in introduction of an offence of terrorist character into Article 115 § 20.[19]

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in the widest sense of the term; (ii) blocking recruitment of terrorist groups members and exchanging information on terrorists' migrations; (iii) elimination of the supply of weapons to terrorists; (iv) penalization of terrorist acts. By thus tailored contents the Resolution has delineated main course and dimension of antiterrorist – also legislative – measures.

[13] As far as the fundamental regulations were concerned, the juxtaposition embraced: (i) the 2000 Act – see footnote 10 – seen as a tool which allowed to subject terrorist acts to total control of 'responsible institutions' which include banks, and also allowed the acts to be qualified as 'money laundering' directly named and penalized in the PPC; (ii) the Act of 29 November 2000 on international exchange in goods, technologies and services of strategic importance for the safety of the State, and maintaining international peace and safety that allows to block 'terrorist' weapon exchange; (iii) collating sequence of PPC regulations so that they could give grounds to penalization of "[…] several instances of penalization of the behavior that possesses characteristics of terrorist acts," especially dispositions of Articles 140; 163; 165; 171; 185; 258 of the PPC – applicable apart from the realization of the *universal jurisdiction* rule; (iv) and, last but not least, giving the Republic of Poland the ability to prevent terrorist acts as an effect of the information concerning imminent threats which can be exchanged between the responsible institutions, operations made possible on the basis of international agreements targeting organized crime prevention and to which Poland is a Party.

[14] The early Polish reports (2001–2002) submitted to the Security Council Counter-Terrorism Committee were the first indication of the ability to counteract terrorist threats on the grounds of the existing legal solutions – see also www.un.org/en/sc/ctc/resources/countryreports.html (last accessed on January 30, 2014).

[15] See footnote 10.

[16] Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) – OJ EU L 164; Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA) – OJ EU L 162; Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) – OJ EU L 190; Council Framework Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA) – OJ EU L 063.

[17] OJ 2004 – 93/889.

[18] OJ EC L 164/3.

[19] See also part III of the Report.

The promulgation of the rules set in the Article 115 § 20 of the PPC was accompanied by the significant extension of the provision set in Article 110 § 1 of the PPC by a passage that allows Polish penal law to be applied "[…] to aliens who have committed a terrorist offence abroad."[20] In the operational sense, the modified Article 110 § 1 determining the responsibility of an alien in Polish law for terrorist offences committed abroad, informs about the jurisdiction of Polish courts in case where it would not be possible to hold such person responsible on the basis of the *universal jurisdiction* provided in the PPC.[21]

The implementation of the remaining Framework Decisions issued in 2002 by the Council was also carried out by means of the aforementioned Act of 2004.[22]

At the same time, the following government agencies that come under the authority of the Prime Minister were set up and regulated in a separate bill – the Agency of Internal Safety [Agencja Bezpieczeństwa Wewnętrznego] and Intelligence Agency [Agencja Wywiadu] [further as: ABW; AW] – their task is (among others) "preventing and eliminating terrorism (the crimes of terrorism)."[23] Also, the signal for the necessity of fighting those crimes, in broader all-European dimension, found its reflection in the accession by Poland to Europol on 1 November 2004 as a result of the ratification of the said Convention.[24]

The sign of changes in quality of the law was also the act of introducing into the bills – enacted in the year 2002 – concerning states of emergency (that is: *martial law*,[25] *state of emergency*[26] and *state of emergency in case of natural*

[20] Article 110 § 1 had been worded as follows: "The Polish penal law shall be applied to aliens who have committed an offence against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organizational unit not having the status of a legal person and to aliens who have committed abroad a terrorist offence."

[21] See also The Commentary, p. 890.

[22] The Act had developed Chapter 62 of the Polish Criminal Procedural Code [PCPC] – titled: "Mutual Legal Assistance and Summons in Penal Cases" set from Article 589b to 589f – also implementing Council Framework Decision on combating terrorism (2002/475/JHA) and adding two subsequent Chapters, 65a and 65b, to Part XIII of the PCPC. The first of the abovementioned chapters regulates procedure that is to be followed when a Polish court puts forward a request to a member state for handing over the person under prosecution, whereas the other chapter regulates a request of an EU member state for handing over the perpetrator for whom a European arrest warrant has been issued – thus implementing the Council's Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). See also M. W r ó b l e w s k i, "Wspólne zespoły dochodzeniowo-śledcze" [Mutual Investigation and Inquiry Teams], *Prokuratura i Prawo* [Prosecutor's Office and the Law] 2006, 9, p. 74–85.

[23] The Act of 24 May 2002 on *the Agency of Internal Safety and the Intelligence Agency* – OJ 2002 – 74/676.

[24] OJ 2005 – 29/243.

[25] The Act of 29 August 2002 – OJ 2002 – 156/1301.

[26] The Act of 21 June 2002 – OJ 2002 – 113/985.

disaster),[27] special clauses stating that such circumstances can also be "caused by terrorist actions."[28]

The fourth stage of the analyzed law development is the period of Poland's operations as the EU member state fulfilling the guidelines of *The EU Counter-Terrorism Strategy* (2005) adopted in 2005, as well as the Strategies[29] accepted afterwards – according to the standard – *prevent*, *protect*, *pursue*, *respond* – confirmed and stressed also in the analogous Strategies of the Republic of Poland – *National Security Strategy of the Republic of Poland*;[30] *National Counter-Terrorism Programme of the Republic Poland 2012–2016*;[31] *Polish Foreign Policy Priorities 2012–2016*.[32]

Contemplating the motifs: *prevent and protect*, accentuated by the sole structure of the report, the following achievements of the legislation have to be mentioned.

First of all, the subsequent amendment to the 2000 Act[33] introduced on 25 June 2009. Thus amended Act has been dedicated to the "prevention of money laundering and terrorism financing."[34] The amendment also introduces, in the text of Article 165a,[35] a new provision to the PPC, the aim of which is to penalize any acts of "financing of the terrorism." The operation described, along with all the amendments introduced by the Act, not only constitutes the expression of the realization of obligations that bound the Republic of Poland and derive from recommendations set forth by the UN Security Council Counter-Terrorism Committee that monitors the execution of Resolution 1373, but also the realization of the UN International Convention for the Suppression of the Financing of Terrorism – its Article art. 2.1.[36] At the same time, it is also – on parallel plain – an aspect of implementation of the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[37] – its Article 1.4.

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[27] The Act of 18 April 2002 – OJ 2002 – 62/558.

[28] Article 2.1 of both Acts.

[29] *The European Union Strategy for Combating Radicalization and Recruitment to Terrorism* (2005); *The EU Internal Security Strategy – Towards a European Security Model* (2010).

[30] www.iniejawna.pl/pomoce/przyc_pom/SBN_RP.pdf (in Polish) (last accessed on January 30, 2014).

[31] http://zbrojnie.pl/wp-content/uploads/2013/06/Narodowy_Program_Antyterrorystyczny_na_lata_2012–2016.pdf (in Polish) (last accessed on January 30, 2014).

[32] www.msz.gov.pl/resource/d31571cf-d24f-4479-af09-c9a46cc85cf6:JCR (last accessed on January 30, 2014).

[33] See also footnote 10.

[34] See also point VI of the Report.

[35] See also point III of the Report.

[36] See also point VI of the Report.

[37] OJ EU L 309/15.

Statutory absorption of other international solutions, such as the *Financial Action Task Force* recommendation that aims at terrorism suppression, complements the signaled achievements.[38]

Furthermore, it is necessary to mention the amendment of 25 May 2012 to the Act of 29 November 2000 on *international exchange in goods*, *technologies and services of strategic importance for the safety of the State*, *and for the maintaining international peace and security*. It specifically requires – aside the 'routine' execution of the decisions (sanctions) introducing *arms embargo* adopted either by the Security Council or the European Union – individual and independent assessment of the given situation and, in consequence, independent, individual performance of actions that are to block terrorist weapon supplies. By doing so, the discussed amendment fully takes into consideration the EU decisions.[39] Whenever transfer of 'military technology and equipment' that include 'weapons' – components of the latter are enumerated in the Act (Article 3) – is concerned, the duty to rigorously follow and be directed by the stipulations of the Council Common Position in the process of decision making arises directly from the imperatives already present and binding in Polish law. Criterion No. 6 requires in the process mentioned above an assessment of "behavior of the buyer country with regard to the international community, as regards in particular its attitude to terrorism […]." Therefore, the Act (per its Article 16.2.3) indicates that the circumstance in which "[…] final destination country; a) supports terrorism and international organized crime" constitutes grounds for the refusal of weapon transfer.

What is more, aside the abovementioned amendment, one more bill has been enacted, namely, the Act of 26 April 2007 on *critical management*,[40] which opens the possibility to undertake indirect actions in the face of threats that need to be combated with the use of resources that go beyond the scope of the basic forces and measures but do not require resorting to the tool of emergency states. The array of such threats – according to the text of the amended law[41] – include "acts terrorist in character" (Article 3.11) which "shall be […] understood as situations being the effect of an offence described in Article 115 § 20 […] of the PPC […]."

Contemplating the forces involved in antiterrorist activities, it is necessary to draw attention to forming, as a part of the ABW structures, the Antiterrorist Centre of ABW.[42] The main task of the Centre is to coordinate actions of all the forces and institutions that take part in securing the Republic of Poland against the terrorist threat, not only in information – analytical scope of operations, but also by supporting the decisional process of the state executives basing on the information

[38] See also footnote 71.

[39] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (OJ EU L 335/99).

[40] OJ 2007 – 89/590.

[41] OJ 2013 – 1166.

[42] The Prime Minister's Order, No. 102, Monitor Polski 2008 – 69/622.

obtained.[43] Also, amendment to the Act on *Border Guards* complements – *expressis verbis* – the catalogue of their tasks by adding antiterrorist actions.[44] Whereas in the case of the Police forces, the amendment implies the antiterrorist scope of tasks by means of the construct that "[the Police] carries out tasks flowing from the legal regulations of the EU as well as international contracts and agreements on grounds and in accordance with the rules contained therein."[45]

Through the prism of taking on international antiterrorist treaty obligations, the discussed process has been supplemented by the act of ratifying four subsequent UN conventions[46] and the Council of Europe conventions.[47] The practice of penalizing numerous variants of terrorist acts described in those documents by applying *universal jurisdiction* rule has not occurred in the analyzed stage either.

II. The Definition of Terrorism

Considering the sequence of stages of Polish law development, announced in point I of the presented Report, it is deemed necessary to acknowledge that the first particular attempt at defining terrorism in the law of the Republic of Poland has been the amendment of 2002 to the 2000 Act [*on Counteracting Introduction into Financial Circulation of Property Values Originating from Illegal or Undisclosed Sources*]. The change of title of the 2000 Act meant that its goal became, aside from preventing money laundering, also combating acts that aim at financing terrorist activity. Article 2.7 has defined the essence of the 'financed' actions stating that "any time the Act mentions a terrorist action – it shall be understood as crimes against peace, humanity, as well as war crimes, crimes against universal safety and those described in Articles 134 and 136 of the PPC."

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[43] See also A. M a k a r s k i, "Centrum Antyterrorystyczne Agencji Bezpieczeństwa Wewnętrznego. Geneza, zasady działania oraz doświadczenia po pierwszym roku funkcjonowania" [Antiterrorist Centre of the Internal Safety Agency], *Przegląd Bezpieczeństwa Wewnętrznego* [Internal Safety Review] 2010, No. 2 (2), p. 101–112.

[44] The Act of 12 October 1990 *on Border Guards* (OJ 1990 –78/462) – from 2007 (OJ 2007 – 82/558); in its Article 1.2.5 stating that one of the tasks of the Border Guards is, among others, "carrying out activities in order to recognize and counteract terrorist threat."

[45] OJ 2010 – 164/1108.

[46] International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999 – OJ 2004 – 263/2620; Protocol for the Suppression of Unlawful Acts of Violence At Airports Serving International Civil Aviation, done at Montreal on 24 February 1988 – OJ 2005 – 48/348; International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997 – OJ 2007 – 66/438; Convention on the Marking of Plastic Explosives for the Purpose of Identification, done in Montreal on 1 March 1991; OJ 2007 – 135/948.

[47] European Convention on the Prevention Terrorism (16.05.2005) – OJ 2007 – 191/1364; European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (16.05.2005) – OJ 2008 – 165/1028; see also footnote 137.

It would be difficult, however, to recognize the rule stated in the Article 2.7 of the Act as a legal definition of terrorism, hence it describes a terrorist act by enumerating a closed catalogue of offences classified in the regulations of the Penal Code.[48]

Thus, it has to be concluded that the amendment to the PPC of 16 April 2004, for the first time introduced into Polish body of law the legal definition of terrorism. It remains regulated in the text of Article 115 § 20 of the PPC.

Art. 115 *An offence of a terrorist nature*

§ 20 An offence of a terrorist nature is an act subject to punishment of deprivation of liberty, with the upper limit of at least five years, committed for:

1) a serious intimidation of many persons,

2) compelling the public authority of the Republic of Poland or of the other state or of the international organization to undertake or abandon specific actions,

3) causing serious disturbance to the constitutional system or the economy of the Republic of Poland, of the other state or international organization

– and an threat of the commitment of such act.

By means of the said amendment, the Republic of Poland has implemented the Framework Decision No. 2002/475/JHA of the Council, fulfilling its recommendation obligating the member States of the European Union to pass a uniform definition of a crime which is terrorist in character.

III. Criminal Laws and Prosecutions

A. Criminal Law

Legal definition of an offence of a terrorist nature was introduced as we have mentioned into the PPC in 2004.

Polish lawmakers defined an offence of a terrorist nature with reference to two criteria which need to be met cumulatively – a substantive one and a formal one. It is assumed that the offense has been defined, as to its substance, similarly to the meaning of Article 1 § 1 of the Framework Decision, although with a different wording. The definition contained in Article 115 § 20 PPC names as the substantive

[48] Included in Chapter 16 of PPC which puts together and classifies shown in its title – "Offences against peace, and humanity, and war crimes" – behaviors (Articles 117–126) that allow to fulfill the act of *universal jurisdiction* (see also footnote 8) – supplemented by the provisions providing for penalization of assassination attempt "of the President of the Republic of Poland" (Article 134 PPC) and perpetrating on the Polish territory "active attack against the head of a foreign state or the accredited chief of diplomatic mission of such state or any person benefiting from similar protection on the basis of internal legal acts, agreements or universally recognized international customs" (Article 136 PPC).

criteria a particular aim, which must accompany the perpetrator for him to commit an offence of a terrorist nature. Such an aim driving the culprit of an offence of a terrorist nature ought to be: 1) a serious intimidation of many persons; 2) compelling the public authority of the Republic of Poland or of the other state or of the international organization to undertake or abandon specific actions; 3) causing serious disturbance to the constitutional system or to the economy of the Republic of Poland, of the other state or international organization. The second criteria – unlike the Framework Decision – does not contain an enumeration of particular kinds of crimes, such as attacks onto human life, kidnappings or taking hostages, causing damage to governmental or public utility buildings, hijacking an air vessel or other means of transportation, weapons production, their supply or use, propagating hazardous substances, causing fires or explosions, interfering with or interrupting water or energy supplies in a way threatening to human life. Instead of such an enumeration Polish lawmakers introduced a formal criteria by defining an offence of a terrorist nature as (any) prohibited act committed for one of the three purposes named above, subject to imprisonment with the upper limit of at least five years. Because in PPC each of the crimes named in the Framework Decision is subject to imprisonment with the upper limit of at least five years and in many cases of a much higher limit, it can be assessed that the definition of an offence of a terrorist nature covers in its scope all the categories of crimes named in the Framework Decision.

The use of a formal criteria (of the act being subject to imprisonment with the upper limit of at least five years) in the definition of an offence of a terrorist nature by the Polish lawmakers instead of including a list of such crimes (when the perpetrator acts under a specific aim) enabled for a concise wording of Article 115 § 20 PPC. This regulation is much shorter than Article 1 § 1 of the Framework Decision, which ought to be recognized as a virtue of the legislative technique used. As a vice of such a method one might recognize the fact that the scope of an offence of a terrorist nature covers also acts not included in the original definition of the Framework Decision, making the Polish definition broader than that of the Framework Decision. As one example the disclosure of secret information might be named, once aimed at forcing an organ of state power to undertake a certain action or refrain there from. A criminal act of disclosing information designated as "top secret" or "secret" is subject to punishment of deprivation of liberty from 3 months to 5 year (Article 265 § 1 PPC[49]). Therefore when both criteria are met: the substantive one – i.e. the perpetrator acts in order to force state authorities, Polish or foreign, to undertake a certain action next to the formal one: the prohibited act is subject to imprisonment with the upper limit of at least five years, in light of Polish criminal law

[49] Chapter XXXIII Offences against information protection – art. 265 § 1 PPC.

an offence of a terrorist nature is committed. As an illustration of such an event one might assume that a person who reveals a secret document about using illegal methods of surveillance or the existence of a secret prison where torture is deployed, while they commit the crime of revealing secret information in order to force public authorities to refrain from such practice, will be recognized as a "terrorist." With the example named above being of purely academic nature, it serves to show that the verbal interpretation of Article 115 § 20 PPC may lead to a broader understanding of "an offence of a terrorist nature" than the one included in the Framework Decision, which does not name the act of revealing state secrets as an act of terror.

When assessing the acts of a culprit who committed an offence of a terrorist nature the court if obliged to decide upon a sentence of deprivation of liberty above the lower limit foreseen in the act of law, it may however increase the upper limit of the sanction by half (Article 64, Article 65 PPC).

Criminal responsibility will also be faced by those who take part in an organized criminal group or association (art. 258 PPC[50]), 'aiming at committing offences of a terrorist nature' (art. 258 § 2 PPC), also when they do not themselves commit a terrorist crime. A member of such a group or association is subject to punishment of prison from 6 months up to 8 years. A particularly severe (of at least three years of prison) will be the responsibility of those who 'create or manage a terrorist group or association' (art. 258 § 4 PPC). The notion of "taking part" ought to be understood as membership in such a group or association, accepting its rules, executing orders or tasks designated by individuals holding leading positions, taking part in meetings, planning criminal acts, providing resources needed for the fulfillment of its tasks, seeking hideouts, giving shelter, enabling transpiration, donating money, as well as undertaking actions disabling the identification of group's or association's members. It is understood that an "organized group" ought to include at least 3 individuals, who act to achieve a joint goal which is the commission of an offence of a terrorist nature. It is punishable by law to participate in such a group, even if it was created for the commission of just one crime. The traits of an "association" include its durable formation, the existence of an identifiable leadership and internal discipline of its members.

B. Terrorism Prosecutions

B.1. Poland is a country not directly threatened by terrorist attacks. But we cannot completely exclude the increased interest in Poland on the part of terrorist organizations, especially in the context of Polish involvement, among others, in Afghanistan (and in the past – in Iraq). Like in the case of Poland, the threat

[50] Art. 258 Contribution in an organized criminal group or criminal association.

of terrorism in Central Europe is currently low. However, in regions neighboring the EU (the North Caucasus, Central Asia and the Maghreb countries) we observe the activity of extremist/terrorist groups of varying intensity.[51]

Fortunately, that is why there are no such crimes under prosecution in Poland, nowadays. Information on crimes and criminal trials are available for example on the website of the Ministry of Justice of Republic of Poland.[52]

There are no specialized courts for terrorism prosecution in Poland. Because of legal definition of a terrorism crime (the PPC – section 115 § 20) and so-called nature of such crimes (for example: manslaughter, kidnapping, possession of a weapon) potential offenders would be prosecuted by a public prosecutor and their cases would be sent to a district court (in Poland we have criminal courts: so-called common courts and military courts; and there are three levels of courts and two legal instances of a criminal trial).

Of course, in Poland there is no possibility to obtain evidence through torture or degrading treatment in any case. There are no exceptions in Polish law and everyone who overuses his power would face a criminal prosecution because of such an unlawful act.

There is a regulation in the Polish Criminal Procedural Code of 1997 [further: PCPC] (section 184) which allows a witness to testify anonymously. But this regulation is only for "protection of a witness' life, health, freedom and his/her belongings in a wide scale" in all criminal cases. Moreover, according to the Polish Supreme Court's sentence such anonymous testimony cannot be a sole evidence for an indictment (in every criminal trial).[53] All procedural regulations are established for all criminal cases, for example – rules of the Polish criminal trial, i.e.: 1) *Lex retro non agit* [law doesn't act back]; 2) *Nullum crimen*, *nulla poena sine praevia lege poenali* [no crime and no punishment without law]; 3) *Nullum crimen sine culpa* [no crime without guilt]; 4) *The rule of humanitarian punishments*; 5) *The right to appeal*; 6) *The material truth*; 7) *The free evaluation of evidence*; 8) *The objectivism*; 9) *The directness*; 10) *The accusatorial process*; 11) *The contestability*; 12) *The equality of parties*; 13) *The mandatory prosecution* (of legalism); 14) *The presumption of innocence*; 15) *In dubio pro reo* [irresolvable doubts in favor of defendant]; 16) *Onus probandi* [burden of proof]; 17) *The right to defense*; 18) *The public trial* (open for people and media); 19) *The oral and (or) in writing process*; 20) *The concentration of a criminal trial*.

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[51] This is an official statement of the Ministry of Foreign Affairs of the Republic of Poland (October 1, 2013); see www.msz.gov.pl/en/foreign_policy/security_policy/international_terrorism/ (last accessed on January 30, 2014). There are some statistical data on different issues – for example: criminal trials during a year, periods of criminal trials, etc.

[52] See http://ms.gov.pl/en/ (last accessed on January 30, 2014).

[53] See also point X of the Report.

B.2. A theoretical issue, recently gaining in significance around the world, as well as in Poland, is the question of legitimate means for solving so-called *ticking bomb scenarios* without infringing national legal norms.[54] This is a question of the possibility of applying torture and other cruel, inhuman or degrading treatment towards a person suspected of contributing to a terrorist act, if such treatment would offer a chance for saving human life. Torture and other cruel, inhuman or degrading treatment is generally considered prohibited as per Article 3 of the European Convention on Human Rights and Article 40 of the Polish Constitution.[55] It might however be considered admissible in the light of necessary self-defense (Article 25 PPC) or force majeure (Article 26 PPC).

In the case of activities undertaken by a representative of public authorities it ought to be regarded that he is bound by legal norms defining the scope of his competence and behavior, which leads to the conclusion that he may not use the abovementioned Articles of the PPC introducing self-defense or force majeure. Their stipulations may be applied solely in situations where no regulations on public authority apply, that is, e.g. when such an officer is off duty.[56]

Another conclusion ought to be drawn for an individual who in self-defense, as per Article 25 PPC, uses means recognized in any other circumstances as infringing the prohibition of torture or other cruel, inhuman or degrading treatment. As per Article 3 of the European Convention on Human Rights the European Court of Human Rights rejects its horizontal application, while simultaneously identifying certain positive obligations of the state.[57] This norm does not, as a rule, apply to individuals acting in their private capacity. Analogically Article 40 of

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[54] J. K u l e s z a, "Czy państwo może mordować własnych obywateli? Zestrzelenie samolotu typu renegade w świetle prawa karnego – zarys problemu" [Can a State Murder Its Own Citizens? The Renegade Aircraft Shootdown in the Light of Penal Law – Outline of the Problem], *Czasopismo Prawa Karnego i Nauk Penalnych* [Penal Law and Penal Sciences Periodical] 2009, No. 3, p. 5–33; J. K u l e s z a, "Legalne tortury" [Legal Torture], [in:] *Problemy wymiaru sprawiedliwości karnej. Księga jubileuszowa Profesora Jana Skupińskiego* [Problems of Penal Judiciary. Professor Jan Skupiński's Jubilee Book], eds. J. Jakubowska-Hara, A. Błachnio-Parzych, H. Kuczyńska, J. Kosonoga, Warszawa 2013, p. 882–893.

[55] www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (last accessed on January 30, 2014).

[56] Decision of the Polish Supreme Court [Postanowienie Sądu Najwyższego] of Oct. 27, 1994, case number III KRN 144/94, Orzecznictwo Sądu Najwyższego, Izba Karna I wojskowa 1995, No. 1–2, position 3, with commentaries from M. Dąbrowska-Kardas and P. Kardas, *Palestra* 1996, No. 7–8, p. 275 ff; M. F i l a r, [in:] *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2012, p. 91; J. L a c h o w s k i, [in:] *Kodeks karny. Część ogólna* [Penal Code. General Provisions], Vol. I: *Komentarz* [Commentary], eds. R. Zawłocki, M. Królikowski, Warszawa 2011, p. 791–792; "Decision of the Appelate Court for Katowice from May 15, 2008, case number II AKa 13/08", *Krakowskie Zeszyty Sądowe* 2008, No. 9, position 40.

[57] More on that: L. G a r l i c k i, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* [The European Convention on Human Rights], ed. L. Garlicki, Vol. I, Warszawa 2010, p. 135–136.

the Polish Constitution also ought not be applied horizontally. This is not to imply that using means described in Article 40 of the Polish Constitution is per se legal, but only that the constitutional prohibition does not exclude the possibility to use them in self-defense as described within Article 25 PPC.

On the other hand it might be assumed that means and ways of self-defense applied by a private individual do not fall within the ambit of torture or other cruel, inhuman or degrading treatment and ought to be assessed solely according to the stipulations of the PPC. As far as the actions of any public officer may be analyzed as activities falling within the scope of torture or other cruel, inhuman or degrading treatment, there are no grounds for such an analysis in the case of a private individual.

A private individual may therefore use the above mentioned means in the name of self-defense in order to obtain information on the hiding place of a kidnapped person or an active explosive. Fulfilling the legally proscribed prerequisites for self-defense such as the reality of a threat, its directness, illegality of a violation raises no doubt. The methods used to obtain the aforementioned information ought to be assessed as per the regulations of Article 25 PPC, in particular the proportionality towards the risk of a prevented violation.

The applicability of force majeure, as per Article 26 PPC, in the situation described above is doubtful, primarily due to the need of its subsidiarity, which in the circumstances of force majeure means the necessity to address appropriate Law enforcement authorities, as well as the applicability of Article 25 PPC, which relates particularly to the situations, where two competing legal interests are contested and that of the wrongdoer is to be sacrificed in order to preserve that of the victim.

IV. Investigative Powers

In Polish law there are no special investigative powers in terrorism cases given to the police, intelligence agencies and the military. All criminal proceedings are under the same rules, for example (see above B.1): presumption of innocence, criminal nature of a torture or degrading treatment, right to defense, right to appeal, an so-on. Poland does obey both – the international law and its own constitutional law.

A. Police Powers

As stated above the Polish police has no special/extra powers in terrorism cases not available in ordinary criminal investigations and cases. There are no special preventive arrests, pre-trial detention powers, and so-on.

B. Intelligence Agencies

As stated above the Polish intelligence agencies have no special powers in terrorism cases not available in ordinary criminal investigations and cases. Of course they can use some legal measures (for example electronic surveillance) but all powers in criminal prosecutions and criminal trials are the same for every case and against every person.

V. Proscription/Listing of Terrorist Groups/Individuals

As far as the proscription is concerned, creation of 'antiterrorist' listings by the authorities of the Republic of Poland, in principle, is not provided for in the Polish law.

Registering groups, persons and entities that are subject to special terrorism combating restrictive measures – which are included in the law of the Republic of Poland – is a consequence of putting those 'groups, persons and entities' on the appropriate lists. The lists are created by the UN Security Council, as well as implemented by means of the EU decisions,[58] or are put together by the EU within the framework of independently realized antiterrorist strategy of the Union.[59] In the case of the latter, the action is performed by means of the lists approved (since 2001) according to the procedure amended in 2007.[60]

Those specific restrictive measures directed against those persons and entities that are on the lists – contain – first of all, the necessary measures to combat any form of financing for terrorist activities.[61] But it does not exhaust the phenomenon of restrictive measures.

The purpose of the lists – as the sole structure of the Report presented herein directly signals – conveys encompassing the enumerated subjects with further specific restrictive measures, also including: migration/immigration control, possible arms trade transactions blocking. Creating such tools also reflects the realization of the general obligation to exchange information concerning terrorist

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[58] Council Regulation (EC) No. 881/2002 of 27 May 2002 – OJ L 139; Council Regulation (EC) No. 596/2013 of 24 June 2013 amending Regulation No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network – OJ EU L 172/1 – 25.06.2013.

[59] Council Common Position of 27 December 2001 *on the application of specific measures to combat terrorism* – 2001/931/CFSP – OJ L 344/93. Council Regulations (EC) of 27 December 2001 *on specific restrictive measures directed against certain persons and entities with a view to combating terrorism* – No. 2580/2001 – OJ L 344/70.

[60] Council of EU – 10826/07 Restraint – 21 June 2007; see also http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm (last accessed on January 30, 2014).

[61] See also point VI of the Report.

threats by proper forces, both in the national and international (Europol) dimensions. The scale of those operations is unknown due to their confidentiality.[62]

Self-executing character of the lists means that all forces involved in antiterrorist activities (including the Prosecutor's Office, ABW [Antiterrorist Centre of ABW], Central Anticorruption Bureau [Centralne Biuro Antykorupcyjne – further: CBA], the Police, Border Guards) are aware of their content and of the duty to take them into consideration in the course of undertaken operations.

International (UN/EU) sets of persons can potentially be supplemented by the autonomous – immigration/migration – decisions of Polish authorities in case of building lists of persons whose presence on the territory of the Republic of Poland is undesired.[63]

VI. Regulation of Terrorism Financing

A.1. Reconstructing the evolution of statutory provisions concerning activities that are to counteract terrorism financing, directly – after 11 September 2001 – in the quest of such regulations that constitute a real and an effective tool blocking terrorism financing activity, the regulations enclosed in the 2000 Act have to be evoked.[64] Even though, in principle, the Act concerned solely the suppression of money laundering.

It was amended on 27 September 2002. The title as well as the scope of the regulation has become widened by the provisions concerning the prevention of 'terrorism financing.' In the Act, the legislator – not referring to the contents of international debates on terrorist financing – defines independently the notion of 'terrorist act.'[65]

Subsequent amendment – of 25 June 2009 – changes the title of the Act – from that moment on it has been the Act "on *prevention of money laundering and terrorism financing.*" It implements the UN-member obligations[66] and the Union Directive 2005/60/WE of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorism financing.[67] The most crucial consequence of that step is inclusion, in accordance with Article 9 of the amended Act, in the new PPC latest

[62] See also Chapter X of the Report.

[63] See also Chapter VII of the Report.

[64] See also footnote 10.

[65] See also point II of the Report.

[66] See also point I of the Report.

[67] OJ EU L 309/15 – and Commission Directive 2006/70/EC (1.08.2006) laying down implementing measures for Directive Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of financial activity conducted on an occasional or very limited basis.

provision of Article 165a which penalizes unknown to the Polish penal law till that moment type of an offence – namely 'terrorism financing.'

> **Art. 165a.** Gathering, transferring or offering legal tenders for the purposes of financing a terrorist act
> Whoever gathers, conveys or offers legal tenders, financial instruments, securities, foreign currencies, property rights or other unmovable property for the purpose of financing a crime of a terrorist nature, shall be subject to penalty of deprivation of liberty from 2 to 12 years.

Consequently, in the present legal state, the PPC in its Article 115 § 20 and Article 165a provides for pivotal antiterrorist regulations.

The aforementioned Act, in its many provisions, refers to the contents of Article 165a of the PPC, indicating that "whenever 'terrorism financing' is mentioned, it shall be understood as an offence defined in Article 165a of the PPC." In principle, the aim of referring to the PPC is to facilitate recognition of the acts that constitute terrorism financing, but it is also an obvious sign of the legislator's will to unify the interpretation of the notion of 'terrorism' in the law of the Republic of Poland in general. The interpretation of law which has to be carried out in accordance with the base standard set in the PPC. The standard which determines the practice of application of the Act as much as other statutory regulations that contain antiterrorist provisions.

However, the prevention of money laundering and prevention of terrorism financing are the two separate subject matters, yet they both are regulated and treated with equal determination.[68]

A.2. The main mechanism used to reveal an act of 'terrorism financing' are the procedures that serve disclosure of money laundering acts. Those procedures were adopted in the 2000 Act. They currently include both: the cases in which the suspicion of money laundering is to be verified and the terrorist financing acts. Hence, each verification of the source of the origin of money accumulated on a bank account implies the application of Article 165a definition of its deliberated terrorist dimension.

Undersecretary of State at the Ministry of Finance – the General Inspector of Financial Information [Generalny Inspektor Informacji Finansowej – further: GIIF] – is a separate institution of administration which is competent where each given case is to be assessed separately. The notifications about the fact of registration – by 'obligated authorities' – of any transaction which exceeds the value of 15 000 euros are directed to that organ, also in instances where the value amounts from more than one transaction being carried out (so called 'combined transaction'), and transactions – regardless their value and character – where there

[68] A. Golonka, "Polskie rozwiązania prawne w zakresie przeciwdziałania finansowaniu terroryzmu" [Polish Legal Solutions Within the Scope of Terrorism Financing Prevention], *Prokuratura i Prawo* [Prosecutor's Office and the Law] 2013, No. 3, p. 95–110.

is a substantiated suspicion that they can be connected with money laundering or terrorism financing (so called 'suspicious transaction'). The 'obligated authority' – or 'obligated institution' – means a circle of over twenty entities, beginning with banks, through accountants, 'ending' on attorneys/notaries.[69] 'Suspicious transactions' which remain connected to the acts of terrorism financing, are all the activities bearing characteristics of the offence defined in the text of Article 165a of the PPC.

The degree of ability with which the obliged entity is capable to perform the proper assessment of the occurrence of 'terrorism financing' *ergo* 'suspicious transactions,' along with the requirement to carry out the reconstruction of distinguishing traits of the offence or the threat of such action, as described in Article 115 § 20 of the PPC, which is vital for the positive/negative formulation of charges, remains an open case. It has been highlighted by the statistics published by GIIF in 2010.[70] Pointing at 15 357 pieces of information about the 'suspicious transactions' among which 15 341 concerned money laundering and 'only' 16 of them – were under suspicion of terrorism financing.

Qualification of a transaction as a 'suspicious' one – after carrying out the required by the Act, obligatory 'risk assessment,' combined with application of 'customer due diligence' mechanism – may lead, in consequence, to account blocking, transaction withholding, and the freezing of the incriminated material values.

On the grounds of the provisions of the Act, the procedure devoted to terrorism financing prevention also includes the GIIF's competence to request from the state authorities (the Prosecutor's Office, ABW [Antiterrorist Centre of ABW], CBA, etc.) the disclosure of information about all cases of open investigations that concern terrorism financing acts along with the cases where only suspicion of those has been demonstrated. In turn, the GIIF is obliged to disclose to those authorities any obtained data, as indicated in the Act, which remain connected with the information provided by those organs.

The Act, in harmony with the premises of the Convention/Directive, presents a reliable regulation that limits terrorism financing. Thus demonstrating the fundamental conformity of the Polish law with international obligations in that matter as it has been outlined in the latest periodical MONEYVAL Report.[71]

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[69] See A. K o ł a c z e k, "Księgowi a przeciwdziałanie praniu pieniędzy i finansowaniu terroryzmu" [Accountants and Money Laundering and Terrorism Financing Prevention], *Rachunkowość* [Bookkeeping] 2009, No. 10, p. 9–16.

[70] Information available on: www.mf.gov.pl/_files_/giif/publikacje/spr_2010_v2g_final_23.pdf.03 (last accessed on January 30, 2014); see also Report of the General Inspector of Financial Information on the implementation of the Act of 16 November 2000 on *counteracting money laundering and terror financing* in 2011 – www.mf.gov.pl/en/documents/764034/1223641/spr_2011_ANG.pdf (last accessed on January 30, 2014).

[71] See Report on Fourth Assessment Visit – *Executive Summary* – Anti-Money Laundering and Combating the Financing of Terrorism – Poland – 13 April 2013 – Key findings, p. 5–7.

VII. Immigration Measures

Introduction

Although Poland is a country in which there appears to be an insignificant level of immigration,[72] its geographical location and legal conditions arising from the EU membership, including the Schengen area, make it often a transit country for migrants on their way to the western and northern Europe. This also applies to citizens of the so-called 'dangerous countries' [kraje wysokiego ryzyka] which – according to the Ministry of Foreign Affairs – may be a factor fostering the terrorist activities on the territory of Poland.[73] The government highlights in this respect the need to 'conduct consistent and coherent migration and asylum policy, which may prevent the emergence of terrorist threats.'[74]

In the Polish legal system there is a number of regulations in the field of immigration law, which can be used to combat terrorism. These are in particular the rules governing residence permits and visas to foreigners, provisions related to granting international protection and protection of borders. This short text provides an overview of these regulations, sometimes combined with their critical analysis, as well as examples of their practical application.

Law on Foreigners

In the Polish legal system, the Law on Foreigners is the basic legal act which regulates such issues as third-country citizens' entry into, stay in or expulsion from the Polish territory.[75] The Law does not explicitly refer to the threat of terrorism. It does, however, refer to more general terms, such as a threat to 'national security' or 'security and public order.' These premises are examined in the course of proceedings on the legalization of stay. The immigration body assesses whether the entry or stay of a particular migrant does not constitute a threat to the above-mentioned values. The 'national security' or 'protection of security and public order' clauses can be used in proceedings conducted against persons suspected of terrorist activity.

The task of granting residence titles [tytuły pobytowe] lies within the remit of voivods. Prior to granting a given residence title, the voivod[76] submits a motion

[72] J. G o d l e w s k a, *Migracje i imigranci w Polsce – skala*, *podstawy prawne*, *polityka* [Migrations and migrants in Poland – scope, legal basis, policies], Polish Committee of the European Net Against Poverty EAPN [Polski Komitet Europejskiej Sieci Przeciwdziałania Ubóstwu EAPN], 2010.

[73] See also footnote 30.

[74] *Ibidem*.

[75] Law *on Foreigners* of 13 June 2003 (OJ 2003 – 128/1175).

[76] Voivode [wojewoda] is a local government office governing the terrirory of a voivodship and the head of united government administration there.

to the Border Guard Unit Commander, the Voivodship Police Commander, the Chief of the ABW, and sometimes also the consul competent with respect to the foreigner's last place of residence abroad, to provide information on whether the foreigner's entry into or stay in the Polish territory constitutes a threat to the defense or security of the state or protection of security and public order. Data of those foreigners who are eventually classified by immigration bodies as posing such a threat can be entered into the index of persons whose stay in the territory of the Republic of Poland is undesirable (Article 128 § 6). The index is a national information system, existing beside the European Union's Schengen Information System (SIS). It is maintained by the Head of the Office for Foreigners. A record in the index entails a refusal of entry into or stay in the Polish territory within the period covered by the record. In particular, the inclusion of the foreigner's data in the index vests immigration bodies with the authority to refuse the entry into the territory of the Republic of Poland, refuse to grant a visa, refuse to grant a limited time residence permit, refuse to grant a permit to settle, issue an expulsion decision or establish a prohibition on the part of the foreigner of re-entry into the Polish territory. Furthermore, a record in the index results in the inclusion of the foreigner's data in SIS, which prevents the foreigner from entering any of the countries belonging to the so-called "Schengen area."

If an entry into the index of undesirable persons was based on the premise of constituting a threat to the defense and security of the state or protection of security and public order, or violating the interest of the Republic of Poland (Article 88 § 1 pt. 5), the foreigner's data is stored in the register for the longest provided in the Law period i.e. 5 years (in the event when an index entry is based on other premises, this period – as a rule – lasts from 6 months to 3 years – Article 99b).

In practice, it is difficult to estimate the number of index entries which concern persons undesirable on the premises of 'national security' or 'security and public order' and which relate specifically to foreigners posing a terrorist threat. This is the case because, first and foremost, the above-mentioned clauses also encompass threats to national interests which are of a different than terrorist character. Secondly, the existence of a threat to the 'defense and security of the state' or 'security and public order' allows immigration bodies not to substantiate their decisions issued in proceedings conducted on the basis of the Law on Foreigners (Article 8 § 1). In those circumstances, factual bases for inclusion in the index of undesirable persons are not disclosed either (Article 128 § 1 pt. 6). Secrecy stretches onto case files of such proceedings (e.g. the opinion and documents provided to the voivod by ABW), which are usually covered by the confidentiality clause due to protection of classified state or professional information. A foreigner who is the subject of proceedings has no possibility of learning the particular premises which underpin their classification as a person posing e.g. a threat to national security. Such a foreigner does not have the possibility – either directly or through a proxy (even authorized to access classified information) – of

examining evidence gathered against them in the course of such proceedings. The fact that clauses of 'national security' and 'security and public order' are used in the cases of persons suspected of terrorism, the public opinion only learns from unofficial information disclosed by the media. By way of example, one may point out the case of a Yemeni national, Imam Ahmed Ammar,[77] who was subject to expulsion from Poland, or the case of a Cracow Polytechnic graduate from Morocco – Chakib Marakchi.[78]

The case of Chakib Marakchi adequately illustrates the arbitrariness of the above-described residence procedure. The Moroccan, who had been living in Poland for 8 years, was refused a limited time residence permit pursuant to Article 57 § 1 pt. 5 on the grounds of protection of national security or security and public order. The voivod issued such a decision upon receiving a negative opinion concerning the foreigner from ABW. Subsequently, Chakib Marakchi was included in the index of undesirable persons and ordered to leave the territory of the Republic of Poland. His data was also entered into SIS, which prevented him from going to France where he was to begin doctoral studies. The foreigner filed an (eventually ineffective) appeal against the voivod's decision with the Head of the Office for Foreigners; then, he lodged a complaint with the administrative court. In the application, Chakib Marakchi argued, among others, that due to the lack of detailed explanations of decisions issued against him and the classified character of case files, which could not be accessed by a professional proxy representing him either, he did not have a possibility of disputing the charges brought against him effectively and on the merits. The applicant also argued that administration bodies did not verify the accuracy of information on the alleged threat to national security and public order provided by ABW. The Voivodship Administrative Court dismissed the case[79] (the judgment is not final; the applicant lodged a cassation appeal with the Supreme Administrative Court and is awaiting its consideration).

It should be noted that, in the current shape, the provisions of the Law on Foreigners do not correspond to international standards as developed by the European Court of Human Rights (further: ECtHR; see judgments in cases *Lupsa against Romania*,[80] *Al-Nashif and others against Bulgaria*,[81] *Chahal against the United*

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[77] W. C z u c h n o w s k i, "He encouraged to Jihad?," *Gazeta Wyborcza*, 26 May 2004.

[78] "Absolwent Politechniki Krakowskiej terrorystą? ABW: 'To możliwe'" [Graduate of the Cracow Technical University is a terrorist? ABW: 'It's possible'], *Gazeta Wyborcza*, 22 February 2010, http://wiadomosci.gazeta.pl/wiadomosci/1,114873,7587961,Absolwent_Politechniki_Krakowskiej_terrorysta__ABW_.html (last accessed on January 30, 2014).

[79] Judgement of the Administrative Court in Warsaw of 28 December 2012, No. V SA/Wa 173/12.

[80] *Lupsa against Romania*, ECtHR judgement of 8 June 2006 r., No. 10337/04.

[81] *Al-Nashif and others against Bulgaria*, ECtHR judgement of 20 June 2002, No. 50963/99.

Kingdom[82]) and the Court of Justice of the European Union (further: CJEU; see judgment in case C 300/11[83]). In their case law, both courts have established a series of procedural conditions for issuing decisions on expulsion of foreigners on the basis of national security threats. According to those conditions, the national procedure has to provide particular safeguards against arbitrary actions of state bodies in this respect. It is crucial to guarantee not only that the decisions issued are formally evaluated, but also and above all that the premises of expulsion decisions as well as the body of accumulated evidence are controlled in the course of proceedings by an independent organ. Furthermore, ECtHR and CJEU point out that a procedure is unacceptable when neither the person under expulsion nor their legal representative are allowed to acquaint themselves with the reasons for expulsion (beside a general indication of being a threat to national security). Such a procedure makes it impossible for a foreigner to present their stance in the case and effectively enjoy the right to a fair trial. Classifying proceedings should be accompanied by the foreigner's right to assistance of a special lawyer with a certificate of access to classified information (*security-cleared counsel*) who will represent the foreigner's interests in proceedings (the institution of a 'special advocate' was introduced, for example, in the United Kingdom after the Chahal case which was decided by ECtHR).

In conclusion, it is justified to express a critical view of Polish law, which lacks procedural solutions enabling the person under expulsion (or their legal representative) to build effective defense. Such a situation results from the refusal of access to classified case files and resignation from providing (appropriately detailed) justifications for residence decisions. In the light of presented international standards, these practices, in cases such as that of Chakib Marakchi, could be considered by ECtHR to be a violation of Article 6 and 13 of the European Convention on Human Rights and Article 1 of Protocol 7 to the Convention (which concerns procedural safeguards referring to expulsion of foreigners). The problem has been noted by representatives of the Polish legal doctrine.[84] It has also been singled out repeatedly by non-governmental organizations which offer legal aid to foreigners.[85]

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[82] *Chahal against the United Kingdom*, ECtHR judgement of 15 November 1996, No. 22414/93.

[83] *Z. Z. against Secretary of State for the Home Department*, CJEU judgement of 4 June 2013, No. C 300/11.

[84] I. C. K a m i ń s k i, "Proceduralne gwarancje związane z wydaleniem cudzoziemca ze względów bezpieczeństwa państwa – uwagi na kanwie sprawy Chakiba Marakchiego" [Procedural safeguards concerning the expulsion of foreigners posing state security threat – Chakib Marakcji case], *Problemy Współczesnego Prawa Międzynarodowego*, *Europejskiego i Porównawczego* 2012, Vol. X.

[85] Comments of the Helsinki Foundation for Human Rights to the periodic report by the government of the Republic of Poland presented on the basis of International Covenant on Civil and Political Rights. Commentary to answers, 15 September 2010, www.hfhr.org.pl/pliki/komentarz_hfpc.pdf (last accessed on January 30, 2014).

Amnesty law

In 2012 in Poland there was an 'amnesty' for irregular migrants allowing them to legalize their stay. It was introduced by the Law on legalization of stay of some foreigners on the territory of the Poland and the Act amending the Act on granting protection to foreigners on Polish territory and the Law on Foreigners.[86] One of the conditions for the use of the amnesty mechanism by a migrant was the absence of contraindications for legalization of their stay because of the threat to national defense or national security or the protection of public order and safety or interests of the Republic of Poland (Article 3.2 pt. 5). The amnesty was also not available for the foreigners whose data were included for the above mentioned reasons in the index of undesirable persons (Article 3.2, pt. 6).

The regulations for granting refugee status

The fact that the migrant poses a threat to the state security can also be the basis – according to the Act on *granting protection to foreigners on the territory of the Poland*[87] – for refusing them a refugee status or granting other forms of international protection (such as a tolerated stay or subsidiary protection). The Act also does not expressly refer to the risks associated with terrorist activity. This makes it difficult to determine how often this provision is in fact used as a reason for denying the refugee status migrants constituting a terrorist threat.

The Border Guard Act

An important role in fulfilling the tasks associated with the threat of terrorism in Poland, also in the context of migration control, has the Border Guard on the basis of the *Border Guard* Act[88] and the Act on *the Protection of the State Borders*.[89] Border Guard is a unified, uniformed and armed law enforcement formation set up for the purpose of the land and maritime border protection and border traffic control in accordance with national security interests. The specific role of the Polish Border Guard in Europe results from the obligation to safeguard one of the longest sections of the external land border of both the European Union and NATO.

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[86] An Act on *legalization of stay of some foreigners on the territory of the Poland*, amending the Act on *granting protection to foreigners on Polish territory* and the Act *on Foreigners* of 28 July 2011 (OJ 2011 –191/1133).

[87] Act on *granting protection to foreigners on the Polish territory* of 13 June 2003 (OJ 2003 – 128/1176).

[88] *Border Guard* Act of 12 October 1990 (OJ 2005 – 234/1997).

[89] Act on *the Protection of the State Borders* of 12 October 1990 (OJ 2005 – 226/1944).

In contrast to the Law on Foreigners, the Border Guard Act explicitly recognizes the power of the Border Guard to 'conduct operations to identify and counter threats of terrorism' (Article 1.2 pt. 5d). This provision was added in 2007 by the amendment which expanded the competences of the Border Guard in the area of national security and public order.[90] The amendment was introduced in connection with the planned abolition of controls at the borders of Poland representing the internal borders of the European Union which took place in 2008 (according to the Schengen agreement).

Specific duties of the Border Guard of counter-terrorism include, in particular:

1) maintenance of law and order within the territorial border crossings, including the protection of objects owned or used by the Border Guard against terrorist attacks;

2) monitoring environments and clusters of migrants and their criminal activity on the territory of the Republic of Poland;

3) collecting, processing and analyzing information related to potential terrorist threats;

4) implementation of operational activities related to the recognition and prevention of terrorist threats;

5) cooperation to counter terrorist threats with the ABW, Intelligence Agency, the Police Service of Counterintelligence the Military Intelligence Service and the Military Police and border authorities of neighboring countries.

The Border Guard is also to prevent illegal transporting across the border of waste, harmful chemicals, nuclear and radioactive materials, drugs and psychotropic substances, arms, ammunition and explosives. An important task of the Border Guard is also an obligation to ensure the safety of international transport by conducting security checks of passengers, their baggage as well as sapper – pyrotechnic activities at airports, train stations, harbors for the purposes of crime prevention (including terrorist activity).

The role of the Border Guard in the fight against terrorism was highlighted in the 'National Security Strategy of the Republic of Poland.'[91] This document emphasizes the further development of the intelligence and monitoring competencies of the Border Guard in relation to the prevention of terrorist activities. As underlined in the Strategy: 'monitoring and control of migration of foreigners on the territory of the whole country is a very important task and should be performed also in the preventive manner. Both the Police and the Border Guard should constantly monitor the terrorist threats and co-operate with other services in this respect.'

Measures taken by the Border Guard aimed at preventing terrorist attacks sometimes raise doubts. In 2011, there was an interesting trial in Poland for

[90] Act amending *the Border Guard* Act and other acts of 13 April 2007 (OJ 2007 – 82/558).

[91] Signed by the President of Poland on 13 November 2007, §§ 36, 108.

the protection of personal rights against the Commander of the Border Guard brought by a citizen of the United Kingdom Shaminder Puri. Puri is a Sikh who during security checks at the airport in Warsaw was ordered to take down his turban. When he refused, citing religious causes, he was fined by the Border Guards. Puri argued during the court proceedings that the inspection carried violated his dignity and freedom of religion. Moreover, he referred to the violation of the principle of proportionality – Border Guard officers immediately demanded taking down his turban without applying less invasive methods of control in a first place (for example the body scanner or metal detector). Polish courts found however that the Border Guard officers acted within their statutory competences and the lawsuit was finally dismissed.[92] It is important to note that this case triggered a public debate in Poland on the absence of any rules governing the conduct of the Border Guard officers with respect to the religious minorities during security checks at airports.

Conclusions. The directions of the evolution of immigration policy in the context of counter-terrorism

Based on the discussed legislation it is difficult to determine clear trends in the development of regulatory efforts such as the tightening of immigration policy because of the increasing terrorist threat in Poland. Besides the extension of the competence of the Border Guard associated with Poland's full implementation of the Schengen Agreement, there have not been any significant legislative changes introduced in this area in the recent years. Most discussed legislation contains only general regulations aimed at countering threats to national security or public order which cover *inter alia* fight against terrorism. We cannot rule out the possibility that under these provisions there have been implemented more restrictive practice to combat terrorist threats and that these clauses are today more than ever applied by the immigration authorities and enforcement agencies in this context. However, due to the problem of confidentiality of proceedings against migrants suspected of terrorist activities and the ability to withdraw from the justification of decisions made in such cases by immigration authorities, it is difficult to estimate the real scale of the phenomenon.

It should also be noted that some procedural solutions adopted in the Polish legal system raise certain doubts as regards their conformity with international standards for the protection of human rights. As indicated above, the *Act on Foreigners* lacks procedural solutions that provide the migrant (being under expulsion from Poland due to suspicion of terrorist activity) or its attorney – an effective remedy against these allegations. Consequently the law does not guarantee a fully effective right to a fair trial.

[92] Judgement of the Appeal Court in Warsaw of 12 February 2012, No. I ACa 499/12.

Although the role of immigration laws in preventing and combating terrorism seems to be gaining in importance, it should be noted that this problem is only to a small extent included in the government documents specifying the conditions for the development of legal regulations concerning state security and protection against terrorist threats. These issues were only very briefly tackled in the aforementioned *National Security Strategy of the Republic of Poland* (2007).[93] A little bit more attention to this problem was paid in the *National Counter-Terrorism Programme of the Republic of Poland for 2012–2016*.[94] In the context of immigration measures, this document calls for the improvement of the mechanism of mandatory consultation with the relevant enforcement agencies (such as ABW) by the immigration authorities prior to delivering decisions on visas and residence permits. It also stresses the need of introduction of more effective integration programmes for foreigners in Poland in order to prevent the radicalization of their attitudes and vulnerability to recruitment into extremist groups. Moreover it urges for development of electronic databases to facilitate the exchange of information between different institutions dealing with immigration issues (there is currently no central database of foreigners in Poland; each of the institutions operates its own information system). Finally the document previews the introduction of biometric residence permits and visas, to facilitate the control of migration processes.

It should be noted at the same time that in the key document *Polish migration policy – the current state and proposed actions* adopted by the Polish government in July 2012,[95] which sets out the national priorities on immigration policy and legal changes in this respect, the authors do not relate at all to the issue of counter-terrorism.

VIII. Administrative/Executive Measures

Disquisitions on the application of alternative – meaning: administrative (executive), measures as a part of antiterrorist regulations both in practice and in doctrinal discussion have not been observed.

IX. Role of Military and Extra-Territorial Counter-Terrorism Activities

1. Criminal cases involving offences of a terrorist character are decided by common courts of general jurisdiction. A personal exception applies however: Courts-martial composed of military judges are competent to hear cases involv-

[93] See footnote 30.

[94] See footnote 31.

[95] http://emn.gov.pl/ese/news/8765,dok.html (last accessed on January 30, 2014).

ing soldiers in active service, civilian employees of the armed forces, soldiers of the armed forces of foreign states present in the territory of the Republic of Poland and civilian members of their personnel.[96] Procedural guarantees of the right to the fair trial apply equally before common courts and courts-martial.[97]

2. Four Polish Military Contingents (PMC's) acted outside national territory in 2013. In all instances their missions were inseparably linked to international operations either with clear anti-terrorist mandate (*International Security Assistance Force* in Afghanistan)[98] or exposed to terrorist threat during performance of their stabilization or training functions (*European Union Force ALTHEA* in Bosnia and Herzegovina, *European Union Training Mission* in Mali and *Kosovo Force* in Republic of Kosovo, Former Yugoslav Republic of Macedonia and Bosnia and Herzegovina).

Ministry of National Defense (further: MND) asserts that PMC's have not conducted any anti-terrorist operations and have performed only peace-keeping and training duties. Nonetheless there were instances of apprehension and short. rm detention in Afghanistan and Iraq (PMC-Iraq formed a part of *NATO Training Mission – Iraq*, completed in December 2011) when security of the mission so required. In cases involving short.rm detention, detainees were transferred to relevant local authorities after unspecified time, but allegedly pursuant to military procedures applicable to PMC's. MND claims no statistics in this respect available and information on relevant military procedures classified. Detained individuals did not try to challenge detention before domestic or international courts.[99]

3. In early December 2002 at least two suspected high-rank al-Qaeda members (Saudi Arabia national Abd Al Rahim Hussayn Muhammad al Nashiri and stateless Palestinian Zayn Al-Abidin Muhammad Husayn a.k.a. Abu Zubaydah), both in custody of the US Central Intelligence Agency (CIA) were allegedly transferred covertly to Poland and detained in a secret CIA detention center at the Stare Kiejkuty intelligence training base. Throughout six and nine months incommunicado detention respectively they were supposedly ill-treated by CIA Agents, thereafter transferred from Poland to other CIA 'black-sites' and finally to the Internment Facility at the US Guantanamo Bay Naval Base, Cuba. It is claimed that Polish Military Information Services (further: MIS)[100] had oversight

[96] Article 647 of PCPC, Article 22 and 54 Court-Martial Act of 1997 – OJ 2012 – 952.

[97] Art. 646 of PCPC.

[98] Security Council's Resolution S/RES/2069 (2012).

[99] A note by MND of 5.06.2013 on file with authors.

[100] MIS [Wojskowe Służby Informacyjne] was a separate and specialized intelligence agency of Polish Armed Forces (PAF), established to strengthen the State defence and security of the PAF and supervised by the lower house of the Polish Parliament [Sejm], pursuant to art. 1 of an Act of 9 July 2003 on MIS (OJ.2003.139.1326). MIS was liquidated in 2006 by Sejm amidst allegations of its extralegal conduct as revealed in the Report of the Chairman of the Verification Commission:

of the operation with an authorization given by high-rank officials of the Republic of Poland (e.g. the President, the Minister of National Defense and the Head of Military Intelligence).[101] The existence of a secret prison in Poland was disclosed in November 2005 by Human Rights Watch (HRW).[102] In the same month the Parliamentary Assembly of the Council of Europe launched an investigation on the issue resulting in three reports prepared in 2006,[103] 2007[104] and 2011[105] by a Swiss Senator Dick Marty, confirming HRW allegations.

In November-December 2005, the Polish Parliamentary Committee for Special Services initiated an inquiry on the matter. The Committee generally worked in camera and, in such cases, without minutes. It held a one-day meeting on 21 December 2005 to discuss the allegations of secret CIA prisons in Poland. The only public indication given by the Committee was that there had not been any CIA prisons in Poland.[106]

On 14 February 2007 the European Parliament (further: EP) adopted the Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI), deploring *inter alia* "the glaring lack of cooperation by the Polish Government with EP temporary committee" and "encouraging the Polish Parliament to establish a proper inquiry committee, independent of the government and capable of carrying out serious and thorough investigations."[107]

On 11 March 2008 the District Prosecutor's Office in Warsaw instituted proceedings on the alleged existence of so-called secret CIA detention facilities in Poland as well as the illegal transport and detention of persons suspected of terrorism. The prosecutor office granted injured party status in this proceedings to Al Nashiri and Abu Zubaydah in October 2010 January 2011 respectively. The proceedings has not reach a trial stage yet and is conducted by the Appellate Prosecutor's Office in Cracow.[108] Until June 2013 the investigation has been extended

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http://web.archive.org/web/20071008104447/http://raport.gov.pl/Raport_jawny_16022007.pdf (in Polish) (last accessed on January 30, 2014).

[101] See note 9 (II Marty Raport) §§ 168, 174.

[102] Statement on US Secret Detention Facilities in Europe, www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe (last accessed on January 30, 2014).

[103] AS/Jur (2006) 16 Part II, 7 June 2006, http://assembly.coe.int/Main.asp?Link=/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.htm (last accessed on January 30, 2014).

[104] AS/Jur (2007) 36, 7 June 2007, http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11555 (last accessed on January 30, 2014).

[105] Report | Doc. 12714 | 16 September 2011, http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=12952&lang=EN (last accessed on January 30, 2014).

[106] 2011 Marty Report, § 40.

[107] www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-32, par. 167, 178 (last accessed on January 30, 2014).

[108] www.hfhr.pl/en/odpowiedz-prokuratury-na-pytania-o-przebieg-postepowania-ws-tajnych-wiezien-cia/ (last accessed on January 30, 2014).

nine times and remains pending without clearly defined date of its completing. A bulk of case-files is classified.[109]

On 19 February 2010 the Human Rights Council of United Nations released the *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, appreciating the fact that an investigation had been opened on the existence of places of secret detention, but, at the same time, deploring the lack of transparency into the investigation.[110] The UN Human Rights Committee, in its Concluding Observations on the sixth periodic report of the Republic of Poland of 27 October 2010, expressed its concern that secret detention center had reportedly existed at Stare Kiejkuty and that the domestic investigation was not yet concluded.[111]

On an unspecified date, presumably on 10 January 2012, the Warsaw Prosecutor of Appeal charged Mr Z. Siemiątkowski, the Head of the Intelligence Agency in 2002–2004 with abuse of power and with violation of international law by 'unlawful detention' and 'imposition of corporal punishment' on prisoners of war.[112]

Al Nashiri and Abu Zubaydah lodged applications against Poland to the European Court of Human Rights on 6 May 2011[113] and 28 January 2013[114] respectively, both communicated to Polish Government. The applicants allege violation of numerous provisions of the European Convention on Human Rights as a result of their ill-treatment in Poland while in US custody, their unconditional transfer from Poland by US Agents and Poland's failure to conduct an effective investigation into the circumstances surrounding their ill-treatment, detention and transfer from the Polish territory.

X. Secrecy

Cases involving offences of a terrorist character are subject to general rules of Polish criminal procedure as provided in the PCPC, the law of 5 August 2010 on *protection of classified data* (further: the 2010 Act)[115] and the Ordinance of

[109] www.hfhr.org.pl/cia/images/stories/Odpowiedz%20PA%20Krakow_marzec%202013.pdf (in Polish) (last accessed on January 30, 2014).

[110] A/HRC/13/42, 26 January 2010, § 118.

[111] CCPR/C/POL/CO/6, § 15, www2.ohchr.org/english/bodies/treaty/CD_Concl_Obs_2010/CCPR/100th%20session/CCPR-C-POL-CO-6%20(e).pdf (last accessed on January 30, 2014).

[112] ECHR, Application No. 7511/13 *Zayn Al-Abidin Muhammad HUSAYN (ABU ZUBAYDAH) against Poland* lodged on 28 January 2013, § 143.

[113] Application No. 28761/11.

[114] Application No. 7511/13.

[115] The Act of 5 August 2010 on *the protection of classified data* – OJ 2010 – 182/1228.

the Minister of Justice of 20 February 2012 on *the handling of transcripts of questioning and other documents or items covered by the duty to maintain secrecy of classified information or the duty of secrecy related to the exercise of a profession or function* (the 2012 Ordinance).[116]

The courts shall base its judgments in such cases solely on facts and evidence disclosed during the main trial.[117] An accused access to classified files, documents and items may be conditioned (but not refused) as they shall be made available to parties, counsel and representatives only on the basis of an order issued by the court or its president, or, at the investigation stage, by the prosecutor. Such order should indicate the person authorised to study evidence and specify its scope, manner and place. If the person concerned asks for the creation of a bound set of documents for the purposes of taking notes, such a bound set of documents shall be made and classified appropriately. It will be deposited and made available only in the court's or the prosecution's secret registry.[118] However judges may not impose conditions on disclosure such as only the accused's lawyer and not the accused see a classified file, document or item.

As a rule, the hearing shall be held in open court unless otherwise provided by the law.[119] The court may permit the media to make video and sound recordings during the trial if the public interest so requires, the hearing is not obstructed thereby and it is not contrary to any important interest of a participant in the proceedings.[120] On the other hand, the court shall exclude the public from all or part of the trial when e.g. the hearing may disclose circumstances which should remain secret to protect interest of the state.[121] Moreover when classified files, documents and items are referred to in open decisions or judicial writs, classified data should be replaced by an evidentiary number of such evidence.[122] If the whole trial or its part has been held in closed session, the announcement of the statement of reasons for the judgment may be also made in closed session.[123]

A notable ambiguity exists as to the conflict between the right to defence in criminal proceedings and the protection of classified information. Article 265

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[116] The Order of the Minister of Justice of 20 February 2012 on *the procedure of managing the interrogations protocols and other documents or objects which are protected by the duty to maintain secrecy of the classified data and/or to maintain the secrecy of profession or office*, OJ 2012 – 219.

[117] Article 410 of PCPC.

[118] § 6 The Ordinance.

[119] Article 355 of PCPC.

[120] Article 357 § 1 of PCPC.

[121] Article 360 § 1.3 of PCPC.

[122] § 11 of the 2012 Ordinance.

[123] Article 364 § 2 of the PCPC.

§ 1 of the PPC provides that whoever discloses or, in violation of the 2010 Act, uses information rated as "secret" or "top secret" shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. An unconditional wording does not exclude an accused intending to use classified information in a statement at any stage of the proceedings.[124] A doctrine in its majority takes a different stand however, advancing systematic and functional interpretation to the effect that if only classified information is relevant in a given case, an accused is not legally barred from using such information even if not duly cleared to do so.[125]

On the other hand, witnesses (e.g. intelligence service members), experts, translators and court experts obliged to preserve information rated as "secret" or "top secret" may be examined as to the circumstances to which this obligation extends only if cleared by an authorized superior agency or, if clearance not granted, by a relevant central administration agency.[126] Such clearance, on the request of the court or persecutor, may be refused only if the giving of evidence might result in a serious damage to the State's interest.[127] This rule applies to documentary evidence accordingly.[128] Therefore judges and persecutors have not the power to balance the competing claims of secrecy and disclosure in individual cases as the competence is granted solely to relevant superior agency or central administration agency only.

Witnesses (e.g. intelligence service members) may testify in terrorism prosecutions anonymously in accordance with general rules of Polish criminal procedure.[129] In particular, if there is a justified concern for safety of life, health, freedom or considerable property loss of the witness or his next-of-kin, the court (or at the pretrial stage – the persecutor) may issue an order classifying as secret personal data of such witness. Such personal data shall be known exclusively to the court, the prosecutor and, when necessary, to a police official at the pretrial stage. Consequently, records of interrogations of the witness may be made available to the accused or counsel redacted to prevent identification of the witness.

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[124] See e.g. Polish Supreme Court's Judgment of 11.04.1983, No. I KR 393/82, unpublished.

[125] M. K l e j n o w s k a, *Oskarżony jako osobowe źródło informacji o przestępstwie* [The Accused as a Personal Source of Information About the Offence], Zakamycze 2004; P. H o f m a ń s k i, S. Z a b ł o c k i, *Elementy metodyki pracy sędziego w sprawach karnych* [Elements of Judge's Work Methodology in Penal Cases], Zakamycze 2006; M. Leciak, "Tajemnica państwowa w wyjaśnieniach oskarżonego w procesie karnym" [State Secret in Explanations of the Accused in Penal Proceedings], *Prokuratura i Prawo* [Prosecutor's Office and the Law] 2005, No. 11, p. 56.

[126] Article 179 § 1 in conjunction with Article 197 § 3, 204 § 3 and 206 § 1 of PCPC.

[127] Article 179 § 2 of PCPC.

[128] Article 226 in conjunction with Article 179 of PCPC.

[129] Article 184 of PCPC.

XI. Other matters

Poland's anti-cyberterrorism strategy

Following its access to the NATO Cooperative Cyber Defense Centre of Excellence in 2011 Poland enhanced its work on an effective cybersecurity strategy.

1. The baseline for such a strategy may be found in the 2007 Act on critical management which defines critical infrastructure as systems and functionally connected objects composite thereof, including building objects, facilities, installations and services crucial to state security and that of its citizens and allowing for effective operation of public administration bodies, as well as institutions and entrepreneurs. The Act was followed by a *2012 National critical management plan*[130] adopted by the Council of Ministers, identifying four stages of crisis management including: prevention, preparation, reaction and restoration. Each of those stages rests in the competences of different public authorities. The division of those competences was described in more detail within the *White Book on National Security of the Republic of Poland* (2013),[131] presented by National Security Office [Biuro Bezpieczeństwa Narodowego] [further as: BBN].

The White Book assigns the task of counter-cyberespionage to BBN. Yet, according to the White Book, due to the fast pace of information innovation cybercrime and cyberterrorism prevention and monitoring follows no uniform methodology in Poland. To meet new challenges posed by cyberterrorism the Ministry of Administration and Digitalization was created in 2011 and fully authorized to manage national information and communication policies, including management of telecommunication networks and critical infrastructure functioning within it, as well as the development of the information society. Its competence over critical infrastructure management is to ensure a high level of integrity and confidentiality of information transmitted and processed through such networks. Also within the BBC a specialized unit was created – Governmental Counter Unit for Computer Incidents (CERT.GOV.PL), responsible for prompt reactions to any attempted cyberattack against critical infrastructure located within Polish jurisdiction. According to the White Book Poland struggles with shortages of highly educated computer staff, allowing for effective protection of national critical infrastructure from cyberthreats. Another challenge is the diffusion of responsibility for national information security among different governmental entities, resulting in a lacking sustainable system for coordinating the exchange of information.

2. With all those challenges in mind, it ought to be noted that a significant contribution to increasing national cybersecurity were the 2011 amendments of

[130] http://rcb.gov.pl/eng/?p=403 (last accessed on January 30, 2014).

[131] WhiteBook_NationalSecurity_PL_2013.pdf.

numerous acts on states of emergency, including the martial law act amendment.[132] The latter includes a definition of cyberspace – possibly the only legal definition of cyberspace in modern state legislature worldwide. According to Article 2 § 1b of the Act of August 29, 2002 on martial law, cyberspace is to be understood as the space of processing and exchanging information created by teleinformation systems, including their interconnections and relationship with users. The amended act allows the General Commander to introduce martial law in case of threats to Poland's security originating from cyberspace.

3. The abovementioned documents were supplemented by the *2013 National Programme on Critical Infrastructure Protection*[133] presented by the Government Centre for Security, based on Article 5b of the Act on critical management (2007). According there to Poland as a developed country needs to assure the security of services allowing for a certain standard of living in a modern society, available through what is referred to in the report as "critical infrastructure." All human educed and nature driven threats to critical infrastructure must be prevented. According to this document critical infrastructure includes all systems needed for supplying energy and fuel, communications, telecommunication services, financial services, food and water supply, health care, transportation, as well as emergency services, allowing for the continued operation of state administration, production and storing of chemical and radioactive substances, including pipelines for hazardous substances. Following the stipulations of *the 2010 Regulation of the Council of Ministers on the National Critical Infrastructure Protection Program* § 1 a critical infrastructure operator is identified as the owner or an owner-like possessor of objects, installations, facilities and services of critical infrastructure.[134] Among the addressees of the program various entities, including governmental bodies, private business, with particular emphasis on critical infrastructure operators, academia and civil society are named. It invites individual entities, in particular critical infrastructure operators, to provide risk assessments for the infrastructure they operate. When combating terrorist threats critical infrastructure operators are required to rely on information provided to them by state agencies, and use those to produce detailed analysis of threats to individual objects, installations or systems. Such scenarios need to indicate areas of potential insecurity and risk factors, shaping security decisions, which need to be taken. Such scenarios need to be credible, factually correct, consequential, functional and simple. All instructions included in the Program strongly rely on European Union regulations dealing with European Critical Infrastructure as defined

[132] OJ 2011 – 222/1323.

[133] http://rcb.gov.pl/eng/?p=791 (last accessed on January 30, 2014).

[134] http://rcb.gov.pl/eng/wp-content/uploads/2011/03/REGULATION-on-NATIONAL-CRITICAL-INFRASTRUCTURE-PROTECTION-PROGRAMME-AB.pdf (last accessed on January 30, 2014).

within *the European Programme for Critical Infrastructure Protection* based on the Communication from the Commission of 12 December 2006 on a European Programme for Critical Infrastructure Protection,[135] followed by the Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.[136]

4. Summarizing the current endeavors it must be noted that Poland enhanced its efforts in combating cyberthreats to national security, defining the components subject to cyberthreats and introducing legislation allowing for combating them, yet it still lacks coherent procedures and methodology in recognizing and preventing cyberterrorism.

XII. Conclusion: Assessment of Poland's Domestic Anti-Terrorism Laws

The Report submitted herein bears testimony to the fact that coordinated, complex, autonomous counter-terrorism legislative measures in the Republic of Poland have been developed in the aftermath of the WTC attacks and, consequently, the absorption of the EU regulations observed in the Polish law. What seems evident, as a result, the powers of the government (its institutions) to counteract and suppress acts of terrorism have been emphasized and strengthened. The adopted regulations and their application process do not indicate any disregard for human rights. The lack of terrorist activity cases on the territory of the Republic of Poland also gives rise to the assumption that the regulations along with the process of their adoption shall be deemed reliable and fully effective. Counter-terrorist law embraces the domain of penal law, financial law regulations, immigration law, the Acts regulating matters of international exchange between states and other legal subjects indicated in the rules, what has been comprehensively signaled by the Report[137] and, in the sense and dimension of the document, illustrates a significant influence of the 'counter-terrorism law' – after the 11 September 2001 – on 'other branches of the law.' From the comparative perspective, Poland is a thoroughly responsible partner in antiterrorist actions not only in the European aspect.

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[135] COM (2006) 786 final – OJ C 126 of 7.06.2007.

[136] OJ EU L 345/75.

[137] See also www.coe.int/terrorism – Council of Europe – Committee of Experts on Terrorism (Codexter) – Profiles on Counter-Terrorist Capacity – Poland (last accessed on February, 2012).

SECTION V B

Maria Rogacka-Rzewnicka
Professor of Law, University of Warsaw

Piotr Girdwoyń
Professor of Law, University of Warsaw

UNDERCOVER OPERATIONS

1. Undercover operations and their legal grounds

Operations aimed at crime prevention have their general legal basis in Article 5 of the Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws [J. of L.] No. 78 item 483). Under this provision, the Republic of Poland safeguards the independence and integrity of its territory, ensures civil freedoms, human rights, and the security of its citizens, safeguards the national heritage and ensures the protection of the natural environment pursuant to the principles of sustainable development. This provision is supplemented by Article 146 section 7, which states: "To the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers in particular shall ensure the internal security of the state and public order." In addition, in varying regulatory scope the above obligation has been provided by numerous statutes and legal acts of lower rank, as well as acts located outside the constitutional hierarchy of the sources of law. This includes the acts regulating the operation of the law enforcement agencies authorized to conduct undercover operations with the purpose of combating and preventing crime.

In Poland, there are ten agencies authorized to conduct undercover operations aimed at combating and preventing crime, of which five enjoy the status of special services. Undercover operations fall under the umbrella term of preliminary investigation activities. Only three of them are more closely regulated by the law, i.e. operational control, controlled purchase, and controlled delivery. In case of these operations, the Polish law stipulates uniform principles of administration and conduct, as well as common procedural conditions of implementation. It is characteristic that the practically identical legal regulation of these three measures is replicated in provisions governing the activity of each formation of special

services. Also significant is the judicial and prosecutorial supervision over their application. Under Article 3 section 1, item 7a of the Act on the Public Prosecutor's Office of 20 June 1985 (consolidated act, J. of L. 2011 No. 27, item 1599, as amended), the Prosecutor General and subordinate prosecutors exercise supervision over the legality of the institution and conduct of preliminary investigation activities by law enforcement agencies, to the extent provided by the statutes regulating the structure and object of these agencies. Pursuant to Article 18 section 5 of the Act, the Minister of Justice issued an ordinance of 9 June 2011 on the performance of the prosecutorial supervision over preliminary investigation activities (J. of L. No. 121, item 692). The ordinance stipulates precisely and at the same time broadly the control power of the prosecutor's office with respect to the implementation and conduct of preliminary investigation activities by authorized services. However, these stipulations concern only the three above mentioned operations, i.e. operational control, controlled purchase, and controlled delivery. It is within these limits that "the substantive and effective control over the factual basis of the requested operations and the legality and correctness of their administration and conduct" (§ 2 of the ordinance) is exercised. The ordinance also provides for the prosecutor to formally ask an agency for an explanation of the transgressions and irregularities identified (§ 7.3), and to notify the supervising authority about the transgressions established (§ 7.4). Complementing these solutions is an internal system of procedural control over preliminary investigation activities, granting the Prosecutor General the power to appoint a prosecutor to inspect the work performed by the prosecutors exercising supervisory duties with respect to the law enforcement agencies, pursuant to Article 1 section 1, item 7a of the Act on the Prosecutor's Office as well as § 9 and § 10 of the above-mentioned ordinance. Also, with respect to operational control, the law provides for the participation of the court in the administration of the measure.

Given the existing regulations, a generally satisfactory legal status of control mechanisms over the undercover operations of law enforcement agencies can be asserted only with respect to operational control, controlled purchase, and controlled delivery. This statement indirectly expresses a positive opinion about the recent legal initiative to gradually specify and consolidate the provisions governing undercover operations in the statutes on special services. Thanks to these consolidated regulations, control of undercover operations has become feasible. However, it is hard to be fully content with the solutions provided by the Polish law with this respect. Specifically, the existing provisions fail to specify the maximal duration of operational control. A change in this respect is proposed by the currently prepared bills on the Internal Security Agency and on the Intelligence Agency, which set the maximal duration of operational control at 12 months (Art. 21 section 6 and Art. 4 section 4, respectively). Objections should still be raised about the indefinite (open) range of data that can be gathered during an

operational control and the lack of a precise definition of technologies that may be used in such operations.

The remaining preliminary investigation activities comprise measures lacking statutory definitions and regulated application. They form a common and scantly regulated category of activities that law enforcement agencies are authorized to use for the purpose of combating and preventing crime. These activities are merely reflected in legal acts regulating the activity of secret services, such as ordinances, instructions, and guidelines, which, however, do not constitute sources of generally applicable law. In some cases their compliance with the Constitution of the Republic of Poland of 2 April 1997 has been questioned by the Constitutional Tribunal (see e.g. the judgment of the Constitutional Tribunal of 12 December 2005, K 32/04). In the same decision, the Constitutional Tribunal adjudicated that preliminary investigation activities infringe upon the privacy of citizens safeguarded by the Constitution and pose a threat to the rights of the accused. According to the Constitutional Tribunal, the covert character of these operations "determines their effectiveness but at the same time causes a situation where the interested party, who is unaware of operational control, cannot, for purely factual reasons, implement the procedures and safeguards whose application is conditional on personal knowledge and initiative."

These numerous, unnamed types of operations used by secret services are not controlled by either the courts or the prosecutor's office. They are subject to internal supervision as well as the parliamentary, control exercised by the Parliamentary Committee for Secret Services, which, however, has no real control mechanisms to employ.[1] The key problem is the lack of statutory rules governing the application of preliminary investigation activities, a catalog of these activities, and their control mechanisms. This results in a conflict with the Polish constitutional system due to the impact of covert operations of secret services on civil rights and liberties. It should be emphasized that the problem has been recognized in Poland, which is evidenced by several recent initiatives to regulate the activity of secret services. However, the main drawback of the initiatives undertaken to reform this sphere is their non-systemic character, which has contributed to their limited success. The most recent legislative initiatives concern the formation of a special supervisory body, i.e. the Special Services Control Commission, as well as the proposed reform of the existing secret services, aimed at the precise definition of their respective competences, re-determination of their institutional subordination, and improvement of the mechanisms for the ongoing coordination of their activity. The present bills do not go sufficiently far in the proposed reform

[1] An opinion of P. Sarnecki about the interpretation of Art. 138 section 4 of the Rules of the Sejm in the light of the Law on the protection of undisclosed information of 22 January 1999 (the Rules of the Sejm as interpreted by the Office for Parliamentary Analyses, 2010, Vol. 2, Chancellery of the Sejm, 128–130).

of the activity of secret services because they provide merely for institutional and structural changes. In particular, they fail to offer a holistic conception, despite the fact that attempts to develop one were undertaken in fairly immediate past.

In 2008, a bill on preliminary investigation activities, marked as parliamentary paper No. 353, was drafted. Its purpose was to regulate the extra-procedural activities, which are not subject to regulation by the Code of Penal Procedure or any other separate statute. The need to introduce legal regulation was justified by the interference of covert operations conducted by secret services in the domain of constitutionally guaranteed civil rights and liberties. Unfortunately, the bill was abandoned and subsequently replaced by a conception to form an independent body controlling the preliminary investigation activities conducted by the five special services, i.e.: the Internal Security Agency, Intelligence Agency, Central Anti-Corruption Bureau, Military Counterintelligence Agency, and Military Intelligence Agency. The bill is dated 11 October 2013 and at the moment its future is hard to predict.

Given the existing legal situation, the formation of a new supervisory body, modeled on the solutions existing in many European countries, may be justified by reference to a broad spectrum of preliminary investigation activities which are currently outside any control by external bodies. The existing system of parliamentary control exercised by the Parliamentary Committee for Secret Services does not ensure adequate external control owing to the lack of legal sanctions at its disposal. The unregulated activities of secret services encompass various forms of covert operations that – like the codified undercover operations – are not indifferent to the sphere of constitutional rights and liberties, which certainly justifies subjecting them to the supervision of an independent, external body. In contrast to the limited catalog of undercover operations that are subject to judicial and prosecutorial supervision, the prerogatives of the proposed Control Commission are broadly drawn. A considerable drawback of the proposed bill is the failure to provide a systemic regulation defining the powers of the Control Commission. With respect to preliminary investigation activities, this function is partly fulfilled by Art. 33 section 1 of the proposed bill, which states that the purpose of external supervision is to establish the state of affairs, to document it in a reliable manner, and to assess the compliance of the activities of secret services with the provisions of the Polish Constitution, statutes, and other regulations, particularly in the area of civil rights and liberties. With regard to a large group of covert operations the material basis of the activity of the proposed control body remains undefined, considering that no provisions governing the activity of secret services determine precisely what these preliminary investigation activities are, or within what limits and based on what principles they can be conducted. For this reason, the proposed legislation should be preceded by a complex solution to the problem of undercover operations in the form of either a separate statute or suitable provisions incorporated into the legal acts governing the particular law enforcement agencies

authorized to conduct these operations. The observance of the proper legislative order in this case is necessary due to the functional relationship between the duties of the controlled services and the powers if the controlling body.

2. The decision to conduct an undercover operation

In Poland, both the decision making procedure and the decision making body depend on the type of operation which is to be conducted. Therefore, this criterion has been adopted as the basic one, although the degree of civil rights infringement, justifying decision-making by supreme administrative agencies or higher courts, has also been considered. Generally, complex operations are used in proceedings involving many subjects, while simple and auxiliary activities require solely an internal decision of the given agency.

Complex operations include: operational control,[2] controlled purchase (controlled bribe),[3] and controlled delivery.[4]

Normally, operational control is authorized by a local court on the motion by the commander of a competent law enforcement agency, lodged after securing a written consent of the Prosecutor General or District Prosecutor. In urgent cases, the decision is made by the commander or head of the law enforcement agency after receiving a written consent of a competent prosecutor, who then has to ask the competent court for approval of the operation. A slightly more complicated solution has been adopted in the Police Act. According to the ordinary procedure (which acts as a starting point for other solutions), the decision to institute an operational control is made by a district court upon a written motion by the Commander-in-Chief of the Police, lodged after securing a written consent of the Prosecutor General, or by a provincial police commander upon a written consent of the district prosecutor with competence over the seat of the applicant (Art. 19.1 of the Police Act). According to the extraordinary procedure, i.e. in urgent cases where a delay could result in the loss of information, or concealment or destruction of evidence, the use of operational control is authorized by the Commander

[2] According to the legal definition, operational control is conducted in a covert manner and consists in checking a person's correspondence and parcels, and using technological devices to secretly gather and record information and evidence, especially telephone conversations and other data transmitted by means of telecom networks.

[3] Under the Polish law, controlled purchase (controlled bribe) is: 1) clandestine purchase, sale or interception of objects (a) which have been acquired by crime, or (b) whose manufacture, possession, shipment or sale is prohibited; 2) acceptance or offer of a financial benefit.

Controlled purchase may consist in making a proposal to do the above, hence it may be seen as containing an element of police provocation.

[4] Controlled delivery includes clandestine manufacturing, shipment, storage, or sale of objects of crime, which does not constitute a hazard to human life or health.

in-Chief of the Police or a provincial police upon commander after securing a written consent of the competent prosecutor and with a simultaneous lodging of a motion to the competent district court for a decision on the matter. The court has five days to pass a decision. Similar model procedure is used by other services.

Controlled purchase (controlled bribe) operations may be instituted by:

1. The Commander-in-Chief of the Police or a provincial police commander after obtaining a written consent of the district prosecutor with competence over the seat of the applying police unit. The prosecutor may revoke the operation at any time (Art. 19a of the Police Act);

2. The Commander-in-Chief of the Border Guard or a unit commanding officer of the Border Guard after obtaining a written consent of the district prosecutor with competence over the seat of the applicant. The prosecutor may revoke the operation at any time. The Commander-in-Chief of the Border Guard has greater powers, i.e. is competent in all matters in which the Border Guard may need to conduct a controlled purchase operation, while a unit commanding officer is competent only in certain cases (Art. 9f of the Border Guard Act);

3. The Commander-in-Chief of the Military Gendarmerie or a unit commanding officer of the Military Gendarmerie after informing the competent military district prosecutor, who can revoke the operation at any time (Art. 32.3 of the Military Gendarmerie Act);

4. The Head of the Central Anti-Corruption Bureau after obtaining a written consent of the Prosecutor General, who can request information about the operation but cannot revoke it (Art. 19 of the Central Anti-Corruption Bureau Act);

5. The Head of the Internal Security Agency – according to the procedure described above (Art. 29 of the Internal Security Agency and Intelligence Agency Act);

6. The Head of the Military Counterintelligence Agency – according to the procedure described above (Art. 33 of the Military Intelligence Agency and Military Counterintelligence Agency Act).

Controlled delivery operations, in turn, may be authorized by:

1. The Commander-in-Chief of the Police or a provincial police commander after informing the competent district prosecutor, who may revoke the operation at any time (Art. 19b of the Police Act);

2. The Commander-in-Chief of the Border Guard or a unit commanding officer of the Border Guard after informing the competent district prosecutor, who may revoke the operation at any time (Art. 9g of the Border Guard Act);

3. The Commander-in-Chief of the Military Gendarmerie of a unit commanding officer of the Military Gendarmerie after informing the competent district prosecutor, who may revoke the operation at any time (Art. 33 of the Military Gendarmerie Act);

4. The General Treasury Control Inspector after notifying the Prosecutor General, who must be informed about the conduct and results of the operation on

a daily basis and who may revoke the operation at any time (Art. 36 of the Treasury Control Act);

5. The Head of the Central Anti-Corruption Agency – according to the above procedure and principles (Art. 30 of the Central Anti-Corruption Agency and Intelligence Agency Act);

6. The Head of the Military Counterintelligence Agency – according to the above procedure and principles (Art. 34 of the Military Intelligence Agency and Military Counterintelligence Agency Act).

In principle, the scope of each activity and the possibility of using other investigative techniques in its course have been sufficiently regulated by the existing provisions. There are, however, some exceptions, which are presented below.

With regard to **operational control**, having met additional criteria (i.e. if the operation is necessary for the purpose of the prevention of crimes which may justify if, identification of the perpetrator, or obtaining of evidence), the Police may gain access to insurance information, especially the data of specific persons processed by the insurance company with whom they have concluded an insurance agreement, and to information processed by the banks and constituting a banking secret. This information is made available based on the decision issued by the court with competence over the seat of the applicant at a written request of the Commander-in-Chief of the Police or a provincial police commander. The court notifies the interested party about its decision within nine days, but may suspend notification for a definite period of time upon a motion of the Commander-in-Chief of the Police and after a prior written consent of the Prosecutor General (Art. 20 of the Police Act). The analogous procedure is used with reference to the Border Guard, where the decision is made by the district court with competence over the seat of the applicant, i.e. the Commander-in-Chief of the Border Guard or a unit commanding officer (see Art 10c of the Border Guard Act).

The Central Anti-Corruption Bureau, in its proper competence as well as for the purpose of verifying the declarations of assets submitted by public officials, may use the information processed by banks and constituting banking secret, as well as information regarding agreements of investment accounts, money accounts, insurance policies, and other agreements for the trading of financial instruments, and especially the data of the persons who hold such accounts and instruments. The written motion is lodged by the Head of the Anti-Corruption Bureau and the decision is made by the District Court in Warsaw (Art. 23 of the Central Anti-Corruption Bureau Act).

Due to the adopted conception, preliminary investigation activities are generally conducted before criminal proceedings are instituted, with the purpose of obtaining information making the institution of such proceedings possible. However, the current practice shows that such activities are also conducted after the proceedings have been instituted. In view of the general rules governing criminal

procedure in Poland it is not advisable to conduct preliminary investigation activities when the legal proceedings are in progress (i.e. after indictment or its equivalent has been presented) with reference to the offense being prosecuted. However, such activities are acceptable with reference to other offenses committed by the same person.

As has already been mentioned, the Polish law sets two procedures for the administration of preliminary investigation activities: ordinary and extraordinary. It also uses the conception of authorization or approval of the preliminary investigation activities by an external body. The distinction is based on the degree of infringement on civil rights and liberties (determined by the seriousness of the crime triggering the activities), according to the principle that the most painful and complicated operations undertaken in the most important cases should be authorized by a district court (or an equivalent military district court) upon a written motion by a competent commanding officer of a law enforcement agency and sometimes upon a prior written consent of the competent prosecutor.

In the most serious cases the motion is made by the Commander-in-Chief of the Police (or the Head of another law enforcement agency, equivalent in rank) and the consent is given by the Prosecutor General, but the law allows also for the initiative of a provincial police commander and the territorially competent district prosecutor. The extraordinary procedure consists in regarding the written consent of the Prosecutor General or a district prosecutor as the sufficient condition for the administration of an operation by a commanding officer of the competent law enforcement agency, with a simultaneous obligation to make a request for subsequent approval of the operation to the competent court.

In less serious cases, involving operations which violate less valuable rights, such as controlled purchase, the usual procedure consists in the authorization of the operation by the head of a particular law enforcement agency upon a prior written consent of the Prosecutor General (or a district prosecutor), where the prosecutorial consent may be revoked only in case of the Police and the Border Guard. The remaining law enforcement agencies are only obliged to keep the prosecutor informed, and although it may be inferred that a failure to meet this obligation should result in the revocation of the prosecutorial consent, this rule has not been made explicit in any provisions.

Finally, the third category of operations – controlled delivery – encompasses activities authorized by the commanding officers or heads of law enforcement agencies with simultaneous notification of competent prosecutors, who may order the discontinuance of the operation at any time.

With reference to other operations, the existing legislation does not require any external approval, which means that operational decisions of the law enforcement agencies are unsupervised.

If the consent of another body is required by the binding legal regulations, the motion for the use of a given investigative operation is submitted to the competent body together with the documents justifying the need for the operation. In case of the most sensitive operation, i.e. operational control, the motion is lodged to the court, whereas in case of controlled purchase (controlled bribe) it is made to the prosecutor. Another procedure, applicable to less intrusive operations, prescribes informing the party whose consent is required (usually the prosecutor) on a daily basis; which indicates a lower degree of formalism. However, in both cases the law enforcement agency wishing to use extraordinary measures is required to present information regarding the reasons for the proposed operation. This obligation does not exist with regard to simpler operations which do not require external approval, though of course internal regulations of the law enforcement agencies place upon them the obligation to keep operational records, which should include information about the reasons for undertaking a given activity.

The supervisory body verifies both formal and factual reasons. It should be noted that only in case of operational control the Polish law provides a subsidiarity clause, which states that this measure may be used only after other measures have proved ineffective or are likely to yield useless result. The clause contains an arbitrary premise, especially in its second part, for which it lends itself to criticism.

The Polish legislator adopted a conception of defining the offenses which justify the use of undercover operations with reference to the type of operation and the agency responsible for its conduct. Simple operations (those that require no approval or notification) may be used in all types of cases, whereas complex operations such as operational control, controlled purchase or controlled bribe, and controlled delivery can only be used when the proceedings concern concrete criminal acts. Thus, all complex investigative operation may be used in case of these offenses:

1) in the category of crimes against life: homicide, infanticide, and euthanasia;
2) in the broad category of various intentional offenses;
3) selected offenses defined in the Act on Sport;
4) selected offenses against economic relations, resulting in a financial loss or directed against property, if the amount of loss or the value of property exceeds fifty times the amount of minimal wage set in separate provisions;
5) tax offenses, if the value of the object of the act or the loss to public finances exceeds fifty times the amount of the minimum wage set in separate provisions;
6) breach of statutory provisions or conditions of the license for gambling;
7) illegal manufacture, possession or sale of weapons, ammunition, explosives, intoxicants and psychotropic drugs or their ingredients, and nuclear and radioactive materials;
8) sale of a person into slavery, keeping persons in slavery, and slave trade;
9) illegal retrieval and sale of human cells, tissues, and organs;
10) offenses prosecuted pursuant to international treaties and agreements.

A similarly constructed catalog is used in the Border Guard Act.

The operation of controlled purchase (controlled bribe) may be used with reference to a narrower category of offenses than the above, namely corruption and economic offenses.

With respect to the activity of the Central Anti-Corruption Bureau, the catalog of offenses which may necessitate complex preliminary investigation operations include:

1) active and passive bribery, paid favoritism, offering benefits in turn for exerting illegal influence upon a public official, abuse of powers or negligence of duties by a public official, trading in electoral votes, participation in organized crime or criminal organization, fraud, demand of ransom, abuse of powers or negligence of duties while handling the finances of another person to the detriment of that person, demanding or accepting financial benefits in return for causing harm to an organizational unit or committing an act of unfair competition, obtaining money from a bank or another institution by false pretenses, money laundering, forging or counterfeiting money;

2) tax offenses related to the failure to meet tax obligations or the obligation to settle grants and subsidies, if the value of the object of the offense or the amount of unpaid tax dues exceeds fifty times the amount of the minimal wage set in separate provisions.

A similar catalog of offenses is used to authorize units of Treasury Control to conduct complex investigative operations. It includes:

1) tax offenses, if the value of the object of or the amount of unpaid tax dues exceeds fifty times the amount of the minimal wage set in separate provisions;

2) tax offenses related to the failure to meet tax obligations or the obligation to settle grants and subsidies, if the value of the object of the offense or the amount of unpaid tax dues exceeds fifty times the amount of the minimal wage set in separate provisions;

3) offenses against economic activity causing a financial loss, if the amount of loss exceeded fifty times the amount of the minimal wage set in separate provisions on the date the offense was committed;

4) offenses against property, if the value of the property exceeded fifty times the amount of the minimal wage set in separate provisions on the date the offense was committed;

5) accepting or offering financial benefits in connection with a public office or a position of exceptional responsibility;

6) offenses prosecuted pursuant to international treaties and agreements.

The Act on the Central Anti-Corruption Bureau and Intelligence Agency, unlike the above-mentioned acts, does not use a close catalog of offenses which may cause the administration and implementation of complex investigative operations, but merely states that these operations may only be used for the purpose of performing certain duties of the Central Anti-Corruption Bureau, notably in-

vestigation, prevention, and detection of crimes as well as prosecution of criminal offenders with respect to:

1) espionage, terrorism, illegal disclosure and exploitation of confidential information, and other offenses against national security;
2) acts undermining the economic base of the state;
3) corruption of public officials if it can undermine national security;
4) offenses committed in the area of manufacture and sale of goods, technologies, and services of strategic importance for national security;
5) illegal manufacture, possession, and international sale of weapons, ammunition, explosives, and weapons of mass destruction, as well as intoxicants and psychotropic drugs.

Similarly, the Military Intelligence Agency and Military Counterintelligence Agency Act uses the criterion of expediency of an operation without directly listing a catalog of offenses. The use of complex preliminary investigation activities is allowed if they serve the purpose of investigation, prevention, and detection of crimes committed by soldiers in active service, agents of the Military Counterintelligence Agency and the Military Intelligence Agency, employees of the Armed Forces and other organizational units of the Ministry of National Defense.

It should be noted here that the Military Counterintelligence Agency can also conduct preliminary investigation activities with respect to other spheres of its activity, which is not connected to prosecution of perpetrators and crime protection.

In turn, the Military Gendarmerie uses complex preliminary investigation activities in cases of the following offenses:

1) offenses against peace and mankind;
2) certain offenses against the Republic of Poland, except those reserved for other services;
3) attack on troops and units of the Armed Forces;
4) homicide;
5) hijacking of an aircraft or a ship;
6) use of force or illegal duress in connection with criminal proceedings;
7) accepting or providing a financial benefit or its promise in connection with the performance of a public office;
8) kidnapping;
9) human trafficking;
10) extortion of ransom;
11) participation in organized crime;
12) illegal manufacture, possession and sale of weapons, ammunition, explosives, intoxicants and psychotropic drugs, nuclear materials, and poisonous substances;
13) unauthorized disclosure or exploitation of confidential information labeled ‘secret’ and ‘top secret’;

14) robbery and aggravated larceny;
15) desertion with arms or group desertion together with other soldiers;
16) willful seizure of combat gear;
17) offenses prosecuted pursuant to international treaties and agreements.

The Polish law has adopted a slightly different construction here. The so-called simple investigative activities, i.e. those that can be undertaken by the Police or another law enforcement agency within their own capacity, can be conducted with respect to every offense under investigation. While investigating cases of the offenses listed above, if a complex operation is authorized it is carried out according to its definition. Video and audio recording of information may be additionally ordered in course of such operations.

At the same time, while conducting an investigation the particular special services may perform the following activities by virtue of their own powers:

1) obtain, gather, verify, and process information, including confidential information;

2) collect, obtain, gather, process and use certain types of information for the purpose of performing statutory duties, including personal data of persons suspected of committing crimes prosecuted on indictment, minors committing acts prohibited by the law as indictment offenses, persons of unknown identity or trying to hide their identity, and persons wanted for crimes, with or without their knowledge and consent;

3) process personal data, including sensitive, without knowledge or consent of the person to whom they concern;

4) collect, obtain, gather, process, verify, and use information, including personal data, obtained or processed by agencies of other states and by the International Criminal Police Organization – INTERPOL;

5) for the purpose of crime prevention and detection, and perpetrator identification, to obtain, gather and process information, including personal data, from databases kept by public administration agencies pursuant to separate provisions, and particularly from the National Criminal Register and the Register of Personal Identification Numbers PESEL, as well as from databases used for processing information, including personal data, obtained by these agencies in course of the investigation;

6) carry fake documents, which make it impossible to determine the identity of the agent and the measures used in the line of duty and in particularly justified cases, also issue such documents for persons aiding in the investigation who are not officers or agents (though not all special services have this right);

7) obtain access to telecommunications data allowing for the identification of a telecommunications device and its location;

8) obtain and process data of persons using postal services as well as data concerning the fact and circumstances of the use or provision of these services, as

long as it is done for the purpose of crime prevention or detection, or perpetrator identification;

9) use the help of informers who are not officers or agents, including in the conduct of investigative operations;

10) keep a database of DNA samples;

11) use the databases of other special services (subject to exceptions, whose discussion falls outside the scope of the present report).

An operational control operation is ordered for three months. This period can be extended to the maximum of another three months according to the same procedure. In particularly justified cases, when in course of an operational control some new circumstances relevant for crime prevention or detection, perpetrator identification or evidence collection occur, it is possible to issue a decision to continue the operational control for a definite period of time also after the two three-month periods have elapsed. The operational control operation should be terminated immediately after the cessation of reasons for its conduct, and no later than at the end of the period for which it was authorized. Yet the information regarding the reasons for the termination of operational control has come from the law enforcement agency and be submitted to the prosecutor.

This means, that the body ordering the conduct of the operation cannot monitor the reasons for operational control in an ongoing way, but merely gains access to this information when the operation is renewed or terminated.

An analogous procedure is used with respect to the operation of controlled purchase (controlled bribe) conducted by the Police or the Border Guard. The operation is normally ordered for up to two three-month periods, and in particularly justified cases, further extended for a definite period of time by the same procedure. If the reasons for the operation cease, it should be terminated and the information gathered should be submitted to the competent institution. Like in the previous case, the institution approving the decision to conduct a controlled purchase operation has access to information about the reasons for the operation only at its initiation, renewal, and termination. The provisions regulating controlled purchase or bribe are identical in the Police Act and the Military Gendarmerie Act. In turn, the Intelligence Agency and Internal Security Agency Act, the Military Intelligence Agency and Military Counterintelligence Agency Act, and the Central Anti-Corruption Bureau Act do not stipulate any periods of time for which the operation may be conducted but merely state that it is conducted for a fixed period of time, which causes much well-deserved criticism.[5]

[5] One of the most important judgments was passed in the so-called Sawicka case. Member of Parliament Beata Sawicka was under investigation by the Central Anti-Corruption Bureau, and as a result charged with accepting a financial benefit. She was convicted by the court of the first instance, but acquitted by the court of the second instance. The oral justification of the decision of April 2013 contained a number of critical remarks about both the practice and content of the Central

The law does not mention duration in case of controlled delivery because it is a one-time operation.

Simple investigative operations are governed by general rules, which are classified. These operations are not regulated by the provisions of generally applicable law.

3. The conduct of the undercover investigation

Considering that for the most part the legal regulation of this issue does not belong to the generally applicable law (i.e. is classified), an analysis of the relevant acts in this respect would yield only residual information.

All agencies have special departments or other units responsible for preliminary investigation. However, there is no ban on participation in undercover operations by other officers.

Under Article 22 of the Police Act, the Police may use the help of persons who are not police officers to carry out their duties (the same applies to the Central Anti-Corruption Bureau, Treasury Control, Internal Security Agency, Military Counterintelligence Agency, Military Intelligence Agency, and Military Gendarmerie). Disclosure of personal data of the person assisting the Police in preliminary investigation activities is prohibited (it may only be done in special cases provided for by separate provisions). Persons who are not police officers may be remunerated for their work. The remuneration is paid out of the so-called operational fund, created for this purpose. If while helping the Police and in connection with providing help such a person has been killed, incurred an injury, or suffered a loss in property, he/she is entitled to compensation on special terms. Pursuant to Article 20a section 2 of the Police Act, in particularly justified cases persons helping the Police in investigative operations may be issued fake documents to hide their real identity. The entitlement to compensation and to fake identity is what distinguishes such persons from ordinary police informers, who can only earn money for their help. It should be emphasized that the Border Guard Act does not provide for the possibility to issue fake identity documents to secret collaborators in preliminary investigation activities. Summing up, it should be said that persons collaborating with law enforcement agencies enjoy protection which is broader than that of ordinary informers, but narrower than that of agents, at least with respect to the explicit rules of compensation for loss of life or health while performing the tasks. Slightly different rules apply to the Military Gendarmerie, but their discussion would exceed the scope of the present report.

Anti-Corruption Bureau Act. The Sawicka case was the first such case and it would be premature to talk about any tendency in this respect.

This matter is not explicit. There is some subordination between the agent and the commanding officer of the competent agency, as well the duty to present the information on the reasons to conduct a given operation to the overseeing authority, but legal regulations do not explicitly provide for the obligation to disclose the identity of infiltrators, or details of their work.

This matter is not regulated by generally applicable law. Collaborators of law enforcement agencies have their case officers.

In this respect, Polish law has adopted the principle of relating the purposes of operations to the objects of activity of particular law enforcement forces. Therefore, with partial reference to previous considerations, the following purposes should be pointed out.

Operational control operations undertaken by the Police, the Border Guard, or the Central Anti-Corruption Agency are conducted for the purpose of crime prevention and detection, perpetrator identification, and obtaining and recording evidence of intentional offenses which are prosecuted on indictment and belong to the above listed catalog of offenses. An additional reason for undertaking operational control is a situation where previously undertaken measures have been ineffective or are likely to yield useless results. A similar regulation, though limited to soldiers, can be fund in the Military Gendarmerie Act. The Internal Security Agency uses operational control to perform its duties connected with criminal prosecution, i.e. the investigation, prevention and detection of offenses, and prosecution of their perpetrators. The Military Counterintelligence Agency has a right to undertake operational control to perform its duties connected with criminal prosecution but also for other purposes related to its competence, and particularly to protect national security. The Treasury Control undertakes operational control to detect and identify offenders and to obtain and record evidence.

Controlled purchase or bribe operations used by the Police, the Border Guard, the Central Anti-Corruption Bureau, the Internal Security Agency, and the Military Counterintelligence Agency must be aimed at the verification of previously obtained reliable information about an offense, identification of offenders, and obtaining of evidence.

Controlled delivery operations used by the Police, the Border Guard, the Treasury Control, the Internal Security Agency, and the Military Counterintelligence Agency are aimed at obtaining evidence of crimes, identifying perpetrators, and possibly recovering objects used in these crimes, unless it may pose a threat to human life or health.

Generally, law enforcement agencies have access to various types of information for the purpose of performing their statutory duties.

Operational control, as the most intrusive operation, is conducted covertly and consists in the control of correspondence and parcels as well as the use of various technologies to secretly obtain and record information and evidence, especially phone calls and other types of information transferred via telecommunications

networks. Controlled purchase is a covert operation involving the purchase, sale or acquisition of objects resulting from crime, or goods whose manufacture, possession, shipment or sale are prohibited, while controlled bribe is an operation involving accepting or giving financial benefits. This activity can also consist in making an offer to buy, sell or acquire objects resulting from crime or goods whose manufacture, possession, shipment or sale are prohibited, or else to give or accept a financial benefit. It is allowed to make video and audio recordings during this operation. Finally, controlled delivery is covert monitoring of the manufacture, movement, storage and sale of goods resulting from criminal activity.

Limits of admissibility of the activities of a police agent carrying out an undercover operation are not explicitly regulated. The law in clear only with reference to concealing the identity of police agents or their secret collaborators by providing them with fake identity documents, where the relevant provisions state that no offense is committed by:

1) the person who orders or monitors the production of the fake documents:
2) the person who produces the fake documents;
3) the person who helps in the production of the fake documents;
4) the police officer or secret collaborator who carry the fake documents, provided they do so for the purpose of performing an undercover investigation.

With respect to other activities, no equivalent guidelines are provided by the generally applicable law, which results in subsuming their admissibility under general rules, such as the state of higher emergency.

Regulating the activity of forging documents for the purpose of undercover operation is highly rational because in view of the warranty function of criminal laws, it provides the courts with some point of reference needed for assessment of legality. The lack of regulation regarding the acceptability of police activities renders their assessment extremely difficult, and makes the introduction of some statutory criteria highly desirable. Solutions applying to other law enforcement agencies are similar to those stipulated in the Police Act.

Considering the lack of statutory regulation and scant jurisdiction, it can be said that the limits of police provocation are only beginning to form. The operation which involves an acceptable degree of police provocation is controlled purchase (or bribe), which according to relevant statutes can take the form of an offer to engage in prohibited behavior. On the other hand, as it has already been mentioned, the statutes clearly state that the controlled purchase/bribe operation can only be undertaken to verify previously obtained reliable information about an offense, which means that the activities of law enforcement agencies must be a reaction to criminal behavior, not its inspiration. The problem of exceeding the limits of police provocation is even more complex. While there is no doubt that the behavior of undercover police agents is illegal, their liability for it is not clear. Clearly, there should be some disciplinary accountability and, to a lesser extent, also criminal liability, but these matters have not been adequately and fully regulated.

Certainly an undercover agent (a law enforcement officer or a secret collaborator) is not exempt from complying with the law applicable in the Republic of Poland. On the other hand, while infiltrating criminal organizations and participating in a complicated undercover game the agent is constantly exposed to criminal activity and therefore holding him liable for all the acts of which he was a part does not appear possible, or at least purposeful. These matters were to be regulated by the long-awaited act on preliminary investigation activities, which, however, has not been passed.

This sphere is not regulated by the generally applicable law, apart from the basic provision that the assistance of third persons in undercover operation is allowed. With the exception of using fake documents to conceal the identity of the third person, the legality of their actions should be assessed according to the general rules of criminal liability.

4. Supervision of undercover investigations

As has already been said, the leading role in the decision-making process concerning the use of preliminary investigation activities which interfere with civil rights and obligations is played by the court authorizing their use. However, judicial supervision is mainly relevant for the assessment of the probative value of the operation, and indirectly, also its legality. As indicated above, a significant role in overseeing the legitimacy and legality of the activities of law enforcement agencies is played by civilian and military prosecutors. In the light of provisions of lower rank[6] and party referring back to the institutions described above, it can be said that the prosecutorial supervision is exercised by means of:

1) factual and formal evaluation of the motion to be submitted to the competent court, and authorization of the operation before issuing a written consent to be presented to the court for approval;

2) monitoring the execution of the operation, based on the right to obtain ongoing information about its progress;

3) supervision of the correct and timely destruction of materials which are useless or inadmissible due to legal or factual limitations;

4) in some cases, granting consent to abandon the destruction of materials, if so stipulated by a specific provision;

5) keeping a record of the activities and gathering documentation of the supervision.

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[6] Ordinance of the Minister of Justice of 9 July 2011 on the manner of performing the prosecutor's competence in overseeing preliminary investigation activities; Ordinance of the Prosecutor General No. 6/ten of 31 March 20ten on exercising the competence of the Prosecutor General and district prosecutors in the area of operational control and other preliminary investigation activities performed by authorized agencies.

Thus in fact, it is the prosecutor as *dominus litis* overseeing the activity of law enforcement agencies who supervises preliminary investigation activities.

The supervision of the prosecutor (and of the court in the area of judicial acts) is exercised in course of the operation, on an ongoing basis, together with a factual and formal assessment of the motions. In judicial proceedings, the court may rule an undercover operation illegal, which results in the inadmissibility of the evidence against the accused obtained in its course but at the moment this doctrine is only beginning to take shape (in principle, the poisonous tree doctrine is not used by the Polish law).

In addition, the Polish law provides for an additional form of exercising control over the preliminary investigation activity of law enforcement agencies by means of obligating them to submit annual reports showing the number of cases in which particular undercover operations were used. Unfortunately, the existing regulations are not consistent because they do not apply to all agencies and operations. Information about the number of motions for authorization filed can be found, inter alia, in the reports of the Prosecutor General and the Minister of Justice (the later only in reference to police operational control operations). The heads of the Central Anti-Corruption Bureau, Internal Security Agency, and Intelligence Agency file their reports with the President of the Council of Ministers and the Parliamentary Committee for Special Services. In turn, the commanders-in-chief of the Military Counterintelligence Agency and Intelligence Agency additionally file their reports with the Minister of National Defense, whereas the General Inspector of Financial Information presents the report to both houses of parliament, the Sejm and the Senate. By rule, these reports are classified and inaccessible. Thus, the system clearly emphasizes the observance of procedures.

5. The use of evidence gathered during the undercover investigation in court

The problem of using materials obtained in preliminary investigation activities in criminal proceedings is a controversial legal issue due to the only partial regulation of this master and the systemic distinction between probative and detective functions of activities performed by law enforcement agencies. Extreme views are not infrequent, though moderate ones prevail. The latter are exemplified by the position recognizing the admissibility of information obtained in course of undercover operations in cases where the Code of Criminal Procedure does not insist on evidence complying with the adjective law, but allows for the so-called free evidence.[7] In the resolution of 21 March 2000 (I KZP 60/99), the Supreme

[7] T. G r z e g o r c z y k, "Wykorzystanie i przekształcenie materiałów operacyjnych w materiał dowodowy w postępowaniu karnym" [Use and conversion of operational materials into evidence

Court stated that the results of preliminary investigation activities cannot be used directly in a criminal trial, except for those that are granted the status of evidence by the acts on particular law enforcement agencies. For instance, evidence obtained in course of operational control enjoys this status, provided it was obtained in compliance with the provisions regulating this undercover operation. This involves meeting the following criteria:

– inclusion in the case file of the documents listed in the Ordinance of the Minister of the Interior of 18 March 2002 on documenting police operational control, particularly storing and handing over to proper authorities the motions, orders, and materials used or obtained in course of the control, as well as documentation of processing and destroying of operational materials – to enable verification of the legality of the operation;

– compliance with the catalog of offenses provided in Article19 section 1 of the Police Act;

– compliance with the conditions stipulated by Article 19 section 3 of the Police Act;

– requirement of authenticity of the materials;

– requirement to disclose these materials during court proceedings, in accordance with Article 410 of the Code of Criminal Procedure;

– ban on replacing the act of playing an audio recording with reading its transcript;

– ban on reading the notes from preliminary investigation activities in court, combined with a ban to record them in court minutes.

Also applicable with respect to materials obtained in course of an operational control is the first sentence of Article 393 § 1 of the Code of Criminal Procedure. Under this provision, information that may be read during court proceedings includes: protocols of inspection, search, and object seizure; statements of expert witnesses, research institutes, and institutions; criminal records, results of the environmental inquiry, as well all documents filed in course of the preparatory proceedings, court proceedings, or other proceedings provided for by the statutory law. The same possibility of direct use of operational materials in criminal proceedings applies to evidence obtained during controlled purchase or controlled delivery operations.

In case of legally undefined preliminary investigation activities it is not possible to automatically use the materials obtained in criminal proceedings. Inadmissibility of the direct use of the materials in court results from the fact that these activities are conducted secretly, without properly defined rules and grounds

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in criminal proceedings], [in:] *Przestępczość zorganizowana. Świadek koronny. Terroryzm – w ujęciu praktycznym* [Organized crime. Key Witness Terrorism – a practical view], ed. E. Pływaczewski, Kraków 2005, p. 224–225; D. S z u m i ł o-K u l c z y c k a, *Czynności operacyjno-rozpoznawcze i ich relacje do procesu karnego* [Preliminary Investigation Activities in Relation to Criminal Proceedings], Warszawa 2012.

which would allow the interested parties to question their legality, and without external supervision. These conditions make impossible the verification of the operational materials for legality and accuracy, making them too unreliable to be directly used in a trial. The key question here is whether and under what conditions the information gathered by such activities as inquiry, observation or surveillance of criminal groups can be used in court. After all, covert operations of law enforcement agencies are conducted for a concrete purpose and frequently constitute the only way of uncovering the truth about offenses being committed. The general rule adopted with respect to the unregulated preliminary investigation activities states that the information and materials obtained by means of these activities cannot constitute evidence, but can lead to information about evidence, and in particular, can disclose personal sources of evidence, who acting as witnesses will provide the proceeding agent with data and information fully capable of being used in court proceedings.

Under Article 177 § 1 of the Code of Criminal Procedure, each person summoned to be a witness in a criminal case is under the obligation to appear in court and give a testimony. This regulation does not exempt an undercover agent from the obligation to testify. To protect the agent in the situation of a justified fear that the life, health, freedom, or property of the agent or his/her close relative may be endangered, the institution of the anonymous witness may be used. During the preliminary proceedings the court may issue an order to keep secret the information (including personal data) making possible identification of the witness (Art. 184 of the Code of Criminal Procedure).

In the case of granting anonymity to the agent testifying in a criminal trial, the institution of confrontation of witnesses is excluded by the existing regulation (2nd sentence of Art. 172 of the Code of Criminal Procedure). The opposite solution would negate the sense of anonymity, which is essential for the institution of anonymous witness. Apart from confrontation, all other probative methods may be used with respect to an agent acting as a witness. The obligation to ensure physical anonymity to such a witness does not preclude the participation of the accused in the hearing of the witness carried out with the use of techniques ensuring witness anonymity. This may slightly hinder the hearing due to the lack of a direct contact with the witness and the possibility to record his/her physiological reactions, but does not negate the sense of hearing if proper technological conditions have been arranged. With respect to this matter, the present situation in Poland is generally satisfactory.

In Poland, probative law is subject to various regulations which are aimed at both establishing reliable facts in criminal proceedings and ensuring loyalty towards different categories of its participants, certain procedural relations, and the special character of certain sources of evidence by granting them specific rights. Specific provisions regulating these matters are provided by the Code of Criminal Procedure of 6 July 1997 (J. of L. No. 89, item 555). The Polish law

provides for numerous bans eliminating the possibility to use certain personal sources of evidence. A token of loyalty recognized in Poland is the restricted use of evidence provided by foreign diplomats. Another category of evidential bans encompasses professional and service secrecy. The institution of anonymous witness (Art. 184 of the Code of Criminal Procedure) and the regulation to keep secret the domicile and employment details of the witness form a separate category of rights. Also, special rights are granted to minors under 15 who are victims of sexual, family and custody crimes due to their age and sensitive situation (Articles 185a, and 185b of the Code of Criminal Procedure). In addition, illegal interrogation methods are defined by Article 171 of the Code of Criminal Procedure.

The principles of the Polish probative law are anchored in the European Convention on Human Rights, which was ratified by Poland on 19 January 1993, as well as in judicial decisions of the European Court of Human Rights.[8] These principles increasingly apply to the pre-trail stage, indicating the growing popularity of the holistic view of fair trial as applicable to different legal procedures.[9]

The jurisdiction of the Constitutional Tribunal is influenced by standards developed by the European Court of Human Rights. It recognizes the fact that the European Convention of Human Rights places a number of obligations on domestic legislation, namely to identify persons who may be subject to operational control by court authorization; specify the types of offenses in case of which operational control can be instituted; determine its maximal duration; introduce the principle of reporting the contents of recorded conversations, establish measures ensuring the delivery of these records to the court in complete and intact state to allow for their inspection by the judge and the defense; and to specify the conditions of mandatory distruction of these records.

In formulating the rules regarding the admissibility of the preliminary investigation activities the Constitutional Tribunal of Poland has followed judicial decisions of the ECHR, especially with regard to the so-called operational tap and vigil. The doctrine approves the decision of the ECHR to ban provocation which consists in inducement into crime.[10]

The interest of the Constitutional Tribunal in the regulation of the preliminary investigation activities is a consequence of their relationship with civil rights and liberties. However, the regulations adopted in Poland are not universally applicable.

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[8] D. S z u m i ł o-K u l c z y c k a, *op. cit.*, p. 115–157.

[9] C. K u l e s z a , "Czynności operacyjno-rozpoznawcze a zasada rzetelnego procesu w orzecznictwie Trybunału w Strasburgu i sądów polskich" [Preliminary investigation activities and the principle of fair trial in the jurisdiction of ECHR and Polish courts], *Przegląd Policyjny* 2008, No. 2.

[10] P. K ł a d o c z n y, A. P i e t r y k a, "Prowokacja policyjna a wyłączenie odpowiedzialności prowokowanego w świetle orzecznictwa strasburskiego – postulaty pod adresem polskiej regulacji" [Police provocation and the exclusion of the liability of the provoced in light of ECHR jurisdiction – proposals for Polish legislation], *Przegląd Legislacyjny* 2013, No. 2(84), p. 11.

The first group of exceptions encompasses the cases where the legislator explicitly provided for the possibility to restrict civil rights (e.g. Art. 41 section 1, Art. 49, Art. 50, Art. 51 section 1, 2, and 3, Art. 52 section 1 of the Polish Constitution). The general grounds for limiting the constitutional rights and liberties are provided by Art. 31 section 3 of the Constitution. According to this provision, restrictions on the exercise of civil rights and liberties can only be introduced by a statute and solely when they are necessary in a democratic state to ensure its security and public order, or to protect the natural environment, public health and morality, or the freedom and rights of other people. However, these limitations cannot violate the fundamental nature of civil rights and liberties.

The conflict between the constitutional rights and liberties and the admissibility of their restrictions in the context of undercover investigation activities has been repeatedly discussed by the Constitutional Tribunal. The decisions of the Constitutional Tribunal indicate that obtaining evidence by means of law enforcement activities that interfere with the rights and liberties safeguarded by the Constitution (including by undercover operations) is conditional on the presence of a specific legal basis. If statutory regulation is absent or the statutory restrictions on undercover operations have been violated, the activities have to be ruled unconditional. The statement of unconstitutionality results in the inadmissibility of thus obtained evidence in criminal proceedings. In this sense, the constitutional provisions establishing civil rights and liberties, combined with complementary statutory regulations, constitute evidential bans *sui generis*.[11]

6. Protection of undercover agents

The Police Act in Article 20b stipulates a general rule, which is repeated by other statutes, that disclosing information about the specific forms, rules, and organization of preliminary investigation activities, as well as about the actions conducted and the measures or methods used in their performance can only take place if there is a strong suspicion that an indictable offense has been committed while performing these activities. In such a case, the provision of information about the police agent involved follows the procedure set in specific provisions. In principle and on the virtue of Article 22.1 of the Police Act, disclosing data about a person assisting the Police in carrying out an undercover investigation is prohibited and results in the violation of Article 231 of the Penal Code (abuse of powers or failure to fulfill duties, punishable by imprisonment of up to three years). However, specific provisions stipulate that disclosing the identity of such a person to an institution of public administration is possible in particularly justified cases,

[11] D. Szumiło-Kulczycka, *op. cit.*, p. 157.

such as on demand by the prosecutor, or in case of suspicion that the person might have committed an indictable offense while participating in the investigation.

Identical principles apply to the Border Guard (Art. 9a–9d of the Border Guard Law).

A slightly different regulation has been adopted with respect to the Central Anti-Corruption Bureau. A similar procedure is adopted by the Internal Security Agency and the Intelligence Agency. The Military Intelligence Agency and the Military Counterintelligence Agency Act sets basically the same procedure, although it includes the Public Interest Spokesman, acting to conduct vetting proceedings or exercise the statutory duties of his office among the institutions authorized to request classified information. Although this office was abolished in 2007, its functions have been taken over by the prosecutors working for the Institute of National Remembrance, so theoretically they are now authorized to make a request for classified information.

The regulation of the release from secrecy is somewhat different in case of the Military Gendarmerie. In a procedure similar to the one described above, the First President of the Supreme Court revokes the decision of the Minister of National Defense to refuse a request for release from secrecy.

Under Article 36i and 36j of the Treasury Control Act, provision of the information enabling the identification of a person aiding in an undercover investigation takes place on the motion of the First President of the Supreme Court in case of legal proceedings for crimes against peace or mankind, war crimes, crimes against life or misdemeanors against life and health resulting in the loss of life, or in case of a reasonable suspicion that an indictable offense has been committed by that person in connection with the investigation.

7. International mutual assistance in criminal matters

The performance of mutual legal assistance on the territory of the European Union, including also in preliminary investigations, is regulated by the Act of 16 September 2011 on the exchange of information with law enforcement agencies of other member-states of the European Union (J. of L. No. 230, item 1371), which results from the incorporation into the Polish legal system of the following decisions:

– Council framework decision 2006/960/WSiSW of 18 December 2006 on simplifying the exchange of information and intelligence data among law enforcement agencies of the member-states of the European Union (Official Journal of the EU L 386 of 29 Dec. 2006, p. 89), and

– Council framework decision 2008/977/WSiSW of 27 November 2008 on the protection of personal data processed in course of police and judicial cooperation in criminal cases (Official Journal of the EU L 350/60 of 30 Dec. 2008, p. 60),

as well as the adjustment of Polish regulations to the provisions of:

– Council decision 2008/615/WSiSW of 23 June 2008 on the intensification of trans-border cooperation, particularly in combating terrorism and trans-border crime (Official Journal of the EU L 2ten of 6 Aug. 2008, p. 1), and

– Council decision 2007/845/WSiSW of 6 December 2007 on the cooperation among agencies for the recovery of property in member-states in the area of detection and identification of financial benefits from crime and other property related to crime (Official Journal of the EU 332 of 18 Dec. 2007, p. 103).

The aim of the proposed bill is the adjustment of domestic legislation to the EU standards of information exchange for the purpose of identifying and prosecuting offenders as well as preventing and combating crime also on the level of preliminary investigation.

As stated in the reasons for the bill: "the performance of preliminary investigation activities is connected with gathering information (personal data) on the one hand and achieving the goals of identifying and prosecuting offenders, preventing and combating crimes, and obtaining evidence of their commission. Thus defined objectives are closely connected to processing information about people, places, objects, etc." Further on, we can read that "the legality of the activity of public administration, including the legality of gathering and processing personal information by its agencies, necessitates statutory regulation of the right to process personal data during investigation activities by competent agencies in the legislation governing their powers." The EU regulations indicate, that in order to facilitate the exchange of information within the European Union it is absolutely necessary to ensure an adequate level of data protection at the domestic level of data processing, which includes ensuring the legality and integrity of the process, i.e. its accuracy, reliability, and timeliness.

It is assumed that the specific nature of preliminary investigations and the effective achievement of their objectives is conditional on the appropriate degree of protection for the execution of investigative activities, and on the proper legal status of the collected and processed operational data, which at the same time must be subject to adequate protection by the provisions of generally applicable law.

The functional model for law enforcement agencies formed to combat and prevent crime has been discussed in Poland for several years now. Many people are of opinion that with ten agencies, including five enjoying the status of special services, there are too many law enforcement agencies. Another criticism has to do with their unclear competences and the lack of an explicit definition of their powers. This situation makes it difficult to identify the agencies responsible for the failure to fulfill the duties of law enforcement in big-scale economic and financial scandals, e.g. with reference to the activity of the so-called shadow-banks. An important aspect of this criticism is the high cost of operation of law enforcement agencies and the poor cost-effect ratio. Also criticized is the lack of effective mechanism of collaboration between the agencies and coordination of their op-

erations. This criticism has lead to the gradual rise of a reform movement, which however is still in its early stage and comprises individual rather than systemic activities.

The general question that has to be asked concerns the relationship between preliminary investigation activities and procedural activities and expresses the dichotomy between a single-track system and a double-track system. Both have their advantages and disadvantages.[12] Another matter that needs to be decided in the near future is the choice between general statutory regulation of undercover operations by the proposed act on preliminary investigation activities, which would be applicable to all law enforcement agencies, and a system of compatible regulations in the existing acts governing these agencies. Also important is the regulation of the organizational aspect of the functioning of the agencies, which is already subject to partial legislative initiatives, as indicated by the proposed bills on two important agencies: the Internal Security Agency and the Intelligence Agency.

In conclusion, the above outline of the factual and legal situation of law enforcement agencies in Poland points to a number of important issues that are still waiting for an adequate solution.

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[12] *Ibidem*, p. 350 on.

SECTION VI

Xawery Konarski
Advocate, Kraków

Tomasz Targosz
Associate professor, Jagiellonian University, Kraków

SECONDARY LIABILITY OF SERVICE PROVIDERS

1. Liability of service providers as part of the general question of liability for indirect (secondary) infringements

Secondary liability of service providers must be seen in the context of general liability rules for infringements of third party rights under Polish law. The Polish law does not recognize special regimes of liability for what is termed 'secondary infringements' even in the areas of law where such regulations are particulary common in other jurisdictions, e.g. in patent law.[1] Therefore the search for liability must begin with finding suitable legal grounds in the existing provisions of law. Before these will be analysed in greater detail below it is however necessary to start with one caveat: at present it cannot be said that the issues of internet providers' liability or even, speaking more generally, liability for indirect infringements have been settled in Polish law. There is very little case law dealing with these problems and the existing decisions fail to follow any consistent theory. Most court decisions approaching this issue have dealt with the protection of personal interests (such as reputation) as it is often the case that internet provides ample opportunities for defamation and comparable torts.

The most popular solution is to apply art. 422 of the Polish civil code (CC) regulating liability of persons inducing a tort, assisting in committing a tort or consciously taking advantage of the damage caused to another.[2] The conditions of

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[1] Polish patent law does not regulate indirect patent infringements, unlike most other European countries or the US.

[2] J. B a r t a, R. M a r k i e w i c z, "Przechowywanie utworów na stronach internetowych" [Storing Copyright Works on Websites], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* [ZNUJ PPWI] 2009, Vol. 105; J. B a r t a, R. M a r k i e w i c z, *Prawo autorskie* [Copyright Law], Warszawa 2013, p. 364; G. J. P a c e k, P. W a s i l e w s k i, "Pomocnictwo

liability are: (a) an intentional action consisting in inducing, assisting or exploiting a tort committed by a third party and (b) according to the prevailing although probably incorrect view adequate causal link[3] (with the exception of taking advantage of the damaged caused to another). The route through art. 422 suffers however from serious disadvantages, the most conspicuous of which are the requirement that the liable person must act with knowledge of a third party committing a tort and that this must be generally knowledge of a specific person infringing specific rights. Knowledge that some users of an internet provider's services infringe some third party rights is insufficient. As a consequence, the boundaries of liability are quite similar to the so-called safe harbors,[4] so that the latter do not in fact considerably privilege the providers in comparison to the general conditions of liability.

There have been some proposals to handle indirect infringements differently: one way would be to rely on the general tort clause of art. 415 CC modeled after the French art. 1382 code civile. It can be argued that creating a source of danger for third party rights, such as operating a service widely used for infringements, without taking all the necessary and reasonable steps to prevent infringements from happening, is a tort in its own right.[5] Then it does not have to be intentional; any fault (including negligence) would be sufficient. Similar in effect is the idea to consider the term "infringes" used in statutes regulating specific IP rights as denoting also indirect infringements (the same way infringement of property in things is understood as comprising both direct and indirect infringements).

With regard to injunctions, it is possible to apply art. 439 CC. This provision states that any person who is threatened directly by damage as a result of another person's behaviour, in particular, as a result of lack of proper supervision of the operation of an enterprise or establishment run by that person, may demand that such a person undertakes measures indispensable to ward off the peril and where necessary, to provide an adequate collateral.

There are no theoretical impediments for the above named grounds of liability to be applied independently of one another and they are all 'general' in the sense

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w ujęciu cywilistycznym a odpowiedzialność dostawców usług hostingowych – dwugłos w sprawie" [Aiding in Civil Law and Secondary Liability of Host Providers – Two Opinions], *Przegląd Prawa Handlowego* 2008, No. 7.

[3] B. Lewaszkiewicz-Petrykowska, *Wyrządzenie szkody przez kilka osób* [Causing Damage by Several Persons], Warszawa 1978, p. 108, 110.

[4] T. Targosz, Glosa do wyroku SN z dnia 8 lipca 2011 r., IV CSK 665/10 [Comment on Supreme Court's Decision of July 8, 2011, IV CSK 665/10], OSP 2012, No. 4, p. 45 ff.

[5] R. Longchamps de Berier, *Zobowiązania* [Law of Obligations], Poznań 1948, p. 234–235; S. Sołtysiński, *Licencje na korzystanie z cudzych rozwiązań technicznych* [Licences for Use of Technological Solutions], Warszawa 1970, p. 163–175; M. Wilejczyk, "Dlaczego nie należy chodzić w tłumie ze szpilką wystającą z rękawa? Naruszenie obowiązku ostrożności jako przesłanka odpowiedzialności deliktowej za czyn własny" [Why One Should Not Walk in a Crowd with a Pin in One's Sleeve? Violation of Due Care as Condition of Tort Liability], *Studia Prawa Prywatnego* 2013, No. 1, p. 55 i ff.

that they have not been specifically designed to handle issues of secondary liability. These laws are therefore not specific to internet providers' liability, but rather general standards of civil law. The very conditions of liability are consequently the same regardless of the cause of action. They should be equally relevant for infringements of personal interests, copyright, trademark rights and other possible infringements committed on the internet or in the brick and mortar world. However, a cause of action may have an impact on how liability in practice works, because it will for example decide what is considered infringement. On a basic level all intellectual property rights and personal interests (defamation) are protected using the same legal instrument, i.e. a subjective absolute right vested in the right-holder.[6] Any encroachment upon this right is presumed to be illegal.[7]

Since there are no laws creating secondary liability of service providers (including internet service providers), the existing grounds of liability do not define the term "service provider." The law on e-commerce defines online service providers, but these definitions are only of consequence for the limitations of liability recognized by this law (implementing the UE E-commerce directive). Therefore, based on the existing grounds of liability it would not be possible to argue that a certain entity is or is not liable because it falls under (or does not fall under) a definition of a service provider. Once liability has been established according to the general rules, e-commerce safe harbors must be however taken into account and liability may be in this way excluded.

It is too early to say which approach will win the upper hand in combating indirect infringements in Poland. The reason is that even the rare court decisions addressing such matters fail to establish coherent and comprehensive standards. Courts have not so far been able to tweak the general standards of liability and modify them to suit the needs of an efficient liability system for service providers. Most ideas in this area come from the legal doctrine and the judiciary may try to follow them.

2. Scope of IP rights and other protected interests under Polish law

One way of dealing with the co-called secondary infringements is to start with the scope of the infringed right and ask what its infringements actually means. Since the problem of liability of service providers is usually closely related

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[6] E. T r a p l e, [in:] *System prawa prywatnego. T. 13. Prawo autorskie* [System of Private Law. Vol. 13. Copyright Law], ed. J. Barta, Warszawa 2013, p. 136 ff.; R. S k u b i s z, [in:] *System prawa prywatnego. T. 14A. Prawo własności przemysłowej* [System of Private Law. Vol. 14A. Industrial Property Law], ed. R. Skubisz, Warszawa 2012, p. 59 ff.

[7] P. M a c h n i k o w s k i, [in:] *System prawa prywatnego. T. 6. Prawo zobowiązań – część ogólna* [System of Private Law. Vol. 6. Obligations – General Part], Warszawa 2009, p. 380.

to intellectual property rights it may be noted that intellectual property rights, as far as their theoretical concept is concerned, have been modeled after property rights traditionally known in civil law.[8] Such rights protect a sphere of exclusivity granted to the right-holder and are effective against anyone. In property law the concept of infringement encompasses also indirect infringements[9] and it has been proposed to handle intellectual property rights in the same way.[10] However, the analysis must surely take into account how specific intellectual property rights have been regulated and whether it has been legally defined what infringement means. When one applies this approach in Polish law, the conclusion will be that a one-size-fits-all solution is unlikely to emerge. A wide understanding of "infringement" would be a feasible theory in copyright law, because the Copyright Act[11] does not define infringement. Instead it vests the rightholder with exclusive rights with regard to any use of the protected copyright work and declares that infringement of these rights gives rise to the infringer's liability. It may be therefore argued that the very concept of infringement may resemble what has been known in property law, thus including also indirect infringements. There are however many problems resulting from such construction of art. 79 of the CA. This provision does not seem to differentiate legal consequences of infringement depending on their forms, therefore very strict rules, providing for example for damages in the amount of a double license fee even in the absence of fault would have to apply also to those secondarily liable. So far neither the doctrine nor the judiciary have chosen this road and therefore have not been able to offer a more nuanced solution resembling for example the German *Störerhaftung*,[12] a ground of liability evolved from property law (§ 1004 BGB).

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[8] Even when one argues that there are too many exceptions from protection to justify the use of the term property – M. C z a j k o w s k a-D ą b r o w s k a, "Treść (elementy struktury) prawa autorskiego a treść prawa własności" [Content (Structural Elements) of Copyright and Content of Property Rights], *Studia Iuridica*, Vol. XXI, p. 272.

[9] W. J. K a t n e r, *Ochrona własności nieruchomości przed naruszeniami pośrednimi* [Protection of Real Estate Property Against Indirect Infringements], Warszawa 1982.

[10] W. M a c h a ł a, "Specyfika roszczenia odszkodowawczego z art. 79 ustawy o prawie autorskim i prawach pokrewnych" [Specifics of a Claim for Damages under art. 79 Copyright Act], *Studia Cywilistyczne* 2007, No. 47; W. M a c h a ł a, R. M. S a r b i ń s k i, "Wymiana plików muzycznych za pośrednictwem Internetu a prawo autorskie" [Exchange of Music Files on the Internet and Copyright Law], *Prawo i Państwo* [PiP] 2002, No. 9. See also critically as to his approach E. L a s k o w s k a, "Podstawa prawna odpowiedzialności za pośrednie naruszenie autorskich praw majątkowych – uwagi do stosowania przepisów kodeksu cywilnego w prawie autorskim" [Legal Ground of Liability for Indirect Copyright Infringements – On Applying Civil Code in Copyright Law], ZNUJ PPWI, Vol. 120.

[11] Copyright and Related Rights Act of February 24, 1994 with amendments – Journal of Laws [J. of L.] 1994, No. 24, item 81; consolidated text J. of L. 2006, No. 90, item 630 with amendments.

[12] See eg. M. L e i s t n e r, "Störerhaftung und mittelbare Schutzrechtsverletzung" [Interferer's Liability and Indirect Infringements], *GRUR-Beil.* 2010, p. 1 ff.

Industrial property rights such as trademark or patent rights differ from copyright in one important aspect (of course there are multiple differences, but here only the problem of secondary liability is the subject of discussion). Unlike copyright where there is no exhausting list of infringing activities, industrial property rights have been regulated in such a way that the law defines what actions are considered to be within the scope of the right in question.[13] To prove infringement one has to show that the defendant has undertaken at least one of such legally named actions (e.g. offering or selling in the case of patent law). With trademarks the law goes even further, because it adds additional conditions of liability, such as the risk of confusion[14] and requires that any infringement constitute the use of a protected designation as a trademark (in its function of a trademark).[15] Persons who could be considered secondarily liable usually do not use the protected subject-matter in a way the law defines as "infringing." Therefore their liability can not be based on a wide interpretation of the term "infringement" in the relevant provisions of the law in force.

Liability for secondary infringements if understood as falling under the wide concept of infringement of a particular right would be usually tied to an act of direct infringement (most likely committed by a user taking advantage of the service provided to him), because only such a direct infringement could be the required encroachment upon the exclusive sphere granted to the rightholder. Liability for secondary infringements under this theory would also follow liability for primary infringements with regard to such requirements like fault. Liability is always defined by legal regulations relating to a specific category of rights, such as various types of IP rights. In Poland it is usually strict, in that any use of the protected subject-matter without the right holder's consent and outside the sphere of legal exceptions and limitations is considered unlawful and constitutes infringement, regardless of fault. Fault may be required to justify claims for damages, but not in all areas of law. The most notable exception is copyright law, where it is possible to claim damages in the amount of double license fees even in the case of an innocent infringement.[16]

3. Polish Tort Law and indirect infringements

There are three possible sources of secondary liability in Polish tort law worth discussing. The most often named art. 422 CC, the less frequently considered art. 415 CC (general tort liability clause) and preventive liability regulated in art. 439 CC.

[13] See art. 66 IPL (patents); art. 154 and 296 IPL (trademarks).

[14] Art. 296 (2), p. 2 IPL. Even where double identity occurs, it appears that for infringement to be proven at least one function of the trademark must be disturbed.

[15] R. S k u b i s z, [in:] *System prawa prywatnego. T. 14B. Prawo własności przemysłowej* [System of Private Law. Vol. 14B. Industrial Property Law], ed. R. Skubisz, Warszawa 2012, p. 1070 ff.

[16] Art. 79 (1), p. 3 CA.

Art. 422 CC states that "Liability for damage is borne not only by the direct perpetrator but also by any person who incites or aids another to cause damage and a person who knowingly takes advantage of damage caused to another person." There are three separate torts in this provision. Two of them take place before damage is caused (inducing and aiding), the third may only happen after this has been done (knowingly taking advantage of damage caused to another person). In all three cases the prevailing view requires not only fault, but even something more, i.e. intentional conduct.[17] This is of course correct, but also difficult to prove. Most importantly, intention must be always based on knowledge (actual) of a specific illegal action to be taken or already committed by a third party. In other words, in order to be liable on the grounds of art. 422 CC a service provider would have to intentionally cause another person to commit an infringement or knowingly help this other person to commit infringement (i.e. be conscious of the fact that this person intends to commit a tort and objectively facilitate this deed). Most service providers cannot be charged with this sort of malice. One can often accuse them of not doing enough to prevent or reduce infringements, but rarely to actively induce or assist their perpetrators. An interesting consequence of applying art. 422 CC is that it practically makes safe harbor regulations redundant.[18] There may be some small differences, but generally speaking if secondary liability is based on art. 422 CC, service providers are not liable if they do not have knowledge of specific infringements and therefore are not even in the need of safe harbor provisions that would shield them from liability. Liability based on art. 422 CC is also tied to establishing primary liability, because liability for inducing or assisting a tort depends on this tort being committed and causing damage.

Art. 422 CC could only allow claiming damages if the demanding conditions of liability it requires could be met in a practical situation. The prevailing view wants to see the complementing regulation in art. 439 CC, as the latter makes it possible to apply for injunctions. According to this provision: "Anyone who, as a result of another person's behavior, especially due to a lack of proper supervision of the operations of an enterprise or establishment run by that person or of the condition of a building or other facility in his possession, is directly threatened by damage may demand that the person undertake the measures necessary to avert the imminent danger and, if needed, that he give appropriate security." It is a rather modern solution other legal systems often have to create by interpretation of other legal provisions,[19] however one of the most surprising features of

[17] B. Lewaszkiewicz-Petrykowska, *Wyrządzenie szkody przez kilka osób*, p. 112; A. Szpunar, "Wyrządzenie szkody przez kilka osób" [Causing Damage by Several Persons], PiP 1957, No. 2, p. 287; Supreme Court, July 8, 2011, IV CSK 665/10.

[18] T. Targosz, *op. cit.*,

[19] H. Kötz, "Vorbeugender Rechtsschutz im Zivilrecht. Eine rechtsvergleichende Skizze" [Preventive Protection in Civil Law. A Comparative Sketch], *Archiv für die civilistische Praxis*

art. 439 CC is that it has never been even modestly popular in court practice.[20] There is practically no case law (especially of appeal courts or the Supreme Court) analyzing this provision and its requirements. On the face of it, there is nevertheless a lot of promise as far as secondary infringements are concerned. The prevailing view requires that the action to be prevented must be unlawful (i.e. if completed and causing damage, there would be objectively speaking a tort)[21] but fault, let alone intention are not conditions of liability. It is interesting to notice that the law explicitly names operations of an undertaking a source of risk covered by art. 439 CC and refers to inadequate supervision of such operations. Preventive liability has been designed in such a way, that the person who may sustain damage can demand that dangerous activities be stopped or (more often) modified or adjusted, so that the danger is if not reversed, then at least brought back to reasonable levels. As is therefore common in the case of preventive injunctions, fault is not necessary, but becomes so if damages are to be awarded. The obvious problem with art. 439 CC, often overlooked in legal literature is the requirement that the actions resulting in danger must be objectively unlawful. Most service providers will say, their operations are anything but. It is therefore necessary to turn to the third tort law instrument, the general tort clause of art. 415 CC. This provision states: "Anyone who by a fault on his part causes damage to another person is obliged to remedy it."

It is obvious that all complexities of the Polish general tort clause cannot be discussed in this short contribution, and therefore some basic information must suffice. Art. 415 CC mentions only fault, but it is not contested that conduct giving rise to liability must not only be subjectively reproachable but first of all objectively improper.[22] This requirement is usually referred to as unlawfulness,[23] although some prefer "objective fault."[24] Regardless of the name, it is also not contested that this objective unlawfulness does not have to result from an infringement of a specific statutory provision (e.g. prohibiting a certain action) or an absolute right. It suffices that it is contrary to the so called principles of community life

1974, Vol. 174, p. 158 ff.; A. P e u k e r t, *Güterzuordnung als Rechtsprinzip* [Allocation of Goods as Legal Principle], Tubingen 2008, p. 304.

[20] A. Ś m i e j a, [in:] *System prawa prywatnego. T. 6. Prawo zobowiązań – część ogólna* [System of Private Law. Vol. 6. Obligations – General Part], Warszawa 2009, s. 621–622.

[21] B. L e w a s z k i e w i c z-P e t r y k o w s k a, "Roszczenie o zapobieżenie szkodzie" [Preventive Action], *Studia Prawno-Ekonomiczne* 1974, Vol. XIII, p. 52 ff.; W. J. K a t n e r, *op. cit.*, p. 156 ff.

[22] P. M a c h n i k o w s k i, *op. cit.*, p. 377.

[23] A. S z p u n a r, *Nadużycie prawa podmiotowego* [Abuse of Right], Kraków 1947, p. 112 ff.; M. S o ś n i a k, *Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyn niedozwolony* [Unlawfullness as Condition of Tort Liability], Kraków 1959 (already in the title).

[24] J. D ą b r o w a, *Wina jako przesłanka odpowiedzialności cywilnej* [Fault as Condition of Tort Liability], Wrocław 1968, p. 7 ff.; B. L a c k o r o ń s k i, *Odpowiedzialność cywilna za pośrednie naruszenie dóbr* [Liability for Indirect Infringements], Warszawa 2013, p. 178.

(social co-existence).[25] These are norms, not necessarily explicitly reflected in any binding statutory provisions, comparable to good morals known in other legal systems. The concept of unlawfulness is therefore very broad and may be developed by the judiciary.

In many publications, as well as in many court decisions, it has been proposed to recognize a general rule of conduct relevant for the application of art. 415 CC, i.e. a rule according to which everyone should act with care so as to avoid causing damage to another.[26] Negligence is thus substituted for fault and understood objectively as observing care required in a given situation. Courts have for example used this approach to find liable organizers of social events, during which some participants have sustained damage due to organizational oversight, or in other words lack of due care to have the event organized in such a way that the risk of harm is significantly reduced.[27] What is particularly important for this ground of liability is its flexibility. It does not strive to offer absolute protection, but only requires what can be reasonably expected to reduce the risk of damage.

Following this reasoning it should be possible to argue that a service provider who has organized his business in such a way that the risk of direct infringements is high and has not taken any reasonable steps to reduce this risk to an acceptable level should be liable for his own tort. What steps should be required in practice must be determined taking into account many circumstances, such as what is technically available, what are the costs of such measures and what industry standards should apply.

If the organization of the service provider's business were to be considered a tort (creating a source of danger), then a simple connection with primary liability does not exist, since unlawfulness of the provider's actions would be assessed independently of specific direct infringements. Applying art. 439 CC is not conditional upon an infringement having been committed, since it explicitly refers to a situation before damage has been done. It then only requires an imminent danger, not proof of infringement itself.

4. Remedies

What remedies would be available against secondary infringers depends on which legal ground should apply. It should be stressed that the consequences of infringement of intellectual property rights (as already mentioned this category of cases seems to be crucial for service providers) have been regulated separately for each of these rights. In copyright law art. 79 provides that the rightholder may

[25] M. Sośniak, *op. cit.*, p. 102 ff.; P. Machnikowski, *op. cit.*, p. 381.

[26] R. Longchamps de Berier, *op. cit.*, p. 234–235; M. Wilejczyk, *op. cit.*, p. 55 ff.

[27] See examples provided by M. Wilejczyk, *op. cit.*, p. 56.

request the person who has infringed those rights to stop the infringement, remove the effects of the infringement; redress the damage caused: in accordance with general rules (tort liability as regulated in the civil code), or by paying an amount of money equal to double, or in the case of fault triple the value of the adequate remuneration (license fee) and surrender any benefits gained. Apart from this there are also other claims such as publication of a press statement or payment for the Fund for the Promotion of Creativity. Article 80 of the Copyright Act provides for legal remedies concerning securing the evidence and information claims. This provision makes it also possible for the right holder to request the competent court to obligate a person other than the infringer to provide any information relevant to the claims referred to in Article 79 on the origin, distribution networks, quantity and price of the goods or services violating economic rights, if it is ascertained inter alia that he provides services that are used in activities violating economic rights, and the purpose of those activities is to gain, directly or indirectly, profit or other economic benefits.

Remedies available against infringers of industrial property rights are similar, though not as generous in scope. For example if there is trademark infringement the rightholder may demand that the infringer ceases the infringement, surrender the unlawfully obtained profits and in case of infringement caused by fault also redress the damage in accordance with the general principles of law, or by the payment of a sum of money corresponding to a reasonable license fee (art. 296 IPL[28]). Measures for securing evidence and information claims also apply (art. 286^1 IPL), including requesting the court to order a party other than the infringer to provide information necessary to enforce protected rights, i.e. information on the origin and distribution networks of the goods or services which infringe an industrial property right, where the likelihood of infringement of these rights is substantial, and additional requirements are met such as the fact that the addressee of such a demand "was found to provide services used in activities which infringe the patent, supplementary protection right, right of protection or right in registration," and the above activities are intended to directly or indirectly gain profit or other economic benefits.

Information claims against "innocent" third party service providers are therefore the only legal instrument specifically designed to enhance protection of intellectual property rights and involving entities other than the 'direct' or 'primary' infringer. It would be difficult to find a legal ground allowing injunctions against 'innocent' service providers, for example ordering them to block access to certain users, etc. Of course, one may argue that practically it is not as important as it might seem, because once a service provider has been notified of an ongoing infringement, there is information leading to knowledge and eventually (in lack of

[28] Act of 30 June 2000 Industrial Property Law, consolidated text J. of L. 2013, item 1410.

action) to fault. However, the current state of affairs is most likely incompatible with EU law.[29]

If rightholders were to rely on general civil law provisions a secondary infringer would be liable for damages (jointly and severally with the direct infringer). It is however controversial, whether this also encompasses 'special' damages recognized by copyright law (double or triple license fees) or only damages according to the general rules.

In practice, courts would be more inclined to grant injunctions against secondary infringers. However, when one considers the possible grounds for liability, it becomes apparent that very often remedies against a secondary infringer mirror those against primary infringers.

In principle, it would be difficult to justify the view that remedies available against primary infringers should in any way limit the liability of secondary infringers, if their conditions of liability have been met. The only limitation in such cases would result from general standards of civil law (for example the same damage cannot be compensated twice).

5. Safe harbors for ISPs – Polish legal environment

Transposition of the e-Commerce Directive

The so-called intermediary service providers (ISPs) constitute a special category of service providers. A common feature to all these services is that they serve as middlemen between contributors to the internet, such as content providers, and users (receivers of information). However, they do not create any content themselves; instead, they play a fundamental role in the information society by enabling access to or disseminating online information. They do that by transmitting or hosting internet content that has been provided by a third party.

It did not come as a surprise that ISPs became a target for claims raised by right-holders whose content had been illegally distributed on internet or whose interests had been threatened in other ways (e.g. defamation). The service providers are more likely to be sued in those situations since they are much more visible in the market than content providers and are usually solvent. Moreover, under most legislations, it is not impossible to hold an ISP liable by courts for disseminating illegal content created by another party (e.g. as an accomplice). In order to counter that risk, legislators in the European Union had agreed that it would be inappropriate to apply the traditional liability criteria to ISPs since it is practically impossible for intermediaries to monitor all the information they transmit or host

[29] See CJ EU L'Oreal v eBay C-324/09: "neither Article 11 (third sentence) of the Directive, nor Article 8(3) of Directive 2001/29 link injunctions with the liability of an intermediary."

on the internet. As a result, Directive 2000/31/EC (the e-Commerce Directive) provides for exemptions from liability for ISPs. Intermediary service providers can benefit from those exemptions when they meet the criteria set out in Articles 12–14 of the e-Commerce Directive ("safe harbors"). Moreover, Article 15 of the Directive prohibits Member States from imposing on the providers of such services a general obligation to monitor content that they transmit or host.

The safe harbor regime provided for in the e-Commerce Directive has been transposed into the Polish legal system in Articles 12–15 of the Act of 18 July 2002 on Rendering Electronic Services (the "e-Commerce Act"). Polish e-Commerce Act provides for two types of protection for online service providers. Firstly, protection against liability (Articles 12–14). Secondly, protection against the (general) monitoring obligation (Article 15).

Considering the definitions of "service provider" (Article 2 point 6) and "provision of services by electronic means" (Article 2 point 4), it should be understood that the safe harbor regulation applies not only to internet services, but to all online services as long as their provision meets the conditions set forth in the e-Commerce Act. On the other hand, the special regime applies to specific activities rather than to service providers in general. In consequence, a service provider can conduct various activities, some of which are covered by safe harbor provisions while others are not.

Polish legislator has chosen a horizontal immunity scheme for services covered by the safe harbor regime. ISPs are exempted from liability regardless of what substantive law is applicable. Polish law does not differentiate between the forms of liability from which service providers are exempted. Therefore, any liability is covered by the exemptions. On the other hand, it should be underlined that even though the safe harbor regime constitutes an additional shield for service providers, it does not modify the underlying material law governing liability.

The activities covered by safe harbor regime

Intermediary online services can be subdivided into four categories: mere conduit, caching, hosting, and provision of information tools (search engine services and hyperlinking). At present, the e-Commerce Act covers the first three categories, while information tool providers are still excluded from the special regime. However, it should be noted that the Polish government is currently working on amending the law, so that this group of ISPs could also benefit from exemptions.[30]

Mere conduit services consist of either network access services or network transmission services provision. Those services are rendered by telecommunications operators.

[30] See the bill of 13 July 2012 on amendment to the e-Commerce Act.

Caching providers' services consist in temporary and automatic storage of data in order to make the onward transmission of that data more efficient. As in the case of mere conduit, those services are also performed by telecommunication companies, i.e. entities responsible for routing internet traffic.

Host providers store data provided by third parties. When the e-Commerce law was adopted, typical hosting services were those rendered by data centers renting their hard disk space to content providers. Since then, several new storage activities and services have emerged. They are mainly based on the so-called Web 2.0 model. Despite little case law on that subject, it is commonly understood that those activities (and services) are covered by hosting exemption set forth in the e-Commerce Act. Among those services, the most popular are video-share sites, online selling platforms, social networks, and discussion fora.

Protection against liability for transmitting or hosting illegal content

Articles 12–14 of the e-Commerce Act provides for a number of specific material conditions to be met in order for the ISP to benefit from liability exemption. They differ depending on what kind of service is rendered by an online service provider.

In the case of *mere conduit* services, the condition for liability exemption is a passive role of the service provider towards the data transmitted. In particular, ISPs do not make decisions as to whom the data should be transmitted (they do not initiate transmission or select the receiver of the transmission) as well as what happens to the transmitted data (they do not select or modify the information contained in the data). Potential storage of transmitted data may take place as long as it is for the sole purpose of carrying out the transmission in a communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission (Article 12 point 2 of the e-Commerce Act).

In the case of caching services, the precondition for liability exemption is, like in *mere conduit*, a passive nature – towards the data cached – of the service (Article 13 point 1). In particular, service providers may not modify the content of the data and should use information technology techniques that are recognized and commonly used in those types of activities, while specifying the technical parameters of data access. Moreover, a caching service provider is obliged to immediately disable access to any information it has been storing upon obtaining knowledge of the fact that the information has been removed from the network at the initial source of the transmission, or access to it has been disabled, or that a court or an administrative authority has ordered such disablement.

Most of the cases in which Polish courts decided to hold ISPs liable concerned the activities of host providers. It should not come as a surprise considering

that the most popular internet services are based on a hosting model. It is thus worth addressing the most controversial issues below.

Under Article 14 of the e-Commerce Act, host providers can benefit from the liability protection when they do not have knowledge of the illegal nature of the data stored or related activities and once they are notified about that – through official or reliable notice – they have made access to that data impossible.

It should be noted, in the first place, that the e-Commerce Act does not define the notions of "illegal data" or "illegal activity." Moreover, in contrast to some EU Member States legislation, it does not require that content is "manifestly" illegal. In consequence, it could be understood that the provision of Article 14 applies to any content which is considered illegal according to Polish legislation, regardless of the degree to which the information or content is manifestly unlawful.

Comparison of the wording of Article 14 of the e-Commerce Directive and of Article 14 of the e-Commerce Act leads to the conclusion that the Polish regulation is more protective for host providers. Under Polish law, they may be held liable only if they have knowledge of the illegal nature of the data stored (related activity). In the case of the EU regulation, they can be also liable (as regards claims for damages) if they are "aware of facts or circumstances from which the illegal activity or information is apparent."[31] Polish case law shows that the omission to implement the latter part of Article 14 of the e-Commerce Directive in Article 14 of the e-Commerce Act constitutes a very significant limitation of host providers' liability. In practice, they are regarded to as obtaining "knowledge of illegal nature of the data stored (related activity)" only by way of official or reliable notice submitted to them by interested parties (e.g. right-holders).

Obligation of blocking access to content and the notice and take down procedure

As was stated above, the second condition to be fulfilled by a host provider to benefit from the liability exemption is the obligation to block access to (allegedly) illegal content. That obligation is a source of uncertainty in Poland, especially as it concerns an obligation to block access following the so-called "reliable notice," i.e. a notice coming not from an official source but a private third party.

Firstly, it is not clear what requirements the notice has to meet to lead to knowledge of an ISP about the infringement. Many ISPs indicate that the required standard of notice should be more detailed, in particular they should be provided with more specific information which enable them to identify the illegal content and its location (e.g. URL address should be of particular importance). Moreover, the simple statement that a given content is illegal should not be regarded as

[31] See Article 14.3 of the e-Commerce Directive as regards damage claims.

a valid notice, and notifying subjects should provide more specific information, including the reasons why they claim that their rights/interests are affected, to help providers assess the alleged illegality of the content.

Secondly, host providers are not sure how the timeframe within which they have to block illegal information should be interpreted. The current obligation to block unlawful information "immediately" is too vague.

Thirdly, the current regulation does not provide for the possibility of defense for the providers of information. Blocking of certain content may have a negative impact on the exercise of the right to freedom of expression. It is thus argued that the provider of allegedly illegal information should be given an opportunity to submit a counter-notice and defend the legality of the information at issue.

The above legal and operational risks connected with the obligation to block (allegedly) unlawful content are eliminated (or limited) in many EU countries by adopting the so-called *notice and take down* procedure.[32] Its objective is, on the one hand, to oblige complainants to provide information that will enable ISPs to better process notices and, on the other hand, to enable the persons whose data is questioned to present their standpoint (*counter-notice*). The Polish government, following good examples of several Member States, plans to introduce the notice and take down procedure in an amendment to the e-Commerce Act.[33]

Liability for blocking legal content

ISPs' obligation to disable access to unlawful content involves a risk that wrongful notices are provided to intermediaries and that intermediaries, acting on such notices, block legal content. Two groups of situations should be distinguished in this context. The first concerns the liability of an ISP towards the party whose content has been wrongly blocked. According to Article 14 point 3 of the e-Commerce Act, service providers do not bear any responsibility towards the data-storing party for any damage inflicted as a result of disabling access to such data if they have notified that party of their intention to deny access to the data.

The second group of situations concerns the issue of liability of persons submitting wrongful notices. The e-Commerce Act does not regulate it. In cases where such notice has been made in bad faith, general provisions of the Polish Civil Code will apply, in particular the provisions regulating liability for committing torts.

[32] A possibility of its adoption has been provided for in Article 21 point 2 of the e-Commerce Act.

[33] See the bill of 13 July 2012 on amendment to the e-Commerce Act.

Protection against injunction

In addition to the liability protection, the e-Commerce Act has also introduced an additional protection for ISPs in order to prevent them from being obliged to monitor the acts or information from their users for possible infringements, or to proactively search their systems for such infringements. Article 15 states that the neither the obligation to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity will be imposed on ISPs. That Article thus prevents courts from holding ISPs liable because they did not generally monitor or actively search for illegal material. In addition, Article 15 prevents the courts from ordering such services providers – through injunction – to generally monitor and/or to actively search for illegal material in the future. In the light of the above provision, it is thus possible that specific monitoring obligation can be imposed by the courts on ISPs (for instance, a filtering obligation). However, two reservations should be made. Firstly, the injunction may be imposed only on ISPs who are secondary infringers (see point IV above). Secondly, it must be recognized that the possibility of issuing a specific monitoring obligation constitutes an exception to the general prohibition. Such an exception must thus be interpreted narrowly.

Issues of proportionality and other constitutionally protected interests

It the rare cases when Polish courts have dealt with questions revolving around secondary liability of internet service providers they have generally proved rather willing to consider the complexity of the legal situation and the need to balance various interests and values involved. For example courts have recognized that when a right holder requests data on copyright infringers, it is necessary to take into account issues of data protection and privacy. Even in decisions confirming that right holders may as a rule request service providers to furnish information on the identity of users suspected of copyright infringements, it has been stressed that any such remedies must be proportional[34] and therefore information may be demanded in principle only when the scope of infringements and in particular the profit-making intention of the infringer tip the scale in favour of the applicant. Courts have also found monitoring the web by right holders in order to gather IP addresses of suspected infringers to constitute illegal processing of personal data.[35] When considering the statutory exceptions for hosting providers courts have been able to look beyond the formal aspects of legal interpretation and presented the outcome as an exercise in balancing interests such as free speech and

[34] Court of Appeal in Białystok, decision 7.02.2013, I ACz 114/13.

[35] Court of Appeal in Warsaw, 29.12.2011, VI ACz 2212/11.

other values necessary in a democratic society on one hand and reputation and other personal interests of society members on the other.[36] These examples are undoubtedly optimistic in that they communicate a readiness to apply and enforce the law in a thoughtful and nuanced way. Perhaps even, it may be argued, the arguments speaking against more effective enforcement on the internet, have been overplayed a bit and the interests of right holders slightly neglected. However, as already mentioned, any such generalisation is premature at this stage and one must wait for more cases and more judgments, especially from the Supreme Court.

6. Conclusion

In our opinion Polish law has all the required instruments in its hands to provide adequate legal framework of secondary liability. It has simply not been able to use them so far. The general clause of art. 415 CC and the wide concept of infringement allow shaping liability in a very flexible way and this seems to be of utmost importance in this area of law. Because technology and circumstances quickly change, specific statutory provisions soon become obsolete and start to hamper rather than facilitate the attempts to build a reasonable liability standard. It should be noted that it is possible to apply in Poland almost all legal instruments courts in Germany or France have been able to use to a rather satisfying effect.

[36] Court of Appeal in Kraków, 19.01.2012, I ACa 1273/11.