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Ruling as a form of settlement of an individual tax case: Considerations exemplified by tax overpayment

ABSTRACT

The ruling on the application of tax overpayment is a formal act which does not prejudge the existence of tax arrears, but which provides information on the way the payment is credited. The credit is legally binding. Therefore, the ruling on the credit only confirms that it has been effected. The amount of the tax liability or arrears shall not be verified in the credit decision. The amounts shall be fixed or determined in accordance with their respective procedures. The ruling is a formal condition for the overpaid tax to be credited against outstanding and current tax liabilities. The ruling has legal effects in the sense that as for the date of crediting the overpayment, tax arrears no longer exist.

KEYWORDS

ruling, tax proceedings, tax overpayment

Introduction

In the legal regulations of the pre-war Tax Ordinance,[1] the ruling – i.e. tax ruling – was adopted as a procedural form of action of the tax authority. The rulings were the second form of action of tax authorities in tax proceedings. In this way, due to the procedural consequences, the legislator separated the rulings from the decisions, which were sovereign acts of tax authorities issued in the course of assessment and appeal proceedings. On this basis thereof, the tax authority imposed, reduced or repealed the tax or fine. At present, it is considered that the ruling as an individual act of tax law issued on the basis of the current Tax Ordinance[2] differs from the decision in terms of the subject of ruling and, consequently, the scope of its legal effects.

1 Cf. Articles 38 and 39 of the Act of 15 March 1934 Tax Ordinance, consolidated text, Dz.U. (Journal of Laws) of 1936, no. 14, item 134.

2 Act of 29 August 1997 Tax Ordinance, consolidated text, Dz.U. (Journal of Laws) of 2020, item 1325, as amended, hereinafter referred to as the "Tax Ordinance".

While undertaking the analysis of issues defined by the subject of this study, it is crucial to first of all pay attention to the decisions issued by tax authorities in the form of the ruling to credit the tax overpayment against future and current tax liabilities in terms of the tax and legal relationship. Undertaking research in this area is all the more important, since the concept of a legal act gave rise to many controversies in the doctrine of tax law and the judicature, which refers to the issuance of the ruling by the tax authority, thus creating a new legal state (a constitutive administrative act), or, on the contrary, not creating a new legal state – an administrative declaratory act. At the same time, the issue is part of a problem analysed by the representatives of the doctrine of tax law, which may also support the process of interpreting the provisions of Chapter 9 of the Tax Ordinance entitled *Overpayment*.

The essence of the tax overpayment

The legal regulations of the current Tax Ordinance pursuant to Article 72 § 1 refer to the essence of tax overpayment. In compliance with the aforementioned provision, the amount of tax overpaid or unduly paid shall be deemed to be the tax overpayment. In the first case, the tax debtor's benefit is higher than it should result from current law – it is the overpaid benefit. On the other hand, in the second case, the tax overpayment happens when the tax benefit should not be allowed in light of the applicable law – it is the undue benefit. Furthermore, the tax overpayment refers to the facts outlined in § 1 points (2) to (4) of Article 72 of the Tax Ordinance, where other cases are listed, which, in the legislator's opinion, should also be considered as the overpayment of tax.[3] Having regard to the content of the aforementioned provision, the tax overpayment should also be considered the amount of tax unduly collected by the remitter or in the amount greater than the amount due, as well as refer to a situation where the benefit of the remitter or collector resulting from the decision on the tax liability of such entities was determined unduly or in the amount greater than the amount due, and then, after the decision has been annulled or declared invalid, the tax authority issued another correct assessment decision of a lower value, the overpayment shall constitutes the difference between the tax and the tax resulting from the latter decision. The tax overpayment is also the amount unduly paid by third parties within the meaning of Article 107 of the Tax Ordinance and by heirs, i.e. cash benefits paid on the basis of a tax liability decision or a decision determining the amount of the testator's tax liability, under which the benefit due was overstated or the undue benefit was determined or established.

It is also worth noting that the legislator treats other cash amounts on the same level as the tax overpayment, which shall include, for example, paid arrears, interest for late payment of outstanding tax advances and extension fee amount.[4] In this way, the tax overpayment shall be deemed to mean not only the advances towards personal and corporate

3 Cf. A. Szymczak, *Nadpłata podatku powstała w wyniku orzeczenia trybunału konstytucyjnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, Vol. 4, p. 108.

4 Cf. Article 72 § 2 of the Tax Ordinance.

income tax, tax instalments with interest or extension fee amount, but also other non-tax cash benefits, which include budgetary fees and non-tax receivables.[5]

Additionally, the tax overpayment refers to payments of the distributed profit of the State Treasury sole proprietorships and state enterprises,[6] the amount of tax on the basis of a legal provision, which was later declared unconstitutional by the Constitutional Tribunal, or the amount of tax for which the legal basis was the provision being subject to examination by the Court of Justice of the European Union, and – pursuant to the ruling issued by the CJEU – it follows that this provision is incompatible with European Union law.[7]

On the basis of the above-cited legal regulations, it may be interpreted that the concept of the tax overpayment consists of two types of benefits of a different legal nature. On one hand, it is a pecuniary benefit which has arisen as a result of the cash payment higher than that resulting from a tax obligation or liability. On the basis of the characteristics of this benefit, it is evident that the benefit is related to the existing legal relationship between the tax creditor and the taxpayer. The tax overpayment understood in such manner is an overpayment *in the strict sense*. The second type of benefits are those unduly paid. In such case, there is no legal obligation or tax liability. There is no link resulting from the tax and legal relationship between the tax authority and the person paying the benefit. Undue benefit also exists where there was a legal basis for its payment at the time the benefit was provided, but after the payment was made, the legal basis disappeared, for example, due to the fact that the decision has been annulled or declared invalid. The presented type of the tax overpayment is the tax overpayment *in the largo sense.* Such a conclusion is all the more justified given that the tax overpayment constitutes the benefit paid to the public-law association (State Treasury, local government units) with the intention of fulfilling the tax obligation of the taxpayer. The benefit results from the transfer of assets by the body regulating tax benefits to benefit of the tax authority. The payer is mistakenly convinced that there is a tax obligation or liability that did not exist at all or existed, but the basis therefor disappeared. The essence of the tax overpayment is the payment of the benefit to the tax authority, which is overpaid or unduly paid at that particular moment.[8]

Ruling as a form of action by the tax authority taken with respect to the tax overpayment

Without going into detail on the definition of a tax provision, as it would go beyond the thematic framework of this study, it should be considered that the tax provision is adopted on the basis of the provisions of the Tax Ordinance and, exceptionally, in accordance with the generally applicable rules of substantive tax law, an externally formalised legal act of

5 Judgment of the Supreme Administrative Court of 24 February 2006, II FSK 402/05, Lex no. 297971; judgment of the Voivodeship Administrative Court in Wrocław of 13 April 2016, I SA/Wr 1742/15, Lex no. 2084573.

6 Cf. Article 73 § 2 point 3 of the Tax Ordinance.

7 Cf. Article 74 of the Tax Ordinance.

8 A. Drozdek, *Stosunki podatkowo-prawne w nadpłacie podatków*, Toruń 2020, p. 176.

the tax authority of a judicial nature that is essential to adjudicate in an individual situation, with the characteristics of sovereignty and unilateralism expressed in the admissibility of forced execution. It means that the ruling should be classified as a type of a specific legal act, based on the procedural and substantive legal norms, as a form of action of the tax authority, with characteristics similar to those of a decision. An important difference between the tax ruling and the tax decision, as a procedural form of action of the tax authority, is the subject matter of the ruling, the procedural form and the character of legal effects that they produce.[9]

The essential legal role of the tax ruling is contained in Article 216 of the Tax Ordinance, Chapter 7, Section 4 entitled "The ruling". The ruling contains two paragraphs, based on which the scope of its application and the content of the decision should be established. Pursuant to § 1 of the above-mentioned legal regulation, the tax authority issues decisions in the course of the proceedings. In turn, § 2 explicitly states that the subject matter of the rulings are the issues related to pending tax proceedings inconclusive as to the substance of the case unless the provisions of the Tax Ordinance provide otherwise. The content of the aforesaid legal regulation clearly indicates that there are three forms of individual administrative acts issued by the tax authority in the form of the decision, namely:

- the acts issued in the course of tax proceedings,
- the acts concerning the issues arising in the course of the proceedings, and
- cases inconclusive as to the substance.[10]

All of the above-mentioned forms of the ruling, as a formalised sign of the tax authority's activities within the framework of the tax and legal relationship, shape the rights and obligations of the tax debtor and creditor. As a declaration of will by the tax creditor under the tax-legal standard, it is characterised by strictly defined features, which undoubtedly include the following:

- made as a result of the application of substantive and procedural law,
- made in relation to the established facts,
- made in the manner and form as provided for in procedural law,
- to be made public by publishing it on the website in order to have legal effect.[11]

An example of the ruling concerning issues related to tax proceedings conducted by the tax authority is the situation where the tax overpayment is charged against outstanding and current tax liabilities. In compliance with Article 76a of the Tax Ordinance, in cases where the overpayment is credited against overdue and current tax liabilities, the tax authority shall issue a decision against which the taxpayer may bring an appeal. If in the event when the overpayment is credited against tax arrears, the payment made does not cover the amount of the tax arrears plus default interest, the tax authority shall credit the payment

9 J. Borkowski, B. Adamiak, *Postanowienia*, in: *Ordynacja podatkowa. Komentarz*, B. Adamiak, J. Borkowski, P. Borszowski, R. Mastalski, J. Zubrzycki (eds.), Warszawa 2017, p. 1273.

10 Cf. R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System prawa administracyjnego,* Vol. 9, *Prawo procesowe administracyjne,* Warszawa 2010.

11 B. Adamiak, *Z problematyki właściwości sądów administracyjnych (Article 3 § 2 point 4 of the Law of the Administrative Courts Procedure)*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2006, no. 2, p. 7.

pro rata against the amount of the tax arrears and the amount of default interest in the proportion in which the amount of the tax arrears remains on the date of payment to the amount of default interest. Moreover, the aforementioned legal regulation provides that if the taxpayer is subject to tax obligations under various titles, the payment made shall be credited towards the tax in accordance with the taxpayer's indication, and in the absence of such indication – towards the tax obligation with the earliest date of all the taxpayer's tax obligations. Where the taxpayer has tax liabilities whose term of payment has expired, the payment made shall be credited towards the tax arrears with the earliest date of payment of the tax specified by the taxpayer, and in the absence of such indication or absence of tax arrears in the tax indicated towards the tax arrears with the earliest date of payment out of all the taxpayer's tax arrears. The second paragraph of the aforementioned legal regulation indicates a closed catalogue of situations in which the overpayment is credited to tax arrears by the tax authority.[12] Thus, in the first case, the overpayment of tax arises on the date of payment by the taxpayer of undue tax or in an amount greater than due, collection of undue tax by the remitter or in an amount greater than due, payment made by the remitter or collector of the receivables resulting from the decision on their tax liability, if such receivables were unduly determined or in an amount greater than due, and payment made by a third party or heir of the receivables resulting from the decision on tax liability or the decision determining the amount of tax liability of the testator, if such receivables were unduly determined or in an amount greater than due. In the latter case, on the other hand, the creation of the overpayment was dependent on the taxpayer's actions, which include the submission of the application to ascertain the tax overpayment.

In the decisions issued by the tax authorities in cases related to the application of the tax overpayment to overdue and current tax liabilities, the legislator has not specified whether they create a new legal status or, on the contrary, do not create a new legal status, but only confirm the existing status.[13] The question of the legal nature of the ruling on the application of the tax overpayment to outstanding and current tax liabilities has raised and continues to raise numerous doubts not only in the legal doctrine, but also in the judicature system.

12 Article 76a § 2 of the Tax Ordinance.

13 The constitutive and declaratory provisions differ in content and legal effect they produce. Therefore, it should be pointed out that a constitutive provision is an administrative act of that kind based on which a specific tax and legal relationship is created, changed or terminated. It shapes, creates new rights and duties of the recipient whom they concern. The moment from which it produces legal effects may be defined in different ways – the moment when it is issued, becomes final or the judgment is served. On the other hand, a declaratory provision is a type of an administrative act which does not create, abolish or change the existing tax and legal relationship, but confirms the existing rights and obligations of its addressee (taxpayer) as well as the limits of the legal sphere of a given entity established by law. It shall establish, in a legally binding manner, the existence of a specific legal or factual situation which exists by operation of law, irrespective of the fact that the judgment has been given. In other words, the legal effects occur by the very operation of law, but the issue of such an act is a necessity, as it is only from the moment of its issuance that a party may exercise the rights and obligations resulting from a legal situation whose existence has been established by a declaratory act. The declaratory acts have "retroactive" legal effects – *ex tunc*. Cf. J. Lang, J. Służewski, M. Wierzbowski, A. Wiktorowska, *Polskie prawo administracyjne*, Warszawa 1992, p. 196; A. Gomułowicz, *Powstawanie zobowiązań podatkowych,* part 1, "Monitor Podatkowy" 1998, no. 6, p. 169; J. Szermański, *Akt administracyjny,* in: *Encyklopedia prawa*, E. Smoktunowicz, C. Kosikowski (eds.), Białystok–Warszawa 2000, p. 35.

The legal nature of the ruling on the application of the overpayment to overdue and current tax liabilities is perceived in many different ways in the administrative and judicial decisions. In many of their decisions, the adjudication panels employ the thesis that the deduction of the overpayment for tax arrears is by virtue of law and the decision issued in this case is of declaratory nature. One of the examples could be the judgment of the Voivodeship Administrative Court in Gliwice of 25 September 2019, case file no. I SA/Gl 528/19,[14] in which it is stated that the amount of the refund of the tax difference (on goods and services) is set off against tax arrears by operation of law and takes place on the date of submission of the return disclosing the tax refund in question. On the other hand, the tax authority is legally obliged to issue a decision, which only states the resulting (existing) *ex lege* credit towards tax arrears. The ruling for the knowledge of the tax authority and the taxpayer is intended to create the possibility of verification and then its further use in future tax settlements with the tax authority. Therefore, it confirms and articulates, in the form of an administrative act in an individual case, that a certain amount of the tax difference to be refunded has been credited to the subject tax arrears on the date prescribed by law and in compliance with the ruling, but undoubtedly does not constitute the above legal status. The application of the refund of the tax difference to specific tax arrears results, also by virtue of law, in the expiry of the tax liability out of which the tax arrears settled in this way are derived. In its judgment of 14 March 2008, the Voivodeship Administrative Court in Wrocław indicated that both in the case of crediting the payment made by the taxpayer to overdue liabilities as well as crediting the overpayment to overdue tax liabilities, the tax authority is obliged to issue a decision in which it shall determine the credited amount and towards which tax liabilities.[15] If the provisions of tax law provide for such a procedure – and the tax liability expires due to the crediting of the overpayment or payment – it should be concluded that the effect in the form of expiration of the liability by crediting the overpayment or payment against outstanding tax liabilities takes place on the date of delivery of the decision on crediting the overpayment or payment against outstanding tax liabilities to a party. Another thesis was put forward by the Supreme Administrative Court in its ruling of 23 March 2020, in which it stated that the tax overpayment is credited to tax arrears by operation of law on the maturity date of the tax arrears if the overpayment was made earlier than the tax arrears.[16] The issuance of the ruling on the tax overpayment is not a prerequisite for the occurrence of such overpayment, as it has already existed when the taxpayer paid the undue tax. Therefore, not only the date of the decision on determination of the overpayment, but also the date of submission of the motion for its determination is irrelevant for defining the moment when the overpayment shall be credited against the tax arrears.[17] However, such interpretation must lead to the conclusion that the application of the overpayment towards tax against arrears is a material and technical activity and the ruling referred to in Article 76a § 1 of the Tax Ordinance is a formal condition for crediting

14 Judgment of the Voivodeship Administrative Court in Gliwice of 25 September 2019, I SA/Gl 528/19, Lex no. 2734353.

15 Judgment of the Voivodeship Administrative Court in Wrocław of 14 March 2008, I SA/Wr 1210/07, Lex no. 469269.

16 Judgment of the Supreme Administrative Court of 23 March 2020, I FSK 186/20,Lex no. 2854733.

17 D. Malinowski, *Glosa do wyroku WSA z dnia 26 marca 2004 r., III SA 1385/03*, "Przegląd Podatkowy" 2005, no. 1, p. 45.

the overpayment against tax arrears and current tax liabilities. This, in turn, implies the conclusion that, when crediting the tax overpayment towards tax arrears, the tax authority is not entitled to verify the correctness of tax returns submitted by the taxpayer or decisions determining the amount of tax liabilities.[18]

However, the Supreme Administrative Court expressed a completely different view in its judgment of 23 June 2005,[19] stating that the nature of the ruling on the application of the tax overpayment towards future and current tax liabilities takes effect retroactively, which means that the ruling is constitutive. The thesis on the retroactive effects of the ruling to credit the overpayment against tax arrears was also put forward by the Voivodeship Administrative Court in Kraków in its judgment of 3 February 2009. The court pointed out that the application of tax overpayment towards arrears is a material and technical activity and the ruling referred to in Art. 76(a) § 1 of the Tax Ordinance is a formal condition for crediting the overpayment towards overdue and current tax liabilities. To effectively apply the tax overpayment, it is important that the tax arrears towards which the overpayment is to be applied exist (not time-barred) on the date of the crediting.[20] It means that the date of the ruling is not decisive if the overpayment is credited to future and current liabilities. The ruling has legal effects in the sense that as for the date of crediting the overpayment, the tax arrears cease to exist. On the other hand, in accordance with the thesis of the ruling of the Voivodeship Administrative Court in Wrocław of 8 January 2008, the need to issue a decision on the application of the overpayment towards current and overdue tax liabilities results from the constitutional principle of the rule of law expressed in Article 7 of the Constitution. In compliance with the aforesaid principle, on the basis of the ruling on the tax overpayment to be credited, the authority shall perform material and technical activities in the form of entries in the taxpayer's settlement accounts, and not vice versa. This is also supported by the importance of the legal effects of crediting the tax overpayment in the form of expiry of the tax liability. In the ruling, the tax authority shall indicate the arrears towards which the overpayment is credited, thus, only in respect of such arrears may the effects of crediting be accepted. Therefore, the ruling shows that the tax authority decides on the tax overpayment under tax law.[21] A much more far-reaching thesis was formulated by the Supreme Administrative Court in its ruling of 27 March 2019.[22] When commenting on administrative acts, the Court stated that the administrative acts that are constitutive in tax proceedings may be effective *ex nunc* or *ex tunc*. The temporal effectiveness of the administrative constitutive acts depends on the hypothesis or the disposition of a specific material standard or content of a rule of jurisdiction related thereto. The substantive rules ultimately determine whether, and to what extent, the administrative acts based thereon have retroactive effect *(ex tunc*), hence – from a certain point in time, preceding the date

18 Cf. Judgment of the Voivodeship Administrative Court in Gliwice of 20 June 2018, I SA/Gl 1363/17, Lex no. 2534288

19 Judgment of the Supreme Administrative Court of 23 June 2005, FSK 2475/04, LEX no. 173255.

20 Judgment of the Voivodeship Administrative Court in Kraków of 3 February 2009, I SA/Kr 1585/08, Lex no. 504663.

21 Judgment of the Voivodeship Administrative Court in Wrocław of 8 January 2008, I SA/Wr 1561/07, Lex no. 504663.

22 Judgment of the Supreme Administrative Court of 27 March 2019, I OSK 1540/17, LEX no. 2665611.

of notification (announcement) of the administrative act, at which a given element or all statutory circumstances took places.

Attempts have also been made in the doctrine of tax law to determine the legal nature of the ruling regarding the application of the tax overpayment towards overdue and current tax liabilities. In the opinion of J. Zubrzycki, in view of Article 75 of the Tax Ordinance, it should be pointed out that the application of the tax overpayment against tax arrears is a material and technical act, and the decision issued by the tax authority is only a formal condition for the application of the tax overpayment against future and current tax liabilities.[23] *A contrario*, it seems justified to say that the date of the ruling by the tax authority is therefore not the date on which the tax overpayment shall be credited towards the tax arrears. It means that the tax overpayment is credited on the date when the overpayment occurs, i.e. by operation of law. A similar view is also presented by L. Etel, who is of the opinion that the tax overpayment should be credited, as a matter of principle, on the date of the overpayment – in the cases referred to in Article 73 § 1 points 1-3 and 5 and § 2 of the Tax Ordinance – or on the date of submission of the motion to establish tax overpayment. Therefore, the rule is that the overpayment is credited on the date on which the overpayment occurs. However, in the case of the motion to establish tax overpayment, the crediting should be effected on the date of submission of such motion.[24] Therefore, the above justifies the conclusion that the ruling issued by the tax authority to credit the tax overpayment against future and current tax liabilities has retroactive effects meaning that the tax arrears cease to exist as for the date of crediting the overpayment.

An important view on this issue is presented by J. Gorąca-Paczulska, who draws attention to the fact that the tax overpayment is subject to *ex officio* crediting. In practice, it means that a taxpayer does not have to apply for the ruling on the crediting of the tax overpayment towards current and overdue liabilities, as it is the tax authority that is obliged to issue the said ruling under the legal standard. It is also confirmed by the literal wording of Article 76(a) § 2 of the Tax Ordinance, where the legislator precisely indicates that the crediting of the tax overpayment "shall take place as of the date", by operation of law, without interference from the tax authority. *A contrario*, the legislator assumes that the tax overpayment "is not credited on the day". Furthermore, it should be stressed that no provision of the Tax Ordinance prejudges the declarative or constitutive nature of the ruling on the crediting of the tax overpayment towards current and outstanding liabilities. Where a taxpayer has accumulated more tax arrears, the tax overpayment shall be credited towards the arrears with the earliest payment date. In exceptional cases, the taxpayer may indicate which tax arrears are to be credited by the authority. In such a manner, the will of the taxpayer is binding on the tax authority. In principle, the tax authority thus reflects events that have already taken place in the past. In the opinion of the author, the legislator allowed, as an exception, to include in the ruling a constitutive element, expressed as a possibility of considering the taxpayer's will to credit the overpayment towards tax arrears other than the arrears with the

23 J. Zubrzycki, *Zobowiązanie podatkowe*, in: *Ordynacja podatkowa. Komentarz*, B. Adamiak, J. Borkowski, P. Borszowski, R. Mastalski, J. Zubrzycki (eds.), Wrocław 2017, p. 511.

24 Cf. L. Etel, *Komentarz do art. 76(a) Ordynacji podatkowej*, Lex./El. 2020.

earliest payment date. In such case, the tax authority, by issuing the ruling on the crediting of the tax overpayment towards overdue and current tax liabilities, declaratively states that on the date of creation or submission of the motion to establish tax overpayment,[25] the tax overpayment was credited towards the tax arrears in the amount of the difference between the tax obligation and the tax liability on account of the overdue. In such case, the constitutive element of the ruling shall oblige the taxpayer to indicate the arrears towards which the overpayment has been legally credited. The tax authority, on the basis of such element of the ruling, shall amend the legal situation of the taxpayer arising after the overpayment has been credited in this regard by operation of law (constitutive element).[26] On the other hand, M. Ślifirczyk mentions that the ruling to credit the tax overpayment towards future and current liabilities is issued for the knowledge of the tax authority and the taxpayer to create an opportunity to verify and then use it in future tax settlements. Therefore, the ruling confirms and articulates, in the form of an administrative act in an individual case, that a certain amount of the tax difference to be refunded has been credited to the subject tax arrears on the date prescribed by law and in compliance with the ruling, but certainly does not constitute the above legal status.[27] The adoption of this view means that the application of the tax overpayment against future and current liabilities initiates a specific procedure, which ends with a material and technical transaction by the tax authority in the form of crediting the overpayment against future tax liabilities. It is worth mentioning at this point that the provisions of tax law do not allow tax authorities to freely handle the motion, and the very fact that the motion has been submitted already produces certain legal effects of a substantive legal nature.[28] It means that the submission of the motion to credit the tax overpayment towards future and current tax liabilities has retroactive effects, and therefore leads to the expiry of the tax liability as soon as the tax overpayment is incurred. The aforesaid fact is confirmed by the doctrine of tax law. In the opinion of M. Popławski, the provisions are thus formal in nature, i.e. they only confirm the accounting activities of the tax authority.[29] The tax overpayment shall be credited towards tax arrears or current tax liabilities by virtue of law as of the date on which the tax overpayment arose and not as of the date of issuing the ruling in this respect by the entity obliged under the tax and legal relationship of the tax overpayment.[30]

Bearing in mind the views of the academic circles and the judiciary, it should be stated that the ruling to credit the tax overpayment against outstanding and current tax liabilities constitutes a formal administrative act, which does not prejudge the existence of the tax

25 Article 76a § 2 of the Tax Ordinance.

26 J. Gorąca-Paczulska, *Nadpłata*, in: *Ordynacja podatkowa. Komentarz,* H. Dzwonkowski (ed.), Warszawa 2019, p. 597.

27 M. Ślifirczyk, *Zaliczenie nadpłaty i zwrotu podatku jako przedmiot rozstrzygnięć organów podatkowych*, in: *Ordynacja podatkowa w praktyce. Rozstrzygnięcia organów podatkowych i skarbowych*, R. Dowgier (ed.), Białystok 2014, pp. 269-283.

28 M. Ślifirczyk, *Charakter prawny wniosku o zaliczenie nadpłaty na poczet przyszłych zobowiązań podatkowych*, in: R. Dowgier (ed.), *Ordynacja podatkowa. Kontrola realizacji zobowiązań podatkowych*, Białystok 2012, pp. 440-449.

29 M. Popławski, *Uprawnienia podatkowe. Procedura dochodzenia należności podatkowych od Skarbu Państwa lub jednostek samorządu terytorialnego*, Warszawa 2014, p. 236.

30 A. Drozdek, op. cit., p. 332.

arrears, but provides information on how to credit that payment. The tax overpayment shall be credited by virtue of law when the tax and legal relationship of the tax overpayment arises. Therefore, the ruling on the application of the tax overpayment only confirms that the overpayment has been applied, since in the ruling to credit the overpayment, the tax authority does not verify the amount of the tax liability or tax arrears. The ruling on the application of the tax overpayment is not constitutive in nature. It only defines what has been done and illustrates the method of crediting for the taxpayer, thus, enables the taxpayer to check its accuracy. Therefore, the ruling indicates the liability towards which the tax authority has applied the overpayment, the amount towards which the tax authority has applied the principal and the amount towards which the tax authority has applied the interest as well as the date on which the tax authority has credited a given amount, why that date is considered the crediting date, the period and rules for *pro rata* calculation and settlement of the interest.

Final conclusions

In conclusion, it should be stated that the ruling on the application of the tax overpayment towards current and outstanding liabilities as an administrative declaratory act of the tax authority is a formal confirmation of the activities of its accountants. In the case of the tax overpayment that occurs by virtue of law, the tax overpayment shall be credited against existing tax arrears.

The tax overpayment as a subjective right is always a correlate of the tax authority's obligation, i.e. its competence in the strict sense of the word. The existence of subjective law determines the behaviour of the tax authority from the beginning to the end. The authority may not depart from such pattern of behaviour. The crediting of the tax overpayment under the tax and legal relationship does not depend on whether the entity (tax authority) becomes obliged due to the tax overpayment or the disposition of tax overpayment is issued by the entitled entity (taxpayer, payer, collector). The entitled entity is allowed to dispose of the amount of the tax overpayment only with regard to future tax liabilities. If the entitled entity submits a relevant request in this respect, the entity obliged due to the tax overpayment shall be bound thereby, which means that the entity shall implement the disposition of the entitled entity. In such case, the right of the entitled entity shall not be limited either by the order or the deadline for payment of future tax liabilities. Therefore, it must be assumed that, as a result of the request submitted by the entity entitled due to the tax overpayment, the entity shall be exempt from the obligation to pay the tax covered by the overpayment. Furthermore, it should be noted that in the event when the entity entitled due to the tax overpayment does not indicate the titles towards which it wants to credit the amount of the tax overpayment, the entity obliged due to the tax overpayment should collect a relevant statement from such entitled entity. The introduction of such a solution results in the fact that the entity obliged due to the tax overpayment may not decide on its own towards which tax liabilities the overpayment should be credited.

Once the tax overpayment occurs, the taxpayer, payer or collector, by becoming a creditor of the tax authority, does not have full freedom to dispose of the overpaid benefit. To protect the interests of the State Treasury, the legislator introduces certain rules concerning the return of the overpayment, which may not be modified by the parties to the relationship. It follows unequivocally from the public and law method of the regulation. However, what is positive is the mutual offsetting of tax claims, which, under Article 76 § 3 of the Tax Ordinance, shall be available to both parties to the tax and legal relationship of the tax overpayment. The analysis of the issues related to the crediting of the tax overpayment towards overdue and current tax liabilities has shown that the overpayment should be credited on the date on which the overpayment occurs, i.e. in situations referred to in Art. 73 § 1 points 1-3 and 5 and § 2 of the Tax Ordinance. However, in the case of the motion to establish tax overpayment, the overpayment should be credited on the date of submission of the motion, i.e. in this case, the day on which the tax and legal relationship of the tax overpayment arises.

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Action in a case ended with an administrative decision

ABSTRACT

The article deals with the issue of administrative procedural law and civil court proceedings. The author describes a special right of the parties to administrative proceedings, which is the right to bring an action against an administrative decision, and attempts to analyse the action in relation to the administrative decision against the control of common courts against individual acts of public administration. This analysis is carried out in the light of the provisions of the Code of Civil Procedure, as well as on the legal grounds for bringing actions against administrative decisions. The article was enriched with a number of judgments of common and administrative courts. At the end of the article, the author formulates *de lege ferenda* conclusions.

KEYWORDS

action, administrative decision, party, common court of law, public administration body

Introduction

The motivation to write this article stemmed from: 1) little interest in the subject matter of the doctrine of administrative law, 2) the need to carry out a dogmatic and legal analysis of issues covering the special right of the parties to administrative proceedings to bring an action concerning an administrative decision.

The issue of action in a case ended with an administrative decision is part of the broader subject area of the control of administrative decisions by the common courts.

The literature strongly emphasises the view that the control of administrative decisions can be exercised by the common courts only if this results from a clear statutory mandate.[1]

1 J. Borkowski, *Sąd powszechny w kontroli administracji publicznej w sprawach indywidualnych,* in: J. Borkowski, B. Adamiak, *Postępowanie administracyjne i sądowoadministracyjne*, Warszawa 2019, https://sip.lex.pl/#/monograph/369460336/95?keyword=barbara%20adamiak&tocHit=1&cm=SFIRST. Accessed 02.12.2020; J. Litwin, *Problematyka sądownictwa administracyjnego*, NP 1956, no. 1, pp. 4-5; J. Jagielski, *Kontrola administracji publicznej*, Warszawa 2006, pp. 135-137.

This problem has been recognised by the Supreme Court. The justification of the Supreme Court's resolution (7z) of 23 November 1959[2] indicated: "In the State, strictly defined and separately formed state bodies are appointed to perform the functions of the judiciary and state administration, and the possible opportunity to influence of the activity in one area on the activity in another is limited to certain situations, especially those provided for in the Act. In this state of affairs, the courts may, by their rulings, only challenge administrative acts if a specific provision of the law allows it. In particular, a civil relationship cannot be used to challenge a decision issued by a state administration body by means of a judgment of a common court, as this would create a specific means of overriding an administrative decision by means of a judgment of a common court, that is, interference by the civil judiciary in a sphere reserved for state administration. An action formulated in this way should be characterised according to its actual content, that is to say, as a complaint against an administrative decision for which no judicial process is available".

Against the background of the current legislation, the legal science formulates two main categories, in which common courts may interfere in the activities of public administration, expressed in the form of administrative decisions.

The first will be a situation where "the court, by virtue of an explicit statutory provision, is called upon to resolve a case in which an administrative decision has already been made (temporary inadmissibility of the judicial process)". The second will be a situation in which "a court by virtue of an express statutory provision is appointed to hear an appeal or other action against an administrative decision (a common court as an appeal body)".[3]

In this article, the author will focus primarily on the first category, i.e., temporary inadmissibility of the judicial process. However, in order to properly understand the issue and to identify similarities and differences between these two categories, it will become necessary to analyse the second category too.

Temporary inadmissibility of the judicial process concerns a specific procedure for the assertion of claims. The case is considered by one administrative instance and a party dissatisfied with the decision may file a claim with the civil court, which will hear the case anew. The court has no power to change or revoke an administrative decision or to declare it illegal, because it would need a special legal basis for such actions. "The courts, when considering these cases, do not take into account the legality of a previous administrative decisions; on the contrary, the premise of the rule of law seems to play a major role here. In many cases, the courts, in the exercise of their judicial functions, must assess the legality of specific administrative actions".[4]

In turn, the role of the common court as an appeal body against administrative decisions (the so-called hybrid procedure) is different and has a different effect on an administrative decision than in the case of a temporary inadmissibility of the judicial process. The

2 Resolution of the Supreme Court (7z) of 23.11.1959, case file I CO 20/59, OSNCK 1960, no. 2, item 32. https://sip.lex.pl/?_ga=2.105606785.388146383.1606892008-848456491.1539524780#/jurisprudence/520209364/1?directHit=true&directHitQuery=I%20CO%2020~2F59. Accessed 02.12.2020.

3 J. Borkowski, op. cit.

4 J. Łętowski, *Sądy powszechne i praworządność w administracji*, Wrocław 1967, p. 23.

specificity of the common court as an appeal body against administrative decisions can be illustrated by two types of proceedings: 1) on appeals against decisions in the area of cash benefits in social security matters (pensions, annuities, allowances, etc.), and 2) on appeals against decisions of the President of the Office of Competition and Consumer Protection. In both cases, the courts have reform and cassation competence over administrative decisions. They can change decisions in whole or in part and decide on the substance of the case. This is a clear difference between the competences of the administrative courts, which are primarily called upon to review administrative decisions, and the common courts. As a rule, administrative courts have cassation competences and as indicated above, common courts have broader competences than administrative decisions.

When transferring the analysis of the issue of action in a case ended with an administrative decision onto the ground of administrative proceedings, one should start by stating that pursuant to Article 107(1)(9) of the Act of 14 June 1960 on the Code of Administrative Procedure[5] the Decision contains: in the case of a decision against which an action may be brought before a common court, an objection to the decision or a complaint to the administrative court – a notice on the admissibility of bringing the action, objection to the decision or complaint and the amount of the fee for the action or entry of the complaint or objection to the decision, if they are permanent in nature, or the basis for calculating the fee or entry of a relative nature, as well as the possibility for the party to apply for exemption from costs or for the right to assistance.

The notice referred to in the above-mentioned provision is mandatory. An administrative body competent to issue an administrative decision is obliged to include an appropriate notice on the admissibility of bringing an action before a common court. The authority is obliged to determine, based on the provisions of the proceedings outside the CAP, from which decision an entity is entitled to bring an action.

The lack of an advisory notice cannot be qualified as an erroneous advisory notice (Article 112 of the CAP). In the case of an erroneous advisory notice, the notice is included in the decision, it has only the defective content. In the absence of an advisory notice, the authority does not inform the party at all about the available legal remedies. Acceptance of the admissibility of applying Article 112 of the CAP to a situation where there is no notice of appeal would result in a party being able to lodge an effective appeal at any time, and a decision not containing such a notice could not become final. This is unacceptable in the light of the principle of permanence of final decisions expressed in Article 16 of the CAP.[6]

Pursuant to Article 111(1) of the CAP, a party may, within fourteen days from the date of delivery or announcement of the decision, demand its supplementation as to the ruling or as to the right of appeal, bring an action before a common court or a complaint before an administrative court or request a correction of an advisory notice contained in the decision. § 2 of the above-mentioned article states: "If the decision referred to in § 1b[7] has been issued,

5 Dz.U. (Journal of Laws) of 2020, item 256, as amended, hereinafter referred to as the "CAP".

6 Judgment of the Voivodship Administrative Court in Warszawa of 14 February 2012, case file I SA/Wa 2369/11, LEX no. 1121563.

7 Supplementation or refusal to supplement the decision shall take the form of an order.

the time limit for a party to file an appeal, action or complaint shall run from the date of its delivery or announcement. No appeal, action or complaint to the administrative court shall be made against the order to supplement the decision (as to the decision or as to the right of appeal, bringing an action before a common court or a complaint to an administrative court)".[8]

Article 112 of the CAP reads as follows: "An erroneous advisory notice in the decision regarding the right of appeal or the consequences of renouncing an appeal or bringing an action before a common court or a complaint before an administrative court shall not be prejudicial to a party that has complied with it".

Lack of an advisory notice is treated as erroneous advisory notice within the meaning of Article 112 of the CAP. The provision of Article 112 of the CAP provides that erroneous advisory notice in the decision as to the right of appeal or bringing an action before a common court or a complaint before an administrative court shall not be prejudicial to a party that has complied with it.[9]

Pursuant to the content of Article 112 of the CAP, an erroneous advisory notice in the decision as to the right of appeal or to bring an action before a common court or a complaint before an administrative court shall not be prejudicial to a party that has complied with it.[10]

It follows from the above considerations that an advisory notice on the admissibility of an action against an administrative decision before a common court is a mandatory element of those administrative decisions from which such a measure is entitled. The authority is obliged to include this notice. Failure to include an advisory notice in the decision should be qualified as an erroneous advisory notice and shall not be prejudicial to a party that has complied with it. However, there is no uniform position of administrative court judicature here.

Civil law regulations: A procedural approach

In Article 1 of the Code of Civil Procedure,[11] the legislator defined the term "civil case". The Code of Civil Procedure regulates court proceedings in matters of civil, family, and guardianship law and labour law, as well as in matters of social security and other cases to which the provisions of this Code apply by virtue of specific acts (civil cases).

The definition of a civil case is important for the admissibility of legal proceedings before a common court or a civil court. Traditionally, it distinguishes the concept of a civil case based on substantial premises and a civil case in the formal sense. The substantive criterion is not sufficient to establish the admissibility of legal proceedings before the common civil

8 Similar ruling of the Supreme Administrative Court of 10 April 2008, case file I OSK 875/07, LEX no. 505244.

9 Judgment of the Voivodship Administrative Court in Gdańsk of 26 September 2019, case file II SA/Gd 234/19, LEX no. 2726395.

10 Judgment of the Supreme Administrative Court of 28 January 2020, case file II OSK 689/18, LEX no. 2798771.

11 Act of 17 November 1964 on the Code of Civil Procedure, Dz.U. (Journal of Laws) of 2019, item 1460, as amended, hereinafter referred to as the "CCP".

court, since it follows from Article 2 that civil cases sometimes fall within the jurisdiction of special courts. The identifying feature of a case, which is a civil case by its very nature, is the guarantee of legal protection of a legal status or legal relationship of an equivalent and comparable nature.[12]

Civil cases in the formal sense are those for which specific provisions provide for civil court proceedings, even though they do not have elements relevant to a civil case in the substantive sense. Such cases include, first of all, social security cases explicitly mentioned in Article 1 (judgments of the Supreme Court of 1 September 2010, case file III UK 15/10, LEX no. 667499; of 22 October 2013, case file III UK 154/12, LEX no. 1463908), as well as regulatory cases, the procedure for the examination of which is provided for in Articles 479(46)-479(78). Moreover, they are listed in non-codex regulations, e.g. Article 36 of the Law on Civil Status Records and Article 5 of the Decree of 7 July 1945 on the Reconstitution of Diplomas and Certificates of Completion of Studies, Dz.U. (Journal of Laws), no. 27, item 164, as amended.[13]

It should be considered that proceedings brought against an administrative decision constitute a civil case in a formal sense. The status of these proceedings falls within the definition of a civil case and is derived from specific laws.

Pursuant to Article 2(1) of the CCP, common courts are appointed to hear civil cases, unless such cases fall within the jurisdiction of special courts, and the Supreme Court. Pursuant to Article 16(1) of the CCP, district courts adjudicate on all cases except for those for which the jurisdiction of regional courts is reserved. Furthermore, pursuant to the provisions of the CCP, only the courts referred to in Articles 479(28) et seq., 479(46), 479(57) et seq., 479(60) and 479(79) of the CCP shall have jurisdiction over appeals against administrative decisions of certain public administrations. The provisions mentioned above refer to "an appeal" against the administrative decision and not to actions in relation to the administrative decision. It is a separate form of questioning administrative decisions, which transfers the administrative dispute to the judicial level (civil law level).

A dispute over jurisdiction also includes a dispute over the determination of the appropriate course of action in cases of appeals or action in a case ended with an administrative decision. This issue has been dealt with by the Supreme Court and has been expressed in Resolutions III CZP 30/01,[14] III CZP 77/09,[15] and III CZP 116/08.[16] It follows from the above

12 M. Manowska, Article 1, in: *Kodeks postępowania cywilnego. Komentarz,* Vol. 1, System Informacji Prawnej LEX, https://sip.lex.pl/#/commentary/587826880/624320. Accessed 19.07.2020.

13 Ibidem.

14 The court proceedings to adjudge a fee for an increase in the value of the real estate, determined in an administrative decision issued pursuant to Article 36(3) and (9) of the Act of 7 July 1994 on Spatial Development, consolidated text: Dz.U. (Journal of Laws) of 1999, no. 15, item 139, as amended, are inadmissible, LEX no. 47598.

15 The court proceedings in the case of reimbursement of expenses incurred alternatively by the municipality in the event of failure to pay for the stay in a residential care home by persons referred to in Article 61(2)(2) of the Act of 12 March 2004 on Social Assistance, consolidated text: Dz.U. (Journal of Laws) of 2008, no. 115, item 728, as amended, are inadmissible, LEX no. 522992.

16 The court proceedings in the case of the municipality's claim for payment of the amount of the additional annual fee established by the decision taken pursuant to Article 63 of the Act of 21 August 1997 on Real Estate Management, consolidated text: Dz.U. Journal of Laws of 2004 no. 261, item 2603, as amended, are inadmissible, LEX no. 468638.

Resolutions that the judicial route from the administrative decisions was questionable and its inadmissibility had to be judged by the Supreme Court.

The question of whether a civil court is bound by the findings of a public administration authority as to the basis on which an administrative decision has actually been made is also a matter of concern in the judiciary. In the above case, we can point to the decisions of the Supreme Court. In the absence of a provision analogous to Article 11 of the CCP (binding of a civil court by a criminal conviction) there are no grounds for stating that the court, when examining a case in civil proceedings, is obliged to consider the facts established by an administrative authority and adopted as the basis for its decision.[17]

Pursuant to Article 16 § 1 of the CCP,[18] decisions which are not subject to appeal or an application for a review are final. Such decisions may be revoked or amended, declared invalid and proceedings may be resumed only in cases provided for in the Code or in specific acts.

It cannot be deduced from the wording of the said provision that the binding nature of a court in civil proceedings by an administrative decision precludes the possibility of making a different assessment of the facts on which this decision is based or of applying for legal effects different from those for which administrative rulings are provided. The above was pointed out in the resolution of seven judges of the Supreme Court of 9 October 2007, case file III CZP 46/07, pointing out that "the power of the court to determine objective events constituting the factual basis of the decision itself cannot, in the light of Article 233 of the CCP, be called into question. Possible limitations in this respect would have to result from statutory regulations, as is the case of a criminal conviction (Article 11 of the CCP). The cognizance of the court cannot be restricted as regards the possibility of deriving further civil law effects from facts assessed by an administrative authority in a situation where the administrative decision does not concern such further effects".[19]

In another judgment, the Supreme Court referred to the effects of the administrative decision and its evaluation by the court. In civil proceedings, the court is not entitled to question the correctness and effects of an administrative decision, even if in its assessment it is defective, except for decisions affected by the so-called absolute nullity (non-existent decisions), i.e. issued by an unauthorised authority or without observing any provisions of the proceedings, or without a substantive and legal basis, where "lack of a substantive and legal basis" does not mean a substantive defectiveness, but only the lack of substantive and legal regulation of the subject matter which the administrative authority ruled on in the decision.[20]

The Supreme Court, in its judgment of 27 February 2019, held that the civil court is bound by the established legal status which is the basis for issuing an administrative decision (legal effect of the decision). In civil proceedings, the court is bound by an administrative decision of significance for the settlement of a civil case. Binding means that the court

17 Judgment of the Supreme Court of 9 October 2019, case file I NSK 59/18, LEX no. 2729332.

18 Act of 14 June 1960 on the Code of Administrative Procedure, Dz.U. (Journal of Laws) of 2018, item 2096, as amended, hereinafter referred to as the "CAP".

19 From justification of the judgment of the Supreme Court of 9 October 2019, case file I NSK 59/18, LEX no. 2729332.

20 Judgment of the Supreme Court of 19 June 2019, case file II CSK 288/18, LEX no. 2684159.

has to consider the legal status as shaped or established in the decision. In this respect, the court is not entitled to make a different assessment of the legal consequences of certain facts constituting the basis for the decision.[21]

In yet another judgment, the Supreme Court analysed the question of challenging final administrative decisions by a common court. The common court has no power to question final administrative decisions, and even if these decisions are affected by defects, it cannot question their substance. An exception to this rule can only be made if the decision appears to be non-existent or is absolutely null and void, i.e., it undermines the very essence of the administrative act, which is an administrative decision (e.g. not being issued by an administrative authority). Any undermining of administrative decisions falls within the scope of the legal and administrative jurisdiction.[22]

The following conclusions can be drawn from the above-mentioned rulings: 1) the civil court is not bound by the factual findings being the basis for issuing an administrative decision, 2) the civil court is bound by the legal status (legal effect) established in administrative proceedings as the basis for issuing an administrative decision, 3) the common court is not entitled to challenge final administrative decisions, even if they are affected by legal defects. The court should adjudicate in this respect within the scope of competence and jurisdiction.

An action in a case ended with an administrative decision as to its form shall not constitute a separate case from a classic action, as defined by the provisions of Article 187 of the CCP, which states: §1. The claim should satisfy the terms of the pleading and should also contain: 1) a precisely defined claim, and in cases involving property rights also an indication of the value of the subject of the dispute, unless the subject of the case is a fixed sum of money, 2) an indication of the date on which the claim is due in cases involving an award of a claim, 3) an indication of the facts on which the claimant bases his/her claim and, where necessary, also justifying the jurisdiction of the court, 4) information whether the parties made a mediation attempt or any other out-of-court settlement of the dispute and, if no such attempt has been made, an explanation of the reasons for not making it. §2. The statement of claim may contain motions for securing the claim, making the judgment immediately enforceable and conducting a hearing in the plaintiff's absence, as well as motions for preparing a hearing, and in particular: 1) summoning witnesses and experts indicated by the claimant to a hearing, 2) carrying out an inspection, 3) ordering the defendant to deliver at a hearing a document in his/her possession which is necessary to carry out evidence or the subject of the inspection, 4) requesting evidence held at courts, offices or third parties, together with the fact that the party cannot obtain it by itself.

21 Judgment of the Supreme Court of 27 February 2019, case file I NSK 17/18, LEX no. 2643232. Similarly, in the judgment of the Supreme Court of 18 November 2016, case file I CSK 759/15, and in the resolution of the Supreme Court of 9 October 2007, case file III CZP 46/07 "On the reconciliation of the legal status of real estate – disclosed in the Land and Mortgage Register based on the final administrative decision issued pursuant to Article 18 (1) in connection with Article 5 (1) of the Act of 10 May 1990 – Provisions introducing the Act on local government and the Act on local government employees, Dz.U. (Journal of Laws), no. 32, item 191, as amended – with the actual legal status, the court is bound by such decision". LEX no. 298665.

22 Judgment of the Supreme Court of 10 August 2017, case file I CSK 30/17, LEX no. 2352155.

Legal grounds for bringing an action against administrative decisions

After a dogmatic analysis of the legal regulations and whether there are any legal regulations concerning the grounds for bringing actions against administrative decisions, it should be stated that the legislator provides for such a form of "challenging" the decision as an exception to the general rule of appeals against administrative decisions to a higher-level body (within the meaning of the CAP). This issue is of small interest to the legislator. It should be noted, however, that the legislator has introduced, exceptionally, the right for the parties to bring an action in some cases. As examples of legal regulations, the following grounds for bringing actions against administrative decisions can be indicated:

1) Article 131(2) of the Act of 27 April 2001 – the Environmental Protection Law[23] provides: A party dissatisfied with the compensation granted may, within 30 days from the date of service of the decision referred to in paragraph 1, file an action with a common court. The court shall also have jurisdiction if the competent authority does not issue a decision within 3 months of the date of the injured party's request. In accordance with paragraph 1 of the afore-mentioned Article 131, in the event of a limitation on the use of the property referred to in Article 130(1), the competent district governor shall, at the request of the injured party, fix, by decision, the amount of compensation; the decision shall be uncontested.

There is no doubt that the decision referred to in Art. 131 of the EPL is an administrative decision within the meaning of the CAP and is issued by a public administration body – a district governor (*starosta*). It follows from the content of paragraph 1 of Article 131 of the EPL that the decision is not subject to appeal. Non contestability of this decision concerns the administrative procedure and the right of appeal. By the way, it is important to note the legislative incorrectness of the legislator, which uses the term "not contestable". A rational legislator is required to create the rules that are part of the legal system correctly and consistently. A better formulation would be, for example, that "the decision is not subject to appeal". In Article 131(2) of the EPL, the legislator introduces the right for a party to bring an action before a common court. This is clearly indicated by the wording of this provision. In this case, the legislator limited the right of a party only to bring an action, depriving it of the possibility of appeal in the course of the administrative proceedings. Why did he do this? It seems that the answer to this question should be sought in the subject and scope of the action. In accordance with Article 131(2) of the EPL "the party dissatisfied with the compensation granted…". Generally speaking, the issue of compensations remains within the scope of the jurisdiction of the common courts, and this may be a factor determining whether the legislator has transferred this category of case to be examined by the common court, and not by a public administration body.

In the course of the proceedings brought by the claim, the court in civil proceedings, pursuant to Article 131(1) of the EPL, shall have the power to examine the legitimacy of the compensation granted by the administrative authority, and not only to check the correctness of its determination.[24]

23 Dz.U. (Journal of Laws) of 2020, item 1219, as amended, hereinafter referred to as the "EP".

24 Judgment of the Voivodship Administrative Court in Białystok of 6 June 2013, case file I Aca 107/13, LEX no. 1335594.

In view of the content of Article 131 of the EPL adopted in this way, a number of doubts arise in connection with the relationship between administrative proceedings and court proceedings. This is pointed out by K. Gruszecki,[25] who indicates the following problems:

- When claims can be pursued before a court in case of parallel administrative proceedings. The author assumes that the condition is that an administrative decision (not contestable) or no decision is issued within 3 months of the injured party's request.26
- The question of the form of possible termination of the administrative proceedings if the dissatisfied party, after three months to settle the matter, has successfully brought an action before a common court. The author points to the discontinuance of proceedings pursuant to Article 105 § 1 of the CAP.
- Is it possible for an administrative authority to issue a decision terminating the proceedings after the expiry of the time-limit set out in Article 131(2) of the EPL in a situation where the party has not brought an action before a common court? According to the author, there are no contraindications to issue, after the lapse of this period, a decision deciding on claims for restriction of the right to use the real estate (with the reservation that after the lapse of this period no action has been brought before a court).
- Will there be a right to take legal proceedings if an administrative authority makes any decisions, or only for a specific category of decisions?
- What is the relationship between the decision awarding compensation and a possible judgment of a common court terminating proceedings in this case?

I share all of the author's doubts, and without referring to them in detail, I find that they point to an unfortunate interface between administrative law and civil law, which, in the absence of precise regulations, gives rise to great interpretative doubts. For the parties to the proceedings, it also means a lack of a sense of legal accuracy and transparency. There is no doubt that the combination of two different branches of law, even from the procedural point of view, raises concerns about the uniformity and completeness of this procedure from the point of view of the party (the claimant).

2) Article 37h(2) of the Act of 27 March 2003 on Spatial Planning and Development[27] states: A party dissatisfied with the compensation granted may, within 30 days of the date of delivery of the decision referred to in paragraph 1, file an action with a common court. The court shall also be entitled to take legal action if the competent authority fails to issue a decision within 3 months of the date of the injured party's request. Pursuant to Article 37h(1) of the SPD, in the event of a limitation of the use of the property as a result of the establishment of regulations referred to in Article 37g(2)(4), at the request of the injured party, the competent district governor (*starosta*) shall determine, by decision, the amount of compensation. The decision of the *starosta* is not subject to appeal.

25 K. Gruszecki. Article 131, in: *Prawo ochrony środowiska. Komentarz*, Wolters Kluwer Polska, https://sip.lex.pl/#/commentary/587291860/590794. Accessed 22.07.2020.

26 See the judgment of the Voivodship Administrative Court in Warszawa of 29 October 2004, case file IV SA 2007/03, LEX no. 164442.

27 Dz.U. (Journal of Laws) of 2020, item 293, as amended, hereinafter referred to as the "SPD".

The above regulation is to some extent similar to the content of Article 131 of the EPL. Therefore, the comments made in point 1 will partly apply also here.

The administrative procedure for compensation is one-stage. It is not possible to appeal the decision of the district governor (*starosta*) to a higher level (second instance) body. Issuing a decision that is unsatisfactory to the party (the applicant) or a lack of such a decision within 3 months from the date of submitting the application (according to the authors from the date of submitting the application to the authority), entitles the party (the applicant) to bring an action before a common court. Submitting a claim triggers new court proceeding, which is not a continuation of the administrative proceedings that ended with a decision with which the applicant is not satisfied.[28]

3) Article 14(6) of the Act of 29 June 2011 on Preparing for and Performing Investments Involving Nuclear Power Facilities and Accompanying Investments[29] provides that a party dissatisfied with the compensation granted to it may bring an action before the common court within 30 days from the date of delivery of the decision on compensation. The bringing of the action shall not suspend the execution of the decision. Pursuant to Article 14[30](5) of the said Act, the decision on compensation is issued by the *voivode* within one month, at the request of the owner or perpetual usufructuary of the real estate, or a person who has a limited right *in rem* to the real estate submitted not later than within 2 months from the day on which the decision on the indication of the investment location or the permit to enter the real estate expired. The decision is not subject to appeal.

This regulation is also similar in nature to those discussed earlier.

4) Article 46e(4) of the Act of 13 October 1995 on Hunting Law.[31] The owner or holder of agricultural land on which the damage referred to in Article 46(1) has occurred, as well as the lessee or manager of the hunting district dissatisfied with the decision referred to in paragraph 1, may, within three months from the date of its delivery, bring an action before

28 A. Plucińska-Filipowicz, A. Kosicki, Art. 37(h), in: *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz aktualizowany*, Legal Information System LEX, https://sip.lex.pl/#/commentary/587754911/599324. Accessed 22.07.2020.

29 Dz.U. (Journal of Laws) of 2018, item 1537, as amended.

30 Article 14 of the Act of 29 June 2011 on Preparing for and Performing Investments Involving Nuclear Power Facilities and Accompanying Investments. 1) The investor, after completion of measurements, research or other works referred to in Article 11 paragraph 1, is obliged to restore the real estate to its previous state. If the restoration of the real estate to its previous state is not possible or causes excessive difficulties or costs, the owners, perpetual usufructuaries and persons with limited rights *in rem* are entitled to compensation from the investor. 2) The compensation should correspond to the value of the damage suffered. If the value of the real estate decreases because of these events, the compensation shall be increased by the amount corresponding to that decrease. 3) For determining the amount of compensation, Articles 130, 134 and 135 of the Act of 21 August 1997 on Real Estate Management, Dz.U. (Journal of Laws) of 2018, items 121, 50, 650, 1000 and 1089, shall apply accordingly. 4) In the case referred to in Article 11(1)(1), owners and perpetual usufructuaries and persons who have limited rights *in rem* to real estate are also entitled to compensation for the effects referred to in Article 6(4)(2) and (3). 5) The decision on compensation shall be issued by the *voivode* within one month, at the request of the owner or perpetual usufructuary of the real estate or a person who has a limited right *in rem* to the real estate submitted not later than within 2 months from the day on which the decision on the location of the investment project or the permit to enter the real estate expired. The decision is not subject to appeal. 6) A party dissatisfied with the compensation granted to it may bring an action before a common court within 30 days from the date of service of the decision on compensation. Lodging an action does not suspend the execution of the decision.

31 Dz.U. (Journal of Laws) of 2020, item 67, as amended, hereinafter referred to as the "Hunting Law".

the court competent for the place where the damage occurred. Pursuant to Article 46e(1) to (3) of the Hunting Law 1) The District Manager of the State Forests National Forest Holding, competent for the place where the damage occurs, shall determine the amount of compensation by way of a decision, taking into account in particular the arrangements contained in the protocols referred to in Article 46a(4), Article 46c(5) and Article 46d(8). The opinion of the representative of the Agricultural Chamber referred to in Article 46d(9) shall not be binding. 2) The decision referred to in paragraph 1 shall be issued within 14 days of receipt of the protocols referred to in paragraph 1 and shall be final. 3) The payment of the compensation referred to in paragraph 1 shall be made from the funds of the lessee or manager of a hunting region, not later than within 30 days from the date of delivery of the decision referred to in paragraph 1.

The subject of the action is also compensation for the damage caused. Against the background of the analysis of the above-mentioned provisions of the Hunting Law, apart from the doubts already raised, due to the contact between the administrative proceedings and civil proceedings, it can also be pointed out that the decision establishing the compensation and its amount was being questioned incorrectly. The parties wrongly directed complaints to administrative courts, which were correctly rejected by those courts. The courts did not recognise their jurisdiction to hear cases. This is indicated by the decisions of voivodship administrative courts.[32]

In one of the justifications for the Voivodship Administrative Court's[33] decision we can read: The complaint shall be rejected, as the case does not fall within the jurisdiction of the administrative court.

Pursuant to the content of Article 3 § 1 of the Act of 30 August 2002 on the Law on Proceedings before Administrative Courts, Dz.U. (Journal of Laws) of 2019, item 2325, as amended, hereinafter referred to as the "LPAC", administrative courts exercise control over the activities of public administration and apply the measures specified in the Act. The subject of control carried out by the administrative courts is primarily the forms of authoritative and unilateral activity of public administration bodies listed in Article 3 § 2. This control includes, inter alia, adjudicating on complaints against administrative decisions, decisions issued in administrative proceedings, in enforcement and security proceedings, and other acts or activities in the field of public administration referred to in Article 3 § 2 point 4 of the LPAC. In the case under consideration, the District Manager of the Forest Inspectorate K. established, pursuant to Article 46e of the Act of 13 October 1995 on the Hunting Law, Dz.U. (Journal of Laws) of 2018, item 2033, as amended, the amount of compensation due to the applicant A. M. for hunting damage caused by wild boars in agricultural crops. Pursuant to this regulation, the District Manager of the State Forests National Forest Holding responsible for the place where the damage occurs shall deter-

32 Resolution of the Voivodship Administrative Court in Białystok of 12 March 2020, case file II SA/Bk 157/20, LEX no. 2830010. Resolution of the Voivodship Administrative Court in Szczecin of 18 February 2020, case file II Sa/Sz 52/20, LEX no. 2783924. Resolution of the Voivodship Administrative Court in Gdańsk of 30 December 2019, case file III SA/Gd 789/19, LEX no. 2759896.

33 Resolution of the Voivodship Administrative Court in Białystok of 12 March 2020, case file II SA/Bk 157/20, LEX no. 2830010.

mine the amount of compensation by way of a decision, taking into account, in particular, the arrangements contained in the protocols referred to in Article 46a(4), Article 46c(5) and Article 46d(8). However, pursuant to Article 46e(4) of the Act, the owner or holder of agricultural land on which the damage referred to in Article 46(1) has occurred, as well as the lessee or manager of a hunting region dissatisfied with the decision referred to in paragraph 1, may, within three months of the date of its delivery, bring an action before the court having jurisdiction over the place where the damage occurred. It follows from the above that the competent court for this case is the common court with jurisdiction over the place where the damage occurred (see judgment of the Voivodship Administrative Court in Szczecin of 8 January 2020, case file II SA/Sz 1172/19; judgment of VAC in Warszawa of 17 February 2020, case file IV SA/Wa 2772/19).

Due to the civil law nature of the dispute in this case, the court, pursuant to Article 58(1)(1) of the LPAC, decided to reject the complaint.

5) Article 73(2d) and (2e) of the Act of 21 August 1997 on Real Estate Management.[34] 2d) The competent authority shall present in the form of a written statement a proposal to change the purpose of perpetual usufruct and set a deadline for the perpetual usufructuary to take a written position, not shorter than 2 months from the date of receipt of the proposal. If the perpetual usufructuary does not agree with the proposed change of the purpose of perpetual usufruct or has not presented a position, the competent authority may bring an action before a common court having jurisdiction over the location of the real estate. 2e) If the perpetual usufructuary submits the application referred to in paragraph 2 or 2b, the competent authority shall present a written position within 2 months of receipt of such application. If the authority does not agree to the change of the purpose of perpetual usufruct or does not present a position, the perpetual usufructuary may bring an action before a common court having jurisdiction over the location of the real estate.

This provision is not a classic example of an action against an administrative decision, but a right of action, by the claimant, against an administrative authority activity.

As regards an application submitted by a competent authority, in accordance with Article 73(2d) of the Real Estate Management Act, such authority shall present a proposal to change the purpose of perpetual usufruct in a written statement and set a deadline for the perpetual usufructuary to take a written position, which shall not be shorter than 2 months from the date of receipt of the proposal. If the perpetual usufructuary does not agree with the proposed change of the purpose of perpetual usufruct or does not present a position, the competent authority may bring an action before a common court having jurisdiction over the location of the real estate. It should be assumed that such an action may concern both an amendment of the agreement with respect to the purpose for which the real estate is given over for perpetual usufruct (and thus, as a consequence of a change in the interest rate), and possibly it may concern the termination of the agreement for perpetual usufruct of the real estate. In the light of paragraph 2e of Article 73 of the Real Estate Management Act, added on 15 August 2019, in the event of submission by the perpetual usufructuary of

34 Dz.U. (Journal of Laws) of 2020, item 65, as amended, hereinafter referred to as the "Real Estate Management Act".

the application referred to in Article 73 paragraph 2 or 2b of the Real Estate Management Act, the competent authority shall present a written position within 2 months of receipt of the application. If the authority does not agree for a change of the purpose of perpetual usufruct or has not presented a position, the perpetual usufructuary may bring an action before a common court having jurisdiction over the location of the real property.[35]

In conclusion, it should be stated that the common courts, when hearing actions against administrative decisions, have the competence to take evidence and the right to assess the evidence gathered in administrative proceedings ended with an administrative decision, e.g. expert opinions, witness statements, etc. Proceedings before the court triggered by the claim end with a judgment against which an appeal is possible. The specificity of a civil proceeding does not differ significantly from a typical trial before a common court, with the proviso that evidence gathered in administrative proceedings may be subject to judicial review. On the other hand, a common court is not allowed to interfere in the administrative decision in the course of proceedings brought by a claim in a case which has ended with an administrative decision. The Court is not allowed to apply reform or even cassation powers due to a lack of statutory authority. This is an important feature distinguishing the control of public administration exercised by common courts, as appeal bodies against administrative decisions, and as appointed to hear actions in relation to administrative decisions. Common courts e.g. the social security courts, as appeal bodies against decisions of public administration authorities in pension matters, have reform and cassation competences.

An action against an administrative decision is not an appeal for lack of subject matter of objection, i.e., an administrative decision. The action is linked to the administrative matter by the identity of the parties to the proceedings and evidence gathered in the administrative proceedings. This evidence should be assessed by the court in the course of the proceedings. However, the court may also admit, within the scope of the parties' and the court's powers, other evidence.

Another feature that distinguishes proceedings before common courts, as appeal bodies against administrative decisions, from trials against administrative decisions is the participation in the first proceedings, as a party, of the public administration body issuing the decision and the right to take account of an appeal lodged by a dissatisfied party against the body issuing the decision and, consequently, its amendment. In proceedings on actions against administrative decisions, the public administration body issuing the decision is not a party to the court proceedings, due to the statutory prohibition of appeal against such decisions. However, the outcome of the proceedings (the judgment), particularly if it is different and contrary to the administrative decision, will not be without significance for the administrative authority.

Finally, there is another issue, namely the relationship between the administrative decision and the claim brought as well as the relationship between the administrative decision and the judgment (final judgment). Two situations can be distinguished here. The first

35 E. Bończak-Kucharczyk, Article 73, in: *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany*, LEX Legal Information System, https://sip.lex.pl/#/commentary/587724878/625447. Accessed 22.07.2020.

situation concerns the legislator's regulation that taking legal action does not suspend the execution of the decision. This is, for example, the case in Article 131(3) of the EPL. Taking legal action does not suspend execution of the decision referred to in paragraph 1. Against this background, there is competition between the judicial process and the right to enforce an administrative decision. On the one hand, as has already been pointed out, a common court cannot interfere in an administrative decision and, on the other hand, the outcome of the trial is uncertain and future and, consequently, binding on the parties. In practice, it may turn out that the decision will be enforced before the end of a civil trial. This issue would require clear clarification by the legislator. On the other hand, when a final judgment has been issued, it appears to replace an administrative decision which, once the court ruling has become final, no longer binds the parties and the authority, unless such decision has been already executed earlier. It may be necessary to issue a judgment of an administrative and legal nature with respect to the decision, e.g. to the extent that the court has made a final judgment on civil claims, the decision will expire *ex lege* or will become pointless and it will have to be declared invalid (Article 162 § 1 point 1 of the CAP).

The second situation concerns cases where the Act "keeps silent" about the fate of a decision after an action has been brought, in particular "keeps silent" about whether or not this decision is enforceable. This situation seems to be even more complicated. It seems that different solutions can be considered here: 1) to the extent to which the civil court has made a final judgment on the claims, a declaration of termination of the administrative decision should be made pursuant to Article 162(1)(1) of the CAP, 2) the fate of the administrative decision should be taken by the court in civil proceedings after the final judgment on the claims,[36] 3) the legislator should in each case foresee the effect of termination of the decision *ex lege*.

Adopting a different concept would result in an administrative decision and a judgment in the same case. This seems to be unacceptable.

Summary and conclusions

Action in a case ended with an administrative decision is an exception to the principle of appeal against an administrative decision under the provisions of the CAP. On the basis of an analysis of normative acts of statutory rank, I conclude that the legal basis determining the right of a party to bring an action against a decision occurs occasionally. The legislator usually does not grant the right to bring an action against an administrative decision. In most cases, the right of action applies to decisions concerning compensation. I am thinking here of both positive decisions, setting the amount of compensation, and negative decisions, as well as the authority's failure to issue a decision. The subject of court proceedings triggered by an action may be both the questioning of the amount of compensation and the failure to grant it.

36 See resolution of the Supreme Court of 11 October 2012, case file III CZP 49/12, OSNC 2013/3, item 32.

From a procedural point of view, a decision against which there is no right of appeal to a higher instance within the meaning of the CAP, i.e., a final decision, terminates the administrative procedure. An action before a common court in a case which has ended with an administrative decision starts new proceedings. From the point of view of the party, however, it can be assumed that this is a continuation of the same procedure but carried out from the beginning by a different authority. It is not entirely understandable why a case involving civil law matters has been entrusted by the legislator to be resolved by public authorities. The issue of compensation is a typical civil matter in the substantive and legal sense. All the differences arising from these two branches of law, regardless of the procedural dimension, cause many difficulties and doubts in the course of these proceedings, especially at the junction between them. These problems lie both with the administrative authorities and the court and, more importantly, with the parties to the proceedings. I am critical of the power of public administration bodies to issue administrative decisions in relation to which an action is entitled to be brought. I believe that the legislator is involving public administration too much in matters of a civil law nature. This state of affairs creates uncertainty for parties to proceedings as well as authorities.

Given that the vast majority of the actions in a case ended with an administrative decision concern compensation, the issues of determining them should be governed solely by civil law, and not by administrative law – uniformly. The role of the administrative authorities should be definitely limited or completely eliminated. Although I am aware of the problems that may arise in carrying out such a task. I see such a solution in the long term.

Within the framework of the *de lege ferenda* proposals, the legislator should be urged to change the current legal situation by regulating administrative proceedings at the interface with (civil) court proceedings more precisely, so as to duly safeguard the interests of the parties to the proceedings and to remove uncertainty on the part of the authorities.

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Port control of the ship as a special case of control of the entrepreneur's business

ABSTRACT

The issue of controlling business activities of entrepreneurs is an extremely broad one. Due to the limited framework of this study, port control of ships has been made the subject of this paper. The development of the existing system for controlling compliance with shipping safety standards has been analysed in depth. International, EU, and Polish legal solutions concerning port control of ships have been presented, analysed, and evaluated. The aim of this study is to demonstrate the effectiveness of the analysed system of ship control. The research method used in this paper is dogmatic and legal.

KEYWORDS

control, Paris MoU, New Inspection Regime, THETHIS, Port State Control (PSC), maritime safety, maritime security

The concept of control

An entrepreneur and their business activities are subject to public control carried out under the provisions of the Act of 6 March 2018 on the Entrepreneurs' Law.[1] The issue of control is a complex one, and its discussion should begin from clarifying the very concept of it. According to the definition given by K. Strzyczkowski,[2] control shall be understood as checking the correctness of certain phenomena or actions, analysing, and evaluating them, establishing the results, and drawing appropriate conclusions. In pecialist literature, control is also defined as a set of activities aimed at checking a given entity.[3] In this respect, the inspector is entitled to collect information concerning the controlled entity in order to compare it with the model resulting from the applicable legislation. The controlling authority,

1 Dz.U. (Journal of Laws) of 2019, item 1292, as amended, hereinafter referred to as the "Entrepreneurs' Law".

2 K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2011, p. 165, based on: T. Bigo, F. Longchamp, *Kontrola administracji,* "Studia Prawnicze" 1963, no. 4, p. 51.

3 Z. Snażyk, A. Szafrański, *Prawo gospodarcze publiczne*, Warszawa 2018, p. 150.

however, shall be duly authorised to check the facts and must be thoroughly familiar with the current legal situation. Meeting these two conditions gives the controlling authority the opportunity to seek an answer to the question "Is this the way it should be?". If differences between the existing state and the desired state are found, the reasons for these differences shall be established and comments, conclusions, and recommendations formulated.[4]

According to the Glossary of terms concerning control and audit in public administration,[5] the concept of control can have two meanings: functional and managerial. Control in the functional sense means an examination or review, consisting of establishing facts, comparing them with the required state, and evaluating them. Management control is, on the other hand, an established governance system designed to provide reasonable assurance that management objectives will be achieved.

When discussing the concept of control, it is impossible not to refer to the concept of supervision, which, although close to the former, is a broader concept, linked to certain governing means of influencing the supervised entity. There can be no sign of equality between control and supervision as concepts, not least because the purpose of control is to indicate to the controlled entity the irregularities that have been identified, while leaving it relative freedom to choose how to remedy them. The essence of supervision, on the other hand, includes both the right of control and the power to govern the controlled (supervised) entity. At this point, attention should be drawn to the principle of legalism (Article 7 of the Constitution of the Republic of Poland of 2 April 1997[6]),[7] which states that both controlling and supervisory authorities shall act on the basis of and within the limits of law, and therefore the presumption of competence of the bodies in question is unacceptable. In other words, every action of the controlling bodies must have a legal basis in the form of statutory provisions, and what is connected with it, the illegal action of public authorities gives rise to the State's liability for damages to the entrepreneur.[8]

Here, attention should also be paid to the concept of audit and inspection. According to the Glossary of terms relating to control and audit in public administration,[9] audit means the same as control, in a functional sense. Inspection, in turn, means one of the control procedures consisting of review and examination of the results of activities and the elimination of existing deficiencies and shortcomings following immediate orders, examination

4 G. Kozieł, *Prawo przedsiębiorców*, in: *Prawo przedsiębiorców. Przepisy wprowadzające do Konstytucji Biznesu. Komentarz,* G. Kozieł (ed.), Warszawa 2019.

5 Supreme Audit Office (NIK), Chancellery of the Prime Minister, Ministry of Finance, Ministry of Internal Affairs and Administration (2005), Glossary of deadlines concerning control and audit in public administration, NIK, 1 ed., Warszawa.

6 Dz.U. (Journal of Laws), No. 78, item 483, as amended and corrected, hereinafter referred to as the "Constitution of the Republic of Poland".

7 Article 7 of the Constitution of the Republic of Poland: "The organs of public authority shall function on the basis of, and within the limits of, the law".

8 Article 77(1) of the Constitution of the Republic of Poland: "Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law".

9 Supreme Audit Office (NIK), Chancellery of the Prime Minister, Ministry of Finance, Ministry of Internal Affairs and Administration (2005), Glossary of deadlines concerning control and audit in public administration, NIK, 1 ed., Warszawa.

of records, documents or fixed assets.[10] In this study, inspection does not exist in an institutional sense, which means that it is not understood as one type of administrative police with control competences and the power to impose penalties and sanctions directly.

The area of legal regulations under examination is characterised by specific and diverse terminology. However, taking into account that the concept of control in this study is only functional, it is possible to put an equality mark between control and audit. Inspections, on the other hand, should be treated as a control procedure, i.e., a method, specific for a given activity, of obtaining control evidence and analysing it. This method, often preceded by a series of other steps, is taken to ensure that ships meet the legal requirements. In maritime legislation, however, the concept of inspection is very often associated with the concept of control and they are used interchangeably.

Inspection entities

Every entrepreneur can expect control activities to confirm that they are acting in accordance with the applicable law. Controls may be carried out based on the general principles set out in the Entrepreneurs' Law or pursuant to separate provisions (*lex specialis*). As a result, it is primarily public administration authorities, whose jurisdiction and powers are determined by specific regulations, that are entitled to carry out controls. Depending on the type of business activity,[11] the control may be carried out by:

- National Labour Inspectorate,
- Social Insurance Institution (ZUS),
- sAgricultural Social Insurance Fund (KRUS),
- Tax Office,
- Customs and Fiscal Office,
- State Sanitary Inspectorate (Sanepid),
- General Veterinary Inspectorate,
- Trade Inspection,
- State Fund for Rehabilitation of Disabled People (PFRON),
- the concession granting authority,
- the authority maintaining the register of regulated activities,
- Border Guard,
- Personal Data Protection Office,
- Inspection for Environmental Protection,
  State Fire Service, or
- Port State Control (discussed in more detail later).

10 Supreme Audit Office (NIK), Chancellery of the Prime Minister, Ministry of Finance, Ministry of Internal Affairs and Administration (2005), Glossary of deadlines concerning control and audit in public administration, NIK, 1 ed., Warszawa.

11 Source: https://www.biznes.gov.pl/pl/firma/obowiazki-przedsiebiorcy/chce-przygotowac-sie-do-kontroli-w-firmie/kontrole-w-firmie/jakie-urzedy-moga-kontrolowac-przedsiebiorce. Accessed 04.05.2020.

System for monitoring compliance with shipping safety standards

Further consideration should be given to the fact that one of the basic objectives of monitoring compliance with maritime safety standards is to ensure maritime safety in the broadest sense. Despite the lack of a legal definition, there are many proposals to define the concept of maritime safety in specialist literature. In one sense, this concept is defined as the safety of human activities at sea, including the prevention and minimisation of incidents and accidents at sea.[12] In another sense, it is stated that maritime safety is the safety of life, health, and property from the environmental and operational hazards that shipping brings with it.[13]

In addition to English *maritime safety*, there is also the concept of *maritime security*. In European legislation,[14] *maritime security* means a combination of preventive measures to protect shipping and port facilities against threats of intentional unlawful acts (i.e., terrorist attack).[15]

These concepts, although of different meaning, are interconnected. In the author's opinion, there is a subordinate relationship between the term *maritime security* and *maritime safety* – the former is subordinate to the latter.[16] It seems appropriate that the concept of *maritime safety* includes:

- the safety of the ship – all aspects of maritime safety covered by the International Convention for the Safety of Life at Sea (hereinafter referred to as the "SOLAS Convention"), as well as incident & accident prevention, health, and safety at work, etc.,
- environmental protection (prevention, response, and crisis management of ship-source pollution), and
- maritime security (protection of shipping and port facilities).[17]

This seems to be confirmed by the fact that on 12 December 2002 the Diplomatic Conference of the International Maritime Organisation (IMO) adopted amendments to the 1974 SOLAS Convention and the International Ship and Port Facility Security Code (hereinafter referred to as the "ISPS Code"). At this point it should be stressed that the SOLAS Convention is recognised as the most important international convention on maritime safety,[18] and therefore the introduction of provisions on maritime security in Chapter XI-2 of the SOLAS

12 J. Nawrot, *Międzynarodowe prawo bezpieczeństwa morskiego*, Warszawa 2019.

13 K. Formela, T. Neumann, A. Weintrit, *Overview of definitions of maritime safety, safety at sea, navigational safety, and safety in general*, "The International Journal on Marine Navigation and Safety of Sea Transportation" 2019, Vol. 13, no. 2, pp. 285-290.

14 Neither the SOLAS Convention nor the ISPS Code provide a definition of the legal concept of maritime security. This definition at least has been included in Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security (OJ L 129, 09.4.2004, p. 6). See J. Nawrot, *Międzynarodowe prawo…*; J. Nawrot, *Koncepcja nadzoru w zintegrowanej polityce morskiej UE,* "Prawo Morskie" 2011, Vol. XXVII, pp. 166-167.

15 Source: https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32004R0725&from=En. Accessed 12.12.2020.

16 See J. Nawrot, *Międzynarodowe prawo…*; S.H. Jore, *The conceptual and scientific demarcation of security in contrast to safety*, "European Journal for Security Research" 2019, no. 4, pp. 157-174.

17 Source: https://ec.europa.eu/transparency/regdoc/rep/2/2006/EN/2-2006-689-EN-1-7.Pdf. Accessed 12.12.2020.

18 W. Adamczak, J. Nawrot, *Bezpieczeństwo morskie. Uwagi na tle anglosaskiego rozróżnienia* maritime safety *i* maritime security, "Gdańskie Studia Prawnicze" 2015, Vol. XXXIII, pp. 19-31.

Convention seems to confirm the validity of the above-mentioned thesis. It is not possible to ensure the safety of a ship in the broadest sense of the word without protecting it against threats of intentional illegal acts.

It should be stressed that the monitoring of compliance of ships' parameters with international safety standards, the qualifications of the crew, the prevention of maritime pollution as well as living and working conditions on board the ship is the responsibility of the Flag State. The responsibility for maintaining the good condition of the ship and its equipment, and for the compliance of the crew's qualifications with the requirements of the international conventions, lies with the company (ship owner/ship operator – depending on agreement).[19] The system for monitoring compliance with maritime safety standards currently operates at three levels: national, regional, and global.[20] This system is not incidental, because it is at national level that maritime safety standards are implemented and enforced. At regional level, however, actions are of a coordinating nature and are complementary to national processes. The aim of activities undertaken at global level is to create unified safety standards, and therefore appropriate legal standards. The main role in their creation is played by the International Maritime Organization (hereinafter referred to as the "IMO"), based in London. As a United Nations specialised agency, the IMO is an international body that sets standards for shipping safety, environmental protection, and the development of maritime trade. The primary objective of the IMO is to create a fair, effective, generally accepted, and widely implemented legal framework for the shipping industry.[21] To date, the IMO is responsible for more than 50 agreements and conventions and has adopted a number of protocols and amendments. The Republic of Poland is a founding member of this organisation. Another body playing an important role in creating uniform maritime safety standards is the International Labour Organization (hereinafter referred to as the "ILO"), based in Geneva. The main objective of the ILO is to promote employment and job creation, to strengthen the protection of labour rights, social security, and social dialogue and to develop international labour standards (e.g., the Maritime Labour Convention, 2006). Other important maritime organisations include:

- Baltic and International Maritime Conference (BIMCO),
- International Chamber of Shipping (ICS),
- International Association of Classification Societies (IACS),
- International Association of Lighthouse Authorities (IALA),
- International Marine Pilots' Association (IMPA),
- International Hydrographic Organisation (IHO),
- Baltic Marine Environment Protection Commission (BMEPC), and

Committee of Paris Memorandum of Understanding on Port State Control. This is a non-governmental organisation, bringing together the maritime administrations of the

19 Source: https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52008AP0446&from=ES. Accessed 07.05.2020.

20 R. Molski, *Kontrola portowa statków o obcej przynależności (problematyka prawna)*, "Studia Prawnicze" 2001, no. 2, p. 55.

21 Source: http://www.imo.org/en/About/Pages/Default.aspx. Accessed 07.05.2020.

participating States, with the aim of international cooperation in the field of inspection of ships with regard to their compliance with the basic rules on maritime safety.[22]

The system for monitoring compliance with maritime safety standards includes the following controls carried out by maritime administrations:[23]

- control of ships by the Flag State, also known as Flag State Control (hereinafter referred to as the "FSC"), its frequency varies according to the rules of the Flag State,
- Coastal State Control (hereinafter referred to as the "CSC"),[24]
- Port State Control of Ships, also known as Port State Control or simply Port Inspection (hereinafter referred to as the "PSC"), as further elaborated in this paper,

as well as controls by NGOs, which are of great importance for the commercial operation of a ship. In order to obtain a charter and maintain the employment of a ship ("No approval, no hire!"), it is often necessary, as a rule, to be affiliated to recognised NGOs that ensure compliance with maritime safety standards and are approved by the charterer's representative for maritime safety. Quite frequently, a charterer, before hiring a ship, will commission an external company specialising in shipping safety audits to inspect it. The most important of the non-governmental organisations' inspections are:[25]

- ISM (International Safety Management) and ISPS (International Ship and Port Facility Security) audits – increasingly Flag State maritime administrations are delegating their execution to approved classification societies,
- periodical Class Surveys carried out on behalf of the Flag State maritime administration by approved classification societies such as DNV-GL (Det Norske Veritas Germanischer Lloyd) or PRS (Polish Register of Shipping),
- industry inspections, such as *vetting inspections* of the ship, carried out on oil tankers, chemical tankers, and offshore vessels,[26] on behalf of oil companies or other cargo owners with a significant market share or on behalf of the ship owner/ship operator (such as CDI, OCIMF / SIRE, Rightship, etc.) – as a general rule, these inspections are carried out at the request of the ship owner/ship operator in order to obtain a quality certificate which will help to get a charter,
- inspections by insurance companies, such as P&I Clubs, for insurance purposes.

It would appear that this control should be secondary to that carried out by the maritime administration, however, from a commercial perspective no charterer, particularly in the offshore sector, will currently employ a vessel solely based on positive inspection reports carried out by or on behalf of the authorities. This is a consequence of the fact that the inspections of non-governmental bodies are, in principle, more detailed and more authorita-

22 M.H. Koziński, *Morskie prawo publiczne*, Gdynia 2010, p. 32.

23 R. Molski, op. cit., pp. 56-57.

24 During his 15 years at sea, the author has not encountered this type of inspection, which may indicate its marginal role in the system for monitoring compliance with maritime safety standards.

25 S. Knapp, Ph.H.B.F Franses, *Analysis of the Maritime Inspection Regimes: Are ships over-inspected?*, "Econometric Institute Research Papers" 2006, no. 30, http://hdl.handle.net/1765/7895. Accessed 12.12.2020.

26 The offshore industry is a business activity offering production solutions related to the exploitation of raw materials (mainly energy ones – crude oil and natural gas) and obtaining renewable energy at sea. See P. Czapliński, *Przemysł* offshore *w Polsce – próba definicji, stan i możliwości rozwoju*, "Prace Komisji Geografii Przemysłu Polskiego Towarzystwa Geograficznego" 2015, Vol. 29, no. 4, pp. 103-111.

tive. They make it possible to identify a greater number of potential non-compliance with the maritime safety standards,[27] which is crucial from the charterer's point of view.

Port State Control (PSC)

One of the most important elements of maritime safety is Port State Control, which concerns the inspection of foreign-flagged ships by Port State Control Inspectors[28] employed by the maritime administration of the port called on by the ships in question. The mechanism of this control is a kind of exception to the principle that a ship is subject to the law of the Flag State.[29] The overriding objective of the PSC is to ensure that companies, ships, and their crews comply with internationally accepted safety standards.[30] This is achieved by verifying: standards of maritime safety, protection of the marine environment and working conditions of the crew.[31] The legal and international bases for PSC inspections derive from the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[32] as well as other conventions on the safety of navigation such as:

- the International Convention for the Safety of Life at Sea (SOLAS 74/78),
- the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78),
- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 78).

In 1978 the maritime administrations of Western European countries developed the so-called "Hague Memorandum". The aim of this memorandum was to enforce living and working conditions on board the ship, as required by ILO Convention 147.[33] Unexpectedly, in March 1978, just before the memorandum came into force, there was an oil spill off the coast of Brittany (France) due to the grounding of the oil tanker "Amoco Cadiz". This incident has led to stricter rules on maritime safety. It was a contributory factor in setting stricter rules on maritime safety and resulted in the drafting of the Paris Memorandum of Understanding on Port State Control (hereinafter referred to as the "Paris MoU"), which is primarily aimed at eliminating the substandard ships from operation, through a unified port control system. This memorandum, as has already been mentioned, covers the following issues: safety of life at sea, prevention of pollution from ships, and living and working conditions on board the ships. Initially, only 14 European countries participated in this memorandum, but over the years, the organisation has grown up to 27 Member States. The

27 It is this author's position based on 15 years of experience at sea.

28 See J. Pawełkiewicz, *System Szkolenia oficerów PSC,* "The Maritime Worker" 2012, no. 2.

29 W. Adamczak, J. Nawrot, op. cit., pp. 19-31.

30 R. Molski, op. cit., p. 57.

31 A. Walczak, *Methods of port state control assessment of ships flying a specific flag*, "Zeszyty Naukowe Akademii Morskiej w Szczecinie" 2014, no. 39, pp. 156-160.

32 Dz.U. (Journal of Laws) of 2002, No. 59, item 543.

33 Source: https://www.parismou.org/about-us/history. Accessed 08.05.2020.

positive impact of the Paris MoU on maritime safety has resulted in the creation, under the auspices of the IMO, of nine similar regional agreements worldwide.[34]

PSC in the European law

To effectively implement the provisions of the Paris MoU, it was necessary to strengthen them through EU legislation. As J. Nawrot rightly points out: "The establishment of regional PSC authorities does not, however, mean that the degree of effectiveness of inspections is the same worldwide. There are still significant differences in their operation, due to the application of different rules and the scale of inspections".[35]

The EU PSC was established by Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control.[36] The EU PSC system draws its foundations from the Paris MoU. It is worth noting that all coastal states of the European Union are members of the Paris MoU. The aim of Directive 2009/16/EC is to reduce the number of substandard ships operating within EU waters by ensuring that ships comply with EU and international rules on maritime safety and the environmental protection, and by establishing common criteria for the inspection of the ships.[37] This Directive amended and replaced Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control).[38] Successive amendments to Directive 2009/16/EC resulting for example from Directive 2017/2110 of the European Parliament and of the Council of 15 November 2017 have been incorporated into the basic text.[39]

Since 1 January 2011 in the European Union and within the framework of the Paris MoU a New Inspection Regime (hereinafter referred to as the "NIR") on port state control is in force. The frequency of this inspection depends on the risk profile of the ship. Each ship in the system has a risk profile assigned to it which determines, inter alia, the priority of a possible inspection, the maximum period between inspections, and the scope of inspections. All ships under the scheme are classified as high, normal, or low risk ships, based on their overall and historical parameters. The risk profile of the ship is updated daily based on dynamically changing parameters such as the age of the ship, 36 months' inspection history and the performance of the company. It is also updated after each inspection of the ship and

34 Source: http://www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx. Accessed 08.05.2020.

35 J. Nawrot, *Międzynarodowe prawo…*.

36 OJ L 218, 14.08.2013, p. 1, hereinafter referred to as the "Directive 2009/16/EC".

37 Source: https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=LEGISSUM:tr0022&from=EN. Accessed 08.08.2020.

38 OJ L 157, 7.7.1995, p. 1.

39 OJ L 315, 30.11.2017, pp. 61-77. This Directive amended the requirements for ro-ro passenger ships (roll on/roll off) and high-speed passenger ships operating on a regular service. The essence of the amendment is the requirement that these ships must be inspected by a PSC before they can commence operation on a regular service to ensure that they meet the requirements for safe navigation on such service.

after a change in the parameters of the flag States or recognised organisations. Thanks to this, based on the ship risk profile, the scope (level of detail), frequency and priority of PSC inspections is determined.[40]

Particular attention needs to be paid to the most important principles of Directive 2009/16/EC.[41] The Directive applies to any ship – and its crew – calling at an EU port or anchorage. High risk ships are subject to periodic inspections every 5-6 months, normal risk ships every 10-12 months and low risk ships every 24-36 months. In addition, EU governments shall ensure that they have a sufficient number of qualified inspectors with the required resources to carry out the inspections.[42] All ships calling at EU port are assigned a risk profile in the THETIS[43] inspection database. It is based on criteria such as the type and age of the ship and is also used to determine the level of detail and frequency of inspections. In order to facilitate the planning of inspections, the THETIS database has been linked to the SafeSeaNet system, which is used to monitor maritime traffic and exchange information. This system has been developed with the aim of strengthening navigational safety, security of ports and coastal states, protecting the marine environment and improving maritime transport in the ports of EU Member States.[44]

When analysing the key points of Directive 2009/16/EC, it should be noted that annual inspections are mandatory for ships with a high-risk profile and optional for other ships. Priority is given to inspections of ships that rarely call at EU ports. During the initial inspection, the ship's certificates and documents are examined and its overall condition is verified. Importantly, where deficiencies are found, the ship is subject to a more detailed inspection. More detailed inspections are carried out on ships with a high-risk profile and on passenger ships, oil tankers, gas or chemical tankers or bulk carriers more than 12 years old. Any deficiencies found must be remedied. In the case of a high risk to safety, health or the environment, the ship shall be detained until the deficiencies are rectified. National authorities may refuse access to the port for ships which have been detained more than twice during the previous two to three years. Owners or operators have the right to appeal against a detention or refusal to access. It is also worth adding that the European Commission maintains and updates the inspection database. It regularly publishes information on the THETIS website on companies whose compliance rates with regulations are low or extremely low.

The ship's New Inspection Regime introduced by Directive 2009/16/EC aims to eliminate substandard ships. This is done by increasing the frequency of inspections of substand-

40 F.J. Ravira, F. Piniella, *Evaluating the impact of PSC inspectors' professional profile: A case study of the Spanish Maritime Administration*, "WMU Journal of Maritime Affairs" 2016, no. 15, pp. 221–236.

41 Source: https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=LEGISSUM:tr0022&from=EN. Accessed 08.05.2020.

42 The directive provides for three types of inspections: an initial inspection, a more detailed inspection, and an expanded inspection.

43 The ship risk profile is determined based on seven criteria: type of ship, age of ship, flag, recognised organisation, company performance, number of deficiencies recorded during the last 36 months and number of detentions during the last 36 months.

44 Nawrot J., *SafeSeaNet*, in: *Wielka encyklopedia prawa*, B. Hołyst, R. Hauser (eds.), Vol. 19, *Prawo komunikacyjne* 2020, http://wikiprawna.com.pl/index.php?title=SAFESEANET. Accessed 12.12.2020.

ard ships while reducing the frequency of inspections of ships with a low risk profile. One of the instruments for achieving this is the use of the IT support system THETIS, already mentioned, which collects and makes available data on Port State Control. This system makes it possible to calculate, based on the data collected, the criteria necessary for targeting inspections in the Member States.

PSC in Poland

The system and competences of maritime administration in Poland are defined in the Act of 21 March 1991 on the Marine Areas of the Republic of Poland and Maritime Administration.[45] The maritime administration together with other states, members of the Paris MoU, protects marine areas against threats resulting from the operation of ships which do not comply with basic maritime safety regulations. The instrument to ensure that these objectives are met is the Paris MoU port inspection. The supervision of compliance with the provisions of the Act is carried out within the area of their activity by directors of maritime offices who, through separate organisational units, act for the safety of navigation. One of such unit is a port inspection which inspects foreign ships calling at Polish ports (and since the implementation of Directive 2009/16/EC also anchorages).[46] The legal basis for the functioning of the PSC in Poland can be found in various normative acts. The most important of these are:

- the Act of 18 August 2011 on Maritime Safety,[47]
- Ordinance of the Minister of Maritime Economy and Inland Navigation of 20 December 2019 on the Port State Control,[48]
- Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control,[49]
- Commission Regulation (EU) No 428/2010 of 20 May 2010 implementing Article 14 of Directive 2009/16/EC of the European Parliament and of the Council as regards expanded inspections of ships,[50]
- Commission Regulation (EU) No 801/2010 of 13 September 2010 implementing Article 10(3) of Directive 2009/16/EC of the European Parliament and of the Council as regards the Flag State criteria,[51] and
- Commission Regulation (EU) No 802/2010 of 13 September 2010 implementing Article 10(3) and Article 27 of Directive 2009/16/EC of the European Parliament and of the Council as regards company performance.[52]

45 Dz.U. (Journal of Laws) of 2019, item 2169, as amended.

46 M.H. Koziński, op. cit, p. 84.

47 Dz.U. (Journal of Laws) of 2020, item 680.

48 Dz.U. (Journal of Laws) of 2020, item 90, hereinafter referred to as the "PSC Ordinance".

49 OJ L 131, 28.5.2009, p. 57.

50 OJ L 125, 21.5.2010, p. 2.

51 OJ L 241, 14.9.2010, p. 1.

52 OJ L 241, 14.9.2010, p. 4.

Tasks in the field of shipping safety are carried out in Poland by PSC, as a rule, in accordance with procedures developed by Paris MoU. The main task of port inspections is to carry out port state control of maritime safety. This inspection consists of checking the ship's documents, the qualifications and composition of the crews, the safety condition of the ship's construction, its fixed installations and equipment. The results of the controls are transmitted to the THETIS database and the relevant notifications are sent to the flag State, the recognised organisation, as well as the PSC of the next port of call.[53] Other factual activities undertaken by the PSC include:

- participating on an expert basis in the investigations of violations of safety of navigation and pollution regulations,
- participation on an expert basis in the investigation of maritime incidents and accidents,
- providing training for PSC and FSC officers in ship inspection procedures,
- cooperation with classification societies and other national institutions within the scope of the Inspectorate's activities,
- drafting and giving an opinion on draft legislation on the safety of shipping and human life at sea,
- cooperation with the national IMO Centre and participation in the work of the national sections of the IMO, cooperation with the maritime chambers, the Border Guard and the Navy, as regards the Inspectorate' s activities.

The PSC also undertakes certain legal actions in the form of issuing administrative decisions of a supervisory nature. The most important of these include:

- issuing post-control recommendations to the captain and ship owner/ship operator,
- the detention of the ship (e.g., arrest),
- the ban on exploitation of the ship,
- a ban on the ship's entry into or exit from port,
- release of the ship.

The required competence and experience to carry out PSC inspections have been defined in PSC Ordinance. In the light of this regulation, the persons considered competent are those holding a certificate of so-called management level, i.e., master mariner or chief mate (chief officer) certificates on ships of 3000 gross tonnage and more, as well as chief engineer officer or second engineer officer certificates on ships of the main propulsion power of 3000 kW and more. Both deck and engine officers are required to have a minimum of five years' service experience as officer on board the seagoing ships, assistant inspector, or Flag State Control officer. The provisions of the regulation also make it possible to carry out port inspections by persons who do not have a maritime degree. However, these persons must have:

- a degree as a marine engineer, mechanical engineer or an engineer in the maritime profession and a minimum of five years' service experience in such profession, or
- a bachelor's, engineer's, Master of Science or equivalent degree and evidence of training in ship safety requirements and inspection procedures.

53 Source: http://www.ums.gov.pl/sch/PSC.pdf. Accessed 09.05.2020.

Inspectors are also required to have knowledge of English or any other language commonly used on board the ships. Prior employment as a Flag State inspector or assistant inspector, knowledge of the relevant inspection procedures under the Conventions is also required. At this point, it is worth adding that the inspector must not be associated with the port, the ship being inspected or the recognised organisation in such a way as to raise doubts about his/her impartiality.

Conclusions

Control understood as the examination of compliance of a given entity with the assumed pattern is a significant manifestation of interference in the sphere of entrepreneurs' activity. Confrontation of the established factual state with the model state should lead to conclusions that may constitute a basis for the possible application of appropriate supervisory measures. This constitutes a stimulus for entrepreneurs to comply with generally applicable law.

The control of business activity is devoted to Chapter 5 of the Entrepreneurs' Law, but not every control is based on this Act. This legislation contains general provisions on the control of business activity, which are subject to further clarification in specific acts. Among the legal solutions discussed, some are aimed at ensuring the sense of safety of the entrepreneur during the control proceedings, but their primary objective is to check and evaluate the existing situation.

The paper pays particular attention to monitoring compliance with maritime safety standards. Port State Control in the field of maritime safety is the primary task of port inspections. This inspection consists of checking the ship's documents, the qualifications and composition of the crews, the safety condition of the ship's construction, its fixed installations and equipment. It should be stressed that, in order to be effective, the control system should aim to ensure that all ships entering European Union ports and anchorages are regularly inspected. The system for selecting ships for inspection, which is based on the ship's risk profile, should also be welcomed.

Moreover, it is not only national rules, but also EU regulations that apply to controls in this area. An important tool for the proper functioning of the entire system is the use of the THETIS IT support system, which collects and makes available data of PSC inspections and allows, on their basis, the criteria necessary for targeting such controls in the Member States to be calculated.

Full conceptual consistency and clear safety rules would further strengthen the effectiveness of the system for monitoring compliance with maritime safety standards. It is worth noting the shortcomings of the legislation on the control of compliance with maritime safety standards in the form of inconsistent application of the concept of inspection and the concept of control. Although, when interpreting the rules, it seems that inspection is treated as a form of control, and these terms are often used interchangeably. It would therefore be appropriate to propose that the concepts in this area shall be harmonised by consistently using the concept of inspection as a control, its form or method. As part of the

proposed demands, attention should also be paid to the shortcomings in terminological arrangements in the area of safety, which have been signalled in this paper. It also seems appropriate to introduce into the system of Polish domestic law a definition of the legal English terms "maritime safety" and "maritime security".

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The place of animals in the legal system based on the Hunting Law: Legal and humane aspects

ABSTRACT

Since the late 1920s, the legislator has been trying to indicate the place of animals in the legal system. Due to their psychophysical features, they can be classified neither as things nor as persons. Determination of the place of animals in the legal system was extremely important due to the need to grant them legal protection in order to combat inhumane treatment. Today, the term "animal" is regulated in the Animal Protection Act, which clearly states that an animal is not a thing. However, in matters not regulated in the said act, laws applicable to things apply. Such subjectivity of animals is opposed by the understanding of game under the Hunting Law. What is more, this is not the only significant difference in the understanding of these related terms based on analysis of the two legal instruments. Humaneness viewed through the prism of the two pieces of legislation seems to be contradictory – the above-mentioned acts present different understanding thereof as well as different implementation by law. The cited acts were analysed in terms of literal, purposive, logical, and functional interpretation. Research into the issues in question was carried out with the use of dogmatic-legal, theoretical-legal, historical-legal, and sociological methods. This publication indicates the problem of ambiguity of the term "animal" based on the Hunting Law. Its aim is an in-depth analysis of the legal aspects of humane protection of animals, as well as an *a contrario* presentation of hunting practices. The research work carried out has suggested both inconsistencies as to identical terms in the above-mentioned acts, and a clear problem with regard to respecting and implementing the norms that stem from the provisions of the Hunting Law. Such results lead to a justified concern about the topicality of the legal solutions presented in the said act, while approval of this position should result in a conclusion that there is a need to amend the Hunting Law.

KEYWORDS

hunting law, animal protection, state property, humaneness

Introduction

Since the dawn of time, animals have been an essential element of human life. In prehistoric times, man hunted animals in order to obtain, above all, meat, but also, among other things, hides and pelts necessary for survival. As time went by and mankind developed,

animals turned from wild game into farm animals. Man was less and less often forced to hunt in order to survive. Over time, the need to hunt was almost completely eliminated and the only reason why it still exists today seems to be the so-called "cultural heritage". Undoubtedly, the fact that animals had been domesticated significantly influenced the way animals were perceived. With every new century, the position of animals has been changing, leading to a situation where we can no longer speak of hunting as an institution essential for the functioning of human life. In the thinking of a significant portion of the society, there has been a generational change that has resulted in perceiving an animal as a living being that deserves to be treated humanely, too. If it is able to feel pain and suffer, it should be distinguished from other elements of the environment. In view of the above, also the legislator should have listened to the ever stronger demands made by the society for changes in legislation as regards the issue of humaneness in how animals are treated.

Evolution of the term "animal"

In Poland, the first instrument regulating animal-related matters dates back to the interwar period – it is the Regulation of the President of Poland dated 22 March 1928 on the protection of animals.[1] The said instrument was not extensive and did not contain any complex codifications. Despite the fact that it consists of merely 12 articles, it is an extremely important regulation from the standpoint of animal protection. It can be said that this tiny legal instrument is a milestone for the treatment of animals under law. Before it was issued, an animal itself was not covered by legal protection. It is therefore important to point out the significance of this regulation in the history of Polish law. By far, the most important point is Article 1, which prohibits the abuse of animals. The direction set out by the legislation, which does not permit improper treatment of animals, means that, through the said instrument, the legislator expressed the need to develop an approach that should be taken by the legal system and, more importantly by the public consciousness, in the perceiving of animals. The said article is a clear and unambiguous beginning of a humane approach to animals. It is also worth mentioning that the same article specifies what an animal should be considered to be. According to its provisions, the following creatures are animals:

1) All domestic and tamed animals and birds,
2) Caught wild animals and birds as well as fish, amphibians, insects, etc.

In Article 2, the legislator also enumerated ten points that clearly indicated what behaviour is understood as "abuse" under law. It ought to be emphasized that the provisions in question were not *lex imperfecta*, because measures such as fines and arrests were provided for as a consequence of violating these norms. Do note that in cases where the perpetrator acted with exceptional cruelty, they were punishable by imprisonment for up to 1 year.

1 Regulation of the President of Poland dated 22 March 1928 on the protection of animals, Dz.U. (Journal of Laws) 1928, no. 36, item 332, hereinafter referred to as the "Regulation of the President of Poland dated 22 March 1928".

Undoubtedly, another noteworthy event in the process of shaping the term "animal" in the Polish legislation was the creation of the Code of Offences of 31 May 1971,[2] which is an instrument that is still in force today. The provisions of the Regulation of the President of Poland dated 22 March 1928 concerning animal abuse were incorporated into the said Code of Offences and placed in Chapter VIII entitled *Offences against public order and peace*. Such classification suggested at least two important aspects. The first is the legal aspect, which meant that the Code of Offences – by virtue of the amending provisions contained in this act – resulted in the repealing of the Regulation of the President of Poland dated 22 March 1928 with regard to the provisions concerning animal abuse, and, more specifically, Articles 4, 6, and 8 of the said regulation. The second important dimension was the very placement of the issue of inappropriate behaviour towards animals. The inclusion, by the legislator, of a ban on abuse in the Code of Offences indicated an axiological need to indicate that animal welfare is a public good.

The essence of legislation until now is the Animal Protection Act of 21 August 1997.[3] This legal instrument is the first such a comprehensive regulation which, in its entirety, pertains to animal rights. The basis of the said act is Article 1, which is of fundamental importance from the perspective of the protection of animal rights. The article states *expressis verbis* that man owes protection, care, and respect to animals. Furthermore, the article establishes that an animal is not a thing. This position, expressed in such a way, is of key historical importance because, before the date of publishing the Animal Protection Act, the position of animals was unclear. Through the norms that it established, this act led to the placing of animals under legal protection. It should also be stressed that the Animal Protection Act is the first statutory-rank regulation pertaining to this matter, and can be described as relatively extensive since it consists of 44 articles. Moreover, from the standpoint of legal and humane aspects, Article 4 is of no small importance. It contains legal definitions of the said act, where one can find such terms as humane treatment of animals and the need for quick slaughtering. Article 5 of the same act is an additional expression of how important an aim humane treatment of animals is. It reads: "every animal needs to be treated humanely".

Legal instruments that regulate the hunting law

When analysing animal protection issues, particular attention ought to be paid to the links between this issue and the hunting law. Hunting is a field that interferes with the animal world to a great extent. As far as legal regulations are concerned, the one that "leads the way'" and is the only legal instrument of statutory rank is the Hunting Law of 13 October 1995,[4] which consists of 64 articles. The primary subject matter of the said act are the main

2 Act of 20 May 1997 Code of Offences, Dz.U. (Journal of Laws) 2019, item 821, as amended, hereinafter referred to as the "Code of Offences".

3 Animal Protection Act of 21 August 1997, Dz.U. (Journal of Laws) 2020, item 638, hereinafter referred to as the "Animal Protection Act".

4 Hunting Law Act of 13 October 1995, Dz.U. (Journal of Laws) 2020, item 1683, hereinafter referred to as the "Hunting Law".

assumptions of hunting and of the hunting economy, as well as the objectives of the hunting procedure. The said instrument is fundamental due to the criminal-law norms that it contains.

However, it is not possible to speak of completeness of the Hunting Law Act. There is no doubt that it should be pointed out that, despite its complexity and extensive subject matter, it is not a comprehensive instrument. In order to fully understand the issues of the Polish hunting law, the above-mentioned act should be examined together with the Statute of the Polish Hunting Association,[5] the Set of Principles of Ethics of Hunting Traditions and Customs compiled by the Committees for Ethics and Hunting Customs of the Chief Hunting Council of the Polish Hunting Association,[6] the Regulation of the Minister of the Environment dated 23 March 2005 on detailed conditions for carrying out hunts and marking of carcasses,[7] and the Regulation of the Minister of the Environment dated 11 March 2005 on establishing the list of game species.[8] Only after reading the above-mentioned instruments can one speak of exhausting the issue of hunting law in its essence.

In the regulation on establishing the list of game species, the Minister of the Environment points out key issues concerning the implementation of the Hunting Law Act, that is, the Minister establishes the list of game species by dividing them into large game (7 species: moose, red deer, sika deer, fallow deer, roe deer, wild boar, mouflon) and small game (24 species, such as: fox, raccoon dog, badger, pine marten, American mink). It is also necessary to note the Regulation of the Minister of the Environment on detailed conditions for carrying out hunts and marking of carcasses. It details, *inter alia*, the conditions for hunts depending on the game, as well as the requirements that must be fulfilled when carrying out individual or group hunts.

The term "animal" in the Animal Protection Act versus the Hunting Law

It should be emphasized at the outset that the understanding of an animal under the Hunting Law and under the Animal Protection Act is strikingly different. In the Animal Protection Act, an animal is perceived as a living being, that is to say, one that is capable at least of suffering, as the legislator directly points out. The fact that an animal is separated from the term "thing" is extremely important too. This not only has legal consequences, but also necessitates a change in the psychological approach to animals. Through such a legal regulation, not only do they gain a completely different position and become a new participant

5 Polish Hunting Association, *Statut Polskiego Związku Łowieckiego,* 16.02.2019, https://statut-pzl.pl/wp-content/uploads/2019/03/NOWY_STATUT_PZ%C5%81_2019.pdf. Accessed 10.09.2020.

6 Polish Hunting Association, *Zbiór zasad etyki i tradycji łowieckich,* https://pzl.radom.pl/pliki/zbior_zasad_etyki_i_tradycji_lowieckiej.pdf. Accessed 10.09.2020.

7 Regulation of the Minister of the Environment dated 23 March 2005 on detailed conditions for carrying out hunts and marking of carcasses, Dz.U. (Journal of Laws) 2019, item 1782, hereinafter referred to as the "Regulation of the Minister of the Environment on detailed conditions for carrying out hunts and marking of carcasses".

8 Regulation of the Minister of the Environment dated 11 March 2005 on establishing the list of game species, Dz.U. (Journal of Laws) 2017, item 1484, hereinafter referred to as the "Regulation of the Minister of the Environment on establishing the list of game species".

in legal transactions, but they can also actually be regarded as a living element of the environment in the light of law. According to Article 45 of the Civil Code,[9] without prejudice to the situations listed in Article 1 para. 2 of the Animal Protection Act, animals must not be treated as material objects – they are left suspended between the rights of respect and protection of human life and the absence of similar regulations concerning things, which would be bizarre because of the fact that these are unable to experience suffering.[10] The Animal Protection Act also points out that man owes respect, protection, and care to animals.[11] This should be interpreted mainly in terms of treating animals with the respect and dignity they deserve, as well as applying the principle of humaneness and always ensuring proper living conditions.[12] However, at this point, it seems justified to also pay particular attention to Article 2 of the said act, which states that the act regulates the handling of vertebrate animals, which are characterized by high individual development; but if we were to limit this group to the classes of mammals and birds that are of strict interest to us in this publication (because they are hunted), we could definitely say that in the case of both classes we are dealing with living creatures that have advanced cerebral abilities not only in terms of certain complex activities, the use of tools or the making of some inferences, but also in view of the fact that, with most species, it is easy to observe behaviour that indicates the ability to create bonds or attachment between individuals, or even to show feelings in the most human sense of the word.[13] This is true not only of mammals, which are so easy for human beings to identify with, if only because they belong to the same class and consequently all of them, like *homo sapiens*, have a cerebral cortex, but also of birds which, according to research, have a number of neurons in the brain mantle that is twice as high as that found even in primates.[14]

In order to refer to the meaning of the term "animal" that may be inferred from the Hunting Law Act, one ought to follow the guidelines set out in the Regulation of the Minister of the Environment on establishing the list of game species, in which the list of the only game species to which this act applies is indicated. As previously noted, those animals include species that belong to the classes of mammals and birds. The Hunting Law Act

9 Civil Code Act of 23 April 1964, Dz.U. (Journal of Laws) 2020, item 1740, as amended, hereinafter referred to as the "Civil Code".

10 It is worth mentioning the ruling of the Supreme Court dated 9 March 1973, reference number I CR 58/73, which directly states that "forest animals are not things within the meaning of Article 45 of the Civil Code, therefore the State cannot be their owner within the meaning of civil law and is only liable for any damage caused by these animals if the act so provides".

11 As indicated by the judgement of the Voivodeship Administrative Court with its seat in Poznań, dated 29 August 2018, reference number IV SA/Po 332/18, from Article 1 para. 1 of the Animal Protection Act "it follows that every animal has the right to expect from people a due understanding, treatment in accordance with generally accepted norms, and even respect. All legal measures taken with regard to animals should take into consideration their welfare and, above all, their right to exist."

12 Z. Gądzik, *Ochrona humanitarna zwierząt utrzymywanych w ogrodach zoologicznych*, "Studia Prawnicze KUL" 2019, pp. 114-116, https://czasopisma.kul.pl/sp/article/view/5851/7937. Accessed 10.09.2020.

13 K. Kuszlewicz, *Zwierzęta objęte ustawą o ochronie zwierząt,* in: *Prawa zwierząt. Praktyczny przewodnik,* Warszawa 2019, pp. 74-116.

14 A. Zykubek, *Czy wiecie, że ptaki mają w mózgu więcej neuronów niż ssaki?,* 20.06.2016, http://kognitywistyka.kul.pl/ptaki-maja-mozgu-wiecej-neuronow-niz-ssaki/. Accessed 10.09.2020.

does not provide for a separate legal definition of game, but only states that it is state property. Such a definition of game raises justified doubts as to its interpretation. According to the view presented by A. Pązik,[15] the doctrine suggests that in the light of Article 2 of the Hunting Law Act the right of ownership (in the civil-law sense) arises at the moment when an animal is caught and taken possession of, or, if killed, its carcass becomes the object of ownership.[16] As a result, a free animal that has not been taken possession of is not an object in a civil-law relationship until it has been taken possession of. A different opinion is presented by Roman Stec[17] who follows in the footsteps of W. Radecki and claims that pursuant to Article 2 of the Hunting Law Act the hunting right is not a right of ownership within the meaning of Article 140 of the Civil Code but rather a special subjective property right of an absolute nature, whereas free animals, which are not game, are not the object of any property right.[18] The dispute about how to properly understand the given legal regulation has not been resolved and there is no consistent interpretation thereof. It cannot be stated that, under the Hunting Law, live game is a thing, but neither can it be stated that free game is not a thing.[19] A provision constructed in this way causes legal uncertainty because it cannot be clearly stated what position the legislator has adopted as the applicable position with regard to game which, *nota bene*, are animals too within the meaning of Article 1 of the Animal Protection Act. It seems necessary to resolve the issue of what the status of free game is in the light of the Hunting Law because, in the currently applicable formulation, it is impossible to determine its status unambiguously. In this discussion, it is worth pointing out that, within the meaning of property law, one cannot speak of free game. We must admit that a person cannot have a right of ownership if this entitled person does not have control over the animal. Therefore, free game – until taken possession of or killed – cannot be the object of a right of ownership within the meaning of Article 140 of the Civil Code. Consequently, it ought to be concluded that such an animal is not a thing, but the laws on things can be applied to it. In such a case, the animal becomes an object of an absolute property right. The above-presented definition of the legal norm differs from the literal interpretation of the provision contained in the Hunting Law because, in its current wording, it is misleading. Therefore, the said provision needs to be revised. It seems that it would be justified to unequivocally stipulate that game, which remains free and alive, is not a thing, but rather *quasi-property* of the state. Only when it is killed is it allowed to be covered under the right of ownership within the meaning of Article 140 of the Civil Code.

15 A. Pązik, Article 2, in: M. Słomski, A. Pązik, *Prawo łowieckie. Komentarz*, Warszawa 2015.

16 Differently: W.J. Katner, in: *System prawa prywatnego*, Vol. 1, *Prawo cywilne – część ogólna*, M. Safjan (ed.), Warszawa 2012, p. 1337.

17 Similarly: E. Skowrońska-Bocian, M. Warciński, Thesis 6 of the commentary on Article 45, in: *Kodeks cywilny*, Vol. 1, *Komentarz do art. 1–44910*, K. Pietrzykowski (ed.), Legalis 2013.

18 R. Stec, Article 2, in: B. Rakoczy, R. Stec, A. Woźniak, *Prawo łowieckie. Komentarz*, Warszawa 2014.

19 M. Goettel, *Sytuacja prawna zwierzęcia po wejściu w życie ustawy o ochronie zwierząt*, in: *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013, pp. 42-49.

Ways of killing animals based on the provisions of the Hunting Law

According to the official statistics published by the Polish Hunting Association, in Poland there are currently 128,500 hunters and 18,500 candidates.[20] They are associated in 48 hunting districts. Notably, the number of hunters is increasing from year to year, as clearly demonstrated by the statistics: in 2012, there were 113,178 hunters, while in 2000, the number of hunters was only 100,236.[21] At this point, a conclusion should be drawn given the legal situation concerning the subjectivity of animals and the broadly-defined humaneness, i.e., living in an ever more ecological and environmentally friendly world, it may be puzzling that the number of hunters is on the rise, and not the other way round. Even more astonishing is how many game animals are killed during hunts. In 2018, the number of game killed was almost one million, or 951,241 to be precise. What is more, it ought to be noted that 3,463 carcasses of game were submitted to game purchase points in National Parks in 2017, although under the law, it is not permitted to hunt in National Parks. The only action permitted there under the law is "headage control", but it must not be forgotten that the process taking place in National Parks is *de facto* identical to hunting. It is noteworthy that 1,262 pieces of game were shot dead in National Parks in 2007. These statistics suggest a significant extent of hunting in Poland.

Attention must be paid to a certain curious phenomenon, namely, the fact that hunting is particularly oriented towards profit from the sale of slaughtered animal carcasses,[22] while the hunters themselves describe it as preserving "hunting traditions". Currently, the revenues of the Polish Hunting Association exceed PLN 300 million, and its main assets are revenues from hunts and the sale of carcasses and killed animals.[23] Zenon Kruczyński, in his article entitled "Współczesne myślistwo w Polsce. Raport subiektywny" (*Present-day hunting in Poland. A subjective report*), demonstrates a strong connection between the total amount of money spent on compensation and feeding of game, and the total amount of money obtained from the meat of killed animals. This is a kind of cause-and-effect sequence aimed at achieving the greatest possible natural increase in a specific species by means of feeding (which is artificial and unnatural to game), in order for that to lead to an ever greater number of animals to be shot which, in turn, generates huge profits.[24] The practice of feeding the animals, supposed to force an increase in the population, resulting in more killings as part of game population control, is confirmed by the life experiences as

20 Homepage, General Statistics, www.pzlow.pl. Accessed 10.09.2020.

21 Statistics Poland, *Leśnictwo 2012,* Warszawa 2012, p. 157, https://stat.gov.pl/cps/rde/xbcr/gus/rl_lesnictwo_2012.pdf. Accessed 10.09.2020.

22 Z. Kruczyński, *Współczesne myślistwo w Polsce. Raport subiektywny,* "Dzikie Życie" 2010, no. 10, https://dzikiezycie.pl/archiwum/2010/pazdziernik-2010/wspolczesne-myslistwo-w-polsce-raport-subiektywny. Accessed 10.09.2020.

23 R. Ślusarczyk, *Panie ministrze! Łowiectwo to wielki biznes i liczne przywileje. Czas z tym skończyć. W społecznych postulatach nie ma miejsca na kompromis,* Workshop for All Beings, 22.01.2018, https://pracownia.org.pl/pracownia-aktualnosci/425-panie-ministrze-lowiectwo-to-wielki-biznes-i-liczne-przywileje-czas-z-tym-skonczyc-w-spolecznych-postulatach-nie-ma-miejsca-na-kompromis. Accessed 24.08.2020.

24 Z. Kruczyński, *Współczesne myślistwo…*

well as the numerous statements and publications of biologists and ecologists.[25] Repeating of this behaviour is in total contradiction to the objectives of hunting laid down in Article 3 points 1–3 of the Hunting Law Act. By feeding game, hunters disturb the balance of the natural environment, which stands in opposition to their statutory goal. Moreover, it should be pointed out that by making it easier for an animal to get food, its population increases and then requires control. It seems obvious that if hunters did not provide animals with food in such overabundant quantities, culling on such a scale would not be necessary. It must be made clear that feeding animals on such a scale is not an actual measure to improve their living conditions; on the contrary, they lose their natural instinct for survival, which makes their existence highly dependent on humans.

Another issue that raises a lot of doubts is the very method of carrying out hunts. To begin with, attention should be paid to lead cartridges. In Poland, between 400 and 600 tonnes of this metal are found in forests every year due to shots fired by hunters. It is important to realize that by firing a single lead bullet and killing an animal with this shot, one causes much more damage than it might seem. Assuming that the animal that has been shot does not die immediately, but escapes so effectively that it is not found by the hunter, and then dies, the hunter causes a situation where the animal's body poses a significant environmental hazard. At this point, the following circumstances should be distinguished:

3) A situation where the body decomposes naturally and the lead contained therein enters the soil thus contaminating it. If vegetation grows there, it will be contaminated by the soil in which it grows. The said vegetation can then pass the lead contained therein on to the animal that feeds on it. Do note that the role of this animal can also be played by humans.
4) A situation where the body serves as food to a scavenger, whose living body receives the lead through the digestive system. This pattern may repeat itself, leading to a spread of the lead contamination in the environment.

The situations mentioned above are merely an example of the impact of lead on forest animals and the entire ecosystem. The use of lead cartridges stands in contradiction to Article 127 para. 1 point 3 of the Environmental Protection Law Act.[26]

§ 1 point 15 of the Regulation of the Minister of the Environment on detailed conditions for carrying out hunts and marking of carcasses contains a legal definition of a *postrzałek*, i.e., an animal wounded as the result of getting shot. Referring to the numerous hunting practices, it ought to be pointed out that contact with an animal wounded in this way is a common situation during hunts. This is due to the fact that no provision of the act introduces an obligation of annual shooting exercises supposed to improve the marksmanship of hunters. As a result, often the shots fired at the game hit a different part of the body than intended. When joining a hunting club, the candidate must know how to use the weap-

25 A. Kepel, *Minister apeluje o dokarmianie zwierząt,* The Polish Society for Nature Protection "Salamandra", 14.06.2006, http://salamandra.org.pl/component/content/article/41-ogolne/128-dokarmianie-zwierzt?directory=152. Accessed 10.09.2020; Z. Kruczyński, *Koronne argumenty,* "Dzikie Życie" 2005, no. 6, https://dzikiezycie.pl/archiwum/2005/czerwiec-2005/koronne-argumenty. Accessed 10.09.2020.

26 Article 127 para. 1 point 3 reads as follows: "animal and plant protection consists in preventing or limiting negative impacts on the environment that could adversely affect resources or the condition of animals and plants".

on. Unfortunately, in further practice, no one verifies their shooting skills. Furthermore, a practice typical among hunters is to aim at the animal's trunk. This is supposed to leave intact the trophy which, in principle, is the head of the animal. It should also be mentioned that a hunter's "takes" are scored by the Polish Hunting Association. It seems clear that both intentional and unintentional shots that do not immediately kill the animal result in a death that is far from humane, which it should be guaranteed to be in the light of Article 5 of the Animal Protection Act. A wounded animal may live for many hours after being wounded. As a rule, hunters look for any animals that have survived the gunfire from their weapons. It is common practice that a hunter does not go immediately to find the animal, but waits for a relevant period of time for the animal to bleed out and weaken in order to minimize the risk of the hunter being attacked. When animals are found still alive, they are rarely killed with the hunter's weapon, because a half-dead creature is an ideal opportunity to train young hunting dogs and boost their aggression. In most cases, the animal wounded by a gunshot dies from attacks by hunting dogs or from exhaustion. Only when these two eventualities do not happen as expected is the animal finished off with a gun. There should be no doubt that the events described above are far removed from the statutory matter, which in § 5 para. 1 point 3 of the above-mentioned regulation clearly states that "the hunter should seek out, approach, and kill the injured animal as quickly as possible in a way that spares it any unnecessary suffering".

According to the Regulation of the Minister of the Environment on establishing the list of game species, also 13 species of birds are considered as game. In order to hunt fowl, hunters use the same weapons as for killing other animals, i.e., pellet shot cartridges. It is also undisputed that birds often move in larger groups or V-formations. Generally, when a hunter points the gun at one of the flying birds, he/she will also hurt those around it. In the light of the opinion written by Michał Skakuj, entitled "Opinia o możliwości identyfikacji oraz o ryzykach związanych z odstrzałem wybranych gatunków ptaków łownych w warunkach polowania" (*An opinion on the possibility of identification and the risks associated with the shooting of selected species of game birds under the conditions of a hunt*),[27] it should be noted that only 70% of the fired pellet shot flies to the place at which the hunter was aiming (the field of focus). The remaining 30% is an "erroneous pellet shot" that, as a result of deformation when being fired, takes an unpredictable flight trajectory. The area covered by the pellet shot increases in proportion to the distance from which the shot was fired. Accordingly, assuming that the gun is fired from 40 m using 3 mm pellet shot, the covered area may have a diameter of almost 3 m. This is why bird hunting statistics are extremely drastic. Every year, hunters successfully kill about 140,000 birds, while 500,000 die after being shot. To make things even worse, in Poland there are legally protected bird species that are deceptively similar to those considered as game.[28] This leads to situations where hunters often kill an animal that is protected by law.

27 M. Skakuj, *Opinia o możliwości identyfikacji oraz o ryzykach związanych z odstrzałem wybranych gatunków ptaków łownych w warunkach polowania,* Gdańsk, 10.03.2014, https://niechzyja.pl/dokumenty/opinia-o-mozliwosci-identyfikacji-ptakow-lownych.pdf. Accessed 10.09.2020.

28 *Zbliżone gatunki ptaków,* "Niech Żyją", https://niechzyja.pl/baza_wiedzy/zblizone_gatunki_ptakow/. Accessed 10.09.2020.

Another issue of disputable ethicality are hunts with the participation of "beaters", usually accompanied by hunting dogs. What is particularly odious about such hunts is the method of carrying them out.[29] The task of the beaters is to flush out or "drive the game towards lines of hunters standing in positions called flanks",[30] often using dogs and making noise in order to scare the game in the right direction. Such way of hunting violates Article 6 para. 2 point 9 of the Animal Protection Act. Once the game runs in front of the flank, it is fired at. It must be emphasized that such a course of a hunt is in opposition to Article 3 point 3 of the Hunting Law Act, which clearly states that "the aim of hunting is to achieve the best possible individual condition of game". What is more, Article 11 para. 2 point 7 of the same act indicates that "management of the game population requires, in particular, maintenance of an age and sex structure and size of the game population appropriate to ensure the balance of ecosystems and achieve the main economic objectives in agriculture, forestry, and fishing. It seems clear that driving the game by a group of hunters and then shooting at it has little to do with humane killing of the weakest individuals.[31] The dynamism of this situation excludes the possibility of verifying whether, by killing a particular individual, hunters will fulfil the population management objectives set out in the act. For this reason, it seems that the method of hunting described above violates the main assumptions of the Hunting Law Act which, *nota bene*, is the basis for the functioning of hunters in Poland.[32]

Conclusion

The claim that hunting had a significant impact on people's lives cannot be disputed but, as the world developed, the role of hunting gradually diminished. Hunting in its current form is an archaic institution that does not keep up with the modern needs or requirements of the society. It ought to be noted that, to a large extent, animals are no longer seen as things under the law, and therefore game also deserves law-regulated dignified treatment and adherence to relevant regulations, which in the current state of hunting is not the case. The actions of hunters are the cause of much controversy, and the existing legislation is no longer sufficient to meet the demands made by the society.

An issue that has been the subject of many discussions is the excessive and, in many opinions, unnecessary feeding of animals. It is easy to recognize that this practice is not dictated by the welfare of animals, but only by financial factors, that is, increasing the rev-

29 R. Stec, *Wykonywanie polowania indywidualnego i zbiorowego* in: *Uprawianie łowiectwa i prowadzenie gospodarki łowieckiej*, Warszawa 2012, pp. 92-119.

30 Regulation of the Minister of the Environment dated 23 March 2005 on detailed conditions….

31 W. Daniłowicz, *Selekcja osobnicza,* in: idem, *Prawo łowieckie*, Warszawa 2020, pp. 84-86.

32 Attention should also be paid to situations where hunters make a mistake and kill the wrong animal, for example, as referred to in the judgement of the Voivodeship Administrative Court in Warszawa dated 5 September 2013, reference number IV SA/Wa 1162/13, in which the Court stated that no fault, even unintentional, can be attributed to the forest district office, because they could not have expected that "professional" Belgian hunters, who paid for the possibility of carrying out the hunt, would confuse a raccoon dog with a wolf and accidentally kill the wolf.

enues of hunting clubs. This stands in contradiction to hunting ethics, namely, Principle 10 listed in the Set of Principles of Ethics and Hunting Traditions,[33] which is the moral benchmark for hunters' behaviour. The said principle states that "a hunter does not seek material benefits in hunting, as hunting cannot be a means to obtaining them".

The killing technique that is in use should not deserve approval. The above examples clearly show that many actions are far from fulfilling the basic postulates, such as a quick and least painful death. This violates Principle 20 of the aforementioned set, which states that "a hunter is obliged to check the effectiveness of the shot or attack by the hunting bird, to look for the wounded game, and to humanely put an end to its suffering as quickly as possible".

Another issue that raises doubts is the fact that hunters obtain trophies from animals, which are then scored by the Polish Hunting Association. It seems unethical to obtain any trophies, let alone compete and fight for the highest score. The hunting culture is based on outdated foundations, which require change. Suffice it to mention that one of the customs is to smear one's face with a "paint" being the blood of killed animals, especially on the occasion of "baptisms" and "swear-ins". What also seems odd are some of the superstitions connected with hunting, such as grabbing women by the knee, following the rule that "the bigger the animal, the higher you grab", which means that "when you go hunting for small fowl you should grab a toe, for bigger fowl – by the ankle, for wild boar – by the knee, for deer and moose – by the…" supposed to ensure luck and a fruitful hunt. Even more astonishing is the fact that the Polish Hunting Association has applied for the above ritual to be included on the UNESCO national list of intangible cultural heritage.[34]

To sum up, there is a necessity to start a public discussion about the need to amend the set of legislation that regulates the legal matter in the scope of hunting. The contradiction in the understanding of the term "animal" under the Hunting Law Act and under the Animal Protection Act creates a situation of legal danger in the form of misinterpretation of legal norms, and, in consequence, illegal actions based on incorrectly made assumptions. The state of legal uncertainty cannot be left without the intervention of the legislator, so this fact alone should be an obvious argument for taking legislative action aimed at amending the Hunting Law Act. Also discussed should be the actual impact of hunting on the entire ecosystem and the further legal approval for certain activities of hunters. This publication has referred to many legally regulated issues that raise doubts as to the legitimacy of their legal acceptance and the social need to cultivate them.

33 Polish Hunting Association, *Zbiór zasad etyki i tradycji łowieckich,* http://pzl.radom.pl/pliki/zbior_zasad_etyki_i_tradycji_lowieckiej.pdf. Accessed 10.09.2020.

34 R. Jurszo, *PZŁ chce wpisać na listę UNESCO myśliwski obyczaj łapania kobiet za kolano. Lub wyżej, gdy większy zwierz,* Oko Press, 28.06.2019, https://oko.press/pzl-chce-wpisac-lapanie-kobiet-za-kolano-na-liste-unesco-dokladniej-im-wiekszy-zwierz-tym-wyzej-mierz/. Accessed 10.09.2020.

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"Reverse distribution chain" in public pharmacies in decisions of the Supreme Administrative Court

ABSTRACT

The purpose of this article was to demonstrate the approach of the Supreme Administrative Court to ruling in cases of the "reverse distribution chain" and its effects for the entities operating public pharmacies that participate in the "reverse distribution chain". The judgments of the Supreme Administrative Court in this area were analysed, taking into account the new legal standard prohibiting wholesale trade in medicinal products by a public pharmacy, regulations existing before the above legal standard was implemented, and the effects associated with the participation in the "reverse distribution chain". The most important conclusion of the above analysis was the fact that the Pharmaceutical Law, when regulating trade in medicinal products, defines the principles of such trade and only on the basis thereof may the activity be conducted.

KEYWORDS

reverse distribution chain, pharmacy, wholesale trade, disposal

Introduction

The "reverse distribution chain" is a term used in the media, legal doctrine, and administrative and court case law.

In the media world and healthcare market, the term "reversed distribution chain" of medicines is understood as various illegal practices undertaken with the aim of circumventing the law or acquiring medicinal products illegally and then exporting them abroad to derive significantly high profits. This procedure, especially with regard to some "unique" medicinal products available at attractive, low prices (often due to refund negotiations that result in the lowest prices in Europe), has led to significant shortages in the availability of

these medicines to patients in Poland. In the case of life-saving medicines, their lack also causes serious health risks.[1]

In the doctrine, it is assumed that reverse distribution qualifies as such when a pharmacy sells medicines to entities other than patients, i.e. other entities authorised to market the medicine.[2]

In the judicial decisions of the Supreme Administrative Court, the term "reverse supply chain" is used interchangeably with the term "reverse distribution chain", which does not change the fact that both expressions refer to the same activity of the operators of public pharmacies, who participate in the "reverse distribution chain".

The present study includes judgments of the Supreme Administrative Court with regard to the provision of Article 86(a) of the Act of 6 September 2001 Pharmaceutical Law, in force from 12 July 2015 to 6 June 2019. The purpose of this article was to present the normative context and approach adopted by the Supreme Administrative Court to ruling in cases of the "reverse distribution chain" and the effects for the entities operating public pharmacies that participate in the "reverse distribution chain".

Reverse distribution chain in normative context

The reversed distribution chain has obtained an independent regulation through the introduction of Article 86(a) into the Pharmaceutical Law. The provision was added by the Act of 19 December 2014 amending the Pharmaceutical Law and certain other laws.[3] It reads as follows: "Article 86(a). The sale of medicinal products through a public pharmacy or pharmacy shop to the pharmaceutical wholesaler, another public pharmacy or pharmacy shop shall be prohibited". The Law entered into force on 8 February 2015.

By the Act of 9 April 2015 amending the Pharmaceutical Law and certain other acts,[4] the wording of the provision has been changed and reads as follows: "Article 86(a). The disposal of medicinal products through a public pharmacy or pharmacy shop to the pharmaceutical wholesaler, another public pharmacy or pharmacy shop shall be prohibited". In this wording, the provision was in force from 12 July 2015 to 6 June 2019, when its content was seriously amended without being addressed in either the doctrine or judicial decisions of the Supreme Administrative Court. Various types of opinions appear in the media space, but they remain outside the scope of this analysis.

Wojciech L. Olszewski pointed out that the provision in Article 86(a) was introduced into the Act at the beginning of 2015 to address the problem of pharmacies that increased their sales of medicines to wholesalers who later exported them abroad. The pharmacies carrying out such activities defended themselves by claiming that there was no provision which

1 G. Mączyński, attorney-at-law at: http://aptecznerewolucje.pl/2018/11/15/odwrocony-lancuch-dystrybucji-produktow-leczniczych-jako-ogromne-ryzyko-oraz-odpowiedzialnosc-dla-aptek-i-farmaceutow/. Accessed 28.01.2020.

2 W.L. Olszewski (ed.), Article 86a, in: *Prawo farmaceutyczne*. *Komentarz*, Warszawa 2016.

3 Act of 19 December 2014 amending the Pharmaceutical Law and certain other acts, Dz.U. (Journal of Laws) of 2015, item 28.

4 Ibidem.

would explicitly prohibit such operations. Certainly, the prohibition should clearly result from the law, especially if entailing such severe sanctions as withdrawal of a pharmaceutical licence or even penal consequences. Therefore, in this context, it is impossible to question the grounds for introducing the aforesaid provision.[5]

Justyna Stefańczyk-Kaczmarzyk mentioned that the movement of goods between European Union countries was legal. It provides grounds for the principle of free movement of goods in the EU. In the case of medicinal products, the movement of goods takes place in the form of the so-called parallel import authorised by law. The economic basis for parallel import are differences between prices of medicines in individual EU countries. As a result, this phenomenon is becoming profitable despite the parallel distribution system operated by the producer. It should not result in a lack of medicines on the Polish market.[6]

On the other hand, Leszek Ogiegło stated that the Pharmaceutical Law amended in 2014 introduced a new provision, which explicitly prohibited the sale of medicines by public pharmacies and pharmacy shops to other public pharmacies or other pharmacy shops and pharmaceutical wholesalers. The existence of this restriction in the legal supply chain for medicinal products could be illustrated on the basis of the legislation in force, in particular, by showing the limits of legal distribution as set out in the established terms of reference for public pharmacies, pharmacy shops, and wholesalers. The terms of reference for entities involved in regulated business designate the limit which should not be exceeded for the entity not to be accused of illegal activity.[7]

It should be noted that in the Statement of Reasons for the draft to the Act of 9 April 2015 amending the Pharmaceutical Law and certain other acts, the legislator indicated that the need to clarify certain provisions in the Act of 6 September 2001 Pharmaceutical Law resulted from the necessity to solve the issue of uncontrolled export of medicinal products, medical devices, and foodstuffs for special nutritional purposes outside the territory of the Republic of Poland. It is necessary to introduce effective supervisory measures to be implemented by state authorities with respect to the process of distributing medicinal products, which is currently reaching a socially unacceptable level of pathology and making it impossible to ensure constant access to important medicinal products, the lack of which may cause permanent and adverse health consequences. It is necessary to provide the National Pharmaceutical Inspectorate with the competence in the monitoring, supervision and control of the distribution chain of medicinal products, foodstuffs for particular nutritional uses and medical devices. Therefore, it is assumed that the proposed regulations shall contribute to the reduction of the phenomenon of the so-called "reverse distribution" of medicinal products. The draft Act assumes that all participants in the distribution chain, i.e. the producer, wholesalers, and pharmacies, shall be obliged to regularly report on a daily basis on inventory balance and sales volume of goods.

5 W.L. Olszewski, op. cit.

6 J. Stefańczyk-Kaczmarzyk, *Art. 86(a) 86a.1.* [*Odwrócony łańcuch dystrybucji*], in: *Prawo farmaceutyczne. Komentarz*, M. Kondrat (ed.), 2nd ed., Warszawa 2016.

7 L. Ogiegło, Article 86a, in: *Prawo farmaceutyczne*, 3rd ed., Warszawa 2018.

Rafał Stankiewicz indicated that on 12 July 2015, Article 86(a) was introduced into the Act Pharmaceutical Law, pursuant to which the public pharmacy or pharmacy shop could not sell medicinal products to the pharmaceutical wholesaler or another public pharmacy or pharmacy shop. Therefore, the provision introduces an absolute ban on the sale of medicines by public pharmacies or other pharmacy shops to other public pharmacies or pharmacy shops, as well as pharmaceutical wholesalers. The aforementioned legal institution aims to prevent the creation of the so-called reverse distribution chain. At this point, it should be added that such an obligation could be inferred from the content of the previous regulations, but the implemented amendment eliminates any doubt in this regard.[8]

However, on a side note, it should be mentioned that, on the basis of the grounds for the draft Act of 4 April 2019 amending the Pharmaceutical Law and certain other acts (finally adopted on 23 April 2019), the current wording of the provision was to a large extent incomplete, as it only prohibited the sale of medicinal products by public pharmacies and pharmacy shops to other public pharmacies, pharmacy shops, and pharmaceutical wholesalers. The regulation did not cover many practical cases, such as, for example, the disposal of medicinal products by public pharmacies to nursing homes or other entrepreneurs not being patients, and the disposal of medicinal products to pharmaceutical wholesalers through herbal and public shops. In the present state of the law, the demand of the provider of medicinal products constitutes the only exception to the principle of direct supply to the public (Article 96 sec. 1 et seq. of the Pharmaceutical Law). The Pharmaceutical Law governs the above institution in a comprehensive and precise manner, without including other cases, where a pharmacy could sell medicinal products, also free of charge, to an entity other than a patient. However, pursuant to Article 65 sec. 1 of the Pharmaceutical Law, trade in medicinal products may be conducted solely in compliance with the principles described in the Act. Currently, there is no regulation in Article 86(a) of the Pharmaceutical Law that would be fully consistent with the above-mentioned rules on trade in medicinal products. This provision has been used by entrepreneurs selling medicines abroad through the aforesaid channels. The proposed wording of the provision indicates that a pharmacy or pharmacy shop may only sell medicinal products to directly supply the public, including free supply to patients – solely for the purpose of their treatment or based on the demand of entities carrying out therapeutic activities – in compliance with the principles set out in appropriate provisions of generally applicable law (in particular the Pharmaceutical Law and other regulations on official prices for medicinal products subject to refund).

In its judicial decisions, the Supreme Administrative Court mainly pointed out to the fact that the present lack of a legal norm including a direct ban on the sale of medicinal products by public pharmacies or pharmacy shops to the pharmaceutical wholesaler, other public pharmacies or pharmacy shops did not have any impact on the existence or operation of such ban. The Court inferred this prohibition from the entirety of the provisions of the Pharmaceutical Law, which govern wholesale and retail trade in medicinal products. In

8 R. Stankiewicz, *Obrót hurtowy w systemie obrotu produktów leczniczych,* in: *Instytucje rynku farmaceutycznego*, ed. R. Stankiewicz, Warszawa 2016.

its judgment of 13 August 2019, file no. II GSK 565/17,[9] the Supreme Administrative Court indicated that the ban on the sale of medicinal products by public pharmacies or pharmacy shops to the pharmaceutical wholesalers, other public pharmacies or pharmacy shops had remained in force before the implementation of Article 86(a) of the Pharmaceutical Law and resulted from the entire systematics of the Act Pharmaceutical Law, although not explicitly. The Court emphasised that the Act defined pharmacies as entities authorised to conduct retail trade only (Article 68 sec. 1 of the Pharmaceutical Law) and to supply the public (Article 87 sec. 2 point 1 of the Pharmaceutical Law). The distribution of medicines to entities other than patients generally falls within the scope of wholesale trade reserved exclusively to pharmaceutical wholesalers.[10]

In its judgment of 17 October 2018, file no. II GSK 3320/16,[11] the Supreme Administrative Court stated the following:

> The correct application, in the circumstances of the case, of Article 37ap sec.1 point 2 of the Pharmaceutical Law, as the legal basis for withdrawal of a pharmacy licence due to the ascertained loss of warranty of due execution of business in this case – contrary to the position of the complainant in the cassation proceedings – is not challenged by the amendment to the Pharmaceutical Law, introduced by the Act of 19 December 2014 amending the Pharmaceutical Law and certain other acts (Dz.U. [Journal of Laws] of 2015, item 28) and the Act amending the Pharmaceutical Law of 9 April 2015 (Dz.U. [Journal of Laws] of 2015, item 788). Pursuant to Article 103 sec. 1 point 2 of the Pharmaceutical Law, in compliance with the wording after the amendment, the voivodeship pharmaceutical inspector shall withdraw the licence to operate a public pharmacy if the pharmacy has infringed the provision of Article 86(a). Pursuant to the last provision, the disposal of medicinal products through a public pharmacy or pharmacy shop to the pharmaceutical wholesaler or another public pharmacy or pharmacy shop shall be prohibited. The Supreme Administrative Court does not find any arguments supporting the thesis that the quoted provision should be interpreted as the qualitative (normative) change with respect to the previous legal status. The above-mentioned ban on the wholesale trade in medicinal products was clearly based on the previous legislation and principles. "The sale of medicines by pharmacies/pharmacy shops to other pharmacies/pharmacy shops or pharmaceutical wholesalers was subject to sanction of withdrawal of the licence also before the entry into force of the Act amending the Pharmaceutical Law. The conditions, whose fulfilment authorised the body to issue the decision, are set out in Article 37ap of the Act, which applies to all licences regulated by the Act" (see Justyna Stefańczyk-Kaczmarzyk, *Komentarz do art. 86(a) Ustawy Prawo farmaceutyczne*, WK, 2016, Lex database). Therefore, it is justified to treat the implementation of Article 86(a) as the clarifying and editorial change. In the opinion of the adjudication panel of the Supreme Administrative Court, it may be assumed that, while under the law previously in effect – of course, depending on the factual circumstances of a particular case – it was possible to state that a pharmacy selling medicinal products to a pharmaceutical wholesaler did not entail losing the warranty of due execution of business, the implemented amendment, which introduced in Article

9 Judgment of the Supreme Administrative Court of 13 August 2019, file no. II GSK 565/17 available at the Central Database of Administrative Court Decisions, website http://orzeczenia.nsa.gov.pl/cbo/query, hereinafter referred to as "CBOSA". Accessed 12.02.21.

10 Cf. W.L. Olszewski, op. cit.

11 Judgment of the Supreme Administrative Court of 17 October 2018, ref. no. II GSK 3320/16, CBOSA.

> 86(a) the explicit ban on the sale of medicinal products by the public pharmacy or pharmacy shop to the pharmaceutical wholesaler or another public pharmacy or pharmacy shop, also provides for the consequences of breaching the provision of Article 86(a), resulting directly from the Act, in the form of an obligatory withdrawal of the licence to operate a public pharmacy by a competent authority (amended Article 103 sec. 1 point 2).

In the judgment of 5 March 2019, file no. II GSK 12/17,[12] the Supreme Administrative Court stated:

> The amendment introduced to the Pharmaceutical Law on 12 July 2015 only enhanced the existing ban on the sale of medicinal products by the public pharmacy to another pharmacy and transformed the nature of the sanction from an optional to an obligatory penalty. Pursuant to Article 103 sec. 1 point 2 of the Pharmaceutical Law, the voivodeship pharmaceutical inspector shall withdraw the licence to operate a public pharmacy if the pharmacy has infringed Article 86(a). In compliance with the last provision, the disposal of medicinal products through the public pharmacy or pharmacy shop to the pharmaceutical wholesaler, other public pharmacy or pharmacy shop shall be prohibited. The legal regulation of the Pharmaceutical law, in the wording applicable and amended in this case, provided for the disputable prohibition and authorisation of the pharmaceutical inspection authorities to withdraw the pharmacy licence in the event when it is established that the operator does not provide the warranty of due execution of business, also in the case of breach of such prohibition.

In the judgment of 15 October 2019, ref. no. II GSK 2669/17,[13] the Supreme Administrative Court stated that it shared the view expressed in the case law that the prohibition of the so-called "reverse distribution" in Article 86(a) of the Pharmaceutical Law may not be interpreted as the normative qualitative change with respect to the previous legal status. The introduction of Article 86(a) is rightly treated as the clarifying and editorial change.[14]

In the aforementioned judgments, the Supreme Administrative Court explicitly pointed out that the provision in Article 86(a) of the Pharmaceutical Law, introduced and amended in 2015, was aimed at encompassing the ban in a single provision and explaining the doubts raised so far, leading to the argumentation of the entities operating public pharmacies that the lack of the provision made it impossible to be held liable for its violation. Additionally, the Supreme Administrative Court emphasised in its rulings the fact that the provision of Article 86(a) of the Pharmaceutical Law, in the wording established in 2015, did not introduce any new solution or approach to the concept of "reverse distribution". Such wording of the introduced provision should be interpreted as the strengthening of the approach to the above-mentioned practices resulting in the infringement of not only this particular provision of the Pharmaceutical Law, but also many other regulations included therein, as discussed below.

12 Judgment of the Supreme Administrative Court of 5 March 2019, ref. no. II GSK 12/17, CBOSA.

13 Judgment of the Supreme Administrative Court of 15 October 2019, ref. no. II GSK 2669/17, CBOSA.

14 Cf. Judgment of the Supreme Administrative Court of 17 October 2018, ref. no. II GSK 3320/16 and the views included in the doctrine views referred to therein.

Prohibition of wholesale trade in medicinal products by the public pharmacy

First of all, it should be stressed that under Article 65 sec. 1 of the Pharmaceutical Law, trade in medicinal products may be conducted solely in compliance with the rules set out in the Act. As a matter of principle, retail trade in medicinal products shall be conducted in public pharmacies (Article 68 sec. 1). Article 72 sec. 1 of the aforementioned Act – stipulating that the wholesale trade in medicinal products (…) may be conducted only by entities (including pharmaceutical wholesalers) specified in this provision – excludes the possibility of such trade by pharmacies. The legislator defined "trade" in Article 72 sec. 3 as any form of supply, storage, delivery or export of medicinal products or veterinary medicinal products, with marketing authorisation for a medicinal product issued in a Member State of the European Union or the European Free Trade Association (EFTA) – a party to the European Economic Area Agreement or authorisation referred to in Article 3 sec. 2, executed for the benefit of manufacturers or importers of medicinal products which they manufacture or import, or wholesalers, or pharmacies or veterinary clinics, or other authorised persons, excluding direct supply to the public.

In its judgment of 17 October 2018, ref. no. II GSK 3320/16,[15] the Supreme Administrative Court held that the sale of medicinal products by the pharmacy to the pharmaceutical wholesaler was in the form of wholesale and such trade in medicinal products was prohibited under the Pharmaceutical Law. By virtue of article 65 sec. 1 of the Pharmaceutical Law, trade in medicinal products may be conducted solely in compliance with the rules set out in the Act.

However, already in the judgment of 22 May 2014, the Supreme Administrative Court indicated that the Pharmaceutical Law included the definition of the wholesale trade in medicinal products (Article 72 sec. 3 of the Pharmaceutical Law). The definition is closely linked to the character of the entities that receive supplies of medicinal products. The definition is explicit and clearly shows that the supplies to, *inter alia*, wholesalers and pharmacies constitutes wholesale. Article 72 sec. 1 of the Pharmaceutical Law stipulates that only wholesalers may engage in wholesale trade, whereas Article 74 sec. 1 of the Pharmaceutical Law indicates that the operation of the pharmaceutical wholesaler requires special authorisation. Nevertheless, when comparing Article 80 sec. 1 point 3 and Article 101 point 3 of the Pharmaceutical Law, it is evident that one entity may not operate the public pharmacy and pharmaceutical wholesaler at the same time, since conducting one of such businesses precludes the obtaining of the licence to operate the other business. The Court held that, on the basis of the invoked provisions, it was apparent that the wholesale trading required a special licence, which could not be obtained by the entity operating the public pharmacy. Therefore, the wholesale trading by the public pharmacies was prohibited and the prohibition did not result from Articles 86 and 87 of the Pharmaceutical Law governing the operation of pharmacies, but from the provisions on wholesale trade (Article 72 sec. 1 in connection with Article 72 sec. 3 of the Pharmaceutical Law), according to which wholesale trade could

15 Judgment of the Supreme Administrative Court of 17 October 2018, ref. no. II GSK 3320/16, CBOSA.

be conducted only by wholesalers, customs and consignment warehouses. Since these are only the wholesalers, customs and consignment warehouses that may conduct the wholesale trade, it means that other entities may not be involved in such trade. Therefore, based on this very regulation, the ban on the wholesale trade by public pharmacies should be inferred. The judgment shows that before the introduction of Article 86(a) of the Pharmaceutical Law, the Supreme Administrative Court has already taken a clear position, without any doubts as to the separation of retail trade from wholesale trade in medicinal products and the impossibility of combining these two activities. It should be mentioned that both wholesale and retail trade are carried out within an extremely sensitive area, which is the protection of human health.

The above also leads to the conclusion that the provision in Article 65 of the Pharmaceutical Law sets forth the principle that has no exceptions. The market operators involved in the marketing of medicinal products must decide to be involved in either retail or wholesale trade. Neither the legislator nor the court and administrative case law permit any derogations in this regard.

The aim of retailers in medicinal products, i.e. the operators of public pharmacies, to demonstrate the scale of their turnover or lack of health risk could not be achieved.

Consequences of the ban on disposal

Pursuant to Article 37ap sec.1 point 2 of the Pharmaceutical Law, the licensing authority shall withdraw the licence if the entrepreneur ceases to meet the conditions prescribed by law, required for the performance of business activity specified in the licence.

In its judicial decisions, the Supreme Administrative Court stated that the aforesaid provision referred to non-compliance with the laws – which proved that the entrepreneur no longer met the conditions required to conduct business as specified in the licence.

It is confirmed by, among other things, the following judgments of the Supreme Administrative Court:

- Judgment of 2 October 2019, file no. II GSK 2667/17[16] (available at CBOSA), in which the Court stated that, apart from the dispute, there was also the issue of mandatory withdrawal of the licence subject to Article 37ap of the Pharmaceutical Law; contained in Chapter 2b "General provisions on licensed business activity". Pursuant to Article 37ap sec.1 point 2, the licensing authority shall withdraw the licence if the entrepreneur ceases to meet the conditions prescribed by law, required for the performance of business activity specified in the licence.
- Judgment of 5 March 2019, file no. II GSK 1542/17,[17] in which the Court found that the withdrawal of the licence to operate the public pharmacy did not depend, according to the legislator, on the scale or seriousness of violations or the reasons therefor. On the contrary, the legislator used the imperative of this provision, expressed in the phrases "with-

16 Judgment of the Supreme Administrative Court of 2 October 2019, ref. no. II GSK 2667/17, CBOSA.

17 Judgment of the Supreme Administrative Court of 5 March 2019, ref. no. II GSK 1542/17, CBOSA.

drawal of the licence" and "the entrepreneur ceases to meet the conditions prescribed by the law", which indicated the (obligatory) competence of the pharmaceutical inspector to withdraw the licence if the conditions for carrying out pharmaceutical business had been breached. The Court pointed out that the withdrawal of the licence was based on purely objective premises, i.e. finding that the infringement had been committed. Liability for infringement of the conditions for operating a public pharmacy is objective liability (of administrative character). The legislator, probably bearing in mind higher values, such as the constitutional guarantee of the protection of human health and life as well as the social importance of the pharmacist's profession, did not decide – as was often the case – to introduce statutory conditions which, if demonstrated by the entrepreneur, would form grounds for exemptions from the "sanctions" in the form of withdrawal of the pharmaceutical licence.

Moreover, the Supreme Administrative Court emphasised that the warranty of due execution of business was one of the provisions laying down the conditions required to carry out the activity specified in the licence. Pursuant to Article 101 sec. 4 of the Pharmaceutical Law, the voivodeship pharmaceutical inspector shall refuse to grant the licence to operate a public pharmacy if the applicant does not provide the warranty of due execution of business.

In its judgment of 5 March 2019, the Supreme Administrative Court also noted that one of the premises for refusing to grant the licence to operate a public pharmacy was the loss of the warranty of due execution of business by the applicant. Therefore, the applicant who applies for the pharmaceutical licence shall not receive it if they fail to provide the warranty of due execution of business. The condition for the warranty of due execution of business must exist not only at the time of granting the licence to operate a pharmacy, but must also remain effective throughout the whole period of operation of such business activity, and the limits, within which the entrepreneur may conduct such legally regulated activity are determined by the obligations imposed under the Pharmaceutical Law. In the above-mentioned judgment, the Supreme Administrative Court stated that the Act Pharmaceutical Law, which regulates, among other things, business activity in the field of trade in medicinal products, constituted a cohesive act that should be read and interpreted as a whole, whereas an attempt to interpret a single provision without taking into account other regulations contained in that Act led to wrong conclusions. Pursuant to the provision in Article 65 sec. 1 of the Pharmaceutical Law, it is evident that the trade in medicinal products may be conducted solely in compliance with the principles stipulated therein. It means that, according to other rules, the aforementioned activity may not be carried out and any deviation from the statutory trading principles are unacceptable. The regulation contained in the Pharmaceutical Law provides for two forms of trade in medicinal products, i.e. retail trade and wholesale trade.

In addition, the Court pointed out that, subject to sec. 8 sec. 2, only pharmaceutical wholesalers, customs and consignment warehouses of medicinal products may engage in wholesale trade in medicinal products pursuant to Article 72 sec. 1 of the Pharmaceutical Law. However, by virtue of Article 68 sec. 1 of the Pharmaceutical Law, retail trade in me-

dicinal products shall be conducted in public pharmacies subject to sec. 2, Article 70 sec. 1, Article 71 sec. 1 and Article 72 sec. 3 of the Pharmaceutical Law. In both cases, it is required to obtain the appropriate licence pursuant to Article 74 sec. 1 of the Pharmaceutical Law and Article 101 of the Pharmaceutical Law, respectively. Therefore, a pharmacy may not sell medicines to other pharmacies or wholesalers, as it is only the wholesaler who is allowed to be involved in wholesale.[18]

Based on the premises specified in Article 37 sec. 1 point 2 of the Pharmaceutical Law and Article 104 point 4 of the Pharmaceutical Law, the Supreme Administrative Court clearly stated that both the public administration bodies and the Voivodeship Administrative Court did not violate the law by deciding to withdraw the licence to operate a public pharmacy, which had been granted to the entity using "reverse distribution chain" in their pharmacy. In compliance with the Pharmaceutical Law, the withdrawal of the licence is the most severe sanction for the pharmacy operator, as it deprives the operator of the possibility to run their business and consequently makes it impossible therefor to operate all public pharmacies in the country. Therefore, the Supreme Administrative Court had consistently stated in its rulings that the "reverse distribution" is an example of infringement of the requirements stipulated in the provisions of the Pharmaceutical Law.

Conclusions

The above analysis shows that the Supreme Administrative Court has consistently indicated that the provisions of the Pharmaceutical Law, which govern the regulated business activity in the field of health protection, should be read literally, as established by the legislator. When interpreting the provisions on retail trade in medicinal products, it is important to consider the purpose of the operations of the public pharmacy, which has been explicitly regulated in Article 86 sec. 1 point 1 of the Pharmaceutical Law. Once again, it is worth referring to judgment of the Supreme Administrative Court, in which it stated that the Act Pharmaceutical Law, regulating, among other things, business activity in the field of trade in medicinal products, constituted a cohesive act that should be read and interpreted as a whole, whereas an attempt to interpret a single provision without taking into account other regulations contained in that Act led to wrong conclusions.[19] In addition, the regulated business activity in the field of health protection is aimed at safeguarding such values as human health and life, hence, the control exercised over such activity should be efficient. At the same time, the Supreme Administrative Court, by shaping a uniform line of case law with respect to "reverse distribution", enhanced the form of the proper course of proceedings conducted by public administration bodies and showed how the legal norms should be construed. The "reverse distribution chain" is presented in the judicial decisions of the Supreme Administrative Court as material breach of law, going beyond the framework of the regulated business activity, i.e. trade in medicinal products.

18 Judgment of the Supreme Administrative Court of 22 May 2014, ref. no. I GSK 491/13, G. Prawna FiP 2014/150/2.

19 Judgment of the Supreme Administrative Court of 17 October 2018, ref. no. II GSK 4607/16, CBOSA.

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The legal situation of financial market participants in the context of the amendment of the Act on Trading in Financial Instruments

ABSTRACT

The main subject of this article is an attempt to resolve whether and on what principles active financial market participants were entitled to continue their activities related to trading in financial instruments during the so-called transition period determined by the provision of Article 29 of the Act of 1 March 2018 amending the Act on Trading in Financial Instruments and certain other acts (Dz.U. [Journal of Laws] of 2018, item 685).

To this end, the authors have interpreted this provision in the context of the overall regulation of the amending act, with particular attention paid to the new wording of the definition of trading in financial instruments. The analysis of the indicated issues is carried out primarily from the point of view of active participants of the financial market, which constitutes a significant enrichment of the studies that have so far dealt with the discussed problem.

Against the background of the above considerations, the authors draw attention to the influence of the Polish Financial Supervision Authority (Financial Supervision Commission) on other financial market participants, especially in relation to the supervisory proceedings conducted by the Authority and the supervisory measures applied. As a result of the conducted deliberations, the authors notice that the imprecision and incompleteness of the content of the analysed legal acts may be connected with significant negative consequences for the financial market participants, primarily in the form of financial sanctions.

KEYWORDS

financial market, Polish Financial Supervision Authority (Financial Supervision Commission), financial supervision

Introduction

In the face of emerging threats to the stability of the financial systems of many European countries, often caused by sudden and unforeseen events that result in, for example, cyclical slowdowns in the economic development of these countries, it seems justified for legislators to increase the protection of financial market participants as well as its rationing.[1] The implementation of such tasks takes place in particular through intensified legislative activities aimed at maintaining as well as expanding the legal instruments of financial market supervision, which are to secure business transactions. They are taken up both at the European level and more and more often with increased intensity also by the Polish legislator. This trend has been translated, first of all, into the manner and scope of regulation of activities related to trading in financial instruments within the meaning of the Act of 29 July 2005 on Trading in Financial Instruments,[2] hereinafter referred to as the "Trading Act". In this context, special attention should be drawn to the amendment introduced by the Act of 1 March 2018 amending the Act on Trading in Financial Instruments and certain other acts,[3] hereinafter referred to as the "Amending Act".

The vast majority of the provisions of the Amending Act entered into force fourteen days after its announcement, however, the scope and significance of the introduced changes forced the legislator to set a period during which the current financial market participants would have the opportunity to adapt their businesses to the amended provisions. The *vacatio legis* period shaped in this way, especially in the context of the principle of continuity of business activity and imprecision of transitional provisions, makes it necessary to seek an answer to the question whether it was possible to conduct business activity consisting in offering financial instruments, i.e. *ipso iure* brokerage activity within the meaning of the provision of Article 69 of the Act on Trading, on the principles hitherto in force, i.e. those in force until the entry into force of the Amending Act, i.e. during the so-called transitional period. In case of a positive answer, it also needs to be determined on what principles and under what obligations it was possible to conduct such activity. In this respect, however, further doubts arise, namely whether conducting brokerage activity within the scope and within the time frame indicated above – if it was possible – required the consent (permit) of a competent financial supervisory authority, i.e. the Polish Financial Supervision Authority (Financial Supervision Commission),[4] hereinafter referred to as the "Commission", issued pursuant to Article 82 of the Act on Trading. On the other hand, if it is considered that it was possible to conduct this activity during the so-called transition period without any adjustment measures, in particular without obtaining the required permit, it should be examined whether the very intention to continue the existing activity could have been legally

1 P. Ochman, *Rola Komisji Nadzoru Finansowego w karnej ochronie rynku finansowego*, "Ius Novum" 2016, no. 4, p. 324.

2 Act of 29 July 2005 on Trading in Financial Instruments, Dz.U. (Journal of Laws) of 2020, item 89 as amended.

3 Act of 1 March 2018 amending the Act on Trading in Financial Instruments and certain other acts, Dz.U. (Journal of Laws) of 2018, item 685.

4 The Polish Financial Supervision Authority (also called Financial Supervision Commission), which is a competent authority in matters of supervision over the financial market within the meaning of Art. 3(4)(1) of the Act of 21 July 2006 on Financial Market Supervision, Journal of Laws (Dz.U.) of 2020, item 2059 as amended.

fulfilled by submitting an application for a permit during the transition period. Moreover, in case the application has been submitted and then withdrawn (regardless of the reason) by the interested entity, it should be determined whether the Commission will be ready to consider the above-mentioned circumstance as meeting the legal requirements applicable during the transition period or the above-mentioned activities will be treated in the same way as in the case of an entity that remains inactive.

Based on the questions posed this way, it is also necessary to establish the powers, including supervisory powers, which the Commission, as a public administration authority, has in relation to entities operating under the existing rules during the above-mentioned transitional period. As a consequence, both in the context of the presented legal regulation and the legislative aspirations expressed this way, which are part of the state policy, it seems right to consider whether all financial market participants, to an equal or at least appropriate degree (taking into account the degree of experience and professional character of individual participants) are or become beneficiaries of the protection by state institutions. At the same time, since the effects of a certain behaviour in the form of the Commission's supervisory activities may and most likely will continue even after the so-called transition period, the issue addressed in this paper remains valid.

Interpretation of Article 29 of the Amending Act

The issue can be considered in two ways, that is, with a narrower and wider approach, which allows for two different research perspectives. The first one – assuming some simplification – will refer to the legal relationship: an active financial market participant and the Commission, which will be shaped by rights and obligations resulting from the Amending Act. The second approach allows for the possibility of equal treatment, on a legislative basis, of all financial market participants, including the Commission, not forgetting, however, that through specific legal instruments of a supervisory nature, resulting from the current state policy, it interferes in the activity of other financial market players in order to ensure certainty of trading both in the near and long term.

At the beginning, it is necessary to cite the regulation contained in the disposition of Article 29 of the Amending Act, which is the starting point for the undertaken deliberations. In accordance with section 1 of the said provision:

> An entity which, on the date of entry into force of this [Amending] Act, performs a business activity which did not require a permit before the date of entry into force of this Act, and which requires a permit in accordance with the provisions of Article 1, as amended by this Act, shall adjust its activity to the provisions of Article 1 [on trading], as amended by this Act, within 12 months from the date of entry into force of this Act.

At the same time, section 2 of Article 29 of the Amending Act states that:

> The entity referred to in section 1, which within 12 months from the date of entry into force of this [Amending] Act will submit an application for granting the permit provided for by Article 1, as amended by this Act, may conduct the activity referred to in section 1 on the

existing principles until the date: 1) of the final decision on such application – in the case of a refusal to grant the permit provided for by Article 1, as amended by this Act; 2) of commencement of the activity on the basis of the permit granted, but not longer than 30 days from the date of obtaining the permit – in the case of granting the permit provided for by Article 1, as amended by this Act.

Both of the above-mentioned provisions determine the time frame of the so-called transition period, which is 12 months from the entry into force of the Amending Act, i.e. from 21 April 2018.

When considering the issue in the light of the narrower approach defined above, it is important to note the specific power of the Commission, which, in situations of ambiguity of the text of a legal act, has *de facto* power to interpret it in a binding way, as was the case with the Amending Act. The Commission, within the scope of its powers, including those resulting from the provisions of the Act on Supervision,[5] has undertaken "educational and informational activities in the field of the functioning of the financial market", which resulted in written explanations contained in the so-called Guidelines of the Commission Office.[6] They were supposed to be a practical, detailed explanation of the behaviour of an entity operating in the sphere of offering financial instruments, among others, during the transitional period. At this point it should be stressed that the Commission, although it is not a legislative or, even more so, a judicial body, through the guidelines it issues, has the power to shape the legal situation of financial market players and to have real impact on the scope of their rights and obligations, which can be clearly seen in the context of this issue. As a result, the legislator's use of undefined and vague words and phrases results in a situation where the Commission interprets them in a binding way and then severely imposes behaviour contrary to its position. This state of affairs significantly violates the principle of legal certainty and legal security, especially since the Commission is not obliged to issue so-called "guidelines", which means that it is also not bound by any deadline and any potential omissions will not be legally stigmatized and corrected in any way. Therefore, the guidelines may also be issued only after a significant number of entities have been punished for behaviours contrary to the Commission's position.

However, in this case, the Guidelines are limited to indicating the existence of a transitional provision (see Article 29 of the Amending Act) and citing its content, without further specification of the obligations of the entity operating in this area. For these reasons, it is reasonable and necessary to try to interpret this provision and determine the legal obligations arising from it. For this purpose, it is necessary to carry out primarily a linguistic interpretation of the above-mentioned provisions of the Amending Act. Taking into account this way of interpretation of the law, it should be pointed out that the meaning of section 1 of Article 29 of the Amending Act requires the entity performing its activity to offer,[7] dur-

5 See Art. 4(1)(1) of the Act on Supervision.

6 *Stanowisko UKNF dotyczące definicji usługi oferowania instrumentów finansowych zawartej w art. 72 ustawy z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi,* https://www.knf.gov.pl/knf/pl/komponenty/img/Oferowanie_Instrumentow_65197.pdf. Accessed 27.07.2020.

7 And thus, an active financial market participant, whose aim, in the context of the issue raised, is to offer financial instruments.

ing the period preceding the moment of introduction of the amended rules of the Act on Trading and thus, to a certain extent without the need to have the consent of the Commission, to adapt its activity to the provisions of the "new" act within a specified period (the so-called transition period). It should be assumed that only in the case of the intention to continue the business activity by the above-mentioned economic entity, under the amended rules, it is obliged, within 12 months, to adjust its activity to the introduced legislative changes. Therefore, theoretically, the entity is entitled to take such actions even on the last day of the transition period. Moreover, in the absence of an intention to continue the business, after the expiry of the transition period and under the amended rules, it was entitled to continue to provide services of offering financial instruments in the previous manner, without taking any action to adjust such business, including the absence of an obligation to submit an application to the Commission for a permit to conduct such business. The above interpretation assumption is also confirmed by the systemic context referring to the disposition of section 2 of Article 29 of the Amending Act. As noted above, this provision provides for the possibility of extending the transitional period for conducting business activity under the "existing rules" if an application for the Commission's approval during the transitional period has been submitted. In such a case, the right to conduct business activity under the rules in force prior to the entry into force of the Amending Act lasts until the date of final settlement of such application, in the case of refusal to grant the permit, or until the date of commencement of business activity on the basis of the permit granted, but not longer than 30 days from the date of obtaining such permit.

A different stance stressing the *ratio legis* of the above-mentioned provision assumes that the so-called transition period has been set by the legislator only for entities which intend to continue their brokerage activity on the amended principles set out in the Amending Act. In such a case, the 12-month period is, in the legislator's opinion, sufficient to adapt the current activity to the new legal realities. If, however, it should prove inadequate, section 2 of Article 29 provides for two exceptions to extend this period of time. It is worth noting at this point that "business alignment" does not only mean the submission of an application for authorisation to the Commission but is undoubtedly the most obvious manifestation of the intention to continue brokerage activity. In such a case, the so-called "transition period" is an exception to the principle that after the entry into force of the Amending Act, every brokerage activity shall take place under new, stricter rules. In turn, the submission of an application for permission implies that the entity will adapt its activities to these principles as soon as possible. Therefore, it seems that the first thing to do is to submit an application to the Commission, which will allow the entity to conduct its business under the existing rules "(…) until the date: 1) of the final decision on such application – in the case of a refusal to grant the permit provided for by Article 1, as amended by this Act; 2) of commencement of the activity on the basis of the permit granted, but not longer than 30 days from the date of obtaining the permit – in the case of granting the permit provided for by Article 1, as amended by this Act".

This means that an entity conducting such activity would have the competence (and therefore the right and obligation) to submit an application within 12 months from the

date of entry into force of the Amending Act, if, during the transitional period, it intends to conduct its activity under the existing rules (i.e. in force before the date of the amendment). However, this competence also exists in the situation of discontinuation of offering services during the indicated transitional period, which would mean that even if the above-mentioned entity provided services (offering), at least during the one day of the transitional period, it would be obliged to submit an application for a permit to the Commission. It seems that it would be unacceptable if the legislator, despite the entry into force of the law, whose aim is, among other things, to increase the protection of the financial market passive participants, will allow economic entities to carry out their activities on the existing principles without the intention of adapting them to the new rules. In the author's opinion, such an interpretation of the provision results from both the literal and systemic context related to the location of the interpretation of the provisions of Article 29 of the Amending Act, i.e. its sections 1 and 2. It is worth noting that the legislator, first of all, in section 1, provides for the "adjustment of activities to the amended regulations", and only in section 2 it does provide for the possibility of conducting activities "according to the existing principles". A different interpretation, taking into account the way of interpreting the law, would be prompted by the situation in which the legislator, while enacting a transitional provision, in this case Article 29 of the Amending Act, will omit its section 1.

Regardless of the interpretation, this provision undoubtedly creates space for far-reaching violations. It allows entities to create a kind of legal fiction by submitting applications to the Commission (regardless of their formal correctness or material validity) and then withdrawing them during the transitional period without the need to provide justification. This state of uncertainty is undesirable not only for active financial market participants but also because of the need to protect the interests of its passive participants.

Interpretation doubts related to the definition of offering financial instruments

The above interpretation of generally applicable laws, although not binding to any extent, is a manifestation of the desire to take into account and protect also the interests of active financial market participants. For them, a state of legal uncertainty is never advantageous, especially since their conduct, that is inconsistent with the Commission's assessment and position, may result in severe financial sanctions. Therefore, this paper should also include the broader approach to the issue indicated above. With regard to this broader approach, it seems important to take the position that, in the context of financial market supervision, the Commission, in terms of its administrative power, including supervisory powers, has a number of rights *vis-à-vis* other participants, which, however, does not correlate to an appropriate extent with clearly defined obligations of such entities, or even their internal statutes. This, in turn, translates into the possibility to clarify the appropriate behaviour (its framework) of these entities in connection with their activities, which in the context

of the issue raised is the right to offer, during the so-called transition period, the financial instruments.

However, before discussing the possible reasons for this assumption, it is advisable at first to refer to the legal matter covered by the Amending Act. Namely, the disposition of the provision of Article 72 of the Act on Trading has replaced, by way of legislative action, the term "seller" by the term "offeror". Thus, the wording of the above mentioned provision is as follows:

> Offering financial instruments shall be understood as undertaking, for the benefit of the issuer of securities, the issuer of a financial instrument or the entity offering a financial instrument, activities leading to the acquisition of financial instruments by other entities, by: 1) presenting, in any form and in any way, information on financial instruments and conditions of their acquisition, made available by the issuer or offeror, constituting a sufficient basis for making a decision on the acquisition of such instruments, or 2) mediating in the disposal of financial instruments acquired by the entities as a result of presenting the information mentioned in point 1, or 3) presenting, in any form and in any way, information made available by the issuer or offeror to individually marked addressees for the purpose of: a) promote, directly or indirectly, the acquisition of financial instruments, or b) encourage, directly or indirectly, the acquisition of financial instruments".

In accordance with the above-mentioned content, the provision of Article 72 of the Act on Trading determines that the offering of financial instruments shall be understood as activities undertaken for the benefit of the issuer or seller (currently the offeror), hereinafter jointly referred to as the "issuer", leading to the acquisition of financial instruments by other entities. However, the legislator neither specifies what is to be understood by the phrase "undertaken for the benefit of the issuer/offeror", nor identifies the legal form in which this action could take place. It is therefore justified to refer to the line of case-law of the administrative courts,[8] where it is noted that the legislature does not specify or indicate how the term "in the name of and for the benefit of someone" should be understood. Therefore, the jurisprudence, in the above-mentioned judgment, refers to a directive of linguistic interpretation, stating that it is legitimate to assume the meaning that these expressions have in common language (the directive of presumption of common language). It is thus established that the expression "for the benefit of" is equivalent to action "in favour of someone, for someone, for the good of someone". This meaning can also be applied to the said provision, with the preservation of appropriateness.

Thus, once again, the legislator uses vague and undefined terms, which allows for a wide range of applications and implies the need to assume that practically every activity of entities operating under the rules of the previous act, and thus before the entry into force of the amendment, may be recognized as offering financial instruments, which will require, in particular, the Commission's approval. At the same time, any omissions, in case of a different assessment by the Commission as a body authorised to make arrangements in

8 See, inter alia, the judgment of the Voivodship Administrative Court (VAC) in Gdańsk of 12 July 2011, case file no. I SA/Gd 551/11, Legalis no. 417880.

this respect, may be subject to specific sanctions, related to conducting brokerage activities without a permit.

In this paper, only two regulations of significant importance for the financial market active participants have been pointed out. Far-reaching interpretation of the problems noticed in this "space" allows us to assume that this is only a small percentage of ambiguities faced everyday by the financial market players. This statement is a starting point for further reflection on the legal and financial implications that follow from the above doubts primarily for the financial market active participants.

Governing powers of the Polish Financial Supervision Authority

The analysis carried out so far reveals a specific way in which the Commission "practices" financial market supervision. In order to protect the financial market passive participants, the legislator imposes rather unspecified legal obligations on active participants of this market. Then, the Commission, which has been equipped with a number of empire powers, including the power to impose severe financial sanctions, may find their violation (based on evaluation criteria). In order to confirm the above positions, it is necessary to approximate the Commission's powers in relation to financial traders.

There is no doubt that the powers, and more precisely the competences of the indicated public administration authority in relation to the active participants of this market, due to the political position of the Commission, are shaped by the norms of public law, hence of an administrative and legal nature. Moreover, by means of the legal instruments granted to the Commission, this authority may exert direct or indirect influence not only on the administrative proceedings conducted on its own, but also on the actual conducted, as well as potential criminal proceedings, which are related to financial market cases.[9] Thus, in this respect, the Commission's activities, although this body does not have the status of a law enforcement or judicial authority,[10] have a key impact on the postulated behaviour of the financial market active participants. Therefore, the Commission's competence translates into the possibility of initiating the so-called investigation procedure, provided for in the provision of the Act of 21 July 2006 on Financial Market Supervision,[11] hereinafter referred to as the "Act on Supervision", which seems to be important. The consequences of these proceedings have an effect on the controlled entity not only on the administrative grounds, including the possibility of applying administrative sanctions, but also on the grounds of criminal law, since the Commission has the power to file a notification on suspicion of committing a crime. In this respect, special attention shall be paid to the scope of application of Article 18a of the Act on Supervision. The conditions contained therein entitle the Commission, and in principle its Chairman, to initiate (by way of an order) such proceedings in any case in which it is necessary to determine whether there are grounds for filing

9 P. Ochman, op. cit., p. 325.

10 Ibidem.

11 Act of 21 July 2006 on Financial Market Supervision, Dz.U. (Journal of Laws) of 2006, no. 157, item 1119 as amended.

a notification of suspicion of a specific offence or to initiate administrative proceedings for an infringement of the law in the range the Commission is authorised to do it. Thus, the norm contained in the above-mentioned provision constitutes a legal instrument of criminal law protection of the financial market, which the Commission has in its possession.[12]

While acknowledging the validity of the thesis posed at the beginning of this paper, according to which there is a need to increase the protection of financial market participants, in particular by maintaining certainty or increasing the security of economic trading, it should be pointed out that an active participant of this market, when the Commission applies, among others, such a legal instrument, is often deprived of the possibility to actively participate in the proceedings, including the right to submit effective applications, which might determine the protection of its interest. This is another circumstance that supports the legitimacy of the question concerning equal treatment of "all" financial market participants. This is due to the fact that the regulation of the above-mentioned provision of the Act on Supervision directly excludes the application of the standards of the Code of Administrative Procedure,[13] within the scope of the rights vested in a party within the administrative proceedings. Moreover, the selective application of the provisions of the Code of Administrative Procedure, provided for by this act, refers only to instruments from the scope of the public administration "empire". This circumstance results in obligations on the part of the active participants of the investigation, as well as in the constitution of sanctions for a possible failure to comply with them by such active participants of the investigation.

Thus, in view of the supervisory and control functions[14] assigned by the legislature to the Commission in the field of the financial market supervision, the competence of this authority in the discussed scope – even though, according to the representatives of the doctrine, there was no provision for the possibility of exercising a governing influence over the controlled entity[15] during the investigation procedure – deprives this entity of effective protection of its rights to a certain extent. It is important that in a situation where the Commission determines on its own that there are grounds for submitting a notification of the possibility (suspicion) of committing a crime, without the necessity to provide any information and explanations to the controlled entity, the authority is competent or even obliged to submit such notification.

Apart from the definition of the Commission's individual powers *vis-à-vis* the controlled entity in the framework of this investigation, two aspects should be noted. Firstly, there is no doubt that the Commission's powers regarding access to information are very extensive.[16] Secondly, however, these powers are not compensated by those of an active market

12 See P. Ochman, op. cit., pp. 326-327.

13 Act of 14 June 1960 on the Code of Administrative Procedure, Dz.U. (Journal of Laws) of 2020, item 256 as amended.

14 J. Grabowski, *Publiczny obrót papierami wartościowymi. Ustrój prawny i procedury*, Warszawa 1996, p. 55.

15 C. Kosikowski, *Organizacja i funkcjonowanie kontroli i nadzoru państwa wobec gospodarki w świetle Konstytucji RP*, in: *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji*, C. Kosikowski (ed.), Warszawa 2005, p. 115.

16 A. Żywicka, *Kompetencje Komisji Nadzoru Finansowego w zakresie gwarantowania bezpieczeństwa finansowego RP. Wybrane zagadnienia dotyczące nadzoru nad rynkiem kapitałowym,* "Zeszyty Naukowe WSEI" 2013, seria Administracja, no. 3, p. 68.

participant that is a controlled entity. Thus, regardless of the unilateral findings made by the Commission in the framework of this procedure, the inspected party has no legal possibility to respond to such findings. Nor does any legal provision entitle it to inspect the file of the proceedings. Last but not least, the inspected party has no right to challenge the Commission's decision in any way.

Conclusions

While it can be accepted that, within the framework of the Commission's activities, it takes an active part in shaping state policy by ensuring the development of the (financial) market,[17] such powers cannot be considered to be a manifestation of its interaction with participants (in this case active) of this market. The best expression of this is the fact that this paper, despite in-depth legal reflection, has failed to unequivocally resolve the interpretative uncertainties identified at the introduction and to establish the intention that accompanied the legislator amending the Act on Trading. Despite the application of different methods of interpretation, it is not possible to unambiguously determine how the financial market active participant should behave during the so-called transition period, in case it would like to continue its activities after the new regulations come into force. It is expected that this issue will soon be resolved by the Commission itself, which will probably result in significant fines. Another example of the raised thesis is the difficulty in clearly establishing the designators of the term "trading in financial instruments", which is likely to be resolved by the Commission *in concreto*. This leads to the general conclusion that, in the current state of law, an active participant is often deprived of the possibility to identify or even predict the correct behaviour. At the same time, being aware of the indicated powers of the Commission, in order to avoid any negative consequences of the action, including during the transitional period, it will be forced to discontinue its current activities.

Without questioning to any extent the legitimacy of the legislator's efforts to maintain or even increase the protection of the financial market, it is agreed to note that there is currently no regulation guaranteeing adequate protection of entities that are active participants of this market. Moreover, the possibility for the Commission to apply at least legal instruments from the scope of repressive administration,[18] or to assign to the above-mentioned entity the responsibility from the scope of such administration, will be a particular ailment for such an entity, as it will allow the Commission to assign to an active participant the administrative tort.[19] This circumstance, on the one hand, may cost the above-mentioned entity much more than even criminal liability, as it is connected, in particular, with the authority of a public administration body to impose a statutory administrative penalty.[20]

17 R. Blicharz, *Nadzór państwa nad rynkiem kapitałowym,* in: *Publiczne prawo gospodarcze,* A. Powałowski (ed.), Warszawa 2012, p. 283.

18 See P. Ochman, op. cit., p. 326.

19 See W. Radecki, *Kilka uwag o zastępowaniu odpowiedzialności karnej odpowiedzialnością administracyjną,* in: *Współczesne problemy nauk penalnych,* M. Bojarski (ed.), Wrocław 1994, pp. 13-22.

20 Ibidem.

On the other hand, it deprives such participant of the possibility to exercise the rights that a party has in administrative proceedings. It also entitles the Commission (public administration authority) to submit a notification of a possible crime.

While the doctrine, according to which the Commission's activity is to protect both public and private goods,[21] remains valid, it certainly does not serve to protect, or at least to safeguard, entities which together constitute an active part of the financial market. From this point of view, *de lege ferenda*, it becomes necessary to take into account, on a statutory basis, also the interests of such entities. Otherwise, a situation in which the initiators of certain investment undertakings on the regulated markets withdraw from it, leading to the limitation of its development is not excluded. The consequence of such a situation will be the impossibility of further participation in this market also by its passive participants, who, according to the legislator's assumption, have been protected by the Commission. Therefore, the protection of the financial market passive participants assumed by the legislator cannot function without a simultaneous precise and unquestionable determination of duties and rights of active entities. Strict and unambiguous determination of the normative space in which active entities may operate will enable the Commission to identify only unacceptable behaviours, which will strengthen its lawfulness and at the same time make it easier for experienced passive participants of this market to identify potential threats themselves. It should be agreed that the state of legal uncertainty does not serve either active or passive participants, whose involvement and prosperity in the financial market is linked to the existence and success of investments by active participants.

The inability to achieve in practice, regardless of the reason, the postulated degree of legislative precision will require each time detailed explanations to be made by the competent public administration authorities (in this case, the Commission), which *in abstracto*, in an unquestionable manner, within the framework of at least guidelines, if not legal interpretations (because, as a matter of fact, such bodies are not established for it[22]), whose content will also be binding on the authority applying the law. However, it should be clearly stressed at this point that a state in which citizens and the economic entities they create cannot determine what is prescribed, prohibited, or permitted under the applicable law cannot be assessed positively in the context of the constitutional principle of the democratic state of law and the resulting assumptions of legal certainty and security. However, in the case of the Amending Act, such explanations have not been provided. Furthermore, within the framework of the regulation of Article 11b(2) of the Act on Supervision, it will also not be possible to submit an application for an individual interpretation as to the scope and manner of applying the regulations, unless it concerns "products and services which are aimed at the development of the financial market innovation". Therefore, in the transitional period, carrying out activities on the basis of the existing principles exposes an entity operating on the financial market to criminal liability – through the possibility of filing a report on suspicion of committing a crime (Article 18a of the Act on Supervision). Such an entity is thus

21 J. Monkiewicz, *Wybrane problemy kształtowania nadzoru ubezpieczeniowego w Polsce w minionym piętnastoleciu,* "Rozprawy Ubezpieczeniowe" 2007, no. 1, pp. 5-6.

22 With a few exceptions, see, among others, the provision of Article 11b of the Act on Supervision.

exposed to the risk of disclosing to the public information on filing a notification on suspicion of a specific crime,[23] on a dedicated website of the Commission called "List of Public Warnings of the KNF – Polish Financial Supervision Authority" (Article 6b(1) and (4)). At the same time, at the stage of proceedings conducted by the Commission, the aim of which is to determine whether a specific crime could have occurred, the entity will not have the rights of the party resulting from the provisions of the Code of Administrative Procedure.

All of the above seems to support the need for legislative action that takes greater account of the interests of active market participants. This is caused by, as it is emphasised in the literature:

- the effectiveness of the Commission's actions, with the indication of obtaining a more undefined desired behaviour of the controlled entity,[24] as well as
- referring to the legitimacy of applying a number of repressive measures as a manifestation of enforcing the lawful behaviour of that entity, or
- indicating the legitimacy of applying the above-mentioned measures as an educational element,[25]

together with the frequent legislative failure to define a precise scope, or a catalogue of obligations of the controlled entity, as well as the abandonment of the prior use of soft legal instruments, which should first constitute a warning (in certain cases) preceding the application of the above-mentioned sanctions, in the long run, for various reasons, may significantly contribute to the exclusion of some of the active participants from involvement in the financial market, which is crucial for the state's economic policy.

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23 The catalog of crimes has been defined in Article 6b(1) of the Act on Supervision.

24 A. Żywicka, op. cit., p. 71.

25 Ibidem.

Żywicka A., *Kompetencje Komisji Nadzoru Finansowego w zakresie gwarantowania bezpieczeństwa finansowego RP: Wybrane zagadnienia dotyczące nadzoru nad rynkiem kapitałowym,* "Zeszyty Naukowe WSEI" 2013, seria Administracja, no. 3.

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The right to file a complaint by environmental organisations in administrative court proceedings as an example of the Europeanisation of national legal systems

ABSTRACT

In this study, the author attempts to raise the issue of Europeanisation of national procedural law as exemplified by the right to file a complaint by environmental organizations in administrative court proceedings under Polish and German law. The process of Europeanisation takes place in all areas of national law, also in the absence of a clear competence for the European Union to establish a specific type of legislation. The right to file a complaint by environmental organisations is objective in nature. The implementation of EU regulations in German law resulted from the necessity to introduce a completely different model of the right to file a complaint than the right that has already been in force, i.e. the subjective right. The Polish legislator also had to reshape the form of the right to file a complaint by environmental organisations, which, in essence, differs significantly from the form of the right of social organisation, despite classification of environmental organisations into a group of social organisations.

KEYWORDS

Europeanisation, procedural law, European Union, Polish right to file a complaint, German right to file a complaint, Article 50 of the Law on Proceedings before Administrative Courts, § 42 VwGO

Introduction

The right to file a complaint is one of the basic procedural institutions in all jurisdictions. However, depending on the analysed legal framework or even the specific procedure in a particular legal system, the right to file a complaint may take a different form. EU regulations also have a significant impact on the form of the right to file a complaint. Although the European Union authorities are deprived of explicit power to create procedural rules, they also influence the shape of the procedural institutions in national legal systems by introducing requirements for Member States to comply with certain legal standards.

One of the best examples showing the impact of the EU law on procedural provisions in all Member States of the European Union is the form of the right to file a complaint by non-governmental organisations in environmental matters, i.e. environmental organisations. The right to file a complaint by environmental organisations is an interesting issue, as it is intended to be an objective right in every Member State, which is certainly at variance with the basic principles of the aforesaid right in jurisdictions where the concept of a subjective right is adopted, for instance, in Germany. However, also in the systems of national law, where the concepts of objective or mixed rights are in force, the right to file a complaint by environmental organisations, despite the classification of the organisations in question into social organisations, is characterised by numerous differences resulting from the requirements formulated in EU legislation, as is the case of Polish law.

The aim of this article is to bring closer the essence of the process of Europeanisation of procedural provisions in national legal systems by analysing the ways in which EU directives defining the form of the right to file a complaint by environmental organisations in EU Member States are implemented. A thorough analysis of a given issue implies the need to refer to European, national jurisdictions. However, the considerations shall be limited only to the form of regulations in Polish and German law and their transposition of the EU directive 2011/92/EU, known as the EIA Directive. The analysis shall also cover the question of the correct implementation of a given directive in Polish law. Apart from the key dogmatic-legal method, the article also uses a comparative method, which makes it possible to analyse the regulations from different legal systems.

The essence of the Europeanisation of national law systems

The Europeanisation of law is the entirety of all changes in the Union's legal system, which give rise to the processes of adaptation and alignment of national laws, and thus lead to the transposition of the features of the Union's legal system into the national systems.[1] The essence of Europeanisation is to strive for a convergent system of values considered to be fundamental in various European countries and to introduce certain quality standards of law in Member States[2]. The structural Europeanisation of court proceedings, including administrative court proceedings, has three dimensions: the instrumentalization of national court proceedings as a means of proper application of the EU provisions in national law,[3] the need to adapt the content of national procedural provisions to the requirements of EU

1 T. Biernat, *Europeizacja prawa – zjawisko wielowymiarowe. Wprowadzenie*, in: *Europeizacja prawa*, T. Biernat (ed.), Kraków 2008, pp. 8, 10; under German law, the term is considered *façon de parler* not really reflecting the essence of the phenomenon, see V. Götz, *Europarechtliche Vorgaben für das Verwaltungsprozessrecht*, "Deutsches Verwaltungsblatt" 2002, no. 117, p. 1.

2 S. Jaśkiewicz, *Europejski Kodeks Dobrej Administracji jako element europeizacji standardów funkcjonowania administracji publicznej*, Warszawa 2015, p. 298.

3 F. Schoch, *Die Europäisierung des Verwaltungsprozessrechts*, in: *Festgabe 50 Jahre Bundesverwaltungsgericht,* E. Schmidt-Aßmann, D. Sellner, G. Hirsch, G.H. Kemper, H. Lehmann-Grube (eds.), Berlin 2003, p. 513; see case CJEU C-6/ 90 and C-9/90 *Andrea Francovich przeciwko Republika Włoska, i Danila Bonifaci et al. Przeciwko Republika Włoska*, ECLI:EU:C:1991:428.

law,[4] and the need to interpret existing procedural provisions in accordance with the pro-EU ideas and the application of EU-conformist (*unionrechtskonforme Auslegung*) interpretative rules.[5]

Furthermore, the form of the Europeanisation of judicial proceedings, including administrative court proceedings, is directly linked to the principle of integrity of the sovereignty of the Member States within the framework of their competence to make procedural regulations, which determines the degree of possible interference of Union law in legislative solutions in procedural law, including the structures selected on the basis of national law. The Member States may shape the structure of judicial proceedings by laying down procedural standards governing the course of proceedings and organise the structure of the judiciary at their sole discretion, yet while taking into account the requirements of the protection of procedural rights as required by *acquis*.[6]

As mentioned in the introduction, EU bodies have no clear competence to create purely procedural rules at national level.[7] Nevertheless, the creation of standards which shall be met by national procedural provisions is mainly achieved through the implementation of secondary EU law in the national legal systems, an example of which is the form of the right to justice in cases concerning environmental protection.

4 As an example in German law, it is possible to invoke the form of the right to file a complaint pursuant to § 42 II of the VwGO, which is understood very narrowly in comparison to most European Union countries. Furthermore, the German regulation does not fully comply with the requirements of EU law, as it does not allow popular complaints, which should be allowed in justified cases under the European law, see F. Schoch, op. cit., p. 516; A. Epiney, K. Sollberger, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht-Rechtsvergleich, völker- und europäische Vorgaben und Perspektiven,* Berlin 2002, p. 299 et seq.; T. Groß, *Konvergenzen des Verwaltungsrechtsschutzes in der Europäischen Union*, "Die Verwaltung" 2000, no. 33, p. 426; V. Götz, op. cit., p. 4.

5 O. Dörr, Ch. Lenz, *Europäischer Verwaltungsrechtsschutz,* Baden-Baden 2019, p. 273.

6 V. Götz, op. cit., p. 2.

7 J. Schwarze, *Europäische Rahmenbedingungen für die Verwaltungsgerichtsbarkeit*, "Neue Zeitschrift für Verwaltungsrecht" 2000, pp. 241, 244; V. Götz, op. cit., p. 1; O. Dörr, *Grundstrukturen eines europäischen Verwaltungsprozessrechts*, "Deutsches Verwaltungsblatt" 2008, no. 128, p. 1407; it is now assumed in EU law that the competence of Member States to regulate procedural rules is vested therein unless there is secondary legislation on the matter, as is the case, for example, with customs law, which has been codified in the EU Customs Code (Regulation (EU) no. 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the EU Customs Code, Official Journal L 296/1, 10/10/2013), previously, before the Treaty of Lisbon, the regulations in question were rare, thus, they did not directly regulate procedural issues, but only indirectly influenced the form of procedural rules; an example could be the Council Directive of 25 February 1964 concerning the coordination of special measures relating to the entry and residence of foreign nationals which is no longer in force, justified on grounds of public policy, public security, and public health, no. 64/221/EEC, of 25 February 1964, concerning migration of people between the countries of the Community, which must be in the form of guaranteed certain minimum standards of protection (i.e. legal remedies), requiring the adaptation of national procedural rules, otherwise, in accordance with Article 9 of the said Directive, these were the procedural rules of the Directive that were applied, see also Case C-500/15 P *TVR Italia Srl v Office of the European Union for Intellectual Property*, ECLI:EU:C:2016:345; Case C-297/88, and C-197/89 Massam Dziodzi v Belgischer Staat, ECLI:EU:C:1990:360.

The form of the right to a fair trial in environmental matters

The environment as an objective value and common good is protected at all multicentric level of the legal systems[8] in Poland and Germany. The objective, which is the environmental protection, in the EU Member States is specified, *inter alia*, in Article 3(3) TEU.[9] The articulation of the above objective in the Treaty, which is part of the primary law of the European Union, clearly shows that the public interest is above the individual interest in environmental matters that are one of the fundamental legal values, with a strong axiological load associated therewith.[10]

However, the sources of law for judicial authorities in environmental cases at international level should be found in Article 9 sec. 2 of the Convention of the United Nations Economic Commission for Europe, hereinafter referred to as the Aarhus Convention.[11] One of the main objectives of the Convention was to introduce into national legal systems certain guarantees allowing social control of actions undertaken by public authorities in environmental cases.[12] The European Union and all Member States are parties to the Aarhus Convention. At this point, it is worth stressing that the European Union is not a Member of the United Nations, but was given the status of permanent observer. However, all Member States of the European Union are members of the United Nations, which the European Union should assist in adapting national legislation to the requirements laid down in international law, in compliance with the principles of the Common Foreign and Security Policy, for example, by introducing EU directives.[13]

The European Union, using its competences under the Common Foreign and Security Policy, based on the content of the Aarhus Convention, and in particular Article 9, drew up EU Directive 85/337/EC,[14] amended by Directive 2003/35/EC,[15] and finally replaced by Directive 2011/92/EU, EIA Directive.[16] The aforesaid acts set out the criteria to be met by na-

8 B. Iwańska, M. Baran, *Ochrona interesu prawnego w prawie ochrony środowiska*, in: *Partycypacja w postępowaniu administracyjnym. W kierunku uspołecznienia interesu prawnego*, in: Z. Kmieciak (ed.), Warszawa 2017, p. 193.

9 Treaty of Maastricht on European Union of 7 February 1992, Official Journal C 191, 29/7/1992, pp. 1-112.

10 B. Iwańska, M. Baran, op. cit., p. 193.

11 The Convention on access to information, public participation in decision-making and access to justice in environmental matters, drawn up in Aarhus on 25 June 1998, Dz.U. (Journal of Laws) of 2003, no. 78, item 706.

12 A. Knade-Plaskacz, *Dostęp do wymiaru sprawiedliwości w sprawach dotyczących ochrony środowiska – bezpośredni skutek art. 9 ust. 3 konwencji z Aarhus – wprowadzenie i wyrok TS z 8.03.2011 r. w sprawie C-240/09 Lesoochranárske zoskupenie VLK przeciwko Ministerstvo životného prostredia Slovenskej republiky,* "European Judiciary Review" 2015, no. 4, p. 46.

13 See i.a. Case T-306/01 Ahmed Ali Yusuf, Al. Barakaat International Foundation v Council of the European Union and Commission of the European Communities, ECLI:EU:T:2005:331.

14 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, Official Journal L 175, 5/07/1985, p. 40.

15 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, Official Journal L 156, 25/06/2003, p. 17.

16 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, Official Journal L 26/1, 28/1/2012, which has been subject to some modifications by Directive 2014/52/EU (Directive 2014/52/EU of the European Parliament and of the

tional legislation guaranteeing the non-governmental organisations dealing with environmental protection the right to a fair trial, to the extent enabling them to effectively exercise their powers stemming from international law conventions and EU secondary legislation.[17]

In compliance with Article 11 sec. 1 of the EIA Directive, Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest or possibly claiming infringement of law, where administrative procedural law of a Member State requires such a prerequisite, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, actions or omissions.

By virtue of Article 11 sec. 2 and 3 of the EIA Directive, Member States shall determine at what stage of the proceedings, the decisions, actions or omissions may be challenged and when the public concerned has a sufficient interest or may claim infringement of law in a way that ensures the widest possible right to a fair trial of the public concerned. However, it should be noted here that, according to the legal definition in Article 1 sec. 2(e) of the EIA Directive, the concept of the public concerned also includes non-governmental organisations promoting environmental protection and meeting the requirements under the national law. The above-mentioned organisations always have a legal interest in lodging appeals in environmental protection cases, as stipulated in both the definition in Article 1 sec. 2(e) and Article 11 sec. 3 of the analysed EIA Directive. Therefore, in compliance with the requirements of Union law, it seems appropriate to state that the right to file a complaint by environmental NGOs should be objective in nature.

However, it should be noted at this point that the concept of an environmental NGO is not uniformly understood under national legislation. The non-governmental organisations promoting environmental protection should be interpreted differently depending on the national legal system. Pursuant to the EIA Directive, the national legislators may define the conditions that must be met to recognise certain organisations as environmental NGOs, at their sole discretion. However, the Court of Justice of the European Union has indicated in its judicial decisions that national legislation laying down requirements to be met by an environmental NGO must guarantee extensive right to a fair trial and effectiveness of the EU Directive by providing certain organisations with the right of action before competent courts.[18]

Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, Official Journal L 124/1, 25/4/2014).

17 See A. Knade-Plaskacz, *Legitymacja procesowa organizacji pozarządowych w sprawach dotyczących ochrony środowiska – art. 9 ust. 2 konwencji z Aarhus – wprowadzenie i wyrok TS z 12.05.2011 r. w sprawie C-115/09 Bund für Umwelt und Naturschutz Deutschland,* "European Judiciary Review" 2015, no. 5, p. 42.

18 See Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun dess marknämnd*, ECLI:EU:C:2009:631; Case C-137/14 *European Commission v Federal Republic of Germany,* ECLI:EU:C:2015:683.

In genere right to file a complaint in administrative court proceedings

In anticipation of the analysis of the form of the right to file a complaint by environmental organisations under national law, it is necessary to give an overview of the form and concept of such right in administrative court proceedings in national legal systems, in particular in the Polish and German jurisdictions. Under Polish law, the right to file a complaint by social organisations shall be analysed in detail, since, in accordance with the definition in Article 3, point 10 of the Environmental Impact Assessment,[19] an environmental organisation is a social organisation whose statutory objective is to protect the environment. The aforesaid analysis shall allow further considerations *strictly* concerning the right to file complaint by the environmental organisation. However, a preliminary analysis of German regulations shall concern the form of the subjective *in genere* right to file a complaint pursuant to § 42 II VwGO,[20] making it possible to show differences in relation to the right to file a complaint of environmental organisations.

Within the framework of the models of the right to file a complaint in administrative court proceedings in the legal systems of European countries, two main concepts have developed, one of which is based on the assumption of the protection of public subjective rights and the other on the assumption of the protection of an objective legal order.[21]

The first of these, i.e. the concept of subjective right to file a complaint was mainly developed by German thinkers and it was the model of such right that was adopted by the German legislator. The above concept has also been appreciated in the Austrian and Italian legal systems.[22] The second model, referred to as the objective right to file a complaint, has been implemented, in its purest form, into the French legal system, with an intention to *strictly* protect the objective legal order. The model does not require the complainant to demonstrate any individual or public interest in the subjective right, *a fortiori* any infringement, thus, the complainant may lodge a complaint on the basis of a potential interest only.[23] Similar solutions have been adopted in Belgium, Luxembourg, Portugal, and Greece.

Sometimes clear categorisation of the model of the right to file a complaint may pose considerable difficulties, especially in the case of legal systems in which the chosen models of the right to file a complaint are based on both the premises characteristic for the subjective and objective complaint model. For example, the subjective premise for the right to file a complaint in the form of the requirement to demonstrate an individual legal inter-

19 Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment, Dz.U. (Journal of Laws) of 2020, item 283, as amended.

20 Act of 19 March 1991 *Verwaltungsgerichtsordnung*, BGBl. I S. 686 i.e., as amended.

21 J. Parchomiuk, *Granice rozpoznania i orzekania sądu administarcyjnego w sprawach kontroli uchwał organów jednostek samorządu terytorialnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, no. 6, p. 54.

22 Examples of countries where the subjective, objective or mixed model of the right to file a complaint have been adopted: Ch. Sennekamp, in: *Verwaltungsrecht*, M. Fehling, B. Kastner, R. Störmer (eds.), beck-online 2016, § 42 VwGO.

23 Ibidem, § 42 VwGO.

est, which does not always have to be violated, is part of the regulation that the Dutch and Spanish legislators have adopted. In the *common law* area, the mixed concept also prevails.[24]

When considering the issue of the model of the right to file a complaint chosen by the Polish legislator, it is possible to get the impression that the legislator has also decided to implement the mixed model. However, by conducting a more in-depth analysis, a clear categorisation is not possible. In compliance with Article 50 § 1 of the Law on Proceedings before Administrative Courts,[25] any party having a legal interest in lodging a complaint shall be entitled to do so. The essence of the legal interest is to request the administrative court to assess the conformity of the contested act or activity of a public authority with the objective legal order.[26] However, the legal interest under Article 50 § 1 of the Law on Proceedings before Administrative Courts must result from a generally applicable legal norm, and not only from the subjective belief of the complainant.[27] Moreover, in Article 50 § 1 of the Law on Proceedings before Administrative Courts, apart from the entity having legal interest, the Polish legislature also mentions the following persons: the prosecutor, the Ombudsman, the Children's Rights Ombudsman, and social organisations.

Social organisations constitute a separate group of entities entitled to initiate administrative court proceedings,[28] whose right to file a complaint is based on the protection of the social interest.[29] Pursuant to the content of Article 50 § 1 the Law on Proceedings before Administrative Courts, the social organisation may file a complaint to the administrative court in a case concerning the legal interest of other persons, if the case falls within the scope of its statutory activity and if the organisation in question has participated in previous administrative proceedings as a party.[30] The aforementioned conditions should be fulfilled in a cumulative manner.[31] Failure to fulfil any of the aforesaid conditions shall be tantamount to the lack of right to file a complaint by the social organisation[32] and result in the rejection of the complaint by the administrative court.[33] However, the social organisa-

24 Ibidem, § 42 VwGO.

25 Act of 30 August 2002 Law on Proceedings before Administrative Courts, Dz.U. (Journal of Laws) of 2019, item 2325, as amended.

26 T. Woś, in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz,* T. Woś (ed.), Warszawa 2016, p. 403; Judgment of the Supreme Administrative Court of 17 March 2015, II OSK 1955/13, LEX no. 166572.

27 Judgment of the Voivodeship Administrative Court in Poznan of 10 August 2017, case file no. II SA/Po 444/17, LEX no. 2348837.

28 W. Piątek, *Ustrój oraz postępowanie przed sądami administracyjnymi*, in: *Postępowanie administracyjne i sądowoadministracyjne z kazusami*, R. Hauser, A. Skoczylas (eds.), Warszawa 2016, p. 408; Judgement of the Voivodeship Administrative Court in Warszawa of 2 July 2008, II SA/Wa 254/08, LEX no. 519024.

29 A. Nędzarek, *Znaczenie udziału organizacji społecznej w postępowaniu przed sądem administracyjnym w sprawach dotyczących interesów prawnych innych osób*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2014, no. 4, p. 33.

30 Judgment of the Supreme Administrative Court of 22 March 2006, II FSK 536/05, LEX no. 197531; M. Jagielska, A. Wiktorowska, P. Wajda, in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz,* R. Hauser, M. Wierzbowski (eds.), Warszawa 2017, p. 329.

31 Judgment of the Voivodeship Administrative Court in Łódź of 5 October 2017, II SA/Łd 226/17, LEX no. 2365036.

32 Judgment of the Voivodeship Administrative Court in Bydgoszcz of 7 October 2008, I SA/Bd 285/08, LEX no. 1029392.

33 W. Chróścielewski, *Legitymacja skargowa w postępowaniu sądowoadministracyjnym,* "Zeszyty Naukowe Sądownictwa Administracyjnego" 2010, no. 5/6, p. 89.

tion may apply to take part in administrative court proceedings as a participant.[34] The right to file a complaint by the social organisation or an individual is subject to judicial review at every stage of the administrative court proceedings.[35]

The condition for participation of the social organisation in the previous administrative proceedings is closely linked to whether the social organisation may act as legal subject to court administrative proceedings.[36] The capacity of the social organisation to be a party to court proceedings in matters concerning the legal interests of other persons depends on whether the organisation is capable of being a party to administrative proceedings,[37] which is a specific consequence of its participation in the proceedings before a public administration body.[38]

The entities, whose capacity to participate in administrative proceedings in cases involving the legal interests of other persons was restricted by the legislator, may not demand to be a party to administrative court proceedings, hence, they do not have the right to file a complaint.[39] The aforementioned issue is reflected in the regulation on the grant of a water permit. Article 402 of the Water Law[40] excludes the application of Article 31 of the Code of Administrative Procedure,[41] thus, prevents the social organisation from participating in the administrative proceedings to protect the legal interest of other entities that get involved in the proceedings as a party. Therefore, the condition included in Article 50 § 1 of the Law on Proceedings before Administrative Courts shall not be met, the organisation shall not have the capacity to be a party in court proceedings, hence, shall not have the right to appeal to the court against the act issued by an administrative authority in specific proceedings. A similar regulation may be found in Article 28 sec. 3 of the Building Law.[42]

Turning to the issue of the form of the subjective right to file a complaint under German law, pursuant to § 42 II VwGO,[43] anyone who claims that their subjective rights have been infringed by issuing or refusing or failing to issue an administrative act is entitled to lodge an administrative complaint unless the law provides otherwise. An action or omission of a public administration body must, in consequence, violate the public subjective right of a particular person; the act itself contrary to the applicable legal norms of the body does not

34 J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2012, p. 158.

35 Sz. Łajszczak, *Legitymacja skargowa a przedmiot postępowania sądowoadministracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2010, no. 5, p. 70.

36 See J.P. Tarno, op. cit., p. 164.

37 Judgment of the Supreme Administrative Court of 20 March 2008, II OSK 265/07, LEX no. 468730.

38 A. Nędzarek, op. cit., p. 30.

39 See ibidem, p. 32.

40 Act of 20 July 2017 Water Law, Dz.U. (Journal of Laws) of 2020, item 310, as amended.

41 Act of 14 June 1960 Code of Administrative Procedure, Dz.U. (Journal of Laws) of 2020, item 256, as amended.

42 Act of 7 July 1994 Building Law, Dz.U. (Journal of Laws) of 2020, item 1333, as amended;
see A. Nędzarek, op. cit., p. 30; W. Chróścielewski, op. cit., p. 89.

43 Act of 19 March 1991, *Verwaltungsgerichtsordnung,* BGBI. I S. 686, as amended, § 42 II VwGO: "Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig, wenn der Kläger geltend macht, durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein".

meet the requirements of the right to file a complaint.[44] § 42 II of the VwGO does not enumerate entitled entities, but only sets out in a general way the conditions which must exist to lodge an administrative complaint.[45] The concept of the right to file a complaint under § 42 of the VwGO is based on violation of public subjective law.

The premise of infringement of public subjective rights under § 42 II of the VwGO constitutes a significant difference in relation to the general regulation of the right to file a complaint under Art. 50 § 1 of the Law on Proceedings before Administrative Courts, according to which the Polish legislator does not require any proof of infringement of the legal interest of the entitled entity. The German legislator decided to adopt a different method of codification, since it wanted to eliminate the possibility of lodging common complaints in the general interest[46] and to prevent an entity from appealing against an administrative act to the court, if the entity has its own, material and current interest in repealing a given act, even though there has been no infringement of the entity's public rights.[47]

However, at this point, it is worth noting that the nature and type of the legal norm which the complainant sees as the source of its own legal interest or the infringement of which it challenges is significant under both Polish and German law. The entity may not demand audit of the activities of the public administration body if it does not have the right which is the source of the legal interest or infringement of which the entity challenges. By way of example, social organisations are not entities entitled to lodge a complaint with an administrative court in cases related to the provision of public information, since the right to public information is not granted to social organisations at all. This is the right vested to natural persons only, hence, the complaints lodged by social organisations against the decisions to refuse to provide public information are not subject to judicial review, since the organisations may not request such information anyway, unlike their members.[48]

The right to file a complaint by environmental organisations under Polish and German law

The right to file a complaint by environmental organisations, regardless of the model of such right that has been chosen in the system of national law, should be objective in nature pursuant to the EIA Directive based on the Aarhus Convention. The separate character of the rights granted to environmental organisations results from the guarantee of public

44 Ch. Sennekamp, op. cit., § 42 VwGO, it should be noted that there are often situations when an unlawful act of an authority (based on objective evaluation) entails violation of the subjective rights of an individual.

45 At the language level, this structure is similar to the Polish part of the provision of Article 50 § 1 of the Law on Proceedings before Administrative Courts, i.e. "everyone, whose legal interest is at stake".

46 P.J. Tettinger, V. Wahrendorf, *Verwaltungsprozeßrecht*, Köln 2005, p. 165.

47 R. Kintz, *Öffentliches Recht im Assessorexamen, Klausurtypen, wiederkehrende Probleme und Formulierungshilfen*, München 2015, p. 89.

48 Decision of the Supreme Court of 2 December 2015, SK 36/14, OTK-A 2015/11/189.

participation in matters regarding environmental protection.[49] The question arises as to whether the way in which the EU directive is implemented under Polish and German law meets the objectives of the directive, providing the environmental organisations with the broadest possible right to a fair trial.

Turning to German law, it should be noted that the solution included in the EIA Directive is a kind of *novum* compared to the German regulation and as opposed to the Polish legal system. The German legislator, in the European spirit, has decided to introduce the regulation, in compliance with which the environmental protection organisation[50] *(eine Vereinigung*) does not have to prove any infringement of its own individual rights to be able to bring an action before an administrative court,[51] as follows from § 64 sec. 1 BNatSchG.[52] The UmwRG Act,[53] which is implementation of the EU Directive 2003/35/EC (called Öffentlichkeitsbeteiligung-Richtlinie, which, as previously indicated, was in force prior to the EIA Directive),[54] includes in § 2 the prerequisites for a court administrative complaint[55] that may only be made by entities that are recognised *(die Anerkennung*) under § 3 of the UmwRG by state authorities or Land authorities as environmental organisations.[56]

It should be noted that the form of the current regulation was largely influenced by the judicial decisions of the European Court of Justice, due to the fact that the UmwRG Act, in its 2006 version, in § 2, required the ecological organisation to designate a third party having subjective right, which was affected by the contested decisions of a public administration body in the field of environmental protection, thus, a given premise significantly limited the right to file a complaint by ecological organisations.[57] The CJEU ruled in the *Trainel-Urteil*[58] judgment that the German legislator wrongly implemented the EU direc-

49 B. Rakoczy, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, LEX/ el. 2010, Article 44.

50 The German term *die Umweltvereinigung* (in numerous studies also *the Umwetlverein, der Umweltverband*) in the BNatSchG and the UmwRG corresponds, in essence, to the Polish institution which is an environmental organisation according to EU Directive 2003/35/EC.

51 M. Lothar, M. Morlok, *Grundrechte,* Baden-Baden 2016, p. 414.

52 Act of 29 July 2009, Bundesnaturschutzgesetz, BGBl. I S. 2542, as amended.

53 Act of 7 December 2006 Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz), BGBl. I S. 3290, as amended.

54 See Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, Official Journal L 156, 25/06/2003, p. 17.

55 R. Schmidt, *Verwaltungsprozzesrecht, Sachentscheidungsvoraussetzungen und Begründetet wichtiger Klage- und Verfahrensarten, Normenkontrollverfahren, Vorläufiger und vorübergehender Rechtsschutz, Widerspruchsverfahren*, Grasberg bei Bremen 2016, p. 70.

56 See the official website of *Umwelt Bundesamt*, http://www.umweltbundesamt.de/themen/nachhaltigkeit-strategien-internationales/anerkennung-von-umwelt-naturschutzvereinigungen. Accessed 27.07.2020, the list of organisations recognised as environmentally friendly has also been published on the website of the Federal Office for the Environment.

57 R. Schmidt, op. cit., p. 71.

58 Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband NordrheinWestfalen e. V. against Bezirksregierung Arnsberg,* ECLI. EU C 2011/289; see more: Schlacke, S., *Recht von Umweltverbänden auf Zugang zu einem Überprüfungsverfahren*, Neue Zeitschrift für Verwaltungsrecht 2011, no. 13, p. 801.

tive in the UmwRG Act, as a consequence of which the environmental organisation had the right to directly invoke the EU directive within the scope of its right to file a complaint.

At the same time, the CJEU has obliged the German legislative authorities to amend § 2 of the UmwRG by deleting the restrictions on complaints against environmental organisations. The changes in line with the European and conformist interpretation took place in 2013, and in 2015, §5 of the UmwRG was also amended in response to the *"Altrip-Urteil"* CJEU.[59]

The EU environmental protection regulations were smoothly incorporated into the Polish system of law.[60] In Article 44 § 3 of the Environmental Impact Assessment,[61] the Polish legislator granted ecological organisations the right to lodge an administrative court complaint, if justified by the statutory objectives of the organisation in question, also in the event when the organisation did not participate in the proceedings requiring public participation. Therefore, the source of the right to file a complaint by the environmental organisation does not constitute the general regulation under Article 50 § 1 of the Law on Proceedings before Administrative Courts, but Article 50 § 2 of the Law on Proceedings before Administrative Courts in conjunction with Article 44 § 3 of the Environmental Impact Assessment, despite the fact that according to the legal definition under Article 3 sec. 1 point 10 of the Environmental Impact Assessment, the environmental organisation is a social organisation whose statutory objective is to protect the environment, therefore, it acts within the framework of the protection of social interest.

In addition, with reference to previous issues concerning the limitation of the possibility for the social organisation to participate in administrative proceedings for the issuance of a building permit, the environmental organisation is entitled to participate in the said proceedings in pursuant to Article 28 § 4 of the Building Law.[62] However, such authorisation is irrevocable with regard to the right to file a complaint by the environmental organisation, since, as indicated earlier, it is not based on Article 50 § 1 of the Law on Proceedings

59 Case C-72/12 *Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider v. Land Rheinland-Pfalz,* ECLI. EU 2013/712 Schmidt, R., op. cit., p. 71; The CJEU, in the above mentioned judgment, ordered amendment to § 5 of the UmwRG in the wording of the 2006 Act, which allowed environmental organisations to lodge a complaint only against administrative decisions, which, after 15 December 2006, i.e. the date of entry into force of the provisions in the UmwRG, were final. In 2015, the German legislator abandoned the aforementioned restriction in response to the "*Altrip-Urteil*". The Polish legislator has not introduced any time limits concerning the right to file a complaint by ecological organisations in the Environmental Impact Assessment.

60 It is worth noting that at the time the Directive 2003/35/EC was announced, Poland was not yet a Member State, and when it joined the European Union on 1 May 2004, it undertook to adopt the Community acquis in its entirety (*acquis communautaire*), thus, the deadline for implementation of the above Directive was the same as for "older" Member States, i.e. by 25 June 2005; see more: M. Führ, J. Schenten, M. Schreiber, F. Schulze, S. Schütte, *Evaluation von Gebrauch und Wirkung der Verbandsklagemöglichkeiten nach dem Umwelt-Rechtsbehelfsgesetz* (*UmwRG*), Dessau-Roßlau 2014, p. 108.

61 Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment 2020, item 283.

62 Although the Polish legislator has created the possibility for the environmental organisation to participate in administrative proceedings in the field of construction law, the environmental organisations shall be entitled to lodge a complaint with the administrative court only in the proceedings including the environmental impact assessment of a given projector against the decision delivered in such proceedings (see P. Daniel, *Udział organizacji ekologicznej w postępowaniu w przedmiocie wydania decyzji o pozwoleniu na budowę,* "Przegląd Prawa Ochrony Środowiska" 2012, no. 4, pp. 9-29.

before Administrative Courts, so it does not have to meet the condition of participation in previous administrative proceedings. However, in this case, it is not possible to speak of inconsistency or clear contradiction on the part of the legislator within the framework of the regulation on the participation of the social organisation, i.e. the ecological organisation, in the context of the entire legal system,[63] as Article 44 § 3 of the Environmental Impact Assessment should be qualified as *lex specialis* in relation to Article 50 § 1 of the Law on Proceedings before Administrative Courts.[64]

The Polish legislator has aligned the provisions with the EU directives using the instruments in the legal system; hence, the solutions in question are not exceptional like the German solutions which, in essence, have adopted a completely different concept than that which has hitherto been applied in the entire system. The German legislator has abandoned the general concept of the subjective right to file a complaint in favour of the objective right, thus, allowed for a possibility of lodging a general complaint (*die Popularklage*), also known as an altruistic complaint in the field of environmental law (*die altruistiche Verbandsklage im Umweltsrecht*).[65]

The German legislator initially implemented the EU directive incorrectly, which in turn necessitated changes in national legislation. When analysing the Polish implementation of the EU EIA Directive, it is possible to get the impression that it has been transposed into national law in a correct manner. Nevertheless, it is impossible to agree with the above statement, as evidenced by the content of the European Commission's opinion of 8 March 2019 concerning the incompatibility of, inter alia, the Environmental Impact Assessment with the EU EIA Directive regarding Article 11 sec. 1 and 3. The European Commission has alleged that, under Polish law, environmental organisations may not question the legality of an investment permit in the case when it does not include the results of the environmental impact assessment or the conditions contained in the environmental decision, which should be therefore considered wrong implementation of the EU directive.[66] In response to the opinion of the European Commission, the Polish Government undertook to make legislative amendments to eliminate certain irregularities in the implementation of the EIA

63 Otherwise: W. Chróścielewski, op. cit., p. 90; A. Barczak, *Partycypacja społeczna w procesie administrowania w ochronie środowiska*, in: *Internacjonalizacja administracji publicznej,* Z. Czarnik, J. Posłuszny, L. Żukowski (eds.), Warszawa 2015, pp. 27-28.

64 The decision of the Supreme Administrative Court of 19 April 2016, II OSK 2010/14, LEX no. 2065748 – the Supreme Administrative Court stated that Article 44 sec. 3 of the Environmental Impact Assessment extends the procedural rights vested to special social organisations, such environmental organisations. Non-fulfilment of the conditions contained in Article 44 sec. 3 of the Environmental Impact Assessment does not preclude the possibility to base the right to file a complaint by ecological organisations on the general provision, namely Article 50 § 1 of the Law on Proceedings before Administrative Courts.

65 R. Stüwe, in: Öffentliches Recht und Europarecht, Staats- und Verfassungsrecht Primärrecht der Europäische Union Allgemeines Verwaltungsrecht, H.M. Wolffgang (ed.), Hamm 2007, p. 424.

66 See the Public Information Bulletin of the Council of Ministers, Draft Act amending the Act on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment no. UD 50, https://bip.kprm.gov.pl/kpr/bip-rady-ministrow/prace-legislacyjne-rm-i/prace-legislacyjne-rady/wykaz-prac-legislacyjny/r328547,Projekt-ustawy-o-zmianie-ustawy-o-udostepnianiu-informacji-o-srodowisku-i-jego-o.html. Accessed 28.11.2020.

Directive. Currently, a draft act introducing new regulations for the Environmental Impact Assessment is under discussion.

Conclusions

The form of the right to file a complaint by environmental organisations under Polish and German law shows a significant impact of EU law on the form of procedural provisions despite the lack of clear competence of the European Union to establish such processes. The process of Europeanisation takes place in all areas of national law. The implementation of EU legislation in compliance with the EU requirements often gives rise to the need to introduce certain solutions into national legal systems, which are foreign or radically different from those that have been already in force.

The aim of the EU EIA Directive is to increase the participation of the social factor in environmental matters by guaranteeing the broadest possible right to a fair trial in environmental cases. However, when analysing the idea of the environmental non-governmental organisation (NGO), it should be remembered that the concept is subject to different interpretations depending on the national legal system, as it is up to the national legislators to lay down the conditions which a given organisation must meet to be recognised as the environmental organisation.

The German legislator had to grant the environmental organisations the objective right to file a complaint, even though the grounds therefor under § 42 II VwGO are based on the subjective right. However, the implementation of EU solutions was not correct, which gave rise to the need to introduce certain legislative changes. Under Polish law, the model of the objective right to file a complaint is applicable, which could indicate that there are no difficulties in transforming EU regulations into national legislation. Nevertheless, the Polish legislator like the German legislator has not managed to avoid the mistakes while implementing the EIA Directive, which the European Commission addressed in its opinion of 8 March 2019.

Granting the right to file a complaint in administrative court proceedings to environmental NGOs, as proposed by the European Union, has a strong axiological justification despite the fact that it raises numerous controversies both in the case-law and in the literature.[67] However, the idea of guaranteeing the protection of the social interest by allowing environmental organisations to take part in the administrative court proceedings should be welcomed, as it allows the inclusion of the social factor in all environmental protection proceedings.

67 See W. Piątek, *Glosa do postanowienia NSA z dn. 17 lutego 2016 r., II OZ 1270/15, układ podmiotowy postępowania sądowoadministarcyjnego,* "Państwo i Prawo" 2017, no. 11, p. 131 et seq., the author presents in the gloss rational and convincing arguments in favour of extending the subject-oriented approach in administrative court proceedings.

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Robot rights: Where science ends and fiction starts

ABSTRACT

Artificial intelligence (AI), thanks to pop culture, is widely identified with robots or humanoid machines that take control over humans. Even though we might be feared of the new technology or the questionable social and ethical issues that arise from it, AI is developing rapidly which makes it a priority in the cognitive economy. Consequently, processes or services performed without any help from humans can no longer be considered as a part of the distant future. According to public opinion research from last year, conducted for IBM by NMS Market Research, 92% of Poles have heard of AI and 8 out of 10 expect it to be used more broadly. Efficient legislation can ensure the correct and regulated development of new technologies whilst inefficient legislation or the complete lack thereof can halt and even completely cease further research, or make the usage of AI significantly difficult in both social life and the economy.

This paper is an attempt at placing national legislation concerning AI in the context of the legislation of the EU and other countries. I will attempt to answer the question of whether it is possible to introduce into legislation a technology whose usage and full potential are yet unknown. Is AI, in terms of the law, a scientific fantasy or can it be regulated? I have analysed soft law on which some general regulations and future law recommendations are based. Currently, AI is only restricted by single provisions as there are no regulations that can be used in a complex manner in the area of new technology.

KEYWORDS

artificial intelligence, new technologies, law, legal principles, soft law

Introduction

A thinking machine has been the objective of scientists' and creators' work for centuries. We have already got used to smart solutions and have been using them on a large scale in work and private life. "The future is today!", this slogan in simple words illustrates how technological spheres of science fiction have unnoticeably become a part of everyday life. In 2018, the android from Saudi Arabia, Sophia, who e.g. became a student of the AGH University of Science and Technology in Kraków, and Pepper, a robot assistant, who recognises human emotions and speech, gained media popularity. While their participation in global

business conferences and events is aimed at promoting advanced technological solutions, we come across artificial intelligence much more often than we think. Every third report on the helpline of one of the most popular telecommunications network in Poland is served by Max – artificial intelligence that gives information e.g. on the bank account balance. Giants from the IT industry introduced and developed assistants for their customers e.g. Siri (Apple), Alexa (Amazon), Cortana (Microsoft), Google Assistant. Speech, text (also handwritten) or image recognition is no longer a great challenge for automated processes. We can "talk" to artificial intelligence on social media portals, chatbots are mass produced for the purposes of automating companies' communication with customers. Autonomous cars have as many supporters as they have opponents. Every year medicine is opening to new technological solutions, especially in the field of diagnostics. Irrespective of the industry, enterprises are implementing algorithms to search for savings and gain market advantage. This broad use of technology raises risks and has legal consequences, therefore, development of artificial intelligence is not only the domain of engineers. Legal experts and legislators should develop norms that keep up with the development of artificial intelligence.

What is artificial intelligence?

Artificial Intelligence is such a complex issue that we are faced with difficulties as soon as at the stage of defining the subject of considerations. It is intuitively associated with robots, however, it also refers to the area of IT which develops models and programmes, operation of which is based on the rules identical to intelligent human behaviours. This term was already made up in the 1950s by John McCarthy, with regard to the science and engineering creating thinking machines, which would be able to perform activities that constitute the domain of humans. According to Alan M. Turing,[1] a machine can be considered intelligent, when a human is not able to differentiate answers given by the machine from answers given by a human. Technological terms are as advanced as the engineering of artificial intelligence itself, however, for the purposes of other sciences, the definition proposed by Andreas Kaplan and Michael Haenlein as a "system's ability to correctly interpret external data, to learn from such data, and to use those learnings to achieve specific goals and tasks through flexible adaptation" may be appropriate.[2]

The legal definition of artificial intelligence has not yet been sufficiently developed. The European Commission underlined the need to establish commonly acceptable and flexible definitions of the concepts: a "robot" and "artificial intelligence". While determining legal issues, the issue of specifying the technologically diverse matter becomes key as the starting point for defining the object and subject of rights. Therefore, on the one hand, the definition should not raise doubts with regard to the use within legal regulations and on

1 A human and a machine (computer programme) answer questions of the human-judge in separate rooms, on printouts to exclude voice guidance or in handwriting. The main assumption of the test is that the machine is to pretend to be a human and convince the asker accordingly.

2 A. Kaplan, M. Haenlein, *Siri, Siri in my hand, who's the fairest in the land? On the interpretations, illustrations and implications of artificial intelligence*, "Business Horizons" 2019, no. 62(1), pp. 15-25.

the other hand, it has to take into consideration the dynamic development of technology. In the "Artificial Intelligence for Europe" it is proposed that "artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals".[3]

Soft law: From Asimov's Laws to Guidelines on the AI Code of Ethics

At the current stage of development of artificial intelligence, the opinion that artificial intelligence is to serve to the best interest of a human prevails. It means that the technological revolution should proceed in compliance with the law and ethical principles which are currently the subject of experts' discussion. For AI creators, producers and operators, in the ethical matter depiction, the Three Laws of Robotics of I. Asimov remain everlasting:[4]

1) A robot may not harm a human being or, through inaction, allow a human being to come to harm.
2) A robot must obey the orders given it by human being except where such orders would conflict with the First Law.
3) A robot must protect its own existence as long as such protection does not conflict with the First or Second Law.

Can the laws of robotics formulated in the science-fiction story from 1942 be interpreted as soft law in the 21st century? Universal principles are reflected in the guidelines drawn up by the high level expert group on AI of the European Union,[5] in the scope of ethics concerning the development and use of artificial intelligence. Out of the recommendations established by independent experts, as the superior one they indicate the protection of fundamental human rights:

- human agency and oversight – AI systems should support the development of just society by reinforcing the leading role of a human and fundamental rights and not diminishing, limiting or distorting human autonomy,
- technical robustness and safety – algorithms used in reliable artificial intelligence have to be secure, dependable, and sufficiently solid in order to manage errors or inconsistencies at all stages of the AI system lifecycle,
- privacy and data governance – citizens should have full control over own data, whereas, data concerning them will not be used to their detriment or to discriminate them,
- transparency – identifiability of AI systems should be provided,
- diversity, non-discrimination and fairness – AI systems should take into account the whole range of human abilities, skills and requirements, and ensure availability, societal

3 Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, *Artificial Intelligence for Europe* of 25.04.2018, COM/2018/237.

4 Robot rights were presented by Isaac Asimov in the science-fiction story *Runaround* of 1942.

5 Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, *Artificial Intelligence for Europe* of 25.04.2018, COM/2018/237.

and environmental well-being – artificial intelligence systems should reinforce positive social changes, support balanced development and environmental responsibility,
– accountability – mechanisms ensuring responsibility for AI systems and results thereof should be introduced.

Guidelines should have key application to all AI systems in various environments and industries. It was underlined that "in order to achieve "trustworthy AI", three components are necessary: 1) it should comply with the law, 2) it should fulfil ethical principles, and 3) it should be robust".[6] Recommendations are not binding and do not create any legal obligations, they remain in the soft law sphere by creating the future policy of European Union legislators.

As far as the ethical and legal subject matter related to the development and use of artificial intelligence is concerned, it is worth mentioning "Assumptions to the AI Strategy in Poland".[7] It is a collection of recommendations drawn up on the invitation and under the leadership of the Ministry of Digitalisation. In 2018, environments interested in artificial intelligence development in Poland engaged in AI-related legal issues. The analysis conducted by the legal group, who drew up recommendations, implies the direction of works for legislation in selected areas concerning artificial intelligence technology and machine learning.[8] The following legal challenges were identified as crucial: protection of fundamental human rights, providing a wide access to data with the respect for personal data protection principles, protection of consumer rights, establishing the principles of civil liability for damages caused with the use of AI, determining the rules and terms of using AI in the process of concluding agreements, and considering introduction of a support system for persons who will lose work due to the AI implementation.

Selected legal challenges

In the future, the basic legal conceptions should be re-constructed so that they take into account the economic trend using technological innovations, the application scale of which is rapidly growing. In the contemporary business, obtaining and analysing large numbers of data in nearly real time is perceived as a key competitive advantage. In the cognitive economy data is a new type of intangible goods, therefore, it is necessary to cover it with protection in civil legal turnover. On the grounds of binding legal orders, non-personal data protection may be considered e.g. in the context of *sui generis* database protection. However, experts believe that "introduction of an exclusive right to data may affect competitiveness and innovativeness. In consequence, it should be recommended not to introduce an absolute right of machine data ownership. Instead of a separate data ownership right, it would be

6 Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, *Building Trust in Human-Centric Artificial Intelligence* of 08.04.2019, COM/2019/168, https://eur-lex.europa.eu/legal-content/EN-PL/ALL/?uri=CELEX:52019DC0168. Accessed 26.02.21.

7 *Założenia do strategii AI w Polsce,* 2018, www.gov.pl/web/cyfryzacja. Accessed 05.03.2019.

8 Capability of computer systems to learn new skills directly without software – Arthur Samuel.

worth considering developing frameworks determining the right to access data".[9] It should also be determined whether it is possible to draw up one general regulation or separate principles determining access to data for various industries or entities. The new Regulation (EU) of the European Parliament and of the Council on framework for free flow of non-personal data,[10] assumes implementation of self-regulatory codes (codes of conduct) and other best practices, taking into account recommendations, decisions, and actions taken without human interaction. At Union level it is encouraged to develop codes of conduct adjusted to open standards, covering, among others, quality management, information security management, business continuity management, and environmental management on the grounds of the adopted national and international norms.[11] Adjusting provisions to technological progress and new technologies in the market assumes a draft of a regulation concerning the respect for private life and the protection of personal data in electronic communications (ePRIVACY), which extends the principles of data confidentiality with new communication services. In the area of machine learning and Big Data solutions it is planned to extend the scope of the regulation with communication, with the use of telecommunications network among devices and applications (so-called Internet of Things).

Using personal data by artificial intelligence that is information on an identified or identifiable natural person causes specific legal issues. Automated decisions can be made with the use of various types of data including personal data directly transferred by the data subject, observed data on natural persons (e.g. face recognition), as well as derivative or inferred data. The General Data Protection Regulation[12] specifically refers to profiling that is automated processing of personal data to assess personal features of a natural person. The GDPR imposes new obligations on artificial intelligence disposers as entities responsible for processing natural persons' data as well as automated decision making with regard to persons in compliance with the same principles even if the entities are different. Commercially used automated processes may be difficult to observe and understand by natural persons and, in consequence, they may not see the effects of such a process on them. Therefore, keeping the principles of personal data protection with the use of artificial intelligence technology should be one of the basic standards. In compliance with the requirement of accuracy and transparency, Article 5 of the GDPR, the controller has to ensure transparency of data processing also with regard to derivative or inferred data, so-called "new personal data". Furthermore, profiling may be related to using personal data previously collected for other purpose. In order to determine whether controllers, who intend to use personal data in this manner, have relevant grounds, it may be problematic to justify whether the conditions stipulated in Article 6 of the GDPR have been met, that is, giving consent, necessity to perform a contract or comply with a legal obligation, or the necessity for the purposes

9 *Założenia do strategii*…, p. 135.

10 Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for free flow of non-personal data in the European Union, OJ of the EU C of 2018 no. 303.

11 Ibidem, Article 6.

12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ of the EU C of 2016 no. 119.

of the legitimate interests pursued by the controller or by a third party. It imposes on the controllers the obligation to consider interests in order to protect the rights and freedoms of a person. With regard to personal data processing by artificial intelligence systems X. Konarski recommends,[13] among others:

- determining by the personal data protection authority which anonymization techniques it considers effective,
- indicating by the personal data protection authority how should the information obligation stipulated in Articles 13-14 of the GDPR be fulfilled in the case of data processing for the purposes of machine learning processes,
- determining the manner of giving consent in the case of changing the purposes of processing personal data which has been generated by data subjects (so-called digital footprints, information from devices at a disposal of data subjects),
- indicating when and how should the so-called balance test be conducted in the case of basing processing on the legally justified interest of the data controller or a third party, specifying in which types of situations a processor from the public sector will be able to base (secondary) processing of personal data on a legal provision ("implementation of the legal obligation imposed on the controller"), and in which it will be necessary to request the consent of the stakeholder,
- drawing up guidelines of the personal data protection authority concerning the obligation and manner of carrying out assessment of the effects of planned processing operations for the protection of personal data.

Functioning and using of the new technology raises problems related to the liability for damages caused with the use of artificial intelligence. The issue of AI liability is the most often discussed in the context of autonomous cars. Accidents with the participation of this type of cars brought up issues of liability of many managing entities for activity with the use of AI, activity of a producer, a user or a person outside the autonomous vehicle, or possibly other traffic participant. A. Chłopecki differentiates liability in terms of the entity who actually manages artificial intelligence:

- liability for AI activities leading to damages caused to third parties is borne by the producer (creator) of AI, but only in the scope in which AI activity irregularities were saved in the primary algorithm. Whereas, it should be understood more broadly, i.e. also as a situation when the algorithm includes elements facilitating or not sufficiently hindering unfavourable changes of this activity,
- liability for AI activities leading to damages of third parties is held by the AI disposer (owner, lessee, leaseholder etc.),
- in the case of the AI activity leading to damages caused to third parties when AI has more than one disposer, the liability should be held by each of them in compliance with the principles of several liability.[14]

Liability of creators, producers, managing entities and users will be derived from legal, preventive, and repressive protection system. Directive (85/374/EEC) concerning liability

13 *Założenia do strategii…*, p. 157.

14 A. Chłopecki, *Sztuczna inteligencja. Szkice prawnicze i futurologiczne,* Warszawa 2018, p. 29.

for defective products is indicated as possibly applicable in the context of liability towards consumers. A product means any movable even being a component of other movable or immovable. Electricity is also a product. The question is whether the "self-awareness" and learning process of AI may be a reason for excluding liability of the managing entity? Therefore, there cannot be an equality sign and artificial intelligence cannot be directly included in goods, and thus, the issue of liability for defective products cannot be derived. Thus, should the liability be transferred to a robot? Such a solution is proposed by the supporters of giving legal personality to artificial intelligence, however, this direction is highly debatable. M. Rosiński explains: I love my dog, but it does not have a legal personality, therefore, if it bites someone I will be in trouble, not my dog. I do not love my bank, yet, it does have a legal personality. Therefore, it can sue me or I can sue the bank.[15]

Legal personality of AI requires revolution in the traditional division of the civil law into persons and things. Despite the fact that artificial intelligence is identified with a machine, opinions that give certain rights to robots are not isolated. Such a conception was presented in the works of the European Parliament, giving legal personality or limited capacity to perform acts in law. By analogy, the rights of legal persons or evolution of animals' rights are referred to. D. Szostek is of a different opinion, since he believes that activities aimed at giving legal personality to AI should be opposed.[16] In times when artificial intelligence raises ethical questions, introducing to the civil code terms such as "an autonomous being", "an electronic person" seems to be a futuristic vision. Thus, the debate focuses on legal consequences of artificial intelligence activities. A. Chłopecki believes that "in order to talk about an actual possibility of autonomous functioning in the legal sphere, we have to […] define what this actual possibility means. In fact, in essence it means the actual "legal Turing test". In the legal turnover a legal entity encounters, in fact, a being characterised with the following features:

- has the possibility and ability to enter into legal interactions,
- acts in an autonomous manner, that is, particular legal activities or more broadly – legal events – do not result from instructions of a natural person determining the contents of such activities (events),
- acts outside the human control (relatively, in a situation of *a posteriori* inspection),
- is able to adjust its activities in the legal sphere to its own needs or intentions irrespective of whether they result from self-awareness or algorithm.[17]

Therefore, is it possible to conclude an agreement with artificial intelligence? New solutions based on automatic decision making processes are no longer a technological novelty but become more and more popular in the economic turnover. Fintechs establish new legal constructions e.g. smart contracts as an effect of the development of blockchain technology and DLT (Distributed Ledger Technology). In the reality of the digital market, they create new solutions and, as noticed by D. Szostek, it results in transferring from the property law

15 Speech given by Marek Rosiński during the international congress of digital economy and innovation Impact '18, 13 June 2018 in Kraków.

16 *Założenia do strategii…*, p. 167.

17 A. Chłopecki, op. cit., p. 4.

in the direction of services regulated in compliance with the principle of freedom of contract.[18] Automation and auto-execution of intelligent contracts cannot be identified with the artificial intelligence's declaration of will. At the current stage, it may occur as a support element of the process of concluding an agreement with a consideration of *lex specialis*, and not as an actual representation of the entity. In the legal order, human – machine or machine – machine contracts, despite their presence in the business trading, constitute a vague vision of the future.

Industrial Revolution 4.0 changes not only contractual relations. In recent years it has significantly influenced employment relationships from supporting recruitment processes to changing jobs in many industries. Development of artificial intelligence means potentially new professions and thus, new workplaces; and according to pessimistic scenarios, a complete breakdown of the labour market. If robots commonly replace people at work, it will be necessary to support the unemployed, whereas, the focus should primarily be on co-financing improvement of competences or ensuring the living wage. In this context, new propositions are made with regard to imposing a tax on the work of robots or to introduce fees for employers who liquidated or limited workplaces due to the use of artificial intelligence. A different direction may turn out to be the unconditional guaranteed income which was introduced as an experiment in Finland. Moreover, the questions regarding the relation of work performed by humans and thinking machines remain. Could artificial intelligence hold a managerial position? Should the law regulate the parity of employees and robots? P. Polański forecasts that "the key question which politicians and lawyers will soon have to ask themselves is the question whether in a quarter of a century computerization and robotization will lead to losing repetitive work and thus, deepen social inequalities or, on the contrary, we will witness societies functioning more harmoniously. […] The revolution of artificial intelligence may affect the essence of provisions protecting the rights of employees".[19]

Summary

Which initiatives regarding artificial intelligence and the law are taken mainly results from the fact in which field the use of AI has priority in a given country.[20] For the United States it is key to maintain global technological dominance, whereas, the share of administration, including state regulations and standardisations, is limited to a minimum, indicating the key role of free market and industry in the development of AI. China focuses in terms of artificial intelligence on automation of the industry, the use of artificial intelligence in medicine and image processing. Competitiveness of the British AI sector is established on

18 D. Szostek, *Regulacje prawne drugiej dekady XXI wieku – dokąd zmierzamy? Czy zastąpi nas inżynieria prawa?*, "Monitor Prawniczy" 2019, no. 2, p. 116.

19 P. Polański, *Inwigilacja, dostępność, blockchain i sztuczna inteligencja. Pytania o kierunki rozwoju prawa nowych technologii w erze rewolucji internetowej,* "Monitor Prawniczy" 2019, no. 2, pp. 110-114.

20 Digital Poland Foundation, *Przegląd strategii rozwoju sztucznej inteligencji na* świecie, 2018, https://www.digitalpoland.org/assets/publications/przegl%C4%85d-strategii-rozwoju-sztucznej-inteligencji-na-swiecie/przeglad-strategii-rozwoju-ai-digitalpoland-report.pdf. Accessed 05.03.2019.

the grounds of highly qualified specialists and a friendly economic environment. In France, it is recommended to research artificial intelligence without excessive state regulations and developing such relations at the European and even international level. Cooperation of the public and private sectors comprises the main assumption of the strategy of Canada which conducts basic studies in the areas of forecasting the effects of artificial intelligence activities, its impact on society, economy, and ethical issues. German automotive industry is developing its advantage with sectors based on knowledge, electromobility, and artificial intelligence. Japan assumes the use of the newest technologies in each social area – Society 5.0. Indian strategy of development underlined that liability for automated processes is held not only by disposers, but also the artificial intelligence itself. Estonia attempts to include artificial intelligence in its judicial system with adjudicating cases on petty crimes.

Jerry Kaplan believes that artificial intelligence will turn the social order as we know it upside down. "Profound ethical issues, which have been tormenting philosophers for centuries, suddenly appear in court rooms. Can machines be held liable for their actions? Should intelligent systems have independent rights and obligations or are they also simply a property?".[21] If and which limitations should be imposed on developing and using artificial intelligence? Strategies of developing artificial intelligence are not coherent in various countries. Good practices, which are the subject of a debate of industry experts and public institutions take into account the opportunities and threats to common implementation of new technologies. "The tendency of automation requires persons engaged in the development and commercialisation of artificial intelligence-based solutions to follow the principles of security and ethics from the beginning so that they are aware of the necessity of legal liability for the quality of technology they develop".[22] The Communication from the European Commission[23] states that citizens and entrepreneurs have to be able to trust technologies they come across and their basic rights and freedoms should be guaranteed by effective securities in a predictable and understandable legal environment. Currently, it is undoubtedly one of the biggest challenges for private and public institutions which cannot be treated as a futurological proposition, but as a starting point for introducing artificial intelligence to the legal order.

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21 J. Kaplan, *Sztuczna inteligencja. Co każdy powinien wiedzieć,* Warszawa 2019, p. 11.

22 European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), OJ of the EU C of 2018 no. 252, letter M.

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