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Shared custody configuration in Spanish law

Abstract

The paper deals with the specific organization of the shared custody regime in Spanish law. This requires a separate analysis of two aspects: what the physical organization will be like and how the time will be distributed among the parents. With regard to the first question, there are two possible alternatives for the physical organization of the shared custody regime: that the children remain in the same home and the parents rotate, or that the children rotate between their parents' homes. Both possibilities are analyzed, considering the advantages and disadvantages of each, as well as their practical repercussions, through the study of the judgements of our courts. With regard to the second aspect to be analyzed – the distribution of time between parents, as we know, shared custody does not necessarily imply an equal distribution of time, although it does seem to be similar, as this is the main data that allows it to be differentiated from an exclusive custody regime that involves a wide regime of visits for the non-custodial parent. The paper attempts to determine the necessary time requirement to be able to speak of shared custody and addresses the issue of the specific duration of periods of alternation – which may be long and extended in time or, on the contrary, short and frequent. For this, once again, the jurisprudence emanating from our courts is taken into account, as well as the views of the authors who have worked on this issue.

Keywords: family law, civil law, Spanish law, shared custody configuration.

Introduction

In order to address the specific configuration of the shared custody regime, it is necessary to analyze two aspects separately: on the one hand, what the physical organization of the regime will be like and, on the other, what the allocation of time between the parents will be like.

Neither of the two questions has been foreseen either by the Civil Code (Código Civil, Gaceta de Madrid, No. 206, 25/07/1889) or by the or by the laws of the different regions of Spain. In any case, in order to determine both the modality of shared custody to be adopted and the temporality of the exchanges, the autonomy of the will of the parties will prevail, so that the judicial authority will only intervene in the absence of an agreement. To this end, it should be understood that the specific configuration of the custody regime should be included in the regulatory agreement submitted by the parents.[1] Not in vain, in the event that the parties limit themselves to agreeing on the shared custody regime without foreseeing its specific content, it seems that it would be appropriate for the judge to make use of the power granted to him by article 777.4 of the Law of Civil Procedure (BOE (Official State Gazette), No. 7, 08/01/2000) and require the parents to complete this point.

I will now address separately the two issues that arise in determining the specific configuration of the shared custody regime. To this end, I shall begin by referring to the forms of physical organization that it may present (warning that, although this is an issue that is closely related to the attribution made of the use of the family home, I am not going to dwell on the criteria for the attribution of that home). Subsequently, I will refer to the temporal distribution.

Physical organization

The legal scholarship and commentary has generally identified two possible alternatives for the organization of the system of shared custody:[2] that the children remain

1 This requirement was expressly provided for in the Law of the Basque Country 7/2015 of 30 June on family relations in cases of separation or break-up of parents (BOE (Official State Gazette) No. 176, 24/07/2015), Articles 5.2 a).3 and 9.1, and was also intended to be introduced in the Civil Code by the failed Draft law on the exercise of parental authority and other measures to be adopted after the break-up of cohabitation in 2013 (Document CE-D-2014-438, File number: 438/2014) (Art. 1.1).

2 See: Tamayo, S., *La custodia compartida como alternativa legal*, "Revista Crítica de Derecho Inmobiliario" 2007, No. 700, p. 705; Moreno, V. and Gaudet, J., *La problemática del uso de la vivienda familiar en los supuestos de custodia compartida: reflexión comparativa España y EEUU*, "La Ley"

in the same home and the parents rotate (known as "nest custody") or that the children rotate between the homes of their parents (known as "suitcase child").

However, according to some authors,[3] I believe that we should talk about a third organizational alternative: one in which both parents stay in the same house with their minor children.[4] Although it is the least common option in practice (since it is normal for the spouses to cease living together after the break-up), it is perfectly admissible. In any case, this assumption raises no doubt from the point of view of their physical organization, so I will not dwell more on it.

Returning to the two most frequent organizational alternatives, the first one I have mentioned is what our legal writings have called "nest custody",[5] "house nest"[6] or "child nest". This means that the children remain constantly in the family home and it is the parents who rotate.[7]

Although a priori it may seem to be the solution that least affects the stability of the children[8] and is the fairest for the parents (since both will be able to enjoy the use of the family home on equal terms), the fact is that in practice it has several disadvantages.

First of all, I believe that this form of organization of shared custody can be a source of constant conflict between parents,[9] which can end up harming the

2009, No. 7179, pp. 1763-1764; and Berrocal, A.I., *Los criterios para la atribución del régimen de guarda y custodia compartida*, "La Ley Derecho de Familia" 2014, No. 3, p. 48.

3 See: Pérez, A.A., *El interés del menor y la custodia compartida (Comentario de la sentencia de la Audiencia Provincial de Asturias, sección 7ª, de 7 de noviembre de 2003. Publicada en la Revista de Derecho Familiar, núm. 24 de julio de 2004. Págs. 221 y 222)*, "Revista de Derecho de Familia" 2005, No. 26, p. 277; and Messía, J.A., *El tratamiento de la custodia compartida en el Anteproyecto de Ley sobre el ejercicio de la corresponsabilidad parental*, "La Ley Derecho de Familia" 2014, No. 3, pp. 2-20, p. 12.

4 This is the only case in which it is possible to speak of shared custody in the strict sense, since in the cases we are going to see below, both parents alternate in the care of the children, but clearly do not share custody. However, I will continue to use the term shared custody to refer to all the assumptions.

5 See: González, J.P., *El derecho de uso de la vivienda familiar en los supuestos de guarda y custodia compartida*, "La Ley" 2009, No. 7206, p. 2052; Goñi, M., *La vivienda familiar en caso de custodia compartida. Sus implicaciones en el Derecho de las cosas*, "Revista Crítica de Derecho Inmobiliario" 2013, No. 736, p. 1144; and Ureña, B., *Vivienda familiar y custodia compartida (a propósito de la STS núm. 594/2014, de 24 de octubre)*, "La Ley Derecho de Familia" 2015, No. 6, p. 10.

6 See: Berrocal, A.I., op. cit., p. 48.

7 See: Pérez, A.A., *El interés del menor y la custodia compartida*…, p. 277.

8 See: Moreno, V. and Gaudet, J., op. cit., p. 1764.

9 This has also been understood by our jurisprudence (see: Judgment of the Provincial Court of Barcelona of 21 February 2008, JUR 2008\144903 and Judgment of the High Court of Justice of Catalonia of 5 September 2008, RJ 2009\1449) and by our scholars and commentators (see: Zarraluqui,

interests of the child. Sharing a home (even if it is alternately) always causes problems, as it involves sharing various items and objects (bedrooms, wardrobes, clothes, etc.)[10] and having to distribute cleaning tasks. Disputes may also arise over the payment of the various expenses generated by the home or the acquisition of products necessary for the house (cleaning, food, etc.). In addition, the situation will be aggravated in the event that one of the two parents rebuilds his or her life with a new partner.[11]

On the other hand, for this possibility to be viable, it is necessary for parents to have some purchasing power. Normally they will have to have three homes[12] (in addition to the one in which the child will constantly reside, each parent will have to have their own home, where they will live during the periods when they are not with the child). Although it is also possible to establish this option when they only have two homes (the family home, and another that is occupied by each parent during the periods in which they do not have to care for their children),[13] this would involve sharing not one, but two homes, which would multiply the problems I referred to in the immediately preceding paragraph.[14]

Notwithstanding the foregoing, the aforementioned drawbacks have not impeded that in some cases our courts have opted for this alternative.[15] And it is

L., *La guarda y custodia compartida: pautas para su correcta aplicación*, "Economist &, Jurist" 2006, No. 104, p. 64; and Hernando, S., *La intervención del Ministerio Fiscal en los procesos de guarda y custodia. Especial referencia a la guarda y custodia compartida*, "Estudios Jurídicos" 2010, No. 2010, p. 13).

10 See: Domingo, J., *Custodia y nido compartido: todo cambia*, "Actualidad Jurídica Aranzadi" 2014, No. 891, p. 5.

11 See: Esparza, C., *La guarda compartida en el Código Civil español y en la Ley autonómica valenciana*, "Revista Boliviana de Derecho" 2014, No. 174, p. 194.

12 See: Giralt, N., *Las modalidades de guarda y custodia en el ordenamiento jurídico español*, in: Herrera, R. et al. (eds.), *Derecho y familia en el siglo XXI*, Almería 2011, p. 808; De la Iglesia, M.I., *Custodia compartida y el derecho de uso de la vivienda familiar: análisis jurisprudencial*, "Revista Crítica de Derecho Inmobiliario" 2012, No. 732, p. 2317; and De Verda, J.R. and Carapezza, G., *El derecho de uso de la vivienda familiar en las crisis familiares: comparación entre las experiencias jurídicas española e italiana*, "Revista Crítica de Derecho Inmobiliario" 2015, No. 752, p. 3391.

13 See: González, J.P., op. cit., p. 2053; and De la Iglesia, M.I., op. cit., p. 2317.

14 However, we did find some judicial pronouncement in which this form of custody has been chosen despite the fact that the family had only two dwellings (see: Judgment of 3 October 2008 of the Court of First Instance No. 8 of Gijón, AC 2008\1963).

15 See: Judgment of the Provincial Court of Castellón of 4 October 2005, JUR 2005\274311; Judgment of the Provincial Court of Castellón of 23 October 2006, JUR 2007\228244; Judgment of the Provincial Court of Huelva of 20 March 2007, JUR 2007\272774; Judgment of the Provincial Court of Castellón of 28 May 2008, JUR 2008\274860; Judgment of the Provincial Court of Madrid of 27 July 2007, JUR 2007\346934; Judgment of the Provincial Court of Madrid of 28 October 2009,

that, which there will be cases in which the concurrent circumstances demand to adopt this formula (for example, when the minor suffers some type of pathology that requires his rest in the same domicile).[16]

The other option for organizing joint custody is for children to rotate between their parents' homes, a modality commonly known as "suitcase child".[17] In my opinion, this is the most recommendable alternative in most of the cases (this has also been understood by a good part of our jurisprudence).[18]

However, it is true that this form of organization also has a major drawback, and that is that it can affect the stability of children,[19] who will be forced to make continuous changes (precisely the situation which has compelled this form of organization to be called 'child suitcase'). However, this disadvantage can be minimised if

JUR 2010\38880; Judgment of the Provincial Court of Madrid of 3 March 2010, JUR 2010\166006; Judgment of the Provincial Court of Zaragoza of 29 November 2011, JUR 2011\431895; Judgment of the Provincial Court of Zaragoza of 6 September 2012, JUR 2012\318794; Judgment of the Provincial Court of Barcelona of 11 March 2013, JUR 2013\169985; Judgment of the Provincial Court of Madrid of 28 June 2013, JUR 2013\263874; Judgment of the Alicante Provincial Court of 24 October 2013, JUR 2014\7596; Judgment of the Provincial Court of Teruel of 5 March 2014, JUR 2014\118875; Judgment of the Provincial Court of Zaragoza of 8 July 2014, JUR 2014\199874; Judgment of the Provincial Court of Cordoba of 30 July 2014, JUR 2014\258259; Judgment of the Provincial Court of Guipúzcoa of 26 September 2014, JUR 2014\298695; Judgment of the Provincial Court of Cantabria of 28 May 2015, JUR 2015\265595 and Judgment of the Provincial Court of Zaragoza of 30 June 2015, JUR 2015\181856.

16 See: Meco, F., *La alternancia y cercanía de domicilios de los progenitores como criterio de atribución de la custodia compartida. Comentario a la STS núm. 495/2013, de 19 de julio (EDJ 2013, 149996)*, "Revista Boliviana de Derecho" 2015, No. 19, p. 593.

17 See: Pérez, C., *¿Excepcionalidad de la salomónica medida sobre custodia compartida en el Código Civil? Algunas referencias, JURisprudenciales y legales*, "Aranzadi Civil-Mercantil" 2011, No. 8, p. 26; and Escribano, P., *Guarda y custodia compartida y atribución de la vivienda familiar*, "Práctica de Tribunales" 2016, No. 119, p. 11.

18 See*:* Judgment of the Alicante Provincial Court of 7 July 1997, AC 1997\1591; Judgment of the Provincial Court of Madrid of 20 April 1999, AC 1999\956; Judgment of the Provincial Court of Girona of 25 February 2001, AC 2001\1827; Judgment of the Provincial Court of Las Palmas of 10 November 2004, JUR 2005\22343; Judgment of the Provincial Court of Jaén of 9 May 2005, JUR 2005\159766; Judgment of the Provincial Court of Cordoba of 24 April 2006, JUR 2006\230967; Judgment of the Provincial Court of Girona of 3 November 2006, JUR 2007\105329; Judgment of the Provincial Court of Barcelona of 20 February 2007, JUR 2007\101427; Judgment of the Provincial Court of Barcelona of 5 October 2007, JUR 2008\13568; Judgment of the Provincial Court of Barcelona of 21 February 2008, JUR 2008\144903; Judgment of the Provincial Court of Barcelona of 8 October 2008, JUR 2009\38058; Judgment of the Provincial Court of Toledo of 16 May 2008, JUR 2008\330924; Judgment of the Alicante Provincial Court of 24 April 2009, AC 2009\1040; Judgment of the Provincial Court of Barcelona of 14 December 2011, JUR 2012\21752 and Judgment of the Provincial Court of Barcelona of 9 April 2014, AC 2014\689.

19 See: Coll, M.J., *La custodia compartida*, "Aequalitas: Revista Jurídica de Igualdad de Oportunidades Entre Mujeres y Hombres" 2014, No. 7, p. 34.

the parents' homes are close to each other and if the periods of permanence with each parent are sufficiently long (to avoid the continuous transfer of the child).

In conclusion, if we consider the disadvantages of one or the other system of organization, in my opinion it is more advisable for parents to remain in their respective homes and for their children to rotate (but trying to take all the necessary precautions so that this measure affects the stability of minors as little as possible). This does not prevent the reality, however, that there are certain cases in which it is advisable for the minor to remain in the same home and for the parents to rotate.

Allocation of time between parents

In the event that the parties do not agree and it has to be the judge who decides about the temporary distribution of the cohabitation, he will do so based on the different circumstances that concur in the specific case.[20]

We only find timid references to the aspect of temporal distribution in the Code of Regional Law of Aragon (BOA (Official Gazette of Aragon) No. 67, 29/03/2011) and in the Valencian Law 5/2011 of 1 April on family relations for children whose parents do not live together (BOE (Official State Gazette), No. 98, 25/04/2011), which are contradictory to each other. While the first points out that shared custody does not entail an arithmetical distribution of the time spent with one and the other parent (see Exposition of Reasons for the Code of Regional Law of Aragon); the second seems to establish just the opposite, pointing out in article 3 a) that shared custody is characterized "(...) by an equal and rational distribution of the time of cohabitation of each of the parents with their minor sons and daughters (...)".

In our jurisprudence[21] and legal commentary and scholarship[22] there is almost unanimity in considering that, in general, shared custody does not necessarily imply

20 See: Tena, I., *La ruptura de pareja con hijos: la opción por la custodia compartida*, in: *Factores y contenidos de la evolución del Derecho de Familia*, Montevideo 2008, p. 64; and Pérez, L., *La jornada laboral del padre no puede ser un obstáculo para la custodia compartida*, "Revista de Derecho de Familia" 2014, No. 64, p. 308.

21 See: Judgment of the Supreme Court of 11 March 2010, RJ 2010\2340: "(...) Shared custody is not synonymous with sharing 50% of coexistence between both parents (...)". See also: Judgment of the High Court of Justice of Catalonia of 31 July 2008, RJ 2009\643; Judgment of the Provincial Court of Pontevedra of 8 May 2003, JUR 2003\228964 and Judgment of the Provincial Court of Girona of 10 June 2011, JUR 2011\290768.

22 See: Martínez de Aguirre, C., *La regulación de la custodia compartida en la Ley de igualdad de las relaciones familiares ante la ruptura de la convivencia de los padres*", in: *Actas de los vigésimos encuentros del Foro de Derecho Aragonés*, Zaragoza 2010, p. 162; Serrano, J.A., *Guarda y custodia de los hijos y régimen de visitas en Aragón*, in: Bayod, M.C. et al. (eds.), *Relaciones entre padres e hijos en Aragón: ¿un modelo a exportar?*, Zaragoza 2013, p. 40; Monterroso, E. and Goñi, M.,

an equal distribution of time.[23] In this sense, the failed Draft law on the exercise of parental co-responsibility and other measures to be adopted after the rupture of cohabitation presented by the government on 19 July 2013 was also pronounced, whose Exposition of Reasons expressly stated that shared custody does not necessarily imply that the periods of alternation are equal[24].

Therefore, with the sole exception of the Valencian Law 5/2011 of 1 April 2011 on family relations for children whose parents do not live together (BOE (Official State Gazette), No. 98, 25/04/2011) (in which, as I said, it did seem to require an equal distribution of time), it is not necessary to speak of shared custody that the child is in the company of each parent exactly fifty percent of the time.

However, the fact that joint custody does not require an equal sharing of time may pose problems in distinguishing it from an exclusive custody regime that involves a comprehensive regime of communication, relationship and stay for the non-custodial parent. For this reason, it seems reasonable to understand that in order for there to be a proper shared custody regime, children should remain a minimum of time with each of their parents[25] (since this is the key data that will allow us to distinguish it from exclusive custody with a broad regime of communication and stays).[26] In this respect, legal scholars and commentators have considered that it is possible to speak of shared custody when the children are in the company of each parent at least between forty and forty-five percent of the time.[27]

Análisis de la regulación legal de la custodia compartida tras la separación y el divorcio: una propuesta de lege ferenda, CEFLegal: "Revista Práctica del Derecho" 2011, No. 131, p. 54; Pinto, C., *La custodia compartida en la práctica judicial española: los criterios y factores para su atribución*, "Misión Jurídica: Revista de Derecho y Ciencias Sociales" 2015, No. 9, 2015, p. 149; and Messía, J.A., *El reparto de los tiempos de estancia de los hijos menores con los progenitores en los casos de custodia compartida*, "La Ley Derecho de Familia" 2016, No. 11, p. 2.

23 However, we also find some authors who consider that shared custody in any case requires an equal distribution of time (see: Romero, F., *Coparentalidad y género*, "Intervención Psicoeducativa en la Desadaptación Social" 2009, No. 2, p. 20).

24 See: Statement of reasons for the Draft Law on the exercise of parental co-responsibility and other measures to be adopted after the break-up of cohabitation: "(...) without shared custody necessarily implying an alternation of the residence of the children with their parents in equal periods, but in an adequate time for the fulfilment of the purpose of custody (...)".

25 At this point I disagree with those who claim that it is possible to speak of shared custody even in cases where the child permanently resides with one of the parents (see: Lathrop, F., *Custodia compartida de los hijos*, Madrid, 2008, p. 511).

26 However, other criteria may also be taken into account, such as whether or not there are overnight stays with both parents (see: Martínez de Aguirre, C., op. cit., pp. 147-148).

27 See: López, A., *El tratamiento en derecho español de la custodia de los hijos menores en las crisis de pareja: la novedosa opción del legislador aragonés por la custodia compartida*, "Revista Boliviana de Derecho" 2015, No. 19, p. 216.

In any case, if we look at the casuistry, the truth is that it is usually established as an equal distribution of the time of coexistence with one parent and another.

As for the specific duration of the periods that the minor will remain with both parents, there are multiple options, finding assumptions in which it has been distributed by hours,[28] by days,[29] by weeks,[30] by fortnights[31] (in reality, these will be

28 See: Judgment of the Provincial Court of Castellón of 14 October 2003, JUR 2003\264777.

29 See: Judgment of the Provincial Court of Jaén of 9 May 2005, JUR 2005\159766; Judgment of the Provincial Court of Girona of 3 November 2006, JUR 2007\105329; Judgment of the Provincial Court of the Balearic Islands of 29 December 2006, JUR 2007\89096; Judgment of the Provincial Court of Barcelona of 20 February 2007, JUR 2007\101427; Judgment of the Provincial Court of Zaragoza of 3 May 2011, JUR 2011\269689; Judgment of the Provincial Court of Barcelona of 9 April 2014, AC 2014\689; Judgment of the Provincial Court of Barcelona of 12 January 2016, JUR 2016\102213; Judgment of the Provincial Court of Cadiz of 3 May 2017, JUR 2017\183872; Judgment of the Provincial Court of Barcelona of 16 March 2017, JUR 2017\183605; Judgment of the Murcia Provincial Court of 11 January 2018, JUR 2018\61929 and Judgment of the Provincial Court of Barcelona of 16 January, 2018 JUR 2018\38141.

30 See: Judgment of the Supreme Court of 17 November 2015, RJ 2015\5392; Judgment of the Supreme Court of 17 February 2017, RJ 2017\483; Judgment of the Supreme Court of 17 January 2018, RJ 2018\100; Judgment of the Supreme Court of 29 January 2018, RJ 2018\199 and Judgment of the Supreme Court of 4 April 2018, JUR 2018\98270. See also: Judgment of the Court of Alicante Province of 8 May 2006, JUR 2006\248961; Judgment of the Court of the Province of Las Palmas of 14 June 2006, JUR 2006\211237; Judgment of the High Court of the Province of Santa Cruz de Tenerife of 27 September 2006, JUR 2007\2044; Judgment of the High Court of the Province of the Balearic Islands of 28 November 2006, JUR 2007\240039; Judgment of the Court of Alicante Province of 1 February 2007, JUR 2007\265890; Judgment of the Provincial Court of Barcelona of 1 October 2007, JUR 2008\14175; Judgment of the Provincial Court of Barcelona of 3 March 2010, JUR 2010\177860; Judgment of the Provincial Court of Valencia of 21 February 2011, JUR 2011\76122; Judgment of the Provincial Court of Barcelona of 14 December 2011, JUR 2012\21752; Judgment of the Alicante Provincial Court of 16 January 2012, JUR 2012\216263; Judgment of the Provincial Court of Zaragoza of 7 February 2012, JUR 2012\63159; Judgment of the Provincial Court of Barcelona of 10 April 2012, JUR 2012\195763; Judgment of the Provincial Court of Ourense of 1 June 2012, JUR 2012\228284; Judgment of the Alicante Provincial Court of 12 July 2013, JUR 2013\350085; Judgment of the Provincial Court of Valencia of 17 July 2014, JUR 2014\252664; Judgment of the Provincial Court of Castellón of 2 September 2014, JUR 2015\53194; Judgment of the Alicante Provincial Court of 25 October 2013, JUR 2014\5732; Judgment of the Alicante Provincial Court of 30 October 2013, JUR 2014\7998; Judgment of the Provincial Court of Navarre of 20 January 2017, JUR 2017\137776; Judgment of the Provincial Court of Zaragoza of 14 March 2017 JUR, 2017\107757; Judgment of the Provincial Court of Valladolid of 12 January 2018, JUR 2018\52352; Judgment of the Provincial Court of Madrid of 16 January 2018, JUR 2018\74934; Judgment of the Provincial Court of Valladolid of 22 January 2018, JUR 2018\65110; Judgment of the Provincial Court of Cordoba of 23 January 2018, JUR 2018\46596; Judgment of the Provincial Court of Valladolid of 24 January 2018, JUR 2018\64183; Judgment of the Provincial Court of Asturias of 25 January 2018, JUR 2018\64401; Judgment of the Provincial Court of Madrid of 5 February 2018, JUR 2018\91094 and Judgment of the Provincial Court of Barcelona of 6 February 2018, JUR 2018\82473.

31 See: Judgment of the Supreme Court of 19 July 2013, RJ 2013\5002. See also: Judgment of the Provincial Court of Barcelona of 27 July 2006, JUR 2007\124388; Judgment of the Provincial Court

periods of fourteen days, since to apply literally the distribution by fortnights would suppose that the changes would take place each time a different day of the week),[32] by months,[33] by bimesters,[34] by trimesters,[35] by quartermesters,[36] by periods of five

of the Balearic Islands of 27 February 2007, JUR 2008\133674; Judgment of the Provincial Court of Valencia of 31 May 2007, JUR 2007\259947; Judgment of the Provincial Court of Barcelona of 5 October 2007, JUR 2008\13568; Judgment of the Provincial Court of Madrid of 17 October 2007, AC 2007\2330; Judgment of the Provincial Court of Valencia of 9 April 2008, JUR 2008\189008; Judgment of the Provincial Court of Toledo of 16 May 2008, JUR 2008\330924; Judgment of the Provincial Court of Barcelona of 27 January 2010, JUR 2010\148898; Judgment of the Provincial Court of Valencia of 21 February 2011, JUR 2011\76122; Judgment of the Provincial Court of the Balearic Islands of 20 September 2011, JUR 2011\347585; Judgment of the Provincial Court of Zaragoza of 28 February 2012, JUR 2012\88042; Judgment of the Provincial Court of Valencia of 21 October 2013, JUR 2013\351021; Judgment of the Provincial Court of Valencia of 14 November 2013, JUR 2014\10308; Judgment of the Provincial Court of Valencia of 5 May 2014, JUR 2014\200932; Judgment of the Alicante Provincial Court of 5 May 2015, JUR 2015\167918; Judgment of the Provincial Court of Palencia of 28 July 2017, JUR 2017\234466 and Judgment of the Provincial Court of Cadiz of 11 January 2018, JUR 2018\82165.

32 See*:* Ferrer, M., *Algunas ideas procesales y sustantivas de las Sentencias de Primera Instancia de Zaragoza, en los dos primeros años de preferencia en la custodia compartida*, in: *Actas de los vigésimosegundos encuentros del Foro de Derecho Aragonés*, Zaragoza 2012, p. 361.

33 See*:* Judgment of the Provincial Court of Valencia of 1 March 2006, JUR 2006\243590; Judgment of the Provincial Court of Asturias of 29 November 2006, JUR 2007\23523; Judgment of the Provincial Court of Valencia of 15 January 2007, JUR 2007\235242; Judgment of the Provincial Court of Valencia of 19 June 2007, JUR 2007\258457; Judgment of the Provincial Court of Seville of 14 October 2010, JUR 2011\82839; Judgment of the Provincial Court of Tarragona of 26 November 2010, JUR 2011\79232; Judgment of the Provincial Court of Zaragoza of 6 September 2011, JUR 2011\329999; Judgment of the Provincial Court of Zaragoza of 14 February 2012, JUR 2012\73103; Judgment of the Alicante Provincial Court of 5 December 2012, JUR 2013\116336; Judgment of the Provincial Court of Valencia of 14 October 2013, JUR 2013\351228; Judgment of the Provincial Court of Valencia of 19 May 2014, JUR 2014\174658 and Judgment of the Provincial Court of Valencia of 18 June 2014, JUR 2014\201095.

34 See: Judgment of the Provincial Court of Zaragoza of 17 January 2012, JUR 2012\35561; Judgment of the Provincial Court of Zaragoza of 22 May 2012, JUR 2012\184960; Judgment of the Provincial Court of Burgos of 15 May 2012, JUR 2012\234462 and Judgment of the Provincial Court of Cadiz of 10 January 2018, JUR 2018\82579.

35 See: Judgment of the Supreme Court of 11 March 2010, RJ 2010\2340. See also: Judgment of the Provincial Court of Madrid of 22 September 2006, JUR 2007\31052; Judgment of the Provincial Court of Madrid of 12 December 2007, JUR 2008\82720; Judgment of the Provincial Court of Madrid of 22 December 2008, JUR 2009\88147; Judgment of the Provincial Court of Madrid of 28 October 2009, JUR 2010\38880; Judgment of the Provincial Court of Zaragoza of 21 June 2011, JUR 2011\265026 and Judgment of the Provincial Court of Zaragoza of 6 September 2012, JUR 2012\318794.

36 See: Judgment of the Supreme Court of 12 May 2017, RJ 2017\2203.

months,[37] by semesters,[38] by years, by school courses,[39] etc. There are those who have even raised the possibility that the periods of alternation of minors are not fixed either in the regulatory agreement or in the sentence, leaving the parties to decide at each moment on the temporary distribution they deem appropriate.[40] However, in my opinion, this can lead to a certain degree of legal uncertainty and end up becoming an important source of conflict.

With regard to the most appropriate temporal distribution, in my opinion, long periods of alternation (from 15 days) are generally preferable, as this minimises the risk that continuous transfers end up affecting the stability of the child. This has also been understood by a good part of our jurisprudence[41] and legal scholars.[42] Obviously, if long periods of alternation are established, it may be advisable to establish a regime of visits in favour of the parent who is not with the minors at all times.

37 See: Judgment of the Provincial Court of Barcelona of 1 July 2009, JUR 2009\418335.

38 See: Judgment of the Provincial Court of Córdoba of 1 March 2004, JUR 2004\125769; Judgment of the Provincial Court of Las Palmas of 15 April 2004, JUR 2004\152448; Judgment of the Provincial Court of the Balearic Islands of 17 September 2004, JUR 2004\287192; Judgment of the Provincial Court of Santa Cruz de Tenerife of 25 July 2005, JUR 2005\222818; Judgment of the Provincial Court of Valencia of 1 March 2007, JUR 2007\274051; Judgment of the Provincial Court of Cantabria of 3 April 2007, JUR 2007\263125; Judgment of the Provincial Court of Zaragoza of 21 June 2011, JUR 2011\265026; Judgment of the Provincial Court of Zaragoza of 29 November 2011, JUR 2011\431895 and Judgment of the Provincial Court of Zaragoza of 9 May 2012, JUR 2012\199240.

39 See: Judgment of the Provincial Court of Córdoba of 10 March 2005, JUR 2005\144585; Judgment of the Provincial Court of Cordoba of 24 April 2006, JUR 2006\230967; Judgment of the Provincial Court of Madrid of 29 September 2006, JUR 2006\268395; Judgment of the Provincial Court of Barcelona of 20 December 2006, JUR 2007\143259; Judgment of the Provincial Court of Madrid of 25 May 2007, JUR 2007\312903 and Judgment of the Provincial Court of Zaragoza of 24 January 2012, JUR 2012\43195.

40 See: Pérez, A., *La guarda y custodia compartida de los hijos sometidos a patria potestad*, "Anuario de la Facultade de Dereito da Universidade da Coruña" 2005, No. 9, p. 688.

41 See: Judgment of the Provincial Court of Barcelona of 20 December 2006, JUR 2007\143259; Judgment of the Provincial Court of Madrid of 21 November 2011, JUR 2011\432435; Judgment of the Provincial Court of Zaragoza of 25 April 2012, JUR 2012\162327 and Judgment of the High Court of Justice of Aragon of 15 November 2013, RJ 2013\8501.

42 See: Bellod, E., *Hijos menores, custodia compartida e individual, vivienda familiar y gastos de los hijos*, in: Bayod, M.C. et al. (eds.), *Relaciones entre padres e hijos en Aragón: ¿un modelo a exportar?*, Zaragoza 2013, p. 323.

However, in the case of very young children, shorter and more frequent periods of alternation[43] (by the week or even by the day) are more advisable, and these can be extended as the children grow older.[44]

References

Bellod, E., *Hijos menores, custodia compartida e individual, vivienda familiar y gastos de los hijos*, in: Bayod, M.C. et al. (eds.), *Relaciones entre padres e hijos en Aragón: ¿un modelo a exportar?*, Zaragoza 2013.

Berrocal, A.I., *Los criterios para la atribución del régimen de guarda y custodia compartida*, "La Ley Derecho de Familia" 2014, No. 3.

Clemente, M., *Aspectos psicológicos y jurídicos de la guarda y custodia de los hijos*, Madrid 2014.

Coll, M.J., *La custodia compartida*, "Aequalitas: Revista Jurídica de Igualdad de Oportunidades Entre Mujeres y Hombres" 2014, No. 7.

De la Iglesia, M.I., *Custodia compartida y el derecho de uso de la vivienda familiar: análisis jurisprudencial*, "Revista Crítica de Derecho Inmobiliario" 2012, No. 732.

De Verda, J.R. and Carapezza, G., *El derecho de uso de la vivienda familiar en las crisis familiares: comparación entre las experiencias jurídicas española e italiana*, "Revista Crítica de Derecho Inmobiliario" 2015, No. 752.

Domingo, J., *Custodia y nido compartido: todo cambia*, "Actualidad Jurídica Aranzadi" 2014, No. 891.

Escribano, P., *Guarda y custodia compartida y atribución de la vivienda familiar*, "Práctica de Tribunales" 2016, No. 119.

Esparza, C., *La guarda compartida en el Código Civil español y en la Ley autonómica valenciana*, "Revista Boliviana de Derecho" 2014, No. 174.

43 This thesis is supported by the child psychology studies carried out by the Children's Rights Council (goo.gl/rVQKk5, accessed 31.07.2020). This also emerges from the Report of 25 September 2002 (goo.gl/wxaCDt, accessed 6.04.2018), drawn up by the "Asociación de Padres de Familia Separados" (APFS) and the "Federación Andaluza de Padres y Madres Separados" (FASE), with the support of the "Asociación Gallega de Padres y Madres Separados", the "Federación de Euskadi de Padres y Madres Separados" (KIDETZA), the "Unión de Separados y Separadas de Madrid" and the "Asociación Azulfuerte" (see page 12). See also: Clemente, M., *Aspectos psicológicos y jurídicos de la guarda y custodia de los hijos*, Madrid 2014, p. 118.

44 By way of example, this is the solution adopted by the Judgment of the Provincial Court of Castellón of 23 October 2006, in which it is decided on the custody of a child under the age of two. The Provincial Court establishes a shared custody with weekly alternation until the minor reaches six years of age, after which the alternation will be for periods of five months. Although the solution arrived at by the court seems to me to be adequate, I believe that it would have been convenient for the change to take place in a more progressive manner.

Ferrer, M., *Algunas ideas procesales y sustantivas de las Sentencias de Primera Instancia de Zaragoza, en los dos primeros años de preferencia en la custodia compartida*, in: *Actas de los vigésimosegundos encuentros del Foro de Derecho Aragonés*, Zaragoza 2012.

Giralt, N., *Las modalidades de guarda y custodia en el ordenamiento jurídico español*, in: Herrera, R. et al. (eds.), *Derecho y familia en el siglo XXI*, Almería 2011.

González, J.P., *El derecho de uso de la vivienda familiar en los supuestos de guarda y custodia compartida*, "La Ley" 2009, No. 7206.

Goñi, M., *La vivienda familiar en caso de custodia compartida. Sus implicaciones en el Derecho de las cosas*, "Revista Crítica de Derecho Inmobiliario" 2013, No. 736.

Hernando, S., *La intervención del Ministerio Fiscal en los procesos de guarda y custodia. Especial referencia a la guarda y custodia compartida*, "Estudios Jurídicos" 2010, No. 2010.

Lathrop, F., *Custodia compartida de los hijos*, Madrid, 2008.

López, A., *El tratamiento en derecho español de la custodia de los hijos menores en las crisis de pareja: la novedosa opción del legislador aragonés por la custodia compartida*, "Revista Boliviana de Derecho" 2015, No. 19.

Martínez de Aguirre, C., *La regulación de la custodia compartida en la Ley de igualdad de las relaciones familiares ante la ruptura de la convivencia de los padres*, in: *Actas de los vigésimos encuentros del Foro de Derecho Aragonés*, Zaragoza 2010.

Meco, F., *La alternancia y cercanía de domicilios de los progenitores como criterio de atribución de la custodia compartida. Comentario a la STS núm. 495/2013, de 19 de julio (EDJ 2013, 149996)*, "Revista Boliviana de Derecho" 2015, No. 19.

Messía, J.A., *El tratamiento de la custodia compartida en el Anteproyecto de Ley sobre el ejercicio de la corresponsabilidad parental*, "La Ley Derecho de Familia" 2014, No. 3.

Messía, J.A., *El reparto de los tiempos de estancia de los hijos menores con los progenitores en los casos de custodia compartida*, "La Ley Derecho de Familia" 2016, No. 11.

Monterroso, E. and Goñi, M., *Análisis de la regulación legal de la custodia compartida tras la separación y el divorcio: una propuesta de lege ferenda*, CEFLegal: "Revista Práctica del Derecho" 2011, No. 131.

Moreno, V. and Gaudet, J., *La problemática del uso de la vivienda familiar en los supuestos de custodia compartida: reflexión comparativa España y EEUU*, "La Ley" 2009, No. 7179.

Pérez, C., *¿Excepcionalidad de la salomónica medida sobre custodia compartida en el Código Civil? Algunas referencias jurisprudenciales y legales*, "Aranzadi civil-mercantil" 2011, No. 8.

Pérez, L., *La jornada laboral del padre no puede ser un obstáculo para la custodia compartida*, "Revista de Derecho de Familia" 2014, No. 64.

Pérez, A.A., *El interés del menor y la custodia compartida (Comentario de la sentencia de la Audiencia Provincial de Asturias, sección 7ª, de 7 de noviembre de 2003. Publicada en la Revista de Derecho Familiar, núm. 24 de julio de 2004. Págs. 221 y 222)*, "Revista de Derecho de Familia" 2005, No. 26.

Pérez, A., *La guarda y custodia compartida de los hijos sometidos a patria potestad*, "Anuario de la Facultade de Dereito da Universidade da Coruña" 2005, No. 9.

Pinto, C., *La custodia compartida en la práctica judicial española: los criterios y factores para su atribución*, "Misión Jurídica: Revista de Derecho y Ciencias Sociales" 2015, No. 9, 2015.

Romero, F., *Coparentalidad y género*, "Intervención Psicoeducativa en la Desadaptación Social" 2009, No. 2.

Serrano, J.A., *Guarda y custodia de los hijos y régimen de visitas en Aragón*, in: Bayod, M.C. et al. (eds.), *Relaciones entre padres e hijos en Aragón: ¿un modelo a exportar?*, Zaragoza 2013.

Tamayo, S., *La custodia compartida como alternativa legal*, "Revista Crítica de Derecho Inmobiliario" 2007, No. 700.

Tena, I., *La ruptura de pareja con hijos: la opción por la custodia compartida*, in: *Factores y contenidos de la evolución del Derecho de Familia*, Montevideo 2008.

Ureña, B., *Vivienda familiar y custodia compartida (a propósito de la STS núm. 594/2014, de 24 de octubre)*, "La Ley Derecho de Familia" 2015, No. 6.

Zarraluqui, L., *La guarda y custodia compartida: pautas para su correcta aplicación*, "Economist & Jurist" 2006, No. 104, pp. 60-66.

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Work-life balance among athletes

Abstract

The application of the work-life balance concept has become increasingly popular in recent years. This concept draws not only from legal solutions, but from psychological sciences and those related to human resources management. In the field of labour law, the instruments used may be, *inter alia*, rights related to parenthood (maternity, paternity, parental and extended parental leave), the use of fixed-term contracts or part-time employment, the use of individual working time schedules, the use of task-based schedules, equivalent or intermittent working time, telework regulations, variable work start and end times.

However, employment in professional sports is atypical. The very essence of providing sports work is different from the essence of performing both office and industrial work. It consists in the provision of a special type of work of a multiple nature aimed at maximising the performance of athletes, carried out for profit. The athlete's ability to achieve success results from the effect of actions taken as part of the employment relationship with the club as well as from leisure activities. Such activities include preparing appropriate meals, keeping a balanced diet, refraining from an unhealthy lifestyle and from the use of unauthorised substances, not using drugs that could be considered doping, taking care of proper regeneration and rest, and refraining from betting on matches in the practiced sport discipline.

Herein, firstly, the characteristics of sports work was presented and, secondly, the possibilities of using work-life balance tools in shaping everyday sports work were analysed. The paper analyses the blurring of personal and professional lives among athletes. The main conclusion of the paper is the inability to effectively guarantee a work-life balance among

athletes, and that athletes can effectively use legal tools of WLB only if they simultaneously perform services or work elsewhere.

The paper uses a dogmatic and legal method (analysis of the literature, analysis of normative acts) and the results of research carried out by the author, i.e. a survey addressed at professional athletes.

Keywords: athlete, work-life balance, working time, sports law

Introduction

In the 21st century reality, issues of over-engagement of employees in the working process are phenomena of strong social nature, which, by its intensification, have a direct impact on all other spheres of a human's life, including family and health. There are numerous works on the topic of the many reasons for organising one's own life around work. Currently, the concept which meets with the greatest approval among employees, as well as more broadly among researchers dealing with the world of work, is the so-called work-life balance (WLB), which assumes such time management that allows achieving a balance between work and private life and, as a result, achieving objectives in compliance with personal principles and rules. However, the feeling of this balance or a lack thereof will be different for different persons, since it is subjective and individual.[1]

Simultaneously, it should be indicated that WLB is not strictly a legal issue, and should rather be treated as a broader issue related to human resources management and psychology. Nevertheless, there are legal constructions primarily included in the Labour Code, which indirectly allow the maintenance of a WLB. In particular, those that address issues of working hours or the right to a holiday leave are the most useful.

Difficult to define, WLB is a concept that can be analysed at many various levels. The primary difficulty consists in defining what life or a life might be, which for each athlete (player) can mean something else. We can consider its various aspects, among others: family, social, home, as well as other activities, and so forth: duties, rest, hobby or recreation.[2] The relations between the professional sphere, private

1 Tausig, M. and Fenwick, R., *Unbinding time: alternate work schedules and work-life balance*, "Journal of Family and Economic Issues" 2001, Vol. 22(2), pp. 104-105.

2 Hildt-Ciupińska, K., *Work-life balance a wiek pracowników,* "Bezpieczeństwo Pracowników" 2004, No. 10, p. 17.

sphere and family sphere remain the main object of research of persons dealing with the topic of WLB.[3]

Unfortunately, persons dealing with the topic of balancing professional life and private life do not present too many instruments that make it possible to determine which activities fall under which sphere, with a relatively precise indication of a demarcation line. The literature indicates numerous difficulties with capturing this issue and ongoing processes of blurring these two spheres. It should be noted that the vast majority of scientific works in this scope concern 'classic performance of work' in which it is undoubtedly difficult to include performance of sports work.

Maintenance of the WLB concept is currently one of the priorities of the European Union.[4] Legal scholars and commentators describe this area as the one that allows improving the quality of a person's life.[5] In its essence it concerns each person who performs gainful employment, and not only women during motherhood, an issue to which the largest number of studies are devoted.[6] Any instruments in the scope of WLB should be applied with a consideration of the variety of life situations of employees and their individual preferences so that it is possible to achieve the assumed results.[7]

The main goal of this study is to analyse the possibilities of professional athletes to use WLB tools, and as a result of the above to identify possible threats that result from the specific conditions of performing sports work in this area. The research problem remains relevant, given the increasing number of players who practice sports for commercial purposes. As a consequence of the above, the following thesis was verified: due to the unique nature of sports, which is intensified by its commercialisation, athletes can use only some of the tools included in the WLB concept.

This paper uses a dogmatic and legal method (analysis of the literature, analysis of normative acts) and presents the results of the research conducted by the author – a survey addressed to professional athletes, which was conducted between December 2018 and July 2019. The questionnaire consisted of seventeen closed-ended

3 Pietras, A., *O zakresie podmiotowym prawa pracy z perspektywy koncepcji work-life balance*, "Acta Universitatis Lodziensis. Folia Iuridica", 2019, No. 89, p. 59.

4 Crompton, R. and Lyonette, C., *Work-life 'balance' in Europe*, "GeNet Working Paper" 2005, No. 10, pp. 3-7, https://journals.sagepub.com/doi/abs/10.1177/0001699306071680 (accessed 02.12.2019).

5 Guest, D., *Perspectives on the study of work-life balance*, "Social Science Information" 2002, Vol. 41, Issue 2, pp. 256-258.

6 Fleetwood, S., *Why work-life balance now?*, "Lancaster University Management School Working Paper" 2006, No. 41, pp. 1-3.

7 White, M. et al., *'High-performance' management practices, working hours and work-life balance*, "British Journal of Industrial Relations" 2003, Vol. 41, Issue 2, pp. 191-193.

questions and one extended question in which individual elements of sports work had to be assigned their significance (key, important, average, unimportant, completely irrelevant). The method applied in the research was a quasi-representative survey, which was direct and anonymous and was carried out by using a standardised questionnaire. In my opinion, from the point of view of the labour law, using this concept in many specific areas of employment is extremely problematic. Herein, I will present my doubts in detail with an example of the situation of professional athletes. They are a specific occupational group, whose everyday image of performing work is different from the 'typical' 'office' work which most often is the object of analysis in the context of maintaining WLB.

Characteristics of sports work

Maintenance of a proper balance between the number of professional duties and the possibility of the employee's personal fulfilment in the private sphere is crucial for the long-term guarantee of the full use of their potential.[8] At the same time, balance should not be identified with effectiveness.[9] In the reality of the present nature of professional sports, this is an extremely important factor, which allows achievements in both individual and team sports. A player is, in fact, obliged to act inside a dual system: first of all, in a system that maximises their psychophysical abilities allowing achievements in sports, and secondly in a system that allows maintaining the long-term ability to compete in sports across consecutive sports seasons.

The characteristics of professional sports create numerous difficulties in arriving at a precise determination of where the performance of sports work ends and where the time for leisure and for all other elements comprising the whole of private life begins. To a certain extent these difficulties are identified with the issue of indicating athletes' working time, which can include, among others, activities such as: training; work with a psychologist and a dietician; gym workouts; doing other recommended sports (e.g. swimming); marketing activity; participation in marketing and promotional meetings; maintaining social media accounts; undergoing physical therapy and preparing meals and nutritional supplements in compliance with individual psychophysical needs. Defining a rigid boundary between work

8 Robak, E. and Słocińska, A., *Równoważenie pracy z życiem osobistym pracowników jako istotny czynnik warunkujący gospodarowanie współczesnymi zasobami pracy,* "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2016, No. 257, pp. 159-160.

9 Riordan, C., *Work-life balance – tu nie chodzi o równowagę*, https://www.hbrp.pl/b/work-life-balance---tu-nie-chodzi-o-rownowage/DQ725mbo?NO_COOKIES=1 (accessed 02.12.2019).

and private life is extremely difficult. Sometimes it is impossible, especially considering the fact that a player does not have full autonomy in decision-making with respect to the majority of the aforementioned activities.

For the purposes of this paper, it is sufficient to employ a simplified definition of sports work, which can be understood as: work consisting of the performance of a specific type of work of a varied nature, performed by athletes in order to fulfil particular needs of sports fans consisting in maximisation of achieved sports results and performed for employment purposes.[10]

Maximisation of achieved sports results is a derivative of maintaining proper physical and psychological fitness by the athlete. It should be underlined that maximisation of results achieved by the athlete depends on many factors, whereas some of them remain outside the sphere of the athlete's direct impact. Undoubtedly, without a stable private life that is directed at a healthy lifestyle, it is much more difficult to achieve the dream objectives in sport. Therefore, separating professional and private lives is almost impossible.

It should be underlined that keeping a high level of fitness by athletes is important for them as well as for the sports club in which they play. A player is usually affiliated with a parent sports club on the grounds of an employment relationship or a civil law relationship.

Athletes' duties at particular stages of their careers

Before proceeding to further discussion, it should be indicated that the athlete's everyday duties and thus their schedule change at various stages of their careers and differ depending on the practiced sport discipline.[11]

At the stage of a junior career (first stage) a player is obliged to reconcile training with school duties. Available biographies of professional athletes imply that during this period of time their schedules were very similar. They usually got up two, three hours before starting classes at school in order to prepare for them and directly

10 The author included complex reflections on the definition of sports work and its components in his doctoral thesis entitled 'Sports Contract'. In the author's opinion, for the purposes of the discussion on a work-life balance of athletes herein, a simplified definition of sports work, which allows complex understanding of its essence and, in particular, understanding interference of athletes' professional and private life as an inherent feature of performing sports work, is fully sufficient. For greater familiarity with more in-depth reflections concerning sports work, I would encourage reading the aforementioned doctoral thesis.

11 Precise specification of the stages of a sports career is significantly impeded due to, first of all, the individual course of each career, secondly, individual conditions, and thirdly, significant differences among particular sports disciplines.

after classes they started training at their sports clubs. Sometimes, training was held twice a day – before and after school.

At the stage of a proper career (second stage), a player trains professionally in a given discipline and participates in particular competitions of championship rank. During this period of time, an athlete has the greatest achievements and thus gains the highest income.

In the Code of Good Governance for Polish Sports Associations, the Ministry of Sport and Tourism provided absolute guidelines binding for Polish sports associations consisting in promoting dual careers among players and coaches consisting in ensuring a parallel educational or professional path for players, which allows them to smoothly enter the labour market after ending their sports careers.[12]

At the stage of sports retirement (third stage) a player no longer participates professionally in competitions of championship rank. They also look to other means of earning an income. Sometimes players are interested in related possibilities concerning the previously practiced discipline, including continuing the career as a coach, an activist, a scout, a sports journalist, etc. Some of them establish their own training centres and sports academies under their own names. After ending their careers, some former athletes in a way abandon their roots and start an activity in completely different fields of endeavour. Athletes who during their career accumulated significant funds can spend several years on their passions and achieve personal goals, achievement of which was not possible during their proper career.

Reflections herein concern the stage of junior and proper careers and thus, the stages where there are significant difficulties with maintaining proportions between sports career, education, other gainful employment and personal life.

Due to its significant impact on other activities undertaken by the athlete in his or her private life, sports work seems to penetrate the sphere of private life even more deeply than is the case with work outside the realm of professional sports. In their leisure time the athlete is usually obliged to heed the recommendations of the coaching staff, club doctors, dieticians, and physical therapists, to constantly inform the club of one's whereabouts (with regard to the duties resulting from anti-doping controls) as well as observe prohibitions regarding consumption of alcohol or drugs, smoking, and the taking of medications which could be regarded as doping, participation in evening events, placing oneself in jeopardy of injury by engaging in physically risky sports disciplines (e.g. skiing), avoiding a sedentary lifestyle and participation in gambling consisting in predicting results of one's own sports

12 *Kodeks Dobrego Zarządzania dla Polskich Związków Sportowych,* Ministry of Sport and Tourism, Warszawa 2018, https://www.msit.gov.pl/pl/aktualnosci/7622,Kodeks-Dobrego-Zarzadzania-dla-Polskich-Zwiazkow-Sportowych.html (accessed 02.12.2019).

discipline matches, as well as any other activities that could have an impact on the current or long-term fitness or the possibility to compete in a given competition in compliance with the internal regulations of a specific sports association.

Legal and organisational instruments facilitating reconciliation of professional work and private life

The existing instruments facilitating reconciliation of professional work and private life can be divided into legal instruments resulting from legal constructions adopted by the legislator in particular acts and organisational instruments primarily implemented by factual activities of an employer in particular workplaces.

In the current legal state there are certain solutions allowing implementation of the WLB concept within the employment relationship including, among others, existence of rights related to parenthood (maternity, paternity, parental leave), using fixed-term contracts, the possibility of part-time employment, application of an individual schedule (Article 142 of the Labour Code), using the possibility to apply task-based schedule (Article 140 of the Labour Code), equivalent working time (Article 135 of the Labour Code), provisions concerning teleworking (Article 67(5) of the Labour Code et seq.), flexible working hours (Article 140(1) of the Labour Code), reduced working week (Article 143 of the Labour Code), work performed on weekends (Article 144 of the Labour Code) or job sharing.[13]

The Labour Code does not constitute an independent barrier in effective application of the WLB concept, since there are such legal constructions which can be effectively applied by the parties to the employment relationship. The factual situation of particular employees is usually inhomogeneous, therefore, different instruments may seem to be proper for each employee. It is true that there is not a single effective universal-character model of maintaining balance between professional and private lives of an employee.

An employer can, in the scope of his competences, undertake certain further organisational activities, which can be understood more broadly as organisational instruments in the scope of WLB. Such activities of the employer can include, among others, introduction of care provided for children at the workplace, reducing overtime, allowing the possibility to perform work remotely,[14] introduction

13 Job sharing is not regulated in Polish provisions and the essence thereof consists in organising work so that the total number of working hours of two or more employees fills one full working time.

14 Ibidem, pp. 14-15.

of a system of both financial and non-financial bonuses which are awarded to employees forced to reconcile work with care duties.

Furthermore, sometimes an additional group of instruments directed at building a proper atmosphere amenable to persons managing family and professional roles, which is to contribute to the perception of work as a value and additionally improve satisfaction therefrom, is indicated by legal commentators. Undoubtedly, each case of introduction of the work-life balance concept is, in essence, an interdisciplinary project which usually uses various legal and organisational instruments.

Using the above legal and organisational tools is still not very popular in Poland. Their actual use most often results from the single interest of the employer and not the individual situation of the employee. Nevertheless, it should be indicated that using WLB tools generates long-term benefits for employers by, among other things, the improvement of their image, thus increasing their attractiveness as employers to valuable persons on the labour market and improving the work motivation of current employees.[15] The aforementioned benefits are crucial for achieving set objectives by sports clubs in both national and international competitions.

The use of the instruments of increasing flexibility of an employment relationship may paradoxically result in increased blurring of boundaries between the work sphere and the private life. Almost unlimited possibilities of contacting the employee via remote communication tools and performing a part of work in the domicile,[16] in the so-called home-office system, in the long run causes immanent interpenetration of these two spheres sometimes resulting in the impossibility to properly perform duties both at work and in private life.

Limited use of legal instruments for effectiveness of professional athletes' of work and family life

While performing sports work, athletes cannot effectively use many tools of making their work more flexible due to the essence of the performed work. Sports work consists in many activities, among others, participation in sports competitions, training, and marketing, which in the main requires the athlete to appear in person at a given place and time. There is not much room for moving these time and space frameworks. There are, in fact, fixed schedules of sports competitions which force athletes to perform the aforementioned activities in strict set conditions. There is

15 *Raport z pogłębionej analizy danych zastanych: rozwiązania na rzecz godzenia życia zawodowego i rodzinnego w Polsce,* October 2016, No. 10, www.kapitalludzki.gov.pl (accessed 30.12.2019).

16 Pietras, A., op. cit., pp. 57-58.

a possibility of a certain interference in the time framework of the athlete's training so as not to affect their current fitness, to allow them to reconcile their sports career with their education or the performance of other gainful employment in order to earn a living and pay for training.

A professional sports career does not allow closing it within the tight framework of several hours of work per day. Legal instruments in the scope of WLB focus on guaranteeing the employee the possibility of limiting working hours or introducing periods free of the obligation to provide work. Effective performance of sports work is strictly correlated with the player's organisation of his or her private life. Therefore, in my opinion, using available legal instruments will not be effective with regard to athletes due to the characteristics of their work, which has been presented herein in detail. The essence of performing sports work does not consist in performing work for a specific period of time (as in the case of, among others, cashiers) or in producing of a specific number of products (as in the case of piecework), but achieving synergy within the framework of performed sports work which would allow maximisation of fitness and thus allow significant sports achievements. In consequence, it is necessary for both parties to the employment relationship to keep the athlete in good physical and mental condition, which can be executed indirectly with tools included in the implementation of the work-life balance, which, however, in essence are not aimed at maintaining a balance between private and professional life, but in all instances maximising the player's fitness. Nevertheless, the existence of this balance can be in practice a side effect of a joint fight of both parties to the employment relationship for the highest sports goals.

However, the possibilities to use legal instruments to make the employment relationship more flexible may be utilized in the context of other gainful employment performed by the athlete, so that they can reconcile performance of other employee duties with those resulting from the performance of sports work, in particular, in the scope of keeping their high level of psychophysical fitness. Undoubtedly, performance of full-time gainful employment in a basic work system usually does not allow one to commit themselves to a sports discipline at a championship level. However, in such a situation, there will be no case of implementing the work-life balance concept in the strict sense, since it means reconciling professional work with private life and not combining two different employment activities.

Conclusions

Application of WLB, irrespective of the differences in understanding it as underlined in legal writings, should be considered necessary and in the long run beneficial for

both parties, i.e. the employer (the principal) and the employee (the contractor). The athlete is an individual who is especially prone to blurring boundaries between his or her sports work and private life. Irrespective of the legal grounds for the performance of sports work i.e. the civil law contract or the employment agreement, the possibilities of using tools to make work more flexible are not significant. It should be noted that to a significant extent the employee status and the civil law status of athletes is greatly standardised due to regulations of sports federations at various levels: global, continental, national or club.[17]

The research conducted by the author shows that only 43.1% of athletes earn a full living with their sports work.[18] Therefore, athletes have a real need to develop and pursue a dual career. Some universities in Poland already provide athletes with such opportunities.[19] Some instruments applied in the implementation of the WLB concept can also be effectively used in reconciling performance of sports work with other gainful employment, which would provide the athlete with means necessary for everyday life and to pay for training.

Irrespective of the above conclusions, an athlete can use non-legal WLB tools including, among others: doing other physical activity, spending time with family and friends, pursuing their passions, taking a break from social media or organising trips. Traditionally understood legal instruments in the scope of the work-life balance can be used to only a small extent in the case of athletes which is strictly related to the characteristics of sports work.

References

Crompton, R. and Lyonette, C., *Work-life 'balance' in Europe,* "GeNet Working Paper" 2005, No. 10, https://journals.sagepub.com/doi/abs/10.1177/.

Fleetwood, S., *Why work-life balance now?* "Lancaster University Management School Working Paper", 2006, No. 41.

17 Kubot, Z., *Statusy zatrudnienia sportowców profesjonalnych,* in: Baran, K. (ed.), *System prawa pracy. Tom VII. Zatrudnienie niepracownicze,* Warszawa 2015, pp. 341-345.

18 Within the studies conducted in the period between December 2018 and July 2019 I prepared several dozens of surveys addressed at professional athletes, the results and analysis of which are included in my doctoral thesis 'Sports Contract'.

19 The dual career programme is carried out, among others, at the University of Physical Education and Tourism in Bialystok, where it is possible to follow the curriculum of bachelor's and master's degree studies within the dual career programme student-athlete. The programme is addressed to national team players, students with the master class or first class status and league club players (at least 2nd league). Information available on the website: http://wswfit.com.pl/s,program_kariera_dwutorowa_student_sportowiec,726.html (accessed 02.12.2019).

Guest, D., *Perspectives on the study of work-life balance*, "Social Science Information" 2002, Vol. 41, Issue 2.

Hildt-Ciupińska, K., *Work-life balance a wiek pracowników*, "Bezpieczeństwo Pracowników" 2004, No. 10.

Kodeks Dobrego Zarządzania dla Polskich Związków Sportowych, Ministry of Sport and Tourism, Warszawa 2018, https://www.msit.gov.pl/pl/aktualnosci/7622,Kodeks-Dobrego-Zarzadzania-dla-Polskich-Zwiazkow-Sportowych.html.

Kubot, Z., *Statusy zatrudnienia sportowców profesjonalnych*, in: Baran, K. (ed.), *System prawa pracy. Tom VII. Zatrudnienie niepracownicze*, Warszawa 2015.

Pietras, A., *O zakresie podmiotowym prawa pracy z perspektywy koncepcji work-life balance*, "Acta Universitatis Lodziensis. Folia Iuridica" 2019, No. 88.

Raport z pogłębionej analizy danych zastanych: rozwiązania na rzecz godzenia życia zawodowego i rodzinnego w Polsce, October 2016, No. 10, www.kapitalludzki.gov.pl.

Riordan, C., *Work-life balance – tu nie chodzi o równowagę*, https://www.hbrp.pl/b/work-life-balance---tu-nie-chodzi-o-rownowage/DQ725mbo?NO_COOKIES=1.

Robak, E. and Słocińska, A., *Równoważenie pracy z życiem osobistym pracowników jako istotny czynnik warunkujący gospodarowanie współczesnymi zasobami pracy*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2016, No. 257.

Tausig, M. and Fenwick, R., *Unbinding time: alternate work schedules and work-life balance,* "Journal of Family and Economic Issues" 2001, No. 22.

White, M. et al., *High-performance' management practices, working hours and work-life balance*, "British Journal of Industrial Relations" 2003, Vol. 41, Issue 2.

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Born to Polish same-sex parents – a case study. A human rights perspective on birth certificate transcriptions

Abstract

This article is a case study regarding a recent resolution of the Supreme Administrative Court in Poland (the SAC). The Court found that a transcription of a foreign birth certificate, in which two people of the same sex are registered as parents, is not allowed under the Polish law and is contrary to *ordre public*. This paper focuses primarily on two aspects regarding the resolution. First, it addresses whether the best interest of the child principle was given due consideration. Second, it analyses whether the possible discriminatory treatment on the grounds of sexual orientation of the parents was adequately examined, with particular reference to the jurisprudence of the European Court of Human Rights (the ECtHR). This paper is divided into four parts. The background information pertaining to the issues at stake as well as the case itself are addressed in Part 1. Part 2 briefly summarises the SAC resolution and the judgement. Part 3 concentrates on deconstructing the best interest principle as an international and national standard. In Part 4 the ECtHR case-law is examined in order to provide a human rights perspective on the matter. This article concentrates on providing the perspective of a child and on the jurisprudence of the European Court of Human Rights, as it is a well-recognised international law-applying body that raises the threshold and quality of respecting human rights in the European continent. The final part summarises the paper and presents the conclusions.

It is going to be demonstrated that in light of the ECtHR jurisprudence, the SAC failed to adequately analyse that a difference in treatment of same-sex parents in comparison to other unmarried couples is reasonable, pursues a legitimate aim and that the treatment is proportional. Moreover, it will be argued that the SAC unsuccessfully demonstrated why primacy had been granted to the interest of the state and public order, instead of that of a child. The main goal of this paper is to highlight the importance of endorsing the child's perspective and the compelling need to carefully consider the child's best interest – in each and every case that involves their fate.

In order to achieve the purpose of this study, the research is based on the evaluation of the universal human rights documents relevant to the topic, as well as the analysis of the ECtHR jurisprudence related to the subject.

Keywords: best interest of the child, birth certificate transcript, European Court of Human Rights jurisprudence, same-sex parenthood

Introduction

In December 2019 the Supreme Administrative Court (the SAC) in Poland issued a resolution detrimental to the situation of children born to same-sex parents. Principally, the SAC ruled that the Polish law does not allow for a transcription of a foreign birth certificate, in which two people of the same sex are registered as parents. The scope of this resolution reaches far beyond this individual case – it conceivably influences the fate of many children, who, as a result, may face some difficulties in the future.

This paper concentrates on two main concerns regarding the SAC resolution. First, it is argued that the SAC did not adequately address the well-established best interest of the child principle. The Court instead repeatedly argued that the refusal to recognise two mothers as parents under the Polish law is justified by public policy. Ultimately, it can be said that the Supreme Administrative Court granted primacy to the interest of the state, not that of the child. Therefore, this article examines whether such reasoning is justifiable, especially according to international standards.

Secondly, it seems that the resolution did not adequately consider the possible discriminatory treatment on the grounds of sexual orientation of the parents. Although the SAC addressed some of the jurisprudence of the European Court of Human Rights (the ECtHR), this paper aims to thoroughly review the prevailing

case-law regarding LGBTQ[1] issues pertaining to the Polish case (especially regarding same-sex parenthood).

It has to be highlighted however, that granting citizenship and a person's status is a prerogative of the state, and thus international law plays a limited role in that regard. For example, this has been brought up in the recent Court of Justice of the European Union judgment. The Grand Chamber reaffirmed that 'admittedly, a person's status, is a matter that falls within the competence of the Member States and EU law does not detract from that competence'.[2] Nonetheless, Poland is still a member of a European community and therefore should respect European values as well as basic human rights and especially children's rights. Therefore, the main focus of this paper is aimed at investigating whether the SAC resolution is in line with contemporary European human rights standards, and especially whether the best interest of a child has been given due consideration.

Background information pertaining to the case

In this particular case, the applicant addressed the superintendent registrar to issue a transcript of a birth certificate of her child, where her partner was stated as the second parent.[3] Both parents were females who have Polish citizenship and were explicitly mentioned in the British birth certificate.[4] The request to issue a transcript was denied both by the register office and by the provincial governor to whom they eventually appealed. Subsequently, the Provincial Administrative Court rejected the complaint, arguing that recognising two mothers is contradictory to the *ordre public*.

The applicant filed a cessation appeal at the SAC. She argued that several provisions were misinterpreted, and emphasized that the transcription would not interfere with public order. She referred to Articles 8 and 14 of the European Convention on Human Rights, demonstrating that there had been an interference with

1 Abbreviation for: lesbian, gay, bisexual, transsexual, queer or questioning.

2 Case C-673/16 *Coman and Others v Inspectoratul General,* ECLI:EU:C:2018:385.

3 Resolution of the Supreme Administrative Court resolution of 2 December 2019, II OPS 1/19, ONSAiWSA 2020, No. 2, item 11.

4 It has to be highlighted that both parents were female and held Polish citizenship, therefore in this case other possible legal disputes did not emerge, as it might happen regarding cases involving e.g. surrogacy, see e.g.: Pilich, M., *Mater semper certa est? Kilka uwag o skutkach zagranicznego macierzyństwa zastępczego z perspektywy stosowania klauzuli porządku publicznego*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2018, Vol. XVI, pp. 7-37.

her and her partner's and their child's rights to private and family life. She raised that the Convention on the Rights of the Child had been violated, in particular: Article 2(1), Article 3(1), Article 7(2) and Article 8. In essence, it was pointed out that no measures protecting the child from discrimination due to its parents' sexual orientation were applied. Moreover, the applicant observed that the best interest of the child principle had not been adequately taken into consideration. The applicant highlighted that the refusal to issue the transcript of the birth certificate would have a result similar to statelessness and that it would deprive the child of recognising its family relations in relation to citizenship and consequently also its identity.[5]

The Polish Ombudsman concurred with the applicant's appeal. He pointed out that the PAC did not demonstrate why *ordre public* was at threat and highlighted that the application of the public order clause requires individual application and approach. Meanwhile, surprisingly, the Polish Ombudsman for Children stated that the transcription of the child's birth certificate in that case would be contrary to public policy. He did not raise any concerns regarding the child's best interest or issues with non-discrimination.

Up to this point, there were two differentiating approaches to the matter in question in Polish administrative jurisprudence. In some judgments it had been stipulated that recognising two parents of the same sex under Polish law would violate the basic principles of the Polish public policy.[6] This arm of case-law pointed out, among other things, that 'parents' under Polish law denote only two people of different sex: a mother (female) and a father (male). This understanding stems from Article 18 of the Polish Constitution, which states: 'marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland'.[7] Accordingly, the *Schalk and Kopf v Austria*[8] judgment was mentioned, where the ECtHR deemed

5 The applicant also argued a violation of the EU law: Article 20(2)(a) and 21(1) of the Treaty on the Functioning of the European Union (TFEU) signed on 13 December 2007, OJ C 326, 26.10.2012, pp. 47-390, that is the right to move and reside freely within the territory of the Member States. In addition, she argued violation of Article 7, 21(2), 24(2) and (3) of the Charter of Fundamental Rights of the European Union of 2 October 2000, OJ C 326, 26.10.2012, pp. 391-407.

6 See: judgement of the Supreme Administrative Court of 17 December 2014, II OSK 1298/13, LEX No. 1772336, as well as the judgements of the Provincial Administrative Courts (PAC): judgement of the Provincial Administrative Court in Gliwice of 6 March 2016, II SA/Gl 1157/15, LEX No. 2035383 and judgement of the Provincial Administrative Court in Kraków of 10 May 2016, III SA/Kr 1400/15, LEX No. 2056842.

7 Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws) of 1997, No. 78, item 483 as amended.

8 ECtHR, *Schalk and Kopf v Austria*, Application no. 30141/04, 2406.2010.

that the European Convention on Human Rights (the ECHR)[9] does not oblige member states to legally recognise same-sex marriages.

However, there was a significant shift in SAC jurisprudence in 2018. In a judgment issued on 10 October 2018 the SAC addressed the child's best interest and consequently argued that the refusal to issue a transcript infringes the rights of a child.[10] In the 2018 judgment the Court argued that the transcript is, according to the law, obligatory and the *ordre public* cannot override that. On top of that, the SAC pointed out that children's rights have to take precedence in that situation, as was stipulated in the ECtHR jurisprudence (e.g. *Mennesson v France*).[11]

These issues were also disputed in the Polish literature. Some authors welcomed the 2018 judgment with enthusiasm, arguing that the refusal to issue a transcript would result in chastising the child for the makeup of their family (i.e. for the fact that they have two mothers or two fathers, instead of parents of different sexes).[12]

However, the 2018 SAC judgment was criticised by Piotr Mostowik, who reckoned that the ruling addressed a problem that in fact falls outside of the scope of the case itself. The author also argued that the solution presented by the Court might 'destroy' the Polish system of registering the civil status from 'within'.[13]

The Supreme Administrative Court II OPS 1/19 resolution

Due to these discrepancies in the jurisprudence, the adjudicating judges in the case concerned referred the legal question to the extended panel of 7 judges of the Supreme Administrative Court for them to adopt a resolution.[14] The question was,

9 European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS 5.

10 Judgement of the Supreme Administrative Court of 10 October 2018, II OSK 2552/16, LEX No. 2586953.

11 ECtHR, *Mennesson v France,* Application no. 65192/11, 26.06.2014.

12 Tadla, T., *Glosa do wyroków Naczelnego Sądu Administracyjnego z dnia 10 i 30 października 2018 r. (sygn. akt: II OSK 1869/16, II OSK 2552/16)*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, No. 3, pp. 150-160, see: Krawiec, G., *Transkrypcja zagranicznego aktu urodzenia dziecka osob tej samej płci pozostających w związku*, "Studia Prawnicze. Rozprawy i Materiały" 2019, No. 2(25), p. 6.

13 Mostowik, P., *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 10 października 2018 r. (sygn. akt II OSK 2552/16),* "Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, No. 4, p. 142, see: Krawiec, G., op. cit, p. 6.

14 See: Skoczylas, A. and Swora, M., *Administrative judiciary in Poland in search for fairness and efficiency – an overview*, "Transylvanian Review of Administrative Sciences" 2007, No. 19E, p.122.

in essence, whether the Polish administrative law allows for the transcription of a foreign birth certificate, where two people of the same sex are named as parents.

The SAC indicated that the transcription of a birth certificate has to be literal and adequate, both linguistically and formally (but it is not a translation). In other words, some modifications are allowed; however, under no circumstances they can be substantial. The Polish bill regarding birth status requires to explicitly mention a male as a father.[15] Consequently, although the transcript is obligatory, the administrative body nonetheless can refuse to issue such document. The SAC agreed that the transcription would result in violating basic principles of Polish public order. The *ordre public* clause, according to the SAC, constitutes a legal safeguard against effects of foreign acts that are contradictory to basic (including constitutional) values. In this case, the Polish legislator requires that parents be of opposite sexes. Not only does Polish law not acknowledge same-sex parents, it does not recognise same-sex unions. Accordingly, the coherence of the Polish legal system and public policy would be endangered if documents containing information such as a birth certificate recognising two mothers as parents were acknowledged. Therefore, the SAC pointed to the link between the birth certificate in question and the *ordre public*. The SAC stated that recognising a 'father' who is not male is not possible and would constitute a breach of the aforementioned public order.

To support its reasoning, the SAC referred to the ECtHR jurisprudence and highlighted that states enjoy a wide margin of appreciation regarding same-sex couples (e.g. *Paradiso and Campanelli v Italy*[16], *Orlandi and Others v Italy*[17] and *Oliari and Others v Italy*[18]). Moreover, the SAC argued that the protection of the European Convention of Human Rights does not directly impose an obligation to issue a transcript of a birth certificate where people of the same sex are recognised as parents. The SAC referred to the Advisory Opinion issued by the Great Chamber of the European Court of Human Rights on 10 of April 2019.[19] In that opinion, the ECtHR stated that the refusal to enter certain documents into the registry does not amount to the violation of the right of a child to a private life according to Article 8

15 See: Act of 28 November 2014 on civil status records, Dz.U. (Journal of Laws) of 2014, item 1741 as amended.

16 ECtHR, *Paradiso and Campanelli v Italy,* Application no. 25358/12, 27.04.2012.

17 ECtHR, *Orlandi v Italy,* Application no. 26431/12, 26742/12, 44057/12 and 60088/12, 14.12.2017.

18 ECtHR, *Oliari v Italy,* Application no. 18766/11 and 36030/11, 21.07.2015.

19 The Grand Chamber, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, issued on 10 April 2019, P16-2018-001.

of the ECHR, if there are available some other measures that are in accordance with the best interest of the child.

However, the SAC recognised that such interpretation of law cannot limit the right of a child to receive a personal number or ID, merely because the foreign birth certificate cannot be transcribed. Therefore, in the view of the Supreme Administrative Court, there are no obstacles for the child to receive an ID and a passport – because to issue those documents, the British certificate could be used. Only when the administrative body refused to grant those documents, could the Court analyse the international and European Union law.

Therefore, on the face of it, the Supreme Administrative Court's reasoning seems comprehensive and logical. However, at least two main issues with the SAC resolution have to be addressed. First, the best interest of the child principle has not been given due consideration. It is well-recognised under both international and domestic laws that in all actions concerning children, his or her best interest should be of primary consideration. Second, the SAC resolution concerning the transcript of the birth certificate does demonstrate a route for children born to same-sex parents. However, the burden of this task is shifted onto the citizen, not onto the state.

What is more, although the obligation to seek the necessary documents relies solely on the citizen, it is neither clear nor certain whether he or she will not face further difficulties. In other words, the plight of the child is not foregone, as there can be more obstacles on the way. It therefore raises concern whether a fair balance was struck between the rights of a child and the frequently mentioned public order clause, which is discussed below.

It has to be noted that in the Polish literature the SAC resolution has been received with acclaim by some authors.[20] For example, Michał Wojewoda agrees with the judgment with caution. He points out the redundant manner in which the SAC invoked the public order clause.[21]

Meanwhile, Piotr Mostowik highlights that the refusal to issue a transcript does not completely eradiate the possibility to settle some issues affecting the child (in

20 Notably, it has also been reviewed in Wiącek, M., *Omówienie do uchwały NSA z dnia 2 grudnia 2019 r., II OPS 1/19*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2020, No. 1, pp. 163-171.

21 While Wojewoda agreed with the overall argumentation provided by the SAC, he argued that it was unnecessary to invoke *ordre public* from Article 7 of the Private International Law (in addition to the *ordre public* provision from the bill on birth status), as it does not pertain to birth certificate transcription, see: Wojewoda, M., *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce – glosa do uchwały Naczelnego Sądu Administracyjnego z 2.12.2019 r., II OPS 1/19,* "Europejski Przegląd Sądowy" 2020, No. 8, p. 34; Act of 4 February 2011 – Private International Law, consolidated text: Dz.U. (Journal of Laws) of 2015, item 1792.

particular: to issue a temporary passport for the child). In addition, the transcript of this document in his view could even infringe the fundaments of the Polish legal system as well as threaten the foundation of family law. Consequently, he argues that the general rules of registering a civil status that apply to all citizens would be destroyed if the transcript had been issued in this 'casuistic' instance.[22] He also appeals to the *naturam non imitator* argument in support of the resolution, and proposes that any possible objections should not be aimed towards the SAC resolution or towards Polish law, but the criticism should instead be directed towards other countries that introduce those 'unusual resolutions to the descent of the child'. In other words, according to Mostowik, the foreign document in fact 'strips' the child of his biological and genetic identity, while the Polish legal system protects children.[23]

Conversely, Grzegorz Krawiec points out that the best interest of the child should have 'absolute priority', especially in cases where there are reasonable doubts (as in this case, taking into consideration the previous discrepancies in the SAC adjudication). He also notes that worldview conflicts should be completely irrelevant when the child's best interest is at stake.[24]

In stark contrast to Mostowik, Krawiec explains that the transcript does not infringe the public order and that a narrow interpretation of this clause is necessary, especially in this case. The fact that the Polish legal system does not (yet) recognise same-sex parenthood is not relevant, because the transcript merely certifies the existence of a foreign legal relationship, which in essence does not need to be recognised under Polish law.[25] It has been argued by Maciej Zachariasiewicz that it is disputable whether foreign law is being applied at all when issuing a transcript. Consequently, there is therefore a reasonable doubt whether the question of a transcript *can* be contrary to public order at all.[26] What is more, Krawiec rightfully points out that the provisions regarding the transcript of a birth certificate are of a technical nature, therefore they should not override Constitutional and international norms and the best interest of a child principle.[27]

22 Mostowik, P., *O żądaniach wpisu w polskim rejestrze stanu cywilnego zagranicznej fikcji prawnej pochodzenia dziecka od "rodziców jednopłciowych",* "Forum Prawnicze" 2019, No. 6(56), p. 9.

23 Ibidem, pp. 25-26.

24 Krawiec, G., op. cit., p. 13.

25 Ibidem, p. 6.

26 Zachariasiewicz, M., *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori,* Warszawa 2018, pp. 135-136, as pointed out by Krawiec, G., op. cit., p. 7.

27 Krawiec, G., op. cit., p. 8.

Given all of the above, arguments supporting the stance that the transcript of a birth certificate where two females are regarded as parents infringes the *ordre public* are not convincing and should not be endorsed. It has to be noted that there are many more claims raised by some authors in support of the SAC resolution that provide various tortuous solutions arguing why and how to refuse the transcript of a birth certificate in accordance with Polish law.[28] This article, however, concentrates on providing European and children's perspectives on the topic; therefore, the next section will concentrate on the best interest of a child – a provision that has gained international recognition.

Best interest of a child

The best interest principle has been present in the arena of international law since the 1959 Declaration of the Rights of the Child.[29] Most importantly, it is now one of the four general principles in the Convention on the Rights of the Child (the CRC).[30] Article 3 of the CRC stipulates that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration'.[31] Similar provisions can be found in other international documents, such as the Convention on the Elimination of all Forms of Discrimination against Women,[32] the Convention on the Rights of Persons with Disabilities,[33] as well as in various European Union documents, notably in the Charter of Fundamental Rights as well as other regulations and directives.[34]

The principle of the child's best interest is also widely recognised under the Polish legal system. In particular, it is considered to be one of the basic principles of

28 See: e.g.: Pilich, M., op. cit., p. 7 ff.

29 UN General Assembly, Declaration of the Rights of the Child (1959), A/RES/1386(XIV), https://www.refworld.org/docid/3ae6b38e3.html (accessed 7.12.20).

30 Along with non-discrimination, right to life, survival and development and the right of the child to be heard.

31 The best interest principle is considered to be an 'umbrella' provision and it is also included in Articles 9, 18, 20, 21, 37 and 40.

32 Article 5, Convention on the Elimination of All Forms of Discrimination Against Women adopted by the General Assembly on 18 December 1979, United Nations, Treaty Series, Vol. 1249, p. 13.

33 Article 7, Convention on the Rights of Persons with Disabilities adopted by the General Assembly on 13 December 2006, A/RES/61/106, Annex I.

34 E.g. see: Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, pp. 1–11.

family law,[35] as well as in civil and administrative law.[36] The Polish Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court all agree that the best interest of the child is paramount, especially in relation to other interests, e.g., the interest of parents or the state.[37]

Undoubtedly, the principle has gained worldwide recognition and acceptance, and it is not being contested, especially as the rule of procedure and to a certain degree as a substantive right. However, as the interpretative legal principle, the best interest principle remains ambiguous.

The phrasing of the principle has raised some concerns. According to the literal interpretation, 'a' is weaker than 'the' and arguably 'primary' is not as strong as, for example, 'paramount'.[38] It has to be noted that during the Convention's drafting, the wording of the principle was not broadly discussed. The CRC's *travaux préparatoires* show that the adoption of words –'a primary consideration' instead of 'the primary consideration', was made due to arguments that in some situations the interest of society or justice should prevail over the interest of the child.[39] However, it has been argued that the choice of the indefinite article 'a' instead of the definite article 'the' during the drafting of the CRC was made solely to provide flexibility only in some *extreme* cases (a childbirth etc.).[40] In General Comment 14 the Committee on the Rights of the Child evaluated that the best interest is not just primary, but a 'paramount' consideration in all actions concerning children by all public bodies.[41]

The concept of the best interest principle as paramount has been developed also in the European Court of Human Rights. In *Neulinger and Shuruk v Switzerland* the Court confirmed that there is 'currently broad consensus – including in

35 Smyczyński, T., *Prawo rodzinne i opiekuńcze*, Warszawa 2005, p. 19.

36 See: Radwański, Z., *Dobro dziecka*, in: Łopatka, A. (ed.), *Konwencja o prawach dziecka a prawo polskie*, Warszawa 1991, p. 51 ff.

37 See a broader analysis of the Polish jurisprudence regarding the best interest of the child in: Mendecka, K., *Klauzula dobra dziecka w Konwencji o prawach dziecka i w prawie polskim (wybrane problemy)*, "Acta Universitatis Lodziensis. Folia Iuridica" 2016, No. 77, pp. 25-36.

38 Parker, S., *The best interest of the child – principles and problems*, "International Journal of Law, Policy and the Family" 1994, Vol. 8, Issue 1, p. 28.

39 Deterick, S., *A commentary on the United Nations Convention on the Rights of the Child*, The Hague–Boston–London 1999, p. 88.

40 Alston, P., *The best interest principle: towards a reconciliation of culture and human rights,* "International Journal of Law, Policy and the Family" 1994, Vol. 8, Issue 1, pp. 1-25.

41 The Committee on the Rights of the Child in the General Comment 14 on 29 May 2013, CRC/C/GC/14I, https://www.refworld.org/docid/51a84b5e4.html (accessed 7.12.2020).

international law – in support of the idea that in all decisions concerning children, their best interest must be paramount'.[42]

It is suggested that only rights-based interests can trump those of the child. In General Comment 6 the Committee pointed out that 'non rights-based arguments such as those relating to general migration control, cannot override best interest considerations'.[43] International human rights institutions' firm standpoint is that only an outstanding right-based interest can override the child's best interest; therefore, neither national security nor public safety can serve as grounds for decisions contrary to what is best for the child.[44]

In the next section, the ECtHR jurisprudence relating to the subject concerned will be addressed, not only in order to demonstrate how the best interest principle had been implemented throughout European case law, but to determine how the newest case law correlates to the facts of the case in question.

ECtHR jurisprudence

First, two concepts which play a substantial part in the ECtHR jurisprudence (especially in the cases that concern the suspect classification – sexual orientation), the European consensus and the margin of appreciation need to be briefly addressed. The European consensus refers to the level of uniformity present in the legal frameworks of the Member States of the Council of Europe on a particular topic.[45] In other words, it is used to justify a margin of appreciation that is given to the member states – another concept created by the ECtHR jurisprudence. The European consensus paradigm as well as the margin of appreciation are useful tools that allow one to adequately interpret the European Convention on Human Rights, which is a 'living instrument'.

Addressing the case that involves the matter of same-sex parenthood, one still needs to discuss the question of a legal recognition of same-sex unions and marriages. The Supreme Administrative Court rightfully noted that whether to acknowledge same-sex unions or marriages still lies within a scope of a wide margin of appreciation. This was first confirmed in the infamous case *Schalk and*

42 ECtHR, *Neulinger and Shuruck v Switzerland*, Application no. 41615/07, 6.07.2010.

43 The Committee on the Rights of the Child in the General Comment 6 on 17 May-3 June 2005, CRC/GC/2005/6, https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf (accessed 7.12.2020).

44 Ibidem, paragraph 86.

45 See: Benvenisti, E., *Margin of appreciation, consensus and universal standards*, "International Law and Politics" 1999, No. 31, pp. 843-854.

Kopf v Austria. However, what the SAC did not note is that since then (the *Schalk* judgment was issued in 2010) the jurisprudence of the European Court of Human Rights has significantly shifted towards a broader recognition of same-sex rights.

Naturally, there are several examples of judgments that bear resemblance to *Schalk.* For example, the case *Gas and Dubois v France*[46] reaffirmed that for same-sex couples there is no right to marry under Article 12 of the ECHR. Similarly, the ruling in *Orlandi and others v Italy* stipulated that states do have wide discretion regarding that issue (however, the Court found a violation of Article 8 of the Convention, due to the fact that the state failed to strike a fair balance between the competing interests). Also, in *Oliari and others v Italy* the ECtHR confirmed that the Convention does not require that same-sex marriages be allowed. Therefore, the Court found no violation of Article 12 (right to marry). However, if a different type of union is allowed, same-sex couples cannot be excluded, thus Article 8 was violated.[47]

There has been a shift in the Court's approach towards recognising a broader spectrum of the rights of same-sex couples as parents. One of the first significant cases was *EB v France*[48], in which the Court deemed that if adoption is open to single persons, homosexuals cannot be discriminated against. The new approach is also apparent in *X and Others v Austria*.[49] At that time, under Austrian law unmarried same-sex couples were not legally permitted to access second-parent adoption. Meanwhile, this procedure was allowed for unmarried heterosexual couples. The Court found a violation of Article 14 in conjunction with Article 8, highlighting that there was no reasonable objective justification for limiting the second-parent adoption only to heterosexual couples. In other words, the Court did not agree that the margin of appreciation should be wide and observed that the couple had been discriminated against, and therefore their right to respect for a private and family life was violated, when read in conjunction with the non-discrimination provision.

The European Court of Human Rights in its jurisprudence stresses the importance of striking a fair balance between the interest of the applicant, especially the best interest of the child, and that of the state. The *Mennesson v France* case concerned a surrogate mother. The French authorities refused to recognise the relationship between the parent and a child that had been established in the United

46 ECtHR, *Gas and Dubois v France,* Application no. 25951/07, 15.03.2012.

47 Which has also been a subject of concern in the ECtHR, *Vallianatos and Others v Greece,* Application nos. 29381/09 and 32684/09, 7.11.2013.

48 ECtHR, *EB v France,* Application no. 43546/02, 22.01.2008.

49 ECtHR, *X and Others v Austria,* Application no. 19010/07, 19.02.2013.

States. The main issue was that the woman who bore the child was entirely omitted in the birth certificate, whereas the document that was issued in California solely mentioned the French couple as parents. It was argued that a civil status cannot be disposed of and therefore it was contrary to French international public policy to recognise the Californian judgment. On the other hand, the French Court allowed for the children to live with the French parents, highlighting that it is in their best interest. The ECtHR deemed that there had been no violation of the right of the children or parents to respect of family life, but that there had been a violation of the private life. Regarding the family life, the ECtHR explained that in its view a fair balance was struck between child's best interest and the interest of the state. However, the Court explained that children would suffer legal uncertainty because of the non-recognition of family ties. In the Court's view there cannot be a contradiction between legal and social reality.[50]

Another ECtHR judgment concerning surrogacy is *Foulon and Bouvet v France*.[51] The ECtHR highlighted that by refusing to transcribe the birth certificate of a child born through surrogacy its right to respect for private life was violated. In view of the Court, the rights of children (who were born as a result of internationally commercialised surrogacy) require that their parents be legally recognised. In other words, although states may prohibit surrogacy agreements, once the child is born through such a procedure, the law of a state cannot be used to prejudice the rights of the child, as it would be contrary to the child's best interest. The Court also highlighted that whenever a child is at stake, their best interest has to be paramount.

The Supreme Administrative Court in Poland, in the discussed resolution, mentioned some of the cases that are discussed in this paper. Although it seems that these cases had been primarily in the resolution's prerogative. Meanwhile, there is much more to those ECtHR cases than it had been demonstrated by the SAC.

For example, in *Paradiso and Campanelli v Italy,* the Grand Chamber found that there was no violation of Article 8 of the ECHR, as in accordance with the law the measures pursued a legitimate aim and were necessary in a democratic society. Therefore, the actions fell within the scope of the margin of appreciation. However, the ECtHR highlighted that the best interest of the child has to be given a primary consideration. In this case, the majority agreed that separation from the parents would not cause harm to the child. To the contrary, legalising the situation would create a situation as *fait accompli.*[52] However, it is believed that this decision

50 ECtHR, *Mennesson v France,* Application no. 65192/11, 26.06.2014.

51 ECtHR, *Foulon and Bouvet v France,* Application nos. 9063/14 and 10410/14, 21.07.2016.

52 ECtHR, *Paradiso and Campanelli v Italy,* Application no. 25358/12, 27.04.2012.

is case-specific, especially in light of the later jurisprudence. Nonetheless, *Paradiso and Campanelli v Italy* demonstrates that there are some factors that the Supreme Administrative Court in Poland did not take into consideration, namely not only the brief analysis of the family life, but also the thorough investigation of the child's private life and its best interest.

Conclusions

There is no doubt that the Supreme Administrative Court's resolution is substantiated and well-argued. Substantially, the SAC made comprehensive points and indicated the procedures that the applicants and their child may follow. However, it has to be highlighted that it is uncertain whether this route will indeed provide a feasible solution in action. Even the authors who acclaimed the resolution address concerns about the future. Though one might agree that it is inadmissible to transcribe birth certificates in such situations, there soon will be other complicated instances to which Polish law should adequately respond in some way. As Michał Wojewoda indicates, the Polish legal register should be prepared to take into account constructions – such as a marriage or death certificate of a person who has parents of the same sex – that are unavailable under Polish law.[53] It remains to be seen how practice and jurisprudence will respond to circumstances in light of the SAC resolution. Nonetheless, these example adversities demonstrate that shifting the responsibility onto the applicant is – in many ways – problematic and may in itself infringe the child's (and person's) interest – especially its right to citizenship, movement and identity.

Notwithstanding, this article aimed to address some other concerns that could have been examined by the SAC in line with the recent ECtHR jurisprudence as well as with the best interest of the child principle. In particular, it has been established in Part 3 that the child's interest is paramount, therefore primacy cannot be automatically granted to the interest of the state – or as in this case, to the *ordre public* clause. Although the SAC provided some reasoning behind its findings, it failed to provide a thorough explanation on how the balance between the two competing interests was fairly struck. Without a doubt, in this respect, the SAC's resolution is unsatisfactory. In other words, *de facto* and *de jure* situation of children born to same-sex couples still continue to be in many ways uncertain and therefore they remain on the periphery of Polish society.

53 Wojewoda, M., op. cit., p. 38.

Secondly, the analysis of the situation of same-sex parents is insufficient. It has to be noted that the reiteration of Article 18 of the Polish Constitution has nothing to do with the case at all, and it most certainly does not support the findings. Highlighting that marriage, under Polish law, is a union between a man and a woman is not relevant while discussing the issue of parenthood. For decades now children have been born 'out of wedlock'[54], therefore it is not at all relevant how the Polish lawmaker regulates the issue. To the contrary, it is crucial to recognise the social reality, and secondly to compare the situation of same-sex parents to that of heterosexual couples that wish to have the birth certificate of their child transcribed. The ECtHR came up with a comprehensive test that allows to determine, whether there was discriminatory treatment. Accordingly, treatment is discriminatory if (1) it has no objective and reasonable justification, (2) if it does not pursue a legitimate aim and (3) when there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[55] Therefore, as in the aforementioned case *X and Others v Austria,* if the transcription would be allowed for heterosexual couples, it should have been proved why there is a difference in treatment for homosexual parents. Importantly, under the Polish law there are no legal unions or partnerships, therefore the legal situation of any couple who has a child together should be identical in the exact same circumstances. The SAC provided some arguments supporting the claim that there is no 'same-sex parents' under Polish law; however, the SAC seems to have failed to prove that such a clear difference in treatment is reasonable and pursues a legitimate aim, and that the treatment is proportional.

One could argue that the legitimate aim is the *ordre public* or even the preservation of the 'Polish tradition', as brought up by the SAC. Although the member states of the Council of Europe (and European Union) still enjoy a wide margin of appreciation regarding legal recognition of same-sex couples, it has to be noted that the European consensus is slowly emerging.[56] In addition, as the ECtHR pointed out in *Mennesson v France,* there cannot be a contradiction between social and legal reality. In this case, avoidance of acknowledging both mothers as parents is to place a tremendous burden upon the child, who will suffer all the consequences of that

54 There is abundant case-law of the ECtHR regarding the topic, e.g. ECtHR, *Rasmussen v Denmark*, Application no. 8777/79, 21.05.1979; ECtHR, *Mikulić v Croatia,* Application no. 53176/99, 7.02.2002, etc.

55 ECtHR, *Boeckel v Germany,* Application no. 8017/11, 7.05.2013.

56 See: Bribosia, E. et al., *Same-sex marriage: building an argument before the European Court of Human Rights in light of the US experience*, "Berkley Journal of International Law" 2014, Vol. 42, No. 1, pp. 1-43.

decision. The main goal of the applicant and her child is not only to merely receive an ID or a passport, as the SAC indicated, but to have the identity of the child fully recognised in a dignified manner. One of the most basic pillars of the wellbeing of a child is the relationship with their parents, as is reaffirmed in a multitude of international instruments and in the literature.[57] Notably, the Polish Constitutional Tribunal as well acknowledged that the best interest of the child does not necessarily require for the relationship to be of biological nature.[58]

According to a survey by the EU Agency for Fundamental Rights, 31% of the LGBTQ population in Europe are *de facto* parents as of today.[59] This is also true for Polish families. Although the refusal to issue a transcript for a child born to a same-sex parents may seem insignificant (especially as the SAC indicated measures that might allow the child to receive an ID or a passport), it is proof of a much deeper problem. The SAC missed a chance to ease the plight of Polish children living in LGBTQ families. Even in the third decade of the 21st century, children of same-sex parents still remain on the margins of Polish society and the law.

References

Alston, P., *The best interest principle: towards a reconciliation of culture and human rights*, "International Journal of Law, Policy and the Family" 1994, Vol. 8, Issue 1.

Benvenisti, E., *Margin of appreciation, consensus and universal standards*, "International Law and Politics" 1999, No. 31.

Breen, C., *The standard of the best interest of the child*, The Hague–London–New York 2002.

Bribosia, E. et al., *Same-sex marriage: building an argument before the European Court of Human Rights in light of the US experience*, "Berkley Journal of International Law" 2014, Vol. 42, No. 1.

Deterick, S., *A commentary on the United Nations Convention on the Rights of the Child*, The Hague–Boston–London 1999.

Krawiec, G., *Transkrypcja zagranicznego aktu urodzenia dziecka osób tej samej płci pozostających w związku*, "Studia Prawnicze. Rozprawy i Materiały" 2019, No. 2(25).

57 See: Breen, C., *The standard of the best interest of the child*, The Hague–London–New York 2002, p. 20 ff.

58 Judgement of the Constitutional Tribunal of 28 April 2003, K 18/02, OTK-A 2003, No. 4, item 32, see furhter: Krawiec, G., op. cit., p. 10.

59 European Union Agency for Fundamental Rights, Report 2019, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-fundamental-rights-report-2019_en.pdf (accessed 25.02.2020).

Mendecka, K., *Klauzula dobra dziecka w Konwencji o prawach dziecka i w prawie polskim (wybrane problemy),* "Acta Universitatis Lodziensis. Folia Iuridica" 2016, No. 77.

Mostowik, P., *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 10 października 2018 r. (sygn. akt II OSK 2552/16)*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, No. 4.

Mostowik, P., *O żądaniach wpisu w polskim rejestrze stanu cywilnego zagranicznej fikcji prawnej pochodzenia dziecka od "rodziców jednopłciowych"*, "Forum Prawnicze" 2019, No. 6(56).

Parker, S., *The best interest of the child – principles and problems*, "International Journal of Law, Policy and the Family" 1994, Vol. 8, Issue 1.

Pilich, M., *Mater semper certa est? Kilka uwag o skutkach zagranicznego macierzyństwa zastępczego z perspektywy stosowania klauzuli porządku publicznego*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2018, Vol. XVI.

Radwański, Z., *Dobro dziecka,* in: Łopatka, A. (ed.), *Konwencja o prawach dziecka a prawo polskie*, Warszawa 1991.

Skoczylas, A. and Swora, M., *Administrative judiciary in Poland in search for fairness and efficiency – an overview*, "Transylvanian Review of Administrative Sciences" 2007, No. 19E.

Smyczyński, T., *Prawo rodzinne i opiekuńcze*, Warszawa 2005.

Tadla, T., *Glosa do wyroków Naczelnego Sądu Administracyjnego z dnia 10 i 30 października 2018 r. (sygn. akt: II OSK 1869/16, II OSK 2552/16)*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, No. 3.

Wiącek, M., *Omówienie do uchwały NSA z dnia 2 grudnia 2019 r., II OPS 1/19*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2020, No. 1.

Wojewoda, M., *Zagraniczne rodzicielstwo osób jednej płci a rejestracja stanu cywilnego w Polsce – glosa do uchwały Naczelnego Sądu Administracyjnego z 2.12.2019 r., II OPS 1/19,* "Europejski Przegląd Sądowy" 2020, No. 8.

Zachariasiewicz, M., *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori,* Warszawa 2018.

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Captatoria conditio: meaning and admissibility in the light of freedom of testation. Analysis of selected legislations of Western European countries

Abstract

The purpose of this paper is the presentation and analysis of the testamentary disposition, present in some foreign legal orders, known by the Latin name *captatoria conditio*, being a particular type of conditional appointment to inheritance. The analysis includes functions of *captatoria conditio* and axiological doubts related to it. In the research, the examination of applicable laws and the comparative methods were used, which allowed the analysis of the form and functions of *captatoria conditio* and its prohibition in foreign legal orders. Conducted in such a way, the research led to the conclusion that particular systems of the law of succession include different regulations regarding the validity and effectiveness of *captatoria conditio*. On the basis of the analysis of the functions of *captatoria conditio*, this paper presents the thesis that in the case of such a disposition *mortis causa* there is not any excessive interference with the autonomy of the beneficiary *mortis causa* because he or she is always entitled to reject the inheritance. This conclusion speaks for the admissibility of *captatoria conditio* if the conditional appointment to inheritance is possible in a given legal system. Axiological doubts do not give arguments for the prohibition of *captatoria conditio*.

Keywords: *captatoria conditio*, freedom of testation, testamentary conditions

Introduction

It is the purpose of this paper to present and analyse the specific testamentary disposition known by the Latin name of *captatoria conditio* (and as *kaptatorische Verfügung* in German legal language).[1] This form of disposition, being a particular type of conditional appointment to inheritance, is to a large extent permissible in German law, which is noteworthy since as a rule even in legal systems providing for conditional appointment to inheritance this particular type of condition is not allowed. This results from significant axiological doubts associated with *captatoria conditio*. The system of German law of succession presents itself as an exception as compared to other Western European legal orders. In Poland, in the current legal circumstances, *captatoria conditio* is not a subject matter of debate in scientific communities considering the general prohibition of appointing an heir under a condition that is in force in Poland. On the surface, it might seem that this issue presents no substantial value to Polish readers. However, one should bear in mind the proposals to introduce conditional appointment to inheritance to the Polish legal order that are sometimes made.[2] In light of these *de lege ferenda* suggestions, the matter of *captatoria conditio* may become more important in the future. For this reason, it is worth taking a closer look at this legal measure and arguments in favour of its admissibility or the lack thereof.

Captatoria conditio – characteristics as well as brief history and comparative legal analysis

In general terms, it can be stated that a disposition captatoria is such a disposition upon death, by means of which the testator wishes to influence the last will of his heir and induce him to make a specific disposition *mortis causa*. Sometimes, such disposition is defined more narrowly, where it is accepted that it involves making a disposition under the condition that an heir makes his own disposition for the benefit of the testator himself or for a third party.[3] Others perceive such disposition

1 The Latin name of *captatoria conditio* may be used in relation to dispositions captatoria present in various legal systems. On the other hand, the term *kaptatorische Verfügung* originates from German legal language and means *captatoria conditio* under German law. This paper will use those terms as defined above.

2 See e.g. Osajda, K., *Ustanowienie spadkobiercy de lege ferenda,* "Studia Prawa Prywatnego" 2009, Vol. 1, pp. 89-91.

3 Azaustre Fernández, M.J., *Captación de voluntad en los testamentos y 'prohibición de confesores' de Roma a la actualidad*, "Glossae. European Journal of Legal History" 2017, No. 14, p. 79.

as appointment to inheritance under the condition that the heir or a third party appoints the testator as heir.[4] In such case, the purpose of this disposition is to influence not only the last will of the heir but also the last will of a third party who is in a sense 'external' to the disposition. The aforementioned differences notwithstanding, the essence of *captatoria conditio* can be found in conditional appointment to inheritance (and thus mutual wills are not included in this category of dispositions[5]) and in influence exercised on the last will of another person (either the heir or a third party) by forming such condition in a particular way. The latter characteristic is associated with the name – a shameful one – of this disposition upon death: the Latin word *captatoria* is the feminine form of Lat. *captatorius*, meaning 'a hunter' – in this case, a hunter of inheritance.

In Roman law, such dispositions upon death were strictly prohibited, although – as has been indicated – they did not have to constitute by themselves an abuse of testamentary freedom. The principal argument in favour of impermissibility of dispositions captatoria was the heir's testamentary freedom. Irrespective of the testator's motives, *captatoria conditio* was therefore deemed *a priori* a prohibited action aimed at 'obtaining a will' of the heir for the benefit of the testator.[6] Any condition that was expressed in this form was deemed non-existent. It is dubious, however, whether the testator that stipulated *captatoria conditio* was to be considered unworthy of succeeding after the person he appointed to inheritance (of course, if the person appointed to inheritance died at an earlier date and appointed the testator as his own heir in accordance with *captatoria conditio*). Also, the matter of validity of a disposition made for the testator's benefit, meeting the condition in form of *captatoria conditio*, has been the subject of discussions.[7]

The conviction, originating from the Roman law, about the unlawfulness of *captatoria conditio* has been reflected in the national civil law system of Spain and in the majority of civil law systems of the autonomous regions of Spain.[8] Article 794

4 Cf. ibidem, pp. 79-80.

5 Ibidem, p. 80.

6 Ibidem, p. 80.

7 Ibidem, pp. 80-81.

8 The Spanish civil law system is very specific. There is a state-wide (national) civil law (Span. *Derecho Común* or *Derecho Estatal*). Independently of it, in territories of certain autonomous regions of Spain there are regional systems of civil law (Span. *Derechos Forales*). In the scope unregulated in regional law, the national law will be applicable. Regional systems of civil law are in force in Aragon, Catalonia, Valencia, Navarra, in the Basque Country, in Galicia and on the Balearic Islands. See in more detail in: Plaza Penadés, J., *El Derecho Civil, los Derechos Civiles forales o especiales y el Derecho Civil autonómico*, "Revista Electrónica de Derecho Civil Valenciano" 2012, No. 12, https://core.ac.uk/download/pdf/71025569.pdf (accessed 09.08.2020). Concerning the

of the Spanish Civil Code[9] says that a disposition made under a condition that the heir or the legatee makes a disposition for the benefit of the testator or a third party shall be invalid. As has been indicated in Spanish legal writings, the principal argument in favour of impermissibility of *captatoria conditio* is the personal nature of a will and the protection of testamentary freedom of the heir (legatee), which requires prohibiting any and all interferences with his last will.[10] It has, however, been alleged that Article 794 of the Spanish Civil Code is obsolete since there are no reasons to prohibit *captatoria conditio* while stipulating certain other conditions may be equally or even more immoral.[11] As it stands, the Spanish law prohibits *captatoria conditio*, additionally under a very harsh sanction: it results in invalidity of the entire disposition (and not in a legal fiction that the condition be deemed non-existent). The severity of this sanction is justified by the forbidden and immoral nature of *captatoria conditio.*[12]

A similar solution to the one adopted in the national inheritance law of Spain can be found in Catalonian inheritance law. Article 423-19 of the Catalonian Civil Code[13] states that dispositions captatoria result in invalidity of appointment of an heir.[14] A regulation to the contrary, however, has been introduced in Aragon law – Article 476 of Aragon Regional Law Code[15] provides for a general rule that all conditions that are not impossible nor contrary to the law or accepted principles

history of regional systems of civil law in autonomous regions of Spain, see: García Pérez, R., *Derechos forales y Codificación civil en España (1808-1880)*, "Anuario de Historia del Derecho Español" 2012, No. 82, pp. 152-174; De Benito Fraile, E.J., *La codificación civil y los derechos forales (1808-1833)*, "Cuadernos de Historia del Derecho" 2012, No. 19, pp. 65-97.

9 Spanish Civil Code of 24 July 1889, Gaceta de Madrid (Official Gazette of Madrid) of 25 July 1889, No. 206, as amended.

10 Quesada González, M.C., *La institución de heredero sometida a condición, a término o a modo*, Madrid 2018, pp. 94-95.

11 See opinions cited ibidem, p. 95.

12 Ibidem, p. 98. The author, however, holds that the testator may modify the voidness of the disposition so that, should it prove that the disposition has the characteristics of *captatoria conditio* as specified in Article 794 of the Spanish Civil Code, such appointment to inheritance (executing the legacy) should be deemed unconditional: ibidem.

13 Catalonian Civil Code, Law 10/2008 of Book 4 of the Civil Code of Catalonia relating to successions, of 10 July 2008, Diari Oficial de la Generalitat Catalunya (Official Gazette of the Government of Catalonia) of 17 July 2008, No. 5175, as amended.

14 See also: Bosch Capdevila, E., *Testamentary freedom and its limits,* in: Anderson, M. and Arroyo i Amayuelas, E. (eds.), *The law of succession: testamentary freedom. European perspectives*, Groningen 2011, pp. 80-81.

15 Aragon Regional Law Code of 22 March 2011, BOA (Official Bulletin of Aragon) of 29 March 2011, No. 67, as amended.

of morality shall be valid. Further, this provision contains examples of permitted (valid) conditions, including a condition where an heir or a legatee shall make a disposition *mortis causa* for the benefit of the testator or a third party. As has been indicated by M.C. Quesada González, the starting point of the Aragon solution was the view that prohibitions of *captatoria conditio* were of archaic nature.[16] Further, in her opinion this solution demonstrates coherence of Aragon inheritance law, where inheritance contracts and joint wills are allowed[17] (i.e. legal measures whose essence lies in – at least to a certain extent –'binding' the last will of disposing parties; it should be noted that in the case of inheritance contracts and joint wills a disposing party actively expresses willingness to bind his last will with the last will of another person by making a relevant legal act (i.e. by executing an inheritance contract or making a joint will), while in the case of *captatoria conditio* the last will is 'captured' without the participation of a disposing party and only based on a disposition *mortis causa* of his testator). Inheritance law systems of other autonomous regions of Spain do not contain any provisions relating to *captatoria conditio.*[18] In accordance with the rule specified in the third sentence of Article 149(3) of the Spanish Constitution[19], national law is complementary in relation to regional legal systems – in matters not regulated in regional provisions, national provisions of law shall be applicable.[20] This means that in those regional systems where *captatoria conditio* is not regulated, Article 794 of the Spanish Civil Code as well as resulting prohibition of making such dispositions *mortis causa* will apply.

Captatoria conditio is also prohibited in Italian law. Article 635 of the Italian Civil Code[21] bans any universal and specific dispositions *mortis causa* subject to a condition of a reciprocated disposition upon death for the benefit of the testator (this is where the expression 'condition of reciprocity', It. *condizione di reciprocità*,

16 Quesada González, M.C., op. cit. p. 95.

17 Ibidem, p. 100.

18 Cf. De Amunátegui Rodríguez, C. et al., *Código civil concordado con la legislación de las Comunidades Autónomas de Galicia, País Vasco, Navarra, Aragón, Cataluña y Baleares*, Madrid 2008, p. 520.

19 Constitution of Spain of 31 October 1978, BOE (Official State Gazette) of 29 December 1978, No. 311, as amended.

20 García Rubio, M.P., *Plurilegislación, supletoriedad y derecho civil,* in: González Porras, J.M. and Méndez González, F.P. (eds.), *Libro homenaje al profesor Manuel Albaladejo García. Tomo I*, Murcia 2004, p. 1940.

21 Italian Civil Code, Royal Decree No. 262 of 16 March 1942, Gazzetta Ufficiale Serie Generale (Official Gazette General Series) of 4 April 1942, No. 79, as amended.

comes from).[22] Making such disposition results in, analogically to Spanish law, complete invalidity thereof (and not merely in a legal fiction that the condition be deemed non-existent). The Italian legislator considers conditions of this type to constitute a 'deceitful suppression' of freedom of testation on the part of a beneficiary of dispositions.[23] Interestingly, this provision does not apply to dispositions made under the condition of making a disposition *mortis causa* for the benefit of a third party indicated by the testator. This does not mean, however, that this form of *captatoria conditio* is allowed in the Italian law. In such case, the condition is still not permitted but is instead deemed non-existent (benefit upon death, however, is valid and effective).[24]

A completely different approach to the permissibility of *captatoria conditio* is presented in the German inheritance law. BGB[25] does not specifically mention this particular type of disposition upon death. In light of this absence of an expressed prohibition of such dispositions *mortis causa*, it may be questionable if such dispositions are permitted on the basis of accepted principles of morality – § 138 BGB provides for invalidity of legal transactions contrary to accepted principles of morality and is applicable also to last will dispositions.[26] In the German legal scholarship, however, it is commonly accepted that *captatoria conditio* is as a rule permitted to a large extent. It is considered that a testator may subject a disposition *mortis causa* to a condition that the beneficiary makes certain dispositions upon death.[27] D. Weidlich expresses *kaptatorische Verfügung* more narrowly, stating that a condition of making the testator or a third party the heir is permitted.[28] Such an approach leads to the question of permissibility of appointment to inheritance under a condition of, for example, disinheriting a certain person. It has been emphasized of course that *kaptatorische Verfügung* does not violate the prohibition of accepting the obligation to execute a will, as provided for in § 2302 of BGB, since

22 Cf. Sesta, M., *Codice delle successioni e donazioni. Volume I. Costituzione e Quattro Codici*, Milano 2011, p. 1343.

23 Ibidem.

24 Ibidem, p. 1344.

25 German Civil Code of 18 August 1896, BGBl. (Federal law Gazette) I, p. 42, 2909; 2003 I, p. 738, as amended.

26 Ellenberger, J., *§ 138*, in: *Palandt, Bürgerliches Gesetzbuch*, München 2017, p. 139, section number 11.

27 Leipold, D., *§ 2074*, in: Kessal-Wulf, S. (ed.), *Münchener Kommentar zum BGB. Band 11. Erbrecht*, München 2020, section number 17; Litzenburger, W., *§ 2074*, in: Bamberger, H.G. et al., *Beck'scher Online-Kommentar BGB*, München 2020, section number 19.

28 Weidlich, D., *§ 2074*, in: *Palandt, Bürgerliches Gesetzbuch*, München 2018, p. 2424, section number 5.

the beneficiary of such disposition is under no obligation to fulfil such condition.[29] The German legal commentary does not consider at length whether *captatoria conditio* interferes with heir's freedom of testation, although it has been observed that when analysed from this perspective *captatoria conditio* becomes 'problematic'.[30]

Functions of *captatoria conditio* and related axiological doubts

Functions that *captatoria conditio* may serve are strictly related to general objectives of a conditional appointment to inheritance. The main purpose of stipulating a condition in appointing an heir is ensuring that the future of the estate can be specified in full accordance with the testator's intent.[31] The testator may in a better – in his opinion – way determine the fate of the estate after he has died, and thus to adjust it to the circumstances of his specific situation.[32] This is one of the most important functions of freedom of testation in general. However, a condition may also constitute a mechanism by means of which the testator wishes not such much to properly determine the legal succession in the event of death but rather to put pressure on behaviours of other people or even – to put it more strongly – to force them to take certain actions by exerting economic pressure in the form of making dispositions *mortis causa* dependent on fulfilling a condition. This may involve a variety of potestative conditions which – in legal systems permitting conditional appointment to inheritance – are usually examined in terms of their correspondence to principles of life in community (acceptance principles of morality) if they pertain to strictly personal matters of the beneficiary.[33] In such case, the will becomes a transaction of sorts, entailing the exchange of certain values: appointment to inheritance (or alternatively other disposition *mortis causa*) in exchange for a scenario desired by the testator. Undoubtedly, having the option

29 Leipold, D., op. cit., section number 17.

30 Blomberg, E.M., *Freiheit und Bindung des Erblassers. Eine Untersuchung erbrechtlicher Verwirklichungsklauseln*, Tübingen 2011, p. 8.

31 Cf. Niezbecka, E., *Ustanowienie spadkobiercy i zapisobiorcy w testamencie*, "Rejent" 1992, No. 6, p. 45.

32 Lenz, N., *§ 2074,* in: Hau, W. (ed.), *Juris Praxiskommentar BGB. Erbrecht. Band 5,* Saarbrücken 2007, p. 594, section number 27.

33 This is discussed in more detail in: Lange, H. and Kuchinke, K., *Erbrecht*, München 2001, pp. 827-828; Lenz, N., op. cit., p. 594, section numbers 27-28; Dittrich, L., *Verfassungsrechtliche Vorgaben des Erbrechts,* "Zeitschrift für Erbrecht und Vermögensnachfolge" 2013, Vol. 1, p. 19; Leipold, D., op. cit., section number 25; Vaquer Aloy, A., *Libertad de testar y condiciones testamentarias*, "InDret" 2015, No. 3, pp. 11-14.

to appoint an heir under a condition enhances the freedom of testation since it increases the number of possibilities by which the testator is able to determine legal succession in the event of death.

Stipulating such a particular condition as *captatoria conditio* fulfils all of the aforementioned functions, but does it so more strongly than any other type of condition. It is the substance of *captatoria conditio* to determine the fate of the estate not only in the event of and after the testator's death, but also in the event of and after the death of the heir. *Captatoria conditio* is, for this reason, an interesting example of an internal conflict existing within the freedom of testation principle: conflict between testator's freedom of testation and heir's freedom of testation.[34] Taking this into account, we should note that one of the principal problems related to freedom of testation as such is the fact that it will always collide in a certain degree with the autonomy of will of the other parties. Intrinsically, freedom of testation enables the testator to make decisions in matters that by their very nature do not concern him, but involve only persons that remain alive. This is related to the problem of the so-called dead hand grip or dead hand control (German: *Herrschaft der kalten* (*toten*) *Hand* or *Herrschaft aus dem Grabe*)[35], where pressure is exerted on living persons via dispositions *mortis causa* and decisions are made that would bind those persons for many years to come.[36] This iron grip of a dead hand is, as a rule, not acceptable. It has been indicated therefore that freedom of testation should end where the influence of a deceased person on the living world becomes too strong. This is the case both when this influence is too intense (expressive pressure on life,

34 In this respect, one can see the similarities between *captatoria conditio* and fiduciary substitution, where the heir is under the obligation to give the inherited property to a specific person following the heir's death. However, fiduciary substitution is more limited in its scope, since it only applies to inherited property, while *captatoria conditio* can entail the establishment of universal legal succession, i.e. not only in relation to inherited property but to the entire property of the heir.

35 About the meaning of those terms in the light of language-based image of the world, see: Owsiński, P.A. and Paluch, A., *Zum sprachlichen Weltbild in ausgewählten Begriffen aus dem Bereich des Erbrechts in der deutschen und polnischen Sprache*, "Colloquia Germanica Stetinensia" 2020, No. 29, pp. 270-271.

36 This is discussed in more detail in: Longchamps de Bérier, F., *Ręka zza grobu? Wokół granic dysponowania majątkiem na wypadek śmierci w prawie rzymskim,* in: Grodziski, S. et al. (eds.), *Vetera novis augere. Studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi, Tom I,* Kraków 2010, p. 611; Wilke, U., *Willensherrschaft und Nachlassbindung*, Frankfurt am Main 2017, pp. 22, 23; Schlüter, W., *Grenzen der Testierfreiheit – Grenzen einer "Herrschaft aus dem Grabe",* in: Hadding, W. (ed.), *Festgabe Zivilrechtslehrer 1934/1935*, Berlin-New York 1999, p. 575; Hirsch, A.J. and Wang, W.K.S., *A qualitative theory of the dead hand*, "Indiana Law Journal" 1992, Vol. 68, pp. 3, 22.

in particular personal life, of other people) and when it is too extensive (making decisions about the fate of many following generations).[37]

In consideration of the discussion carried out above, appointment to inheritance whilst stipulating *captatoria conditio* may seem as having too extensive impact on *post mortem* reality (and if we consider the freedom of testation as one of the most important aspects of autonomy of will afforded to human beings – and in my opinion there are valid reasons therefor – as too intense as well). Exactly those reasons lie, in all likelihood, at the root of the conviction that dispositions captatoria are immoral.

However, a conviction about the excessive pressure of the dead hand grip should not be shared too rashly. It is justified to ask whether, in light of the fact that in all contemporary legal systems the heir is afforded the option to reject inheritance, there is any pressure exerted on the heir in connection with the condition stipulated by the testator. I. Kroppenberg indicates that the motif of the dead hand was grounded on an unreasonable belief that there is no control over testator's dispositions, which would lead to his unlimited power. In her opinion, however, the option to reject inheritance is precisely such a method of control. In the case of conditional dispositions, rejecting inheritance boils down to 'rejecting the scenario written by the testator', which the heir is always allowed to do.[38] As Kroppenberg concludes: 'if the living world falls into chaos as a result of dispositions upon death, this happens in the first place not because the dead have the power but because the living allow it' (author's own translation).[39] So, it is the living who have the final word in the matter. Since therefore the problem of the testator's exerting any pressure on beneficiaries of dispositions does not exist, there can be no excessive grip that a conditional appointment to inheritance has over the fate of the living. The justification of *captatoria conditio* prohibition no longer has any merit. If for the heir 'binding' his last will and making dispositions concerning his estate according to instructions received from the testator is too much of a burden, the heir is free to reject inheritance and retain full freedom of testation. If, however, he accepts the inheritance, he agrees to fulfil the condition. One way or another, he acts within the confines of autonomy of will that is afforded to him.

There are several reservations asserted against such view of conditional appointment to inheritance, which, however, as it seems, do not apply to *captatoria conditio*.

37 Cf. Hirsch, A.J. and Wang, W.K.S., op. cit., pp. 16-17.

38 Kroppenberg, I., *'Wer lebt, hat Recht' – Lebzeitiges Rechtsdenken als Fremdkörper in der Inhaltskontrolle von Verfügungen von Todes wegen*, "Deutsche Notar-Zeitschrift" 2006, Vol. 2, pp. 101-105.

39 Ibidem, p. 105.

For instance, G. Otte indicates that there are situations where the testator, while alive, prepares his children to take over his estate (e.g. by giving them a proper education so that they could inherit the business). If thereafter he appoints his children to inheritance under a condition relating to their strictly personal life, the choice to either accept the inheritance and fulfil the condition or to reject the inheritance becomes a very difficult life decision.[40] These reservations do not concern this particular condition of *captatoria conditio* as it does not affect the heir's life but only his dispositions upon death.

Of course, exercise of freedom of testation is a deeply personal experience, in which both the final decision about the fate of someone's possessions and the final expression of feelings towards the living as well as opinions about their behaviour and life attitude are expressed. By fulfilling a *captatoria conditio*, the testator is deprived of all of this – his last will is, in a manner of speaking, 'seized' by his testator, and the disposition *mortis causa* becomes an expression of not his last will but of that of his testator. In this case it is the exercise of the testator's freedom of testation that is of utmost importance. This is a primary axiological problem associated with dispositions captatoria. One should not, however, lose sight of the circumstances to which Kroppenberg points – namely, the fact that the decision on whether to accept the inheritance and fulfil the condition lies with the heir. If such decision is made, he accepts the testator's will, and thus the testator's will becomes – at least to a certain extent – his own will. Therefore, there are, I believe, no convincing reasons for prohibiting *captatoria conditio* in legal systems that permit conditional appointment to inheritance.

Conclusions

The majority of the discussed Western European legislations that allow for a conditional appointment of an heir provide for the prohibition of appointment to inheritance under the specific condition of *captatoria conditio*. The only exceptions can be found in the inheritance law of Germany and Aragon. Justifications of prohibiting *captatoria conditio* are of axiological nature. Axiological doubts are raised by the fact that this form of condition leads to restricting the heir's freedom of testation. On the surface, it might seem that *captatoria conditio* highly limits his autonomy of will, but in principle it is not an expression of excessive influence of

40 Otte, G. (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 5. Erbrecht. §§ 2064-2196 (Testament 1)*, Berlin 2003, pp. 136-137, sections number 31a-31b.

the testator on the fate of the living nor does it constitute an abuse of freedom of testation. The heir has the option to reject the inheritance after all: he may either accept the inheritance and fulfil the condition or reject the inheritance and retain full freedom of testation. For this reason, pressure put on an heir is not really bigger than in the case of other types of conditions. In extraordinary situations, the last line of defence of the heir's freedom can be the evaluation of the disposition in terms of compliance with accepted principles of morality should such a clause be featured in a given legal system (for example, if the condition includes leaving out of the heir's will a person in a difficult financial situation or in poor health). Therefore, there are no convincing reasons for prohibiting this specific condition which is *captatoria conditio*.

References

Azaustre Fernández, M.J., *Captación de voluntad en los testamentos y 'prohibición de confesores' de Roma a la actualidad*, "Glossae. European Journal of Legal History 2017", No. 14.

Blomberg, E.M., *Freiheit und Bindung des Erblassers. Eine Untersuchung erbrechtlicher Verwirklichungsklauseln*, Tübingen 2011.

Bosch Capdevila, E., *Testamentary freedom and its limits*, in: Anderson, M. and Arroyo i Amayuelas, E. (eds.), *The law of succession: testamentary freedom. European perspectives*, Groningen 2011.

De Amunátegui Rodríguez, C. et al., *Código civil concordado con la legislación de las Comunidades Autónomas de Galicia, País Vasco, Navarra, Aragón, Cataluña y Baleares*, Madrid 2008.

De Benito Fraile, E.J., *La codificación civil y los derechos forales (1808-1833)*, "Cuadernos de Historia del Derecho" 2012, No. 19.

Dittrich, L., *Verfassungsrechtliche Vorgaben des Erbrechts,* "Zeitschrift für Erbrecht und Vermögensnachfolge" 2013, Vol. 1.

Ellenberger, J., *§ 138*, in: *Palandt, Bürgerliches Gesetzbuch*, München 2017.

García Pérez, R., *Derechos forales y Codificación civil en España (1808-1880)*, "Anuario de Historia del Derecho Español" 2012, No. 82.

García Rubio, M.P., *Plurilegislación, supletoriedad y derecho civil,* in: González Porras, J.M. and Méndez González, F.P. (eds.), *Libro homenaje al profesor Manuel Albaladejo García. Tomo I*, Murcia 2004.

Hirsch, A.J. and Wang, W.K.S., *A qualitative theory of the dead hand*, "Indiana Law Journal" 1992, Vol. 68.

Kroppenberg, I., *"Wer lebt, hat Recht" – Lebzeitiges Rechtsdenken als Fremdkörper in der Inhaltskontrolle von Verfügungen von Todes wegen*, "Deutsche Notar-Zeitschrift" 2006, Vol. 2.

Lange, H. and Kuchinke, K., *Erbrecht*, München 2001.

Leipold, D., *§ 2074*, in: Kessal-Wulf, S. (ed.), *Münchener Kommentar zum BGB. Band 11. Erbrecht*. München 2020.

Lenz, N., *§ 2074,* in: Hau, W. (ed.), *Juris Praxiskommentar BGB. Erbrecht. Band 5,* Saarbrücken 2007.

Litzenburger, W., *§ 2074*, in: Bamberger, H.G. et al., *Beck'scher Online-Kommentar BGB*, München 2020.

Longchamps de Bérier, F., *Ręka zza grobu? Wokół granic dysponowania majątkiem na wypadek śmierci w prawie rzymskim,* in: Grodziski, S. et al. (eds.), *Vetera novis augere. Studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi, Tom I*, Kraków 2010.

Niezbecka, E., *Ustanowienie spadkobiercy i zapisobiorcy w testamencie*, "Rejent" 1992, No. 6.

Osajda, K., *Ustanowienie spadkobiercy de lege ferenda,* "Studia Prawa Prywatnego" 2009, Vol. 1.

Otte, G., in: Otte, G. (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 5. Erbrecht. §§ 2064-2196 (Testament 1)*, Berlin 2003.

Owsiński, P.A. and Paluch, A., *Zum sprachlichen Weltbild in ausgewählten Begriffen aus dem Bereich des Erbrechts in der deutschen und polnischen Sprache*, "Colloquia Germanica Stetinensia" 2020, No. 29.

Plaza Penadés, J., *El Derecho Civil, los Derechos Civiles forales o especiales y el Derecho Civil autonómico*, "Revista Electrónica de Derecho Civil Valenciano" 2012, No. 12, https://core.ac.uk/download/pdf/71025569.pdf.

Quesada González, M.C., *La institución de heredero sometida a condición, a término o a modo*, Madrid 2018.

Schlüter, W., *Grenzen der Testierfreiheit – Grenzen einer "Herrschaft aus dem Grabe",* in: Hadding, W. (ed.), *Festgabe Zivilrechtslehrer 1934/1935*, Berlin-New York 1999.

Sesta, M., *Codice delle successioni e donazioni. Volume I. Costituzione e Quattro Codici*, Milano 2011.

Vaquer Aloy, A., *Libertad de testar y condiciones testamentarias*, "InDret" 2015, No. 3.

Weidlich, D., *§ 2074*, in: *Palandt, Bürgerliches Gesetzbuch*, München 2018.

Wilke, U., *Willensherrschaft und Nachlassbindung*, Frankfurt am Main 2017.

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Misleading advertising practices for medicinal products and dietary supplements – selected legal and practical aspects

Abstract

The paper constitutes an attempt at analysing the issue of misleading advertising practices for medicinal products and dietary supplements. Furthermore, the aim of the paper is to provide an answer to the question whether the binding legal regulations concerning advertisement of medicinal products and dietary supplements sufficiently protect consumers against being misled. While studying the topic in question, the research method of examining applicable laws was used, through the agency of the analysis of legal provisions referring to the indicated issue and confrontation thereof with the practice applied in advertising medicinal products and dietary supplements. As a result of the conducted analysis of the indicated issue a conclusion has been drawn that the use of certain advertising practices on the pharmaceutical market may mislead consumers, which has a negative impact on public health. Having in mind the need for strengthening the consumers' protection against the unfair advertisements of medicinal products and dietary supplements, the problems have been identified and the article proposes introduction of legal regulations aimed at improving the consumers' protection against practices that may be misleading.

Keywords: misleading advertising practices, advertisement of medicinal products and dietary supplements, umbrella branding, pharmaceutical and nutritional safety, the right to a safe pharmaceutical market

Introduction

The intensive development of the pharmaceutical industry can be observed through the agency of the omnipresent advertising. In compliance with the second recital of the preamble of Directive 2001/83/EC the essential aim of any rules governing the production, distribution and use of medicinal products must be to safeguard public health.[1] Despite not specifying therein separately the advertisement of medicines, the indicated rules fully apply thereto.[2]

Various marketing efforts significantly influence decisions taken by consumers with regard to purchasing OTC (over the counter) medicines and dietary supplements.[3] An average patient does not notice any difference between them and it should be underlined that from the legal point of view dietary supplements are a specific category of foodstuffs aimed at supplementing a normal diet.[4] Television, radio and press messages are full of assurances of the multitude of usages of advertised products. The omnipresent advertising of OTC medicines and dietary supplements results in those products becoming common and intensifies the frequency of use thereof by consumers.[5] The vast majority of those advertisements create in the consumer the need for purchasing them and the messages included therein are often far from reliability both in terms of form and content thereof.[6]

Legal status of a medicinal product and a dietary supplement

Products available for purchase in a pharmacy or pharmacy outlets are mainly associated with medicines and are colloquially called such. In reality, the situation is much more complex, since a pharmacy offers medicinal products available on

1 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, pp. 67–128, p. 67.

2 Ignatowicz, Z., *Reklama produktów leczniczych,* in: Olszewski, W.L. (ed.) *Prawo farmaceutyczne. Komentarz*, Warszawa 2016, p. 604.

3 Supreme Audit Office, *Dopuszczenie do obrotu suplementów diety*, 2017, https://www.nik.gov.pl/ (accessed 01.02.2020).

4 Act of 25 August 2006 on food and nutrition safety, Dz.U. (Journal of Laws) of 2006, No. 171, item 1225, as amended, hereinafter also FNSA.

5 Mokrysz-Olszyńska, A., *Reklama suplementów diety jako wyzwanie dla ustawodawcy i regulatora*, "Roczniki Administracji i Prawa" 2016, Vol. 16(2), pp. 234.

6 Ministry of Health, *Polityka Lekowa Państwa 2018–2022*, 2018, https://www.gov.pl/web/zdrowie (accessed 01.02.2020).

prescription (Rx or Rp), without prescription (OTC), medical devices, dietary supplements and cosmetics.[7]

In compliance with Article 2 par. 32 of the Act – the Pharmaceutical Law (hereinafter PhL): 'a medicinal product shall mean any substance or combination of substances presented as able to prevent or treat diseases, or administered with a view to making a medical diagnosis or to restoring, correcting, or modifying physiological functions of an organism through pharmacological, immunological or metabolic action'.[8] Among many tasks of the Chief Pharmaceutical Inspectorate stipulated in the aforementioned Act, the most important for the protection of human health and life is the supervision over the quality of medicinal products. The tasks of the Main Pharmaceutical Inspector are specified in details in Article 115 PhL, including, among others, issuing decisions in the scope of giving consent (refusing to give, amending, withdrawing) to manufacturing medicinal products, issuing decisions ordering cessation of broadcasting or carrying out the advertising of medicinal products non-compliant with binding provisions.

Whereas, in compliance with Article 3 par. 3 point 39 of the Act of 25 August 2006 on food and nutrition safety (hereinafter also FNSA), a dietary supplement is foodstuff aimed at supplementing a normal diet. According to some researchers it would be more accurate to use the phrase 'food supplements'[9]. This phrase was used by the European legislator in Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements.[10] In Poland, the Chief Sanitary Inspectorate is responsible for the trade in this group of products. The procedure consists in submitting by the entrepreneur an application including the name of the product which is verified under an investigation procedure regarding detection of any legal non-compliances and confirmation that the given dietary supplement does not have features of a medicinal product (Article 8 FNSA). In contrast to medicinal products, in the case of dietary supplements, it is not required to conduct clinical research and registration procedure. It has a significant impact on the possibility

7 Regulation of the Minister of Health of 14 November 2008 on the criteria for passing medicinal products to individual availability categories, Dz.U. (Journal of Laws) of 2008, No. 206, item 1292, as amended.

8 Act of 6 September 2001 – Pharmaceutical Law, Dz.U. (Journal of Laws) of 2001, No. 126, item 1381, as amended, hereinafter also PhL.

9 Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, OJ L 183, 12.7.2002, pp. 51–57, p. 51.

10 Szczęsny, R., *Reklama farmaceutyczna i pokrewna*, Warszawa 2010, p. 526.

of confirming safety of a given product, as well as benefits from using it.[11] Furthermore, manufacturers of dietary supplements are not obliged to post on the packaging any information regarding interactions of the supplement with alcohol and other substances or medicines. In compliance with Article 104 par. 1 FNSA, due to the non-adherence to the requirements in the scope of marking, including presentation and advertising of dietary supplements, a financial penalty, imposed by the state voivodeship sanitary inspector in a form of a decision, has been provided for.

Advertising of medicinal products and dietary supplements – selected legal aspects

In compliance with Article 52 par. 1 PhL, advertising a medicinal product means an activity consisting in informing about or encouraging to use medicinal products aimed at increasing the number of issued prescriptions, delivery, sales or consumption of medicinal products. The quoted wording of the Article indicates that the aim of the message is underlined instead of the contents thereof. An advertisement for a medicinal product must not be misleading, it should present the medicinal product objectively and inform about its rational use (Article 53 par. 1).

The Act on food and nutrition safety does not include a definition of an advertisement despite using this concept many times. In compliance with Article 27 par. 5, an advertisement for dietary supplements cannot include information stating or suggesting that a balanced and diverse diet cannot deliver the quantity of nutrients sufficient for the body. Whereas, Article 7 of Regulation No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 states that misleading advertising is forbidden, which can happen, among others, by attributing to the food effects or properties which it does not possess.[12] Moreover, regulations referring to the so-called nutrition and health claims, included in Regulation No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 (Article 12) forbid the use of claims which make reference to recommendations of individual doctors or health professionals in the scope of health.[13]

11 Pierewoj, J., *Suplement diety a bezpieczeństwo konsumentów – wybrane aspekty prawa polskiego oraz prawa Unii Europejskiej*, in: Porzeżyński, M. and Borcuch A. (eds.), *Bezpieczeństwo w erze społeczeństwa informacyjnego. Wyzwania w sferach kultury, marketingu i gospodarki*, Kielce 2019, pp. 110-112.

12 Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ L 304, 22.11.2011, pp. 18–63.

13 Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ L 404, 30.12.2006, pp. 9–25.

The joint principle concerning both medicinal products and dietary supplements consists in the ban on misleading advertisements. In both the national and European Union judicial decisions the premise of misleading the consumer should be considered with the use of 'the average consumer model'.[14] In compliance with the judicial decisions of the Court of Justice, it is a consumer who is sufficiently informed and sufficiently careful and attentive with the consideration of social, cultural and linguistic factors, however, with the simultaneous consideration of preventing abusing customers, features of whom make them especially vulnerable to unfair commercial practices.[15] Therefore, it should be underlined that recipients of advertisements for medicine are a special group of consumers, often with lowered ability to perceive and conduct a reasonable and critical assessment of messages targeted at them. Furthermore, a large group of consumers of medicinal products are also seniors.

The umbrella branding and advertisement of medicinal products and dietary supplements

The only similarity between medicines and dietary supplements consists in their form and shape, since in both cases those are tablets, capsules, sachets. A consumer or a patient can mistake a dietary supplement for a medicine; it is possible in three variants:

1) the consumer purchasing a dietary supplement while believing that they are buying a medicine they intended to purchase (e.g. due to the identical trademark);

2) purchasing a dietary supplement while believing that, if its trademark is very similar to the medicine, it has identical therapeutic use as the medicine;

3) purchasing a medicine while believing that they are buying a dietary supplement.[16]

The Report of the Supreme Audit Office indicates a number of irregularities concerning dietary supplement advertisements,[17] one of them being the abuse of the umbrella branding in the pharmaceutical sector. It consists in the introduction

14 Case C-210/96 – *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt*, ECLI:EU:C:1998:369.

15 Kondrat, M. et al., *Prawo suplementów diety*, Warszawa 2012, p. 60.

16 Roszak, M., *Granice stosowania praktyki umbrella brandingu (znaków parasolowych) na rynku farmaceutycznym*, in: Kępiński, M. (ed.), *Rynek farmaceutyczny, a prawo własności intelektualnej*, Warszawa 2013, p. 139.

17 Supreme Audit Office, op. cit.

of a new product within an already existing umbrella brand.[18] The sales strategy of whole lines of products under the same trademark is aimed at generating profit by increasing the probability of product purchases of the same brand by consumers.[19] The new product usually is not much different in terms of the name, yet at the same time it includes other active substances, and thus has a different effect on the human body.

Introduction of new products within the umbrella branding helps decrease the costs of advertising and marketing, while at the same time promotes a larger number of products with one advertising campaign. Furthermore, it is favourable in dynamic markets with short life-cycle products, since it is easier to convince and gain the trust of customers who know the given umbrella brand. Increasing interactions between the brand and the customer may lead to the increase in the given brand's value and transfer the increase in value to other products and categories.[20]

It should be underlined that, in principle, umbrella branding is not covered by the object of legal regulations. Whereas application of a uniform umbrella brand for marking a medicinal product and a dietary supplement may constitute an act of unfair competition pursuant to the Act of 16 April 1993 on combating unfair competition, hereinafter also UCA (Article 10 and 3 par. 2).[21] Furthermore, in some cases, provisions of the Act of 23 August 2007 on the prevention of unfair market practices (hereinafter PUMPA) may apply, since unfair market practice refers in particular to, misleading market practice (Article 4 par. 2 and Article 5 par. 1 PUMPA).[22]

As a result of the insufficient legal regulations regarding advertising medicines and dietary supplements, the Minister of Health by Order of 2 June 2016 appointed the team responsible for drawing up amendments to legal acts concerning advertisement of medicinal products and dietary supplements.[23] In the report

18 Fry, J. N., *Family branding and consumer brand choice*, "Journal of Marketing Research" 1986, Vol. 4, No. 3, p. 237, DOI:10.2307/3149455 (accessed 01.02.2020).

19 Blum, J., *Trademarks in the pharmaceutical sector: the dynamic between brands, proprietary names and labelling regulations*, in: Alemanno A. (ed.). *The new intellectual property of health beyond plain packaging*, Cheltenham 2016, p. 133.

20 Mruk, H. et al., *Marketing strategiczny na rynku farmaceutycznym*, Warszawa 2014, p. 78.

21 Act of 16 April 1993 on combating unfair competition, Dz.U. (Journal of Laws) of 1993, No. 47, item 211, as amended, hereinafter also UCA.

22 Act of 23 August 2007 on the prevention of unfair market practices, Dz.U. (Journal of Laws) of 2007, No. 171, item 1206, as amended, hereinafter also PUMPA.

23 Order of the Minister of Health of 2 June 2016 on appointing the Team for regulating the advertising of medicines, dietary supplements and other foodstuff and medicinal products, Dz. Urz. Min. Zdr. (Official Journal of the Minister of Health) of 2016, item 59.

of the Team for regulating the advertising of medicines, dietary supplements and other foodstuff and medical devices of 1 September 2016 it was proposed that, among others, using umbrella brands in the pharmaceutical market be completely banned.[24] In compliance with the position presented by the Supreme Pharmaceutical Chamber, Article 53a of the following wording should be added to the PhL: 'The use of umbrella branding with regard to medicinal products, dietary supplements, other foodstuffs and medical devices shall be forbidden'.

Advertising of medicinal products and dietary supplements – selected practical aspects

While observing advertisements of medicinal products and dietary supplements, a number of irregularities and measures aimed at misleading consumers can be noticed. Dietary supplements are launched, presented and advertised under the name 'a dietary supplement'. If this type of a product is marked with an additional trade name, the phrase 'a dietary supplement' should be placed in the immediate proximity of this name.[25] While watching commercials of dietary supplements it can be observed that this phrase is often written in very small font, often "blurred", which, in practice makes this information invisible for consumers.[26] At the same time, paragraph 2 of Article 7 of the Unfair Commercial Practices Directive sets forth that it shall also be regarded as a misleading omission when a trader hides or provides 'the material information in an unclear, unintelligible, ambiguous or untimely manner'.[27]

A frequent measure applied in advertising dietary supplements is to use the image of a person from the medical or pharmaceutical circles, as well as reference to the recommendations of persons with such education. It causes the recipients of such advertisements to have a misleading perception of the product, since the

24 The Ministry of Health, *Raport Zespołu ds. uregulowania reklamy leków, suplementów diety i innych środków spożywczych oraz wyrobów medycznych,* 2016, https://www.gov.pl/web/zdrowie/ (accessed 20.02.2020).

25 Supreme Audit Office, op. cit.

26 Makowska, M. and Jasiński, Ł., *A discussion of the unresolved 2016/17 plans for regulating the Polish dietary supplements market*, "Health Policy" 2019, Vol. 123, No. 6, p. 557, DOI: 10.1016/j.healthpol.2019.04.001 (accessed 1.02.2020).

27 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, pp. 22–39, p. 27.

willingness to purchase a given product is mainly based on the authority of persons presented in the advertisement.[28]

The Act on the prevention of unfair market practices provides consumers with protection in the case of entrepreneurs applying unfair practices, that is, entrepreneurs' non-compliance with good practices and significantly distorting or possibly distorting the market behaviour of an average consumer before conclusion of a contract regarding the product, during or after the conclusion thereof. With regard to advertising, unfair market practices include, among others: advertising a product similar to a product of another entrepreneur in a manner purposefully suggesting to the consumer that this product has been manufactured by the same entrepreneur, if it is not compliant with the truth (Article 7 point 13 PUMPA), or stating that the product is able to cure diseases, disorders or malformations, if it is not compliant with the truth (Article 7 point 17 PUMPA).

Moreover, it is inadmissible to use phrases suggesting that the given dietary supplement has features preventing diseases. The Supreme Administrative Court in its judgement of 25 November 2011 deemed such phrases as stating that a given dietary supplement recommended in case of feeling bad while travelling: 'helps in ailments', 'is a solution for motion sickness', 'does not cause side effects'.[29] The message was deemed as one that can imply to a potential consumer that consuming this product helps in ailments and even treats them as in the case of medicinal products. Furthermore, the court stated that the phrase 'does not cause side effects' can be identified by an average consumer without in-depth knowledge in the scope of the pharmaceutical law with the term 'adverse reactions', whereas the latter was used in Article 2 point 3 PhL, and is used with regard to medicines.

In compliance with Article 3 par. 2 of the Act on combating unfair competition, misleading markings of goods or services constitutes an act of unfair competition. Moreover, in compliance with Article 10 of this Act, marking goods in a manner that may be misleading for customers with regard to their origin, quantity, quality, ingredients, manner of production, usefulness, possibility to apply, repair, possibility of maintenance or other significant features of goods or services, as well as concealing the risk related to application thereof is forbidden. Article 16 UCA bans illegal and misleading advertisements, which can influence consumers' decisions regarding purchasing goods. The aforementioned regulations can apply in horizontal relation towards entities in mutual competitive relations, since the behaviour of one of them violating the law influences gaining market advantage with regard to

28 Judgement of the Court of Appeal in Warszawa of 16 September 2014, VI ACa 1858/13.

29 Judgement of the Supreme Administrative Court of 25 November 2011, II OSK 1689/10 NSA.

the competitor not applying such practices. Moreover, in the scope of advertising, an act of unfair competition comprises a message referring to consumers' feelings by causing fear or exploiting the gullibility of children.[30]

The Act on competition and consumer protection[31] gives the President of the Office of Competition and Consumer Protection the competence to issue decisions regarding practices violating the collective interests of consumers. In compliance with Article 106 of the indicated legal act, the amount of the financial penalty imposed on the entrepreneur cannot be higher than 10 % of the turnover generated in the financial year preceding the year of imposing the penalty, if this entrepreneur even unintentionally violates the collective interests of consumers.

In 2017 the President of the Office of Competition and Consumer Protection identified advertisements of dietary supplements disseminated in the years 2015 and 2016 as a practice violating collective interests of consumers and pursuant to Article 106 par. 1 point 4 of the said Act imposed a financial penalty in the amount of almost PLN 26 million.[32] The questioned video messages misled consumers with regard to the product's features, usefulness, capacities and expected results of using the product, as well as related benefits of dietary supplements by suggesting that this product has medicinal properties. Furthermore, in the course of the proceedings, upon the commission of the Office of Competition and Consumer Protection, sociological research concerning the impact of the commercials in question on the understanding and perception of advertised dietary supplements by consumers was conducted. The research showed that a large group of consumers believed that the advertised products have medicinal properties.

As a result of the appeal against the decision of the President of the said Office, the District Court in Warszawa in its judgement of 13 January 2020 indicated that the Act on competition and consumer protection provides the President of the Office of Competition and Consumer Protection with the general competence to issue decisions in matters regarding practices violating collective interests of consumers.[33] In compliance with Article 103 par. 1 point 1b FNSA, non-adherence to the requirements in the scope of marking foodstuffs is punishable with a financial penalty in the amount of up to thirty times the average monthly remuneration in

30 Kondrat, M., op. cit., p. 73.

31 Act of 16 February 2007 on competition and consumer protection, Dz.U. (Journal of Laws) of 2007, No. 50, item 331, as amended, Article 24 and Article 106.

32 Decision of the President of the Office of Competition and Consumer Protection of 12 October 2017, no. DOIK 5/2017.

33 Judgement of the Regional Court, the Court of Competition and Consumer Protection of 13 January 2020, XVII AmA 12/18.

the national economy for the preceding year, imposed by the relevant state voivodeship sanitary inspector in the form of a decision. The Court of Competition and Consumer Protection in its judgement indicated that in compliance with the principle *lex specialis derogat legi generali* Article 103 par. 1 point 1b FNSA excludes from competences of the President of the Office of Competition and Consumer Protection the possibility to impose financial penalties for practices against collective interests of consumers, the illegality of which consists in infringing the above norm. It should be noticed that financial penalties, which may be imposed pursuant to Article 103 par. 1 point 1b FNSA due to misleading advertisements of dietary supplements, are not acute.

Conclusions

Advertisements for pharmaceutical products and dietary supplements often mislead patients or consumers and expose them to negative health consequences; thus, consumers are not sufficiently covered with relevant legal protection. Due to the specific features differentiating medicines from other products, relevant legal regulations concerning advertisement thereof are necessary. The aim of those provisions should be to minimise the situation of consumption thereof unjustified with medical reasons, since using medicinal products always involves a health risk. Adverse reactions or even detrimental interactions cannot be excluded. Medicinal products and dietary supplements are available in pharmacies and, what is more, dietary supplements are often presented in advertisements similarly to medicinal products. Therefore, there is a close relationship with advertisement of these product categories, however, in the current legal status, this issue is regulated in an extremely different manner. A necessary measure aimed at strengthening the legal protection of patients and consumers undoubtedly involves regulation of the practice of umbrella branding, which is often applied to medicinal products and dietary supplements.

Moreover, control tests conducted among consumers before launching products can be introduced in order to verify consumers' behaviours with regard to products belonging to different categories. Packaging and name should properly differ from existing products so that consumers can easily differentiate the new product with changed ingredients. Conducting diagnostic tests in order to verify whether a given product can be safely differentiated within a given product category and whether using the product is safe. Such measures will help disclose and possibly prevent certain problems related to the usefulness of a given new product. At the same time, it should be noted that sometimes the penalties for misleading advertising are not high enough.

References

Blum, J., *Trademarks in the pharmaceutical sector: the dynamic between brands, proprietary names and labelling regulations*, in: Alemanno A. (ed.). *The new intellectual property of health beyond plain packaging*, Cheltenham 2016.

Fry, J.N., *Family branding and consumer brand choice*, "Journal of Marketing Research" 1986, Vol. 4, No. 3, DOI:10.2307/3149455.

Ignatowicz, Z., *Reklama produktów leczniczych*, in: Olszewski, W.L. (ed.) *Prawo farmaceutyczne. Komentarz,* Warszawa 2016.

Kondrat, M. et al., *Prawo suplementów diety*, Warszawa 2012,

Ministry of Health, *Polityka Lekowa Państwa 2018–2022*, 2018, https://www.gov.pl/web/zdrowie.

Makowska, M. and Jasiński, Ł., *A discussion of the unresolved 2016/17 plans for regulating the Polish dietary supplements market*, "Health Policy" 2019, Vol. 123, No. 6, DOI: 10.1016/j.healthpol.2019.04.001.

Mokrysz-Olszyńska, A., *Reklama suplementów diety jako wyzwanie dla ustawodawcy i regulatora*, "Roczniki Administracji i Prawa" 2016, Vol. 16(2).

Mruk, H. et al., *Marketing strategiczny na rynku farmaceutycznym*, Warszawa 2014.

Pierewoj, J., *Suplement diety a bezpieczeństwo konsumentów – wybrane aspekty prawa polskiego oraz prawa Unii Europejskiej*, in: Porzeżyński, M. and Borcuch, A. (eds.), *Bezpieczeństwo w erze społeczeństwa informacyjnego. Wyzwania w sferach kultury, marketingu i gospodarki*, Kielce 2019.

Roszak, M., *Granice stosowania praktyki umbrella brandingu (znaków parasolowych) na rynku farmaceutycznym*, in: Kępiński, M. (ed.), *Rynek farmaceutyczny, a prawo własności intelektualnej*, Warszawa 2013.

Supreme Audit Office, *Dopuszczenie do obrotu suplementów diety*, 2017, https://www.nik.gov.pl/.

Szczęsny, R., *Reklama farmaceutyczna i pokrewna*, Warszawa 2010.

Ministry of Health, *Raport Zespołu ds. uregulowania reklamy leków, suplementów diety i innych środków spożywczych oraz wyrobów medycznych*, 2016, https://www.gov.pl/web/zdrowie/.

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Refusal to implement European social partners' agreements: recent practice of the Commission

Abstract

European social partner agreements negotiated on the basis of Article 155 TFEU may be implemented at the level of the European Union at the joint request of the parties via a Council decision. Unlike the autonomous implementation, this 'institutional' method transforms the agreement into an EU legal act. This text analyses the refusal of the European Commission to submit to the Council, an Agreement that establishes a general framework for informing and consulting civil servants and employees of central government administrations which was concluded within the EU Social Dialogue Committee for the Central Government Administration. It discusses the scope of the Commission's competence to refuse to submit the agreement to the Council for implementation. Moreover, it presents a polemic on the judgment of the EU General Court that confirmed the European Commission's broad scope of competence in refusing to submit to the Council a proposal for a decision to implement the agreement. The author argues that giving the Commission such a large margin of appreciation could undermine the European social dialogue. Moreover, the author explains why the above-mentioned Agreement should be implemented via a Council decision.

Keywords: Article 155 TFEU, agreements of European social partners, implementation of agreements, right to information and consultation, public administration

Introduction

European social partners, namely European employers' organisations and trade unions deemed to be representative according to European Commission[1] statements,[2] have played an important role in shaping European Union (EU) social policy since the 1990s.[3] For example, several Agreements concluded by the European social partners on the basis of Article 155 TFEU[4] (ex Article 138 TEC[5]) were aimed at establishing minimum labour standards in all the Member States, while Article 152 TFEU strengthened the legal basis of negotiations guaranteeing the autonomy of the social partners. In line with the principle of autonomy, European social partners may initiate bilateral negotiations on freely chosen subjects, even without formal incentives from the Commission under Article 154 TFEU. Moreover, the subject scope of the agreement may extend beyond the fields of the European social policy specified in Article 153 TFEU. In addition, the dialogue of the European social partners may be held on a cross-industry or sectoral level. In the latter case, it is carried out within Sectoral Social Dialogue Committees.[6] In order to enforce a given agreement in the Member States, it is necessary to implement it.

According to Article 155 second sentence TFEU, the implementation of European social partner agreements takes place either in accordance with the procedures and practices specific to management and labour and the Member States or in matters covered by Article 153 TFEU at the joint request of the signatory parties by a Council 'decision' (in practice, a directive) on a proposal from the Commission. This provision gives priority to autonomous implementation, but the effectiveness of this method is questioned. In fact, it leads to different results in different countries and does not always guarantee that agreements are properly implemented. For that reason, implementation by a Council decision ('institutional' implementation) on a proposal from the Commission is often preferred by the

1 Hereinafter referred to as 'the Commission'.

2 See Commission communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM(93) 600 final.

3 For more details on European Social Partners' agreements see: Welz, C., *The European social dialogue under Articles 138 and 139 of the EC Treaty: actors, processes, outcomes*, Alphen aan den Rijn 2008.

4 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

5 Treaty establishing the European Community (Consolidated version 2002), OJ C 325, 24.12.2002, pp. 33–184.

6 Acting on the basis of the Commission Decision of 20 May 1998 (98/500/EC) on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level, OJ L 225, 12.8.1998, pp. 27–28.

European social partners, as it leads to the transformation of an agreement into a source of EU law with all its legal consequences. The question remains how large the margin of appreciation of the Commission concerning the submission to the Council of a proposal for a decision to implement the agreement is. It seems that excessive powers of the Commission in this realm may have a freezing effect on the European Social Dialogue (ESD). Therefore, it is important that the Commission applies clear and coherent rules executing its administrative powers to submit or not to submit an agreement to the Council for implementation. These issues will be discussed on the basis of EU law, the case law of the EU General Court, as well as the documents and practice of the Commission, with special focus on the Commission's refusal to submit to the Council for implementation the Agreement of 21 December 2015 establishing the general framework for informing and consulting civil servants and employees of central government administrations (referred to as the I&C Agreement of 2015).

Conditions for an 'institutional' implementation

Article 155 TFEU states that the 'institutional' implementation is restricted only to such agreements that concern matters covered by Article 153 TFEU. The implementation by a Council decision is thus only possible if the content of the agreement is limited to the fields of social policy stipulated in Article 153 TFEU. Moreover, several communications of the Commission complete the list of conditions to be fulfilled by social partners and also relating to the content of the agreement.[7] Even though the non-binding nature of the communications is evident, these types of documents in fact defined various aspects of the ESD, from the definition of the concept of representativeness and different elements of the procedure of consultations and negotiations, to conditions of the implementation of negotiated agreements.

Therefore, according to the communications, the Commission, before submitting to the Council a proposal to enact an agreement, carries out an assessment

7 See respective Commission communications, concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament, COM(93) 600 final; adapting and promoting the social dialogue at Community level, COM(98) 322 final; European social dialogue, a force for innovation and change, COM(2002) 341 final; and Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue, COM(2004) 557 final.

comprising a consideration of the representative status of the contracting parties,[8] their mandate, and the legality of each clause in the collective agreement in relation to EU law and provisions regarding small and medium-sized enterprises (SMEs).[9]

The appropriateness of an EU legal act for the implementation of a given agreement may be analysed by the Commission where negotiations over the agreement have not been preceded by a previous phase of formal consultations.[10] Appropriateness consists of the analysis of subsidiarity and proportionality. In recent years, the assessment criteria have been further extended by the power of the Commission to conduct impact assessments in the case of legislative and non-legislative initiatives or delegated acts, and establishing measures which are expected to have a significant economic, environmental or social effect.[11] The impact assessments cover the existence, scale, and consequences of a problem and the question of whether EU action is needed. The Commission document, called Toolbox (2017),[12] reduced the scope of impact assessments with respect to European social partner agreements, removing the analysis of alternative solutions and focusing especially on the representativeness of signatories, the legality of a given agreement vis-à-vis the EU legal framework, and the respect of principles of subsidiarity and proportionality. Nevertheless, the competence of the Commission to carry out impact assessments of the parties' request to implement an agreement via a Council decision was criticised as encroaching on the European social partners' autonomy.[13]

8 The competence of the European Commission to control the representativeness of the parties to an agreement was admitted by the Court of First Instance [General Court] in *UEAPME* Case (T-135/96), EU:T:1998:128, paras. 86–88.

9 COM(98) 322 final, op. cit., at 19 and COM (2002) 341, para. 2.4.2

10 COM(98) 322 final, op. cit., at 19

11 The Interinstitutional Agreement between the EP, the Council of the EU, and the European Commission on better law-making of 13 April 2016 (paras. 12–18), OJ L 123, 12.5.2016, pp. 1–14.

12 Point 11. Better regulation "Toolbox' SWD(2017) 350, European Commission, https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en (accessed 01.08.2020)

13 See Garben, I. and Govaere, S., *The multi-faceted nature of better regulation,* in: Garben, I. and Govaere, S. (eds.), *The EU Better Regulation Agenda: a critical assessment*, Oxford 2018, p. 7, and the ETUC declaration on 'Better Regulation' adopted at the ETUC Executive Committee on 17–18 June 2015, https://www.etuc.org/en/document/etuc-declaration-better-regulation (accessed 01.08.2020).

The Commission practice to refuse the 'institutional' implementation

The first situation where the Commission decided not to submit to the Council the request of the European Social Partners to implement an agreement via a directive concerned the European framework Agreement of 26 April 2012 on the protection of occupational health and safety in the hairdressing sector that was concluded between Coiffure EU and UNI Europa Hair & Beauty.[14] This decision was justified by the will of the Commission to avoid imposing burdens on small businesses.[15] In 2016, the revised agreement[16] was signed by the same parties with a view to implementing it via a directive. However, so far, the agreement has still not come into effect.

Similarly, the Commission decided not to make a proposal to the Council concerning the activation of the I&C Agreement of 2015, which was concluded within the EU Social Dialogue Committee for Central Government Administration (SDC CGA) by TUNED[17] (bringing together CESI[18] and EPSU[19]) and EUPAE.[20] In a letter dated 5 March 2018,[21] the Commission informed the parties to the agreement that it would not request that the Council implements the agreement at the EU level. Two arguments were presented to justify this decision. Firstly, the Commission noted that central government administrations are placed under the authority of national governments and exercise the powers of public authority. Therefore, their structure, organisation, and operation, according to the Commission, fall under

14 See Broughton, A., *Commission rejects proposed agreement in hairdressing sector*, 18.11.2013, Eurofound, https://www.eurofound.europa.eu/publications/article/2013/commission-rejects-proposed-agreement-in-hairdressing-sector (accessed 01.08.2020).

15 Vogel, L., *The fight to protect the hairdressers' health: the inside story*, 2018, ETUI, https://www.researchgate.net/publication/325929496_The_fight_to_protect_hairdressers'_health_the_inside_story_2018/citation/download (accessed 01.08.2020)

16 Coiffure EU, UNI Europa Hair & Beauty, European framework agreement on the protection of occupational health and safety in the hairdressing sector of 23 June 2016, http://www.uni-europa.org/wp-content/uploads/2016/06/EFA_OHS_HairdressingSector_signed_20160623.pdf (accessed 01.08.2020).

17 Trade Unions' National and European Administration Delegation.

18 European Confederation of Independent Trade Unions.

19 The European Federation of Public Service Unions.

20 European Public Administration Employers.

21 The letter is published on the EPSU website. A letter from Director-General Michel Servoz to Ms Britta Lejon, Chair of the EU Social Dialogue Committee for Central Government Administrations and TUNED's chair and to Mr Hector Casado López, EUPAE's Chair, 05.03.2018, https://www.epsu.org/sites/default/files/article/files/EC%20refusal%20letter%205%20March%202018.PDF (accessed 01.08.2020).

the competence of the respective national authorities. Secondly, the refusal was based on the fact that the degree to which administration is decentralised varies from one country to another and, therefore, would result in different proportions of public sector employees excluded from the scope of the requested EU legislation.[22]

The annulment of the above-mentioned decision of the Commission was requested, pursuant to Article 263 TFEU, by EPSU and W. Goudriaan, its General Secretary, before the General Court (EGC)[23] in case T-310/18. First of all, the applicants claimed that the contested decision was an act adopted in breach of Article 155(2) TFEU and contrary to the requirement that the autonomy of the social partners be respected, as enshrined in Article 152 TFEU. In their opinion, the Commission lacked the power to refuse to propose that the Council makes real the Agreement by its decision, in the absence of any objection either to the representative status of the parties to the Agreement or to its legality. The applicants argued that the Commission was bound by a duty to make a proposal to the Council – unless it produced justified grounds that the social partners who were party to the Agreement were not sufficiently representative or that the agreement was not lawful. It was also claimed that the Commission was not entitled to assess the appropriateness of the Agreement.

Moreover, the applicants alleged that the contested decision was flawed by reasons which were manifestly mistaken and ill-grounded, and finally that the Commission failed to undertake any impact assessment and so could not justify on grounds of proportionality or subsidiarity any conclusion to refuse to propose that the Agreement be implemented as a directive by a Council decision, even if in principle it was permissible to do so.

By its judgment of 24 October 2019, the EGC dismissed the action for annulment of the above-mentioned decision. In its reasoning, the EGC highlighted in particular the Commission's power of discretion in deciding whether to present the agreement to the Council for implementation, its capacity to examine the appropriateness of such implementation in the light of the aims of the EU in any case, and the lack of any error of law in the argumentation for the refusal. The EGC approved particularly of the argument that the possible Council decision establishing agreement could have different scopes of application in EU Member States,

22 See the reasons for the Commission's decision: A letter from Director-General Michel Servoz to Ms Britta Lejon, Chair of the EU Social Dialogue Committee for Central Government Administrations and TUNED's chair and to Mr Hector Casado López, EUPAE's Chair, 05.03.2018, https://www.epsu.org/sites/default/files/article/files/EC%20refusal%20letter%205%20March%202018.PDF (accessed 01.08.2020).

23 Case T-310/18, *EPSU and Goudriaan v. Commission*, EU:T:2019:757.

due to the varying degrees of decentralisation of public administration among EU Member States. The Court also emphasised the alleged adverse influence of the agreement on the functioning of the central government administrations of the Member States. The dismissal of the action for annulment was also justified by the fact that in several Member States, the right to information and consultation in the central administration is already enforced. Moreover, the EGC rejected the concept of 'horizontal subsidiarity' within social policy, as the EGC assigned no role to the Commission communications in the shaping of the European Social Dialogue (ESD). The case is now under appeal before the Court of Justice (ECJ).[24]

The reasoning of the Commission in the administrative decision-making procedure and of the General Court refusing to annul the above-mentioned decision in the procedure pursuant to Article 263 TFEU raises doubts over its correctness. In order to indicate flaws in this reasoning it is necessary first to analyse the content and meaning of the I&C Agreement of 2015.

The I&C Agreement of 2015

Background

Article 153 (1) TFEU establishes the power of the European Union to act in the field of "the information and consultation of workers" not restricting it to undertakings. However, EU directives concerning the right to information and consultation with workers' representatives at the national level – namely, Directives 98/59/EC, 2001/23/EC, and 2002/14/EC – do not cover public administration employees.[25] This exclusion is not justified.

The European Parliament (EP), in its resolution of 19 February 2009 on the implementation of Directive 2002/14/E,[26] expressed the wish to guarantee that public administration employees and employees in the public and financial sectors

24 Case C-928/19 P, *EPSU v. Commission*.

25 See Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, pp. 16–21; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses, OJ L 82, 22.3.2001, pp. 16–20; and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council, and the Commission on employee representation, OJ L 80, 23.3.2002, pp. 29–34.

26 (2008/2246(INI)) (2010/C 76 E/03), para. 16.

enjoy the same rights to information and consultation as are granted to other groups of employees.

In April 2015, the Commission started first phase consultation with social partners on the basis of Article 154 TFEU on consolidating the EU Directives on the informing and consulting of workers.[27] One of the intentions of the Commission launching the first-phase consultation was to invite European social partners to assess whether directives concerning the information and consultation rights at the national level need to be reviewed in order to include public administration workers within their personal scope of application.[28] The Commission underlined two aspects which would support extending the EU information and consultation rights to public administration, namely massive restructuring – resulting in redundancies and changes in working conditions – and increasing the role of a 'private' employment contract in the public sector in the Member States.[29]

In response to the first phase consultations,[30] cross-industry European employers organisations, BusinessEurope[31] and the CEEP[32], did not demonstrate a positive attitude towards the possible extension of information and consultation rights to the public administration at the EU level. In consequence, the Commission did not launch the second-phase consultations on the need to reform the I&C Directives. However, the social partners, being members of the EU SDC CGA, expressed their will to negotiate the agreement on information and consultation rights within their

27 European Commission, Consultation Document, 'First phase consultation of Social Partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation of workers' C(2015) 2303 final, Brussels, 10.4.2015. See also Laulom, S., *Better regulation and the social acquisition: is the REFIT fit for purpose?* "European Labour Law Journal" 2018, Vol. 9(1), p. 15.

28 See C(2015) 2303 final, op. cit., para. 3.2, pp. 5–6.

29 Ibidem, p. 5.

30 See the ETUC document *First phase consultation on a consolidation of the EU Directives on information & consultation of workers – ETUC answer*, 18.06.2015, EPSU, https://www.epsu.org/sites/default/files/article/files/ec212_1st_phase_ic_consultation_finalresponse_en.pdf (accessed 01.08.2020).

31 A letter from Markus J. Beyrer, Director General of Business Europe, to EC Vice-President Frans Timmermans, Vice-President Valdis Dombrovskis and Commissioner Marianne Thyssen, 29.06.2015, Business Europe, https://www.businesseurope.eu/sites/buseur/files/media/imported/2015-00548-E.pdf (accessed 01.08. 2020).

32 See the CEEP response on First-phase consultation of Social Partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation (I&C) of workers, 29.06.2015, CEEP, https://www.ceep.eu/wp-content/uploads/2015/07/15Response02_CEEP_Response_to_consultation_on_I_C_29_06_2015.pdf (accessed 01.08.2020).

sector.[33] Therefore, the I&C Agreement of 2015 is a result of the previous consultation procedure under Article 154 TFEU, but only in the scope of the sector of central government administration.

Representativeness of the parties

The SDC CGA was established and adopted its internal Rules of Procedure in 2010.[34] The members of the Committee, namely the EUPAE and TUNED,[35] stated in the Preamble to the Rules of Procedure that they mutually recognise each other at all levels as being representative of the interests of employers and employees in the CGA sector in the EU. The study of 2017 confirmed that the EUPAE and TUNED are the most representative organisations in the central administration sector and that both have the capacity to negotiate agreements on behalf of their members.[36]

When the I&C Agreement of 2015 was concluded, the EUPAE consisted of 11 Member States and 5 observer countries, whereas TUNED represented government employees in 27 of the 28 EU Member States.[37] Even though the representativeness of the EUPAE is objectively unsatisfactory, as it had a minority of EU countries as member representatives, it is compliant with Article 1(B) of the above-cited Commission Decision 98/500/EC, which allows sectoral dialogue committees to be set up by organisations that are 'representative of several Member States'. The EUPAE, as well as the CESI and the EPSU are listed in the catalogue of representative European social partners' organisations consulted by the Commission under Article 154 TFEU.[38]

33 See Response to the Consultation of the European Commission on a consolidation of the EU Directives on information and consultation of workers, 2.06.2015, EPSU, https://www.epsu.org/article/response-consultation-european-commission-consolidation-eu-directives-information-and (accessed 01.08.2020).

34 Rules of Procedure for the European Social Dialogue Committee for the Central Government Administration Sector in the EU, 17.12.2010, EPSU, https://www.epsu.org/article/rules-procedure-european-social-dialogue-committee (accessed 01.08.2020).

35 TUNED is a joint trade union delegation of affiliates of the European Federation of Public Service Unions (EPSU) and the European Confederation of Independent Trade Unions (CESI).

36 See Eurofound, *Representativeness of the European social partner organisations: Central government administration*, Dublin 2017, pp. 40–41.

37 See *CESI and EPSU sign landmark social partner agreement on right for central administration employees*, 4.01.2016, European Movement International, https://europeanmovement.eu/news/cesi-and-epsu-sign-landmark-social-partner-agreement-on-right-for-central-administration-employees (accessed 01.08.2020).

38 See the document List of consulted organisations, 2017, available on the European Commission website: https://ec.europa.eu/social/main.jsp?catId=522 (accessed 01.08.2020).

Scope and content

The I&C Agreement of 2015 concerns both civil servants and employees of the central government administration. According to Article 3 of the I&C Agreement of 2015, central government administrations are administrations under the authority of governments at the federal, national, and/or equivalent level. The aim and the essence of the agreement is to establish minimum requirements for information and consultation rights of public employees through their representatives in central government administrations. The concepts of information and consultation are visibly influenced by the respective definitions of the Directive 2002/14/EC.

The scope of consultations, according to the agreement, should cover at least, unless defined as wider by national social partners, health and safety at work, working time and work–life-balance policy, and the consequences of decisions on employment conditions that change the organisation of structures and services or when there is a threat to employment. Moreover, remuneration guidelines, employee training, gender equality, non-discrimination measures and social protection specifically applicable to public employees should also be the subject of information and consultation procedures in relation to national legislation and social dialogue. The information and consultation herein should concern proposed measures that cause changes to the situation of public employees.

The application of the I&C Agreement of 2015 may be excluded on the basis of particular provisions in national legislation, in relation to public employees entrusted with sovereign responsibilities, especially national security, public order or judicial power.

The I&C Agreement of 2015, like other previous framework agreements, worded in an appropriate way for implementation via a directive, contains a non-regression clause stating that the requirements defined by it should not constitute valid grounds for weakening of the general level of protection afforded to public employees in the field covered by this agreement. In addition, the I&C Agreement of 2015 does not prevent the application of more favourable national legislation on information and consultation rights, including negotiation rights, to public employees.

In summary, the I&C Agreement of 2015 establishes minimum rights of central government administration employees to information and consultation, regardless of whether they have civil servant status. Thus, the I&C Agreement of 2015 is a successful effort to extend Directive 2002/14/EC to this sector.

The Commission's refusal to implement the I&C Agreement of 2015 and EGC judgment T-310/18

The refusal of the Commission to submit the I&C Agreement of 2015 to the Council for a decision on the implementation is based on the alleged lack of competence of the EU relating to the structure, organisation and functions of public administration and the different scopes of decentralisation of tasks, which leads to varying extents of competencies of the central administration in the Member States.

Firstly, it should be emphasised that, according to the Commission's own rules stemming from its Communication (COM(98) 322 final), an analysis of the agreement focused on its appropriateness may only be carried out by the Commission in cases where no previous consultations under Article 154 TFEU have taken place. In the circumstances under discussion, the consultations in fact did take place, and the Commission was informed on this occasion of the will of the social partners to negotiate the agreement on the I&C in the SDC CGA. As a consequence, the Commission should have restrained its assessment of the agreement to conditions of the representativeness of the parties, the legality of the agreement, and its impact on SMEs, the final point being irrelevant in this context.

Secondly, even if the appropriateness test were legitimately carried out in relation to the I&C Agreement of 2015, the results presented by the Commission still cannot be accepted for the following reasons:

Article 4(2) TEU guarantees the respect of the organisational autonomy of the Member States, including their fundamental political and constitutional structures. In particular, national security remains the sole responsibility of the Member States. However, this does not mean that establishing minimum standards concerning the right to information and consultation in public administration would undermine the exclusive prerogatives of the Member States to shape their public administration structure, organisation and functions. In fact, instituting rules for information and consultation throughout the EU does not affect the very essence of central administration; it only extends the civilised, internationally promoted standards of social dialogue to employees of this sector.

It should be also added that a simple extension of the existing directives to the sector of public administration would not be an appropriate tool. The above-cited Directives, namely 98/59/EC, 2001/23/EC, and 2002/14/EC, were construed in a way to cover the undertakings of the private sector and not that of public administration bodies with regard to their material scope. The subjects of information and consultation, the procedures, and the confidentiality issues are different in the private and public sectors to a large extent. The nature of public administration

requires a separate act to provide the employees of this sector with mechanisms relevant to them.

Additionally, the Commission cannot justify its refusal on the basis of different scopes of the central administration among the Member States. Logically, public administration as such also has different dimensions in different Member States, but this fact did not prevent the Commission consulting the European social partners on the appropriateness of EU action in this field.

The judgment of the EGC (in case T-310/18) dismissing action for annulment of the above-cited decision introduced pursuant to Article 263 TFEU appears to be neglecting the practice of the Commission concerning the scope of assessment of agreements which was set up through a series of communications. The EGC justifies the large margin of competence of the Commission to reject the requests of the European social partners on the basis of Article 17(1) TEU, which states that the Commission shall promote the general interests of the Union and take appropriate initiatives to that end. It therefore seems that the EGC is following the path adopted in its case law concerning the European Citizens Initiative (ECI),[39] allowing broad discretion of the Commission in deciding whether or not to take action following an ECI pursuant to Article 17(1) TEU.[40]

Moreover, the EGC states in the judgment in case T-310/18 that Commission's communications are devoid of any binding legal force (point 102 of the judgment). However, the practice elaborated on the basis of these communications has never been questioned and has been applied on a regular basis for twenty years within the realm of the ESD.

Similarly, neither the above-cited interinstitutional agreement between the EP, the Council of the EU, and the Commission on better law-making – which established the procedure of impact assessments – nor the limitations on the appropriateness analysis relating to the European social partners' agreements established by the Commission, were taken into consideration by the EGC.

39 The European Citizens Initiative is established in Article 11(4)TEU, which states that no less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the EU is required for the purpose of implementing the treaties.

40 Case T-561/14, *European Citizens' Initiative One of Us*, ECLI:EU:T:2018:210, point 169.

It may be thus concluded that the legitimate expectations of the parties to the agreement to have it assessed within the limits delineated in the previous documents of the EU institutions were not respected in this case.[41]

The judgment of the EGC also presents a surprisingly 'fresh' insight into the theory of the ESD. It negates the existence of the principle of 'horizontal subsidiarity', which was commonly acknowledged in the European academic doctrine.[42] This principle refers to the system guaranteed under Articles 154–155 TFEU, which gives priority to collective negotiations of the European social partners over the legislative initiative of the Commission in the field of European social policy. In fact, the whole logic of the ESD is based on the will of EU legislation to give the European social partners priority in handling labour law issues that must be dealt with at the EU level.

Securing the Commission's absolute freedom to refuse to submit the agreement to the Council for implementation would deprive the European social partners of any constructive role in the process. They would be discouraged from requesting the implementation of an agreement via a Council decision, as the result could be arbitrary and unpredictable. As a consequence, the second method of implementation, namely the autonomous one, would be applied instead, which in fact is recommended by the EGC. However, as the implementation reports and studies show, the autonomous implementation leads to very different results among the EU countries, depending on the strength of national social partners.[43] The effectiveness of the autonomous implementation in central government administrations is particularly dubious, as certain EU countries are not represented in this sectoral committee.

Moreover, the fact that several Member States have already introduced mechanisms for information and consultation in their central governmental administrations cannot serve as an argument against adopting a legal act harmonising the minimum standards across the whole EU. On the contrary, this argument shows that discrepancies in the level of exercise of the right to information and consultation

41 For more on the protection of legitimate expectations, see Schwarze, J., *European administrative law*, London 2006, p. 868.

42 Cf. Bercusson, B., *The EU Charter of Fundamental Rights and the Constitution of the European Union*, in: Bercusson, B. (ed.), *European labour law and the EU Charter of Fundamental Rights*, Baden-Baden 2006, p. 483, or Welz, C., op. cit., pp. 190–194. See also Delfino, M., *The reinterpretation of the principle of horizontal subsidiarity in European social law*, "WP CSDLE 'Massimo D'Antona'. INT" 2020, No. 152, pp. 2–13.

43 See also Skupień, D., *European social partners' agreements – current situation and perspectives*, in: Pichrt, J. et al. (eds.), *Obrana pracovního práva. The defence of labour law. Pocta prof. JUDr. Miroslavu Bělinovi*, Praha 2020, pp. 554–555.

persist and should be eliminated. The influence of the possible directive on the organisation of the central government administration is not an argument, either. Provisions concerning the free movement of workers or non-discrimination directives also concerned the organisation of administration, but this fact did not prevent them being adopted.

At the end of this analysis, we should draw attention to the similarities between the recent practice of the Commission in the realm of the ESD and the reality of the European Citizens Initiative, which was established in 2012 as a tool to promote participative democracy in the EU and has yielded little to no results so far, due especially to refusals of the Commission to engage in legislative activity as a consequence of the ECI.[44] The recent reform of the ECI introduced by Regulation (EU) 2019/788[45] strengthens the guarantees that the Commission will properly examine the ECI, in particular, establishing a clearer timetable of Commission actions (Article 15) in comparison with the previous Regulation, (EU) 211/2011.[46] Even though the ECI framework allows for the refusal of the Commission to take any legislative measure as a follow-up of the ECI, it must at least establish in the communication the reasons not to take it. Such communication shall be addressed not only to the group of organisers of the ECI, but also to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and shall be made public. According to Recital 28 of the Preamble to Regulation (EU) 2019/788, the Commission should explain in a clear, comprehensible, and detailed manner the reasons for its intended action, including whether it will adopt a proposal for a legal act of the Union in response to the initiative, and it should likewise provide reasons if it does not intend to take any action. The Commission should examine initiatives in accordance with the general principles of good administration, as set out in Article 41 of the Charter of Fundamental Rights of the European Union[47]. Requirements concerning the treatment of an ECI may be a source of inspiration for the future Commission conduct in decision-making

44 As results from the Bertelsmann Stiftung Study, no legislative acts were adopted by the EU institutions as a result of ECIs. See Hierlemann, D. and Huesmann, C., *More initiative for Europe's citizens, future of democracy*, 02.2018, Bertelsmann Stiftung, https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/ZD_EINWURF_2_2018_EN_final2.pdf (accessed 01.08.2020).

45 Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, OJ L 130, 17.5.2019, p. 55–81, which came into force 1 January 2020 and repeals the previous Regulation (EU) 211/2011.

46 Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65, 11.3.2011, pp. 1–22, effective 1 April 2012.

47 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

process concerning the submission of European Social Partners' Agreements to the Council for a decision on implementation.

Conclusion

The right to information and consultation should be the right of every worker, irrespective of the sector or his/her employment status. Workers of the administration sector should not be excluded from the application of this right to information and consultation. Such exclusion cannot be justified by the national competence to decide on the structure, organisation, and functions of the administration. As this right is not guaranteed by all Member States in the administration sector, the EU should have the power to extend the application of it to this sector using its own measures. The I&C Agreement of 2015 was a step in the right direction, but it was blocked by the Commission's decision not to submit it to the Council for the implementation.

The above-mentioned decision was not properly justified. It was adopted with disrespect for the rules concerning the possible scope of assessment of agreements, established by the Commission itself. The judgment of the EGC dismissing the action for annulment of this decision should also be criticised. It neglected the administrative practice of the Commission that allowed the assessment of 'appropriateness' only in cases where there were no previous consultations on the given matter. Even though the agreement does not cover all employees of the public administration and is limited to the central government administration, this circumstance itself cannot be an obstacle to the 'institutional' implementation of the agreement. Its personal scope could be further supplemented with the Commission's appropriate legislative initiative.

To summarise, the recent practice of the Commission and the following judgment of the EGC introduce much uncertainty to the ESD procedure and may even discourage European social partners to negotiate agreements in the future.

It is therefore postulated that an EU legislative act (preferably a regulation)[48] be adopted in order to precise such aspects as: the scope of control of the European social partners' agreements by the Commission, clear conditions of Commission's refusal not to submit a proposal to the Council for the agreement's implementation as a follow-up of the request of the given agreement's parties, the obligation to reveal the reasons of refusal in a public document, as well as the timetable of

48 For more on the need of regulation in the realm of the ESD, compare Skupień, D., *Porozumienia europejskich partnerów społecznych*, Toruń 2016, p. 348.

Commission's actions while dealing with the agreement. Without transparent rules, the ESD will become an instrument at the mercy of the Commission with disrespect of the autonomy of European social partners.

References

Bercusson, B., *The EU Charter of Fundamental Rights and the Constitution of the European Union*, in: Bercusson, B. (ed.), *European labour law and the EU Charter of Fundamental Rights*, Baden-Baden 2006.

Broughton, A., *Commission rejects proposed agreement in hairdressing sector*, 18.11.2013, Eurofound, https://www.eurofound.europa.eu/publications/article/2013/commission-rejects-proposed-agreement-in-hairdressing-sector.

Delfino, M., *The reinterpretation of the principle of horizontal subsidiarity in European social law*, "WP CSDLE 'Massimo D'Antona' INT" 2020, No. 152.

Garben, I. and Govaere, S., *The multi-faceted nature of better regulation*, in: Garben, I. and Govaere, S. (eds.), *The EU Better Regulation Agenda: a critical assessment*, Oxford 2018.

Hierlemann, D. and Huesmann, C., *More initiative for Europe's citizens, future of democracy*, 02.2018, Bertelsmann Stiftung, https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/ZD_EINWURF_2_2018_EN_final2.pdf.

Laulom, S., *Better regulation and the social acquisition: is the REFIT fit for purpose?*, "European Labour Law Journal" 2018, Vol. 9(1).

Schwarze, J., *European administrative law*, London 2006.

Skupień, D., *European social partners' agreements – current situation and perspectives*, in: Pichrt, J. et al. (eds.), *Obrana pracovního práva. The defence of labour law. Pocta prof. JUDr. Miroslavu Bělinovi*, Praha 2020.

Skupień, D., *Porozumienia europejskich partnerów społecznych*, Toruń 2016.

Vogel, L., *The fight to protect the hairdressers' health: the inside story*, 2018, ETUI, https://www.researchgate.net/publication/325929496_The_fight_to_protect_hairdressers'_health_the_inside_story_2018/citation/download.

Welz, C., *The European social dialogue under Articles 138 and 139 of the EC Treaty: actors, processes, outcomes*, Alphen aan den Rijn 2008.

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Zoning fee as a public levy

Abstract

The zoning fee constitutes a public levy paid to the commune by the owners or perpetual usufructaries of properties. The purpose of the zoning fee is to compensate for the costs incurred by the local government units due to the adoption or change of the local spatial development plans.

The discussed fee may be collected pursuant to the provisions of local law if the market value of the property increased due to the implementation of a new or amended local spatial development plan.

It should be observed that the zoning fee is an element of settling accounts between the commune and entities, whose property value changed with the adoption of the new local spatial development plan or change of the previous plan.

The provisions do not clearly describe the legal nature of the zoning fee. Nonetheless, the public and legal status of the aforesaid fee was confirmed by judicial decisions.

Since the commune is not a taxpayer, the fee constitutes its own income. It is due to the fact that the zoning fee does not follow from the act and does not have an unpaid character. The obligation to pay the zoning fee is the result of a specific spatial policy of the commune.

Even though they were the subject of many judicial decisions, the provisions of the Act of 27 March 2003 on spatial planning and development referring to zoning fees still raise a lot of interpretation doubts as to their amount, date of payment or the very grounds for their existence. The objective of the article is to show the public and legal character of the aforesaid performance. The author is trying to prove that such a measure is by all means necessary, but

its structure requires certain amendments, which was possible by means of the test method in the form of an analysis of legal acts and selected judicial decisions.

Keywords: zoning fee, local spatial development plan, public levy, commune's own income, participation in the costs of spatial planning

Introduction

The zoning fee constitutes a public levy paid to the commune by the land owner. Its purpose is to compensate for the costs incurred by the local government units due to the adoption or change of local spatial development plans.[1]

The regulations included in the Act on Spatial Planning and Development (hereinafter Act)[2] referring to the local spatial development plan constitute the legal basis for determining the amount of the zoning fee. The amount is defined in percentage and may not exceed 30% of the increased land value. The legislator only specified the upper value. The commune's decision-making body is responsible for specifying the appropriate percentage rate.[3]

The competent executive body of the local government unit may request that the owner pay the zoning fee within 5 years from the date of adoption of the local spatial development plan. As a result, a notary is obliged to provide the above-mentioned body with a copy of each agreement, whose subject is the disposal of the property located within the area covered by the local spatial development plan, which entered into force within the last 5 years from the date of its execution.[4]

The spatial planning that establishes the right to use the lands is closely related to the issues of building law by creating the foundations for the investment process.[5]

By analysing the above-mentioned fee, it should be observed that it is an element of settling accounts between the commune and entities whose properties' value changed with the adoption of the new local spatial development plan or with the change of a previous plan. On one hand, the owner or perpetual usufructary, who incurred losses due to the adoption or change of the plan, may demand

1 Strzelczyk, R., *Podatki i opłaty dotyczące nieruchomości*, Warszawa 2016, p. 227.

2 Act of 27 March 2003 on spatial planning and development, consolidated text: Dz.U. (Journal of Laws) of 2020, item 293.

3 Niewiadomski, Z., *Planowanie i zagospodarowanie przestrzenne. Komentarz,* 8th edition, Warszawa 2015, p. 300.

4 Gdesz, M. and Trembecka, A., *Regulowanie stanu prawnego nieruchomości pod drogi*, Katowice 2011, p. 201.

5 Budner, W., *Gospodarka przestrzenna miast i aglomeracji,* 1st edition, Poznań, 2019, p. 30.

compensation from the commune, but on the other, if the land value increased, the commune will impose the fee on such owner or perpetual usufructary.[6]

The expression 'due to the adoption or change of the local spatial development plan' determines the time conjunction of the occurrence of the situation when the increase of the property's value is correlated with the obligation to make a one-off payment for the disposal of the property within 5 years from the date of the adoption of the plan, i.e. the increase of the property's value due to the adoption of the plan, determination of the purpose (more favourable than the present purpose) of the land, which is then sold by the owner, who derives financial benefits therefrom.[7]

Even though they were the subject of many judicial decisions, the provisions of the Act referring to zoning fees still raise a lot of interpretation doubts as to their amount, date of payment or the very grounds for their existence. The author is trying to prove that such a measure is by all means necessary in the spatial planning system, but its structure requires certain amendments. The author analysed and evaluated it in the administrative and legal area and in terms of financial and constitutional law. Another objective of the article is to show the public and legal character of the aforesaid performance.

The test method used in the article consists in the analysis of legal acts, views of legal scholars and commentators and judicial decisions.

Character of the zoning fee

The zoning fee is described in Article 36 sec. 4 of the Act. It is a single public levy reflecting the participation of communes in the income from the disposal of immovable property, whose value increased due to the change of the local spatial development plan.[8]

To determine the property market value, many elements need to be compiled.[9] One such element is the area. In most cases, the lands with identical area significantly differ in terms of their prices. It is due to the fact that many other issues have impact on the price amount of the property, such as, among other things, the

6 Plucińska-Filipowicz, A. and Wierzbowski, M., *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz*, Warszawa 2018, p. 447.

7 Judgement of the Voivodeship Administrative Court in Kraków of 25 April 2019, II SA/Kr 205/19, LEX No. 2664924.

8 Nowak, M.J. and Tokarzewska–Żarna, Z., *Gospodarka nieruchomościami. Kluczowe problemy prawne*, Warszawa 2017, p. 85.

9 Bieniek, G. et al., *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2012, pp. 473-474.

location, legal status, neighbourhood, and technical infrastructure.[10] One feature of the above-mentioned values is the fact that it usually changes. The level of prices of lands and changes related to the property in question, often beyond the control of its owner, are some of the many of the factors that influence the aforementioned value.[11] According to the legislator, it was justified to introduce the regulation, as a result of which the communes had a share in profits of entities who are the property owners, which are built in connection with the activities of appropriate local government units. The above was reflected in a possibility of allowing the communes to collect the so-called zoning fee. The fees are commonly referred to as "*renta*" (Eng. literally: annuity). Obviously, the term is used almost simultaneously with the word 'fee'. However, it is incorrect, as it creates unnecessary doubts – -it is not a *renta*, but a zoning fee. There is also no adjacent annuity, but an adjacent fee. Therefore, it would be necessary to call for appropriate definition of the subject public levy. The fees may be determined on the basis of the provisions included in local law if the land market value increased due to the adoption of the new local spatial development plan or change of the previous plan.[12]

The analysed fee constitutes a public-law liability. Such status has been confirmed by the court decisions. However, the regulations of the Tax Ordinance should not be applied to the aforementioned fee.[13] The fee is the commune's own income, but may not be treated as tax.[14] It does not result from the tax regulations and does not have unpaid character (as a matter of principle, it is the result of the adoption of the new local spatial development plan, which caused the increase of the land value).[15] When determining the amount of the aforesaid fee, the commune authorities perform tasks of public authorities.[16] The obligation to define the analysed fee depends on two premises. First of all, it is necessary to ascertain the increase of

10 Jaworski, J. et al., *Ustawa o gospodarce nieruchomościami. Komentarz*, 5th edition, Warszawa 2017, p. 1030.

11 Źróbek, S. et al., G*ospodarka nieruchomościami. Komentarz do wybranych procedur*, Katowice 2011, p. 232.

12 Mielcarek, P. et al., *Akta administracyjne dla aplikantów*, Warszawa 2016, p. 59.

13 Act of 29 August 1997 – Tax Ordinance, consolidated text: Dz.U. (Journal of Laws) of 1997, No. 137, item 926, as amended.

14 Judgement of the Supreme Administrative Court of 7 November 2001, II SA/Gd 1948/01, "Orzecznictwo Sądów Polskich" 2003, Issue 2, item 16.

15 Judgement of the Supreme Administrative Court of 15 November 2006, II OSK 1370/05, LEX No. 321533.

16 Judgement of the Voivodeship Administrative Court in Warszawa of 28 June 2006, IV SA/Wa 2465/05, LEX No. 232967.

the land value due to the adoption of the local spatial development plan.[17] Furthermore, the owner must dispose the aforesaid properties, which will initiate the fee collection process and constitute the second premise for applying the analysed measure.[18] Only if it is established that the new local spatial development plan has been adopted or a previous plan has been changed, the obligation to determine the zoning fee arises. Therefore, in the context of the above, it will be impossible to determine the above-mentioned fee if the land value increased solely due to the decision on land development and management conditions or decision on the site location of a public-purpose investment project. Furthermore, attention should be paid to the issue of disposing the property after the local spatial development plan has been amended due to the division of the larger property existing prior to such amendment. It should be stated that the commune is entitled to charge the zoning fee also if the physically separated part of the property or fractional part is disposed, despite the fact that Article 36 sec. 4 of the Act does not explicitly provide for such cases. The Supreme Administrative Court adopted such view in its judgement of 14 February 2014, in which it explained that due to the connection between the zoning fee measure and the civil law transactions, it should be assumed – -to produce the effect as stipulated in Article 36 sec. 4 and Article 37 sec. 7 of the Act that the aforementioned provisions refer to such property that may be the autonomous subject of civil and law transactions. With the above in mind, it may be also a part of the property, but only after its geodetic or legal division. Therefore, the provision in Article 36 sec. 4 of the Act applies also when the separated part of the property or its perfect fractional part (share) is disposed.[19] The Supreme Administrative Court previously presented almost the same position in its judgement of 15 April 2008, in which it explained that pursuant to Article 36 sec. 4 of the Act of 27 March 2003 on Spatial Planning and Development, the property is also a part of land owned by the same owner, covered by the local spatial development plan, intended for a particular purpose defined therein, which – -after its geodetic or legal division- – may be an independent subject of civil and legal transactions. The above shows that the collection of the zoning fee is also possible in the event when the owner (perpetual usufructary) disposes of only a part and not the whole of a property, provided that

17 Nowak, M.J., *Planowanie i zagospodarowanie przestrzenne. Komentarz do ustawy i przepisów powiązanych,* Warszawa 2019, p.192.

18 Judgement of the Supreme Administrative Court of 20 July 2006, II OSK 955/05, LEX No. 275481.

19 Judgement of the Supreme Administrative Court of 14 February 2014, II OSK 2216/12, LEX No. 1450902.

other conditions stipulated in Article 36 sec. 4 of the Act of 27 March 2003 on Spatial Planning and Development are satisfied.[20]

In conclusion, the discussed fee may be collected not only in the case of the sale of the whole property, but also a part thereof. Such a position was adopted by the Supreme Administrative Court in its resolution of 17 May 1999, in which it explained that a one-off payment mentioned in Article 36 sec. 4 of the Act of 27 March 2003 on Spatial Planning and Development may be also collected in the case of disposal of a part of the property if the value of the disposed property increased due to the amendment to the local spatial development plan.[21] If the party sold only some plots divided after the adoption of the plan; then, to calculate the zoning fee, the increase rate of the plot value must be adopted, however in the form in which it existed on the day when the local spatial development plan was passed.[22] Another condition imposing the obligation to determine the zoning fee is the disposal of the land. The term 'disposal' refers to such legal actions as sale, in-kind contribution, replacement and other forms of free disposal. Expropriation does not apply to the above actions.[23] As the Supreme Administrative Court showed in its judgement of 14 January 2009, the decision on the zoning fee must be always issued in the case of the increase of the value of the land, even if it is insignificant, but has an impact on the attractiveness and price of the land.[24] The zoning fee should reflect the difference between the value of the land before the plan was adopted and its value on the day of disposal. The analysed fee should be in line with the objective change in the value of the land and not with the price set by parties to a specific agreement.[25] The provision in Article 36 sec. 4 of the Act only refers to the 'increase of the value of the land', which is independent of the sales price.[26] The increase of the value should be a straightforward result of the adoption of the local spatial development plan. The adoption or change of the local spatial development plan does not necessarily lead

20 Judgement of the Supreme Administrative Court of 15 April 2008, II OSK 408/07, LEX No. 467118.

21 Resolution of the Supreme Administrative Court of 17 May 1999, OPK 17/98, "Orzecznictwo Naczelnego Sądu Administracyjnego i Wojewódzkich Sądów Administracyjnych" 1999, No. 4, item 121,

22 Judgement of the Supreme Administrative Court of 19 November 2008, II OSK 1316/07, LEX No. 549384.

23 Brzezicki, T. et al., *Opłaty i wybrane roszczenia dotyczące nieruchomości,* Warszawa 2018, p. 26.

24 Judgement of the Supreme Administrative Court of 14 January 2009, II OSK 1810/07, LEX No. 509156.

25 Judgement of the Supreme Administrative Court of 15 December 2008, II OSK 1600/07, Legalis No. 164590.

26 Judgement of the Voivodeship Administrative Court in Gliwice of 6 September 2019, II SA/Gl 308/19, LEX No. 2723683.

to the increase of the value of the land. The more so when the aforesaid changes are questionable in comparison with the previous plan.[27] The actual way of using the property, which constitutes the point of reference for establishing the increase of the value of the property, refers to the actual condition of a given property at the time of implementation of the local spatial development plan, which, however, does not refer to potential or legally informal possibilities of the property development that may be convergent with the purpose stipulated in the plan.[28] In the discussed case, situations when the value is increased, due not to the plan amendment, but, for instance, to expenditures incurred by the owner on his/her land, should also be taken into account. The above-described situation does not provide grounds for charging the zoning fee, as it should not be based on the increase of the value resulting from circumstances other than the adoption or change of the plan.[29] The increase of the value of the property must be directly connected with the adoption or change of the plan. Nevertheless, to determine whether the increase of the value of the property has actually occurred, it is necessary to compare the 'present' value with the 'previous' value.[30] Furthermore, there will be no grounds to impose the fee on the land disposers if, after the amendment to the local spatial development plan, the properties have become more attractive but the purpose of the aforesaid land has not changed. Therefore, when establishing the zoning fee, it is important to show not only the actual increase of the value, but also the direct cause and effect relationship between the above-mentioned change in the value and arrangements made in the new local spatial development plan.[31]

To determine the fee in question, the provisions of the Act of 29 July 1997 – Tax Ordinance are not applicable. The zoning fee is a special type of the commune's income, which is included in the commune's income along with, among other things, taxes and other fees mentioned in Article 54 sec. 2 point 6 Act of 8 March 1990 on Local Self-Government.[32] Despite the fact that it has some characteristics of a tax in light of Article 6 of the Act of 29 August 1997 – Tax Ordinance, i.e. it

27 Judgement of the Supreme Administrative Court of 19 March 2009, II OSK 254/08, LEX No. 525774.

28 Judgement of the Voivodeship Administrative Court in Gdańsk of 17 April 2019, II SA/Gd 811/18, LEX No. 2653240.

29 Judgement of the Supreme Administrative Court of 4 July 2008, II OSK 774/07, "Wspólnota" 2008, No. 41, item 34.

30 Judgement of the Voivodeship Administrative Court in Kraków of 26 November 2019, II SA/Kr 903/19, LEX No. 2761195.

31 Judgement of the Supreme Administrative Court of 13 July 2009, II OSK 1108/08, LEX No. 552816.

32 Act of 8 March 1990 on local self-government, consolidated text: Dz.U. (Journal of Laws) of 2020, item 713.

is a public-law gratuitous performance, which is obligatory and non-refundable to the local government unit, but also at variance with the requirements of the invoked regulation not resulting from the Tax Ordinance. The Planning and Development Act may not be considered the Tax Ordinance. It does not follow from the provisions of the Planning and Development Act that the legislator's intent was to treat the discussed fee as tax and there are no grounds for presuming it and apply the provisions of the Tax Ordinance to such fee.[33] The fees result from a specific spatial policy of the commune, which is based on rational spatial management. Despite certain characteristics that make the fee similar to the tax, there are significant differences. If the legislator wanted to treat the zoning fee as ta tax or another non-tax receivable subject to the provisions of the Tax Ordinance, the legislator would make it in an explicit manner or would at least oblige other entities to apply the Tax Ordinance in such matters. Since the legislator did not do it, such activity should not be alleged. Tax obligations must be explicit, not implied. This is the basis for the democratic state under the rule of law (Article 2 of the Constitution of the Republic of Poland).[34]

In summary, it must be stated that not all receivables from the budget of the lowest local government unit, even with dominant characteristics of the tax, constitute the budgetary receivables with respect to which the regulations of the Tax Ordinance apply. It is the Act that determines whether the provisions of the Tax Ordinance will apply or not; thus, the above should not be implied in any manner. If it is necessary to imply, then the implication should be reverse, namely, it should be stated that the provisions of the Administrative Code are applicable to such matters[35], since these provisions and not the provisions of the Tax Ordinance have the character of the norms widely applied in administrative proceedings (Article 1(n) of the Code of Administrative Procedure).[36] Therefore, the position, in accordance with which it is necessary to apply the provisions of the Code of Administrative Procedure during the procedure governing the establishment of the zoning fee amount, seems well-founded. Such position prevails in the judicial decisions of the Supreme Administrative Court.[37] Since none of the provisions of the Act oblige

33 Borodo, A., *Finanse publiczne RP. Zagadnienia prawne*, Bydgoszcz 2000, p. 37.

34 Constitution of the Republic of Poland of 2 April 1997, consolidated text: Dz.U. (Journal of Laws) of 1997, No. 78, item 483, as amended.

35 Act of 14 June 1960 Code of Administrative Procedure, consolidated text: Dz.U. (Journal of Laws) of 2020, item 256.

36 Judgement of the Supreme Administrative Court of 16 September 2008, II OSK 1030/07.

37 See Judgement of the Supreme Administrative Court of 6 April 2006, II OSK 710/05, not published; Judgement of the Supreme Administrative Court of 22 June 2007, II OSK 935/06, not

the authorities establishing the amount of the zoning fee to use the tax procedure, it should assumed that, pursuant to Article 1 of the Code of Administrative Procedure, the provisions of such Code should be applicable to the aforesaid matters. In other words, the issue of the zoning fee as a public levy not regulated in the Tax Ordinance should not be excluded from the objective scope of the Code of Administrative Procedure, by virtue of Article 3 § 1 point 2 of the Code.[38]

Article 217 of Constitution of the Republic of Poland stipulates that the levying of taxes and other public levies shall be by means of statute. This is the case of the zoning fees, since they were regulated in the statutory legal acts due to the fact that they are public-law liabilities.

Local law versus zoning fee

By virtue of Article 36 sec. 4 of the Act, the zoning fees should be defined in the local spatial development plan. Furthermore, pursuant to Article 15 sec. 2 point 12 of the above legal act, it should be stated that the aforesaid plans must include the interest rates that constitute grounds for their establishment.[39] The interest rate may not be higher than 30% of the increased property value. The commune's decision-making body may freely determine the interest rate for the subject fee within the above-mentioned limits. However, the fee rate may not be established at the level of 0%. Article 15 sec. 2 point 12 of the analysed Act clearly stipulates that the local spatial development plan should define the interest rates, on the basis of which the fee as provided for in Article 36 sec. 4 of the Act was determined. With the above in mind, it should be concluded that the obligation to define the interest rates in a manner allowing to establish the zoning fee exists, which makes it impossible to define the zero interest rate.[40]

It should be emphasised that the zero rate not only does not fall within the legal framework as stipulated in Article 36 sec. 4 of the Act, but also potentially nullifies the will of the employer that indicates the zoning fee as one of the elements of the

published; Judgement of the Supreme Administrative Court of 15 April 2008, OSK 408/07, not published; Judgement of the Supreme Administrative Court of 2 April 2008, II OZ 287/08, not published.

38 Judgement of the Supreme Administrative Court of 7 February 2006, I OSK 421/05, not published.

39 Rokicka-Maruszewska, K., *Administracyjnoprawne aspekty opłaty planistycznej*, Warszawa 2019, p. 46.

40 Judgement of the Voivodeship Administrative Court in Białystok of 30 March 2006, II SA/Bk 100/06, LEX No. 194598.

public levy system, including the commune's budgetary income.[41] What is more, it is allowed not to establish the analysed fee rates for some areas covered by the new or amended plan. It is justified only when, during the work on the provisions of the new plan, it is shown that the value of specific lands will not change due to the plan implementation--hence, the land value will remain at the same level. If there are no grounds for expecting any increase in the property value, since – -due to the adoption of the plan, the purpose of the land does not change (present purpose will not be more beneficial than the new purpose or will equal thereto)- – the existence of the interest rate of the zoning fee will be unjustified. In light of the above, it is evident that the obligation to determine the interest rates is not unconditional with respect to all areas covered by the draft plan.[42] This will be the case when the present purpose of the property, resulting from the provisions of the previous local spatial development plan or actual purpose of such property – -the manner of its current use, if it was not subject to the provisions of the local plan- – proves equal to the purpose defined in the newly adopted local spatial development plan.[43]

When analysing the discussed topics, attention should be paid to the issue of invalidity of the local spatial development plans. A situation may occur when the regulations of the above Act have the defect of invalidity. When invalidity of the above-mentioned Act is ascertained (in whole or in part), the zoning fee will be reimbursed to the current owner or perpetual usufructary. The zoning fee will not be provided with the entity that incurred it, but with the entity that is currently in the possession of a given land.[44] The regulations included in the acts concerning the local spatial development plans alone are essential to determine the zoning fee. It should be noted that it is impossible to establish such fee when the interest rate was not articulated in the above-mentioned legal act. In such case, the issuance of the decision would lead to the opinion that the decision was delivered without any legal basis and has the defect of invalidity.[45] In light of the above, it should be stated that if there is no plan, neither the commune's decision making body – -by way of a dif-

41 Decision of the Voivode of Podlasie of 1 March 2006, PN.II.A.Ch.0911 – 41/06, "Wspólnota" 2006, No. 13, item 46.

42 Judgement of the Voivodeship Administrative Court in Gliwice of 22 November 2007, II SA/Gl 377/07, LEX No. 340415.

43 Judgement of the Supreme Administrative Court of 10 June 2020, II OSK 3818/19, LEX No. 3026019.

44 Niewiadomski, Z., *Planowanie i zagospodarowanie przestrzenne. Komentarz,* 5th edition, Warszawa 2009, p. 288.

45 Judgement of the Supreme Administrative Court of 15 December 2008, II OSK 1600/07, Legalis No. 164590.

ferent resolution- – nor the commune head, the mayor, or the president – -by way of the decision on the development conditions- – may determine the amount of the interest rates on the increased land value.[46] Currently, there are no regulations providing the commune's decision making-body with the grounds for determining the interest rate of the zoning fee in the absence of the development plan.

The issues of the analysed institution were also the subject of the reflections of the Constitutional Tribunal. In its judgement of 9 February 2010, the Constitutional Tribunal analysed the following circumstances: the local spatial development plan was revoked, then, after several years, when the aforementioned Act did not exist, the new local spatial development plan was passed, specifying the identical purpose of the land as with the previous plan.[47] The real problem was the comparison of the land values.[48] The principle is that it is necessary to compare the present and previous value of the land. However, it should be noted that the legislator failed to specify which values such comparison should concern. The establishment of the current value should not be problematic, as it is defined while considering the purpose included in the valid plan. Nonetheless, the situation may be different when determining the 'previous' value. In such case, the ineffective plan should not be invoked, as the purpose of the land stipulated in the 'old' plan is insignificant. The fact is, that the value has increased and, hence, the obligation to impose and pay the fee occurred is related to the criterion of the actual land use. It is irrelevant whether the subject value is or is not in line with the purpose defined in the plan that expired.

The condition of the increase in the value must be objective and verifiable externally (see Article 36 sec. 4 in connection with Article 37 sec. 1 of the Act), thus, it requires detailed elaboration in the valuation survey. Pursuant to Article 37 sec. 1, sentence 2 of the Act, the value is calculated as the difference between the value established for the land purpose according to the local spatial development plan after its amendment and the value determined for the land purpose according to the local spatial development plan before its amendment. By the will of the legislator, the certified property valuer and competent body are obliged to consider only the planning purpose, leaving aside the actual manner of using the disposed property. Such a solution may actually lead to a situation where the property value, according to its status before the plan amendment, is established in accordance

46 Judgement of the Voivodeship Administrative Court in Białystok of 14 January 2010, II SA/Bk 603/09, LEX No. 554968.

47 Judgement of the Constitutional Tribunal of 9 February 2010, P 58/08, Dz.U. (Journal of Laws) of 2010, No. 24, item 124.

48 Bieniek, G. et al., *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2005, pp. 838-842.

with a planning purpose that does not correspond to the actual manner of using the property. However, it is a statutory manifestation of the general aim of the legislator to maintain compliance between the planning purpose and the actual purpose of the property.[49] The necessity to develop local spatial development plans is not a new task for communes. The land owners may not bear negative consequences of the plan's ineffectiveness due to the omissions of the local government. The fact that the value increased should be analysed as a consequence of the adoption of the new plan immediately following the previous one, not as the result of the discontinuance of planning or temporary lack of any local spatial development plan, including all effects in the form of the obligation to pay the fees.

In conclusion, the Constitutional Tribunal stated that Article 37 sec. 1 is unconstitutional in the part when the increase of the property refers to the criterion of the actual use of the property in the event when the land purpose was described identically as in the plan, which – -by operation of law- – became ineffective on 31 December 2003.

Method of establishment of the zoning fee

The commune head, mayor, or president of the city may introduce a one-off zoning fee, mentioned in Article 36 sec. 4 of the Act when the following cumulative conditions are met:

1) the commune council passed or amended the local spatial development plan, while establishing the interest rate of the zoning fee;

2) due to the adoption or change of the local spatial development plan, the property value increased;

3) the property covered by the planning act was acquired by the owner or perpetual usufructary after the resolution on the local spatial development plan or amendments thereto became effective, yet no later than 5 years after the entry into force of this resolution;

4) the administrative proceedings concerning the zoning fee were initiated before 5 years following the effective date of the resolution on the local spatial development plan or amendments thereto.[50]

49 Judgement of the Supreme Administrative Court of 7 November 2019, II OSK 3166/17, LEX No. 2761923.

50 Judgement of the Voivodeship Administrative Court in Olsztyn of 10 March 2020, II SA/Ol 965/19, LEX No. 2906089.

The increase of the property value is usually correlated with the entry into force of the new plan, which changes the possibilities of land development from less attractive to more attractive in economic terms, but also as regards the arrangements that do not change the function of the land, but which change the parameters of its structures in a more economically beneficial manner. In the case of the increase of the property value, the expenditures incurred by the owner or other entity (e.g. the commune, State Treasury) related to the construction of technical infrastructure are not taken into consideration.[51] The analysed public levy constitutes the product of the following elements – the interest rate and the basis for determining the fee. It is established based on the increase in value which results from the difference between the value defined while taking into account the land purpose effective after the adoption or change of the local spatial plan, and the value determined while considering the land purpose effective before the change of such plan or the actual manner of using the land before the adoption of the plan.[52] If the changed purpose of the land refers to a part thereof, the fee amount is calculated solely for this part of the property, which is affected by the change resulting from the provisions of the plan. By including the value of the property, whose purpose remained unchanged after the adoption of the plan, the owner will be wrongly obliged to make undue payments, not resulting from Article 36 sec. 4 of the Act.[53]

The property value must increase on the day of the adoption of the local spatial development plan or amendment thereto. If this is not the case, i.e. despite the implementation of the local spatial development plan the property value has not increased, the administrative authority (commune head, mayor, president of the city) has no grounds for determining the fee referred to in Article 36 sec. 4 of the Act and to demand payment thereof. This would be the case when the current purpose of the property resulting from the provisions of the local spatial development in force by the time of the implementation of the new plan or change of the previous plan remains equivalent to the purpose stipulated in the new local spatial development plan.[54] As already mentioned, the sales prices adopted by the parties are insignificant when calculating the fee amount. To avoid prices significantly different than the average market prices, various valuation methods and techniques

51 Judgement of the Voivodeship Administrative Court in Kraków of 12 November 2019, II SA/Kr 739/19, LEX No. 2749850.

52 Leoński, Z. et al., *Prawo zagospodarowania przestrzeni,* Warszawa 2019, pp. 355–356

53 Judgement of the Voivodeship Administrative Court in Łódź of 25 July 2019, II SA/Łd 152/19, LEX No. 2707135.

54 Judgement of the Voivodeship Administrative Court in Kraków of 5 April 2019, II SA/Kr 27/19, LEX No. 2656072.

are applied to determine the property value while using the prices of property with similar characteristics and purposes for the sake of comparison. The analysed fee is connected with the objective increase of the property value, whereas the price amount determined by the parties to a given legal action in the sales contract has nothing to do with the obligation to pay such fee.[55] With the above in mind, it should be stated that the profit derived from the sales by the entity is absolutely irrelevant. The fundamental issue is the actual increase of the land value due to the amendments to the provisions of the plan.[56] The commune is responsible for proving that the value of the property has actually increased. The above is confirmed on the basis of a valuation survey prepared by a property valuer.[57] This opinion constitutes sufficient evidence in the proceedings to determine the zoning fee.[58] The fact that the valuation survey was carried out by a property valuer, hence the person meeting certain professional criteria, is not sufficient to be considered as having probative value. Public administration bodies are obliged to specifically explain the case and undertake the necessary actions to appropriately establish the property value, thus to evaluate the credibility of the opinion drafted during the proceedings, since these are the public administration bodies, not the property valuer, who hold executive powers to form the administrative and legal relationship outlining the rights and duties of the parties.[59]

On 28 November 2003, the analysed Act was amended[60] which resulted in the replacement of the term 'sale' with the word 'disposal' in Article 36 of the Act. The purpose of the above change was to expand the scope of legal events whose existence contributes to the possibility of determining the zoning fee. However, in this context, a problem occurred to precisely describe specific actions that entail the obligation of payment of the analysed public levy. The above issue became the subject of many decisions issued by administrative courts. For some time, the judicial decisions included two different views on the above-mentioned issue. The first opinion expressed, among other things, in the judgement of the Supreme Administrative Court of 17 July 2008, showed that the 'disposal of the property' referred to

55 Judgement of the Voivodeship Administrative Court in Warszawa of 10 March 2006, IV SA/Wa 2265/05, LEX No. 222281.

56 Rokicka-Maruszewska, K., op. cit., p. 161.

57 Bieniek, G. and Rudnicki, S., *Nieruchomości. Problematyka prawna*, Warszawa 2011, p. 939.

58 Judgement of the Supreme Administrative Court of 21 May 2007, II OSK 814/06, LEX No. 338319.

59 Judgement of the Voivodeship Administrative Court in Poznań of 15 May 2019, II SA/Po 102/19, LEX No. 2677719.

60 Act of 28 November 2003 amending the Act on real estate management and certain other acts, consolidated text: Dz.U. (Journal of Laws) of 2004, No. 141, item 1492.

all methods of land disposal (both sale and donation).[61] The aforesaid position was approved in the decision of the Voivodeship Administrative Court in Gdańsk of 14 January 2009, in which the Court explicitly stated that the transfer of ownership title to the land by way of donation constitutes disposal in compliance with Article 36 sec. 4 of the Act. Since the analysed legal act lacks the definition of the 'disposal of the property', the term should be interpreted in line with the definition included in the Act on real estate management, which covers all legal actions within the scope of the aforesaid term, as a result of which the ownership title is transferred.[62] On the other hand, in its judgement of 25 March 2009, the Voivodeship Administrative Court in Wrocław concluded that the fee charged to the owner in the case of the land disposal did not depend on whether the owner derived any profits due to such disposal. What is important is the disposal of the land, whose value increased as a result of the changed purpose of the land in the local spatial development plan. In the opinion of the Voivodeship Administrative Court in Wrocław, the fact that the contract for donation to a relative or stranger was excluded from the scope of Article 36 sec. 4 lacks normative justification.[63] What is more, a different view is included in the decisions of administrative courts, e.g. the judgement of the Voivodeship Administrative Court in Szczecin of 8 May 2008, in which the Court informed that if, due to the adoption or change of the plan, the value of the land increased, only the disposal against payment would increase the assets of the seller and generate additional profits.[64] Nonetheless, if the ownership title is transferred under the contract without payment, the change of the plan will not have any impact on the assets and additional profits. In light of the above, there are no grounds for charging the land owner with the fee. The above-mentioned position was accepted, for example, in the judgement of the Voivodeship Administrative Court in Lublin of 27 November 2008[65] and the judgement of the Voivodeship Administrative Court in Olsztyn of 3 November 2009[66], in which the Courts stated that if, due to the adoption or change of the plan, the value of the land increased, then the fee

61 Judgement of the Supreme Administrative Court of 17 July 2008, IIOSK 877/07, LEX No. 493241.

62 Judgement of the Voivodeship Administrative Court in Gdańsk of 14 November 2009, II SA/Gd 799/08, LEX No. 481500.

63 Judgement of the Voivodeship Administrative Court in Wrocław of 25 March 2009, II SA/Wr 478/08, LEX No. 495398.

64 Judgement of the Voivodeship Administrative Court in Szczecin of 8 May 2008, II SA/Sz 976/07, LEX No. 519055.

65 Judgement of the Voivodeship Administrative Court in Lublin of 27 November 2008, II SA/Lu 575/08, LEX No. 521902.

66 Judgement of the Voivodeship Administrative Court in Olsztyn of 3 November 2009, II SA/Ol 790/09, LexPolonica No. 2125740.

could be determined only in the case of chargeable disposal of the land that would allow the disposing entity to increase their assets and generate profits. Finally, the second position prevailed, which was reflected in the resolution passed by seven judges of the Supreme Administrative Court on 10 December 2009. In compliance with the aforesaid resolution, the fee could not be established in the event when the land was donated to a relative. The Supreme Administrative Court emphasised that the term 'sale' used in Article 37 sec. 1 did not constitute the omission on the part of the legislator, as certain amendments to the Act did not change this regulation. Since the current wording of the provisions impose the obligation to set the fee amount on the day of its sale, it is an explicit indication by the legislator that the fee is absolutely connected with the land disposal characterised by functional equality (payment). However, if the transaction is equivalent, the payment obligation does not arise.[67] The zoning fee amount is determined on the day of the sale of the land. The fee is established on the basis of the decision issued by a competent authority, i.e. the commune head, mayor, or president of the city, immediately upon receipt of the excerpt from the notary deed confirming the execution of the agreement, whose subject matter included the disposal of the land.[68] The aforementioned decision, or rather its issuance, is obligatory.

The regulation in the analysed Act is worthy of attention. The owner or perpetual usufructary, whose land's value increased due to the adoption or change of the plan before the land was disposed, is entitled to request that the commune's executive body determine the zoning fee amount by way of a decision. The purpose of the above is to allow the seller to learn about the amount of public and law charges, which will result from the disposal of a specific immovable property. Additionally, it is a kind of guarantee, as the fee amount should not be higher than the planned amount.[69] However, if the above situation occurs, the activities of the executive body could be treated as flagrant violation of the trust principle. Pursuant to Article 37 sec. 7 of the Act, the owner or perpetual usufructary of the property, whose value increased due to the adoption or change of the local spatial plan may – -prior to its disposal- – request the commune head, mayor, or president of the city to determine the fee by way of a decision, according to Article 36 sec. 4 of the Act. Unlike Article 36 sec. 4 of the Act, the subject of the decision issued pursuant to Article 37 sec. 7 of the Act is not the 'collection' of a one-off payment, but

67 Resolution passed by seven judges of the Supreme Administrative Court of 10 December 2009, II OPS 3/09, "Orzecznictwo Naczelnego Sądu Administracyjnego i Wojewódzkich Sądów Administracyjnych" 2010, No. 2, item 22.

68 Bieniek, G. and Rudnicki, S., *Nieruchomości. Problematyka prawna*, Warszawa 2004, p. 11.

69 Rokicka-Maruszewska, K., op. cit., p. 239.

the 'determination of its amount'. Such an interpretation of the above-mentioned provision corresponds to the very purpose of the discussed legal measure. The provision allows the owner or perpetual usufructary to determine whether the zoning fee will be charged thereto in the case of the disposal of the property and, if so, in what amount. The right vested in the owner or perpetual usufructary of the property under Article 37 sec. 7 of the Act allows learning about the zoning fee amount already before the disposal of the property for the purpose of including such fee in the sales price or renouncing the intention of sale. However, the decision issued pursuant to Article 37 sec. 7 of the Act does not impose the obligation to pay the zoning fee. It does not constitute the enforceable title subject to mandatory execution as part of the administrative enforcement proceedings. The decision issued pursuant to Article 37 sec. 7 of the Act, which only defined the 'amount' of the fee mentioned in Article 36 sec. 4 of the aforesaid Act constitutes a kind of promise for the owner or perpetual usufructary. It should be remembered that to charge the zoning fee, the public administration body must – apart from acknowledging the increase of the property value – ascertain the disposal of the property and report the 'claim' no later than 5 years after the day on which the spatial development plan or amendment thereto became effective. The above should be effected in the decision issued on the basis of Article 36 sec. 4 of the Act. Therefore, the purpose of the discussed instrument is to ensure the legal situation of the owner or perpetual usufructary of the property so that when they dispose of the property, the competent body reports the 'claim' within 5 years from the day on which the spatial development plan or amendment thereto became effective, and the fee in the form of the interest rate on the value previously set in the decision according to Article 37 sec. 7 of the Act will be collected. Therefore, the operative part of the decision delivered pursuant to Article 37 sec. 7 of the Act should be only limited to the 'determination of the fee amount' in connection with the intention to dispose of the property. On the other hand, to impose the obligation of payment of the zoning fee ('fee collection'), it is necessary to issue another decision based on Article 36 sec. 4 of the Act. It is not possible to establish the zoning fee once again *ex officio*, pursuant to Article 36 sec. 4 of the Act, if it was already determined upon a request on the basis of Article 37 sec. 7 of the said Act.[70] The purpose of this solution is to enable the owner or perpetual usufructary of the property to obtain the information on the amount of the zoning fee before the disposal of the property. The solution allows the entity, which is the addressee of such obligation, to include the financial charges in the

70 Judgement of the Supreme Administrative Court of 9 March 2010, II OSK 483/2009, LexPolonica No. 2265514.

economic balance of the potential transaction. If the solution is used by the entity – -the owner or perpetual usufructary of the property- – it allows to avoid surprise caused by the zoning fee set *ex officio* on the basis of the decision issued pursuant to Article 36 sec. 4 of the Act. After conducting the proceedings upon the request of the owner or perpetual usufructary of the property, the competent public administration body issues the decision to establish the zoning fee amount. The administrative pronouncement does not establish the amount of the zoning fee. Its aim is to determine the zoning fee amount, which the addressee of the act will be obliged to pay once the decision becomes final. And the point here is not 'preliminary' determination of such fee. Such an approach would constitute grounds for formulating the assumption that the fee will be then modified or approved by way of a resolution in compliance with Article 36 sec. 4 of the Act.[71] The administrative pronouncement understood in such a manner, delivered pursuant to Article 37 sec. 7 of the Act, has constitutive nature. Nevertheless, the established obligation to pay the zoning fee by the owner to the commune is connected with a condition precedent, which consists in the disposal of a given property in the future. If this obligation is not fulfilled, the obligation to pay the established amount does not arise. It should be assumed that the effects of this decision are not limited by any deadline. Therefore, it should be presumed that the obligation may arise as long as the decision remains part of the legal transactions. As a result of this assumption, it is deemed that the final decision issued pursuant to Article 37 sec. 7 of the Act creates the *res iudicata* status and hence makes it impossible to deliver the decision based on Article 36 sec. 4 of the aforesaid Act under pain of invalidity of the latter in compliance with Article 156 § 1 point 3 of the Code of Administrative Procedure. This view is also supported by the judicial decisions of the Supreme Administrative Court.[72] By virtue of Article 37 sec. 3 and sec. 4 of the Act, the executive body is additionally limited in the possibility of issuing the decision on the zoning fee.[73] Namely, the body is obliged to initiate the proceeding *ex officio* within 5 years from the effective date of the local spatial development plan. The view is supported by the judicial decisions of administrative courts. In its judgement of 4 February 2011, the Supreme Administrative Court showed that the appropriate application of Article 37 sec. 3 of the Act to payments mentioned in Article 36 sec. 4 of the aforesaid Act

71 Decision of the local government appeal council in Wrocław of 24 October 2013, SKO 4125/47/13, "Orzecznictwo w Sprawach Samorządowych" 2014, No. 2, pp. 49-53.

72 Judgement of the Supreme Administrative Court of 9 March 2010, II OSK 483/2009, LexPolonica no. 2265514.

73 Niewiadomski, Z., *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz,* 2nd edition, Warszawa 2005, p. 292.

should be understood in such a manner that the commune head, mayor, or president of the city should initiate, within 5 years from the day on which the local plan or amendment thereof became effective, the administrative proceedings (*ex officio*) concerning a one-off fee due to the increase of the property value. The time limit of 5 years mentioned in Article 37 sec. 3 of the Act should be understood as the claims' period of prescription according to civil law and the maximum period during which the administrative proceedings may be initiated to determine the fee resulting from the increase of the property value, and not as the deadline limiting the issuance of the decision in the case.[74] The deadline stipulated in this provision should be included in the category of final dates. Its expiration excludes the possibility to seek to collect the zoning fee.[75] In summary, the fee due to the increase of the property value may be established if, within the 5-year period, the authority submits a claim in this regard. The submitted claim may be in the form of the notice of initiation of the administrative proceedings concerning the determination of the zoning fee.[76] In light of the above, it may be deduced that the establishment of the zoning fee may hinder the disposal of the property after 5 years from the effective date of the new plan. The fee amount is determined by the commune authorities. The maximum statutory threshold is 30%. However, the limit is often much lower, for example, 0.01%. The above-mentioned time limits have caused almost all entities to refrain from the disposal of properties. It is only after 5 years that they start selling their properties and derive profits due to the increased value. Public entities, such as communes, have not received any payments, as the sellers prolonged the sales process.

What is worth considering is the amendment to the Act in the form of the discussed fee established at a fixed level of 30% of the increased value and the elimination of time limits. Or, alternatively, the introduction of the minimum amount of the fee below which the prices may not go. The above could change the current practice, in accordance with which the owners to a large extent do not participate in the costs of spatial planning.

Sometimes certain communes establish 0% fee rates. As a result of particular court judgements, the communes abandoned this bad practice. There are also some demands to eliminate the above instrument from the Act. However, it is impossible to accept such demands, as the fee constitutes an important element of the

74 Judgement of the Supreme Administrative Court of 4 February 2011, II OSK 207/10, LEX No. 753419.

75 Rokicka-Maruszewska, K., op. cit., p. 198.

76 Judgement of the Supreme Administrative Court of 6 December 2012, II OSK 1394/11, LEX No. 1367246.

commune's income. Therefore, it would be more reasonable to introduce other changes, such as, for example, the fixed amount of the zoning fee, without the statute of limitations.

The owners who dispose of their land have perfectly learnt to circumvent the regulations to avoid payment of the zoning fee. It is enough that within 5 years from the date of adoption of the plan, they conclude a preliminary contract for the sale of land.[77] The actual contract is signed when the aforementioned period expires.[78]

Conclusion

The zoning fee is a special reflection of the commune's share in profits obtained by the sellers of lands, whose value increased due to the new purpose defined in the local spatial development plan. The conditions allowing public entities to charge the sellers with the zoning fee have caused interpretation problems. The problems concerned the determination of such fee in the case of the land disposal based on the contract of donation or determination of the amount of interest rates. The donation is of a public-law nature – it is not a tax. The zoning fee does not follow from the Act and does not have an unpaid character. Therefore, it is not a tax in compliance with the definition in Article 6 of the Tax Ordinance Act. Despite the fact that the zoning fee constitutes a public-law liability (public levy under administrative law), it may not be treated as a kind of tax, as it does not result from the Tax Ordinance Act (Article 6) and, unlike tax, it has equivalent character in the form the commune's share in profits derived by the property owners in connection with the adoption of the local spatial plan (judgement of the Supreme Administrative Court of 18 May 2010, II OSK 1809/09). The above shows that these are not the provisions of the Tax Ordinance Act that apply to the proceedings for establishing the zoning fee, but the provisions of the Code of Administrative Procedure. The zoning fee, being a public-law liability, has legal effect within the framework of the administrative relationship. The administrative decision is the source of the obligation to pay such fee.[79]

The zoning fee, which is not a tax, obviously constitutes a non-taxable budgetary public-law receivable of the local government unit, within the meaning of Article

77 Rudnicki, S., *Własność nieruchomości,* Warszawa 2007, p. 167.

78 Żylińska, J., *Właściciele gruntów nie uciekną przed rentą planistyczną*, https://www.serwisy.gazetaprawna.pl/nieruchomosci/artykuly/1417798,renta-planistyczna-pozmianie-planu-miejscowego-przepisy.html (accessed 06.03.2020).

79 Judgement of the Voivodeship Administrative Court in Poznań of 14 March 2013, II SA/Po 60/13.

60 of the Act of 27 August 2009 on Public Finance, since the zoning fee is the budgetary income of the local government unit.[80] Such an understanding of the purpose of the zoning fee is in line with the purposes for which it was created: first of all, to 'share' profits derived by the property owner; second of all, to prevent 'speculative' trading in immovable property directly after the adoption or change of the plan. The purpose of charging the zoning fee is to compensate the local government units of the lowest level for the expenses they incurred due to the adoption of the local spatial development plans and encourage them to implement the plans. The payment of the zoning fee is obligatory.

The amount of the public levy is determined by the commune's decision-making bodies – -30% is the upper statutory limit. However, in practice, this threshold is sometimes lower. The aforementioned time limits have caused the substantial part of entities potentially obliged to pay the zoning fee to refrain from the disposal of their properties. They start selling the properties and derive profits due to the increased value only 5 years later. Public entities such as communes do not receive any payments, hence they do not generate the expected profits due to the prolonged sales process.

What is worth considering is the amendment to the Act in the form of the subject levy established at a fixed level of 30% of the increased value and the elimination of time limits.

Or, alternatively, the introduction of the minimum amount of the fee below which the price may not go. The above could change the current practice, in accordance with which a substantial part of the owners do not participate in the costs of spatial planning or participate only to a small extent.

The local plans put the obligation on the communes to implement the regulations included in such plans. It involves substantial costs, e.g. implementation of the technical infrastructure, purchase of lands for public purposes or satisfaction of claims of the owners due to the decrease of the property value.[81] The provisions in the plans may also have impact on the increase of the commune's income thanks to, among other things, the proceeds from the property brokerage services, property tax, or adjacent fees. Furthermore, the commune's income may also come derived from the zoning fees.[82] The above-described issues should be specifically

80 Act of 27 August 2009 on public finance, consolidated text: Dz.U. (Journal of Laws) of 2019, item 869.

81 Hełdak, M., *Teoretyczne i praktyczne aspekty ustalania wysokości 'opłaty planistycznej'*, "Studia i Materiały Towarzystwa Naukowego Nieruchomości" 2008, No. 16(1), p. 115.

82 Sulczewska, K., *Opłata planistyczna oraz opłata adiacencka – uzasadnienie aksjologiczne i analiza porównawcza*, "Studia Prawno-Ekonomiczne" 2014, Vol. XCII, p. 129; Padrak, R., *Ustalanie opłaty*

defined in the so-called forecast of the financial impact of a given plan (Article 17 point 5 of the Planning and Development Act). The communes, while bearing the costs related to the adoption of the local plans, are interested in the share of profits generated therefrom by the land owners. It is made possible thanks to, among other things, the zoning fee, which is a tool for shaping market behaviours and type of participation of the land owners in the costs of the adoption of the local spatial development plans.[83]

With the above in mind, it should be stated that it is justified to keep the aforesaid measure in the Polish legal framework, as it actually has a positive impact on communes' budgets, and the propounded changes only enhance this effect.

References

Bieniek, G. and Rudnicki, S., *Nieruchomości. Problematyka prawna*, Warszawa 2004.

Bieniek, G. and Rudnicki, S., *Nieruchomości. Problematyka prawna*, Warszawa 2011.

Bieniek, G. et al., *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2005.

Bieniek, G., et al., *Ustawa o gospodarce nieruchomościami. Komentarz*; Warszawa 2012.

Borodo, A., *Finanse publiczne RP. Zagadnienia prawne*, Bydgoszcz 2000.

Budner, W., *Gospodarka przestrzenna miast i aglomeracji,* 1st edition. Poznań 2019.

Brzezicki, T. et al., *Opłaty i wybrane roszczenia dotyczące nieruchomości,* Warszawa 2018.

Gdesz, M. and Trembecka, A., *Regulowanie stanu prawnego nieruchomości pod drogi*, Katowice 2011.

Hełdak, M., *Teoretyczne i praktyczne aspekty ustalania wysokości 'opłaty planistycznej'*, "Studia i Materiały Towarzystwa Naukowego Nieruchomości" 2008, No. 16(1).

Jaworski, J. et al., *Ustawa o gospodarce nieruchomościami. Komentarz*, 5th edition, Warszawa 2017.

Leoński, Z. et al., *Prawo zagospodarowania przestrzeni,* Warszawa 2019.

Niewiadomski, Z., *Planowanie i zagospodarowanie przestrzenne. Komentarz*, Warszawa 2009.

Niewiadomski, Z., *Planowanie i zagospodarowanie przestrzenne. Komentarz,* Warszawa 2015.

Niewiadomski, Z., *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz*, Warszawa 2005.

planistycznej – procedura, przesłanki oraz propozycje zmian w obowiązującym prawie, "Kontrola Państwowa" 2015, No. 2(60), p. 116.

83 Zaremba, A., *Uwarunkowania rozwoju rynku nieruchomości, jako istotnego czynnika rozwoju lokalnego*, "Journal of Agribusiness and Rural Development" 2011, No. 1(19), p. 115.

Nowak, M.J. and Tokarzewska–Żarna, Z., *Gospodarka nieruchomościami. Kluczowe problemy prawne*, Warszawa 2017.

Nowak, M.J., *Planowanie i zagospodarowanie przestrzenne. Komentarz do ustawy i przepisów powiązanych,* Warszawa 2019.

Padrak, R., *Ustalanie opłaty planistycznej – procedura, przesłanki oraz propozycje zmian w obowiązującym prawie*, "Kontrola Państwowa" 2015, No. 2(60), p. 116.

Plucińska-Filipowicz, A. and Wierzbowski, M., *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz*, Warszawa 2018.

Rokicka-Maruszewska, K., *Administracyjnoprawne aspekty opłaty planistycznej*, Warszawa 2019.

Rudnicki, S., *Własność nieruchomości,* Warszawa 2007.

Mielcarek, P. et al., *Akta administracyjne dla aplikantów*, Warszawa 2016.

Strzelczyk, R., *Podatki i opłaty dotyczące nieruchomości*, Warszawa 2016.

Sulczewska, K., *Opłata planistyczna oraz opłata adiacencka – uzasadnienie aksjologiczne i analiza porównawcza*, "Studia Prawno-Ekonomiczne" 2014, Vol. XCII.

Zaremba, A., *Uwarunkowania rozwoju rynku nieruchomości, jako istotnego czynnika rozwoju lokalnego*, "Journal of Agribusiness and Rural Development" 2011, No. 1(19).

Źróbek, S. et al., *Gospodarka nieruchomościami. Komentarz do wybranych procedur*, Katowice 2011.

Żylińska, J., *Właściciele gruntów nie uciekną przed rentą planistyczną*, https://serwisy.gazetaprawna.pl/nieruchomosci/artykuly/1417798,renta-planistyczna-po-zmianie-planu-miejscowego-rzepisy.html.

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Remote working and teleworking. Some points of reflection in the context of the current SARS-CoV-2 pandemic

Abstract

The purpose of adopting the Act on particular solutions related to the prevention, countering and combating COVID-19, other infectious diseases and the emergency crises caused thereby of 2 April 2020 was to minimise the threat to public life. This was to be attained *inter alia* by the introduction of remote working. The laconic wording, however, led to various interpretative difficulties as to the scope of obligations of both employers and employees as well as the framework of their mutual responsibility. In order to eliminate ambiguities and ensure the effectiveness of regulations, certain legislative amendments were introduced, but in the current legal circumstances these do not seem to be the target solution. The author, taking advantage of the historic method, was able to show the evolution of the incidental legal solution that is remote work. Based primarily on the analysis of applicable laws, on the other hand, she highlighted the advantages as well as defects of remote work as it is now, while comparing it to telework. In this context, it was possible to propose certain *de lege ferenda* (as it should be) conclusions as to the direction of desirable legislative changes, i.e. making the rights and obligations of a remote worker, settling accounts and rules of responsibility more precise. The main objective of the author was to present possible ambiguities in the current regulations, which should be removed in the legislative works carried out in the future. In this scope, the rules concerning the use and settling the use private equipment,

used by the remote worker in the performance of work duties, should be clarified and also the rules concerning the transfer of work results ought to be expressly specified. Further, the author points out the unclear limits of responsibility of parties to the employment relationship, where the work is carried out remotely and thus supervision over the worker is lighter. Looking at the global direction of socio-economic changes, it was also suggested that remote work be regulated in the Polish legal order on the permanent basis.

Keywords: COVID-19, remote work, telework, workplace

Introduction

The adoption of the Act on particular solutions related to the prevention, countering and combatting COVID-19, other infectious diseases and emergency crises caused thereby of 2 April 2020[1] was intended to minimise the threat to public health. It was thought that taking more decisive legal steps was necessary. The regulations contained, in particular, in the Act on preventing and combatting infections and infectious diseases of 5 December 2008[2] were deemed insufficient – in terms of guaranteed legal and organisational measures. The new Act was supposed to, in particular, 'determine the rules and procedures for the prevention and combating infection and spread from person to person of a transmissible disease caused by the SARS-CoV-2, including the rules and procedures for taking anti-epidemic and preventative measures for the purpose of eradicating the sources of infection and eliminating the paths of spread of the disease (…)'.[3] The adopted solutions are relatively broad in scope. They include, for instance, regulations concerning the performance of work, covering the area of employee duties and granting further rights to employers, e.g. related to work time. This issue, however, is outside the scope of the present study. Without a doubt, considering its importance, it requires a separate in-depth analysis.[4] This study, on the other hand, focuses on the essence and the legal nature of remote work and on its advantages and disadvantages as compared to telework.

Allowing employees to perform work remotely was supposed to be one of the proposed instruments aimed at improving the state of the pandemic in the country.

1 Dz.U. (Journal of Laws) of 2020, item 374, as amended, hereinafter the COVID-19 Act.

2 Dz.U. (Journal of Laws) of 2019, item 1239, as amended.

3 Draft no. IX.265.

4 See Stefański, K., *Rozwiązania antykryzysowe dotyczące czasu pracy w ustawodawstwie pandemicznym*, "Monitor Prawa Pracy" 2020, No. 6, pp. 14-18 and also idem: *Czas pracy w sektorach krytycznych w dobie COVID-19*, "Monitor Prawa Pracy" 2020, No. 5, pp. 19-23.

Especially in the beginning this solution brought about numerous negative reactions related to the laconic wording of the introduced regulation. This stemmed from difficulties in determining the relation between the new method and the legal solution that was already present in the Labour Code – i.e. telework.[5] The first, incidental in nature, mention of the possibility to provide work remotely can be found in the COVID-19 Act,[6] where it stated that for the purposes of preventing COVID-19 an employer may order an employee to perform work described in the employment agreement, for a specific period of time, outside the place of permanent performance (remote work).

The succinct nature of the regulation from the very beginning led to various problems in its application. It should be noted that the wording thereof does not indicate whether remote work has to satisfy the conditions of telework, in particular with respect to formal requirements related to its introduction. The provision did not make any reference to the scope of obligations of the employee and the employer for the period when the work is rendered on a remote basis. It was necessary to take immediate legislative action aimed at clarifying this regulation so that it might be applied properly. The first changes, however, were introduced only in Article 77 of the Act on subsidised interest rates on bank credits, granted to entrepreneurs affected by the consequences of COVID-19, and on summary proceedings for the approval of arrangements in connection with COVID-19 of 19 June 2020[7], which entered into force on 24 June 2020. According to clause 3 which was added to Article 3 of the COVID-19 Act, it was specified that remote work may be ordered if the employee has the skills and space in order to carry out such work, while the type of work allows this. In particular, remote work may be performed by means of direct remote communication or concern the performance of manufacturing parts or material services. In the extended period of the pandemic, another amendment of the COVID-19 Act proved necessary so that the employer could order employees to carry out remote work after 5 September 2020 as well. In the absence of relevant legislative action, ordering remote work, envisaged as a temporary solution, would be impermissible. Article 4 of the Act on amending the Act on the posting of workers in the framework of the provision of services employees and certain other acts of 24 July 2020[8] introduced a rule that remote work may

5 Labour Code Act of 26 June 1974, Dz.U. (Journal of Laws) of 2020, item 1320, as amended, hereinafter the Labour Code.

6 Dz.U. (Journal of Laws) of 2020, item 374, in the wording as of the entry into force, i.e. 8 March 2020.

7 Dz.U. (Journal of Laws) of 2020, item 1086, as amended.

8 Dz.U. (Journal of Laws) of 2020, item 1423.

be ordered in the duration of the state of epidemiological threat or the state of epidemic announced due to COVID-19 and in the period of 3 months after such states are revoked[9]. The regulations of the COVID-19 Act were supplemented by appropriate executive acts, in particular the framework provisions contained in the Regulation of the Minister of Finance of 9 October 2020 concerning the establishment of certain restrictions, orders and prohibitions in connection with the state of epidemic[10], which provided for detailed instructions with respect to the rules of operation in particular epidemic zones in Poland.

Remote work – definition and most important characteristics

The COVID-19 Act is the legal instrument in which the most important characteristics and rules of remote work performance are provided. The wording of Article 3(1) of the COVID-19 Act states that remote work is such work that: 1) is performed for the purpose of COVID-19 prevention; 2) scope-wise corresponds to the work described in the employment agreement; 3) is performed for a specific period of time, 4) is performed outside the place of permanent performance.[11]

First, it should be indicated that the employer may order remote work performance 'for the purpose of COVID-19 prevention'. This is indicated in Article 2(2) of the COVID-19 Act. This includes any activities related to combating infection, preventing the spread of the disease, prevention and elimination of the consequences thereof, including socio-economic effects. Remote work may therefore be ordered in order to limit direct or indirect danger of COVID-19 and is not dependent on actions taken by other entities in this scope. A decision in this respect is made by the employer only.

Second, the legislator imposed the requirement that the type of work performed remotely corresponds to the work described in the employment agreement. For this reason, the employer may not order work to be performed remotely if it goes beyond the scope of work described in the employment agreement; such work may,

9 The regulation came into force on 5 September 2020.

10 Dz.U. (Journal of Laws) of 2020, item 1758.

11 See also: Baran, K. et al., *Komentarz do niektórych przepisów ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych*, in: Baran, K.W. (ed.), *Tarcza antykryzysowa 1.0 – 4.0, ustawa o dodatku solidarnościowym i inne regulacje, jako szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19. Komentarz*, Warszawa 2020, LEX el.

on the other hand, include a particular part of duties that the employee performs on a permanent basis at the workplace.

A remote work order in accordance with Article 3(1) of the COVID-19 Act is an official order in the meaning of the Labour Code provisions. It may be issued in any form, but for evidentiary reasons it is recommended that the remote work order be issued in a written or document form. The employee without appropriate skills, technical conditions or space that would permit fulfilment of standards concerning transmitted data confidentiality is not obliged to accept the remote work order. The circumstances related to the actual organisational capabilities of an employee should be specified comprehensively by the employer in advance. As has been argued in jurisprudence, in these particular circumstances, in light of the facts, it might be permissible to terminate the employment relationship with the employee in accordance with Article 45 of the Labour Code or to change the terms and conditions of work in accordance with Article 42 §1 – 3 of the Labour Code.[12]

Third, remote work may be performed only 'for a specific period of time'. This does not exclude the option to extend the period of remote work performance. Ordering work to be rendered remotely for an indefinite period of time or without specifying an end date or any other event entailing the termination of work in this form is contrary to law and deemed invalid.[13]

Fourth, another characteristic of remote work is its performance 'outside the place of permanent performance', i.e. outside the workplace specified in the employment agreement. It also seems possible to implement a 'mixed' system of work, where work is performed partially on a remote basis, and partially as per the agreement. From the employer's point of view, it is of no consequence where the employee performs work provided proper performance thereof is possible, appropriate technical conditions and space are ensured, and the employer's interests are not harmed.

The provision covering remote work orders does not pertain to matters related to safety of performance. It may not be accepted, however, that only the employee is responsible for the organisation of remote work. This would mean transferring a part of the risks related to safe work organisation onto the employee. Despite the particular circumstances in which remote work was introduced and the overriding importance of objectives specified in the COVID-19 Act, the employer is still responsible for protecting the health and life of employees by ensuring safe and

12 Ibidem.

13 Article 58 of the Civil Code in conjunction with Article 300 of the Labour Code; Baran, K. et al., op. cit.

healthy working conditions by using scientific and technological developments.[14] On the other hand, it would be difficult to accept that the employer is responsible for an accident at home or at any other location of remote work performance while having no influence over how the work is rendered.[15]

The proposed legislative solution concerning remote work generates several interpretative problems that may give way for impermissibly broad interpretation. This can be seen primarily in the analysis of regulations concerning the scope of employer's responsibility for actions of a remote employee. Due to the severity of legal consequences that may be imposed on employers, taking into account the actual limitations in supervising remote employees, legislative action in this scope seems essential. The provisions should be clear and precise. It should also be mentioned that legislative shortcomings are also evident in the way the responsibilities of remote employees are defined. It is still unclear how the employee should transfer the work results to the employer and upon what basis the employee should use and settle the use of private equipment for the purposes of performing work duties. The comparison between the newly introduced instrument of remote work and the telework which was already present in the Labour Code will prove the validity of the formulated conclusions.

Remote work v. telework – principal differences

In the present legal circumstances, we may not equate the incidental institution of remote work on one hand and telework on the other hand, which was already regulated in the Labour Code, due to a variety of significant differences between them.

Remote work is still a temporary solution. In the initial period after the COVID-19 Act entered into force, according to the wording of Article 36(1), Article 3 was to expire upon the lapse of 180 days after entry into force (i.e. on 4 September 2020). Due to the protracted pandemic, it was necessary to take legislative action and extend this period, as referred to above.[16] Currently, for the duration of the state of epidemiological threat or the state of epidemic announced due to COVID-

14 Kryczka, S., *Koronawirus: praca zdalna to nie telepraca*, 29.03.2020, Rzeczpospolita, https://www.rp.pl/Kadry/303259967-Koronawirus-praca-zdalna-to-nie-telepraca.html (accessed 17.09.2020).

15 Rzemek, M., *Zmiany w kodeksie pracy dotyczące pracy zdalnej*, 30.07.2020, Rzeczpospolita, https://www.rp.pl/Kadry/307309911-Zmiany-w-kodeksie-pracy-dotyczace-pracy-zdalnej.html (accessed 18.09.2020).

16 See also: Leśniak, G.J., *Praca zdalna – rządzący gubią się w terminach*, 14.08.2020, Prawo.pl, https://www.prawo.pl/kadry/jak-dlugo-bedziemy-pracowac-zdalnie,502370.html (accessed 27.08.2020).

19 and in the period of 3 months after they are revoked, the employer may, for the purpose of COVID-19 prevention, order the employee to carry out work described in the employment agreement, for a specific period of time, outside the place of permanent performance (remote work).[17] Contrary to remote work, telework is not subject to any time constraints. There are no statutory obstacles that would prevent the employee and the employer from agreeing to perform telework for an indefinite period of time.

Working remotely, after the employer has made the order, due to the need to implement the statutory objective, is the responsibility of the employee. Sanctions related to refusal to perform the order should be, of course, considered on a case-by-case basis. A refusal to carry out remote work, that was not justified by specific circumstances, exposes the employee to disciplinary sanctions provided for in Article 108 § 1 of the Labour Code since the employer may consider it, under certain conditions, as a failure to comply with the established organisation and order in the work process.[18] Meanwhile, telework may result from an agreement between the parties (save for the case when it is entrusted pursuant to a notice of termination amending the employment agreement).[19] It is proposed as an alternative for the employee.

According to Article 3(8) of the COVID-19 Act, the employer may at any time and in any form withdraw the remote work order. Such withdrawal does not require any justification and the employee is obligated to comply with it without undue delay provided work conditions at the employer's office satisfy occupational health and safety standards and do not cause a direct threat to life or health, due e.g. to the epidemic.[20] Analogically to unreasonable refusal to accept the remote work order, an unreasonable refusal to cease remote work may lead to detrimental consequences for the employee. Meanwhile, telework may be revoked at the request by any of the parties within 3 months of when telework was commenced, where telework was pursued in the period of employment. Otherwise, it may be terminated by agreement between the parties or by means of a notice of termination amending the employment agreement.[21]

17 Kośliсki, K., *Wynoszenie dokumentów z firmy i praca zdalna mogą naruszać prawo*, 19.03.2020, Prawo.pl, https://www.prawo.pl/podatki/wynoszenie-dokumentow-z-firmy-i-praca-zdalna-moga-naruszac-prawo,498775.html (accessed 27.08.2020).

18 See also: Baran, K. et al., op. cit.

19 Article 42 § 2–3 of the Labour Code.

20 See also: Baran, K. et al., op. cit.

21 Article 67^8 of the Labour Code.

Another feature to differentiate remote work from telework is the absence of the regularity requirement, i.e. the performance of work systematically, on dates or in periods agreed with the employer. Teleworkers, on the other hand, are obliged to perform work on a regular basis while outside the workplace, using means of electronic communication in the meaning of provisions on performing services by electronic means.[22]

In this context, attention should be drawn to statutory regulations concerning the transfer of work results to the employer, which occurs primarily via means of electronic communication.[23] In the case of telework, the manner of reporting work performed and thus the tools used by the employer for supervision purposes of work performed are specified in detail. There is no such regulation for remote work. This does not mean, however, that the obligation in this respect does not exist as it follows from general rules of proper performance and supervision of work rendered under an employment agreement. It seems that these matters should be clarified by the employer in internal documents or in a remote work order. At employer's order, the employee performing remote work is obliged to report activities carried out, in particular the description of those activities as well as the date and duration of performance. The failure to comply with the employer's order or improper performance thereof may constitute a violation of base duties of an employee and result in detrimental work-related consequences. The legislator has indicated that remote work may be, in particular, rendered by means of direct remote communication or concern the performance of manufacturing parts or material services. To a certain extent, this resembles the regulation on telework, but seems to be wider in scope and concept.[24]

It is also worth directing attention to differences related to the manner of remote work performance. According to clause 4, tools and materials needed for remote work performance as well as logistical support of remote work must be provided by the employer. In the performance of remote work, the employee may, however, use tools or materials that have not been supplied by the employer if this allows respect for and protection of confidential information and other legally protected secrets, including business secrets or personal data, as well as information whose disclosure could expose the employer to damage. The employer's failure to provide tools and materials does not mean that such tools and materials must belong to the employee.

22 Jaśkowski, K., *Komentarz do art. 67[5] k.p.*, in: Jaśkowski, K. et al. (eds.), *Komentarz aktualizowany do k.p.*, LEX el. 2020.

23 Article 67[5] §2 of the Labour Code.

24 Ibidem.

The term 'that have not been supplied by the employer' means that they may be the property of a third party. However, the risk of appropriate security measures and third-party consent for using them lies with the remote worker. On the other hand, the issue of financial equivalent for the used equipment has not been regulated. Of course, this does not prevent the employer from defining this issue in an order or internal regulation. The situation is different in case of telework. The employer is obliged to provide the teleworker with equipment necessary to perform telework, insure the employee, cover the cost related to installation, servicing, use and maintenance of equipment, and provide technical support as well as necessary training in respect of equipment used unless the employer and the employee decide otherwise in a separate agreement.[25] The employer may arrange with the employee that the latter will use his/her own equipment in the performance of work, but in such case the provisions impose the obligation to provide the financial equivalent, in particular taking into account the wear and tear standards of the equipment, the documented market prices thereof, the amount of materials used for the benefit of the employer, and the market prices thereof.[26]

In light of this comparison between remote work and telework, which is established in the Polish legal order, it seems that remote work could constitute, next to telework, a permanent element of the Polish legal landscape. The evolving social and economic circumstances and global context undoubtedly favour this determination. It is dubious, however, whether in this configuration, keeping both instruments – remote work and telework – is proper or whether it would be better to create a single optimal solution adapted to the world of employment. The latter solution, from the perspective of clarity and transparency of the legal order, seems more desirable. The issue of how remote work is performed in comparison to telework leads to the following conclusions. First, it would be appropriate to clarify the regulation concerning the use and settlement of the use of private equipment by a remote worker, as has been done with telework provisions in the Labour Code. Second, the legislative solution found in telework provisions as regards the teleworker's obligation to provide work results to the employer is to be welcomed. A clarification in this scope could also be introduced to regulations concerning remote work. Based on the conducted analysis, it seems reasonable to take legislative measures in the future aimed at changing and clarifying the currently applicable regulations.

25 Article 67^{11} §1 of the Labour Code.

26 Article 67^{11} §2(1) in conjunction with §3 of the Labour Code.

Remote work – governmental legislative plans

Due to the persisting state of the pandemic, it seems that remote work is becoming a permanent element of the organisational and legal landscape of the Polish reality. Not only employers and employees themselves but also State representatives are aware of this. Extending the effective period of this measure that is present only in an incidental Act does not seem sufficient for socio-economic purposes. In light of the growing number of questions from employees, an interpellation was submitted to the Ministry of Family, Labour and Social Policy on whether – and if so – when remote work would be regulated in provisions of the Labour Code as one of permanent forms of work provision outside the employer's office, even after the pandemic has ended.[27]

In response to the submitted interpellation, Stanisław Szwed, the Secretary of State in the Ministry of Family, Labour and Social Policy, indicated that in addition to extending the effective period of the regulation, the government sees the need to introduce amendments to the provisions of the Labour Code with respect to remote work performance. Works in this scope have been commenced by the Labour Law Problem Team of the Social Dialogue Council, since introducing a new regulation – remote work – to the Labour Code necessitates extensive discussions among the interested stakeholders. The suggested solutions should be accepted both by trade unions and employers' organisations by means of consensus of the parties.[28]

We have to agree with State representatives that the implementation of this solution should be undertaken very carefully, especially in the context of telework which is a measure already present in the Labour Code. Neither solution should be contradictory nor should they overlap; we may also opt for leaving only one measure. However, the regulation concerning remote work should not be laconic or produce ambiguity. It suffices to note how many doubts there were when it came to interpreting the provisions on remote work in the first period since their introduction. If this measure makes its way to the Labour Code on a permanent basis, special care should be taken in drafting the new regulations so as to avoid too-frequent amendments to such a framework act as the Labour Code.

27 Interpellation no. 9326 to the Ministry of Family, Labour and Social Policy concerning remote work, submitted by Anna Kwiecień, Member of the Polish Sejm, of 31 July 2020, Sejm Rzeczpospolitej Polskiej, https://www.sejm.gov.pl/sejm9.nsf/interpelacja.xsp?documentId=D263A686308C36BCC12585BA002470DE (accessed 18.09.2020).

28 A reply from Stanisław Szwed, secretary of state in the Ministry of Family, Labour and Social Policy, of 19 August 2020, https://www.sejm.gov.pl/sejm9.nsf/interpelacja.xsp?documentId=D263A686308C36BCC12585BA002470DE, Sejm Rzeczpospolitej Polskiej (accessed 18.09.2020).

Conclusion

In summary, it can be stated that the very idea of regulating remote work was a good one. The speed of its practical implementation and the absence of excessive formalism foster better organisation in entities that undoubtedly faced difficulties in operation in the course of the ongoing pandemic. It is also impossible to disagree with the statement that the regulation required wording more precise than that which in the first period after its introduction generated too many interpretive difficulties. However, it seems justified, in this era of technological progress, to keep this solution on a permanent basis, not only when the threat of pandemic is prevalent. A step in this direction may even be unavoidable. To ensure that the proposed legal solution produces the expected results, it may be indicated, by way of *de lege ferenda* conclusions, that a stricter regulation of the following matters is desirable: the reporting of results of work carried out on a remote basis and the provision of such results to the employer, clarification of the measures that permit the employer to exercise supervision over the work carried out by a remote worker, and specification of the rules for settling the use of equipment provided by either the employer or the employee. Given the severity of legal consequences and the possibility of impermissibly broad interpretation, is also seems necessary for the new provisions to clearly and directly specify the limits of responsibility of the employee and the employer.

References

Baran, K. et al., *Komentarz do niektórych przepisów ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych*, in: Baran, K.W. (ed.), *Tarcza antykryzysowa 1.0 – 4.0, ustawa o dodatku solidarnościowym i inne regulacje, jako szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19. Komentarz*, Warszawa 2020, LEX el.

Jaśkowski, K., *Komentarz do art. 67[5] k.p.*, in: Jaśkowski, K. et al. (eds.), *Komentarz aktualizowany do k.p.*, LEX el. 2020.

Kościcki, K., *Wynoszenie dokumentów z firmy i praca zdalna mogą naruszać prawo*, 19.03.2020, Prawo.pl, https://www.prawo.pl/podatki/wynoszenie-dokumentow-z-firmy-i-praca-zdalna-moga-naruszac-prawo,498775.html.

Kryczka, S., *Koronawirus: praca zdalna to nie telepraca*, 29.03.2020, Rzeczpospolita, https://www.rp.pl/Kadry/303259967-Koronawirus-praca-zdalna-to-nie-telepraca.html.

Leśniak, G.J., *Praca zdalna – rządzący gubią się w terminach*, 14.08.2020, Prawo.pl, https://www.prawo.pl/kadry/jak-dlugo-bedziemy-pracowac-zdalnie,502370.html.

Rzemek, M., *Zmiany w kodeksie pracy dotyczące pracy zdalnej*, 30.07.2020, Rzeczpospolita, https://www.rp.pl/Kadry/307309911-Zmiany-w-kodeksie-pracy-dotyczace-pracy-zdalnej.html.

Stefański, K., *Czas pracy w sektorach krytycznych w dobie COVID-19*, "Monitor Prawa Pracy" 2020, No. 5.

Stefański, K., *Rozwiązania antykryzysowe dotyczące czasu pracy w ustawodawstwie pandemicznym,* "Monitor Prawa Pracy" 2020, No. 6.

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Dimitry Kochenov, Citizenship, Cambridge, MA, 2019, 321 pages – review article on the monograph

Abstract

The article reviews the newest monograph of professor D. Kochenov on the critical analysis of the institution of citizenship. The main argument of the book consists in the injustice reinforced globally by the institution of citizenship from the perspective of the rights of an individual. The review refers to the issues discussed in the monograph concerning citizenship as a legal relation between an individual and the state, civil rights and obligations in a critical perspective. The author of the review underlines the significance of critical depiction rarely found in the Polish literature. However, he indicates possible areas for polemics with the reviewed monograph, in particular from the perspective of consular law. Polemic notes do not undermine the significance of this work as an important voice in the analysis of international law from the perspective of the rights of an individual.

Keywords: citizenship, Nottebohm, protection of nationals.

If we were to cast our minds back to the university lecturers devoted to the issue of citizenship, we would remember a specific legal status of this institution, characteristic manner of acquiring it and the classic, historic case of Friedrich Nottebohm. The case deserves, in fact, more attention not only due to the relatively new Polish Act on Citizenship that has been in force for eight years,[1] but from the perspective of political, economic and social changes in the world, which should encourage fresh, more extensive than simply doctrinal, and critical view of legal solutions.

As commonly accepted, citizenship is a legal institution the sense of which consists in the existence of a legal relation between a person and a state expressing a formal connection between this person and a given state, and consequently, generating mutual rights and obligations. Citizenship means a legal relation between an individual (a natural person) and a state (legal connection between an individual and a state), which settles the affiliation (formal connection) of this individual with a specific state and which is related to the existence of a set of mutual rights and obligations of the individual and the state.[2] However, such a narrow and formal treatment of citizenship does not forejudge this relation, does not allow appraisal, description of the institution of citizenship in the perspective of the principles of equity, justice, also in critical depiction. As rightly noticed by J. Jagielski, citizenship constitutes a non-uniform and multi-dimensional category. It can be considered from many points of view and constitute a subject for consideration for many scientific disciplines, such as: sociology, political sciences, historical sciences and finally, law. Depending on the applied point of view while considering citizenship, understanding of its essence (sense), role and significance, as well as perspectives for the future will be depicted differently.[3]

The Polish literature presents a logically valid opinion that "the material aspect of citizenship", that is the set of rights and obligations of the legal relation between an individual and the state, is only the effect of a formal relationship between both entities, which results from the legal order.[4] In this context, the work of Dimitry Kochenov covers with critical assessment this material aspect settling the whole

1 Act of 2 April 2009 on the Polish citizenship, Dz.U. (Journal of Laws) of 2012, item 161.

2 Jagielski, J., *Obywatelstwo polskie. Komentarz do ustawy*, Warszawa 2016, p. 17.

3 Ibidem, pp. 13-14.

4 "The indicated narrow and formal treatment of citizenship does not detach it completely from the issues of the rights and obligations of the state and its citizen; 'the material aspect' of citizenship is even discussed. In fact, this 'material' side of citizenship constitutes an effect and not the legal essence of the existence of the legal connection between a natural person and a given state. As a result, the essence of the citizenship as the legal institution should be considered in the context of the legal order of (stipulated by this order) the formal relationship between the individual and the state", Jagielski, J., op. cit., p. 20.

concept of citizenship, as well as the role of sovereign states dominant in international relations.

Professor Kochenov manages the Department of European Constitutional Law and Citizenship of the University of Groningen,[5] and a Polish reader may know him from, among others, publications concerning the rule of law in the European Union.[6] The monograph *Citizenship* constitutes a summary of many years of research conducted by the author in this area. The book is intended to present the topic of citizenship in horizontal terms, by detaching reflections from national legal systems: discussion on the known subject matter, yet, in a completely different light.[7]

The main argument that is brought to the fore from reading almost the entire book is the injustice that the institution of citizenship reinforces in the world: "the story of citizenship is as much a story of flattering the pride of those who are proclaimed to «belong» – a tale of liberation, dignity, and nationhood – as it is one of complacency, hypocrisy, and blunt domination, all dressed up as agency and the pursuit of the common good".[8] D. Kochenov elaborates on his thesis in six chapters written in animated, interesting and sometimes even provocative language.

Professor Kochenov starts his analysis of citizenship with questioning its aforementioned legal structure of this institution – a special relation between a citizen and the state. It is an imposed and authoritative relation. In the vast majority it is created without any participation of a human and it has an extremely important impact on his or her life: it can be a ticket to a wealthy life in a welfare state or become a curse that sentences, as in the case of Turkmenistan, to permanent isolation. Perhaps the popularity of citizenship stems from the fact that it is an organising institution which simplifies thinking about complex international matters. The label of citizenship activates stereotypes, sentences and elevates and all of these only on the grounds of an answer given to the customs officer's question: where are you from? As such, in the author's opinion, citizenship is a tool cementing global inequalities. It becomes similar to Middle Ages feudal layers, privileges and status limitations from which an individual could not set himself or herself free irrespective of their characteristics. The opportunity to travel freely may serve as an example: for citizens of the USA and the European Union Member States, as well several other wealthy states, border formalities either do not exist or are really non-arduous. For

5 University of Groningen, https://www.rug.nl/staff/d.kochenov/research (accessed 14.10.2020).

6 See e.g. Closa, C. and Kochenov, D., (eds.), *Reinforcing rule of law oversight in the European Union*, Cambridge 2016; Jakab, A. and Kochenov, D., *The enforcement of EU law and values. Ensuring Member States' compliance*, Oxford 2017.

7 Kochenov, D., *Citizenship*, Cambridge, MA 2019, p. XVI.

8 Ibidem, p. XII.

citizens of a vast majority of states they often constitute an unbreakable barrier. The world is not a global village for a vast majority of humanity. Such a presentation of the issue can already be noted in the previously written literature: twenty years ago Bauman divided travellers into tourists and vagabonds.[9] The question why some are called expats and others – immigrants remains valid. The strength of classification of citizenship remains grossly effective if we acknowledge that only approximately 2 percent of people make an attempt to change citizenship assigned to them at the moment of their birth.

D. Kochenov scrutinizes these two percent of humanity often showing completely different requirements of particular states in terms of naturalisation, gives examples from the history of European states of the 2nd half of the 20th century. Diagrams included on the next pages of this book showing a growing acceptance of states for holding many citizenships[10] and the decreasing trend of the automatic loss of the primary citizenship as a result of the naturalisation process, are extremely interesting.[11] While on the subject of the legal character of relations between the state and an individual, the disproportion of this relation is also proven by the possibility of losing citizenship: revocation thereof constitutes, as adopted in the literature, a unilateral act of the state against the individual and this practice used to be still accepted in the 1950s.[12] Admittedly, the Convention on the Reduction of Statelessness of 1961 bans revocation of citizenship, however, this ban is not absolute.[13] The current issue constitutes the possibility to revoke citizenship due to terrorist activity, e.g. in Great Britain, competence of the Minister of Foreign Affairs (Secretary of State).[14]

However, what happens if the previous, lost citizenship overshadows the rights of the individual? Professor Kochenov refers to the case of Nottebohm – in his opinion, one of the most wrongly interpreted cases in the history of international law.[15] Did the ICJ rob Friedrich Nottebohm in the light of the law?[16] The author

9 Polish edition: Bauman, Z., *Globalizacja*, Warszawa 2000, p. 92 ff.

10 Kochenov, D., op. cit., p. 87.

11 Ibidem, p. 88.

12 See e.g.: Waligóra, M., *Problematyka obywatelstwa w polskim porządku prawnym*, "Gentes & Nationes. Studia z Zakresu Spraw Międzynarodowych" 2010, No. 2, pp. 165-166. The author refers to, among others, regulations of the Second Polish Republic and the Polish People's Republic allowing revocation of Polish citizenship.

13 Convention on the Reduction of Statelessness, 30 August 1961, United Nations Treaty Series Vol. 989, Article 8.

14 Kochenov, D., op. cit., p. 112.

15 Ibidem, pp. 114-119.

16 Ibidem, p. 119.

criticises not only the conception of the so-called effective citizenship resulting in depriving Nottebohm of benefits directly associated with citizenship, which has already been discussed also in the Polish literature,[17] but the injustice resulting from a certain automaticity of assigning to Germans collective responsibility for activities of the Third Reich even in the event that individual Germans did not support Hitler's policy and as a sign of protest left their homeland[18].

The 3rd chapter of the book is devoted to the rights related to held citizenship. Traditionally, these include the right to settle, protection against deportation, access to the labour market and sometimes other rights, for instance social rights. Oftentimes these rights were not vested in all citizens and depended on the place of residence or other factors.[19] For instance, Kochenov shows how the downfall of the British Empire deprived 200,000 of Indians, subjects of the Queen, of rights. The current trend which has been depicted well in this work is, in fact, the conception of post-national citizenship,[20] in which the rights do not depend on citizenship, but are vested in every person under the jurisdiction of the state, on the grounds of the human rights norms. Therefore, one may ask whether a citizen of a failed state benefits from substantially bigger privileges than a stateless person? In such, not that rare, special situations, this differentiation seems to be purely formal and academic, the catalogue of rights remains unspecified and the possibility of its effective use is illusive.

It is a different case with obligations. Was citizenship not invented so that subjects paid taxes and fought for the kingdom in countless wars and conquests of their prince? In the 4th chapter the author presents the overview of civic responsibilities often expressed in a poetic manner in quoted constitutions. In many of them one can find the spirit of totalitarianism, imposed on the human responsibilities towards the homeland which is not, in fact, chosen by anyone. In the context of

17 See: Sandorski, J., *Opieka dyplomatyczna a międzynarodowa ochrona praw człowieka. Zagadnienia wybrane*, Poznań 2006, p. 118.

18 See e.g.: *Wypędzenie intelektu*, "Przegląd Polityczny" 2001, No. 50, pp. 87-117. Newer criticism on the Nottebohm case presents the activities of Guatemala as obvious and serious violation of human rights, who might have been one of those who opposed the policy of Nazi Germany: Dolinger, J., *Nottebohm revisited*, in: Casella, P.B. and Silva e, G.d.N. (eds.), *Domensão International Do Direito: Estudos Em Homenagem A G.E. Do Nascimentao E Silva,* No. 141, São Paulo 2000, pp. 142–43.

19 "In the light of legislations of certain countries we are dealing with citizenship treated from the perspective of holding all political rights and citizenship with a dimension limited from this point of view, with a simultaneous retention of nationality. This phenomenon is reflected in the diverse nomenclature used in legal provisions, as e.g. (respectively) citizenship and nationality, Bürgerschaft and Staatsangehörigkeit, citoneyetté and nationalité"; Jagielski, J., op. cit. pp. 21-22.

20 Soysal, Y.N., *Limits of citizenship*, Chicago 1994.

the stenographic record of the Joseph Brodsky's trail one can hum T. Love's song: "*Ojczyznę kochać trzeba i szanować, Nie deptać flagi i nie pluć na godło*" (*"Homeland should be loved and respected, the flag should not be stepped on and the emblem should not be spat on*")[21]. Therefore, the concept of citizenship can include the willingness to shape "a good citizen" rooted out of individuality, submerged in state propaganda or history, which is a (controlled?) collective memory. This oppressive dimension of the institution of citizenship was, after all, well-known in the Polish People's Republic, in the militia command: *Citizen!* Fortunately, it is becoming a matter of the past: taxes are paid in the country of residence and not citizenship (the example of the USA is an exception to the rule), the obligation of the defence was taken over by professional armies (also private companies and sometimes hired hands), states are also resigning from the educational function of citizenship and even tolerate far-reaching disloyalty and criticism.

In his deduction, D. Kochenov moves from a dissident to an engaged member of a community: *polis*. The political dimension of citizenship participation is presented in the 5th chapter, where the author gives interesting examples of practices especially targeting minorities and other residents who are or may become citizens, yet, to put it gently, whose political engagement is not promoted, unless it is politically useful e.g. to incite Popper's *tribal spirit* in order to maintain and extend power.[22] Mass naturalisations (e.g. in Hungary), referring to diaspora, have the same objective: soliciting new, loyal and grateful voters.

The book ends with a short summary included in the 6th chapter. Kochenov reminds the reader of the previously presented thesis: for the majority of citizens in the world the legal relation connecting them to the state is not a reason for pride, is not a proof of emancipation of a unit or an achievement of the modern law, but a guarantee of injustice. Citizenship is an institution which cements inequalities, simplifications and arbitrary divisions completely independent of human will, personal characteristics or features. The case is different in the event of "super-citizenships": passports of the USA, the European Union Member States and several other, not numerous, wealthy states. Holders thereof luckily born in the jurisdiction of strong, rich and influential states are winners in this lottery.

Fortunately for Polish citizens, our country is included in the premium group providing its citizens with privileges that are unbelievable in certain regions of the world and in our country are treated as something obvious. Probably that is why a Polish reader may not often think critically about the institution of citizenship. The work by D. Kochenov opens our eyes.

21 T. Love, *Wychowanie*, https://bibliotekapiosenki.pl/utwory/Wychowanie_ (accessed 14.10.2020).

22 See: Llosa, M.V., *Zew plemienia*, Kraków 2020, p. 18 ff.

However, it does not mean that this book may be treated as a comprehensive presentation of the issue. The author's intention was to present criticism of a known and often described legal and political institution that is citizenship. Nevertheless, sometimes depiction of the issue from one perspective, albeit announced in the introduction, seems to be devoid of counterbalance. One may have doubts, whether the basic thesis of Professor Kochenov on the incredible injustice of the institution of citizenship from the perspective of a person who was unlucky to be born "under a different sky" does not in essence refer to the whole system of international relations still based on, in fact, states and whether changing this state of affairs is not a certain utopian postulate of rejecting the Westphalian system? One could imagine that every person legally staying in the territory of a given jurisdiction benefits from identical rights and obligations including the right to vote and the right to be elected. Yet again, it boils down to the right to legal stay, the right to enter the territory of the country, which in practice leads to similar dilemmas as in the case of citizenship. The only permanent breaking of the main thesis included in the book on the injustice of the international community would consist in the resignation from the institution of citizenship and simultaneous abolition of borders and allowing each human to fully realise their potential under the latitude under which, paraphrasing the American Declaration of Independence, they will exercise "certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". Therefore, should we go back to the past?

Sometimes one can also get an impression that examples of practices of states presented in the monograph, although interesting and non-obvious, are taken from different periods, which may give an impression that the institution of citizenship basically stopped in its development. By giving these examples, in several places the author does indicate progress, which took place for instance in the scope of superseding citizenship rights with human rights, however, the contribution of the international law mainly from the 60s and the 90s to the gentle civilizer[23] of the institution of citizenship could have been underlined more.

In this context one should mention the institution of consular protection omitted by the author in the discussed study. Timothy Snyder in his excellent book *The Holocaust as history and warning* indicated that: "Citizenship is the name of a reciprocal relationship between an individual and a sheltering polity. When there was no state, no one was a citizen, and human life could be treated carelessly. (…) For Jews themselves, the existence of a state meant citizenship, even if only in an attenuated and humiliating form. (...) Legal discrimination by antisemitic states did not bring

23 Paraphrasing the thesis of M. Koskenniemi on international law as a gentle civilizer of nations, see: Koskenniemi, M., *The gentle civilizer of nations*, Cambridge 2001.

an automatic downward spiral toward death, but state destruction did. Once a Jew lost access to a state he or she lost access to the protection of higher authorities and lower bureaucrats".[24] During the Second World War some European Jews were saved because they were covered with consular protection of their own country or were naturalised in an express mode.[25] Is there anyone who has not heard about Raoul Wallenberg? Also Polish diplomacy provided such assistance by violating the law e.g. by counterfeiting documents of foreign states or resorting to bribery.[26] The history of consular law of the second half of the 20th century and also recent years with probably the most often quoted case of *Avena*[27] shows that not only empires strive to protect their citizens, although, obviously the reasons for which they do so may vary. The significance of the protective function of citizenship is, in fact, growing e.g. in the context of consular care provided by the EU Member States on the grounds of the institution of the European Union citizenship.

The above notes do not, however, overshadow the basic, in my opinion, value of this work. It is the phenomenon known in the colloquial language as second-class citizenship. In many places of his monograph D. Kochenov underlines that citizenship is, in essence, a racist and sexist institution. Its practical construction in many countries gives examples of marginalising a group of citizenship out of the political community and also the ethnically understood nation in general. Such an observation has a contemporary value and constitutes a warning for the future in the face of global migrations, resurging nationalism and populism, which settled in the circles of states described as developed. Especially in Poland, the country which is next to Portugal the most ethnically and religiously homogeneous in the EU with authoritarian tendencies established in the newest history, noticeable nationalism, racism (especially antisemitism) and xenophobia observed in the public space. Ironically, the Polish Act of 2 April 2009 on the Polish citizenship is one of the most liberal ones. When will an immigrant – a new citizen become one of us? And does the Polish nation really mean all citizens of the Republic of Poland?

It is worth reading professor Dimitry Kochenov's book carefully.

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24 Snyder, T., *Black earth: the Holocaust as history and warning*, New York 2015, pp. 220-222.

25 A separate matter is the fact that a few years ago people of Jewish descent were in many countries treated as second-class citizens, author's note.

26 Activities of the so-called Ładoś Group are described in Drywa, D., *Poselstwo RP w Bernie. Przemilczana historia*, Oświęcim 2020.

27 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004; also see: Wedeł-Domaradzka, A., *Jednostka a sprawiedliwość międzynarodowa – uwagi na tle "prawa do informacji o pomocy konsularnej" w sprawie Avena i inni obywatele Meksyku*, in: Czubik, P. and Burek, W., (eds.), *Wybrane zagadnienia współczesnego prawa konsularnego*, Kraków 2014, pp. 175-191.

References

Bauman, Z., *Globalizacja*, Warszawa 2000.

Closa, C. and Kochenov, D., (eds.), *Reinforcing rule of law oversight in the European Union*, Cambridge 2016.

Dolinger, J., *Nottebohm revisited*, in: Casella, P.B. and Silva e, G.d.N. (eds.), *Domensão International Do Direito: Estudos Em Homenagem A G.E. Do Nascimentao E Silva*, No. 141, São Paulo 2000.

Drywa, D., *Poselstwo RP w Bernie. Przemilczana historia*, Oświęcim 2020.

Jagielski, J., *Obywatelstwo polskie. Komentarz do ustawy*, Warszawa 2016.

Jakab, A. and Kochenov, D., *The enforcement of EU law and values. Ensuring Member States' compliance*, Oxford 2017.

Kochenov, D., *Citizenship*, Cambridge, MA 2019.

Koskenniemi, M., *The gentle civilizer of nations*, Cambridge 2001.

Llosa, M.V., *Zew plemienia*, Kraków 2020.

Sandorski, J., *Opieka dyplomatyczna a międzynarodowa ochrona praw człowieka Zagadnienia Wybrane*, Poznań 2006.

Snyder, T., *Black earth: the Holocaust as history and warning*, New York 2015.

Soysal, Y.N., *Limits of citizenship*, Chicago 1994.

Waligóra, M., *Problematyka obywatelstwa w polskim porządku prawnym*, "Gentes & Nationes. Studia z Zakresu Spraw Międzynarodowych" 2010, No. 2.

Wedeł-Domaradzka, A., *Jednostka a sprawiedliwość międzynarodowa – uwagi na tle "prawa do informacji o pomocy konsularnej" w sprawie Avena i inni obywatele Meksyku*, in: Czubik, P. and Burek, W. (eds.), *Wybrane zagadnienia współczesnego prawa konsularnego*, Kraków 2014.

Wypędzenie intelektu, "Przegląd Polityczny" 2001, No. 50.

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