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Towards normatively limited judicial sanction [structured discretion] as a proportional response to the defectiveness of legal action (contract) in modern legal transactions

Abstract
The primary purpose of the legal considerations herein is to indicate the direction of the modernization of the legality of control mechanisms in modern legal transactions. At the base of these transactions there is still the traditional, dogmatic sanction of nullity (invalidity) regulated by law (*ex lege*), and the legal effects of a defective legal action (contract), i.e. an action contrary to law or moral norms. In consideration of disproportionality and ineffectiveness of the nullity sanction under new conditions, jurisprudence and legislation have directed their attention to the limited judicial sanction (structured discretion) originating from the common law tradition as a proportional and flexible response to the defectiveness of legal action (contract). The statutory judicial sanction, which became the basis of the reform on the concept of illegality in common law countries, have found expression in the model rule of European private law. The Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), the latter of which revises and updates the PECL, are the primary references for the model rules of contract law in the EU. The PECL and the DCFR have affected the concept of the defective sanction of legal action (contract) in the new Civil Code, drafted by the Polish Civil Law Codification Commission.

1. Traditional defectiveness sanction of legal action (contract) by law (*ex lege*) as a disproportional and ineffective legality control instrument in legal transactions

In times of global economic turnover, contemporary private law is transformed and called upon to respond to various challenges. As modern private law is subject to internationalization, such as strong influences from Anglo-Saxon law, traditional law deriving from Roman law, and the positivist legality check mechanism, at the base of which are rigid invalidity sanctions (*ex lege*), private law is becoming increasingly ineffective, impractical and expensive[1]. Unsurprisingly, the phenomenon of globalization has called for a new turn in European legal culture, moving away from the formalistic and dogmatic structures, in favour of pragmatic ones giving more weight to judicial law-making[2].

In European jurisprudence assessment, disproportionality and ineffectiveness of the traditional legality control mechanisms are changing economic turnover. These changes primarily derive from the multitude of sources of contemporary private law (a term known as "multicentricity"). In particular, the far-reaching publicization of private laws causes limitations to private autonomy (freedom of contract) in favour of protecting social interest. At the same time, private law-making is under increasing influence and pressure from pressure groups (lobbyists). Numerous (legal) regulations are orientated towards ensuring fairness and non-discrimination, such as enhanced protection of the weaker party to the contract (i.e. employees, consumers, tenants, and small business entrepreneurs). These regulations exist to supplement traditional contracts which are no longer the only instruments towards achieving private autonomy[3].

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1 On the Roman origin of the invalidity sanction (*ex lege, ex initio* and *erga omnes*) see: R. Zimmerman, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford 2001; W. Dajczak, T. Giaro, F. Longchamps de Berier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009; W. Wołodkiewicz, *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej*, Warszawa 2009.

2 M.W. Hesselink, *The New European Legal Culture*, Kluwer 2001; P. Skorupa, *Nieważność czynności prawnej z perspektywy systemów prawnych common law*, "Studia Prawnicze" 2018, no. 4, p. 7; A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2015, p. 178.

3 On contract transformation see W. Dajczak, *Amerykańska zapowiedź "śmierci umowy" na tle tradycji romanistycznej* [in:] F. Longchamps de Berier (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa 2017; A. Doliwa, *O istocie i przyszłości umowy na tle współczesnej praktyki obrotu i przepisów kodeksu cywilnego o zawarciu umowy* [in:] Z. Kuniewicz, D. Sokołowska (ed.), *Prawo kontraktów*, Warszawa 2017; J. Mazurkiewicz, *„Wszystko na sprzedaż!" Prawo umów wobec mizerii moralnej współczesnego Zachodu* [in:]Ibid.

As contemporary private law is transformed and numerous regulations threaten the safety of contractual transactions, interpretation of law is becoming a legal issue/matter. Hence, the subject of lively interest in the doctrine, judicature and legislation is the defective legal action sanction, – adequate (proportional) to the violation, – which may pave the way for contemporary legality control mechanisms in legal transactions. As part of the academic debate, including discussions on private law unification (harmonization) in the EU, the traditional dogmatic doctrine of nullity/ineffectiveness and the corresponding sanctions are critically measured, particularly as they become automatically null and void. At the same time, the traditional doctrine of nullity seeks to establish a more flexible and effective sanction of a proportional response to the defectiveness of legal action, to achieve 'fair and reasonable results' without eliminating legal action (contract) per se[4].

Generally, improving the efficiency of legality control mechanisms in legal transactions is seen as being founded on the profound modernization of the traditional sanction of nullity in lieu of extended judicial discretion, within, however, a normatively specified framework (known as "limited" and "normatively ordered" judicial sanctions). There are indications that the complexity of contemporary private law requires shifting the weight of "illegality" and "immorality" control in legal transactions towards the judiciary. The settling of disputes within the judicial framework, especially those concerning private rights, may result in the application of sanctions in a more creative way. At the same time, the defectiveness and purpose of the action are more appropriately balanced by the courts based on the principles of proportionality and fairness[5].

The controversies in jurisprudence fundamentally affect the legislation, as the rules of proportional response to defectiveness of legal action (contract), which are expressed in the violation of law or moral norms (known as

4 Within the national literature see: M. Gutowski, *Nieważność czynności prawnej*, Warszawa 2017; P. Skorupa, *Nieważność czynności prawnej w prawie polskim na tle prawnoporównawczym*, Warszawa 2019; R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych*, Warszawa 2013.

5 On the matter of the law-making role of the Court see: T. Giaro, *Interpretacja jako źródło prawa – dawniej i dziś*, "Studia Prawnoustrojowe" 2007, no. 7, pp. 243–253; L. Leszczyński, *Precedens jako źródło rekonstrukcji normatywnej podstawy decyzji stosowania prawa* [in:] I. Bogucka, Z. Tabor (ed.), *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego*, Kraków 2003, pp. 149–162; R. Piotrowski, *O znaczeniu prawa sędziowskiego w polskim ustroju państwowym* [in:] T. Giaro (ed.), *Rola orzecznictwa w systemie prawa*, Warszawa 2016, pp. 39–63; T. Stawecki, *Precedens jako zadanie dla nauk prawnych* [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa. Materiały z Konferencji Zakładu Praw Człowieka Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, zorganizowanej 24 czerwca 2008 roku,* Warszawa 2010, pp. 59–98.

"non-system values"), are becoming the new guiding principles for a balanced assessment between the protection of private interests and public interests.

The advancement of the rule of proportional response by European lawmakers in the context of defectiveness of legal action in the normatively defined framework, such as the adjudication directives, is meant to enable the courts to apply adequate and flexible rules and sanctions. This flexibility may cause, depending on the degree of defectiveness, the limitation or elimination of the legal effects intended by the parties. However, this judicial direction is to maintain the legal action (contract) in force[6].

As part of European inquiries into invalidity, including European codification drafts, and the achievements of the Polish jurisprudence and legislation, the concept of normatively (statutorily) limited judicial sanction (structured reasoning, deriving from the common law tradition, is the furthest-reaching normative model that would entitle the judge to apply *ad casum*, in a normative framework, judicial discretion in considering appropriate sanctions for defective contracts. Permission to change the content of the contract or its legal effects (known as reformation) would also fall under judicial discretion[7].

The foundation of proportionality in the context of illegality of contracts, including safe and flexible judicial sanction, is formed by European and Polish private law. However, it would be difficult to consider that these are fully developed and flexible legal solutions (sanctions) which can sufficiently achieve 'fair and reasonable results' in an optimal way as regards the limits of legal effects in the context of defective legal actions.

Undoubtedly, the expression of the principles of proportionality and flexibility in contemporary approaches to the sanction of nullity by lawmakers involve both nullity's external and internal limits.

These principles reflect an 'escape' from the dogmatism of nullity as a sanction. For example, nullity's external limits are expressed in the form of milder procedures (such as annulment of an action, suspended ineffectiveness, relative ineffectiveness) when specific circumstances occur (e.g. defects in a declaration of will, and refusal to confirm the act performed by the proxy). At the same time, the internal limits of nullity involve a normative structure of partial invalidity and its special types (e.g. reduction upholding effectiveness, conversion, and validation). In practice, the external and internal applications of this sanction result in many problems (including disputes in the court) as they are not applied consistently and they often overlap. At the same time both applications

6 More about the proportional reaction to defectiveness by means of normatively limited judge's sanction, P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 773; R. Trzaskowski, *Skutki sprzeczności umów…*, p. 797.

7 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 773.

are considered to lack sufficient flexibility to establish proportionality in relation to a sanction (legal effects)[8].

The introduction of judicial sanction *sensu stricto* into statutory law, i.e. of creative, reformative nature, which allows the judge to intervene in the content of the contract, finds its expression in many legislative drafts (codifications) in the area of private law. Primarily, EU model law, including the PECL and the DCFR, is in favour of such limited judicial discretion in the context of sanctions[9]. The Polish legislator, similarly follows the same path, which is reflected in the draft of the first book of the Civil Code, elaborated by the Civil Law Codification Commission[10].

The abovementioned drafts, although not revolutionary in nature, they are evolutionary as they attempt to legally organize judicial discretion (judicial sanction) in terms of legality control in legal transactions. In adopted models of legality control, as shown by the reaction of lawmakers to defectiveness, there appears to be a compromise in respect to the sanctions in relation to a defective legal action between the traditional approach, i.e. softening the nullity sanction *ex lege*, and the more contemporary approach, which is oriented towards the limited, normatively ordered, yet creative form of judicial sanction[11].

8 As for critical evaluation of nullity sanction *ex lege* P. Skorupa, Ibid., p. 425 and R. Trzaskowski, *Skutki sprzeczności umów…*, p. 111.

9 Draft Principles of European Contract Law (PECL) and Draft Common Frame of References (DCFR). M. Wilejczyk, *Zasady Draft Common Frame of Reference na tle zasad polskiego prawa prywatnego*, "Państwo i Prawo" 2018, no. 1, pp. 51–65.

10 *Komisja Kodyfikacyjna Prawa Cywilnego działająca przy Ministrze Sprawiedliwości. Księga pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem*, https://webcache.googleusercontent.com/search?q=cache:YE42_wx3frwJ:https://arch-bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf+&cd=4&hl=pl&ct=clnk&gl=pl [access: 05.12.2019]; R. Trzaskowski [in:] *Kodeks cywilny. Księga I. Część ogólna. Projekt Komisji Kodyfikacyjnej Prawa Cywilnego przyjęty w 2015 r. z objaśnieniami opracowanymi przez członków zespołu problemowego KKPC*, Warszawa 2017, p. 96.

11 Drafted models of judge's sanction are still evolving, giving rise to numerous questions, such as those related to the negative or positive regulation of defectiveness, as well as in terms of restitution claims (restitution in integrum).

2. Limited judicial sanction according to EU model law as a model for national law-making

2.1. Anglo-Saxon roots of limited judicial sanction in EU model drafts

National pursuit for an effective normative model of a sanction for a defective legal action (contract) has been inspired, not only by European models of invalidity, but also by international legislative drafts (codifications), particularly drafts drawn up in the context of unification/ harmonization of private law in the EU[12].

In international codification drafts, especially in the context of the PECL and the DCFR, there is a noticeable departure from the traditional complete sanctioning of every (any) violation, even of a technical or organizational nature, in favour of proportional (in terms of the degree of defectiveness) application of sanctions, i.e. depriving the defective legal action of its legal effects by the court.

Proportionality of a (judicial) response is meant to be based on the concept of statutorily limited judicial discretion, and more precisely on the flexibility which is regulated by the law on judicial sanctions, which is promoted in drafts of the EU model law. The concept of normatively (statutorily) limited judicial sanction is modelled on the common law tradition, particularly on the drafts drawn up in Great Britain[13].

2.2. The concept of normatively-limited judicial sanction in the PECL model draft

The first set of EU model law rules, i.e. the PECL draft, which contains model rules that have developed based on the existing achievements *ius commune* and have been adopted with reference to the requirements of contemporary legal transactions, does not introduce a radical change to the normative model of defective legal actions in the substantive sense. In fact, as far as the terminology is concerned, the ambiguous term of 'invalidity' was dropped in favour of the 'no legal effects' term. However, as a rule(?) the classic concept of normative invalidity (as a sanction) was retained for cases where the legal action is found to be

12 With the exception of the drafts of the EU model law (PECL and DCFR), e.g. draft on UNIDROIT Principles of International Commercial Contracts (UPICC); draft on European Contract Code (Gandolfi draft) and draft of AHC group – SLC Revised Principles of European Contract Law.

13 Report by The Law Commission, Illegal transactions: The effect of illegality on contracts and trusts, Consultation Paper 1999, No 154; P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 30.

unlawful (against the law) or immoral (not compliant with the norms which correspond axiologically to the clause of good morals or public order)[14].

Academics have drawn attention to the fact that the PECL, despite that, as a rule, provides a conservative and abstractive model of sanction for defective legal action, it introduces an essential exception to the automatic (mechanical) elimination of all legal effects (*ex lege* and *ex ante*) in favour of greater flexibility. It is expressed in the "limited, normatively ordered judicial sanction", which is treated as a judicial discretional competence, to determine the consequences of violating statutory provisions. These statutory provisions do not provide an explicit sanction in this respect (*lex imperfecta*), nor in the event of invalidity of part of a legal action[15].

The PECL draft, which introduced a limited judicial sanction, placed an obligation on the judiciary to take into account the intentions of the legislator (i.e. the adjudication directives) in the imposition of sanctions. Primarily, the scope of judicial discretion was defined by stating that if a provision of mandatory nature (*lex cogentis*) does not provide the effects of its violation, the contract may be considered fully effective, partly effective, ineffective, or subject to change[16]. Secondly, the court should take into account all relevant circumstances, while bearing in mind the criteria defined in the act. These considerations will enable the court to impose a sanction that is proportional to the violation in question[17].

Despite the positive reception of the PECL rules within the literature, many doubts have been raised as regards concerning the accurate generalization of legal achievements in the area of fighting against defectiveness of legal action, including the availability of restitution claims (after depriving legal action of legal effects). These doubts are particularly founded on concerns over the requirement of predictability of judicial sanctions, including legal certainty and flexibility, which further cast a shadow upon the procedural layer[18].

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14 As for the evaluation of the PECL, in particular O. Lando, H. Beale, *Principles of European Contract Law: parts I and II*, The Hague/London/Boston 2000; H.L. MacQueen, *Illegality and Immorality in Contracts: Towards European Principles*, 2010; P. Meijknecht, *Tworzenie zasad europejskiego prawa kontraktów*, "Państwo i Prawo" 2004, no. 2, pp. 39–56.

15 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 14.

16 Art. 15: 102 § 2 PECL.

17 According to Art. 15: 102 § 3 PECL the court should take into account all circumstances, and in particular, a) the purpose of violated regulation; b) categories of persons who are supposed to be protected by the regulation; c) other sanctions which may result from violation of the regulation; d) the degree of violation; e) intentional or unintentional violation; f) connection between the contract and violation.

18 H.L. MacQueen, *Illegality and Immorality…*, p. 422.

2.3 Judicial sanction in the DCFR

The typology and scope of the sanctions adopted in the PECL have largely been taken over by the DCFR. The main part of the regulation method of defectiveness sanction of contracts, the principle of proportional response to defectiveness, and particularly the structurally-limited judicial sanction, have been maintained in a comparable way/range[19].

The DCFR rules, which promote the directive of proportional response/ Proportionality Directive? and an approach towards flexible sanctions in the event of illegality or immorality of legal action, take as a starting point the partial validity of the contract. If a regulation is breached, and the sanction is not specified for this violation, as *lex imperfecta*, then the judicial sanction should be appropriate/ proportional?, which in respect of its structure, is greatly based on the proposals of the English Codification Commission[20].

The model of defectiveness of a legal action adopted in the DCFR is considered controversial concerning the regulation of invalidity sanction, and, particularly the partial invalidity of abusive clauses. Although these clauses 'are not binding', they contain numerous solutions which promote the judicial sanction and the teleological (purposeful) interpretation. In the system of judicial sanction adopted in the DCFR, it is the judge who should decide the validity and effects of the legal action which violates the law or morality. However, the judge is first expected to investigate the contradiction of the legal action, not on the basis of statutory? law but rather on the basis of fundamental principles (such as on morality). This judicial approach allows the judge to establish whether there has been a violation of a specific prohibition or order introduced by the legislator[21].

According to the DCFR, the model of judicial competence is based on a constitutive verdict which functions as a legal ground for invalidity (no legal consequences). Until the court's decision is given, the legal action is considered binding[22].

The judicial decision, which is based on the model of limited and ordered discretion, may be expressed in such a way that the court:

a) considers the contract binding;

b) annuls the contract with retroactive effect fully or partially;

c) changes the contract or its legal effects[23].

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19 Charter 7 Book 2 DCFR.

20 H.L. MacQueen, *Illegality and Immorality…*, p. 6; P. Machnikowski, *Przepisy dotyczące czynności prawnych w projekcie Common Frame of Reference i w Principles of the Existing EC Contract Law (part I)*, "Rejent" 2008, no. 4, pp. 22–54.

21 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 54.

22 Art. II-7: 2012.

23 Art. II-7: 302 (2) DCFR.

At the same time, in accordance with the DCFR, the court in delivering a judgment (adequate and proportional) should take into consideration, as per the so called adjudication directive, all necessary circumstances of the case specified in the act (in a manner comparable to the PECL)[24].

In consideration of the broadly defined judicial sanction, which gives the possibility of reformative interference in the content of the contract or of its legal effects, doubts have been raised as to whether such judicial competences are excessive and whether it is possible to uphold predictability of the verdicts. To provide an answer to these questions, it must be kept in mind that it is important to prepare the adjudication directives as well as the criteria of limits of excessive court discretion, including substantive check rules of judicial decisions, taking advantage of, hitherto, achievements of the judiciary in relation to contract adjustment criteria (e.g. as in the event of exploitation or the, so-called, extraordinary circumstances- *rebus sic stantibus*)[25].

In the trend of promoting judicial discretion there is also the concept of "partial invalidity"[26]. As a rule, the DCFR accepts the classic approach that the remaining part of the contract provisions, following the annulment of defective provisions, retains its effectiveness unless it cannot reasonably stay in force without the invalid or ineffective part. Maintaining in force the remaining part of the contract may be based on a clause of reason, rather than on the hypothetical will of the parties. The advantage of objective criteria may also be connected with the postulate suggestion to thoroughly justify the effect of partial invalidity regarding the balance of mutual obligations between the parties to the contract[27].

An expression of the innovative character of the judicial sanction as specified in the DCFR is the introduction of the judicial discretion concerning the modification of the contract or change of its legal effects in the event of a violation of its imperative provisions (*iuris cogentis*). This judicial discretion provides the possibility to correct the content of the contract or its legal effects. That includes the settlement rules between the contractual parties in the context of invalidity, which further allows the court to adjust the settlement rules to a specific case[28].

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24 According to Art. II-7: 302 (3) DCFR the court, while making a judgement, should specifically take into consideration such circumstances as: a) the purpose of violated regulation; b) categories of persons protected by violated regulation; c) other sanctions possible to be applied on the basis of violated regulation; d) seriousness of violation; e) whether the violation is intentional; f) degree of connection between violation and contract.

25 Art. II-1: 108 DCFR. P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 68.

26 Art. II-1: 108 DCFR. P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 71.

27 Ibid., p. 72.

28 II-7: 303 (1) DCFR.

3. Manifestations of proportional response to defectiveness of a legal action (contract) in national private law subject to unification (harmonization) with EU law

3.1. General comments about the direction of transformations of invalidity sanction as a basis of national legality control mechanism in legal transactions

The invalidity sanction for a defective legal action (contract) by (virtue of) law (*ex lege*), which constitutes the basis of the national legality control mechanism in legal transactions[29], is subject to – as in other European countries – the evolution towards proportional (flexible) response to defectiveness of a legal action (contract).

The turn towards proportionality and greater flexibility of rigid invalidity sanction of a legal action (*ex lege*) stimulates EU law, while it is open to the Anglo-Saxon tradition and law-making role of the court, and further reflects a global business practice. The rigid invalidity sanction *ex lege* is subject to far-reaching evolution.

The limits of the current law (*de lege lata*) of invalidity sanction *ex lege* are heading towards special models of judicial discretion with separate normative foundations. On the one hand, those limits are expressed in a catalogue of other sanctions pertaining to the effectiveness of a legal action, which, in accordance with the principle of proportional applying invalidity sanction, are indeed normatively defined forms of the procedure of depriving a defective legal action of legal effects (so called external limits of applying invalidity sanction). On the other hand, however, further-reaching limits of applying the invalidity sanction are expressed by the expanding range of other effects of "partial invalidity" of a legal action. Partial invalidity, increasingly takes the form of detailed/more specific limits (so called internal limits of invalidity sanction)[30].

3.2 External limits of applying invalidity sanction *ex lege*

The ongoing theoretical search for proportional and flexible sanctions for defective legal actions, aimed at excluding disproportional application of invalidity sanction *ex lege*, may sometimes result to the detriment of the protected party; in practice this has led to the creation of a catalogue which is somehow external

29 Art. 58 Polish Civil code.

30 More about distinguishing the external and internal limits of applying absolute invalidity sanction (*ex lege*) P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 403.

to the invalidity sanction and its models, and which limits the automatic annulment of legal effects intended by the parties[31].

In accordance with softer procedural sanctions of annulment (of legal effects), which grant, according to the proportionality principle, greater possibilities to private parties to make use of legal protection measures (legal remedies) in legal transactions, the initiative in terms of invalidity (annulment of legal effects) is entrusted upon the parties to the contract (participants in legal transactions), who are better aware of the potential benefits of restoring the previous state (*restitutio in integrum*) of the contract instead of annulling it altogether.

In the event of specific, defined in the statute additional circumstances, national jurisprudence and legislations, are inspired greatly by the tradition *ius civile*, and approve that next to the rigid invalidity sanction by virtue of law (*ex lege*) its softer forms may be applied, as expression of proportionality *ad casum* of that basic sanction. They are: a) the possibility of annulment of such an action; b) suspended ineffectiveness; and c) relative ineffectiveness[32].

The above-mentioned sanctions may indeed lead to invalidity (annulment of legal effects) of a legal action (contract) but generally they create a better possibility of avoidance of invalidity and of maintenance of legal status intended by the parties. The decision to initiate a court case is taken by the participants of legal transactions, and not *ex officio* by the court.

Undoubtedly, those well-established, softer models of applying the invalidity sanction *ex lege*, (and more precisely, the specific types of procedures of depriving a defective legal action of its legal effects) implement, within a certain range, the directive of proportional response to defectiveness. However, the farther-reaching proportionality of invalidity sanction is expressed by the concept of "partial invalidity" of a legal action and its special forms, which allow, in a wider scope, for limited and normatively-ordered judicial discretion.

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31 M. Gutowski, *Nieważność czynności…*, p. 45; T. Liszcz, *Nieważność czynności prawnych w umownych stosunkach pracy*, Warszawa 1971; J. Preussner-Zamorska, *Nieważność czynności prawnej w prawie cywilnym*, Warszawa 1983; Z. Radwański, *Jeszcze w sprawie bezwzględnie nieważnych czynności prawnych*, „Państwo i Prawo" 1986, no. 6, pp. 93–98; T. Zieliński, *Znaczenie terminu nieważność w języku prawniczym*, "Krakowskie Studia Prawnicze" 1970, no. 3, pp. 55–74.

32 More about it M. Gutowski, *Nieważność czynności…*; Id., *Wzruszalność czynności prawnej*, Warszawa 2010; Id., *Bezskuteczność czynności prawnej*, Warszawa 2013; A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2018, p. 829.

3.3 Internal limits of the invalidity sanction *ex lege* and special types of the concept of partial invalidity of a defective legal action (contract)

3.3.1 General comments about the nature of "internal limits" in applying the invalidity sanction

Axiological and pragmatic considerations (the first referring to the protection of the party's autonomy and implementation of the justice principle, while the latter refers to the concern for the effectiveness of legal regulations), lead the legal systems domestically, as well as in other European countries, towards the tendency to avoid full annulment of the legal effects of a defective legal action (contract). That tendency is connected with the principle of proportional response to defectiveness of a legal action (contract), which, as a result, make the range of judicial discretion expand within a normative framework[33].

In theory, it is accepted that the effects of invalidity, based on the violation of law or morality, may be excluded by circumstances (events) that partially, or fully neutralize, the primary level of defectiveness, and exclude, *ex post*, the possibility of making a plea of a violation. Based on that consideration, the first step is considered to be the promotion of "partial validity", i.e. the preservation of the legal effects based on the proportional application of sanctions[34].

The expression of proportional (flexible) response of the legislator in the context of defectiveness of a legal action (contract) is, within classic model of invalidity sanction *ex lege*, the concept of "partial invalidity", and, in particular, the latter's special forms accepted under the influence of EU law and practice. In other words, the normatively defined exceptions from the invalidity sanction *ex lege*, allow the limitation of full invalidity of a legal action, i.e. the automatic exclusion of legal effects intended by the parties, as well as a law-making interference in the content of a legal action (contract). However, because of the inconsistencies of the empirically informed regulations, and in particular the overlapping of the range of exceptions from the invalidity sanction *ex lege*, these solutions may result in litigations and turn out to be ineffective.

The legislator expressly allows for the possibility of the partial limitation of the invalidity sanction *ex lege*, and the partial preservation of legal effects not only normatively but also in special provisions often created by the judiciary/judicature. Within national private law, *de lege lata*, the concept of reservation

33 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 275.

34 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 630.

of a different effect of violating law or moral norms is concurrent with the concept of judicial sanction[35].

Jurisprudence, however, makes attempts to classify the expanding catalogue of legal instruments aiming to maintain partial validity of a legal action (contract) but not without classification discrepancies[36].

3.3.2 The concept of invalidity of part of a legal action (contract)

The concept of partial invalidity, which allows for annulment of some of the legal effects of a defective legal action (contract) by preserving the remaining ones, constitutes one of the most important manifestations of the tendency of the national legislator to ensure the effectiveness and proportionality of the invalidity of sanction. Nowadays, the concept of invalidity is evolving, although not so much towards the legal presumption of limiting the application of general invalidity sanction *ex lege*, but rather towards an independent and quasi-independent sanctioning norm which increases judicial discretion[37].

In judicature and legislation there is a clear tendency to differentiate between new types of *sui generis* sanctions, i.e. different procedural tracks, leading to the partial invalidity referred to as "normative legal action". Independent norms are increasingly becoming the chosen mode of sanctioning in invalidity cases and apply only partially to the legal action[38].

Regarding the impact of invalidity of part of a legal action on the validity of the whole legal action the prevailing academic opinion is that the decisive factor is the individualized analysis of the situation of the persons performing the legal action, and the objective evaluation of how a reasonable person would act under the same circumstances.

The criteria of invalidity of a part of legal action are subject to objectivity. The tendency towards objectivity refers to the procedure of applying partial invalidity, by limiting the premise of the "hypothetical will" of the parties towards which it is postulated to accept the priority of objective criterion. The assessment made by the judiciary should determine, by a majority, the hypothetical will of the parties, based on the actions of a reasonable person acting on the specific

35 Art. 58 § 3 Civil code; Z. Radwański, *Prawo cywilne – część ogólna*, vol. 2, Warszawa 2008, p. 439; A. Bierć, *Zarys prawa prywatnego…*, pp. 827–828.

36 M. Gutowski, *Nieważność czynności…*, p. 435.; P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 607.

37 J. Pisuliński, *Sankcja zamieszczenia w umowie niedozwolonego postanowienia w świetle dyrektywy 93/13/EWG i orzecznictwa TSUE* [in:] M. Romanowski (ed.), *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości UE*, Warszawa 2017, p. 95.

38 Ibid., p. 99.

circumstances, assuming that there is no other relevant information available indicating the real intentions of the parties[39].

In principle, it is becoming increasingly common for partial annulment of legal effects of a defective legal action to not only be limited by the institutional framework, i.e. partial invalidity, but also by other specialized sanctions to address defectiveness, within the normative area. The system of defectiveness sanctions should be flexible, while individual cases of partial invalidity should be stressed/highlighted in order to clarify the procedural track (*ex officio* or upon request) or capacity to sue or be sued[40].

In particular, it is assumed not to allow, in accordance with the principle of deterrence and sanctions in favour of the weaker party, for avoiding sanctions by a party responsible for defectiveness. /In particular, it is common practice according of the principle of deterrence and the imposition of a sanction in favour of the weaker party, to avoid sanctions against a party who is responsible for defectiveness. The admissibility of the judge's interference in the content of the contract and in reshaping it are also not excluded. Additionally, it is said that such a form of proceedings cannot be blocked where the court, together with the parties to the contract, work out a position to issue a verdict[41].

The lawyers' pursuit to the possibility of proportional and flexible response to defectiveness of a legal action (contract) has resulted in creating, not without the influence of EU law, special forms of partial invalidity, without however implying that there are no further discrepancies in applying new forms of partial invalidity.

3.4 Special forms of partial invalidity

3.4.1 The ineffectiveness sanction of non-permitted (abusive) contractual provisions in consumer transactions (i.e. 'consumer not bound' by unfair contractual provisions)

The legal nature of ineffectiveness sanctions of non-permitted (abusive) contractual provisions, is an important issue in national consumer protection law, whose regulations are the result of the implementation of EU directives[42]. These non-permitted contractual provisions are also defined in terms of the consumer not being bound by unfair contractual provisions and with the parties bound by

39 e.g. Verdict of Supreme Court dating 12th May 2000, V CKN 1029/00, OSNC 2001/6, position 83.

40 P. Skorupa, *Nieważność czynności prawnej w prawie…*, pp. 656, 771.

41 Ibid., pp. 621, 636.

42 Art. 385 [1] § 1 i § 2 Civil code; M. Bednarek [in:] E. Łętowska (ed.), *Prawo zobowiązań – część ogólna*, vol. 5, Warszawa 2006, p. 595; E. Łętowska, *Prawo umów konsumenckich*, Warszawa 2002, p. 344.

other contractual provisions. The evaluation of juridical nature of that sanction causes numerous disputes both in European, as well as national, doctrine but opinions in that matter are evolving in the direction of partial invalidity. This development in the field of judicial sanctions has occurred because the effect of partial invalidity is the ineffectiveness of a defective provision *ex lege* or *ex tunc* and the distinguished differences do not justify the position that it is about a new type of sanction for a defective legal action[43].

The case law of the CJEU (Court of Justice of the European Union), which is significantly transformed, leaves it up to the national legislations to select the specific statutory standards with the aim to achieve the purpose of the directive and the effect of sanction (the consumer not being bound), This liberty, however, has contributed to a mismatch in European legal traditions and even resulted in introducing a sanction with specific formal characteristics, i.e. protective invalidity (*nullita di proteztione*)[44].

The case law of the CJEU has played an important part in defining the sanction of "ineffectiveness of non-permitted contractual provisions" in credit contracts when credits were granted in the amount regulated by the "valorization clauses" in case of credits indexed or denominated to a foreign currency exchange rate (Swiss franc). As a result of that, a problem concerning the evaluation of the legal nature of (the influence of) the defectiveness of such valorization clauses (on the legal fate of the entire contract) arose. Generally, it was assumed that acceptance of the allegation of abusiveness would not lead to the invalidity of the entire contract if the consumer had not agreed to that[45].

The jurisprudence of the CJEU, as well as of national courts, shows that the problem of being bound by the contract after eliminating the non-permitted contractual clauses and completing its content with relatively binding regulations under limited judicial sanction is an important practical issue. Another

43 M. Safjan [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, vol. 1, Warszawa 2002, p. 180; M. Romanowski, *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości UE*, Warszawa 2017, p. 8; M. Skory, *Klauzule abuzywne w polskim prawie ochrony konsumenta,* Kraków 2005.

44 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 646.

45 Verdict CJEU dating 3.10.2019 in the matter Dziubak v. Raiffeisen C260/18, as well as verdict CJEU dating 30.04.2014, C26/13; Verdict Supreme Court 14.05.2015r., II CSK 768/14, OSNC 2015/11, position 132 and verdict Supreme Court dating 8.09.2016, II CSK 750/15, LEX 2182659; M. Jabłoński, K. Koźmiński, *Bankowe kredyty waloryzowane do kursu walut obcych w orzecznictwie sądowym*, Warszawa 2018; M. Korpalski, *Co wynika z wyroku TSUE w sprawie frankowiczów,* Rzeczpospolita, 8.10.2019, https://www.rp.pl/Opinie/310089982-Co-wynika-z-wyroku-TSUE-w-sprawie-frankowiczow.html [access: 04.12.2019] and A. Wiewiórowska-Domagalska, *Trybunał nie rozwiązał wszystkich problemów frankowiczów*, Rzeczpospolita, 17.10.2019, https://www.rp.pl/Konsumenci/310179993-Trybunal-nie-rozwiazal-wszystkich-problemow-frankowiczow.html [access: 4.12.2019].

critical element is the prevention of invalidity by completing a consumer contract, as well as in which track it could proceed[46].

In European and national literature, except for the traditional model, which is trying to assign the sanctioning norm to pre-existing types of the defectiveness sanction (i.e. from partial invalidity to suspended ineffectiveness, or the situation of lack of incorporation of a contract template)[47] the theoretical model is becoming increasingly significant. This development means that in case of non-permitted contractual provisions, we are dealing with a *sui generis* norm which may be foreign to the Polish civil law. In particular, it is postulated to break free 'from the chains of thinking in traditional categories of civil-law sanctions' and to recognize the solution provided in consumer law as a specific sanction applicable only in this area of law, whose essence is expressed in the fact that the consumer is not bound by a non-permitted clause but with the entrepreneur being bound by it[48].

Without excluding the sanction of "suspended ineffectiveness" as the closest to achieve the objective of 'the consumer not being bound'[49], a farther-reaching solution would be to widen the competence of the judiciary to modify the content of the consumer contract (within limited and ordered discretion)[50].

3.4.2 Reduction preserving effectiveness

"Reduction preserving effectiveness", as internal limits of invalidity sanction *ex lege* but respecting the autonomy of the will of the parties, is associated with judicial sanction, i.e. accepting the competence of the court to define the content of the contract in the way of reducing the part of the content of a legal action which violates the law. Such a change may produce legal effects for the future[51].

De lege lata in the context of the "reduction preserving effectiveness" does not have an explicit ground in national regulations but it results from the analysis

46 M. Bławat, K. Pasko, O zakresie zachowania mocy wiążącej umowy po eliminacji klauzul abuzywnych, "Transformacje Prawa Prywatnego" 2016, no. 3, pp. 5–28; Review of CJEU Jurisprudence; M. Romanowski, *Życie umowy konsumenckiej…*, p. 35.

47 Not excluding application of a different civil law remedy, beneficial for the protected party (e.g. Art. 5 civil code, Art. 58 civil code). E. Łętowska, *Prawo umów konsumenckich…*, p. 338.

48 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 633; however, J. Pisuliński, *Sankcja zamieszczenia w umowie…*, p. 103.

49 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 606.

50 M. Łemkowski, *Materialna ochrona konsumenta*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, no. 3, pp. 67–96.

51 F. Zoll, *Kilka uwag o tzw. redukcji utrzymującej skuteczność*, "Transformacje Prawa Prywatnego" 2000, no. 1–2, p. 10; P. Skorupa, *Redukcja utrzymująca skuteczność na tle projektu księgi pierwszej kodeksu cywilnego*, "Studia Prawnicze" 2010, no. 3, pp. 93–146; A. Bierć, *Zarys prawa prywatnego…*, p. 837.

of the nature of the violation which may rely on qualitative or quantitative transformation of contractual balance. Its application requires general premises of admissibility to complete the content of the contract for its validity[52].

In national doctrine, it is assumed that the "reduction preserving effectiveness" aims to protect the party to the contract against adverse effect of applying partial invalidity. The result of its application may not be contrary to a statute, clause of reason, or justice[53].

In the literature and in the context of the judicature, it is generally accepted that the "reduction preserving effectiveness" is not admissible in relation to contracts concluded with consumers, where a non-permitted provision may only be replaced by relatively binding regulations[54].

However, exceptionally, the view is presented that in consumer trading, the reduction would be admissible as a unilateral sanction, applied when its effect would be more beneficial for consumer than the annulment of a non-permitted clause[55].

In Polish law, the "reduction preserving effectiveness" is combined with Article 58 of the Polish Civil Code which states that where a legal act is inconsistent with statutory law it shall be rendered null or void, unless the relevant provision foresees a different effect. This approach allows for a quantitative reduction when the contractual balance has been violated against the "principles of the social cohabitation" (principle of justice)[56].

A milder form of the "reduction preserving effectiveness" is the "interpretation preserving effectiveness", as a result of which part of the contract is questioned as unlawful and may be considered valid by way of interpretation[57]. In practical terms, the "interpretation preserving effectiveness" is treated as a combination of "partial invalidity" and "conversion", which complement each other[58].

52 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 275.

53 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 98.

54 E. Łętowska, *Prawo umów konsumenckich…*, p. 344.

55 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 683.

56 Ł. Węgrzynowski, *Sądowe ustalenie treści stosunku umownego*, "Przegląd Prawa Handlowego" 2007, no. 5, p. 45.

57 F. Zoll, *Kilka uwag o tzw. redukcji…*, p. 11.

58 T. Wiśniewski [in:] G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania*, vol. 2, Warszawa 2007, pp. 497–532.

3.4.3 Salvatory clause as a "parties to the contract protection instrument" against its (the contract's) invalidity

Generally, salvatory clauses constitute a protection instrument against the invalidity of a whole contract because in the event of partial invalidity of a contract they may prompt the court to recognize effectiveness of the remaining part of the contract[59].

Admittedly, their application depends on the free assessment of the court but they improve evidentiary proceedings since they contain solutions agreed by the parties to the contract in order to preserve validity of the contract.

Bearing in mind the functions of those clauses, three of their functions are indicated within the Polish literature, which serve to fill in gaps which arise in the text of the contract as a result of partial invalidity. The first function is referred to as the "preserving clauses", in which the parties express their will to uphold the validity of the remaining part of the contract in the event of the application of the invalidity sanction *ex lege* of one or more clauses in the contract. The second function refers to the "replacing clauses", which as reservation provisions define the replacement mechanism of invalid provisions. The third function is related to the "complementary clauses", which refer to the obligation of the parties to negotiate in order to change and complete the contract for obtaining the effects as closely as possible, in economic terms, to the original provisions[60].

The application of salvatory clauses is not allowed in consumer trading because of the duty of transparent and one-sided formulation of the general terms of the contract, and the statutory priority of relatively binding provisions, performing substitution functions[61].

3.4.4 Conversion of an invalid legal action into a different legal action corresponding to the hypothetical will of the parties

Conversion, as a legal instrument serving to save a partially invalid legal action through its 'interpretative switching to new tracks', constitutes a special/particular type of partial invalidity with a high degree of judicial discretion. It corresponds to general axiological assumptions that the consequences of violating an act (a statute) or good morals shall have an impact on the effectiveness of a legal action in a proportional way[62].

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59 Z. Radwański, *Prawo cywilne…*, Warszawa 2008, p. 267.

60 P. Drapała, *Wpływ klauzul salwatoryjnych na ocenę skutków nieważności części umowy* [in:] M. Pazdan, M. Szpunar, E. Rott-Pietrzyk, W. Popiołek (ed.), *Europeizacja prawa prywatnego*, vol. 1, Warszawa 2008, p. 165; R. Strugała, *Standardowe klauzule umowne: adaptacyjne, salwatoryjne, merger, interpretacyjne oraz pactum de forma*, Warszawa 2013, p. 196.

61 F. Zoll, *Kilka uwag o tzw. redukcji…*, p. 15.

62 K. Gandor, *Konwersja nieważnych czynności prawnych*, "Studia Cywilistyczne" 1963, no. 4, p. 30; A. Bierć, *Zarys prawa prywatnego…*, p. 838; M. Rzewuski, *Konwersja testamentu*

Conversion, which aims to protect the legitimate interests of the parties (against too severe invalidity sanction *ex lege*), is logically combined with the interpretation of the declaration of will (intent), as well as with the performance of a legal action. Conversion is founded on the interpretation of a declaration of will (intent), and more particularly, on the reduction inference, which posits that if an invalid action meets the acceptable requirements of a different type of a legal action, then it is assumed that another non-defective and less demanding action has been accomplished. It (the conversion) requires, however, identification of permissible legal effects with hypothetical will of the parties[63].

Despite the lack of a general legal ground/framework in Polish regulations based on normatively defined premises, the national doctrine sees the normative basis of conversion in the rules on the interpretation of declarations of intent determined in the Civil Code (Art. 65 Civil Code), pointing out, in particular, the directive-friendly interpretation. In this respect, the essence of conversion, aiming to "save" legal action is an interpretative treatment intending to reproduce the real, though implied (hypothetical) will of the parties, by weighing the interests of the parties. As a rule, it requires enriching linguistic interpretation with functional interpretation[64].

However, conversion of an invalid legal action into a valid legal action (through friendly interpretation of declarations of intent) may only be applied as a last resort measure, i.e. if it is not possible to uphold the validity of a legal action employing a concept, such as convalidation, which is similarly applied restrictively[65,66].

Indicated in the doctrine scope of application of conversion is often usedin practice. Generally, judicature connects conversion with interpretation with the aim to keep the declarations of intent in force, albeit in a modifimanner. Conversion is commonly applied in the area of contract law and commercial companies law, and it is particularly relevant in the context of invalidity of a legal action,

[in:] P. Stec, M. Załucki (ed.), *50 lat kodeksu cywilnego. Perspektywy rekodyfikacji*, Warszawa 2015, pp. 401–416.

63 M. Gutowski, *Konwersja umowy stanowczej w przedwstępną wobec zmian kodeksu cywilnego*, "Państwo i Prawo" 2004, no. 11, p. 52.

64 Z. Radwański, *Prawo cywilne…*, p. 433.

65 K. Gandor, *Konwersja nieważnych czynności…*, p. 81.

66 First, if invalidity of a legal action results from other than the constructive premises of invalidity with the exception of the legal form *ad solemnitatem*. Second, if a defective legal action meets the essential requirements of a replacement legal action which makes it possible to achieve a social – economic goal of a converted action and does not go beyond its legal effects. Third, from the interpretation of the declaration of intent it may be assumed that parties would perform a replacement the legal action if they knew that the legal action performed by them was defective (i.e. the "hypothetical will of the parties") M. Gutowski, *Nieważność czynności…*, p. 406.

particularly concerning formalities/ for formal reasons, i.e. in the event of a violation of *ad solemnitatem* form[67].

It is estimated that in the new civil code, conversion will gain a legal ground closer to the "effect formula", which derives from the Dutch Civil code, i.e. so that the effects of violation of law or good morals (fair dealings) influence the validity of a legal action in a proportional way. In particular, it is highlighted that conversion, used *ex officio*, and which is based on the "hypothetical will" of the parties may not be applied if this is contrary to the purpose of the violated norm[68].

3.4.5 Convalidation as a normatively limited "salvation" (regularization) of a defective legal action

In the process of counteracting the tendency towards the mechanical application of invalidity sanction by (virtue of) law (*ex lege*), in particular, with the violation of the proportionality principle, convalidation takes an important place. This is because convalidation complements the process of the application of sanctions based on (limited) judicial discretion, which enables a legal action to stay in force (considered effective) in the event of a subsequent change of circumstances (specific event), but only in situations which are clearly defined and regulated by law[69].

Admittedly, the convalidation mechanism coincides to some extent with the conversion mechanism although, there is a difference in practice. In the case of conversion, the final effects which will be upheld/stay in force will only be similar to the intended effects since they are not the ones which formally result from a legal action. Convalidation, however, concerns only such situations where the legal effects are known and defined. In the latter scenario, it is only necessary to find a legal ground to uphold them (the effects?) in force due to important arguments of axiological nature (e.g. the protection of good faith of persons acting in trust in legal action, the performance of an obligation)[70].

The directive of proportional reaction (just like in the case of other limitations) refers to the admissibility of convalidation and the exclusion of the invalidity sanction *ex lege*. The total elimination of legal effects of a "defective

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67 M. Grochowski, *Skutki braku zachowania formy szczególnej oświadczenia woli*, Warszawa 2017, p. 45.

68 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 420.

69 Ibid., p. 435.; M. Grochowski, *Skutki braku zachowania…*, p. 115; S. Grzybowski, O rzekomej konwalidacji nieważnej czynności prawnej, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1974, no. 3, pp. 37–49.

70 S. Czepita, Z. Kuniewicz, *Spór o konwalidację nieważnych czynności prawnych*, "Państwo i Prawo" 2002, no. 9, pp. 79–87; A. Szpunar, *O konwalidacji wadliwych czynności prawnych*, "Państwo i Prawo" 2002, no. 7, pp. 5–17.

declaration of intent", particularly in the absence of the required special form, would be incompatible with some of the fundamental principles.

In the absence of a global convalidation norm integrated into Polish national law, convalidation, as a way of preserving an invalid legal action, is admissible only in strictly defined cases (i.e. those which derive from Civil code or the Commercial Companies code), and it is defined as "statutory convalidation"[71].

According to the prevailing view, the most important effect of convalidation is that the legal action becomes valid from the moment of its performance. The sanction of the legal action follows *ex tunc* by virtue of a special event, although the legal action is valid as a non-defective one. Lack of defectiveness also refers to the legal effects caused up to the moment that a salvatory event takes place[72].

As in the case of last will, the performance of a contract next to passing time (expiration) is a basic statutory premise of "omission of allegation of violation of law" which is sanctioned by invalidity *ex lege*. Convalidation of a defective form, i.e. replacing the requirement of maintaining a special form (*ad solemnitatem*) by fulfilling a/the commitment (performing an obligation), is a European standard[73].

At the time of the performance of the contract, the requirement of a special form loses its validity. Hence, it is possible to have all kinds of claims.

The introduction of a general normative ground of convalidation of "an invalid legal action" in the national law is found in the draft of the First book of Civil code (dating 2015). According to that draft, the convalidation norm turns an invalid action into valid by virtue of law, from the moment at which the reasons for invalidity lose their meaning[74].

4. Normative model of a limited judicial sanction in the work of the national Civil Law Codification Commission

In the work of the Codification Commission and, in particular, in the subsequent drafts of the First Book of Civil Code (from 2008 and 2015), inspired by the EU model law (PECL and DCFR) there has been a pursuit of flexibility

71 S. Rudnicki [in:] *Komantarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2001, p. 190.

72 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 731; A. Bierć, *Zarys prawa prywatnego…*, p. 840.

73 M. Grochowski, *Skutki braku zachowania…*, p. 178.

74 Art. 76 Draft First Book Civil code dating 2015 r. drafted by Civil Law Codification Commission, Warsaw 2017; Z. Radwański, *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, Warszawa 2006; R. Trzaskowski [in:] *Kodeks cywilny. Księga I…*, p. 119.

of the premises of a traditional concept of invalidity sanction of a legal action (contract) *ex lege* and of expanding the range of the judge's discretion within statutory limits[75].

As a rule, maintaining, a traditional model of invalidity sanction *ex lege*, in the event of a violation of law (illegality) or morality (violation of good morals), greater flexibility has been granted to the current concept of reservation of a different effect of a defective legal action ("unless otherwise stated in the content or purpose of the contract")[76].

Judicial sanction (*structered discretion*), treated as a sanction which allows for proportional response to defectiveness and for more flexibility than the current general invalidity sanction (and external or internal limits), has become an extension of the existing concept of the reservation of a different effect of violation of law or morality[77].

Extending the role of reservation within the context of "different effect and approval" when applying discretionary judicial sanction, there is conviction of the need to break the present dogmatic (narrow) understanding of the effect of invalidity sanction, in particular – rejection of automatism in applying that sanction. It is particularly necessary to understand the concept of reservation of a different effect of violation in a dynamic (creative) way, comprising not only the situations in which an explicit legal norm provides for a different effect but also where the purpose of a violated norm is contrary to the invalidity sanction of a legal action (contract) as too far-reaching.

Establishing an appropriate sanction for violation of the law or moral norms should be informed by judicial interpretation of the violated norm, as it falls within the duty of the judiciary to define such a sanction whose effect will best reflect the purpose of the violated norm. As a result, this interpretation will serve best implementation of justice and market honesty. That means that the characteristics of other defectiveness sanctions, even the *sui generis* sanction, may inspire the judge in deciding/imposing a sanction[78].

Structured discretion, defined as a limitation to the judge's discretion, refers not only to model regulations of the EU (PECL and DCFR) but also to the regulation of judicial sanction in *common law*, without losing the feature of originality, at least in the area of *ius civile*[79].

In the case of an illegal action (contract) the judge's competence does not depart far from the EU model law in terms of functionality, although from

75 Reasons for the Draft dating 2015r. First Book of civil code Civil Law Codification Commission, pp. 106 and R. Trzaskowski [in:] *Kodeks cywilny. Księga I…*, p. 97.

76 Art. 58 § 1 Civil code.

77 P. Skorupa, *Nieważność czynności prawnej w prawie…,* p. 773.

78 R. Trzaskowski [in:] *Kodeks cywilny. Księga I…*, p. 97.

79 In particular P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 778.

a procedural perspective it more closely reflects/resembles-*common law*. In particular, the draft of the new Civil Code is oriented, as a rule, not towards the total elimination of legal effects but towards the preservation of at least some of their effects. Particularly/For example, a sanction outside the ambit of invalidity may consist of blocking or modifying legal effects of a defective legal action.

In the Draft of the Codification Commission the following sanctions are mentioned:

a) invalidity of a legal action with effects for the future;
b) instead of a provision contrary to law validity of a provision arising from an act or from good morals or the nearest will expressed in the content of a legal action;
c) no claim possible;
d) ineffectiveness of a legal action or a part thereof until an additional premise is fulfilled, including the consent of a designated person;
e) one or both parties have the right to withdraw or terminate a legal relationship;
f) ineffectiveness of a legal action against a person protected by the violated norm;
g) liability for damages of one of the parties towards persons whose interests were protected by the violated norm[80].

The draft of the Codification Commission, based on an approach normatively ordered (structured) and procedurally limited, does not only point to a catalogue of possible modifications of the characteristics of a sanction (sanctioning norm) but also determines the circumstances which limit (setting out) the court's discretion as grounds for the choice of a particular sanction (sanctioning norm). According to the draft, which was inspired by model law (Art. 15:102 (2) PECL), expresses that the court in determining the appropriate sanction, given the purpose of the violated norm, should consider in particular the following:

a) the interests protected by the violated norm as well as the interests of the parties to the contract but also third parties worthy of protection;
b) other legal effects which follow from the violation of the law;
c) awareness or lack of awareness of a violation of the law or of good morals on behalf of the persons performing the legal actions;
d) determining whether a legal action obliges to respect proceedings prohibited by law or good morals;
e) whether the contradiction of a legal action with the law or good morals results from the abuse of a stronger contractual position by one of the parties;

80 Art. 71 § 1 Draft Civil Law Codification Commission.

f) whether the performance of the parties' obligations leads to a result which was to be prevented by the violated norm[81].

In the literature, it is emphasized that the indicated proposal goes beyond the EU model law concerning some provisions (points). For example, it differs in departing from the examination of the criterion of the degree of violation in favour of an indication of the circumstances (point d-f), concerning not only the degree of the violation but also the dependence of the sanction on the status of the legality of the service[82].

Limiting the discretion of the court and increasing legal certainty is also reflected in the proposals for sanction of a different nature, which are defined more precisely. The initial proposal is a sanction of suspended ineffectiveness. It refers to the conclusion of a contract by a person not authorized by the public authority or the professional powers required by law, as well as to perform a legal action without the consent of the public authority[83].

Considering the normatively limited judicial sanction as a mechanism for proportionality of sanctions, one cannot ignore the discussion in the doctrine on its codification in the context of the general invalidity sanction. In the discussion, the view seems to prevail that the generally approved postulate of proportionality of the invalidity sanction should allow, in addition to the sanction specified by the court, the possibility of defending the parties to a legal action (contract) against unwanted legal effects resulting from the court's assessment by way of instance control. It is assumed that the limits of the discretionary power according to the criteria set out in the legal provisions should be obligatorily indicated in the grounds for the decision so that they can realistically constitute the basis for an instance control[84].

The draft of the Civil Code Codification Commission, providing for a normatively limited judicial sanction as a proportional response to a defective legal action (contract), is the basis for a lively discussion as to the normative approach, maintained by the Commission, of the general invalidity sanction by law (*ex lege*). As part of this discussion, the following issues are pointed out:

Firstly, in the sphere of legislation, the emphasis is on the need to limit the legislator's practice of creating law without an explicit sanction, as this leads to ambiguity of the law. The remedy for this is to provide legal provisions with subsections, which should specify relationships to specific premises for the concept

81 Art. 71 § 2 points 1–6 Draft Civil Law Codification Commission.

82 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 782; R. Trzaskowski, *Skutki sprzeczności umów…*, p. 110.

83 P. Skorupa, *Nieważność czynności prawnej w prawie…*, pp. 788–789.

84 Ibid., p. 837.

of invalidity (no legal effects). This (providing legal provisions with subsections) may occur by completely excluding the application of the general invalidity sanction in favour of other sanctions or by indicating the direction of modification of the features of the sanctioned norm (e.g. invalidity for the future, compensation for recognition as *ex tunc*). Secondly, in addition to the invalidity specified in the global norm and the proposal of norms specified in "subsections", tailored to specific areas of law (e.g. commercial companies law, labour law), it is necessary to assign the effects of violation of acts (statutes) to one model of formal features of sanctions. The same applies to the violation of moral norms and the violation of formal requirements *ad solemnitatem*.

Thirdly, in order to control the correct use of judicial discretion, it is considered necessary to determine accurately what the court should do when assessing a dispute when seeing disproportions in the consequences of the state of invalidity for participants (parties to the contract). The proportionality of sanctions should be defined from the perspective of the need to reject the extremely non-objective effects of restoring the previous state (*restitutio in integrum*); in particular, whether the grounds for damages are grounds of equity (justice).

The proposal of the Civil Law Codification Commission aimed to modernize the general (abstract) invalidity sanction *ex lege* by exemplary pointing out the direction of the modification of the characteristics of that sanction and determining the procedural position of the court. This practice is generally met with approval in the doctrine, as this solution is part of shaping the new European legal culture, which is expressed in pragmatism and not dogmatic attitudes[85].

85 In the literature it is accurately indicated that the legislative proposals of the Civil Law Codification Commission may increase the efficiency and effectiveness of the invalidity sanction of a legal action (contract), and/but they may also be counterweight for far-reaching influence of pressure groups (lobbyists) on law making in contemporary times. P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 837; A. Bierć, *Lobbing w prawodawstwie*, "Nauka" 2000, no. 4; Id., *Racjonalna procedura prawodawcza jako podstawa dobrego prawa* [in:] W. Czapliński (ed.), *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk. Praca zbiorowa*, Warszawa 2006, pp. 85–105.

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SUMMARY

In this essay there is an analysis of the reasons for the inefficiency of the traditional sanction of defectiveness of legal action (contract) by (virtue of) law (*ex lege*) as a traditional legality control instrument in legal transactions. The essay further indicates the desired direction of the modernization of that sanction in modern legal transactions. In particular, the concept is shown of the limited and normatively ordered judicial sanction, promoted by the EU model law (through the PECL and the DCFR), to expose the manifestations of proportional reaction to defectiveness of a legal action (contract) in national private law. This manifestation is also subject to unification (harmonization) with EU law. In the final part, there is description of a normative model of limited and normatively ordered judicial sanction, accepted by the Civil Law Codification Commission in Poland.

Key words: legal action, defectiveness (invalidity, nullity), judicial sanction, contract.

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Effectiveness of EU law and protection of fundamental rights – in search of balance in the context of the *ne bis in idem* principle

Abstract
The article undertakes the current and important issue of balancing between the Member States' obligations to ensure effectiveness of EU law and to respect fundamental rights, taking as an example the *ne bis in idem* principle, enshrined in Article 50 of the Charter of the Fundamental Rights of the European Union. The recent case law of the CJEU in *Di Puma*, *Garlsson and others* and *Menci* is analysed. These rulings exemplify the growing importance of the issue of how to balance the two obligations in a situation when the repression undertaken by a Member State in order to ensure the full effect of EU law may infringe a fundamental right provided for in the Charter. The main objective is thus to formulate proposals on how to balance these interests, as well as to define their consequences for national courts.

1. Introduction

The Member States' obligations to ensure the effectiveness of EU law and to respect fundamental rights are (among others) two cornerstones of the European Union edifice, both subject to continual attention and efforts undertaken by EU institutions, in particular, the European Commission and the Court of Justice of the European Union. The effectiveness of EU law (*effet utile*) is the subject of ongoing interest of European and Polish researchers, but it still escapes

unequivocal definitions[1]. For the purpose of the following analysis, effectiveness is understood in the broadest meaning possible as a general obligation of Member States to give full effect to EU law in their domestic legal orders[2]. This includes an obligation – resulting from the principle of loyal cooperation as enshrined in Article 5(3) TEU – to impose sanctions for infringements of EU law by individuals under their jurisdiction (within the implementation of EU law). At the same time, the Member States shall respect the fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter), "when they are implementing Union law" (according to its Article 51 (1)). Thus, when implementing Union law (including imposing sanctions for infringements of EU law) the Member States are, among others, bound by the *ne bis in idem* principle provided for in Article 50 of the Charter. The recent rulings of the CJEU of 20 March 2018 in the *Di Puma*[3], *Garlsson and others*[4] and *Menci*[5] cases, in which the *ne bis in idem* principle has been interpreted, exemplify the difficult choices that have to be made when the repression undertaken by a Member State in order to ensure the full effect of EU law may infringe a fundamental right provided for in the Charter. Those judicial decisions also reflect the growing importance of such questions and envisage the crucial role of national courts in seeking a balance between the effectiveness of EU law and protection of fundamental rights. The following analysis is divided into three parts: two introductory sections relating to the role of sanctions as a tool to ensure effectiveness of EU law and the obligation to respect the *ne bis in idem* principle in the context of criminal repressions. The third part is devoted to analysis of recent case law of the ECtHR and the CJEU, concluded with proposals for solving the conflict described above, as well as their consequences for national courts.

1 In the Polish literature see in particular D. Miąsik, *Zasada efektywności* [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, vol. I, Warszawa 2010, pp. 225–228 and the literature referred to therein.

2 A. Wróbel, *Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej*, "Ruch Prawniczy, Ekonomiczny i Społeczny" 2005, no. 1, pp. 38, 46.

3 Judgement of the Court of Justice of 20 March 2018, *Di Puma,* C-596/16 and C-597/16, ECLI:EU:C:2018:192.

4 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193.

5 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197.

2. Obligation to impose sanctions in order to ensure effectiveness of EU law

The effectiveness of EU law in the broad sense is strictly dependent on the enforcement of EU rules by the Member States' competent bodies. For that reason, the obligation of the Member States to introduce laws, regulations and administrative measures in order to ensure that Union law is effectively applied and complied with in the national legal orders stems from the general principle of loyal cooperation. As the Court of Justice confirmed in case 68/88 *Commission v. Greece*, the principle of loyal cooperation "requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law". This results in the obligation to ensure in particular "that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive" and that "national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws"[6]. Since that time, the Court of Justice has consequently upheld the strict relation between the obligation to ensure effectiveness of EU law and the obligation to introduce sanctions for infringements of it[7]. At present, it is beyond doubt that the Member States have the right not only to introduce and impose civil and administrative sanctions, but also – if the effectiveness of EU law thus requires – criminal sanctions, as long as they are dissuasive, effective and proportionate, and applied in a non-discriminatory manner. At the same time, as long as EU law does not impose such an obligation to introduce criminal sanctions in order to give full effect to EU law[8], the Member States are free to choose what kind of sanctions are the most appropriate in this context, including administrative penalties, criminal penalties or a combination of them[9]. Still, the combination of criminal proceedings leading to the imposition of criminal sanctions and administrative proceedings leading to the imposition of administrative

6 Judgement of the Court of Justice of 21 September 1988, *Commission v. Greece*, 68/88, ECLI:EU:C:1989:339.

7 From the abundant literature on this topic, in the Polish literature M. Szwarc, *Wpływ prawa wspólnotowego na prawo karne państw członkowskich*, Warszawa 2006; J. Łacny, *Sankcje za naruszenie prawa wspólnotowego* [in:] *K. Kowalik-Bańczyk*, M. Szwarc-Kuczer (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, vol. II. *Zasady-orzecznictwo-piśmiennictwo*, Warszawa 2007, pp. 762–830.

8 At present the EU competence in this field is expressly stated in Article 83(2) TFEU.

9 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 34.

sanctions may, in particular circumstances, raise doubts as to the compatibility of such dual repression with the *ne bis in idem* principle.

3. Obligation to respect the *ne bis in idem* principle in the context of criminal repression

As has already been established, under Article 51(1) of the Charter the Member States are bound by the obligation to respect its provisions "when they are implementing Union law". The interpretation of this criterion is particularly important in all situations where the link with EU law may seem not as obvious as in the clear-cut cases of implementation of EU directives (or framework decisions[10]) or the application of EU regulations. Nevertheless, the CJEU has already had an occasion to confirm, in particular, that the Member States are bound by the obligation to respect the fundamental rights of individuals in the context of mutual recognition of judgements in criminal matters[11] and – particularly relevant for the analyses that follow – in the context of application of national sanctions for infringements of EU law in order to ensure the full effectiveness of that law[12].

The *ne bis in idem* principle enshrined in Article 50 of the Charter is intended to protect individuals against being "tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". Before it was codified in the Charter, this principle was recognised by the Court of Justice as part of the general principles of EU law in the context of EU competition

10 Judgement of the Court of Justice of 16 June 2005, *Pupino,* C-105/03, ECLI:EU:C:2005:386, judgement of the Court of Justice of 3 May 2005, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, judgement of the Court of Justice of 27 February 2007, *Gestoras pro Amnistia*, C-354/04 P, ECLI:EU:C:2007:115.

11 Judgement of the Court of Justice of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, paragraphs 84, 100–101; see also T. Ostropolski, *Naruszenie praw podstawowych jako przesłanka wykonania ENA – uwagi do wyroku Trybunału Sprawiedliwości z 5.04.2016 r. w sprawach połączonych C-404/15 Aranyosi i C-659/15 PPU Caldararu*, "Europejski Przegląd Sądowy" 2016, no 11, pp. 20–26 and G. Agnostaras, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Căldăraru*, "Common Market Law Review" 2016, no. 53, pp. 1975–1704.

12 Starting with the judgement of 26 February 2013, Fransson, C-617/10, ECLI:EU:2013:105, then continued in the judgement of 8 September 2015, Taricco, C-105/14, ECLI:EU:C:2015:555, for more comprehensive analysis see recently M. Szwarc, Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej w kontekście stosowania prawa karnego (uwagi na tle orzecznictwa TSUE), "Studia Prawnicze" 2017, no. 3, pp. 47–79 and the literature referred to therein.

rules[13]. It was also confirmed that Member States were bound by Article 50 of the Charter when applying EU law in the context of the protection of EU financial interests[14], as well as framework decisions in the context of mutual recognition[15] and Article 54 CISA[16]. In recent rulings the CJEU has also confirmed that a Member State is bound by Article 50 of the Charter when introducing administrative sanctions into national law for infringements of an EU Directive[17], and when its competent bodies (i.e. national tax authorities) – in order to ensure the proper collection of VAT and to combat fraud – impose administrative penalties and initiate criminal proceedings in respect of VAT offences, as it constitutes implementation of the respective provisions of an EU Directive and Article 325 TFEU[18].

The principle provided for in Article 50 of the Charter corresponds to the *ne bis in idem* principle as enshrined in Article 4 (1) of Protocol No. 7 to the European Convention on Human Rights, according to which "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". Despite the considerable differences in the scope of application of the principle in the EU and Council of Europe systems[19], when Article 50 of the Charter is applied within the same Member State it must be given the same meaning and scope as the corresponding right in the Protocol and case law of the ECtHR[20]. The Court of Justice had, for a considerable period of time, consistently followed the interpretation of the *ne bis in idem* principle adopted by the ECtHR. In general, the

13 Judgement of the Court of Justice of 14 February 2012, *Toshiba Corporation*, C-17/10, ECLI:EU:C:2012:72, paragraph 94 and the case law referred to therein.

14 Judgement of the Court of Justice of 21 July 2011, *Beneo-rafti*, C-150/10, paragraph 68.

15 Judgement of the Court of Justice of 16.11.2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683.

16 On the *ne bis in idem* principle in Article 54 CISA see, in particular, B. Nita, *O zasadzie ne bis in idem w świetle art. 54 Konwencji wykonawczej z Schengen*, "Europejski Przegląd Sądowy" 2007, no. 7, pp. 4–10; A. Sołtysińska, *Zasada ne bis in idem z art. 54 konwencji wykonawczej z Schengen*, "Europejski Przegląd Sądowy" 2007, no. 7, pp. 35–40.

17 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 23.

18 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 21.

19 Which are immaterial in the context of this analysis, but the main one is that Article 4(1) of Protocol No. 7 concerns only "intrastate" proceedings, meaning a prosecution in only one state, whereas Article 50 of the Charter concerns "interstate" proceedings, meaning a prosecution between two different states.

20 Explanations to the Charter of Fundamental Rights, Official Journal of the European Union C 303/17 – 14.12.2007.

reasoning necessary to answer the question whether *ne bis in idem* is applicable in a particular case rests (according to the case law of both European courts) on assessment of the following elements: a) whether the proceedings are criminal in nature; b) whether the second proceedings are for the same act ("*idem*"); c) whether the first proceedings ended with a final decision; and d) whether there is a duplication of proceedings against the same person for the same act ("*bis*")[21]. Before moving forward to an examination of "*bis*", which is a central issue for the following analyses, let us briefly return to interpretation of "criminal proceedings" and "same act" in the case law of the ECtHR and the CJEU.

As far as the criminal nature of proceedings is concerned, it should be recalled that when assessing whether there was a "criminal charge" (in a particular case) in the meaning of Article 6 of the Convention, the ECtHR applies three criteria, namely: the legal classification of the offence under national law, the very nature of the offence, and the degree of severity of penalty that the person concerned risks incurring (the so-called Engel criteria)[22]. Then, this three-pronged test was applied by the ECtHR in the *Zolotukhin* case for the purpose of interpreting the term "criminal proceedings" in the meaning of Article 4 of Protocol No. 7[23]. Such an approach was fully adopted by the CJEU in the *Bonda* case when assessing the character of measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004[24]. In this particular case, the Court of Justice concluded that the penalties envisaged in the EU regulation could not be equated to criminal penalties in the meaning of the *Engel* criteria. As a consequence, the dual system of administrative sanctions under the EU regulation and criminal sanctions under the PIF convention, thus a system established by the EU law itself, could not be considered to infringe the *ne bis in idem* principle[25]. Since that time, the Engel/Bonda criteria have been consequently applied by the Court of Justice in assessing compatibility with the *ne*

21 For comprehensive analysis see A. Sakowicz, *Zasada ne bis in idem w prawie karnym*, Białystok 2011, including the EU and Council of Europe rules.

22 Judgement of the ECtHR of 8 June 1976, Engel and Others v. the Netherlands, application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, paragraphs 80–82.

23 Judgement of the ECtHR of 10 February 2009, *Zolotukhin v. Russia*, application No. 14939/03, paragraphs 52–53, see also M. Jackowski, *Zasada ne bis in idem w orzecznictwie Europejskiego Trybunału Praw Człowieka*, "Państwo i Prawo" 2012, no. 9, pp. 18–30.

24 Judgment of the Court of Justice of 5 June 2012, *Bonda*, C-489/10, ECLI:EU:C:2012:319, paragraph 37.

25 See also J. Łacny, M. Szwarc, *Legal Nature of European Union Agricultural Penalties*, The European Criminal Law Associations' FORUM 2012 / 4 eucrim; J. Łacny, M. Szwarc, *Sankcje w unijnych przepisach rolnych a zasada a zasada ne bis in idem – uwagi na tle wyroku Trybunału Sprawiedliwości w sprawie C-489/10 postępowanie karne v. Ł. Bonda* [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska (ed.), *Problemy wymiaru sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiego*, Warszawa 2013, pp. 894–921.

bis in idem principle of the dual system of administrative and criminal sanctions adopted by the Member States in order to ensure the effectiveness of EU law in the context of VAT offences[26] and insider dealing offences[27].

In respect of interpretation of the "same act", the ECtHR ruled in *Zolotukhin* that "Article 4 of Protocol No.7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same"[28]. There is no doubt that this standard of interpretation is also applied by the CJEU, interpreting the concept of "same acts" as "referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected"[29]. Thus, in the light of the CJEU case law the criterion of "the identity of the protected legal interest" is immaterial for assessment of the "same act", which is fully aligned with the ECtHR approach.

Therefore, the interpretation of notions crucial for the application of the *ne bis in idem* principle evolved. First, both courts – the ECtHR and the CJEU – departed from the "formal understanding" of "criminal proceedings" or "criminal sanction" (based on the legal classification in national law) towards their "material understanding" based on the repressive character of the sanction. Then, both courts decided to interpret an "offence" or the "same act" without reference to the legal classification in the national order, which also means adopting a "material understanding" instead of "formal understanding" based on the legal classification in national law. This judicial evolution resulted in widening the scope of application of the *ne bis in idem* principle, and thus the scope of protection of individuals against excessive repression. But this may also cause problems for those Member States which base their systems of repression on the dual system of criminal and administrative law. Departing from the formal approach based on the formal division between criminal and administrative law means that the *ne bis in idem* principle may apply also in situations where administrative sanctions are treated as "criminal in nature", and so the

26 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 35, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 26.

27 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193.

28 Judgement of the ECtHR of 10 February 2009, *Zolotukhin v. Russia*, application No. 14939/03, paragraph 82.

29 In the context of mutual recognition of judgements in criminal matters: judgements of the Court of Justice: of 9 March 2006, C-436/04, *Van Esbroeck*, ECLI:EU:C:2006:165, paragraphs 27, 32 and 36, and of 28 September 2006, *Van Straaten*, C-150/05, paragraphs 41, 47 and 48; in the context of Article 54 CISA – judgement of the Court of Justice of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraph 40.

duplication of sanctions of a criminal and administrative-criminal nature may infringe the *ne bis in idem* principle.

4. When effectiveness of EU law and protection of fundamental rights collide – different approaches of European courts

This is exactly the junction where the effectiveness of EU law and the obligation to respect the *ne bis in idem* principle may collide. As stated at the beginning of this article, generally a cumulation of administrative and criminal sanctions introduced by the Member States for the same act in order to ensure effectiveness of EU law is not contrary to the *ne bis in idem* principle, but only as long as the administrative sanction is not of a "criminal nature" as understood in *Engel/ Bonda* rulings[30]. In some cases, such as in the context of protection of financial interests of the EU, such a cumulation is even imposed by EU law itself, as was exemplified in *Bonda* case[31]. The same holds true in other cases when – in order to give full effect to EU rules – the Member States introduce a dual system based on administrative and criminal proceedings, for example, to combat fraud in VAT[32] or manipulating the market (insider dealing)[33]. The Court of Justice also consistently affirms the Member States' freedom to choose appropriate sanctions for infringements of EU law (as long as they are effective, dissuasive, proportionate and applied in a non-discriminatory manner). Still, choices made by the Member States may not compromise fundamental rights, in particular the *ne bis in idem* principle. The risk of such an infringement is more probable in these legal systems in which the reaction of the Member State to unlawful acts is based on a combination of criminal and administrative proceedings. On the one hand, giving priority to the protection of an individual against repression (which would be contrary to the *ne bis in idem* principle) might undermine the effectiveness of EU law, as it would prevent application of the dual system

30 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 37.

31 As a consequence, from the perspective of the *ne bis in idem* principle it was admissible for the Polish authorities to impose the administrative sanction in administrative proceedings for "irregularity" under the EU regulation (loss of entitlement to the single area payment for a certain period of time) and then to initiate criminal proceedings in order to impose criminal sanctions for "subsidy fraud" under the PIF convention (imprisonment and a fine).

32 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105.

33 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193.

of administrative (yet criminal in nature) and criminal sanctions. On the other hand, prioritising the effectiveness of EU law would, in turn, compromise a fundamental right which is one of the cornerstones of the EU edifice. Thus, both European courts initially applied a uniform interpretation of "criminal proceedings" and the "same act/offence". However, their case law later began to diverge.

4.1. ECtHR

When confronted with the question of whether the duplication of criminal and administrative (of a criminal nature) sanctions infringed the *ne bis in idem* principle, the ECtHR confirmed in *Grande Stevens v. Italy* the existence of such a violation[34]. The ECtHR based its reasoning on its earlier interpretation of "criminal proceedings" and "offence" and stated firstly that the administrative procedure resulting in fines for manipulating the market (established in the national system) "involved a 'criminal charge' against applicants", and secondly that the new set of criminal proceedings "clearly concerned the same conduct by the same persons on the same date"[35]. As these two elements were present in the case before the ECtHR, the Court itself had no doubts that the principle had been violated. It is important to note in this context that the Italian authorities imposed administrative fines for manipulating the market and then criminal sanctions for the same acts in fulfilment of the obligation to impose sanctions for unlawful conduct stemming from the EU Directive on market abuse. For that reason, the ECtHR referred also to EU law and the recognition of the *ne bis in idem* principle in the context of duplication of proceedings by the CJEU in its *Fransson* ruling as well.

In November 2016, however, the ECtHR adopted a somewhat new approach to the duplication of proceedings, which unfortunately raises more questions rather than offers clear answers. In *A and B v. Norway*, the ECtHR was confronted with the question of whether the imposition of tax penalties for VAT offences and then the initiation of criminal prosecution for the same acts amounts to a violation of the *ne bis in idem* principle (Article 4 of Protocol No. 7). When assessing the condition of whether a duplication of criminal proceedings was present ("*bis*"), the ECtHR stated that "Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. In particular, for the Court to be satisfied that there is no duplication of trial or punishment (bis) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly

34 Judgement of ECtHR of 4 March 2014, *Grande Stevens and others v. Italy*, Applications No. 18640/10,18647/10,18663/10,18668/10et18698/10.

35 Ibid., paragraphs 222–229.

that the dual proceedings in question have been 'sufficiently closely connected in substance and in time'"[36]. Thus, according to the ECtHR there may be situations when two proceedings are integrated to such an extent that they form a coherent response of the State to unlawful conduct, which implies, however, that "not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organizing the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected"[37]. Hence, according to the ECtHR, if criminal proceedings resulting in the imposition of criminal sanctions and administrative proceedings resulting in the imposition of an administrative sanction criminal in nature are so linked in time and in substance, than the *ne bis in idem* principle is not infringed because the second consecutive proceedings (immaterial whether criminal or administrative) are not treated as "*bis*". This may raise doubts as to whether the protection against dual prosecution or punishment is still effective, even if the ECtHR has elaborated the catalogue of material factors to determine the existence of "such a sufficient close connection in substance". These factors include: 1) the two proceedings pursue complementary purposes, which enables finding that they address *in abstracto* and *in concreto* different aspects of social misconduct; 2) the duality of proceedings for the same act is foreseeable in law and in practice; 3) the two proceedings are conducted in a manner which enables avoiding "as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set"; 4) the sanction which has become final as the first is taken into account in the second proceedings "so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate"[38]. As will be seen below, even if the CJEU decided to take a different path of reasoning as far as *bis* is concerned, it still adopted the reasoning of the ECtHR concerning the above catalogue.

36 Judgement of the ECtHR of 15 November 2016, *A and B v. Norway*, *Applications nos.*24130/11 *and* 29758/11, paragraph 130.

37 Ibid., paragraph 130.

38 Ibid., paragraphs 130–132.

4.2. CJEU

In the context of the possible duplication of criminal proceedings and administrative proceedings resulting in the imposition of an administrative sanction criminal in nature, the CJEU ruled in *Fransson* that "[t]he ne bis in idem principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine"[39]. At that time, such an approach was consistent with the case law concerning the *ne bis in idem* principle of the ECtHR and of the CJEU itself, as it was based on the material understanding of "criminal sanction" and the "same act". Also, the ECtHR in *Grande Stevens v. Italy* recalled the *Fransson* ruling regarding the conceptualisation of the *ne bis in idem* principle in EU law. Until that moment, a coherent interpretation of the *ne bis in idem* by the two European courts could be observed.

After that, however, the CJEU decided not to follow the reasoning of the ECtHR (in *A and B v. Norway*) and elaborated its own interpretation of "*bis*" in the context of the permissible duplication of repressive proceedings. The catalyst for this departure were the preliminary questions addressed by Italian courts regarding the interpretation of Article 50 in the context of the duplication of criminal and administrative proceedings and sanctions envisaged in national law: for the purpose of combatting VAT evasion (*Menci*) and for the purpose of combatting insider dealing and market manipulation (*Garlsson and others* and *Di Puma*). The point of departure in all those rulings was the statement from *Fransson* that "the *ne bis in idem* principle prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person"[40]. Then the CJEU followed its analysis with an assessment of the criminal nature of proceedings and penalties (recalling the Engel/Bonda criteria, but leaving for the referring national court to determine that)[41] and the existence of the same offence (applying the standard from *Kraaijenbrink* and *Mantello* and stating that "pecuniary administrative penalty of a criminal nature and the criminal proceedings at issue in the main proceedings appear therefore to relate to the same

39 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 37.

40 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, [C-537/16], paragraph 27.

41 Ibid., paragraphs 28–35, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraphs 26–33.

offence")[42]. If the Court of Justice had applied the reasoning from *Fransson* case, it would have had to rule consequently that because these two requirements were fulfilled, the *ne bis in idem* principle prevented the application of the second set of sanctions.

It decided instead to treat such a duplication of criminal proceedings and administrative proceedings resulting in the imposition of an administrative penalty of a criminal nature as a limitation of the fundamental right guaranteed by Article 50 of the Charter[43]. This results in the necessity to conduct the analysis from the perspective of Article 52(1) of the Charter, establishing the conditions for permissible limitations of rights.

5. Balancing effectiveness of EU law and protection of a fundamental right – an exercise in proportionality

This takes the discussion of the *ne bis in idem* principle into a different dimension, as it reflects the idea that the right not to be punished or prosecuted twice is not an absolute one, but may be restricted if the premises of Article 52(1) of the Charter are satisfied. Let us recall that for a limitation of a right to be in conformity with the Charter, such a limitation must be provided for by law and respect the essence of that right. In addition, such a limitation is permissible only if it is necessary and genuinely meets the objectives of general interest recognised by the Union or the requirement to protect the rights and freedoms of others, subject to the principle of proportionality. The Court referred to the *Spasic* case, where it had already concluded that "a limitation to the *ne bis in idem* principle guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) thereof"[44]. But *Spasic* was decided in a different context, namely that of Article 54 CISA, according to which "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party".

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42 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraphs 36–40, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraphs 34–38.

43 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 41, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 39.

44 Judgment of 27 May 2014, *Spasic* C-129/14 PPU, EU:C:2014:586, paragraphs 55 and 56.

In its reasoning the CJEU expressed doubt as to whether the first condition enshrined in Article 52(1) of the Charter was fulfilled, as the possibility of duplication of criminal proceedings and penalties as well as administrative proceedings and penalties of a criminal nature in cases before the Italian courts were provided for by law[45]. Such a conclusion raises no doubts, as the Directive on insider dealing had been implemented into the national legal system by Italian law (enacted by the parliament), and the provisions concerning combatting VAT fraud had also been contained in the law enacted by the parliament. In general, this condition is easily fulfilled and it will not cause problems, as the administrative proceedings and criminal proceedings are in general envisaged in national laws, which is necessary from the point of view of Member States' constitutional standards.

Further, the Court argued that since the national legislation "allow(ed) such a duplication of proceedings and penalties only under conditions which are exhaustively defined, thereby ensuring that the right guaranteed by Article 50 is not called into question as such", the requirement to respect the essential content of Article 50 of the Charter was satisfied[46]. Such a statement, however, may raise considerable doubts as there is no logic and visible link between the exhaustive definition of conditions of duplication of proceedings and the conclusion that such a duplication respects the essential content of *ne bis in idem*. As has been already observed, it is impossible to limit the *ne bis in idem* principle without violating its essential substance[47]. The right contained in Article 50 of the Charter may only be exercised (the person interested is protected from the second prosecution or conviction for the same act) or not exercised at all. The fact that the conditions of duplication of proceedings were exhaustively defined in law is rather an argument in favour of assessing the first requirement under Article 52(1) of the Charter, namely, that such a limitation is provided for by law. It is not relevant, however, for assessing whether it respects the essence of a right or not.

In the next stage, the Court of Justice admitted that limitation of the *ne bis in idem* principle might be justified by the general interest, when the national legislation aims at combatting VAT offences[48] or protecting the integrity of

45 Confirmed by the Court in paragraph 44 of *Garlsson* judgement and paragraph 42 of *Menci* judgement.

46 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 46, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 43.

47 A. Błachnio-Parzych, *Zasada ne bis in idem a obowiązek ustanowienia sankcji skutecznych, proporcjonalnych i odstraszających. Glosa do wyroku TS z dnia 20 marca 2018 r., C-596/16 i C-597/16*, "Europejski Przegląd Sądowy" 2018, no. 12, p. 42.

48 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 44.

financial markets of the European Union and public confidence in financial instruments[49]. Such legislation is justified when it pursues "complementary aims relating as the case may be, to different aspects of the same unlawful conduct at issue". In *Menci* the Court admitted that "it appears legitimate for a Member State to seek, first, to deter and punish any violation […] of the rules relative to VAT returns and collection by imposing fixed administrative penalties, where appropriate, on a flat-rate basis and secondly, to deter and punish serious violations of those rules, which are particularly damaging for the society and which justify the adoption of more severe criminal penalties"[50]. Similarly, in *Garlsson* it was admitted that "a Member State may wish, first to dissuade and punish any infringement […] of the prohibition of market manipulation by imposing administrative penalties set, as the case may be, on a flat-rate basis and secondly, to dissuade and punish serious infringements of such prohibition, which have particularly negative effects on society and which justify the adoption of the most severe criminal penalties"[51]. The reasoning of the CJEU may be understood to mean that there is general acceptance that the effectiveness of EU law may be achieved by the Member States not only [simply] by the cumulation of criminal and administrative (also administrative in nature) sanctions, but also allows for the duplication of criminal proceedings and administrative proceedings resulting in imposing administrative sanctions criminal in nature. This is a new thread in the reasoning of the Court in comparison with the *Fransson* case. It results in the admission that considerations of general interest, namely the effectiveness of EU law, may be prioritised before the protection of fundamental rights. On the basis of rulings in *Menci*, *Garlsson* and *Di Puma*, the Member States are authorised to maintain existing legislation or even enact new legislation providing for the cumulation of criminal proceedings and sanctions and administrative proceedings resulting in administrative sanctions criminal in nature in at least two fields: combatting VAT offences and combatting manipulation of the market. Still, the catalogue of other possible unlawful conduct subjected to such a duplication remains open. It may not be excluded that the CJEU would accept such a cumulation also in other areas where unlawful conduct is defined in EU law, for example in environmental law. The only limit to such a duplication is, thus, the principle of proportionality, as it stems from Article 52(1) of the Charter.

Thus, the key issue in the application of the *ne bis in idem* principle to the duplication of proceedings is the proper balancing between the effectiveness of

49 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 46; *Di puma*, paragraph 42.

50 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 45.

51 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 47.

EU law and protection of individuals in the framework of the proportionality test. According to the CJEU, the duplication of proceedings and penalties provided for by national legislation shall not "exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued"[52].

As to the appropriateness of national legislation, the Court of Justice assumed that as long as there are no harmonising measures concerning sanctions at the EU level, "Member States have the right to provide either for a system in which infringements of the prohibition of market manipulation may be subject to proceedings and penalties only once, or for a system allowing duplication of proceedings and penalties", and as a result "the proportionality of national legislation [...] cannot be called into question of the mere fact that the Member State would be deprived of that freedom of choice"[53]. Again, such reasoning raises doubts, because it lacks a sufficient logical link between the fact that Member States are free to do something and the conclusion that whatever they do within this freedom will be appropriate. Such an interpretation of appropriateness in this context makes the requirement illusory, because it leads to the conclusion that any duplication of the proceedings in a Member State is appropriate as long as the EU harmonising measure does not define the sanctions for infringements of EU law. As has been already noted, the most important issue should instead be the analysis of the sanctions envisaged in the national legislation and the assessment of whether they are effective, dissuasive and proportionate[54]. As a result, when the reaction to the same act may consist of criminal sanctions and administrative sanctions criminal in nature, those sanctions which are effective, dissuasive and proportionate should be chosen and maintained in the national legal system[55].

As to the necessity, the Court of Justice requires that the national legislation "provide[s] for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and

52 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 46.

53 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 49, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 47; in particular in *Garlsson* case the Court emphasized that the Directive on manipulating the market left a margin of choice to the Member States, see to that effect A. Błachnio-Parzych, *Sankcja karna a sankcja administracyjna jako środek przeciwdziałania manipulacji instrumentami finansowymi w wybranych krajach europejskich*, "Studia Prawnicze" 2013, no. 1, pp. 165–187.

54 A. Błachnio-Parzych, *Zasada ne bis in idem...*, p. 40.

55 Ibid., p. 41.

penalties"[56]. Again, the link between the necessity of the national legislation and the clear definition of rules can be hardly seen. The necessary measures are those without which the objective pursued would not [have been] attained. The fact that the rules for the possible duplication of proceedings are clear and precise is rather a question of legal certainty, and thus falls under the first requirement of Article 52(1) of the Charter, namely that the limitation is provided by law. If the necessity of duplication of proceedings is interpreted in the way proposed by the CJEU, then it will be very easy for the Member States to prove such a necessity. What is more, the national court which is asked to assess the necessity of such a duplication will have a rather easy task, because it will "only" have to make sure that the rules for duplication are clear and precise. This will not be difficult to assess as long as such rules stem from the law.

Finally, as far as proportionality *sensu stricto* is concerned, the CJEU formulated two general requirements, namely that the national legislation provides for "rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings" and "provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned"[57]. Such requirements correspond, in fact, to the rules formulated by the ECtHR in *A. and B. v. Norway* for the purpose of assessing "a sufficiently close connection in substance" of the criminal proceedings resulting in criminal sanctions and administrative proceedings resulting in administrative sanctions criminal in nature.

The CJEU has explicitly referred to that case in the *Menci* case[58], and thus opened the door for the national court to assess whether proportionality *sensu stricto* is respected or not. As a consequence, even if both European courts have adopted a different approach towards the interpretation of the *ne bis in idem* principle in the context of the duplication of criminal and administrative proceedings, in the end it will be a matter for the proportionality test. The proportionality of repression is also a requirement stemming from Article 49(3) of the Charter, as emphasized by the CJEU in the *Menci* case. The approach was completely different in *Garlsson,* where the CJEU stated that "in the event of a criminal conviction […] following criminal proceedings, the bringing of the proceedings relating to an administrative fine of a criminal nature exceeds what

56 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 51, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 49.

57 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraphs 55–56, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 63.

58 Ibid., paragraph 61.

is strictly necessary in order to achieve the objective referred to in paragraph 46 of the present judgment, in so far as that criminal conviction is such as to punish the offence committed in an effective, proportionate and dissuasive manner"[59]. Then it analysed the national legislation, taking into account that the sanctions include a prison sentence and a criminal fine liable to be imposed in the criminal proceedings, [corresponding] to the administrative fine of a criminal nature liable to be imposed in the administrative proceedings. For that reason, the CJEU concluded (subject to the final determination by the referring court) that bringing proceedings for an administrative fine of a criminal nature "exceeds what is strictly necessary in order to achieve the objective referred to in paragraph 46 of the present judgment, in so far as the final criminal conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner"[60]. Further, the Court considered that the rule of moderation of sanctions applies only to the duplication of pecuniary penalties, and not to the duplication of an administrative fine of a criminal nature and a term of imprisonment, and concluded that such a rule "does not guarantee that the severity of all of the penalties imposed are limited to what is strictly necessary in relation to the seriousness of the offence concerned"[61].

Conclusions

First, in *Menci*, *Garlsson* and *Di Puma* the CJEU decided to interpret the *ne bis in idem* principle autonomously with reference to Article 50(1) of the Charter only, and without taking ECtHR case law into consideration (at least in part, as in the *Garlsson* case). On the one hand, it admitted that Article 52(3) of the Charter required that "the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention", but at the same time recalled that the Convention was not "a legal instrument which has been formally incorporated into EU law". It also argued that the requirement to interpret the Charter in a manner consistent with the Convention might not adversely affect the autonomy of Union law and of the CJEU[62]. Thus, the argument of preserving the autonomy of EU law served as the basis for the CJEU of shaping its own reasoning in the context of *ne bis in*

59 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 57.

60 Ibid., paragraph 59.

61 Ibid., paragraph 60.

62 Ibid., paragraphs 23–24, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraphs 22–23.

idem. Having admitted that the *ne bis in idem* principle may be limited, because Article 52(1) of the Charter is applicable, the Court did not take into account the fact that under Protocol No. 7 the only limitation to the *ne bis in idem* principle is enshrined in its Article 4 (2), and refers only to the "reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of a new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which can affect the outcome of the case". As has already been emphasized, under Protocol No. 7 no other limitations are envisaged, and under its Article 4(3) *ne bis in idem* may not be suspended on the basis of Article 15 of the European Convention, which means that the right derived from the *ne bis in idem* principle is a right which may not be subject to derogations, even in exceptional situations[63]. It even concluded that the standard of protection offered by the CJEU is lower than that offered by the ECtHR, which amounts to an infringement of Article 52(3) of the Charter[64].

Secondly, the decisions of both European courts, even if different in reasoning, lead to a gradual erosion of the protection offered by the *ne bis in idem* principle. The ECtHR decided that the duplication of criminal proceedings and administrative proceedings, leading to the imposition of administrative sanctions of a criminal nature, does not constitute a duplication ("*bis*") when the particular requirements of "sufficiently close connection in time and in substance" are met. Thus, the prohibition of prosecution or conviction is not actualised, because the *ne bis in idem* principle does not apply. The CJEU decided that in such a situation the *ne bis in idem* principle applies in general, but at the same time such a duplication was a limitation that could be authorised when the requirements under Article 52(3) of the Charter were met. Again, prohibition of prosecution or conviction is actualised only when it is proved that any requirement from this provision of the Charter is not fulfilled. As has already been remarked above, some of these requirements are interpreted by the CJEU in a manner that raises doubts as to when these requirements would not be met.

Thirdly, as far as the tasks resting upon the national courts are concerned, the analysis – whether the *ne bis in idem* principle prevents prosecution or conviction in the case of duplication of proceedings – necessitates quite elaborate reasoning. It consists of: 1) assessment of whether the administrative proceedings and resulting sanctions are criminal in nature; 2) assessment of whether the second set of proceedings is initiated for the same offences ("*idem*"); 3) assessment of whether the first judicial decision has become final; 4) assessment of whether the second set of proceedings has been initiated ("*bis*"). If all of the above questions are answered affirmatively, the national court – when the case

63 A. Błachnio-Parzych, *Zasada ne bis in idem…*, p. 41.
64 Ibid., p. 41.

involves implementation of EU law in the meaning of Article 51(1) of the Charter – should conduct detailed analyses from the point of view of Article 52(1) of the Charter of: 1) whether the limitation to the *ne bis in idem* is provided by law; 2) whether it respects the essential content of the *ne bis in idem* principle; 3) whether the limitation may be justified by an objective of general interest; 4) whether it is proportionate, namely: a) appropriate; b) necessary; and c) proportionate *sensu stricto*. In general, the discussion is focused on the proportionality test both in the meaning of Article 52(1) of the Charter, and more particularly in the aspect of repression under Article 49(3) of the Charter, which may be a difficult task.

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SUMMARY

The Member States' obligations to ensure effectiveness of EU law and to respect fundamental rights are two cornerstones of the EU edifice. For the purpose of the analyses in the article, effectiveness is understood in the broadest meaning possible as the general obligation of the Member States to give full effect to EU law in their domestic legal orders. At the same time, the Member States shall respect the fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union "when they are implementing Union law". This includes Art. 50 of the Charter, where the *ne bis in idem* principle is enshrined.

The recent rulings of the CJEU of 20 March 2018 in the *Di Puma*, *Garlsson and others* and *Menci* cases, in which the *ne bis in idem* principle has been interpreted, exemplify the difficult choices that have to be made in a situation when the repression undertaken by a Member State in order to ensure the full effect of EU law may infringe a fundamental right provided for in the Charter. The analyses undertaken in the article concern: the role of sanctions as a tool to ensure effectiveness of EU law, the obligation to respect the *ne bis in idem* principle in the context of criminal repression, and the recent case law of the European Court of Human Rights and the Court of Justice of the European Union concerning interpretation of the *ne bis in idem* principle in the context of cumulation of criminal and administrative proceedings.

The main conclusion is that the decisions of both European courts (ECtHR and CJEU), even if different in reasoning, lead to a gradual erosion of the protection offered by the *ne bis in idem* principle. It is also concluded that, as far as the tasks resting upon the national courts are concerned, analysis of whether the *ne bis in idem* principle prevents prosecution or conviction in the case of duplication of proceedings necessitates quite elaborated reasoning, in which proportionality is the main issue.

Key words: *ne bis in idem*, effectiveness of EU law, fundamental rights, effectiveness of EU law, fundamental rights

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The conservation objectives of the Natura 2000 area in the light of law and case law[1]

Abstract
The article discusses the issue of conservation objectives of the Natura 2000 area. The basis for their analysis is the Habitats Directive and the Polish Act on Nature Conservation together with plans of conservation tasks. It is a key legal instrument for the proper management of the Natura 2000 area and the European network of Natura 2000 sites. Its importance is recognized in the legal interpretations made by the Court of Justice and non-binding documents of the European Commission. However, the question should be asked whether such an important, and indeed fundamental for Natura 2000, institution should not be clearer and more precisely regulated by the European legislator. Lack of unambiguous norms of the directive may cause discrepancies in defining the objectives of Natura 2000 protection both at the level of various EU Member States and at the national level – in relation to individual Natura 2000 areas in a given country.

1 The text was created as a result of the research project „Natura 2000 areas in Polish, Czech and Slovak law. Comparative analysis, financed by the Polish National Center for Science, No. UMO-2014/13 / B / HS5 / 01318.

1. Separation of conservation objectives of Natura 2000 in comparison with other legal purposes related to protection of the environment.

A goal should be understood as a certain postulated state of affairs which is to be achieved by undertaking specific actions, establishing norms and introducing organizational solutions. In this sense, a goal is always something planned, intended by those who take action, establish norms or introduce organizational solutions[2]. A goal is something that one strives for, aims at and wants to achieve[3].

As J. Sommer, one of the pioneers of the modern science of Polish environmental law, aptly remarked, the issue of the purposes which such law pursues is confusing. The problem arises of whether these are goals set by the legislator, or goals that link legal standards with the bodies that apply them, or goals that legal addressees expect to achieve based on legal standards[4]. Such differentiation, visible through the prism of the wording in which the legislator sets out certain goals, can be found in legal regulations.

Inspired by the aforementioned view on these objectives in law (legal purposes), and entering the plane of legal regulation of environmental protection, one can distinguish: 1) the objectives of the European Union in the field of environmental protection (objectives of European environmental policy), expressed in fundamental EU legislation (the Treaties), 2) the objectives of acts in the field of environmental protection, 3) the aims of actual activity, regulated by law, and treated by the legislator as essential – for the sphere of regulation, 4) objectives of legal institutions, created by rules (laws) governing the protection of the environment, 5) targets generally indicated by the rules, but defined for the specific needs of each case (area or object protected by regulations from legal protection of the environment), 6) regulatory measures for the implementation of the stated objectives.

Ad. 1. The best illustration of the first category of objectives is the wording of Article 191 paragraph 1 of the Treaty on European Union. This provision states that the Union's Environmental Policy contributes to the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational use of natural resources, promoting measures at international level to deal with regional or global environmental issues, in particular combating climate change.

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2 T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2019, p. 123.

3 S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, vol. I, Warszawa 2003.

4 J. Sommer, *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury*, Wrocław 2006, p. 6.

Ad. 2. An example of the purpose of environmental legislation can be taken from the preamble to Council Directive 92/43 /EEC of 21 May 1992 on the protection of natural habitats and wild fauna and flora[5] (hereinafter Directive 92/43). The main objectives of this act are to promote the preservation of biodiversity (preservation of such diversity may in some cases require the maintenance or even stimulation of human activity), taking into account economic, social, cultural and regional requirements. The aim of the Directive is to be in line with the achievement of the general objective of sustainable development. The adoption of measures to promote the conservation of priority habitats and species of priority importance to the Community is the joint responsibility of all Member States. The directive refers to numerous objectives, especially considering the level of their implementation. The most general and framework goal is to preserve, protect and improve the quality of the environment, including the protection of natural habitats and wild fauna and flora; this objective is in keeping with the general Community interest as expressed in Art. 130 (now Art. 174) of the Treaty establishing the European Community (the provision defines the Community policy and its objectives in the field of the environment).

Ad. 3. An appropriate exemplification is Art. 2(2) of the Act on nature protection, where the legislator lists the goals of nature protection (among others, maintaining ecological processes and stability of ecosystems, preserving biodiversity).

Ad. 4. A legal institution created by EU environmental protection regulations is the Natura 2000 area (and the Natura 2000 network of areas). The designation of special areas of protection that form a coherent European ecological network is a key legal instrument for implementing Directive 92/43. This is to enable the restoration or conservation of natural habitats and species of Community interest in an appropriate conservation status. In Art. 3(1) of the directive we read that a coherent European ecological network of special protection areas will be created, under the name Natura 2000. The goal of the Natura 2000 network is to preserve certain natural habitats and species habitats in the proper conservation status within their natural range or, if appropriate, to restore them.

Ad. 5. The general purpose indicated by the provisions, but requiring clarification for a particular area (object) is indicated on the basis of the interpretation of recital 10 in the preamble to Directive 92/43 and Art. 6(3) of this Directive. The preamble states that an appropriate assessment should be made of any plan or program likely to have a significant effect on the conservation objectives of an area, which has been designated or will be designated in the future. In turn, according to Art. 6(3) of the Directive, any plan or project that is not directly

5 Official Journal of the European Communities L 206/7.

related to or necessary for the development of the area, but which may significantly affect it, either separately or in combination with other plans or projects, is subject to an appropriate assessment of its effects for the area from the point of view of assumptions its protection.

Ad. 6. I mean such instruments that contribute to the proper implementation of the provisions of the European directive or national act. They can be, for example, reporting or scientific instruments. The preamble to Directive 92/43 states that "in order to ensure that the implementation of the provisions of the directive is monitored, the Commission will periodically prepare summary reports, inter alia, on the basis of information sent to it by the Member States regarding the application of national provisions adopted pursuant to the directive. In order to implement the directive, it is important to deepen scientific and technical knowledge, and it is therefore appropriate to support the necessary research and scientific work." In turn, the Polish Act on nature protection mentions in Art. 3 certain instruments (measures, activities) by means of which nature protection goals are implemented (e.g. including nature protection requirements in various plans, encompassing nature resources and creations with forms of protection, conducting educational activities).

It is worth asking the question of what distinguishes the objectives of conservation in Natura 2000 areas from the perspective of other legal objectives related to environmental protection. At the beginning, it should be stipulated that the objectives of the European ecological network Natura 2000 are a slightly different category, i.e., enabling the preservation of the indicated natural habitats of species in an appropriate state of conservation within their natural range, or, where appropriate, restoring them (Article 3 (1) of the Directive 92/43), comparing them for the purpose of protecting a given Natura 2000 site. The former are of a general and framework character. The latter should be specific in order to form the basis for the assessment of certain projects by law enforcement authorities. For example, in the ordinance of the Regional Director for Environmental Protection in Wrocław of 11 July 2014 regarding the establishment of a plan for conservation tasks for the Natura 2000 area Rudawy Janowickie[6], the objectives of protection indicated for a given subject of protection include preservation of the subject of protection in the appropriate conservation status, preservation of particular species' wintering grounds, enhancement of the state of knowledge, identification of threats, assessment of the conservation status and proposal of conservation measures, preservation of habitat patches. There is a preliminary reflection that the conservation objectives of a given Natura 2000 site are not

6 Zarządzenie Regionalnego Dyrektora Ochrony Środowiska we Wrocławiu z dnia 11 lipca 2014 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Rudawy Janowickie PLH020011.

always indicated precisely and clearly, which may give rise to doubts among the authorities involved in the process of applying the law.

Therefore, in further sections I want to deal with the legal nature of the conservation objectives of the Natura 2000 area.

2. The concept of conservation objectives and their place in the structure of Directive 92/43

The concept of conservation objectives is derived from legal language. It appears in several places in the text of Directive 92/43. In particular, recital 8 in the preamble to the Directive states that "it is appropriate to take the necessary measures in each designated area taking into account the conservation objectives pursued," while in recital 10 it provides that there should be "an appropriate assessment of any plan or program likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future."

Directive 92/43 does not define conservation objectives, nor does it directly require the establishment of "conservation objectives." Their appointment does not appear as one of the stages in the procedure towards the establishment of special areas of conservation. In Art. 4(1) of the Habitats Directive, when information on each area to be provided to the European Commission is mentioned, the site map, its name, location, size and data resulting from the application of the criteria listed in Annex III (stage I) are listed. The provision provides none of the conservation objectives of a given Natura 2000 site. There is therefore no formal obligation to identify these objectives, as opposed to "necessary conservation measures" as stipulated in Art. 6(1) of the Directive. In this provision, we read that for special areas of protection, Member States shall put in place the necessary conservation measures including, where appropriate, appropriate development plans developed specifically for these areas or integrated with other development plans, and appropriate statutory, administrative or contractual measures that meet ecological requirements natural habitat types or species. The European legislator, therefore, lists examples of protective measures necessary for the effective protection of a Natura 2000 site, orders them to be adopted by states, but does not indicate the obligation to set conservation objectives for a specific Natura 2000 site.

Seeing that the legal language does not contain a definition of conservation objectives, it is worth trying to define the understanding of the wording in the language we use to talk about the law. The concept and understanding of conservation objectives can be derived from the wording of certain provisions of Directive 92/43; in particular, I have in mind Art. 1 in connection with Art. 2 and 6(1).

The framework for achieving conservation objectives is set out in particular in Art. 1, especially when it defines the proper conservation status of a natural habitat and the appropriate conservation status of species. The objectives of protection should be situated between the general objectives of the Directive, as proclaimed by Art. 2(1) of this act, and the protection measures referred to in Art. 6(1). They appear as a way of achieving the general objectives of the Directive at a specific Natura 2000 site, and are reflected in specific protection measures (e.g. statutory, administrative or contractual) – which are employed precisely to achieve the protection objectives.

The conclusion is that Directive 92/43 does not specify the form and content of conservation objectives, nor does it indicate the role they should play in managing conservation areas. This is exceptional, especially in view of the fact that the definition of conservation objectives is key and creates a backbone for Natura 2000 structural coherence, due to their legal effects[7].

In summary, conservation objectives can be defined as results that should be achieved in each Natura 2000 site, a reference point for any human activity that may affect a Natura 2000 site, and a reference point for the development of conservation measures appropriate for a Natura 2000 area. It seems that the definition of conservation objectives is determined by two elements: 1) SDF (standard forms of data), providing information that can be defined as goals of protection (conservation objectives), 2) a favourable conservation status – which seems to be closely related to the objectives of protection. A favourable conservation status is a goal to be achieved via the implementation of conservation objectives.

The specific legal effects of conservation objectives are strictly dependent on their formulation, especially in terms of their precision and clarity. The more obscure and general conservation objectives are, the more difficult it is to precisely specify (predict) the effect of a plan or project or identify an appropriate compensation measure.

3. Legal significance of the conservation objectives of Natura 2000

The importance of correctly establishing the conservation objectives of a particular Natura 2000 site is revealed on several levels.

First, conservation objectives form the core of Art. 6(3) of Directive 92/43, which states that the assessment of any plan or project likely to have a significant

7 L. Stahl, *The concept of „conservation objectives" in the Habitats Directive. A need for a better definition?* [in:] *The Habitats Directive in its EU Environmental Law Context. European Nature's Best Hope*, New York 2016, p. 64.

impact on a Natura 2000 site is carried out from the point of view of the conservation objectives of that area. In this sense, precision in determining the conservation objectives of a specific Natura 2000 site is necessary for proper assessment of the impact of a plan or project on a given Natura 2000 site. In the jurisprudence of the EU Court of Justice, it has been stated that this provision sets a strict authorization criterion. If the plan or project carries the risk of violating the assumptions for the protection of an area, then they should be consistently considered as likely to strongly affect the area. When assessing the possible effects of plans or projects, their material nature should be determined in particular in the light of the characteristics and specific environmental conditions of the area to which the plan or project relates. Assumptions of protection can be established, as follows from Art. 3 and 4, and in particular Art. 4(4) of Directive 92/43, based on the importance of these sites for the conservation or restoration, in an appropriate state of conservation, of a type of natural habitat listed in Annex I or a species listed in Annex II, as well as for the purposes of Natura 2000 coherence and on the basis of the risk of degradation or destruction for which these areas are exposed[8]. In addition, a plan or project can only be implemented if there is no reasonable scientific doubt about the negative impact on the conservation objectives of the Natura 2000 site.

In this respect, conservation objectives seem to be a normative reference (basis) for assessing the significant impact of the project on the Natura 2000 site.

Secondly, the conservation objectives relate to compensatory measures referred to in Art. 6(4). These measures shall be taken in the light of the objectives of conservation, because they have to protect the overall coherence of Natura 2000, which contributes to the realization of conservation objectives. According to the position of the European Commission, compensatory measures should ensure adequate replacement of a given place and should refer to the purpose of protecting the given area[9].

The relationship between these two legal effects of conservation objectives is emphasized in the judgment of the Court of Justice in Case C-304/05: "knowledge of these effects [plan or project – AH] for the purpose of protecting the area in question is a necessary condition for the application of Article 6 paragraph 4 of the Directive 92/43, because otherwise it will not be possible to assess any of the conditions for the application of this derogating provision. The assessment of any essential reasons of overriding public interest and the existence of less harmful alternative solutions requires their consideration in relation to the

8 Judgment of the Court of 7 September 2004 in Case C-127/02.

9 See Managing Natura 2000 sites. The provisions of Article 6 of the `Habitats` Directive 92/43/EEC, European Commission guidance, http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf [access: 2.12.2019].

adverse effects caused by the plan or project in a given area. In addition, in order to determine the nature of any compensatory measures, the adverse effects on the site should be clearly identified"[10].

This necessary relationship, indicated by Directive 92/43, the Commission and the Court, is also reflected in Polish law. Article 34 of the Nature Conservation Act of 16 April 2004 provides for environmental compensation necessary to ensure the coherence and proper functioning of the Natura 2000 network.

Thirdly, the assessment of whether there has been a deterioration of natural habitats and habitats of species, as well as disturbance of species for which a Natura 2000 site has been designated (Article 6(2) of Directive 92/43), should be made from the perspective of the conservation objectives; in other words – from the point of view of the natural conditions that required the designation of Natura 2000.

Finally, conservation objectives legally determine the management of Natura 2000 sites because they should be implemented through appropriate protective measures (statutory, administrative, contractual), taken in accordance with Art. 6(1) of Directive 92/43.

Therefore, regardless of the legal location of the conservation objectives of Natura 2000 in national law, it should be stated that they have an indisputable normative force in accordance with Art. 6(3), which is also emphasized in the jurisprudence of the EU Court of Justice.

4. Conservation objectives in other acts of EU law

To further approximate the design of conservation objectives, it is worth comparing them with similar concepts found in EU law. We encounter them in the Water Framework Directive[11] (Art. 4 is dedicated to environmental objectives) or the Marine Strategy Framework Directive[12] (Art. 3(7) defines an environmental objective: a qualitative or quantitative statement on the desired condition of the different components of sea water and the pressures and impacts on them, for each marine region or subregion. Environmental objectives are determined in accordance with Art. 10 (titled Definition of environmental objectives).

10 Judgment of the Court of 20 September 2007, in Case C-304/05, Commission of the European Communities v Italian Republic.

11 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ EC L 327/1.

12 Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for Community action in the field of marine environmental policy, OJ EC L 164/19.

The environmental objectives (conservation objectives) of all three directives seem to be of a similar nature.

Although English texts distinguish environmental goals as *environmental objectives* (Water Directive) *environmental targets* (Marine Strategy Directive), in some of their national translations (French, German, Spanish) the terms are the same, both in the Water and Marine directives. Such semantic convergence reinforces the idea that the conservation objectives in both directives are of the same nature, or at least that the European legislator does not make a significant distinction between non-identical concepts.

This may allow further comparison with the conservation objectives of the Habitats Directive. In fact, all of these goals are aimed at achieving a good environmental status for certain elements of the environment: waters, marine environment, habitats and species.

In addition, these conservation objectives are not only guidelines, but are legally binding and set real environmental quality standards. These are the results that should be achieved.

Despite these common features, the Water Directive and the Marine Directive differ from Directive 92/43 because the first two clearly define it in terms of content, procedure, and effects of the environmental objectives they set, while the latter remains unclear and rather evasive.

This difference could be attributed to the fact that the Water and Marine Directives are newer and reflect some conceptual progress. In addition, it reveals the need for greater clarity in the Habitats Directive, which would be useful to guarantee the overall coherence of Natura 2000, especially given the content of conservation objectives, which have not been defined as of yet.

5. The conservation objectives of Natura 2000 area in the light of selected Polish legal regulations

The question arises of how national legislation treats the issue of conservation objectives, how they are implemented, which in Directive 92/43 has been defined rather vaguely, without clear indications for national legislators. National authorities, given the lack of a precise definition of conservation objectives, have some discretion in what they are to achieve. I would like to remind you that the European Commission recommends that they should be formulated as precisely and clearly as possible, that they should be included in something that can be identified, checked or counted. As a side note, it is worth noting that the Commission is trying to compensate for the shortcomings of Directive 92/43 by developing guides to help set conservation objectives, but such technical support is not able to fill the legal vacuum.

In Poland, the definition of conservation objectives is required from planning instruments for managing Natura 2000. Regulation, however, is different to the plan of protection tasks of Natura 2000 and the Natura 2000 protection plan. The Act of 16 April 2004 on nature protection[13] explicitly provides for the purposes of the tasks, which must articulate a plan of protection tasks, but it is less clear when it comes to a protection plan for Natura 2000. According to the wording of Art. 28(10)(3) of the Act, indication of the objectives of conservation measures is one of the elements that make up the plan of conservation tasks for a Natura 2000 site (together with, for example, a description of the site boundaries and a map of the site, identification of potential and existing threats to maintaining the proper condition of habitats, defining the objectives of protective measures, indicating the entities responsible for their implementation). Meanwhile – when we look at the obligatory components of the Natura 2000 site protection plan – we will not directly find the conservation objectives among them. Admittedly, a certain substitute for such purposes may be "determining the conditions for maintaining or restoring the proper conservation status of the objects of protection of Natura 2000 sites, maintaining the integrity of Natura 2000 sites and the coherence of Natura 2000 sites" (Article 29(8)(3) of the Nature Protection Act); however, if the legislature wanted to refer directly and clearly to the objectives of conservation measures (for the Natura 2000 site protection plan), then it should write so clearly in the legal text. Since it did not, we can assume that it did not perceive such a need.

The question may be asked whether the institution of conservation objectives, outlined in Directive 92/43 and developed in its legal interpretations, is something specific for Natura 2000 areas, or whether it applies to other forms of nature protection functioning in Polish law. The rational answer should be based on the assumption that it would be impossible to talk about effective, legal protection of a particular natural area without specifying the normative goals that this protection is to achieve. This is what the present text is for, providing arguments to support the hypothesis presented above.

Comparison of such a hypothesis with the wording of the relevant provisions of the Nature Conservation Act confirms the accuracy of the adopted assumption. When taking into account the regulation of the key forms of nature conservation in Polish law, we see that the protection plan for a national park, plan to protect a nature reserve, and the plan to protect a landscape park must contain an indication of the objectives of nature conservation and the natural and social conditions (additionally, economic conditions in a nature park) for their implementation (Article 20(3)(1), Article 20(4)(1) of the Nature Protection Act). Therefore, it is clear that the legislature not only notices the need

13 OJ L 2018, item 1614.

to indicate what nature protection in a given area is to serve (which protection objectives should be achieved), but also requires taking into account the accompanying circumstances (conditions) of social, environmental and economic nature. From this point of view, it may be astonishing that among the obligatory components of the Natura 2000 protection plan, there is no direct reference to the purposes of protection.

However, since they are an obligatory element of the plan of protection tasks under Natura 2000, it is worth investigating which of them are reflected in specific plans of protection tasks. In other words, how do specific plans for conservation tasks define the objectives of conservation activities? I place the objectives of protective actions against the background of indicated conservation activities; the relationship between them should be understood thus, that protective measures are to lead to the achievement of conservation objectives.

In the plan of conservation tasks of the Pilczycki Forest PLH 020069 Natura 2000 area[14], the objectives of the conservation activities are placed in Annex 4, along with the protection objects covered by the plan. They are defined primarily as: supplementing the state of knowledge about the habitat, restoring the proper structure and function of the habitat, improving the state of the habitat, supplementing the state of knowledge about the population of species, improving the possibilities of species migration. Protective measures (Annex 5) include, for example, removal of illegal dumps and garbage, leaving trunks of dead trees, limiting the performance of forest works, including cutting down dying trees, designating an educational and tourist path, preserving natural habitats that are objects of protection, and annual mowing.

In the plan of conservation tasks of the Natura 2000 Torfowisko Wielkie Błoto PLH 120080 area[15], protective actions for the object of protection are the restoration of species' habitats to proper condition via active protection and improvement in the parameters of protection. Examples of protective measures are the removal of deposits of trees and shrubs up to 20 years of age, inhibition of excessive water outflow, elimination of invasive and expansive species, continuation or restoration of extensive use of meadows, assessment of the effectiveness of activities related to the elimination of invasive species, water and legal survey.

The plan of conservation tasks for Natura 2000 Ostoja Nadgoplańska PLB 040004 of 1 February 2016, introduced by joint ordinance of the Regional

14 Zarządzenie nr 18 Regionalnego Dyrektora Ochrony Środowiska we Wrocławiu z dnia 11 października 2013r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Las Pilczycki PLH020069.

15 Zarządzenie Regionalnego Dyrektora Ochrony Środowiska w Krakowie z dnia 31 lipca 2014 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Torfowisko Wielkie Błoto PLH120080, http://krakow.rdos.gov.pl/files/artykuly/21154/bloto_zarzadzenie.pdf [access: 2.12.2019].

Director for Environmental Protection in Bydgoszcz and the Regional Director for Environmental Protection in Poznań[16] formulates examples of the following objectives of conservation measures: maintenance of at least 115 breeding pairs in the area, maintenance of at least 20 buzzing males in the area, supplementing the state of knowledge and undertaking protection measures determined on the basis of supplementing the state of knowledge, restoration and maintenance of habitats allowing to maintain at least 45 breeding pairs in the area. The protective measures indicated include annual mowing of herbaceous vegetation, monitoring of the conservation status together with assessment of the species abundance in the area, and determination of the areas in which it is necessary to preserve habitats.

In turn, in the plan of conservation tasks for the Natura 2000 area Lake Kubek PLH 300006[17], we find such conservation objectives as improving the conservation status by expanding the size of the habitat in the Natura 2000 area, improving the conservation status by recreating the conditions for the occurrence of submerged vegetation and floating leaves, and reducing pollution in Lake Kubek waters, improving the conservation status of the habitat by increasing the amount of dead wood, and monitoring species' conservation status. Protective measures include increasing the amount of dead wood, preparing an expert opinion on ichthyofauna, remodeling ichthyofauna in accordance with the expert's recommendations, cutting down blooms and growths, creating places for habitat development, and monitoring.

However, in the plan of conservation tasks for the Natura 2000 Mrowle Łąki PLH 180043 area[18], the objectives of conservation measures include advice to stop the decline of the habitat area – maintain the current area (8.23 ha) or increase it, restore it, and in patches with good conservation status and floristic composition appropriate for the habitats, ensure the preservation of sites and species habitats in the area. The implementation of goals is to be supported by such protective measures as marking area boundaries with information signage, preservation of the habitat by conducting extensive mowing or grazing, use in accordance with the requirements of the appropriate agro-environmental pack-

16 Zarządzenie Regionalnego Dyrektora Ochrony Środowiska w Bydgoszczy i Regionalnego Dyrektora Ochrony Środowiska w Poznaniu z dnia 1 lutego 2016 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Ostoja Nadgoplańska PLB040004.

17 Zarządzenie nr 9/13 Regionalnego Dyrektora Ochrony Środowiska w Poznaniu z dnia 4 grudnia 2013 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Jezioro Kubek PLH300006.

18 Zarządzenie Regionalnego Dyrektora Ochrony Środowiska w Rzeszowie z dnia 14 listopada 2016 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Mrowle Łąki PLH180043.

age, improvement of the habitat condition through shrub removal and felling, and monitoring of the condition of species present.

6. The conservation objectives of Natura 2000 in recent jurisprudence of the EU Court of Justice

The practical importance of the goals of protecting Natura 2000 areas is confirmed by the latest case law of the EU Court of Justice. The Court has raised the issue of conservation objectives in two recent judgments, issued on 12 June 2019, in the context of environmental impact assessments. In its judgment in Case C-43/18, the Court stated that Art. 3(2) and (4) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (Directive 2001/42) must be interpreted as meaning that the object addressed by the referring court, i.e., an order in which a Member State designates a special area of protection and sets out conservation objectives and certain preventive measures, is not included in "plans and programs" for which an environmental impact assessment is mandatory. The decision was made based on the following facts.

The CFE industrial group owns land in Belgium. As part of the creation of the Natura 2000 network, in 2003 the land was included in the list of sites proposed as special areas of protection. A number of complaints to Belgian and European institutions in which the CFE protested against the inclusion of land in Natura 2000 had no effect. Finally, on 14 April 2016, the government of the Brussels-Capital Region issued an ordinance regarding the designation of the area BE 1000001 as a Natura 2000 site covering the land in dispute. On 12 July 2016, the CFE appealed to the Belgian Council of State (administrative court) for annulment of the order. It alleged in particular a violation of Art. 3 of Directive 2001/42, because the government should have carried out an environmental impact assessment, because the ordinance of 14 April 2016 could have had a significant impact on the environment, or because the government should have at least determined whether this act could have had such an impact, which was not done. In reply, the government of the capital region states in principle that the said act is a measure directly related to or necessary for the development of the area within the meaning of Art. 6(3) of Directive 92/43, exempted from the environmental impact assessment pursuant to Art. 3(2)(b) Directive 2001/42. The Council of State asked the Court whether an ordinance in which a state authority designates a special area of protection in accordance with the Habitats Directive, containing conservation objectives and general preventive measures of a normative nature, constitutes a plan or

framework within the meaning of Directive 2001/42. In its justification, the Court stated, inter alia, that, having regard to the purpose of Directive 2001/42, which is to ensure a high level of environmental protection, the provisions determining the scope of its application, and in particular the provisions containing the definitions of the acts it covers, should be interpreted broadly. The arguments that the provisions of Art. 3(2)(b) Directive 2001/42 and Art. 6(3) sentence 1 of Directive 92/43 exclude in any case the obligation to assess the environmental impact in a case such as that at issue in the main proceedings should be rejected. In this regard, on the one hand, the Brussels-Capital region claimed that, since the regulation of 14 April 2016 sets out conservation objectives, it has only beneficial effects and, consequently, does not require an assessment of its environmental impact. However, it should be recalled that the fact that the projects are to have a beneficial effect on the environment is not relevant in the context of examination of the need to subject those projects to an assessment of their environmental impact. The Court also held that the existence of a plan or project that is not directly related to the development or necessary for the development of a given protected area depends mainly on the nature of the intervention. Meanwhile, the act in which a Member State designates a site as a special conservation area in accordance with Directive 92/43 is by its very nature directly related to land use or necessary for it. Article 4(4) of Directive 92/43 requires such a designation in order to implement it. Therefore, an act such as the order of 14 April 2016 may be exempted from the "appropriate assessment" within the meaning of Art. 6(3) of Directive 92/43, and in consequence of the "environmental impact assessment" in the meaning of Art. 3(2)(b) of Directive 2001/42. In addition, Art. 6(3) of Directive 92/43 provides that an appropriate assessment within the meaning of that provision shall be made in the light of "the assumptions for its protection." Meanwhile, the act defining the assumptions cannot be logically assessed in the light of the same assumptions. However, the fact that an act such as that at issue in the main proceedings need not necessarily be preceded by an environmental impact assessment pursuant to Art. 6(3) of the Habitats Directive in connection with Art. 3(2)(b) of Directive 2001/42, does not mean that it is excluded from all obligations in this respect, as it cannot be ruled out that it may lay down rules that will bring it into line with a plan or program within the meaning of that Directive, where an environmental impact assessment may be mandatory. As regards, first of all, the alignment of an ordinance with a plan or program within the meaning of Directive 2001/42 – it should be recalled that under Art. 2(a) of Directive 2001/42, plans or programs are those that meet two cumulative conditions, namely, on the one hand, they have been prepared or adopted by an authority at national, regional or local level or prepared by the authority for adoption through a legislative procedure by parliament or

government, and, on the other hand, are required by law, regulation or administrative provision. The Court has interpreted this provision in such a way that plans and programs whose adoption is governed by national statutory provisions should be considered as "required" for the purposes and application of Directive 2001/42 and, as a consequence, to be subject to assessment of their environmental impact under the conditions laid down in that Directive or executive order, which specify the competent authorities for their adoption and the procedure for their preparation. Secondly, as regards the question of whether a plan or program should be preceded by an environmental impact assessment, it should be recalled that plans and programs meeting the requirements of Art. 2(a) of Directive 2001/42 may be subject to an environmental impact assessment, provided that they are one of those plans or programs referred to in Art. 3 of Directive 2001/42. Article 3(1) of Directive 2001/42 provides that the environmental impact assessment is carried out in relation to the plans and programs referred to in paragraphs 2, 3 and 4 and which may have a significant impact on the environment. In accordance with Art. 3(2)(a) of Directive 2001/42, an environmental impact assessment is carried out for all plans and programs that are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, spatial development plans or land use and which set the framework for future development consent for projects listed in Annexes I and II to Directive 2011/92. In turn, in case number C-321/18, the Court ruled that Art. 3(2) and (4) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment must be interpreted as meaning that the order in which the body of a Member State shall be determined on a regional basis for network Natura 2000 conservation objectives are indicative, whereas conservation objectives at site level are normative, it is not included in "plans and programs" within the meaning of this Directive for which an environmental impact assessment is mandatory. The facts have evolved such that, in line with the Belgian Nature Conservation Act of 1973, the government sets conservation goals at regional level in Wallonia for each type of natural habitat and species; they are indicative. Based on these indicative goals, the government sets conservation objectives that apply at Natura 2000 level; these purposes are normative. The Walloon environmental code transposing the directive does not provide that the indicative protection objectives should be subject to an environmental impact assessment under "plans and programs." On 1 December 2016, the Walloon government adopted an ordinance establishing qualitative and quantitative conservation objectives applicable to the Walloon region in relation to Natura 2000. The social organization *Terre wallone ASBL* challenged the ordinance, claiming that it constituted a "plan or

program" within the meaning of the Directive, and should therefore be subject to an environmental impact assessment. In the justification of the judgment, the Tribunal indicated in particular that, in accordance with Art. 1 of the Directive, its aim is to ensure a high level of environmental protection and to contribute to the integration of environmental aspects into the preparation and adoption of plans and programs to promote sustainable development. Given the purpose of the Directive, the provisions determining the scope of its application, and in particular the provisions containing the definitions of the acts it covers, should be interpreted broadly. The Belgian Government and Ireland argue that since the decree of 1 December 2016 determines the purposes of protection, it has only beneficial effects and the consequences do not require an assessment of its impact on the environment. However, it should be recalled that the Court has already held that the fact that projects are to have a beneficial effect on the environment is irrelevant when examining the need to assess those projects for their environmental impact. As regards, first of all, the alignment of the order at issue in the main proceedings with the plan or program within the meaning of the Directive – it should be recalled that under Article 2(a) of the Directive, plans or programs are those which meet two cumulative conditions: namely, on the one hand, they have been prepared or adopted by an authority at national, regional or local level or prepared by an authority for adoption by means of a legislative procedure by parliament or government and, on the other hand, are required by laws, regulations or administrative provisions. The Court interpreted this provision in such a way that the "required" in the meaning and for the purposes of the Directive, and in consequence, to be subject to an assessment of their impact on the environment, should be considered plans and programs, the adoption of which is governed by national laws or regulations that define the competent authorities for their adoption and the procedure for their preparation. In the present case, the order of 1 December 2016 was prepared and adopted by a regional body, i.e. the Walloon government, and is required by Art. 25 bis of the Act of 1973. Secondly, as regards the question of whether the plan or program should be preceded by an environmental impact assessment, it should be recalled that plans and programs meeting the requirements of Art. 2(a) of the Directive may be subject to an environmental impact assessment, provided that they constitute one of those plans or programs referred to in Art. 3. Article 3(3)(1) of the directive provides that the environmental impact assessment is carried out in relation to the plans and programs referred to in par. 2, 3 and 4 and which may have a significant impact on the environment. In accordance with Art. 3(2)(a) of the Directive, an environmental impact assessment shall be carried out for all plans and programs that are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water

management, telecommunications, tourism, land use or land use plans and which set the framework for future development consent for projects listed in Annexes I and II to Directive 2011/92 on the assessment of the effects of public and private projects on the environment. The concept of "plans and programs" applies to any act which, by setting out control rules and procedures, establishes a significant number of criteria and detailed rules relating to the authorization and implementation of one or more projects that may have a significant impact on the environment. In the present case, the ordinance of 1 December 2016 does not list conservation objectives for specific areas, but summarizes them for the entire Walloon region. In addition, it results from Art. 25 bis 1, third paragraph, of the 1973 Act that protection objectives at the Walloon region level are only indicative, whereas Art. 25 bis in the second subparagraph of Article 2 provides that the conservation objectives applicable at the level of Natura 2000 sites are normative. In the light of these circumstances, it must be concluded that an act such as that at issue in the main proceedings does not set out a framework for future authorization to implement projects, and therefore it is not covered by Art. 3(2)(a) or Art. 3(4) of Directive 2001/42.

7. Summary and conclusions

Directive 92/43 is definitely laconic towards the conservation objectives of Natura 2000 sites. Meanwhile, it is a key legal instrument for the proper management of a Natura 2000 site and the European network of Natura 2000 sites. Its significance is recognized in the interpretations of law made by the Court of Justice and non-binding documents of the European Commission. The Court's statements are sometimes ambiguous, which is not surprising, given that the Directive provides little of the content of the objectives of protection, and also leaves it up to the national authorities to determine the forms and methods. This results in a very heterogeneous situation across individual Member States.

Interpreting the provisions of the Habitats Directive can help uncover the features and shape of this institution. However, the question should be asked whether the European legislature should not more clearly and precisely regulate such an important and even fundamental institution for Natura 2000. The lack of explicit standards in the Directive may cause divergence in the definition of the objectives of protecting a Natura 2000 site both at the level of all EU Member States and at the national level – in relation to specific Natura 2000 sites in a given country.

The Polish Act on nature protection uses the concept of the objectives of protecting a Natura 2000 area. It is surprising, however, that it does so literally

only in connection with the plan of conservation tasks for a Natura 2000 area. It does not formulate any instructions as to how to determine them. This leads to a state of affairs in which specific plans for protective tasks, in terms of defining protection objectives, are overly imprecise and too general. From this perspective, assessing and controlling whether the protection objectives of a given Natura 2000 area are being implemented may be difficult, or even impossible. This also applies to judicial control over the activities of public administration involved in setting and achieving protection goals.

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SUMMARY

The text consists of seven parts.

In the first part, against the background of understanding the purpose of law, I present the concept of the objectives of protecting the Natura 2000 area, confronting those objectives with other objectives expressed in the environmental protection regulations. It can be can distinguished: 1) the objectives of the European Union in the field of environmental protection (objectives of the European environmental policy), expressed in fundamental for the EU legislation (Treaties), 2) the objectives of acts involved to the field of environmental protection, 3) the aims of actual activity, regulated by law, and treated by the legislator as an essential – for the sphere of regulation, 4) objectives of legal institutions, created by rules (laws) governing the protection of the environment, 5) targets generally indicated by the rules, but defined to the specific needs of each case (area or object protected by regulations from legal protection of the environment), 6) regulatory measures for the implementation of the stated objectives. In the second part, I analyze the concept of the objectives of protecting the Natura 2000 site, based on Directive 92/43. The concept of conservation objectives is derived from legal language. A few times it appears in the text of the Directive 92/43. Conservation objectives can be defined as results that should be achieved in each Natura 2000 site, a reference point for any human activity that may affect the Natura 2000 site, a reference point for the development of conservation measures appropriate for the Natura 2000 area. Directive 92/43 does not specify the form and content of conservation objectives, nor does it indicate the role they should play in managing conservation areas. The third part is devoted to explaining why the proper diagnosis of the protection objectives of a Natura 2000 site is of great legal importance. First of all, precision in determining the conservation objectives of a specific Natura 2000 site is necessary from the point of view of proper assessment of the impact of a plan or project on a given Natura 2000 site. In the fourth part, I am looking for examples of other EU legislation in which the concept of conservation objectives appears. I am analyzing similarities with the protection objectives of Natura 2000. In particular, I recall the conservation objectives referred to in the Water Directive.

In the fifth part I describe examples of Polish legal regulations in which the legislator provides for protection purposes. National legislation treats the issue of conservation objectives, how it is implemented, which in Directive 92/43 has been defined in a rather vague manner, without clear indications for national legislators. National authorities, given the lack of a precise definition of conservation objectives, have some discretion in what they are to achieve. I would like to remind you that the European Commission recommends that they should be formulated as precisely and clearly as possible, that they should even be

included in something that can be identified, checked or counted. The sixth part is completed by the analysis of judgments of the Court of Justice, which reveal the practical importance of protection objectives, especially in the context of environmental impact assessment. In the last part I formulate a summary and conclusions.

Keywords: legal nature protection, environmental law, Natura 2000 areas, conservation objectives, environmental protection, Natura 2000

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The Question of External Integration of Jurisprudence in the Context of its Political Character

Abstract
The paper analyzes methodological determinants of jurisprudence, indicating several problems in the process of its integration with other sciences; the complex internal structure of jurisprudence and difficulty in meeting the requirements of the general-methodological naturalistic paradigm are considered sources of problems. According to the author, it is more appropriate to define integration as seeking links between theory of law and theories of related disciplines, which is the easiest in respect of political sciences and sociology (postulate of the political character of the law and the science of law). This is because of similar methodological determinants and commonly analyzed phenomena, as well as shared contemporary challenges. The author considers the process of mere transposition of methods and/or concepts developed in other disciplines to be an overly simplified vision of external integration.

1. Introduction

The paper discusses the question of external integration of jurisprudence in the context of its political character. Such an approach is a consequence of advancing the following postulate: the external integration of jurisprudence is executed to its fullest through taking social determinants of the law into account, where it is impossible to separate the law from its political context. The direction of external integration involving the cognitive or decisive approach, taken by Polish jurisprudence more than a decade ago, cannot definitively be called a "dead end"; however, it may require a correction due to contemporary social processes, of which the most important are the phenomena at the "point of convergence" between law and politics. An attempt to develop a program for the external integration of jurisprudence perceived as a naturalistic phenomenon (typical of non-positivist philosophies of the law) and separated from social-political inclinations must be made, with the reservation that the phenomenon which the research approach described above is trying to describe does not cover the entirety of the law as the subject matter under study.

It should be obvious to everyone that the remark about general sciences in jurisprudence losing interest in the political character of the law is untrue[1]. For sure, this political character has ceased to be perceived as it was in the period of development of the political trend of research in the Polish sociology of the law, i.e. at the turn of 1950s and 1960s[2]. Current social and political changes that can be observed both in Poland and elsewhere seem to cause various methodological problems, since legal practitioners are beginning to lose the set of notions which is necessary to explain emerging phenomena concerning the law. As a result, we are not only witnesses of a paradigm redefinition, but also of the emergence of new social phenomena at the "point of convergence" between law and politics. At the same time, the science of law (leaving aside attempts to explain its status) is faced with at least two new goals. At this point, I would like to make a preliminary remark that I am refraining from any evaluation of the above-mentioned paradigm shift; it often happens that legal practitioners judge these (using harsh words), justifying their assessments on

1 Cf. e.g. A. Bator, P. Kaczmarek (ed.), *Polityczność nauki prawa i praktyki prawniczej*, Wrocław 2017, passim.; M. Paździora, M. Stambulski, *Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań*, „Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, no. 1, passim, A. Sulikowski, *Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu*, "Państwo i Prawo" 2016, no. 4, passim.

2 Which was the case at the onset of the movement of multidimensional research on law when it was equated to external integration of the theory of law. Cf. K. Opałek, *Problemy metodologiczne nauki prawa*, Warszawa 1962, p. 109.

the grounds of obligation and timing[3]. Coming back to the goals, we can say that the first one is related to the necessity to formulate a theory, or at least its general assumptions, for an observed phenomenon. The process involves developing descriptive and explanatory propositions, but not the evaluative-normative ones, unless these are formulated from the perspective of a given system of ethics which allows for making evaluations. So there is a need to explain the rapprochement between law and politics, regardless of any judgements. The second goal stems directly from the first one, i.e. it involves finding and defining a new language, or at least an array of notions, which is appropriate for formulating a description. There are observations (of a rather disapproving nature) that existing notions of the theory of law may be inadequate to achieve this[4]. Ultimately, it makes little difference how we assess a phenomenon, unless observation of a given fact is relevant, which further entails the need to describe and explain it (hence developing a theory), and possibly establishing an adequate set of notions.

2. Selected Methodological Determinants of Jurisprudence Integration

At the beginning, I would like to make a general remark that the notion of integration of a given scientific discipline must be understood as the need to combine the discipline with another one. In the case of jurisprudence, the above definition influences certain basic assumptions.

First of all, any integrated "item" must have the status of a science, and not merely a so-called academic discipline which is listed in academic standards. This first condition is usually based around two requirements: (1) having own subject of research (phenomena for analysis) and (2) an autonomous research method (alternatively adapted from another science for use). Only these two assumptions allow us to acknowledge that a listed academic discipline has the status of a science and can be integrated[5].

The second condition is related to the determinants of integration, which is currently defined as an inevitable unification processes across the entire

3 Cf. e.g. J. Zajadło, *Pojęcie 'imposybilizm prawny' a polityczność prawa i prawoznawstwa*, "*Państwo i Prawo*" 2017, no. 3, passim; J. Zajadło, *Banał formuły dura lex sed lex*, "Palestra" 2019, no. 5, pp. 11–12.

4 Cf. J. Zajadło, *Fałszywość hasła 'demokracja a nie sędziokracja' – analiza filozoficzno-prawna*, "*Krajowa Rada Sądownictwa*" 2017, no. 3, p. 5 et seq.

5 Cf. H. Izdebski, *Ile jest nauki w nauce?*, Warszawa 2018, p. 27 et seq.; also cf. the topic on defining academic disciplines in: S. Kamiński, *Pojęcie nauki i klasyfikacja nauk*, Lublin 1961, passim.

science[6]. This trend is a kind of response to contemporary challenges which stem from the structure of general theories and detailed ones derived from them. So general theories must be characterized by generativity, i.e. be non-esoteric but allow for deducing statements which describe and explain variables encompassed by its subject of study, and ultimately make it possible to develop detailed theories. What I mean is a research program which allows for a comprehensive description and explanation of phenomena of polymorphic nature, which is particularly the case for natural and exact sciences. A good example of this trend is cognitive science (being of interest to legal practitioners as well) which, in the most general terms, blends subjects of study of many other sciences and adopts their research methods to understand (develop a model of) the human mind[7].

In the context of jurisprudence, the second condition involves the necessity to distinguish between so-called "internal" and "external" integration[8]. The concept of external integration is a response to requirements and needs linked to the unification process, whereas internal integration primarily serves the purpose of normative integration. It is all about developing mutually non-exclusive directive statements in the course of researchers' activities, where these are aimed at integrating (primarily) detailed sciences (doctrinal ones) with the support of general (theory and philosophy) and historical sciences in jurisprudence. It can be stated (with a bit of oversimplification) that the result of internal integration should be the participation in the development of a legal system through "ensuring communication and cooperation between individual sciences in the domain of the law"[9]. For this reason, a legal system is not the result of legisla-

6 Also manifested as the science uniformity postulate. Cf. J. Dadaczyński, *Georg Cantor i idea jedności nauki*, "Zagadnienia Filozoficzne w nauce" 2009, no. XLIV, p. 84 et seq.

7 Cf. W. Duch, *Czym jest kognitywistyka*, "Kognitywistyka i Media w Edukacji" 1998, no. 1, p. 9 et seq. M. Miłkowski remarked that "cognitive science […] is an interdisciplinary blend of psychology, linguistics, computer science, robotics, anthropology, philosophy, neuroscience, etiology, cybernetics." Quotation from M. Miłkowski, *Wyjaśnianie w kognitywistyce*, „Przegląd Filozoficzny – Nowa Seria" 2013, no. 2, p. 151. Cognitive science is also defined as a general theory of mind and cognition which is contrasted with epistemology, a discipline of philosophy, considered to be of speculative nature (which is vital in the context of this paper). A. Chmielecki, *Konceptualne podstawy kognitywistyki – krytyka i propozycje własne* [in:] http://www.kognitywistyka.net/artykuly/ach-kpk.pdf [access: 23.07.2019], p. 1 etg seq. Criticism of such type of relationship between cognitive science and philosophical epistemology: W. Załuski, *Nauki kognitywne a filozofia prawa* [in:] M. Zirk-Sadowski, B. Wojciechowski, T. Bekrycht (ed.), *Integracja zewnętrzna i wewnętrzna nauk prawnych,* part 1, Łódź 2014, pp. 175–176.

8 Cf. K. Opałek, *Problemy 'wewnętrznej' i 'zewnętrznej' integracji nauk prawnych*, „Krakowskie Studia Prawnicze" 1968, no. 1–2, passim.

9 Quotation from P. Jabłoński, *Polskie spory o rolę filozofii w teorii prawa*, Wrocław 2014, p. 132.

tive bodies' actions and, in the context of the continental legal culture, executive bodies' limited participation[10]. At the same time, the assumption of jurisprudence being a blend of individual juridical disciplines might be obvious to a legal practitioner but not to a researcher from a different domain. Here I must stress that general and detailed sciences make use of the same subject of research (yet the level and type are varied for individual disciplines and usually limited to a given field of law) and an identical research method, which is considered the dominant and fundamental one. In the case of jurisprudence, it is analytic philosophy focused on linguistic research on normative texts, where the status of belonging to the catalogue of sources of law is of utmost importance. Currently, as a part of studies on the practice of legal transactions, a lot of research is carried out on the quasi-legislative activity of individuals; this trend, among other things, deals with processes called "decodification of the law" and/or the emergence of so-called innominate contracts[11]. On the other hand, the opposite trend involves public law impacting private relations and appropriating the autonomous, private space of individuals. This is achieved through processes defined as juridicisation of social relations or expansion of public law[12].

To conclude, the internal integration of jurisprudence is about conducting analyses across particular juridical disciplines[13]. Underestimating this type of studies seems inappropriate at a minimum, since these are apparently a manifestation of the classic research activities of a legal practitioner. A kind of replacement of internal integration efforts with activities aimed at external integration is particularly undesirable in the context of juridical studies. Internal integration is more about matching the needs of the law perceived as a normative order, i.e. a set of (theoretically) non-exclusive normative statements of related content which can be characterized by certain features. In the case of law, these features are perfectly known as the results of legislative activities of certain types of subjects which are conveyed in some way. Consequently, in order to convey the statements, there must be a communication channel and a class of recipients. Of course, these are basic assumptions but, at the same time, they constitute a ground for seeking connections between the law (understood as science) and other social sciences, especially ones dealing

10 Cf. J. Wróblewski, *Obowiązywanie systemowe i granice dogmatycznego podejścia do systemu prawa* [in:] *Jerzy Wróblewski, Pisma wybrane* (choice of papers and introduction by M. Zirk-Sadowski), Warszawa 2015, p. 250 et seq.

11 Cf. *Dekodyfikacja prawa prywatnego*, F. Logchamps de Berier (ed.), Warszawa 2017, passim.

12 Cf. G. Skąpska, *Prawo a dynamika społecznych przemian*, Kraków 1991, p. 6.

13 Cf. A. Bator, *Integracja prawoznawstwa a rozumienie kompetencji w szczegółowych naukach prawnych* [in:] W. Jedlecka (ed.), *Z zagadnień teorii i flozofii prawa. Kompetencja ze stanowiska teorii i flozofii prawa*, Wrocław 2004, pp. 21–22.

with the state and politics. This confirms that the postulate of an unbreakable link between the law and politics is valid: at least in this domain and as a result of a certain need. It can be observed that while the contemporary, cognitive science-oriented, naturalistic approach to the law seeks relations between symptoms of normativity in human biological determinants (including evolution-related), the positivist trend has always rejected all axiological evaluations and makes do with the conclusion that the question of primacy of the law over politics in a purely functional dimension is senseless; that is because one cannot essentially exist without the other in the social dimension and, consequently, in the empirical dimension. As a matter of fact, any positivist research program must refer to something that is perceptible, real, measurable[14]. Consequently, the relation between law and human political activities (defined as striving for goals according to adopted criteria and in the course of governance) must be chosen as the subject of analysis, even with all the evaluations intact[15]. In the case of research programs, reflections on the primary and the secondary (i.e. law or politics) are nearly absent from the field of analysis, absolving the scholar of the necessity to answer the question.

J. Stelmach neatly summarizes the issue in saying that "the myth around the foundation of the 19th century positivist philosophy [...]" comes down to "a quest for 'a method allowing for building a truly scientific theory of the law which is free from metaphysics and is able to produce verifiable statements'"[16]. It is the speculativeness of research results that we should symbolically consider the embodiment of the problem indicated by A. Bator, Z. Pulka, A. Sulikowski, and others[17]. The

14 Z. Pulka vividly states that "legal positivism is largely a meta-scientific trend and can be *per se* considered as a certain concept of the legal science." Quotation from Z. Pulka, *Legitymizacja państwa w prawoznawstwie*, Wrocław 1996, p. 103.

15 Cf. J. Szczepański, *Dyscyplina nauk o polityce. Status teoretyczny i prawny*, "Społeczeństwo i Polityka" 2013, no. 2, pp. 135–136.

16 Quotation from J. Stelmach, *Spór o metodę we współczesnej nauce ogólnej o prawie* [in:] *Prawo i polityka*, Warszawa 1988, p. 283 after: A. Bator, Z. Pulka, A. Sulikowski, *Czy koniec teorii prawa?*, "Acta Universitatis Wratislaviensis, Prawo" 2011, no. CCCXII, p. 13.

17 The authors consider "'the legal method' as a weapon in the fight against the postulate of randomness and intuitive nature of reflection in the science of the law" (quotation from and cf. A. Bator, Z. Pulka, A. Sulikowski, *Czy koniec...*, p. 13), referring to, among other things, a famous speech by "Kirchmann, a prosecutor from Berlin, who in 1848 possibly delivered his most famous speech for the prosecution. In his lecture entitled *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, not only did he critically evaluate the development of jurisprudence, but also stated that knowledge of legal practitioners is utterly useless or even 'parasitic,' saying, among other things, that 'legal practitioners have become worms preying on rotten wood, turning their backs on what's healthy. They nest and spin their thread in a sick world, and the science of the law is becoming a servant of coincidence, error, passion, and misconception, with its eyes stared into the future only'" (J. Stelmach). Quotation from J. Stelmach, *Pozytywistyczne mity metody prawniczej*, "Forum Prawnicze" 2012, no. 3, p. 7.

remedy for this was the process of developing a research methodology which we can call "an escape into empiricism" and contrast with "an escape into text"[18]. At first, there were attempts to establish a philosophical image of law as a science with a method which allows for delivering consistent results of intellectual operations performed on the subject of research, i.e. a legal text. This trend was further elaborated with various objective theories of semantics (currently referred to as dynamic ones)[19], which were to help meet the above-mentioned condition. In the end, the effects of the program turned out to be unsatisfactory, and the resulting disillusionment has been observable ever since. The strongest argument against the program was that the phenomenon of law was limited to the linguistic aspect only, which is targeted at the text of a normative act[20]. Even in case of the continental legal culture, which highlights the key role of textual sources of the law, supporters of the research program were targeted for criticism due to the significant limitation of the subject of research. We can conclude that it is a kind of limitation of the phenomenon of law to the aspect which is important from the perspective of practice but cannot explain the law in its entirety. Actions aimed at counteracting this state usually take two forms.

The first form can be summarized as ignoring the problem; in other words, it is a further escape into the directivity of a given concept of statutory interpretation, where this concept is to be granted to interpreters in a top-down fashion by a centralized entity. This presents a basic problem of the necessity to adopt the assumptions of this theory and to act according to its prescriptions in a "step-by-step" fashion by interpreters (this is because the research method is perceived as a conventional activity which allows for delivering the same results in comparable circumstances). This approach also involves the adoption of the theory of meaning from the science of logic, which is to ensure external integration of the theory of statutory interpretation. The persons impacted by this approach are completely beyond the scope of its creator's interest. Methodical adequacy in constructing a set of statements as well as locating statutory interpretation in a concept of meaning, philosophy of language, etc. are the most important; the role of the statements is to ensure consistency of interpretative activities concerning the text of a normative act[21]. All of this creates a paradox. Noticing the dissonance between the formula of creating a method for use in the legal field

18 Cf. A. Kozak, *Kulturowy fundament decyzji interpretacyjnej* [in:] A. Sulikowski (ed.), *Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa*, Wrocław 2006, p. 34.

19 Cf. E. Waśkowski, *Teoria wykładni prawa cywilnego*, Warszawa 1936, p. 15.

20 S. Ehrlich criticized this approach, calling it "an isolated doctrine." Cf. S. Ehrlich, *Dogmatyka prawa a metoda porównawcza* [in:] S. Ehrlich (ed.), *Studia z teorii prawa*, Warszawa 1965, p. 24.

21 Cf. e.g. M. Matczak, *Imperium tekstu. Prawo jako postulowanie i urzeczywistnianie świata możliwego*, Warszawa 2019, p. 17 et seq.

with the use of a given theory of statutory interpretation and needs of its real addressees, i.e. interpreters of various types (usually but not necessarily judges only; we speak of people who professionally deal with the law and, consequently, take part in processes of operative and/or doctrinal statutory interpretation), involves an attempt to soften the scale of directivity of the theory; as a result, we lose its fundamental effectiveness as a tool for delivering (theoretically) consistent semantics based on the same fragment of a legal text. Consequently, we devalue the basic condition of such a theory as a scientific method.

The opposite approach is represented by concepts categorized as discursive-sociological ones. For the sake of this paper, it is not necessary to discuss them in detail. The concepts come down to either rejecting the postulate of the primary status of legal interpretation as a research method which offers a "scientific" method to jurisprudence, thereby accepting the fundamental role of the justification context instead of the discovery context[22], or highlighting the necessity to examine real interpretation practice. So, in respect of the latter meaning, the concepts are of an empirical nature. The process of intellectual operations leading to developing a semantics appears to be either of lesser interest to jurisprudence or impossible to be scientifically understood. Sociological concepts are sometimes defined as theories of statutory interpretation which are developed based on analyzing the practical actions of a class of interpreters (so-called bottom-up approach or bottom-up developed theories of statutory interpretation[23]). It is suggested they may transform into directive concepts and satisfy the need of consistency of interpretation results if a developed image of practical actions becomes widespread among a given group of interpreters. However, the above assumption involves a lot of imponderables. First of all, the concepts do not highlight the role of interpretation as a method meeting the positivist criterion of counteracting the speculativeness of results. Instead, they stress the process of developing a theory itself which focuses on the question of organizing an empirical research process addressing the need of representativeness of results derived from observations of interpretation activities. The resulting flaw is related to the impossibility of separating the sphere of interpretation (obtaining meaning) from the process of its justification (argumentation). As a result, both phenomena of law are considered a joint subject of research and interpretation theories of this type are defined as empirical theories of argumentation. It is theoretically a broad research program which radically shifts emphasis from an

22 Cf. J. Holocher, *Kontekst odkrycia i kontekst uzasadnienia w świetle topicznej koncepcji prawa*, „Studia Prawno-Ekonomiczne" 2009, no. LXXX, passim.

23 This can be compared to "a clash" of social processes which are categorized as "top-down" and "bottom-up." Cf. J. Helios, W. Jedlecka, *Wykładnia prawa Unii Europejskiej ze stanowiska teorii prawa*, Wrocław 2018, p. 56.

evaluation of what is to determine the subject and the research method of jurisprudence. These roles are attributed to the methodological process itself, which is located at the metatheoretical level. The above assumptions are of course disputable, but, to a certain degree, solve the problems of lack of objectivity of research in the jurisprudence field which are rooted in the "escape into text" concept (unless we are speaking of statistical-linguistic research on the structure of normative acts, their editing, etc.)[24].

With the passage of time, analytic philosophy started to be contrasted with the concept of empirical jurisprudence which can be summarized as "an escape into empiricism." It is a broad research trend which, e.g., in the English-speaking world, led to the creation of the philosophy of legal realism, whereas in the culture of statutory law, an important trend in the area of external integration. The trend attempts to extensively absorb theoretical approaches from different sciences which allow for overcoming the shortage of verifiable (i.e. empirically verifying) scientific methods into the theory of law. It also refers to the principles of 19th century science and tends to favor the naturalistic paradigm of conducting scientific research. Jurisprudence should be considered a science only if it meets the basic postulate of scientific cognition which "is of an empirical nature, i.e. cannot do without experience"[25]. The external integration trend must have been dominated by concepts based on empiricism or at least strongly connected to it. At this point, it is necessary to highlight a fundamental aspect: unification involves theories, and not the sciences encompassing the theories. Law does not integrate with e.g. sociology, but with certain sociological theories that appear suitable. The mere use of the word "law" is a kind of mental shortcut, since integration does not involve jurisprudence as an entirety, but the general sciences in jurisprudence[26]. The problem of integration trend is concerned with the problem of level of their occurrence.

24 Cf. e.g. A. Malinowski, *Polski język prawny. Wybrane zagadnienia*, Warszawa 2006, passim.

25 Quotation from A. Grobler, *Metodologia nauk*, Kraków 2006, p. 23.

26 P. Jabłoński notes that "the external integration of jurisprudence […] was, first of all, the question of theory of the law". Quotation from P. Jabłoński, *Polskie spory o rolę filozofii…*, p. 131.

3. Problems of the External Integration of Jurisprudence

Analysis of the process of external integration from the methodological perspective faces several fundamental problems. As already noted, theories of a certain type which are dominant in a given science or which pertain to a given aspect are the subject of integration.

The first question which needs to be addressed concerns the level of integration. It is about jurisprudence, which encompasses a general theory of jurisprudence (usually linked to the theory of law) and detailed theories called doctrines. Naturally, this poses a problem whether we are speaking of a doctrine *per se* or a theory of doctrine; however, for the sake of the present discussion, we may leave this question open. Anyway, the problem of integration level type comes down to the question of whether we can discuss integration of jurisprudence with a given theory used in a different science at the level of a theory of a doctrine. The secondary problem involves answering the question of whether this process can take place without taking the general sciences in jurisprudence into account. In this context, I would like to ignore the status of the philosophy of law, which is subjected to various evaluations[27]. The discipline is categorized as belonging to the legal domain, but also – which I personally consider more appropriate – as a subdiscipline of philosophy[28]. The latter approach leaves jurisprudence with two general sciences: theory of jurisprudence and methodology of jurisprudence. As a result, jurisprudence is deprived of a speculative element and an element which is dependent on axiological views; thanks to that, jurisprudence can aspire to the status of a fully-fledged science, removing the argument concerning nonobjectivisms prone to axiological evaluation of philosophical analyses from the array of accusations against the scientific character of jurisprudence[29]. If the philosophy of law were recognized as a discipline in the field of philosophy, rather than law, the theory of law would achieve the status of a general science in jurisprudence, following the example of the positivist research paradigm; this would allow legal practitioners to have – just like their colleagues from other fields, e.g. natural sciences – a basic uniform set of notions and adopted positions regarding the description and explanation of fundamental notions in the law which are still questioned by the modern science of law with a history stretching back nearly two centuries. As noted by J. Stelmach, it is

27 Cf. T. Stawecki, *Filozofa prawa a teoria prawa: spór nierozstrzygalny czy pozorny?*, "Studia Iuridica" 2006, no. 45, passim.

28 Cf. *Filozofia prawa a teoria prawa* [in:] A. Bator, J. Zajadło, M. Zirk-Sadowski (ed.), *Wielka Encyklopedia Prawa*, Vol. VII, *Teoria i filozofia prawa*, Warszawa 2016, p. 160.

29 This approach can include postulates suggesting the necessity for identifying general juristic theory of the law and metatheory of the law as theory of legal sciences. Cf. A. Grabowski, *Prawnicze pojęcie obowiązywania prawa stanowionego*, Kraków 2009, p. 26.

all about the fundamental questions in jurisprudence, such as the essence of the phenomenon of law, and methods for examination of it[30].

Of course, there are no methodological reasons why this integration should not be performed at the level of doctrines (with general sciences disregarded). However, it is advisable to develop a general theory of a given doctrine first. On the other hand, it seems that this level of legal sciences is dominated by the practice of multiplying research questions and problems, which is not helpful at all; what is more, it prevents the development of uniform theories[31]. And the development of e.g. a detailed theory of statutory interpretation which takes the specifics of a given branch of the law into account, and which is not created by legal theoreticians but by practitioners of doctrine, is naturally possible. If such a theory (e.g. of statutory interpretation focused on the specifics of a selected branch of the law) adapted a semantic theory originating from beyond the legal field, this would be an example of integration, provided the doctrine of the adapted theory contributes something new. At this point, it is also worth noting that practitioners of doctrine have attempted (possibly unintentionally) to develop theories of statutory interpretation with an integrative approach; however, the integration was of an internal character and came down to transposing achievements of the theory of law and adapting it to legal doctrine[32]. This also provides a basis for recognizing such research programs as having significant explanatory potential in terms of actual interpretation practice, provided we assume a practitioner of doctrine is "closer" to practice than a researcher from the field of general sciences in jurisprudence, which, of course, is not always the case. It seems that practitioners of doctrine have so far accomplished the external integration concept via adapting chosen research methods targeted at empirical analyses of individual problems which are encompassed by their subject (regardless of whether we consider it integration or not, but this will be discussed in a moment). However, this is only

30 The author notes that "after 200 years of discussions and disputes we (philosophers and legal theoreticians) have not managed to reach an agreement on any of the fundamental questions, e.g. the notion of the law, its enforceability, legal system, or legal method." Quotation from J. Stelmach, *Dyskrecjonalność sędziowska w pozytywistycznych i niepozytywistycznych koncepcjach prawa* [in:] W. Staśkiewicz, T. Stawecki (ed.), *Dyskrecjonalność w prawie*, Warszawa 2010, p. 53.

31 The problem of integration of theories from different branches of science was addressed by M. Miłkowski during 2016 Convention of the Polish Cognitive Science Association in his lecture entitled: *Strategie unifikacji w kognitywistyce – wykład z metodologii kognitywistyki*. Also cf. M. Miłkowski, *Wyjaśnianie…*, pp. 155–156 and 163.

32 Cf. e.g. J. Wyrembak, *Zasadnicza wykładnia znamion przestępstw. Pozycja metody językowej oraz rezultaty jej użycia*, Warszawa 2009, passim, and S. Żółtek, *Znaczenia normatywne ustawowych znamion czynu zabronionego. Z zagadnień semantycznej strony zakazu karnego*, Warszawa 2017, passim.

a small contribution to developing a theory located at the level of detailed science in jurisprudence that integrates with a specific external theory.

Another question concerns understanding of the notion of integration itself. In respect of legal science, methodological processes targeted at "external" integrating actions have so far acted as a kind of "Leviathan," swallowing up selected methods developed in other sciences for the purposes of dealing with particular issues of description and explanation of specific phenomena which are in the scope of its (normative or empirical) interest[33]. Can such a process be considered an integration? This aspect is indeed worth highlighting, since, when taking a rigorous stance, rather than integration, it constitutes an adaptation of a "foreign" methodology for the purposes of reducing the methodological deficit of the "native" science. Adopting the above criterion for what can be considered an integration of sciences, one would need to state that, in the specific context of jurisprudence, real external integration is considerably hindered or limited to questions characteristic of political science, since a sole absorption of a method or a concept into the theory of law (or a doctrine) cannot be regarded as an example of integration. The statement that if a given concept, e.g. the theory of meaning from linguistics, is, symbolically speaking, "transplanted" into legal science, we can therefore speak about a limited scientific integration, is obvious. First of all, integration is about progress in both disciplines (and not only one of them) resulting from the formulated postulates: development of superior (common) theories, "research coordination," and "striving for interdisciplinary work"[34]. Integration is intended to bring certain added value to that which is being integrated. Otherwise, one can only speak about transposition of a theory and/or research method. At this point, an observation made by M. Miłkowski should be mentioned: he claims that integration of a theory for sciences with completely different subjects of research is impossible[35]. One simply cannot integrate e.g. legal proxemics with Einstein's theory of relativity[36]. In respect of jurisprudence,

33 Linking the postulate of external integration of legal science to the so-called multidimensional approach to the phenomenon of law is a fundamental methodological paradigm defined by K. Opałek and J. Wróblewski. The mere absorption of a method from another science, e.g. logic, in a normative (logical-linguistic) research layer was sufficient for scholars to claim the condition of integration is fulfilled. No one imposed the restriction of the necessity to create or develop a theory in the context of the science from which one absorbs a method. This is because law could not lose its autonomy, which is a precondition of independence of jurisprudence as a science. Cf. K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warszawa 1969, p. 339.

34 Cf. and quotation from P. Jabłoński, *Polskie spory o rolę filozofii…*, p. 135.

35 Cf. M. Miłkowski, *Wyjaśnianie…*, p. 156.

36 Cf. R. Tokarczyk, *Proksemika ogólna jako podstawa proksemiki sądowej i proksemiki prawniczej*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio G. Ius" 2009/2010, no. 56/57, passim.

it is about defining borders of normativity as the subject of analysis. Multiplication of layers of legal research is similar to a mechanism that was criticized by A. Newell[37]. In this context, it becomes necessary to accept that multiplying an array of aspects of the phenomenon of law in theory without seeking relations between them is improper. This follows with another assumption that the mainstream trend of real (and not ostensible) integration targeted at, to use a broad term, political-sociological cooperation, results from the very nature of legal science as a social science; this is obvious, and it must be so.

It is important to note that the above assumption results from the methodological determinants of jurisprudence, and not an assumed conviction about the essence and/or axiology of the phenomenon of law. Also, it is worth noting that in respect of major philosophies of law, ontological-legal statements have not usually been preceded with empirical studies, but resulted from intuition about the essence of the phenomenon of law. This also means that the maximum fulfilment of fundamental methodological criteria in the case of the integrative approach in legal science can be achieved when targeted at political science and sociology; this is because the normativity of the subject of research is at odds with the areas of analysis which involve manifestations of naturalistic determinants of the phenomenon of law; these manifestations explain the determinants from the perspective of natural science rather than being a subject of interest to a legal practitioner who usually does not have appropriate methodological knowledge. This can be observed when research aimed at defining a biological basis for the normativity of human behavior is criticized because it does not involve juristic analyses, but appears relevant to other branches of science. In fact, there is nothing about integration here. But most importantly, a very big "what if" can be asked about the essence of integration: what can jurisprudence bring to theories from the natural sciences which are supposed to be integrated with the law?

It all comes down to answering the question of how broad the understanding of the scope of external integration of jurisprudence should be, i.e. the aspect of intensionality or extensionality which is discussed in the literature[38]. Without defining integration criteria, the idea becomes attractive from the "marketing" point of view (grant applications, academic reputation, generally perceived

37 In his book from 1973, A. Newell gives examples of psychological experiments which collectively do not allow for development of a general theory. The book is taken as an example of thoughtless integration of science. Cf. A. Newell, *You Can't Play 20 Questions with Nature and Win: Projective Comments on the Papers of this Symposium*, Pittsburgh 1973, passim; https://pdfs.semanticscholar.org/85a0/96908670cd83cacfdede9e11f2df2dc41c9b.pdf [access: 26.07.2019].

38 Cf. M. Zirk-Sadowski, *Metodologie teorii prawa a problem polityczności prawoznawstwa. Aspekt behawioralny i intensjonalny*, "Acta Universitatis Wratislaviensis, Przegląd Prawa i Administracji" 2017, no. CX, pp. 55–56.

interdisciplinarity) but, at the same time, blurs the notion, treating it often as the previously mentioned simple "transplantation" of methods from other sciences into jurisprudence. This sometimes leads to an intuitive understanding of integration, where e.g. the simple use of quantitative analyses to prepare a fragmentary description of legal phenomena is considered an example of integration (statistics are quite often used for the description of certain regularities in applying institutions in the law). Does this justify the conclusion that the theory of law integrates with statistics? Of course not.

The problem becomes a fundamental one if we evaluate it in the context of methodological requirements of integration. It is related to reduction and unity of science for obvious reasons[39]. That is because it defines the scale of integration and the appropriate methodology for completing the above mentioned processes. In the context of the external integration of jurisprudence, it must be stated explicitly that not every use of a "foreign" theory or methodology which is not considered 100% legal is, in itself, an example of external integration. This seemingly obvious fact needs to be highlighted, since, as it seems, examples of integration activities, however attractive they appear to be from the cognitive point of view, without deeper methodological reflection not only blur the notion of integration, but also do not support the basic assumption of real activities unifying the theory of law with an external theory, where this assumption involved providing jurisprudence with quality to make its "scientific knowledge be a result of using a specific scientific method to explain phenomena"[40].

General methodology is familiar with the problems we have previously mentioned of transposing a method, being an example of flawed integration, and developing a joint theory of a given phenomenon. It needs to be stressed that the literature mentions the advantages and disadvantages of both approaches, even if the mere transposition of a method in a such simple way as presented in the preceding paragraph cannot, of course, be called integration at all. From time to time, authors make the observation that unification of sciences can occur in two ways: via complete integration (of structures) or solely through elementary reduction[41]. In the context of legal science, there is actually a problem of defining the notion of external integration and real needs of legal science. Integrativeness understood as unification of structures requires a total link between two sciences, or at least their general theories. In other words, in practice, both e.g. a sociological practitioner and legal practitioner must unify general theory (or chosen detailed theories) for the sake of a common description and explanation of a specific subject of research.

39 Cf. A. Grobler, *Metodologia…*, pp. 196–203.

40 Quotation from M. Zirk-Sadowski, *Metodologie…*, p. 52.

41 Cf. D. Dank, *Richer than reduction*, p. 2 et seq.

Only then do we obtain an example of external integration of jurisprudence. As already highlighted, this requires a combination of the structures of both sciences, which, in the case of jurisprudence, most often comes down to integration of mere theory of law with a theory from a different science. The second question involves integration of jurisprudence with a different science. Again, in this case, if we stick to the same definition, integration is only possible with regard to the theory of law and political science (especially, as noted by M. Zirk-Sadowski, in the case of the intensional mode of integration, "the theory of law often resembles political argumentation"[42]). In the case of the applied sciences, the theory of law finds it difficult to present confirmatory links between theories, which results in a state of "terribility" of theory obtained in this way[43]. Normativism in the field of jurisprudence is a different manifestation of normativity as understood in natural sciences. First of all, it uses the already mentioned experimental method and is focused on explaining an empirical problem; on the other hand, normativity in jurisprudence comes down to obtaining a semantics which is in conformity with other semantics of the legal order, where this order is understood as a certain set of specific statements; additionally, the whole process is hedged around a number of notions which are characteristic of legal discourse, such as legal reasonings, axiological standards, principles of equity, and legacy meanings. The theory of law cannot transform into a theory explaining the phenomenon of law from the naturalistic point of view only, since it stops being a legal theory which is attractive to doctrines. This can be further elaborated with the statement that the theory of law then becomes "pushed" beyond the scope of legal science (this remark can also be directed towards applying the theory of law as logic of law, usually "in the form of deontic logic"[44]). It has been assumed that the theory of law is primarily a theory of a normative rather than empirical phenomenon. This has resulted in the great interest in language in the context of the legal science in the continental legal culture.

As I have already mentioned, the second trend is called elementary unification, i.e. reductionism; according to it, the ability to partially make use of the mutual achievements of certain sciences is an example of integration. Reductionism is about making use of an element of a theory from a different science in the field of jurisprudence. At the same time, it seems the elementary unification strives for the result of such activity rather than a research method in itself

42 Quotation from M. Zirk-Sadowski, *Metodologie…*, p. 56.

43 Cf. I. Votsis, *Unification: Not Just a Thing of Beauty*, "THEORIA. An International Journal for Theory, History and Foundations of Science" 2015, no. 30, http://dx.doi.org/10.1387/theoria.12695, https://www.academia.edu/31765691/Unification_Not_Just_a_Thing_of_Beauty [access: 26.07.2019], pp. 97–114.

44 Quotation from and cf. M. Zirk-Sadowski, *Metodologie…*, pp. 55–56.

in order to avoid being caught in the previously mentioned trap of "terribility"[45]. Processes of application the law or behaviors of the parties of a trial are not explained via integrating appropriate juristic theories with e.g. chosen theories of temperament (psychology). Possibly, this could bring interesting observations on mutual co-variability, e.g. between the number of appeals which are taken into consideration by the court, brought by a professional attorney, and their type of temperament (sanguine, choleric, melancholic, and phlegmatic). The above research is viable. However, what does it mean to the mutual integration of the theory of law and the theory of temperament in psychology? Would not such a theory be "terrible"?

4. The Political Character of External Integration of Jurisprudence

Upon reading the literature, it can be observed that the phenomenon of external integration of jurisprudence emerged in the Polish theory of law in the 1960s; this was the result of popularization of the postulate of the ontological complexity of the phenomenon of law and "emergence of a group of researchers who wanted to use methods and notions from other, better developed sciences in jurisprudence"[46]. The onset of external integration is also ascribed to a concept by L. Petrażycki[47]. In the context of the evolution of the entire continental legal culture, the literature mentions the 19th century rift in the methodology of science between the so-called naturalistic and anti-naturalistic approaches to research, where, generally speaking, humanities and social sciences should not make use of the same methodological paradigm as natural and exact sciences[48]. In other words, it is about the autonomy of social sciences and the humanities from the sciences equipped with the so-called experimental method, and about highlighting that complete unification of science as a whole is not possible. This is because of the otherness of methods of scientific cognition and, according to anti-naturalists, the objective impossibility to transfer the experimental method

45 Cf. I. Votsis, *Unification: Not Just a Thing…*, p. 101.

46 Quotation from J. Łakomy, *Pojęcie integracji zewnętrznej nauk prawnych* "Wrocławskie Studia Erazmiańskie. Zeszyty studenckie. Prace Prawnicze, Administratywistyczne i Historyczne" 2009, no 3, p. 57. Also cf. L. Nowak, S. Wronkowska, *Zagadnienia integracji nauk prawnych w polskiej literaturze teoretyczno-prawnej*, „Studia Metodologiczne" 1968, no. 5, p. 107.

47 Cf. K. Opałek, J. Wróblewski, *Prawo. Metodologia, filozofia, teoria prawa*, Warszawa 1991, p. 55 et seq.

48 Cf. A. Gurbiel, *Sposób uprawiania nauk społecznych – metodologiczny problem w prawoznawstwie*, „Studia z zakresu nauk prawnoustrojowych. Miscellanea" 2015, no. 5, p. 22.

to social sciences and the humanities. This paradigm was used to develop the postulate of autonomy of jurisprudence in the theory and philosophy of law[49]. The postulate is of a paradoctrinal nature and Polish jurisprudence was very strongly attached to it for a few decades. In jurisprudence, the naturalistic postulate was correlated with the positivist research program which attempted to turn jurisprudence into a fully-fledged science; such an approach highlights counteracting the speculativeness of research results.

The dispute between naturalists and anti-naturalists has continued for almost 200 years. Currently, it is of an "ideological nature"[50]. However, it is the naturalistic paradigm which has dominated legal positivism as a complete program of legal research. On the one hand, it was to equip jurisprudence with the ability to integrate with the external world of science; on the other hand, owing to the postulate of autonomy of jurisprudence, this external world was to maintain the existing criteria of defining a scientific discipline offered by the general methodology, as well as the previously mentioned conditions of own subject of research and methodological autonomy. The latter aspect was to fulfill the naturalistic postulate. A uniform methodology, transposed into different branches of science, was to lead to the discovery of uniform laws of nature and social laws. This is why a science is called "fully-fledged" only when its methodologies correspond to the pattern developed in the natural and exact sciences[51]. As already mentioned, the point is that "an image of the world should be always created based on an epistemologically indisputable foundation which takes the form of empirical facts established in the course of experience"[52].

Evaluating the subject matter in the context of nearly 150 years of attempts at building jurisprudence based on the positivist-naturalistic research program, it is easy to notice its methodological limitations. First of all, the subjects of legal research are the following: directive statements involving institutional means of coercion (the law as a linguistic fact) and facts categorized as legal-normative ones (so-called "real" manifestation of the legal phenomenon, law as a social fact). These constitute an indisputable paradigm of the ontological complexity of the phenomenon of law, which is divided into epistemological planes of cognition: linguistic-logical, sociological, psychological, historical, and a new which is worth adding, i.e. cognitive. The greatest limitation of jurisprudence is the impossibility to examine the phenomena encompassed by its practical scope due

49 Cf. J. Łakomy, *Pojęcie integracji…*, pp. 54–55. Autonomy was juxtaposed with a threat from integration as "dejudirisation of jurisprudence." Cf. and quotation from P. Jabłoński, *Polskie spory o rolę filozofii…*, p. 151.

50 Cf. A. Gurbiel, *Sposób uprawiania nauk społecznych…*, p. 23.

51 Cf. I. Gołowska, *Naturalizm-antynaturalizm jako spór o charakterze metodologicznym*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2003, no. 1, p. 5 et seq.

52 Quotation from ibid., p. 6.

to the limited capacity to use the experimental method. This means that the program to establish legal theory as "a fully-fledged science" seems to be doomed to failure, at least in terms of its capability to define the "full-fledgedness" of a science only for research results which can be reconstructed by applying the same method to an analogous object of analysis. If we also take strict conditions of understanding integration (limited to seeking confirmatory links between theories from different sciences, and not transplanting methods from one science to other) into account, it becomes clear that, for a legal practitioner, the previously mentioned "escape into empiricism" is only an opportunity to describe and explain certain, albeit maybe important, questions in jurisprudence, but cannot be used to formulate a general theory of law on its own. This approach can be applied to research on selected issues of legal practice in the fields of legal interpretation, application of law, or rule-making; however, it is very difficult to provide them in case of classical doctrinal-legal studies, which e.g. for the reason that they engage the greatest number of legal practitioners, are focused on research which is related to establishing meanings or methods of obtaining them from textual sources of the law. Thus, these are linguistic-analytic analyses which have nothing in common with the so-called "applied science" targeting experimental research programs. From this point of view, it seems appropriate to assess the attachment of the positivist theory of law to its autonomy as a sign of a certain impotence in terms of real integration with the external environment; of course, this is not a critical assessment. As a result, we can state that the above-mentioned theory was an example of seeking a defence against the obvious imperfections of jurisprudence which, similar to the humanities, cannot offer natural and exact sciences something which they methodologically desire to achieve and which gives the best results in terms of empirical analyses from the ontological perspective. This is also why scholars made do with recognizing integration as merely adopting a method or the product of its application from a different science, which is easy to notice in respect of theory of statutory interpretation. While it seemed acceptable a few decades ago, now, in times of formulating goals of interdisciplinary studies, it seems necessary to take a dispassionate look at it, formulating a true assessment of integration processes which jurists can take part in. This is important in the context of rapidly developing natural and exact sciences; when compared to these, the methodology of legal science remains virtually impotent, since it utilizes methods which have hardly changed since the 19th century. There are new tools available for scientific activity, i.e. computers and professional software, but these do not influence the essence of the methods used by legal practitioners in their work. Legal interpretation, or, in broader terms, analytic philosophy is still the basic method of jurisprudence, which results from the textual nature of law sources. Consequently, research activity of a legal practitioner comes down to interpreting meaning of a norm and looking

for argumentation which is accepted by the majority and makes it possible to consider the norm legally binding. All other methods which are employed in empirical research on the law, analyzing the biological basis of the normativity of human behavior (including works of the human mind), or the psychological basis of decisions in the legal field have an auxiliary status in jurisprudence. Research in these areas primarily serves the needs of explaining the ontological complexity of the phenomenon of law and, with a bit of oversimplification, is to make dogmatists realize something they should be perfectly aware of, i.e. that the linguistic-logical dimension of law translates into its social aspects. However, it is problematic to recognize this secondary research as real integration between jurisprudence and sciences with better developed methodology and very specific subjects of research, and which are usually of an empirical nature.

For this reason, special attention must be paid to a trend of integration in Polish jurisprudence which can be called "political"; it is further reinforced by statements on the political nature of the phenomenon of law (so-called political character as distinct from politics)[53]. This article does not aim at presenting approaches to the political character and presenting the origins of this notion (the concept developed by C. Schmitt, who was the first to employ the notion as a theoretical category[54], is usually brought up, but there is also a number of other approaches to this political character, such as the republican one, which is the closest to the meaning used in this article)[55], So, this political character is a political rather than sociological category. The broadest definition of the notion is close to its intuitive understanding as "a feature of a social phenomenon consisting in its close relationship to mechanisms of a political system"[56]. In Poland, the origin of integration between the science of law and political science is commonly associated with the climate of transformations that existed at the turn of the 1950s and 1960s. The second half of the 1950s is perceived as a period of freeing political and sociological disciplines from the strong pressure of a conservatively understood Leninism[57]. Political decisions taken by the highest state authorities made it possible to carry out intensive and, most importantly, objective studies in a field that can consider the political character of certain social phenomena from different sciences of common origin, i.e. social sciences and

53 As noted by M. Paździora and M. Stambulski, politics stands for "concrete actions, whereas political character stands for conditions making these actions possible". Cf. M. Paździora, M. Stambulski, *Co może dać nauce prawa…*, p. 57.

54 Cf. ibid., p. 56.

55 Cf. M. Król, *Filozofia polityczna*, Kraków 2008, pp. 146–151.

56 Quotation from M. Karwat, *Polityczność i upolitycznienie. Metodologiczne ramy analizy*, "Studia Politologiczne" 2010, no. 17, p. 64.

57 Cf. K.B. Janowski, *Politologia w Polsce*, pp. 2–3, http://www.ptnp.org.pl/index.php/pl/o-nas [access: 24.07.2019].

humanities. That process was greatly influenced by the personalities of prominent researchers, which is stressed both in the literature and by eyewitnesses to events[58]. The second triggering point for integration, apart from the academic community (the following scholars stand out as the most prominent: S. Ehrlich, K. Grzybowski, J. Hochfeldd, O. Lange, E. Lipiński i J. Wiatr), was the establishment of the Polish Political Science Association (PTNP) in 1957, an organization that has operated ever since[59]. An important factor which makes Polish scientific activity stand out in the field is the fact that the association was created by bottom-up initiatives of scholars, some of whom were members of International Political Science Association (IPSA) established in 1949. Poland was the first of the Communist bloc countries to became a member of the organization, doing so in 1950[60]. The second half of the 1960s was marked by the accelerated development of PTNP. It is worth noting the coincidence in time between the above fact and the formulation of the postulate on the ontological complexity of the phenomenon of law, along with recognizing the necessity of multidimensional analysis of law.

As far as the directions of external integration of jurisprudence are concerned, sociology and political science have played an important role from the very beginning. These were the first areas of legal practitioners' interest who, legitimately, saw the opportunity for conducting scientific projects and formulating theories which describe and explain phenomena common to the sciences, while preserving their methodological autonomy, in developing a relationship with the international political science community. It is also worth noting that some representatives of the group were both legal and political practitioners. Lastly, both the sciences employ the methodology of the social sciences and humanities; in terms of empiricism, they use sociological methods such as interview, survey, or case study, which are later assessed quantitatively and qualitatively, applying methods of statistical analysis. In this field of science, quantitative research is perceived as the exploration of interesting phenomena and not a goal in itself as in the case of the applied sciences, where referring to quantitative methods usually makes it possible to come to universal conclusions for analogous cases. Thus, the shared area of research enjoyed by the legal and political sciences is indisputable. On the other hand, the role and underlying rationale of conducting the research has changed. The postulate claiming that law, understood as a social phenomenon, is political by nature because it is

58 I relied mainly on reports by professor J. Wiatr; at this point, I would like to thank the professor cordially for the information on the origin of integration between legal science and political science.

59 Cf. B. Krauz-Mozer, P. Borowiec, P. Ścigaj, *Historia Polskiego Towarzystwa Nauk Politycznych*, passim, http://www.ptnp.org.pl/index.php/pl/o-nas [access: 24.07.2019].

60 After: ibid., p. 1. The importance of this fact is also stressed by J. Wiatr.

drafted in the course of legislative activities of political bodies is, naturally, a truism. However, nowadays it must be admitted that not only political authorities are creators of law, which, as a social phenomenon, plays the role of an institution linking societies organized around information in a complex way; most often, societies recognize the law-making acts of political authorities as one of many facts categorized as legal-normative ones. Additionally, there is the phenomenon of emancipation of bodies considered public authorities but not traditionally perceived as political ones (especially true for courts, but also entities which are given limited power in certain areas, e.g. higher education, the media, etc. by political authorities). This is for sure about the boundaries defining politics and political authorities. As far as the phenomenon of the political character is concerned, a number of concepts for it have been developed[61]. In the context of the notion of integration, it seems appropriate to highlight that the political character acts as a natural reference for external integration of jurisprudence if it is understood as the capacity of different actors to make decisions in an area (field[62]) of social activity which is considered the law. So, in view of this meaning, the political character in itself constitutes an integration of various trends of research such as: the decisive approach (including psychological mechanisms of making decisions), certain elements of cognitive science which drive political choices, the social dimension of law, and integration of axiological reflection on law along with different approaches to political doctrines. All of this takes place without unnecessary aspirations for the objectivity of research results required by the positivist-naturalistic postulate, which cannot be obtained by the general theory of law. Also, when adopting the criterion of external integration from this paper, only an orientation towards the political character of law facilitates the development of common theories of jurisprudence and other disciplines from the social sciences, where these theories make it possible to fulfill the postulate of the relationship between theories already existing in the sciences in order to create new ones that are common to both sciences. And that was the original idea behind integrating political science and jurisprudence, since representatives of both domains sought to develop existing theories via integration. Only later did practicing discourse on the political character of certain legal notions distort the original meaning, falling into a trap of banality when "any political power could understand notions such as 'law' or 'constitution' as something different"[63].

At the beginning, I highlighted the topicality of integration of jurisprudence with political science not only because of methodological requirements broadly

61 Cf. M. Paździora, M. Stambulski, *Co może dać nauce prawa…*, p. 57 et seq.

62 Cf. H. Dębska, *Prawo jako pole*, „Państwo i Prawo" 2016, no. 9, passim.

63 Quotation from and cf. M. Paździora, M. Stambulski, *Co może dać nauce prawa…*, p. 56.

discussed in this article, but also the original need of such integration and the most appropriate manner of its accomplishment. I also mentioned the topicality of challenges resulting from current social and political changes taking place on a global scale. At this point, we may mention such phenomena as: the end (or crisis) of the concept of liberal democracy, the social need to create or redefine existing models of systems of government, or transformations of societies which, thanks to the information revolution, are becoming more aware of the political character (even when not taking part in processes considered political). Finally, at the turn of the 21st century, civilization faces choices which traditionally do not have a political dimension (limited to mechanisms of governance), but belong to the political sphere of choices made by societies, i.e. they feature "political bias" (regardless of attempts to separate this notion from the political character). Phenomena such as choices in terms of climate change (which will surely influence contemporary civilization), migrations, movement of capital, or multiculturalism juxtaposed with willingness to preserve traditions of identity are perfect examples of relational and contextual relationships between the worlds of tough (traditional) politics and non-politics regulated by law[64]. As already mentioned, all these phenomena require or will require developing more than one set of notions or even entire theories describing and explaining them. Complaints about the impotence of the existing theory of law because, after two hundred years of development of certain principles, it is currently involved in a political game, do not make any sense. Most likely it will be the same in the future. It is up to academic legal practitioners to choose the right course of external integration; if they do, they will be able to develop new theories which partly preserve existing concepts and can be used to describe and explain the phenomena and processes discussed above.

64 Cf. M. Karwat, *Polityczność i upolitycznienie…*, p. 68.

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SUMMARY

The paper discusses the question of external integration of jurisprudence in the context of its political character. It is a critical assessment of extensive programs of external integration of jurisprudence, since, according to the author, legal science is involved in problems of a political nature regardless of how we define the political character.

The introductory section highlights the contemporary need for addressing the topic of political character of law and jurisprudence.

The two following sections discuss methodological determinants of external integration of jurisprudence, raising such questions as: definitions of external and internal integration of jurisprudence, the level and direction of integrative activities including (or not) general disciplines in the field of jurisprudence. In respect of the latter topic, the author wonders if external integration originating from detailed sciences of jurisprudence without taking the theory of law into account is possible. The author also discusses the determinants of establishing and developing the basic method of jurisprudence, i.e. the formal-dogmatic approach. In this context, the literature suggests scholars have attempted to integrate jurisprudence with other sciences such as logic, psychology, sociology, and presently cognitive science as well, transposing various semantic theories into the field of jurisprudence via methods of statutory interpretation.

The summary (part four) discusses historical determinants of integrating jurisprudence with political science; in Poland, these are related to historical factors and a strong tradition based, among other things, on the concept by L. Petrażycki. In the end, the author concludes that jurisprudence cannot fulfil the requirements of the naturalistic paradigm of science methodology because of its political character.

Keywords: politics, methodology, theory of law

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Extraordinary remedies in Polish civil procedure[1]

Abstract
The article's objective is to present the essence of the system of extraordinary remedies in the Polish civil procedure, as well as a characterization of the particular remedies comprising that system. Application of the dogmatic method has also verified the hypothesis according to which the Polish legislator, in giving those remedies (including extraordinary ones) a normative structure, has in view that their objective is to seek a change in or to set aside the contested ruling. The article accents particularly regulation of the extraordinary grievance, considering its status as novel legislation giving rise to numerous doubts and reservation, as the normative shape of that remedy constitutes a source of collision between two values – the stability if a judicial ruling, and its lawfulness. The emergence of this remedy has led to the conclusion that there is a need to review the existing position of the civil procedure doctrine concerning respect for the principle of exclusivity adopted in our system of remedies.

[1] The framing of the issue of extraordinary legal remedies in this article corresponds to a large extent to the approach taken in T. Wiśniewski, R. Bełczącki, *Skarga nadzwyczajna w świetle systemu środków zaskarżenia w postępowaniu cywilnym*, Warszawa 2019, p. 310.

I. Introductory remarks

This article offers a brief characterisation of the remedies available in the Polish civil procedure for reviewing final judgements in civil cases. In the doctrine, these remedies – distinctly from standard remedies – are referred to as extraordinary. This distinction is made according to the criterion of the suspensive effect[2]. Standard remedies are applicable to non-binding judgements, and when the relevant application is lodged, it prevents the judgement from becoming binding. Before describing the particular extraordinary remedies, it would seem appropriate to give at least a brief presentation of the typology of standard remedies. This will aid the reader in gaining a general understanding of the entire system of remedies in the Polish legal order.

In general, the standard remedies are distinguished by their devolutive effect and divided into appeals and other remedies[3]. Under the present Code of Civil Procedure from 1964 (CCP), the concept of "appeal" is of a normative nature, and encompasses both appeals and complaints[4]. As for fact-finding civil procedure, an appeal may be brought against a verdict (in a trial) or a judgement on the merits of the court of the first instance (in non-contentious proceedings), which can be either a district or circuit court (Art. 367, 505[9], 518 CCP). Complaints, however, may be filed against specified rulings of a formal nature[5], issued by either the court of the first or the second instance. The institution of the

2 The devolutional effect on the group of exceptional legal remedies in force is not universal.

3 In the Polish doctrine, there is also a slightly different classification of legal remedies for challenging judgments not yet final. These measures are collectively referred to as "remedies" and are subdivided into appeal measures *sensu largo* and appeal measures *sensu stricto*. The former include all measures which the parties are entitled to take under procedural laws to obtain an annulment or amendment of the contested judicial decision, while the latter seek to amend or annul the contested judicial decision by leading to a higher instance decision. It is characteristic of that position that the concept of remedies is also used for the purposes of creating a suspensive effect, and is divided into ordinary and extraordinary remediep. See W. Siedlecki [in:] J. Jodłowski, W. Siedlecki, *Postępowanie cywilne. Cześć ogólna*, Warszawa 1958, p. 414 et seq. Cf. M. Michalska-Marciniak, *Konstytucyjne podstawy środków zaskarżenia w prawie polskim* [in:] Id. (ed.), *Wokół problematyki środków zaskarżenia w postępowaniu cywilnym*, Sopot 2015, p. 25 et seq.

4 See also T. Ereciński, *System zaskarżania orzeczeń* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 1, Warszawa 2013, p. 67 et seq., and also M. Malczyk, *Zażalenie w postępowaniu cywilnym do Sądu Najwyższego jako gwarancja konstytucyjnego prawa do sądu – uwagi na tle art. 394[1] § 1 KPC (Czego oczekujemy od przyszłego Kodeksu postępowania cywilnego*) [in:] K. Markiewicz, A. Torbus (ed.), *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego w Katowicach-Kocierzu (26–29 września 2013 r.),* Warszawa 2014, p. 858 et seq.

5 The reservation "in principle" is necessary in view of the *de lege lata* admissibility of appealing to the Supreme Court also against substantive decisions of the courts of second

complaint is thus presently not uniform in nature; what is more, the criteria of devolutionality in respect to this remedy is not authoritative in each case. Complaints encompass *inter alia* complaints to another panel of the second instance (so-called horizontal complaint), which should rather be considered another standard remedy, since the act of lodging it does not lead to the case being transferred to a higher instance. It should also be pointed out that with regard to some forms of complaint, we are dealing with only relative devolutionality, as the court of the first or second instance which issued the ruling against which the complaint is lodged can acknowledge it in the event of invalidity of proceedings or when it is obviously justified (see Art. 395 § 2 CCP).

The complaint as an appeal remedy can be considered in respect of an enumerated list of decisions issued in the course of both trial and non-contentions proceedings by a court of the first instance, particularly decisions concluding proceedings in the case (Art. 394 § 1 and Art. 394 § 1 in conjunction with Art. 13 § 2 CCP); however, in non-contentious proceedings, this can also occur in other cases indicated in law (Art. 518 CCP). Additionally, attention should be paid to complaints addressed to the Supreme Court. Such a complaint is admissible in many different and distinct cases detailed in Art. 394^1 CCP. Pursuant to § 1, a complaint to the Supreme Court may be lodged against a decision by a court of the second instance rejecting a cassation appeal, and against a decision of the first or the second instance rejecting an appeal to declare incompatibility of a final judgement with the law. A complaint to the Supreme Court is also admissible in respect of some other decisions of the court of the second instance concluding proceedings in a case (Art. 394^1 § 2 CCP)[6]. Particular attention should be given to a complaint to the Supreme Court regarding the overturning by the court of the second instance of a verdict issued by the court of the first instance and referring it back to that court for judgement (Art. 394^1 § 1^1 CCP). This remains a sort of legislative novelty, introduced into the Code of Civil Procedure on 3 May 2012. It provokes controversy in both scholarship and in practice. Its objective is to ensure review of the proper functioning of the court of the second instance in the full appeal model, in which the role of that court's rulings is essentially reformatory, with cassation as the exception[7].

instance of a cassation nature, referring the case to the court of first instance for reconsideration (Art. 394^1 § 1^1 Code of Civil Procedure).

6 I leave aside the fact that the presented state of affairs with regard to the form of complaints will change to some extent as of 7 November 2019 as a result of the entry into force of the procedural amendment in the form of the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts (OJ L item 1469).

7 More on the subject T. Zembrzuski, *Dopuszczalność zażalenia* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 1…, p. 448 et seq.

Apart from the indicated appeals, standard complaints include:
- objection to judgement by default (Art. 344 CCP),
- complaint to another panel of the court of the second instance (Art. 394^2 CCP),
- charges against order for payment issued in payment order proceedings (Art. 493 CCP),
- objection to order for payment issued in writ of payment proceedings (Art. 503 CCP),
- objection to order for payment issued in European payment order proceedings (Art. 505^{19} CCP),
- objection to order for payment issued in electronic payment order proceedings (Art. 505^{35} CCP),
- complaint against ruling of a referendary (Art. 398^{22}, 518^1 CCP)[8].

II. Exceptional remedies (general remarks)

Proceeding now to the issue of extraordinary remedies, it should first and foremost be emphasised that the Polish doctrine of civil procedure defines these as legal measures aiming at altering or overturning judicial rulings despite their being binding. There is also acceptance for the position that while it is not stated *expressis verbis* in any piece of legislation that this system of legal measures should be characterised by exclusivity of particular remedies in respect to the subject of the remedy (exclusivity of one sole remedy), meaning that they should be characterised by the absence of competition among them[9]. The considerations presented in the following passages will demonstrate that the recent amendments to procedural rules and the introduction of the institution of the extraordinary grievance are proof of the legislator's lack of respect for that postulate.

8 Cf. T. Ereciński [in:] *System zaskarżania orzeczeń*…, p. 57 et seq.; W. Broniewicz [in:] W. Broniewicz, A. Marciniak, I. Kunicki, *Postępowanie cywilne w zarysie*, Warszawa 2016, p. 152.

9 For more on the understanding of the principle of exclusivity of remedies see W. Siedlecki, *System zaskarżania orzeczeń sądowych w postępowaniu cywilnym* [in:] W. Berutowicz, W. Siedlecki (ed.), *Zaskarżanie orzeczeń sądowych*, Wrocław 1986, p. 38 et seq. and M. Michalska-Marciniak, *Zasady zaskarżania orzeczeń* [in:] Id. (ed.), *Wokół problematyki*…, p. 90 et seq.

III. Cassation appeal

I. Presentation of the institution of the cassation appeal demands attention be drawn to the fact that it was reactivated in the Polish legal order[10], initially referred to as cassation, on 1 July 1996, constituting together with the appeal a means of appeal available to parties within the framework of two-instance proceedings. As a result, the Supreme Court became a court of the third instance; however, the procedural construction of the grounds and scope of cassation review rendered the cassation an exceptional remedy. Indeed, this review was limited to a legal aspect of the challenged verdict, ignoring its substantive layer. This is also why the Supreme Court, if it desired to issue a reformational ruling, despite the fact that it was a court of higher instance, was absolutely bound by the facts of the case constituting the basis of the challenged verdict[11]. The extraordinary nature of cassation and the restricted scope of appeal review were also very precisely defined by the specific grounds for appeal. Other significant limitations were introduced concerning the permissibility of cassation against verdicts of courts of the second instance. These limitations in the permissibility of cassation concerned the value of the subject matter of the appeal (*ratio valoris*), and the type of case (*ratio materiae*)[12].

On 6 February 2005, modifications were introduced into the cassation remedy system[13]. The previous cassation was replaced by the cassation appeal; however, this was more than a mere change in terminology, as it represented a fundamental transformation in the legal character of this remedy. However, the cassation appeal was designed as a legal remedy available against binding judgements. It thus constitutes a classic extraordinary remedy[14].

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10 After Poland regained independence in 1918, the cassation appeal was regulated as an appeal in the 1930 Code of Civil Procedure. The provisions relating to this complaint were in force until the entry into force of the Act of 20 July 1950, under which the complaint was replaced by the institution of revision.

11 T. Wiśniewski, *Przebieg procesu cywilnego*, Warszawa 2013, p. 397 et seq.

12 J. Gudowski aptly drew attention to the above aspects of the issue, formulating a general thesis that in the then legal status the Supreme Court, as a court of cassation, did not adjudicate cases as such, but only controlled the lower courts as to whether they did not offend the law with their judgments, and in the case of a found offence, it set aside defective judgmentp. See J. Gudowski, *Kasacja w świetle projektu Komisji Kodyfikacyjnej Prawa Cywilnego (z uwzględnieniem aspektów historycznych i prawnoporównawczych)*, "Przegląd Legislacyjny" 1999, no. 4, p. 28 et seq. See also T. Wiśniewski, *Skarga kasacyjna* [in:] Id. (ed.), *Skarga nadzwyczajna w świetle…*, p. 82 et seq.

13 Under the Act of 22 December 2004 amending the Code of Civil Prodcedure and the Common Courts Act (OJ L 2005, No. 13, item 98).

14 T. Zembrzuski, *Dostępność skargi kasacyjnej w procesie cywilnym*, Warszawa 2008, p. 35.

The procedural amendment retains the core of existing regulations governing the course of cassation proceedings, the rights of the parties, grounds of appeal, the Supreme Court's cognizance and the selection mechanism in the form of the so-called pre-court[15]. Moreover, in line with the previous legal state, the subject matter of cases in which cassation is admissible in general has been limited by law. Thus, the cassation system in force is not universal in nature.

In trial proceedings, pursuant to 398^1 § 1 the Code of Civil Procedure, a cassation appeal to the Supreme Court can be brought against a final judgment or decision on rejection of the claim or discontinuance of the proceedings ending the proceedings in the case, unless a special provision provides otherwise. Such a special provision is the following article of the Code of Civil Procedure, namely Article 398^2, which excludes the admissibility of a cassation appeal due to either the value of the object of the appeal or the nature of the case. A cassation appeal is inadmissible, inter alia, in property rights cases where the value of the object of the appeal is lower than PLN 50,000, and in labour and social security law cases when lower than PLN 10,000. An appeal in cassation is also inadmissible in cases: 1) for divorce, for separation, for maintenance, for rent or lease and for infringement of property ownership; 2) concerning disciplinary sanctions, certificate of employment and related claims as well as for allowances in-kind or their equivalent; 3) adjudicated in summary proceedings.

Also in non-contentious proceedings – pursuant to Article 519^1 of the Code of Civil Procedure. – numerous deviations were introduced from the basic assumption that an appeal in cassation is permissible with respect to a decision on the merits of the case issued by the court of second instance and to a decision on the rejection of the application and discontinuance of proceedings concluding proceedings in cases related to personal, property, and inheritance law, as well as family and guardianship law. For example, in the latter group of cases, an appeal in cassation shall be admissible only in cases of adoption and division of joint property after the cessation of joint property between the spouses, if the value of the object of the appeal is not less than PLN 150,000. An appeal in cassation may also be made in cases for the removal of a person who is subject to parental authority or is under the custody of a person, conducted under the Hague Convention of 1980.

Standing to lodge a cassation appeal is in principle vested in the parties (in non-contentious proceedings – each participant), as well as in the Prosecutor General, the Commissioner for Human Rights, and the Children's Rights Commissioner, with the proviso, however, that the bringing of a cassation complaint

15 T. Wiśniewski, *Skarga nadzwyczajna*…, p. 86.

by a party excludes – to the extent contested – the bringing of a cassation complaint by the aforementioned public law entities (Article 398^1 § 2 of the Code of Civil Procedure).

II. The correctness of submission of an appeal in cassation as a pleading depends on the applicant's compliance with the statutory editorial structure and prescribed form (Art. 398^4 Code of Civil Procedure). This distinction of the broadly understood formal side of a cassation complaint is significant from the point of view of Article 398^6 § 2 of the Code of Civil Procedure. The sanction provided for in that provision for failure to comply with the requirements as to the construction of the appeal in cassation (designation of the decision against which it is brought, indicating whether it is contested in whole or in part; citation of the grounds of cassation and their justification; application for quashing or revocation and amendment of the decision, indicating the scope of the quashing and amendment sought) is rejection of the appeal in cassation *a limine*, since that error cannot be remedied. However, avoiding this defect is to be facilitated by the requirement of compulsory representation by lawyer in the submission of the complaint. An appeal in cassation brought by a party in breach of this rule is also inadmissible *a limine*[16].

With regard to the general formal requirements for an appeal in cassation, the complainant shall, if necessary, be called upon to remedy the deficiencies within a week's time limit under pain of rejection of the application (Art. 398^6 § 1 Code of Civil Procedure).

An appeal in cassation shall be lodged with the court which issued the contested decision within two months from the date of service of the decision with reasons on the applicant (Article 398^5 § 1 Code of Civil Procedure). However, the time limit for submitting an appeal in cassation by authorised public law entities (the Prosecutor General, the Commissioner for Human Rights and the Children's Rights Commissioner) is six months from the date on which the decision becomes final and, if a party has demanded that the decision with a statement of reasons be served on it, from the date of service of the decision on the party (Art. 398^5 Code of Civil Procedure). This provision should also be borne in mind in non-contentious proceedings, except that in cases involving the removal of a person who is subject to parental authority or

16 Some individuals are exempt from the obligation to act in proceedings before the Supreme Court only through an attorney. The provision of Article 87^1 § 1 of the Code of Civil Procedure does not apply if the party, its body, statutory representative or proxy is a judge, prosecutor, notary public or professor or habilitated doctor of legal sciences, as well as if the party, its body or statutory representative is an advocate, legal adviser or advisor to the State Treasury General Prosecutor's Office (§ 2). Furthermore, § 1 is not applicable when the State Treasury is represented by the General Prosecutor's Office of the Republic of Poland (§ 3).

is in custody under the 1980 Hague Convention, the time-limit for the submission of an appeal in cassation by the abovementioned public law entities is four months from the date on which the order becomes final and binding (art. 519^1 § 2^2 Code of Civil Procedure).

III. Its grounds are undoubtedly decisive for the assessment of the essence and legal nature of a cassation appeal, as well as for the scope of the Supreme Court's cognizance, and they are in principle binding on the Supreme Court. Pursuant to Article 398^{13} § 1 of the Code of Civil Procedure, the Supreme Court shall examine an appeal in cassation within the boundaries of the appeal and of the grounds. There is one exception to this general rule. This exception applies to the invalidity of proceedings, which the Supreme Court, always within the boundaries of an appeal, considers *ex officio*.

As already mentioned, the cassation procedure, as opposed to the appeal procedure, addresses purely questions of law. The grounds for an appeal in cassation are both the defectiveness of the judgment itself and the proceedings before the court of second instance. This includes both substantive and procedural law violations. Pursuant to Article 398^3 § 1 of the Code of Civil Procedure, a party may base an appeal in cassation only on two grounds: (1) infringement of substantive law by misinterpretation or misapplication, and (2) infringement of procedural rules, if that defect could have had a significant effect on the outcome of the case.

Further cassation grounds are provided for public law entities. The Prosecutor General may base a cassation complaint on generally indicated grounds, if the issuing of a ruling has led to a violation of fundamental principles of the legal order; the Commissioner for Human Rights – if the issuing of a ruling has led to a violation of constitutional freedoms or human and civil rights; and the Children's Rights Commissioner – if the issuing of a ruling has led to a violation of a child's rights (Art. 398^3 § 2 Code of Civil Procedure).

An appeal in cassation cannot be based on objections concerning findings of fact or evidence (Article 398^3 § 3 of the Code of Civil Procedure). This prohibition is consistent with the Supreme Court's cognizance regulations, since in cassation proceedings the Supreme Court is bound by the findings of fact which form the basis of the contested decision and the parties are prohibited from invoking new facts and evidence (Article 398^{13} § 2 of the Code of Civil Procedure).

IV. As far as cassation proceedings before the Supreme Court are concerned, attention should first of all be paid to the obligatory stage related to the consideration (in closed session and by a single judge) of the matter of acceptance or refusal of an appeal in cassation for consideration (art. 398^9 § 2 Code of Civil

Procedure). At this stage, the appeal in cassation is evaluated from the point of view of the public-law premises referred to in art. 398^{9} § 1 Code of Civil Procedure[17]. The mechanism of selection of cassation complaints is that the Supreme Court accepts a cassation complaint for consideration if it is: 1) there is an important legal issue in the case; 2) there is a need to interpret legal provisions that raise serious doubts or cause discrepancies in the jurisprudence of the courts; 3) the proceedings are invalid or 4) the appeal in cassation is clearly justified.

An order refusing to accept an appeal in cassation is an order terminating the proceedings and is not subject to appeal.

If a complaint in cassation is accepted for consideration, the President shall refer it to a closed session, which is the rule, or to a hearing. This action may be combined with a request to the Prosecutor General to take a position in writing on the appeal in cassation lodged by a party and on any reply to the appeal already lodged (Article 398^{8} § 1 of the Code of Civil Procedure). The Supreme Court shall examine the cassation complaint in a panel of three professional judges (Article 398^{10} of the Code of Civil Procedure).

An appeal in cassation shall be dismissed if there are no well-founded grounds or if the contested decision, despite an erroneous statement of reasons, is well founded in law (Art. 398^{14} Code of Civil Procedure).

It is also permissible, but only at the applicant's request, to set aside the judgment under appeal and to rule on the substance of the case (Art. 398^{16} Code of Civil Procedure). When making a reformatory ruling, the Supreme Court, at the request of the applicant, shall apply Article 415 of the Code of Civil Procedure and shall rule on the reimbursement of the benefit provided or enforced or on restitution[18].

If an appeal in cassation is upheld, the Supreme Court shall set aside the appealed judgment in whole or in part and refer the case back to the court that issued the judgment or to another equivalent court for reconsideration. By declaring the proceedings null and void, the Supreme Court, along with the reversal of the appealed judgment, also cancels the proceedings to the extent affected by the nullity. The Supreme Court may also quash, in whole or in part, the judgment of the court of first instance and refer the case back to the same or an equivalent court for reconsideration. The court to which the case has been referred is bound by the Supreme Court's interpretation of the law in the case and the parties cannot base a future appeal in cassation on a judgment rendered

17 In legal jargon, this institution is referred to as "prejudication".

18 Where the issuance of a restitutional judgment requires the taking of evidence, the Supreme Court may send the application to the court of first instance. Cf. T. Wiśniewski, *Przebieg…*, p. 436 et seq. and Id., *Skarga kasacyjna…*, p. 136.

after rehearing the case on grounds inconsistent with the Supreme Court's interpretation of the law in the case (Art. 398^{20}).

If a statement of claim was rejected or there were grounds for discontinuance of proceedings, the Supreme Court shall set aside the judgments in the case and reject the statement of claim or discontinue the proceedings (art. 398^{19} Code of Civil Procedure,).

If a legal issue that gives rise to serious doubts emerges during the examination of a cassation appeal, the Supreme Court may postpone its ruling and refer the issue to an enlarged panel of that Court for decision (Art. 398^{17} § 1 Code of Civil Procedure). Where a panel of seven judges of the Supreme Court considers that the importance for judicial practice or the serioSCAess of the doubts that exist justifies it, it may refer the legal question to the entire chamber, and the chamber to a panel of two or more combined chambers, or to the full college of the Supreme Court (Art. 86 of the Supreme Court Act of 8 December 2017). A resolution of the enlarged Supreme Court is binding in a given case (Art. 398^{17} § 2 Code of Civil Procedure).

III. Action for ascertainment of unlawfulness of a final judgement

I. As a result of Article 77, paragraph 1 of the Constitution of the Republic of Poland of 2 April 1997, according to which "Everyone has the right to compensation for damage caused to him/her by the unlawful action of a public authority", and its statutory concretisation in the Civil Code (Article 417^1 § 2), a normative necessity arose to create an appropriate procedural instrument which would serve the injured party to obtain, through civil proceedings, compensation due. This instrument was adopted on 6 February 2005 in the form of the action for ascertainment of unlawfulness of a final judgement (art. 424^1–424^{12} Code of Civil Procedure).

Under the Code of Civil Procedure, the object of an action for ascertainment of unlawfulness of a final judgement is regulated by several provisions. The most significant provisions are Art. 424^1 and 519^1 Code of Civil Procedure. The first article indicates the admissibility of the complaint in trial proceedings, while the second article indicates the admissibility of the complaint in the non-contentious proceedings. Under Art. 424^1 § 1 Code of Civil Procedure, an ascertainment of unlawfulness of a final judgement of a court of second instance closing the proceedings in a case may be sought if damage has been caused to the party by the judgment and it was and is not possible to amend or set aside that judgment by means of the legal remedies available to the party. The same solution applies in non-contentious proceedings with regard to orders on the merits

of the case (art. 519^1 § 1 Code of Civil Procedure). In both cases, when assessing the question of admissibility, it is therefore necessary to consider whether it was not and is not possible to amend or set aside the judgment (order on the merits) by means of legal remedies available to the party. The situation is different in the exceptional circumstances mentioned in Art. 424^1 § 2 and 519^1 § 2 Code of Civil Procedure. According to these provisions, when the unlawfulness results from a violation of fundamental principles of the legal order or constitutional freedoms or human and civil rights, the unlawfulness of a final judgment (a final decision on the merits) of the court of first or second instance concluding the proceedings in a case may also be sought if a party has not availed itself of the remedies available to it, unless the judgment can be amended or revoked by other remedies available to the party. As can be seen, subsidiarity of the action is also provided for in exceptional cases, but in a more lenient form, since the complaint is admissible even though the party did not make use of the legal remedy available to it in due time (the action is even permissible against a final judgment of the court of first instance). It is, however, inadmissible if it is still possible to amend or set aside the judgment by means of other legal remedies available to the party.

Let us add that we are presently discussing a specific legal measure, as it is situated between a validly concluded proceeding and a new proceeding that may be pending between one of the parties to that proceeding and the State Treasury in a damages case[19]. The Supreme Court, in accepting the action, confines itself to stating that the decision is unlawful to the extent contested (art. 424^{11} § 2 Code of Civil Procedure). Only in a situation where the case, due to a person or subject matter, was not subject to the jurisdiction of the courts at the time of ruling, the Supreme Court – declaring the ruling illegal – quashes the appealed ruling and the ruling of the court of first instance and rejects the claim or discontinues the proceedings (art. 424^{11} § 3 Code of

19 There is a dispute in the doctrine of civil procedure as to whether the complaint in question can be regarded as a remedy at all. This classification is made according to the criterion which assumes that the purpose of such measures is to set aside or modify the contested decision. An action for an ascertainment of unlawfulness does not seek to challenge the contested decision, but to establish its unlawfulness and can only exceptionally lead to its annulment. On the other hand, it is acknowledged that the present action does not differ from the remedies in that it also has an element of review of the judgment. Furthermore, as is well known, appeals are also classified according to the criterion of the validity of the judgment, whether or not it is contested. From this point of view, an action for ascertainment of unlawfulness should be brought against final decisionp. It should therefore ultimately be accepted, despite the questionable nature of the issue, that this complaint can ultimately be included in the group of extraordinary remedies under the traditional scheme. More broadly, see T. Wiśniewski, *Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* [in:] Id. (ed.), *Skarga nadzwyczajna w świetle…*, p. 170 et seq. and the literature cited therein.

Civil Procedure). Therefore, leaving aside the above exception, the finding that a particular final judgment is unlawful does not eliminate it from the legal system. The judgment, despite its obvious defectiveness, still binds the parties and produces legal effects in civil law transactions. In other words, the judgment under appeal continues to be valid in full force both as regards its validity and its effectiveness and enforceability[20]. The decision of the Supreme Court prejudicating the principle of the State Treasury's liability for a judicial tort creates a prejudicial effect on the injured party in a future compensation process[21].

It should be pointed out that, under the current state of law, extraordinary remedies in the form of an appeal in cassation and an application for resumption of proceedings serve the function of an action for ascertainment of unlawfulness of a final decision, since the relevant decisions granting both these actions are equivalent to a decision granting an action for ascertainment of unlawfulness of a final decision[22].

Requiring a prejudication in the form of a Supreme Court ruling, in other words, a two-stage procedure for the liability of the State Treasury for a judicial tort is not always necessary. This is elucidated in Art. 424^{1b} Code of Civil Procedure, which provides that, in the case of final judgments against which the present action is not permitted[23], compensation for damage caused by a final unlawful decision may be sought without the unlawfulness of the decision being previously ascertained in the action unless the party has failed to avail himself of the remedies available to him.

The time limit for bringing an action for ascertainment of unlawfulness of a final judgment is set out in Article 424^{6} § 1 of the Code of Civil Procedure This provision sets a two-year time limit for its submission. The beginning of the two-year period is linked to the date on which the judgment under appeal became final.

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20 Cf. A. Miączyński, *Orzeczenie Sądu Najwyższego* [in:] W. Berutowicz, W. Siedlecki (ed.), *Zaskarżanie orzeczeń…*, p. 569.

21 T. Ereciński, *Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Warszawa 2005, p. 1002.

22 J. Gudowski [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Vol. 3. Postępowanie rozpoznawcze*, Warszawa 2016, p. 478. Cf. T. Wiśniewski [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania cywilnego. Vol. 2. Artykuły 367–505*[37], Warszawa 2013, p. 362 et seq.

23 It follows from our earlier reasoning that an action for ascertainment that a final decision is unlawful may be brought only against decisions in the form of a judgment or an order on the substance of the case.

II. It follows from settled case-law on the interpretation of the phrase "unlawfulness" that the concept cannot be regarded as synonymous with either unlawfulness linked to general civil liability for damages or unlawfulness distinguished by doctrine and case-law in relation to liability for tort. It is also stressed that when defining the notion of "unlawfulness", it should be kept in mind that it is intended to refer to judicial activity based on the principle of judicial independence. The concept of "a single correct and accurate judgment" should also be ruled out, otherwise, any inconsistency in judicial decisions should be considered to be an infringement of the law. As a result, the Supreme Court adopts the principle of "multiple judgments" in the broadest sense, which allows that even if the same or similar factual and legal decisions are made, conflicting court judgments are not considered unlawful and do not therefore constitute a judicial tort[24]. Ultimately, a unified position was forged in the judicature of the Supreme Court, based on the relevant acquis of doctrine and jurisprudence of the Constitutional Tribunal, according to which an unlawful decision is a decision that is undoubtedly contrary to fundamental and uniformly interpreted provisions, to generally accepted standards of adjudication, or is the result of a particularly grossly incorrect interpretation or application of the law[25]. According to this position, unlawfulness in this sense can only result from manifest errors of the court, caused by a blatant violation of the principles of interpretation or application of law, the understanding of which is not in doubt[26].

IV. Application for resumption of proceedings

I. In civil proceedings, the application for resumption of proceedings shall in principle be available to final judgments and orders for payment (art. 399 § 1 and 353^2 Code of Civil Procedure)[27]. In one case only may proceedings be resumed if

24 T. Wiśniewski, *Kodeks postępowania cywilnego*…, p. 359; Cf. J. Gudowski, *Dopuszczalność skargi o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* [in:] J. Gudowski (ed.), *Środki zaskarżenia*. Part 2, Warszawa 2013, p. 1572.

25 See Supreme Court verdicts: of 31 March 2006, IV CNP 25/05, OSNC 2007, No 1, item 17 and of 7 July 2006, I CNP 33/06, OSNC 2007, No 2, item 35. See also critical gloss to those verdicts of Ł. Kozłowski, PS 2008, no. 7–8, p. 184 et seq. Also, Cf. T. Wiśniewski, *Kodek*s…, p. 359 et seq. and Id., Skarga nadzwyczajna…, p. 186.

26 The Supreme Court thus ruled in its verdict of 4 January 2007, V CNP 132/06, OSNC 2007, no. 10, item 174.

27 As far as the admissibility of challenging orders for payment by way of a resumption of proceedings is concerned, it should be noted that these may be any order for payment issued in separate civil proceedings such as an order for payment, a writ of payment procedure and an electronic writ of payment procedure, whereas such a possibility has been excluded, pursuant to Article 20 of Regulation (EC) No 1896/2006 of the European Parliament and of

they are concluded by a decision of a procedural nature, namely if the Constitutional Tribunal has declared a normative act incompatible with the Constitution, a ratified international agreement or a law on the basis of which it was issued (art. 399 § 2 in conjunction with art. 401[1] Code of Civil Procedure)[28] The basis for reopening, taking into account the relevant decision of the Constitutional Tribunal, obviously includes, as a general rule, also situations in which proceedings were concluded with a substantive decision, i.e. a judgment or an order for payment.

However, an application for resumption is not admissible against a judgment pronouncing a marriage annulment or divorce or establishing the non-existence of a marriage if even one of the parties has entered into a new marriage after it has become final and binding (art. 400 Code of Civil Procedure).

The resumption of proceedings which have been concluded by a final judgment upon an application for resumption is inadmissible (Art. 416 § 1 Code of Civil Procedure), subject to the restriction that this provision does not apply – Art. 416 § 2 Code of Civil Procedure – if the application for resumption was based on the basis of resumption as set out in Art. 401[1] Code of Civil Procedure. In this case, exceptionally, we may be dealing with an extraordinary complaint to resume proceedings.

In non-contentious proceedings, pursuant to Article 524 § 1 of the Code of Civil Procedure, the principle is adopted that a party to proceedings may request the resumption of proceedings concluded with a final decision on the merits of the case, but such resumption is not permissible if the decision ending the proceedings may be modified or set aside[29]. However, in accordance with paragraph 2 of that Article, an interested party who was not a party to proceedings which was concluded with a final decision on the merits may request the resumption of those proceedings if that decision infringes his rights. In such a case, the provisions on resumption of proceedings for incapacity to act shall apply.

An application for resumption shall be made within a period of three months, calculated from the date on which the party becomes aware of the ground for resumption and, where the ground is lack of capacity or representation, from the date on which the party, its body or its legal representative became

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the Council of 12 December 2006, as regards the European order for payment. On the admissibility of an application for a resumption of proceedings against a final order for payment see K. Weitz, *Dopuszczalność skargi* o w*znowienie postępowania* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 2…, p. 1184.

28 More on the subject see A. Olaś, *Wznowienie postępowania zakończonego orzeczeniem niemerytorycznym – uwagi de lege lata i de lege ferenda* [in:] K. Markiewicz, A. Torbus (ed.), *Postępowanie rozpoznawcze…*, pp. 675–690. See also K. Weitz, *Dopuszczalność skargi…*, p. 1177 et seq.

29 Detailed examples of cases in which an application for resumption of proceedings is excluded in non-contentious proceedings on the grounds of the possibility of amending or repealing final decisions on the merits of the case, are indicated and discussed at length by Ibid., p. 1185 et seq.

aware of the judgment (art. 407 § 1 Code of Civil Procedure). However, in the situation indicated in Article 401[1] of the Code of Civil Procedure, the application for resumption is in principle lodged within three months of the entry into force of the decision of the Constitutional Court (Art. 407§ 2 Code of Civil Procedure). No resumption may be requested more than ten years after the judgment has become final, except in cases where the party was prevented from acting or was improperly represented (Art. 408 Code of Civil Procedure). The indicated deadlines – three months and ten years – are independent of each other. Failure to meet either of them will result in rejection of the application.

II. On the basis of the Code of Civil Procedure we distinguish three groups of causes for resumption of proceedings. The first one is related to procedural defects that led to the invalidity of the proceedings; the second one takes into account the existence of the so-called restitution causes; while the third cause can be called constitutional, although it is present in a slightly broader legal context, not only constitutional[30].

The specific grounds for invalidity of the proceedings justifying an application for resumption of the proceedings are set out in Article 401 of the Code of Civil Procedure. They are as follows:

a) if the composition of the court included an unauthorized person or if a judge excluded by virtue of the Act adjudicated and the party could not file for disqualification before the judgment became final,
b) if the party did not have judicial or procedural capacity or was not properly represented, or if, as a result of an infringement of the law, it was deprived of the opportunity to act; however, no resumption may be requested if, before the judgment has become final, the inability to act ceased or the lack of representation was raised by way of a plea or the party confirmed the procedural steps.

Restitution grounds are regulated in Article 403 of the Code of Civil Procedure. They allow for the resumption of proceedings if:

a) the judgment is based on a forged or falsified document or on a criminal conviction, subsequently revoked, or
b) the judgement was obtained by means of an offence (§ 1),
c) such facts or evidence were subsequently discovered, i.e. after the judgment under appeal became final, as could have had an impact on the outcome of the case and could not have been used by the party in previous proceedings (§ 2), or

30 Cf. K. Piasecki, *Postępowanie sporne rozpoznawcze w sprawach cywilnych*, Warszawa 2011, p. 540.

d) a judgment which came before than the judgment under appeal and which has the same legal relationship is found to be final (§ 3).

In proceedings on the application for resumption, the rules of procedure at first instance shall apply mutatis mutandis, unless specific provisions provide (art. 406 Code of Civil Procedure).

If the inadmissibility of the application is established, it is subject to rejection (Article 410 § 1 of the Code of Civil Procedure. Otherwise, the court shall assess the merits of the application for resumption of proceedings, except that there is an exception to this rule for the Supreme Court, which, if it has jurisdiction, shall rule only on the admissibility of the resumption and shall refer the case to the court of second instance. After re-examining the case, the court, according to the circumstances, either dismisses the application for resumption of the proceedings or, taking it into account, amends or revokes the appealed decision and, if necessary, dismisses the claim or discontinues the proceedings (art. 412 § 2 Code of Civil Procedure).

V. Application to the Supreme Court for annulment of a final decision

An application to the Supreme Court for annulment of a final judgment is an institution regulated in Article 96 of the Supreme Court Act of 8 December 2017 (hereinafter: SCA)[31]. Only the Prosecutor General has standing to submit such an application. The Supreme Court, at the Prosecutor General's request, annuls a final decision issued in a case which, at the time of the ruling, a person was not subject to the jurisprudence of Polish courts, or in which the judicial process was inadmissible at the time of the ruling, if the decision cannot be otherwise abolished under procedures provided for in legislation governing court proceed-

[31] OJ L 2018, item 5 as amended. As far as the historical development of this proposal is concerned, its origins are to be found in Article 77 of the Regulation of the President of the Republic of 6 February 1928 – Act on the Common Court System (OJ L No. 12, item 93.), which entitled the Supreme Court to annul the decision, at the request of the first prosecutor, if it was issued, inter alia, against a person who was not subject to the jurisdiction of common courts in a given case. The contemporary institution of the motion in question is considered in detail by Grzegorczyk, *Geneza i charakterystyka wniosku o unieważnienie orzeczenia* [in:] J. Gudowski (ed.), *Środki zaskarżenia*. Part 2…, p. 1640 et seq.; See also A. Góra-Błaszczykowska, *Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017 r.* [in:] *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu*, Warszawa 2018, p. 67 and T. Wiśniewski, W*niosek do Sądu Najwyższego o unieważnienie prawomocnego orzeczenia* [in:] Id. (ed.), *Skarga nadzwyczajna w świetle…*, p. 213 et seq.

ings (art. 96 § 1 SCA). Both these grounds are linked with the broadly understood competence of Polish courts. The former refers to relations with foreign courts, while the latter to relations with respect to domestic administrative procedures[32].

In filing the application, the applicant seeks to have the contested judgment eliminated from the legal system[33], since granting the application is, in terms of its effects, tantamount to setting aside that judgment[34]. It is irrelevant whether it is a final decision of the court of first or second instance, and in what procedural circumstances the decision became final. The legislature did not condition the admissibility of the application on the prior use by the party of available legal remedies by which the defective decision could be set aside. An application is, however, a subsidiary measure, since it can only be validly submitted if there is no possibility of setting aside the judgment by another type of extraordinary remedy[35].

It is noted that the application for a declaration of annulment may be filed at any time, since there is no statutory deadline for an appeal. This is unusual under the provisions on appeals, but nevertheless is worthy of approval.

Pursuant to Art. 96 § 5 SCA, after considering the case, the Supreme Court either accepts the application and annuls the contested decision or rejects the application. A cassation decision with simultaneous referral of the case for retrial is out of the question[36].

VI. Extraordinary complaint

I. In the current system of appeals against judicial decisions in civil proceedings, extraordinary complaints occupy a special place[37]. This is a new legislative development, which entered into force – on the basis of the Supreme Court Act – on

32 Id., W*niosek do Sądu Najwyższego*…, p. 221.

33 P. Grzegorczyk, *Geneza i charakterystyka wniosku*…, p. 1647; A. Góra-Błaszczykowska, *Skarga nadzwyczajna…,* p. 67.

34 P. Grzegorczyk, *Geneza i charakterystyka wniosku…,* p. 1647.

35 T. Wiśniewski, W*niosek do Sądu Najwyższego*…, p. 219.

36 P. Grzegorczyk, *Rodzaje, podstaw i skutki rozstrzygnięcia Sądu Najwyższego* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 2…, p. 1724. See also T. Wiśniewski, W*niosek do Sądu Najwyższego*…, p. 222.

37 It follows from the justification of the draft Supreme Court Act presented by the President of the Republic of Poland that the institution of an extraordinary complaint is to implement the postulate that court judgments should be just, issued on the basis of properly interpreted legal regulations and reflect the evidence collected and properly assessed, even at the expense of the stability of final court judgments, and, moreover, it is to fill a gap in the current system of extraordinary remedies, as the basis for the complaint may be not only a gross violation of the law but also contradiction of essential court findings with the content of the evidence collected in a given case. For more, R. Bełczącki, *Skarga nadzwyczajna* [in:] T. Wiśniewski (ed.), *Skarga nadzwyczajna w świetle…*, p. 223 et seq.

3 April 2018[38]. In the Polish legal doctrine, this complaint gives rise to numerous doubts and objections, as its normative form creates a collision of two values which are of great importance to the legal order – the stability of a judgement and its rule of law[39]. Furthermore, it is also stressed that the extraordinary complaint led to a revision of the position taken to date in our civil litigation doctrine on complementarity and competition between extraordinary remedies, and to respect the principle of exclusivity adopted in our system of appeals[40].

A special feature of the extraordinary complaint is its subsidiarity. It results from Art. 89 § 1 SCA that it is admissible if the judgment cannot be set aside or modified by other extraordinary remedies[41]. On the other hand, the inadmissibility of an extraordinary complaint is not determined by the fact that the party did not take advantage of the ordinary or extraordinary remedies available to it within a reasonable period of time and, as a result, not only did it lose the right to a procedural remedy, but it also deprived itself of the possibility of any correction of the defective judgment. The subsidiarity of an extraordinary complaint means that, in principle, all other possible and admissible extraordinary measures and other legal remedies take precedence over it[42]. This means, for example, that if the expected result in removing the defectiveness of the judgment can be achieved by means of an application for resumption of proceedings, an appeal in cassation, or an application for reinstatement, this excludes the admissibility of an extraordinary

38 It should be noted that the extraordinary complaint was introduced at the same time in criminal proceedings on the above date. In both cases, it was based on the institution of extraordinary review, which was removed from the Polish legal system in criminal cases on 1 January 1996, and in civil cases on 1 July 1996. The roots of the extraordinary complaint date back to the legal order of the USSR. It was, therefore, the creation of a totalitarian state. For more, T. Ereciński, K. Weitz, *Skarga nadzwyczajna w sprawach cywilnych*, "Przegląd Sądowy" 2019, no. 2, p. 10 et seq.; T. Zembrzuski, *Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia*, "Przegląd Sądowy" 2019, no. 2, p. 23 et seq.; T. Wiśniewski, *System środków zaskarżania orzeczeń w postępowaniu cywilnym* [in:] Id. (ed.), S*karga nadzwyczajna w świetle…*, p. 13 et seq.

39 More broadly A. Machnikowska, *O niezawisłości sędziów i niezależności sądów w trudnych czasach. Wymiar sprawiedliwości w pułapce sprawności*, Warszawa 2018, p. 268 et seq.; T. Scheffler, *Skarga nadzwyczajna*, "Radca Prawny" 2018, no. 178, el.; T. Ereciński, K. Weitz, *Skarga nadzwyczajna…,* p. 7 et seq.; T. Zembrzuski, *Wpływ wprowadzenia skargi…,* p. 23 et seq.; A. Góra-Błaszczykowska, *Skarga nadzwyczajna…*, p. 67 et seq.; T. Wiśniewski, *System zaskarżania orzeczeń…*, p. 47 et seq.

40 T. Zembrzuski, *Wpływ wprowadzenia skargi…*, p. 28 and 36. Cf. T. Wiśniewski, *System zaskarżania orzeczeń…*, p. 51 et seq.

41 T. Ereciński and K. Weitz indicate that the extraordinary complaint is an extraordinary remedy of a complex nature and combines elements of the former extraordinary review and the cassation in defence of the law in some systems – T. Ereciński, K. Weitz, *Skarga nadzwyczajna…*, p. 8–9.

42 Cf. T. Zembrzuski, *Wpływ wprowadzenia skargi…*, p. 28.; T. Wiśniewski, *System zaskarżania orzeczeń …*, p. 49 et seq.

complaint. Only in the case of an application for a declaration of incompatibility of a final decision shall priority be given to an extraordinary complaint[43].

II. Article 89 § 1 SCA defines the main subject matter of review in proceedings conducted under an extraordinary complaint. It is: preservation of the principles or freedoms and human and civil rights set out in the Constitution of the Republic of Poland (point 1), correctness of the interpretation and application of the law (point 2), correctness of the findings adopted as the basis for the ruling in the light of the evidence gathered in the case (point 3)[44]. The three-faceted subject-matter of the judicial review discussed here is a derivative of the causes (grounds) for the extraordinary complaint set out in that provision. Under Art. 89 § 1 SCA, an extraordinary complaint is lodged if:

1) the judgment violates the principles or freedoms and human and civil rights set out in the Constitution or
2) the judgment is manifestly unlawful due to misinterpretation or misapplication of the law, or
3) there is a clear contradiction between the relevant findings of the court and the evidence gathered in the case.

The Supreme Court Act adopts the principle that an extraordinary complaint may be lodged against final decisions of a common court concluding proceedings in the case (art. 89 § 1 *princ.* SCA). This means that it is irrelevant whether the decision was issued by a court of first instance or second instance. There are no restrictions on the extraordinary complaint due to the type of case or the value of the object of the appeal. However, an extraordinary complaint is not admissible against a judgment establishing the non-existence of a marriage, a marriage annulment or a divorce, if one of the parties has concluded a marriage after such a judgment has become final, and against an adoption order (art. 90 § 3 SCA).

In cases heard in the course of the proceedings, it is permissible to lodge an extraordinary complaint against a judgment, a payment order, but also against an order terminating the proceedings in a formal manner (order rejecting the claim or discontinuing the proceedings). In non-contentious proceedings, on the other hand, the decision on the merits of the case and procedural decisions to reject an application or discontinue the proceedings are subject to appeal with the complaint under consideration here[45].

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43 T. Wiśniewski, *System zaskarżania orzeczeń…*, p. 50 and Id., *Skarga o stwierdzenie niezgodności…*, p. 200 et seq.

44 R. Bełzącki, *Skarga nadzwyczajna…*, p. 224.

45 Considering the limited framework of this statement, I do not elaborate on the admissibility of an extraordinary complaint in other civil proceedings. See on that subject Ibid., p. 230.

As a general rule, the Supreme Court's decisions, including reformatory judgements, are not subject to appeal. Moreover, it should be noted that an extraordinary complaint in certain procedural situations is a complementary measure to a cassation appeal[46]. Under Art. 90 § 2 SCA, an extraordinary complaint cannot be based on the charges which were the subject of a cassation complaint adopted for consideration by the Supreme Court. Other charges are therefore admissible. Nevertheless, a legislative novelty is the possibility of challenging the decision of a common court, in this case always a decision of a court of second instance, despite earlier appeals in cassation. However, if in a given case the Supreme Court refuses to accept a cassation appeal for consideration, overturns the decision of the second instance court and remits the case for reconsideration, or, alternatively, decides to reject the cassation appeal, the filing of an extraordinary complaint is not only admissible, but also there is no prohibition on repeating the charges made in the cassation appeal[47]. This state of affairs is manifestly incompatible with the requirement for an exclusive remedy against a particular type of judgment.

III. The legislator has defined precisely the list of entities entitled to file an extraordinary complaint (art. 89 § 2 SCA). The parties are excluded, but standing has been given to the following public law entities: the Prosecutor General, the Commissioner for Human Rights and, within the scope of their competence, to the President of the Prosecutor General's Office of the Republic of Poland, the Children's Rights Ombudsman, the Patient's Rights Ombudsman, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium Enterprises, and the President of the Office for Competition and Consumer Protection. Thus, we are dealing here with a multi-purpose public legitimacy, with different scopes of legitimacy to lodge an emergency complaint. The most extensive legitimacy is that of the Prosecutor General and the Ombudsman[48].

IV. The time-limit for filing an extraordinary complaint is laid down in art. 89(3) of SCA, according to which an extraordinary complaint must be lodged within five years of the date on which the contested decision became final[49]. If an appeal

46 Ibid., p. 227.

47 Ibid., p. 228.

48 It should be noted that during the transitional period – i.e., 3 years from the entry into force of the Supreme Court Act of 2017 – with regard to final decisions concluding proceedings in a case which have become final before the entry into force of this Act (i.e. before 3 April 2018), an extraordinary complaint may be brought only by the Prosecutor General or the Commissioner for Human Rights (115 § 1a SCA).

49 The rule laid down in Article 89 § 3 of the SCA on the time-limit for bringing an extraordinary complaint is subject to a serious derogation during a transitional period. Under

in cassation has been lodged against the decision, the time-limit for submitting an extraordinary appeal shall be one year from the day on which the appeal in cassation is decided[50]. Attention should be drawn to the specific situation in which an extraordinary complaint – lodged within the time-limit – is to be examined after five years from the date on which the contested judgment of the Republic of Poland becomes final and binding. In such a case, if at the same time the ruling has had irreversible legal effects, or such is supported by the principles or freedoms and human and civil rights set out in the Constitution, the Supreme Court – if it does not reject the extraordinary complaint – may limit itself to stating that the contested ruling was issued unlawfully and to specifying the circumstances on account of which it has thus ruled (art. 89 § 4 SCA)[51]. In this case, therefore, the Supreme Court, taking into account the extraordinary complaint, limits itself to the so-called "platonic" ("instructional") indicating to the court of a wrongful judgment[52].

V. In connection with issues concerning the proceedings and types of rulings issued by the Supreme Court in proceedings triggered by an extraordinary complaint, attention should first of all be paid to the conciseness of the regulation of this institution. This explains the importance of the reference contained in Art. 95 point 1 of the SCA, based on which, to the extent not regulated by the provisions of the Act on extraordinary complaints, the provisions of the Code of Civil Procedure concerning a cassation complaint are applicable in the proceedings on this complaint, excepting art. 398^4 § 2 and 398^9. However, in general terms, the legislator has adopted the cassation procedural model for the extraordinary complaint itself[53], accompanied by some procedural innovations. Thus, Article 93 of the SCA introduces a legislative novelty in the form of the institution of the public interest ombudsman[54]. According to this article, if the First President of the Supreme

Article 115 § 1 of the SCA, for a period of three years from the date of entry into force of that law, an extraordinary action may be brought against final decisions concluding proceedings in cases which have become final after 17 October 1997.

50 For more, Ibid., p. 235 et seq.

51 See also art. 115 § 2 SAC, applicable during the transition period.

52 Cf. K. Piasecki, *Postępowanie sporne…*, p. 533 and A. Miączyński, *Orzeczenia Sądu Najwyższego…*, p. 515, przypis 96.

53 It should be noted with surprise that the reference in Article 95 of the SCA to the provisions relating to an appeal in cassation does not state that these provisions apply mutatis mutandis. This is a clear oversight by the legislator, since the nature and scope of the review triggered by the bringing of an extraordinary complaint are different from those of the review in the cassation procedure. Moreover, the wording of Art. 91 § 1 SCA, according to which the Supreme Court's ruling in a reformational rather than a cassation manner has priority, is not irrelevant to the subject matter in question.

54 In the current state of law, the social interest in civil proceedings, if necessary, was protected only by the prosecutor (Art. 55 et seq. Code of Civil Procedure).

Court or the President of the Supreme Court considers that the protection of the rule of law and social justice justifies it, particularly in the case of an extraordinary complaint, he may appoint a participant in the proceedings acting as a public interest ombudsman, in particular a person fulfilling the requirements for holding office as a judge of the Supreme Court. The public interest ombudsman aims to make the principles of the rule of law and social justice a reality (§ 1). The public interest ombudsman shall be notified of hearings of the Supreme Court in the case to which he was appointed. The public interest ombudsman may make written statements, attend hearings, and make oral statements (§ 2).

The solution set out in Art. 94 SCA concerning the composition of the court ruling on an extraordinary complaint is unique. The extraordinary complaint is reviewed by the Supreme Court in a panel composed of two Supreme Court judges adjudicating in the Chamber of Extraordinary Review and Public Affairs and one Supreme Court juror (§ 1). However, if an extraordinary complaint concerns a ruling issued as a result of proceedings in the course of which the Supreme Court issued a judgment, the case is examined by the Supreme Court in a panel composed of five Supreme Court judges adjudicating in the Chamber of Extraordinary Review and Public Affairs and two Supreme Court jurors (§ 2).

Although the provisions applied to proceedings on an extraordinary complaint – to the extent not regulated by the provisions of the Supreme Court Act of 2017 – are those applicable to cassation proceedings, the nature and shape of these proceedings is different from cassation proceedings. This is a consequence of the axiological justification for the introduction of the extraordinary complaint into our legal order. The point is that, in the proceedings on such a complaint – as opposed to the cassation procedure – the correctness of the established factual basis of the contested decision is also a protected value. For this reason, the extraordinary complaint may also be based on the allegation that essential findings of the court are contradictory to the evidence gathered in the case, and the Supreme Court, if the appealed decision is overturned and the case is referred back to the court for reconsideration, has the power to give the court that issued the decision guidance on further proceedings[55]. It need not, therefore, like a court of cassation, confine itself to engaging in interpretation of the law (see Art. 398^{20} Code of Civil Procedure).

Article 91 § 1 SCA provides for certain general principles for ruling on an extraordinary complaint. The Supreme Court, when admitting such a complaint, annuls the appealed decision in whole or in part and, in accordance with the outcome of the proceedings, either remits the case to the competent court for reconsideration, if necessary also annuls the decision of the court of first

55 R. Bełczącki, *Skarga nadzwyczajna…*, p. 299.

instance, or discontinues the proceedings. If the Supreme Court finds that there are no grounds for reversal of the appealed decision, the Supreme Court shall dismiss the extraordinary appeal[56].

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56 More on the subject, R. Bełczącki, *Skarga nadzwyczajna*…, p. 287 et seq.

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SUMMARY

Extraordinary remedies in the Polish doctrine of civil procedure are legal measures aimed at amending or overturning court decisions despite their force of law. Although by its very nature, the legal act appropriate for regulating the legal remedies admissible in civil proceedings is the Code of Civil Procedure, the above assumption has not been fully observed by the legislator, as the legal bases for two extraordinary remedies is contained in other legislation, in particular, in the Supreme Court Act of 8 December 2017 (OJ L 2018, item 5 as amended). These are the extraordinary complaint and application for annulment of a final judgment by the Supreme Court. The Code of Civil Procedure, on the other hand, regulates three extraordinary appeals: an appeal in cassation, an action for ascertaining the unlawfulness of a final judgment, and an application for resumption of proceedings. It should be pointed out that, as the law presently stands, extraordinary remedies in the form of an appeal in cassation and an application for resumption of proceedings serve the function of an application for ascertainment of unlawfulness of a final judgment, since the relevant judgments upholding both these applications are equivalent to a judgment upholding an application for ascertainment of unlawfulness of a final judgment. Particular attention has been paid to the legislative novelty of the extraordinary complaint. It is characterised by subsidiarity, as it is admissible if a judgment cannot be set aside or modified by other extraordinary remedies. Only statutorily designated public law entities have standing to bring such a complaint, and its grounds are strictly defined by law. Also, the procedure itself conducted on the basis of an extraordinary complaint is characterised by specificity. Only statutorily designated bodies governed by public law are entitled to bring this action. It is heard by the Supreme Court in a panel composed of two Supreme Court judges adjudicating in the Chamber of Extraordinary Review and Public Affairs and one Supreme Court juror. However, if an extraordinary complaint concerns a decision made as a result of proceedings in the course of which the Supreme Court issued a judgment earlier, the case is considered by the Supreme Court in a panel composed of five judges of the Supreme Court adjudicating in the Chamber of Extraordinary Review and Public Affairs and two jurors of the Supreme Court. A public interest ombudsman may take part in these proceedings.

Keywords: system of extraordinary remedies, appeal in cassation, application for ascertainment of unlawfulness of a final judgment, application for resumption of proceedings, application for annulment of a final judgment by the Supreme Court, extraordinary complaint

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Proposed changes to Polish intellectual property laws

Abstract
This article discusses proposed legislative changes which aim to introduce a special court into the Polish court system to handle intellectual property matters. The main reason for establishing such a court is, undoubtedly, the quite specific nature of proceedings regarding intangible property rights in a broad sense. The bill is part of a vast exercise to amend civil procedure law, but, to a large extent, has an impact on the substantive provisions of Industrial Property Law and the Act on Copyright and Related Rights. A number of the proposed solutions should, therefore, have a consistent influence on intellectual property laws and contribute to increasing the quality of adjudication. A substantial portion of the doctrinal considerations addressed in this article are, however, about selected issues related to new laws on remedies available in intellectual property law proceedings. In particular, they include provisions which enable the disclosure of information on intellectual property right violations. The issue of information disclosure requests has already provoked many reactions, mostly critical, with respect to the current legislation. Therefore, examining the proposed change is all the more justified as it may provide an answer to whether the uncertainties associated with applying this construct will continue to exist.

Introduction

This article discusses proposed legislative changes which aim to introduce a special court into the Polish court system that would handle intellectual property matters. The main reason for establishing such a court is, undoubtedly, the quite specific nature of proceedings regarding intangible property rights in a broad sense. Amidst cases regarding intellectual property rights, there is also a narrower category of matters, namely those regarding industrial property rights, which concern, in particular, patents and utility models. In these matters the technical aspect, which is at the core of any inventive solution, is often dominant, therefore creating the need for assistance from specialists and experts with specialised knowledge in various technical areas in analysing the material gathered[1].

The need to introduce a separate adjudication path for cases regarding intangible property rights, and in particular intellectual property rights, seems to be confirmed by the numerous demands from the business community as well as representatives of collective management organisations and jurisprudence[2]. The proposals in the bill should, therefore, be considered a step in the right direction; however, a detailed analysis of its specific provisions in terms of their wording, editing and completeness, leads to the conclusion that the bill requires further work. The proposed changes contain certain issues which warrant the need for systemic regulation of certain provisions in both procedural and substantive law. The bill is part of a vast exercise to amend civil procedure law, but, to a large extent, impacts the substantive provisions of Industrial Property Law and the Act on Copyright and Related Rights. A number of the proposed

1 Cf. P. Podrecki, *Organizacja i działanie sądu do spraw własności intelektualnej* [in:] P. Kostański, P. Podrecki, T. Targosz (ed.), *Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple,* Warszawa 2017, pp. 1228–1243.

2 Cf. A. Adamczak, M. Kruk, *Perspektywy utworzenia sądu ds. własności intelektualnej w Polsce – obecne realia* [in:] J. Ożegalska-Trybalska, D. Kasprzycki (ed.), *Aktualne wyzwania prawa własności intelektualnej i prawa konkurencji. Księga pamiątkowa dedykowana Profesorowi Michałowi du Vallowi*, Warszawa 2015, pp. 26–39; cf. also a report by Dr. Ż. Pacud, *Innowacyjność w polskim sektorze zdrowia. Analiza jakościowa*, Warszawa 2018, which was prepared on the basis of a sectoral study in which the postulates voiced by businesses included a demand for creating specialised intellectual property courts, stating that "the main problem with the Polish intellectual property protection system is the lack of dedicated courts". The respondents stressed that intellectual property matters are examined by regional courts whose judges lack the technical background for ruling on such matters. Many respondents criticised that system in comparison with more mature jurisdictions, such as that in Germany or the UK. The substantive law problems indicated by the respondents regard granting injunctions, interpretation of the so-called Bolar exemption and of the SPC manufacturing waiver, which confers no protection against drugs for export outside the EU (cf. p. 28 of the report).

solutions should, therefore, have a consistent influence on intellectual property laws and contribute to increasing the quality of adjudication.

A substantial portion of the doctrinal considerations addressed in this article is, however, about selected issues related to new laws on remedies available in intellectual property law proceedings. In particular, they include provisions which enable the disclosure of information on intellectual property right violations.

The issue of information disclosure requests has already provoked many reactions, mostly critical, with respect to the current legislation. Therefore, looking into the proposed change is all the more justified as it may provide an answer as to whether the uncertainties associated with applying this construct will continue to exist. Analysis of the provisions on information disclosure requests is also important for another reason: it touches upon the essential issue of the extent and balance of protection between the intellectual property right holder and the alleged infringer. In this context, we should also look into the legal situation of persons who are not directly identified as intellectual property right infringers, but may have knowledge of infringements. It should be noted that in the light of Polish legislation, delineating the boundaries of protection for intellectual property right holders has not only become an issue requiring interpretation of the relevant provisions within both the judicature and the doctrine, but has also given rise to the need to verify the constitutionality of those provisions. In this respect, the Constitutional Court ruling of 6 December 2018 (SK 19/16) is of particular importance.

New intellectual property court

A new model of adjudicating in intellectual property matters is being introduced as part of a general amendment to the Code of Civil Procedure. The introduction to the government bill, which lays out the reasons for amending the Code of Civil Procedure, says that the main objective of those changes is to create separate organisational units within the common court system that would be tasked with handling cases regarding copyrights and related rights, industrial property rights, as well as the associated unfair competition cases[3].

Based on existing provisions, cases regarding infringement of intellectual property rights are examined by common courts and by the Supreme Court, in accordance with the general rules of civil procedure law. Also, the Polish system

[3] On 5 January 2017, the Minister of Justice appointed a *Team for Developing a Proposal for Establishing Intellectual Property Courts* (Dz. Urz. Min. Spraw., item 1, and of 2018, item 188). The outcome of the work done by that Team is the proposed law.

involves procedural dualism, in accordance with which cases that result from complaints against decisions issued by the Patent Office are examined by the Provincial Administrative Court in Warsaw and the Supreme Administrative Court. Cases regarding EU trade marks and Community industrial designs are examined by a dedicated division of the Regional Court in Warsaw (XXII Division of the Regional Court in Warsaw – EU Trade Mark and Community Design Court).

Before proceeding to discuss the form and mode of operation of the new intellectual property court, it should be said that the term "intellectual property court" is used for convenience only to describe an organisational change within the common court system. The essence of changes to the civil procedure law is to introduce a separate track for intellectual property cases. As regards the adjudication system for industrial property cases, where decisions are issued by the Patent Office of the Republic of Poland, the administrative procedure and the administrative court procedure model will continue to apply. However, the bill proposes abandoning the current dedicated court which rules on an exclusive basis in cases regarding EU trade marks and Community industrial designs (XXII Division of the Regional Court in Warsaw – EU Trade Mark and Community Design Court). Those cases will be ruled on, subject to the general provisions of the Code of Civil Procedure regarding proper venue (Article 27 et seq.), by courts with jurisdiction to adjudicate in cases on the intellectual property track[4]. To justify the need for such changes, the bill's drafters emphasise the fact that the high dispersion of intellectual property cases was certainly not conducive to the emergence of specialised staff; it therefore seems reasonable to provide judges within the existing court structures with the opportunity to gain expertise in intellectual property and to create dedicated units within regional and appellate courts. This objective is to be achieved through aiming at the widest possible scope of cognizance of the specialised intellectual property court.

The authors of the bill refer in that respect to Article 2(viii) of the *Convention Establishing the World Intellectual Property Organization* of 14 July 1967[5], where the term "intellectual property" is defined as including the rights relating to literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavour, scien-

4 In accordance with Article 80 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, the Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance (Community design courts) which shall perform the functions assigned to them by the aforementioned Regulation. Due to the fact that the bill proposes establishment of a higher number of Community design courts, there is an obligation to notify the Commission.

5 Convention Establishing the World Intellectual Property Organization signed at Stockholm on 14 July 1967 (Dz.U. of 1975, No 9, item 49).

tific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The phrase "all other rights resulting from intellectual activity", which concludes this very generous list, is exceptionally prone to wide-ranging interpretation.

The bill is also based on the underlying assumption that because of social, economic and technological changes, and the phenomenon known as commercialisation of certain personal rights, we are witnessing in both legal theory and in case law a tendency to apply the legal constructs typically applied to intangible property rights to personal rights, particularly that of image. Undoubtedly, in many cases licence agreements are signed with respect to certain personal rights, and the permissibility of making unjust enrichment claims[6] and applying constructs aiming at limiting the rigour of non-transferability of personal rights[7] is also being analysed. Those tendencies are reflected in case law[8].

If we adopt such an approach, the scope of cognizance of the court has been determined without any reference to the precise substantive law classification of a particular product of human intellectual activity and, therefore, without any indication which substantive law constructs should be applied. Practical difficulties which are not uncommon to arise out of uncertainty about the legal nature of tangible property rights are, therefore, to be settled within a specialised branch of the judiciary. According to the bill's drafters, "in borderline situations, when it is not certain what substantive law basis for protection may be applied (if any), which is particularly evident in the case of protection of ideas and information, specialised courts (divisions of regional and appellate courts) should rule on such matters"[9]. In practice, we can assume that this will apply in particular to the protection of civil law personal rights that are subject

6 T. Grzeszak, *Ocena uszczerbku doznanego wskutek przekroczenia granic umownego zezwolenia na reklamowe wykorzystanie wizerunku*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2015, no. 2, p. 47 et seq.

7 J. Barta, R. Markiewicz, *Wokół prawa do wizerunku*, "*Zeszyty Naukowe Uniwersytetu Jagiellońskiego"* 2002, no. 80, p. 11 et seq.

8 Cf. Ruling of the Administrative Court in Warsaw of 29 July 2014, VI ACa 1657/13, LEX No 1537498.

9 From the bill's Reasons… To justify that proposal, the bill drafters refer to paragraph (2) of the recitals to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [hereinafter: Directive 2004/48/EC]. According to it, "The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet".

to commercialisation. According to the authors of the bill, the best solution seems, therefore, to describe in great detail the competence and jurisdiction of intellectual property courts, but in such a way as not to give them jurisdiction over typical cases involving protection of personal rights, which are examined by civil divisions. The bill's drafters have proposed that the premise for jurisdiction of intellectual property courts in cases involving protection of personal rights should be a connection between that protection and commercial use of the personal right or scientific or inventive activity (or, in other words, creative activity) of the person seeking legal protection[10].

In conclusion to those proposals, in the first part of the Code of Civil Procedure, after Section IV f of Title VII in Book One, Section IV g is added: "Procedure in intellectual property cases".

According to the wording of its first provision, Article 479^{89}(1) of the Code of Civil Procedure, "The provisions of this Section shall apply in cases for protection of copyrights and related rights, as well as rights regarding inventions, utility models, industrial designs, trade marks, geographical designations, and integrated circuit topographies, and for protection of other intangible property rights (intellectual property cases). The definition of 'intellectual property cases' is elaborated in paragraph (2): "Intellectual property cases, as defined in this Section, shall also include cases:

1) for preventing and combating unfair competition;
2) for protection of personal rights, to the extent that they relate to the use of a personal right for the purpose of individualisation, advertising or promotion of a business, goods or services;
3) for protection of personal rights in connection with scientific or inventive activity."

By defining the notion of "intellectual property case", Article 479^{89} of the Code of Civil Procedure is of essential importance to determining the scope of objects of proceedings in intellectual property cases and will define the cognizance of those specialised courts. The editing of that Article may also invite a discussion about the proposed scope of subject-matter jurisdiction and raise questions as to whether the proposed catalogue of cases listed in Article 479^{89}(1)(2) of the Code of Civil Procedure is correct. Further concerns may also be raised by Article 479^{90}(2), which designates the Regional Court in Warsaw as having exclusive jurisdiction over intellectual property cases regarding computer programs, inventions, utility models, integrated circuit topographies, plant varieties, and technical trade secrets.

10 From the bill's Reasons.

In attempting to comment on the range of cases identified in Article 479[89](1) of the Code of Civil Procedure, we should, in the first place, refer to the wording of the Code's current Article 17(2). It should be emphasized that the current editing of Article 17(2) of the Code of Civil Procedure has made it possible to include other intangible property rights in its subject-matter range, including in particular the *sui generis* right of database creators, rights arising from additional protection certificates, and rights arising from the plant variety protection system. Therefore, the phrase "protection of other intangible property rights" is sufficiently capacious and may include other cases (e.g. for protection of a business name). It should go without saying, however, that it is impossible to develop a complete closed-ended catalogue of "other intangible property rights."

With the above comments in mind, we should now ask ourselves whether there is any point in introducing a detailed list of cases for protection of personal rights, to the extent that they relate to the use of a personal right for the purpose of individualisation, advertising or promotion of a business, and for protection of personal rights in connection with scientific or inventive activity, in Article 479[89] paragraph (2)(2) and (2)(3) of the Code of Civil Procedure. There is concern that in practice those provisions will lead to ambiguous interpretations as the terms used therein (*individualisation, advertising, promotion*) are not legally defined. Of similar ambiguity when defining the scope of intellectual property cases may be the reference to protection of personal rather than property rights.

It also seems that including all unfair competition cases regulated by the Act of 16 April 1993 on Combating Unfair Competition (hereinafter: "Unfair Competition Act") in Article 479[89] paragraph (2)(1) of the Code of Civil Procedure as intellectual property cases provides sufficient elaboration on the range of objects and will ensure protection of intangible property such as non-registered designations, trade secrets or advertising campaigns. In addition, such incorporation of the provisions of the Unfair Competition Act opens up the possibility of aligning the rules of law with business practice, in particular due to the general clause contained in Article 3(1) of the Unfair Competition Act. In conclusion, abandoning paragraph (2)(2) and (2)(3) in Article 479[89] of the Code of Civil Procedure will also not give rise to concerns that the catalogue of intellectual property cases is enumerated and, in fact, casuistic.

At the same time, we should concur with the assumption that intellectual property cases should include the wider category of cases for protection of intangible property rights, as well as for protection of persons who hold only intangible property itself, without the exclusive rights within an enumeration of those rights. To a significant extent, this function is performed by the above-mentioned protection under unfair competition law. It should be emphasised at this point that the reason why it makes sense to expand the catalogue of intellectual

property cases to include unfair competition cases is that there are many typical elements of protection which are shared by both intellectual property rights and unfair competition law (e.g., assessment of the risk of misleading). It should be noted, however, that unfair competition law also addresses a number of issues which are unrelated to intellectual property rights, and their object is to combat unfair limitation of market access (Article 15 of the Unfair Competition Act) or disruption of the functioning of another entity's enterprise (Article 14 of the Unfair Competition Act). Some unfair competition torts are, therefore, separate from the notion of intellectual property rights (e.g., defamation) or require protection of certain interests of the entrepreneur other than intangible property (protection of fair selling). Furthermore, provisions on limitation of market access, in particular the numerous cases regarding slotting fees (cf. Article 15(1)(4) of the Unfair Competition Act), are also very specific in their nature.

The scope of protection laid down in the Unfair Competition Act means that the creation of an intellectual property court that would examine all unfair competition cases would go far beyond the notion of intellectual property. It should, therefore, be considered whether there would perhaps be an excessively far-reaching expansion to the range of objects of intellectual property cases, examined on the basis of all acts of unfair competition, based on specific factual circumstances and legal foundations not related directly to the protection of intangible propoerty. The inclusion of unfair competition cases as intellectual property cases would lead to greater consistency in rulings, but it would also be worth considering a solution that would provide an alternative jurisdiction for the aforementioned acts of unfair competition which are not related to intellectual property. In other words, the inclusion of all legal bases from the Unfair Competition Act under the umbrella of intellectual property cases should be permissible; however, the plaintiff should still be able to opt for general subject-matter jurisdiction, in particular in cases pursued on the basis of Articles 12, 14, 15 and 17 of the Unfair Competition Act.

While acknowledging the arguments for the need to have a wide understanding of intellectual property cases, an interpretation of the notion of 'intellectual property' or 'intellectual property right' that is excessively expansive should not be applied. In certain senses, a reference can be made to the understanding of 'intangible property rights'; however, this approach is not consistent either, for instance due to the aforementioned specific nature of protection on the basis of unfair competition rules, where the interests of entrepreneurs rather than their exclusive rights are protected. It should also be noted that the aforementioned proposals to establish a wider scope of subject-matter jurisdiction should also take into account cases whose object is related to intellectual property rights, but the bases for the claims sought arise from contractual rather than tort liability. If we follow this train of thought, intellectual property cases

would also include cases regarding claims for non-performance or improper performance of obligations, including claims for payment of fees. In this context, it would be more desirable to elaborate the proposed Article 479^{94} of the Code of Civil Procedure by adding after the statement that "whenever an infringement of a right is mentioned, this should also include any threatened infringement of that right" a provision reading: "and, furthermore, any infringement on one's commitments, and on the obligation to pay the relevant fees, the subject matter of which are intellectual property rights". We should assume that in this respect it is not sufficient to rely on defining an intellectual property case by the case law formed on the basis of the currently applicable Article 17(2) of the Code of Civil Procedure. Despite existing rulings which lean towards a broad understanding of the notion of 'case for the protection of copyrights', treating it as a case 'for claims under copyright laws'[11], there may be doubts as to whether a violation of an intellectual property right is required for the case brought before court to be deemed a case for protection of that right. This issue applies in particular to cases for payment of contractual or statutory fees for the use of property protected through absolute rights[12].

At the same time, assuming that the intention of the bill remains that the division of the Regional Court in Warsaw tasked with the examination of intellectual property cases is to have, in accordance with Article 479^{90}(2) of the bill, exclusive jurisdiction over intellectual property cases regarding computer programs, inventions, utility models, integrated circuit topographies, plant varieties, and technical trade secrets, equipping that court with special means that would have a real impact on adjudicating in technical cases should be considered. The bill drafters' reasoning behind creating a 'technical' intellectual property court in Warsaw continues to rest on the assumption that a specialised court should be appointed for those most complicated of cases, which will, in turn, be conducive to the efficiency and speed of the entire process. The fact that cases with a high

11 In its interim order of 26 February 2015 (III CZ 6/15), the Supreme Court supported a wide understanding of the notion of "case for the protection of copyrights", treating it as a case "for claims under copyright laws".

12 The scope of cognizance of intellectual property courts proposed in the bill requires interference with the wording of Article 17 of the Code of Civil Procedure. The bill's drafters adopted a method that involved removing points (2) and (4^3) from that Article, which referred to those cases which should be within the cognizance of intellectual property courts, and inserting a provision which corresponded to their wording in the more specific part of the Code of Civil Procedure (proposed Article 479^{89} paragraph (1) and (2)(1) of the Code of Civil Procedure). In addition, this Article has been given provisions about the cognizance of intellectual property courts in cases regarding protection of personal rights (proposed Article 479^{89} paragraph (2)(2) and (2)(3) of the Code of Civil Procedure). That way, all provisions regulating the jurisdiction of intellectual property courts have been placed among provisions regarding specific proceedings before those courts.

degree of complexity will be accumulated at a single site will cause them to be resolved faster. The bill's Reasons emphasise that the idea of creating a single intellectual property court to examine 'technical' cases is of key importance for cases regarding, for example, computer programs[13].

When assessing the idea of having a separate 'technical' court, we should once again raise the issue of introducing certain means that would ensure more effective adjudication in proceedings before such a court. If the Regional Court in Warsaw is not a special court, in the sense that it does not have the procedural and organisational measures to enable it to include persons with technical qualifications in the adjudication process, then the proposed essential objective may not be achieved. As a result, doubt remains whether the adjudication process should be concentrated at a single site for the entire country. Only the creation of special conditions in which cases with technical elements are examined under separate rules would be a proper justification for the exclusive jurisdiction of such a court.

Modifications to achieve that aim could involve the introduction of permanent technical experts and, as a consequence, deeper changes, in particular to Article 278(1) of the Code of Civil Procedure, which would require introducing a provision that enables the admission of a permanent technical expert by the court *ex officio* in cases that require special knowledge. The court could admit a permanent technical expert at a closed session, without hearing motions of the parties (amendment to Article 279 of the Code of Civil Procedure). Then the court could order that the expert be provided with access to the case files and the object to be inspected and, furthermore, order that the expert participate in the hearing of evidence (Article 284 of the Code of Civil Procedure). The court would indicate whether the expert witness' assessment should be provided orally or in writing. Moreover, it is important to create conditions that would allow sourcing knowledge from a technical expert at court hearings without the need to summon the parties. However, the actions of the expert witness would require supervision, and so the possibility of the parties raising objections to the proceedings against a permanent technical expert's assessment should be considered (appropriate application of Article 162 of the Code of Civil Procedure and of the provisions regarding infringement of substantive or procedural law)[14].

13 For example: ECJ judgement of 3 July 2012 in case C-128/11 UsedSoft vs. Oracle International, regarding legal aspects of software licences, judgement of the Administrative Court in Katowice of 17 March 2016 in case I ACa 1028/15, regarding Article 74(3) of the Act on Copyright and Related Rights and the conflict of employer and employee rights in relation to a computer program, and judgement of the Administrative Court in Warsaw of 18 September 2014 in case I ACa 315/14, regarding fields of exploitation and the interpretation of a contract regarding computer program copyrights.

14 Cf. More on that topic: P. Podrecki, *Organizacja i działanie sądu…*, passim.

Limiting the power to act personally in intellectual property cases

Introducing a special track for intellectual property cases, due to degree of specialisation in both legal and technical terms, requires the introduction, as a rule, of obligatory representation by attorneys and patent attorneys. It should be conceded that limiting the power to act personally would contribute to speeding up the proceedings – both in terms of better concentration of evidence and of identifying the legal basis for one's demands[15]. The bill drafters noted that the tendency suggesting a need for mandatory professional representation is supported by case law. In its judgement of 28 February 2002, the Supreme Court stated that the fact that the legal basis for a claim is indicated by a professional representative is important in the sense that it "gives a direction to the entire hearing of evidence", without, however, being "formally binding on the court"[16]. The obligation to be represented by professional representatives in intellectual property cases is not, however, absolute. The court may exempt the parties, upon application or *ex officio*, from mandatory representation by attorneys if the circumstances, including the degree of complexity of the case, do not warrant such obligatory representation. This exemption may take place at any stage of the case, including at the request of a party made in the pleading initiating the proceedings. The rule of mandatory representation by a professional representative is also sometimeswaived in cases where the value of litigation does not exceed PLN 20,000. This leads to the conclusion that in non-property cases, as well as in cases where a temporary fee is established under Article 15 of the Act of 28 July 2005 on Court Fees in Civil Cases, due to the fact that it is impossible to determine the value of litigation when the case is initiated, the exemption in question does not apply[17].

15 Cf. the bill's Reasons.

16 Cf. Ruling of the Supreme Court in case III CKN 182/01, LEX No 54471.

17 Furthermore, the bill's Reasons say that conferring the power to represent parties also on patent attorneys will remove the doubts which arise in that respect de lege lata in specific proceedings. It is worth pointing to the Resolution of the Supreme Court of 26 July 2017 (III CZP 26/17), in which the Supreme Court stated that in an unfair competition case the subject matter of which is also a claim regarding an infringement of copyrights to a copyrightable work that is simultaneously protected as industrial property, a patent attorney may also act as the representative in litigation.

Jurisdiction of regional courts

Intellectual property cases will come under the jurisdiction of regional courts. The subject-matter jurisdiction of regional courts is justified by the specialist nature and often high degree of complexity of the cases in question. In order to ensure a separate track for intellectual property cases, in addition to the subject-matter jurisdiction regulation contained in Article 479[89] of the Code of Civil Procedure, the bill also provides for a mechanism which will enable intellectual property courts to shape their own case law. According to the bill's drafters, this will increase legal security and speed up the proceedings, especially in cases in which classifying the object of the proceedings as belonging under the umbrella of intellectual property cases is not that obvious[18].

The proposed mechanism involves introducing a special regulation in relation to Article 200 of the Code of Civil Procedure. The proposed Article 479[92] of the Code of Civil Procedure says that the court shall not be bound by an interim order to refer the case issued under Article 200(2) of the Code of Civil Procedure. If the court finds itself to lack jurisdiction, it shall refer the case to a different court, but without precluding the referring court. Such an interim order may be issued not later than within two weeks from when the case being referred is received by the court with jurisdiction over an intellectual property case. The court to which the case is referred will be bound by the interim order of the referring court.

The authors of the bill assume that judges at a specialised court will have better competences to decide which cases should be adjudicated under the provisions on proceedings in intellectual property cases. The introduction of such a short time limit for issuing the relevant interim order is intended to prevent any protraction of the proceedings, and the fact that it is non-binding addresses both a situation where the interim order to refer the case to an intellectual property court is issued by a court of the first instance and that order has not been appealed against, and a situation where the referral of the case to an intellectual property court is made by a court of the second instance. In either case, the intellectual property court is not bound by the interim order and may rule to refer the case to another court[19].

Interim orders to refer the case may be appealed against. They may be complained against with the intellectual property court examining the case in the second instance. It is therefore important that, in the end, the intellectual property court shapes its cognizance on the basis of the proposed provisions of law.

18 Cf. the bill's Reasons.
19 Cf. the bill's Reasons.

In accordance with the new Article 479[91] of the Code of Civil Procedure, provisions on other separate proceedings apply to the extent that they do not conflict with provisions regulating the proceedings in intellectual property cases. Introduction of such a regulation will enable the application of special rules in intellectual property cases which, in the context of the proposed changes to the civil procedure, would not otherwise be permissible. An example may be a counterclaim in intellectual property cases.

Other procedural suggestions in intellectual property cases

The procedural changes proposed for intellectual property cases are not limited to determining the subject-matter jurisdiction. In the initial passages of the bill, there is, for example, Article 479[93], according to which "If in an infringement case the court decides that it is impossible to precisely substantiate the amount of the claim or that it is exceedingly difficult or evidently pointless, it may in its ruling order the payment of an adequate sum based on its assessment of all circumstances of the case". This provision may be *prima facie* considered to be redundant in procedural terms considering the role of Article 322 of the Code of Civil Procedure, and also in conflict with the provisions of substantive law which define strict bases for claims in intellectual property law. The proposed provision may, in particular, create the risk of normative premises, which delineate the boundaries of claims in specific acts, being ignored. Neither are regulations which facilitate such far-reaching pursuit of claims mentioned in the Enforcement Directive.

In that respect, the bill's drafters are of the opinion that Article 479[93] of the Code of Civil Procedure serves intellectual property right holders. They say that the provision will be applicable, for example, in the case of examining a claim by a computer program creator in a situation where, as a result of passage of time and the development of subsequent versions of the software, it is difficult to determine the shape of the previous version and the creative contribution of the person seeking protection. At the same time, the authors are aware of the possibility of employing the solution laid down in Article 322 of the Code of Civil Procedure. They also acknowledge the exceptional nature of the regulation, which – in accordance with the *exceptiones non sunt extendendae* principle – does not warrant its broad application. Arguments that the fast pace of legal and commercial transactions and the multitude of types of claims available to holders of absolute rights support the validity of the proposed regulation and its purpose, which would not be achieved by referring to Article 322 of the Code of Civil Procedure, are not, however, very convincing.

In the context of the proposed Article 479^{93} of the Code of Civil Procedure, it should be noted that it creates the risk of violating the principles of legal certainty and security of transactions. Those principles should not be easily threatened by deficiencies in evidence or investigation into the desirability of protection as such by means of civil procedure provisions which introduce vague and bias-prone premises. That purpose is already achieved by general clauses (e.g. Article 5 of the Civil Code, Article 3(1) of the Unfair Competition Act) as well as by the functional interpretation of the provisions of substantive law. Furthermore, application of the norm in that form may be regarded as a restriction on the balance between the parties to the proceedings, giving excessive preference to right holders. It should also be noted that the remedies listed in enumerations of claims arising out of a violation of intellectual property rights laid down in specific provisions, such as Article 287(1) and 296(1) of Industrial Property Law of 30 June 2002, Article 79(1)(4) of the Act of 4 February 1994 on Copyright and Related Rights, Article 36b of the Act of 26 June 2003 on the Legal Protection of Plant Varieties, and Article 11(1)(4) of the Act of 27 July 2001 on the Protection of Databases, contain specific premises and form a coherent system which gives the right holder a wide range of measures and sufficient basis for the protection of its rights. The wording of Article 479^{93} of the Code of Civil Procedure may also give rise to doubts as to whether the new track properly balances the interests of the parties in accordance with the principle of proportionality. The wording of the new Article 479^{93} of the Code of Civil Procedure may also lead to the observation that the role of ensuring that the principle of proportionality is observed is played by the proposed Article 479^{95} of the Code of Civil Procedure. The need to balance the interests of the parties is very clearly expressed in that provision: "When applying the measures laid down in Article 479^{97}, Article 479^{106} or Article 479^{112}(1), the court shall take into account the interests of the parties to such a degree as to ensure adequate protection for the right holder and not to burden the obligor, or the defendant, more than is necessary, while bearing in mind the burden on the defendant and the obligor that would result from the measures applied and the protection of trade secrets". The wording of this provision, which is intended to serve the purpose of a thorough assessment of facts, rather than as a key to interpreting the law, suggests that the bill's drafters acknowledge the need for establishing the boundaries of interests of both plaintiffs and defendants.

One final comment as regards amendments concerning procedural issues may be that there is also no need to introduce into the Code of Civil Procedure a norm which confirms that whenever the provisions of that Section mention an infringement, this should be understood to include any threatened infringement as well (proposed Article 479^{94} of the Code of Civil Procedure). The

general meaning of such a norm should be explained in the relevant provisions of specific acts.

To sum up, I believe thet the idea of introducing a separate track, which, in turn, leads to the creation of intellectual property courts, proposes valid and desirable changes, regardless of the reservations and suggestions presented above. At the same time, I would stand by the objection that excessive cognizance resulting from vague premises for subject-matter jurisdiction may excessively burden the newly created organisational units, which, as a result, will lead to delays in examining cases. On the other hand, the mechanism which enables the specialised courts to decide about jurisdiction in borderline cases is a welcome solution. It is also difficult to determine *ex ante* whether a single 'technical' court, without being equipped with special measures, will be able to resolve complex cases in a correct and speedy manner.

Information disclosure request

The draft amendment contains provisions which propose to introduce the "right of information" to proceedings in intellectual property cases, which is referred to as "information disclosure request"[20]. It is worth noting at the beginning that the source and normative pattern of the "right of information", or information disclosure requests, is Directive 2004/48/EC. Upon implementation of the Directive, information disclosure requests became regulated in Article 286[1] paragraph 1 point (2) and (3) of Industrial Property Law and in Article 80 paragraph 1 point (2) and (3) of the Act on Copyright and Related Rights. Those provisions were brought into force by the Act of 9 May 2007 Amending the Act on Copyright and Related Rights and Certain Other Acts[21].

It should also be noted that, in addition to the work on new regulations in the Code of Civil Procedure regarding copyright, work is also being done on changes to align the provisions of the Industrial Property Law in accordance with the requirement to comply with the obligation to enforce the ruling of the Constitutional Tribunal of 6 December 2018 in case SK 19/16. For that reason, at the time of writing this article, I am able to refer to two proposed pieces of legislation in making general comments on the objective and shape of the construct being amended[22].

20 Sejm Print UD 497.

21 Act of 9 May 2007 Amending the Act on Copyright and Related Rights and Certain Other Acts (Dz.U., item 662).

22 Sejm Print 3664.

In attempting to determine the legal nature of information disclosure requests, it should be presumed that although they are auxiliary in relation to proceedings regarding intellectual property right infringement, their procedural function nevertheless has a significant impact on the decision whether to initiate a suit and the scope of claims sought. The importance of this auxiliary measure is closely related to obtaining information on the infringement of an exclusive right. Neither literature nor case law provide an unambiguous understanding of the legal nature of an information disclosure request, and, furthermore, its current regulation in Polish law is believed to be misaligned with EU law[23]. From the very moment those laws were passed, there have been arguments raised that changes to Polish law are necessary because of the fact that the implementation of Directive 2004/48/EC is believed to be defective and systemically inconsistent[24]. Fulfilling the obligation to enforce the ruling of the Constitutional Tribunal of 6 December 2018 (SK 19/16) is, however, of particular importance to changing the current provisions of law. According to that ruling, the current wording of Article $286^1(1)(3)$ of the Industrial Property Law of 30 June 2000 (OJ L of 2017, item 776) stands in contradiction to Article 22 in conjunction with Article 31(3) of the Constitution of the Republic of Poland, which deprives the Polish legal system of the possibility of securing a claim by obliging a person other than the infringer to disclose information which is necessary for the purpose of seeking claims related to infringement of exclusive rights (known as a disclosure claim). Moreover, the above ruling stresses that it is important "that there is a connection between the proposed injunction and the proceedings in a case regarding infringement of industrial property rights". The provisions proposed in the bill amending the Code of Civil Procedure address the ruling of the Constitutional Tribunal by introducing a solution which involves a close connection between the execution of an information disclosure request and the claim regarding infringement of an industrial property right. In the bill to amend

23 Disclosure claim is extensively described in the relevant literature – see for example: A. Kołodziej, *Roszczenie informacyjne w prawie własności intelektualnej*, "Prace Instytutu Prawa Własności Intelektualnej UJ" 2005, no. 88, p. 145 et seq., and A. Tischner, *Odpowiedzialność*, p. 292; A. Jakubecki [in:] *Prawo własności przemysłowej*, vol. 14b, Warszawa 2012, pp. 1660–1664; A. Nowak-Gruca, *Roszczenie informacyjne w ustawie – Prawo własności przemysłowej w świetle ekonomicznej analizy prawa*, "Monitor Prawniczy" 2008, no. 15, p. 798; R. Skubisz, *Roszczenie o udzielenie informacji w prawie własności przemysłowej (w świetle dyrektywy nr 2004/48 i prawa polskiego)* [in:] J. Gudowski, K. Weitz (ed.), *Aurea praxis. Aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego* vol. 2, Warszawa 2011, p. 2544, P. Fik, E. Laskowska, *Charakter prawny roszczenia informacyjnego*, "Monitor Prawniczy" 2012, no. 24, p. 1293 et seq.; J.R. Antoniuk, *Postępowanie o udzielenie informacji w związku z naruszeniem własności intelektualnej jako rodzaj postępowania cywilnego*, "Przegląd Sądowy" 2014, no. 11–12, pp. 144–163.

24 Cf. R. Skubisz, *Roszczenie o udzielenie…*, p. 2535 et seq.

the Industrial Property Law, the connection between the information disclosure request and the claim regarding infringement of an industrial property right is also taken into account; however, in a different, somewhat less powerful form, which seems to be a more apt solution. It is worth emphasising that the future shape of that construct should, above all, strike a balance between all interests and maintain adequate proportions between the rights of obligees and the obligations of infringers, as well as other persons who have knowledge of the infringements.

Therefore, the need to amend information disclosure requests seems entirely valid[25]. It should, however, be presumed that the fundamental objective and direction of the proposed changes should be such a wording of the provisions that would make a direct reference to the provisions of Directive 2004/48/EC. With reference to the wording of Article 8 of Directive 2004/48/EC, it should be remembered that the order to disclose certain information is issued in proceedings concerning an intellectual property right in response to a justified and proportionate request of the claimant. Furthermore, paragraph 21 of the recitals to Directive 2004/48/EC says that the right of information allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of any third parties involved in the infringement. Therefore, the Directive provides for quite a broad range of addressees of such a request to include persons infringing exclusive rights and any other person with knowledge of the information necessary for the purpose of seeking claims. The provisions of the Directive also lead to the conclusion that the right of information is a stand-alone demand for specific action, separate from the demand to secure evidence and to secure claims. At this point, it is also worth referring to the legal nature of the Directive, which is a minimum harmonisation Directive and, in principle, allows Member States to grant more far-reaching protection to obligees[26].

When attempting to formulate provisions which describe the rules for disclosure of information, one should, therefore, be guided by the main objective of the construct in question. In accordance with the assumptions underlying Directive 2002/48/EC, the objective of such requests is to create a legal instrument

25 More details: cf. A. Jakubecki [in:] *Prawo własności przemysłowej…*, pp. 1660–1664; A. Tischner [in:] Kostański (ed.), *Prawo własności przemysłowej. Komentarz*, Warszawa 2014, p. 1362, with certain doubts as to the application of Code provisions *per analogiam*.

26 This nature of the Directive arises from its Article 2(1), which says: "Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned."

which would enable the holder of intellectual property rights [obligee] to obtain information on the infringement of those rights. Obtaining of such information by the obligee is frequently the facts-of-the case-related factor upon which effective seeking of legal protection is conditioned. Referring to a passage from the bill's Reasons, it is, therefore, impossible not to agree that in civil proceedings the claimant must demonstrate the facts from which its claim has arisen (Article 232 of the Code of Civil Procedure and Article 6 of the Civil Code). In cases for protection of intellectual property rights, this means, in particular, circumstances such as the existence of a right, the fact of its infringement by the defendant, and, in the case of pecuniary claims, the amount of unjustifiably obtained gains, or the fact of occurrence and the extent of damage. In practice, invoking and proving those factual circumstances causes fundamental difficulties, because the obligee may not be aware of the extent of the defendant's illegal activity, especially when it comes to the number of unlawfully manufactured or marketed goods[27]. Therefore, the desired shape of the 'information disclosure request' construct should fulfil the aforementioned objective, and its accurate understanding may remove some of the doubts voiced in the doctrine.

In connection with the proposed amendment of the Code of Civil Procedure, there is also an opportunity not only to improve the legislation, but also to achieve the fundamental objective of the bill, beyond information disclosure requests, which is to create a consistent law with specific provisions for procedures regarding protected intangible property in relation to all intellectual property rights. At the same time, it should be noted that the specific nature of civil proceedings regarding disclosure of information conducted under other provisions should be maintained[28]. In those cases, there should be a regulation that provides for accordingly applying the provisions on proceedings in intellectual property cases where the right to disclose information arises from specific provisions.

When describing the legal nature of information disclosure requests, it is a welcome finding that the bill preserves their essence as a special legal measure of procedural nature[29]. An obligee's request to disclose information is not a type of claim, but only a different form with the sole purpose of seeking a claim. When deciding on the subject matter of the request, the court issues an order (Article $479^{117}(1)$), and orders issued in the course of proceedings are not a form of

27 Cf. A. Jakubecki [in:] *Prawo własności przemysłowej*, pp. 1660–1664; R. Skubisz, *Prawo własności przemysłowej*, vol. 14a, Warszawa 2017.

28 For example, initiated by collective management organisations under Article 48 of the Act of 15 June 2018 on Collective Management of Copyrights and Related Rights, or based on Article 47 of the Act of 2 April 1994 on Copyright and Related Rights.

29 Cf. A. Jakubecki [in:] *Prawo własności przemysłowej…*, pp. 1660–1664; R. Skubisz, *Prawo własności przemysłowej…* , passim.

resolutions regarding the subject matter of the case. The right of information is, therefore, not of a substantive law nature; however, in certain legal regimes (e.g., Germany) a certain concept of disclosure claims has developed which aims at disclosing the necessary information regarding the infringement of its right to the obligee[30].

When analysing the key elements of the proposed law in the context of criticism of the current provisions, it may make sense to describe in more detail the main objections voiced to date[31]. This will allow us to establish whether the proposed law removes those flaws.

In the first place, the current provisions do not impose the obligation to initiate an infringement suit after receiving the requested information from the alleged infringer. The lack of obligation to initiate a suit has raised the objection that information disclosure requests do not otherwise ensure the necessary connection to an infringement suit. This objection was, in particular, made in the statement of reasons for the ruling of the Constitutional Tribunal, which emphasised the lack of guarantee that a suit would be initiated and that there was no way of controlling how the information would be used.

With respect to that objection, it should be noted, however, that the provisions of the Directive do not directly stipulate the obligation to initiate a suit by the person who makes an information disclosure request. The Directive requires only that the injunction order is issued in intellectual property right proceedings. It is not, therefore, obvious how to understand the connection between proceedings initiated by the person requesting information and an infringement suit. It can only be presumed that any obligee who proves the circumstances of infringement of its right and makes the request in question is intending to file the actual suit. It is impossible, however, to expect that the information disclosed will absolutely in every situation force the initiation of a suit. It may turn out, for example, that despite the existence of certain circumstances that suggest an infringement, the information disclosed will not provide any grounds for the obligee to seek its claims in an effective manner. For example, the information disclosed may show that the goods in possession of the disclosing person are parallel imports from another EU country, which validates their further marketing. Furthermore, in many cases, information disclosed by a third party will not

30 In certain legal regimes (e.g., Germany) a certain concept of disclosure claims has developed which aims at disclosing the necessary information regarding the infringement of its right to the obligee. A. Jakubecki [in:] *Prawo własności przemysłowej…*, pp. 1660–1664.

31 Such a list is presented by T. Targosz in the article *O zasadności dotychczasowej krytyki roszczenia informacyjnego w prawie własności przemysłowej i propozycji jego zmian* [in:] A. Adamczak (ed.), *100 lat ochrony własności przemysłowej w Polsce. Księga jubileuszowa Urzędu Patentowego RP*, Warszawa 2018, pp. 1016–1071.

warrant the seeking of claims against that party, because their role in connection with the infringement was negligible.

So how do we ensure, on the one hand, delineation of the boundaries of protection of the interests of those who disclose information while, on the other hand, making sure that obligees have the possibility of searching for information on the infringement? It seems that several solutions can be proposed in that respect, none of which would tip the scales towards an absolute necessity to file a suit. In the first place, the proposed wording of the provisions could establish the principle of initiation of a suit, but then introduce precisely defined exceptions which waive the obligation to file a suit. Another solution could be to equip the judge who adjudicates the case with discretionary power to decide whether in connection with the information disclosed the obligee should be obliged to file a suit or not. With that solution, it would also be important to decide at which stage of the information disclosure proceedings the court should order that a suit be initiated. At the time of examining the information disclosure request, there may not be anything yet to warrant the initiation a suit, but once the information disclosed is known, the court may be able to impose the obligation to initiate a suit when the scope of the information disclosed justifies, in its opinion, the taking of further steps.

In that respect, the proposed amendment to the Code of Civil Procedure provides for, unfortunately, a somewhat automatic mechanism, which means that once the information disclosure request is accepted, a suit must be filed. The amendment, therefore, complies with the recommendations of the Constitutional Tribunal, but significantly shifts focus onto the protection of the interest of those who infringe on intellectual property rights, or those who have knowledge of such infringements. A sanction which is to guarantee the performance of such obligation – although the Directive is silent on that matter – is, as mentioned in the bill's Reasons, payments from the obligee to the person obliged to disclose information (proposed Article 497^{112} paragraph 3 and 5). The proposed "payments" are financial consequences of failure to initiate a suit in the form of:

– Claim for remedying the damage caused by fulfilling the obligation to disclose information, in accordance with the general provisions of law (or, according to the bill's Reasons, through payment of a pecuniary amount for usage of the information disclosed for a specific period of time), if the obligee fails to submit a pleading to initiate a suit against the infringer within the time limit set by the court, or the pleading to initiate a suit has been withdrawn, or where the pleading to initiate a suit has been returned or rejected, or the statement of claim or the request has been dismissed, or the proceedings have been discontinued. In this case, the bill also introduces a one-year statute of limitations.

– Claim for remedying the damage caused by fulfilling the obligation to disclose information where the obligee has used the information for purposes other than seeking its claim.

An analysis of the proposed solutions leads to the question of whether it would not in fact deprive information disclosure requests of their actual function. Obligees may fear that acceptance of their requests will force them to initiate a suit or will trigger financial sanctions. Such a construct denies the possibility of choosing whether to pursue one's claims or not in a situation where the knowledge about a potential infringement is perhaps insufficient, or where the known extent of the infringement is negligible. The compulsory filing of a pleading to initiate a suit carries a risk of financial consequences arising from the "payments" mechanism, in particular if it has the form of payment of a pecuniary amount for usage of the information disclosed for a specific period of time. If the facts of the case indicate that the scope of the information disclosed may not sufficiently secure the interests of the obligee in a suit, the obligee should be able not to file the suit. Filing a suit would be pointless in certain special circumstances related to the infringement that occur after information disclosure, for example, if the infringing goods had already been marketed and the infringer is insolvent.

In connection with the proposed amendments to the Code of Civil Procedure and the Industrial Property Law, one should compare different solutions concerning a connection between an information disclosure request and the obligation to file a pleading to initiate a suit. In principle, assuming that the obligee did not file a pleading to initiate a suit against the infringer within a period of time set by the court after information had been disclosed to the obligee, the persons who disclosed the information should have the right to file a claim for remedying the damage caused by fulfilling the obligation to disclose information. The factor which warrants the claim for damages is, in this case, the actual damage suffered by the information discloser. If actual damage has been suffered, the information discloser must demonstrate its amount in accordance with general principles of law[32]. Such scope of liability and manner of connecting the information disclosure request to claim seeking is proposed in the amendment of the

32 In accordance with Article $286^1(3)$ of the Industrial Property Law: "If the obligee fails to submit a pleading to initiate a suit against the infringer of a patent, an additional protection right, a protection right or a registration right within the time limit set by the court, or the pleading to initiate a suit had been withdrawn, or where the pleading to initiate a suit had been returned or rejected, or the statement of claim or the request had been dismissed, or the proceedings had been discontinued, the information discloser referred to in paragraph 1 and 2 shall be entitled to a claim for remedying the damage caused by fulfilling the obligation to disclose information, in accordance with the general provisions of law."

Industrial Property Law. However, the obligation to pay a pecuniary amount for usage of the information disclosed for a specific period of time, as stated in the Reasons of the proposed bill to amend the Code of Civil Procedure, may be questionable. The framework of that payment is based on the principle of 'lump-sum damages'. Such an obligation in the case of information disclosure requests is definitely too far-reaching, because it departs from the function of compensatory measures, the essence of which is to restore the state from before the event that had caused the damage. If the person complying with the obligation to provide information has not suffered any damage in connection with such information disclosure, then there is no justification for payment of 'lump-sum damages'. It is, however, necessary and justifiable to regulate the consequences of a situation where the person who provided information has a claim for remedying the damage caused by fulfilling the obligation to disclose information due to the fact that the obligee has used the information for purposes other than seeking its claim. Those consequences seem to be a reasonable solution which aims to control the abuse of a legal remedy contrary to its intended purpose. In attempting to determine an appropriate guarantee that the information will be used in proceedings concerning an infringement of intellectual property rights, it may be helpful to examine the connection in light of CJEU case law[33].

There is no controversy, however, about the proposed obligation on the obligee to refund reasonable costs and expenses incurred in connection with disclosing the information if such a demand is put forward by the obligor or the defendant.

Another frequent objection against the current law is that it erroneously permits the use of the measure in question against persons who have not yet been found, or, as a matter of fact, who have not yet been proven, to have infringed any of the industrial property rights protected under the law. This argument has been substantiated in detail by R. Skubisz[34], who asserts that Polish law contradicts Article 8 of the Directive and also primary law of the EU[35]. To engage in a polemic with that objection, we should, in the first place, refer to the wording of the Directive and once again emphasise that any information disclosure request

33 Cf. Judgement of 18 January 2017 in case C-427/15 (New Wave).

34 R. Skubisz, *Roszczenie o udzielenie…*, p. 2535 et seq., in particular p. 2547 et seq.

35 If the latter assertion is valid, then there is also a high probability that this law could be accused of being unconstitutional. Cf. T. Targosz and substantiation of the constitutional complaint, which says that the objection of non-compliance with the primary law of the EU and the objection of non-compliance with the Constitution of the Republic of Poland will obviously coincide not where we are dealing with 'Treaty freedoms' (such as the free movement of goods), but where the primary law of the EU embodies the principles laid down, for example, in the European Convention on Human Rights (right to a fair trial, right to own property, proportionality of any derogation from protected rights, etc.).

is accepted in response to the claimant's demand. The terminology adopted in the Directive to describe the procedural roles of the claimant and the defendant should not be read literally in accordance with the procedural and substantive law meaning of those terms, nor should one become strictly bound by the statement that the addressee of the request is an infringer who had been proven the infringement. When developing provisions applicable to proceedings whose function is auxiliary in relation to provisions applicable to the main proceedings, one needs to describe the relationship between the persons participating in such proceedings while preserving the special function of the construct, the intended purpose of which is to facilitate preparations for the actual suit. The above assumptions must support the ambiguous phrases and terms used in the Directive itself, which are understood differently in different language versions, and the possibility of implementation adjusted to the inconsistent terminology used throughout national laws.

If we assume such an approach, then we can use the term 'infringer' without any concern in relation to a person with respect to whom there is a probability that they have committed a tort, or credible circumstances exist which indicate an infringement. The term 'infringer' should, in the case of information disclosure requests, be interpreted in the procedural context, while remembering that whether that person is responsible for the infringement will only be decided in the final ruling. An argument in that respect may be the observation that whether the person indicated in the statement of claim as the defendant is the infringer is only confirmed by the ruling of the court, which, in many cases, is not favourable to the claimant. As a result, where the claimant loses its case, the defendant is not deemed to be an 'infringer'. Therefore, any terms applied for the purpose of developing information disclosure requests should be given a meaning which defines the relationships between the parties to such proceedings, and they should be interpreted accordingly.

To sum up this portion of considerations about information disclosure requests, we could say that the proposed provisions adequately define the procedural roles of the requester and the addressee of the information disclosure request. It seems more difficult, however, to define the premises which necessitate the application of that construct. Going back to the wording of the Directive, particular attention should be paid to the requirements which precondition acceptance of the request, that is a "justified and proportionate" demand of the claimant. In that respect, the proposed wording introduces new premises compared to the current wording. In place of "high probability" of the obligee's claims, the bill introduces a requirement that credible circumstances of the infringement must be demonstrated. The semantic proximity of those two premises is evident; however, their legal understanding may still provoke criticism. Nevertheless, given the opinions voiced in the doctrine, unstable case law

and, last but not least, the ruling of the Constitutional Tribunal, the attempt to introduce a new criterion for accepting an information disclosure request may be considered a sort of compromise. The essence of the problem with information disclosure requests boils down to finding such a level of demonstrating the probability of an infringement which is not equivalent to certainty – which is formally guaranteed once the hearing of evidence is fully completed – but the credibility of facts presented by the obligee should be high enough to accept the obligee's request. Assuming that information disclosure requests may be – which is supported by the Directive – examined before commencement of the actual infringement suit, the fact that the order regarding the information disclosure request may state that there was an infringement of a right should not prevail over the findings during the suit, and certainly not be binding on the court. It should, therefore, be accepted that when looking for adequate premises for the requests in question, using the phrase "demonstration of reliable circumstances of the infringement" gives procedural guarantees to both parties to the proceedings – the obligee and the infringer. It should be uncontroversial to say that the undoubtedly special construct of information disclosure requests creates its own evidentiary standards and requirements. When it comes to auxiliary proceedings, the purposes are not identical, and therefore the premises are not identical; this has already been stated above, but also criticised, for example, in the case of a defective connection that has been made between information disclosure requests and injunction requests under the current provisions of Article 286^1 of the Industrial Property Law.

It should also be noted that the proposed provisions contain an additional requirement that the disclosure of information serves the purpose of defining the claim. Although such a premise is not found in the Directive, one could defend the argument that it expresses, in a complementary manner, the need for the request to be justified. Such an approach would be consistent with the Directive, which mentions the requirement of the request being "justified". The judge's evaluation of whether the information disclosure request lies within the boundaries of the future claim could serve as verification of its legitimacy. That way, in addition to evaluating whether the requester has credibly presented the circumstances of an infringement of its right, there would also be a possibility of controlling whether the information is serving the purpose of formulating a claim, or, in other words, whether the request for it is justified.

What remains to be investigated is whether the proposed construct provides the possibility of testing whether the principle of proportionality is observed. Such detailed requirements cannot be directly derived from the wording of the new provision itself. However, Article 479^{95} proposed in the amendment to the Code of Civil Procedure may come to our aid here. According to that provision: "When applying the measures laid down in Article 479^{97}, Article 479^{106}

or Article 479[112] § 1, the court shall take into account the interests of the parties to such a degree as to ensure adequate protection for the right holder [obligee] and not to burden the obligor, or the defendant, more than is necessary, while bearing in mind the burden on the defendant and the obligor that would result from the measures applied and the protection of trade secrets". That provision aims at expressing detailed premises for a kind of 'proportionality' test. Without going into doctrine-related deliberations about the essence of the principle of proportionality, the proposed legislative solution could be considered a practical attempt to apply that principle as an actual element in the structure of the new provision.

Another remark on information disclosure requests is that the possibility of adjudicating a disclosure claim is not permissible before a suit is filed. Although issues related to the timing of the request were already controversial at the initial stages of assessing the outcomes of implementation of Directive 2004/48/EC, arguments in support of the possibility of filing such requests before the suit is initiated seem entirely convincing. T. Targosz points out that in some countries, such as France or Spain, it was believed that the construct in question should also be available during the pre-litigation stage[36]. French legislation supports such interpretation. In this respect, of special significance should be, in particular, the Guidance on how to apply Directive 2004/48/EC published by the Commission in November 2017[37]. The document says that – if a Member State provides for such a possibility – a disclosure claim may also be available before the commencement of the suit[38]. An example of a law which permits a disclosure claim only against entities which have already been found to have infringed on a particular industrial property right is German law[39].

The last of the main objections against the current regulation of the right of information is the issue of preventing abuses related to the use of information

36 Synthesis of The Comments on the Commission Report on the Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (COM/2010/779 final), p. 14.

37 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, COM(2017) 708, http://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52017DC0708&from=EN [access: 3.12.2019].

38 The statement in Article 8 of the Directive on the enforcement of intellectual property rights that the order to provide information shall be available "in the context of proceedings concerning an infringement of an intellectual property right" means that the ordering of information disclosure does not have to take place within the same court proceedings. Such an order may be issued in separate proceedings initiated with the objective to seek damages. Depending on the applicable national laws, it may also be issued at an earlier stage as a preliminary order.

39 See § 19(7) MarkenG; § 140b(7) PatG.

in the context of trade secret protection. The current standards of trade secret protection during court proceedings, which are limited to a general statement that the court is to ensure protection of trade secrets, without listing any specific solutions, have to be deemed insufficient[40]. The issue of trade secret protection in court proceedings has undoubtedly been insufficiently regulated for a long time, and the implementation of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJEU L 157/1) has, unfortunately, not made any satisfactory changes in that matter when it comes to provisions on civil procedure[41].

When it comes to that issue, the bill proposes that where the obligor or the defendant invokes trade secrecy, the court may, in addition, hear the parties. It will be at the court's discretion whether such a hearing would concern one or both parties (assuming that the hearing would not always be obligatory, but would take place in situations actually justified by protection of trade secrets). In this case, however, the president of the court, at the request of the obligee, would set a date for an open session to obtain explanations about the information provided. Thus, this solution shifts the burden of determining the protected trade secrets onto the court, which must, having first analysed the request and the position of persons obliged to disclose information, decide what scope of knowledge is to be provided in order to enable preparation for a suit. The role of the court in examining information disclosure requests is, therefore, decisive and has many far-reaching consequences. If the court decides that the scope of the information requested is to a large extent a trade secret, the requester will be unable to formulate its claims. Giving the obligee access to only a narrow range of information should not, therefore, dictate the necessity to initiate a suit. Such a deficit of information resulting from the need to protect trade secrets should, for that reason, be reflected in the possibility of optional imposition of the obligation to file a pleading to initiate a suit. Difficulties with defining the boundaries of trade secret protection confirm the need to derogate from the unconditional obligation to file a statement of claim.

In the context of the proposed changes to the Code of Civil Procedure, it is also worth noting that the proposed provision of Article 479^{113} indicates

40 M. Kubiak [in:] A. Michalak (ed.), *Prawo własności przemysłowej. Komentarz*, Warszawa 2016.

41 Implementation of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJEU L 157/1) took place in the Act of 5 July 2018 Amending the Act on Combating Unfair Competition (Dz.U. [Journal of Laws], item 1637).

a requirement when the construct of information disclosure request may be applied to an obligor other than the infringer. In doing so, it uses a new phrase to describe the facts the existence of which warrants an information disclosure request – it makes the validity of such a request conditional upon whether the volume of services provided or the quantities of goods held in one's possession "show that [the obligor] does in fact engage in economic activity". The bill's Reasons say that the bill's drafters used that phrase on purpose to distinguish it from the phrase "in connection with any economic activity conducted". The assumption underlying the bill is that the proposed provisions apply to actual situations, where the "volume" of one's activity, rather than the sole fulfilment of certain formal requirements (such as registration of the business or obtaining of a licence), provides grounds to accept the request[42]. A reference in the bill to being "in fact engaged in economic activity" may, therefore, serve the purpose of emphasising its autonomy, while still being able to refer to such features of economic activity as being profit-oriented, of an organised nature, and continuity. This direction of changes seems to be consistent with Article 8 paragraph 1 point (a) and (b) of the Directive, which uses the phrase "commercial scale" when referring to the activity of a third party. As regards the current Article $286^1(1)$ of the Industrial Property Law, it should, on the other hand, be noted, that the activity of a third party must have "the purpose of obtaining, directly or indirectly, profit or other economic gain" and may not be the activity of "consumers acting in good faith". The differences between those regulations are not significant and, although there are arguments in favour of approximating the wording of the Polish provisions to the Directive, a change in that respect does not seem necessary.

42 The latest publications of the European Commission – in particular the document of 29 November 2017 – Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, contain some remarks which enable making that concept more precise. The Communication notes that the concept of 'commercial scale', as provided for in Article 6(2), 8(1) and 9(2) of Directive 2004/48/EC, should be interpreted and applied taking into account qualitative elements, such as the economic or commercial advantage which may be pursued by the infringements in question, as well as quantitative elements, such as the number and extent of the infringements, which are relevant in the case at hand. In relation to Article 61 of the TRIPS Agreement, it has also been argued in the relevant literature that an infringement of a copyright on a commercial scale means actions performed "in a continuous manner in order to obtain financial gain" (M. Barczewski, Traktatowa ochrona praw autorskich i praw pokrewnych, Kraków 2007, p. 149). In connection with the Directive, it has also been argued that "activity on a commercial scale means any activity directed at obtaining, directly or indirectly, economic profit or other commercial gain" (P. Podrecki, *Środki ochrony praw własności intelektualnej*, Warszawa 2010, LEX/el).

In the context of amendments concerning information disclosure requests, it can also be said that a provision which defines the scope of the request that may be filed by the obligee is necessary. It needs to be strictly defined by a closed catalogue and concern only the information listed at length. The scope of information requested in information disclosure requests is exhaustively and adequately indicated in, for example, the current Article 286[1] paragraph 2 and 3 of the Industrial Property Law. Given the fact that it strictly corresponds to the provisions of Directive 2004/48/EC, that provision should remain unchanged[43]. Due to the specific nature of information disclosure requests, it is also justified that this scope applies to persons other than the infringer.

To sum up the legislative work that is currently taking place on information disclosure requests, it can be concluded that the proposed changes to the Code of Civil Procedure may ensure consistency of provisions on information disclosure in all legal acts in intellectual property law. It should also be assumed that Article 296[1] of the Industrial Property Law, which is being amended within a separate legislative path, may be successfully used in order to make the changes introduced by the amendment of the Code of Civil Procedure in other acts. The wording of Article 296[1] of the Industrial Property Law mentioned above fulfils the requirements arising from the ruling of the Constitutional Tribunal of 6 December 2018 in case SK 19/16 and preserves the necessary level of regulation arising from the provisions of Directive 2004/48/EC. For the purpose of determining the legal nature of the right of information in intellectual property law, it is particularly important to preserve the general statement that information disclosure requests are independent procedural measures. Furthermore, it needs to be emphasised that exercising the right of information should continue to be dependent on the court's verification of the justifiability and proportionality of the demand to provide information[44]. An information disclosure request may also precede further stages of seeking civil law claims. This means that a request to order the disclosure of information may be filed with a court also before filing a suit. The right of information should, therefore, be exercised in such a way as to also permit the possibility of seeking the disclosure of information independently of any injunction proceedings. This does not preclude any situations in which information disclosure requests and injunction requests are filed jointly. Requests to order the disclosure of information may be filed against both the

43 This is the direction in which the Court of Appeal in Warsaw leaned in its ruling, stating that "the subject-matter range of the disclosure obligation is specified in Article 286[1](2) of the Industrial Property Law, and, due to the specific nature of that provision, and because of the construct of disclosure request as such, shall not be subject to broad interpretation" (Ruling of the Court of Appeal in Warsaw of 20 September 2012 in case I ACA 251/12, Legalis).

44 Cf. A. Nowak-Gruca, *Roszczenie informacyjne w ustawie Prawo własności przemysłowej w świetle ekonomicznej analizy prawa*, "Monitor Prawniczy" 2008, no. 15, p. 798.

alleged infringer and a third party. The premise for accepting such a request is showing that the requested information is necessary for the purpose of seeking the identified claim arising out of an infringement. It should also be added that the request may be accepted only after a hearing, and the court's decision shall have the form of an order and may be appealed against through a complaint. The information which the alleged infringer or a third party is obliged to disclose may only concern the items explicitly stated in the wording of the provision. Finally, it has to be said that the form of the 'information disclosure request' construct proposed in the amendment to the Industrial Property Law seems to be more synthetic and more closely corresponds to the provisions of Directive 2008/48/EC than the new provisions proposed in the draft amendment of the Code of Civil Procedure.

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SUMMARY

This article discusses the proposed legislative changes which aim to introduce a special court into the Polish court system that would handle intellectual property matters. The need to introduce a separate adjudication track for cases regarding intangible property rights, and in particular intellectual property rights, seems to be validated by the numerous demands from businesses and representatives of collective management organisations and of jurisprudence. The bill is part of a vast exercise to amend civil procedure law, but, to a large extent, has an impact on the substantive provisions of Industrial Property Law and the Act on Copyright and Related Rights. A substantial portion of the doctrine-related considerations addressed in this article is, however, about selected issues related to the new laws on remedies available in intellectual property law proceedings. In particular, they include provisions which enable the disclosure of information on intellectual property right violations. An analysis of the provisions on information disclosure requests is also important for another reason: it touches upon the essential issue of the extent and balance of protection between the intellectual property right holder and the alleged infringer. In this context, we should also look into the legal situation of persons who are not directly identified as intellectual property right infringers, but may have knowledge of infringements. In the light of Polish legislation, delineating the boundaries of protection for intellectual property right holders has not only become an issue requiring interpretation of the relevant provisions within both the judicature and the doctrine, but has also given rise to the need to verify the constitutionality of those provisions. In this respect, the Constitutional Court ruling of 6 December 2018 (SK 19/16) is of particular importance. For the purpose of determining the legal nature of the right of information in intellectual property law, it is particularly important to preserve information disclosure requests as independent procedural measures. Furthermore, it needs to be emphasised that exercising the right of information should continue to be dependent on the court's verification of the justifiability and proportionality of the demand to provide information. An information disclosure request may also precede further stages of seeking civil law claims. Requests to order the disclosure of information may be filed against both the alleged infringer and a third party. The premise for accepting such a request is showing that the requested information is necessary for the purpose of seeking the identified claim arising out of an infringement.

Key words: Polish court system, Intellectual property law, Industrial Property Law, Copyright and Related Rights**,** Information disclosure request.

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Legal aspects of biobanking HBS for scientific purposes in Poland

Abstract
Legal issues related to the biobanking of human biological samples are one of the extremely important areas of European law. Biobanks created in Poland as well as the Polish Biobank Network created under the auspices of the Ministry of Science and Higher Education have become a catalyst for the search for solutions and the basis of rights for the functioning of biobanks in Poland as well as the protection of donor rights. Undoubtedly, the lack of legal regulation of biobanks and biomedical research on human biological samples could become a significant problem limiting the development of biobanking and conducting scientific research in Poland. The research attempts to show how representatives of the doctrine of law, bioethics and sociologists have interpreted the principles and standards of biobank operation in Poland from basic human rights, constitutional norms and personal rights.

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1. Introduction

Conducting scientific research on human biological samples has become one of the most important elements of acquiring knowledge about humans and on the etiology of many diseases, both population and rare. For years, such research has been conducted around the world, but it seems that only in the last ten years the idea of conducting large research on human biological samples from large biorepositories, such as biobanks, has flourished.

The development of such research poses new challenges not only to geneticists and biologists, but also to lawyers. The result is that new legal issues are arising of a character distinct both from medical law and traditionally understood private law. M. Grzymkowska wrote that "the development of biomedicine touches on one of the basic paradigms of law, which is the concept of a person"[2]. Considering the values it is supposed to protect (social solidarity, public interest, the interest of future generations) the law regulating the activities of biobanks departs to a large extent from its particularity as related to national legal systems; this, in turn, implies that the considerations of representatives of foreign and national doctrine depart from universal meanings and the possibility of referring to different legal orders.

In Poland, the need for legal regulation of biobanking has been postulated for years[3]. However, despite the lack of specific legislation, biobanks regulation remains based on fundamental constitutional freedoms. The subject matter of the considerations in this study will be a presentation of the specificity of legal aspects of biobanks in Poland and the decoding of relevant standards from the Polish legal system[4].

2. The idea of biobanking and biobanks in Poland

"Biobank" is a term for various types of biological sample collections with related databases, which have a certain level of accessibility, availability and exchange for scientific purposes. Thus, a biobank is an institution whose main purpose is to store tissues, cells and human organs[5].

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2 M. Grzymkowska, *Standardy bioetyczne w prawie europejskiej*, Warszawa 2009, p. 28.

3 D. Krekora-Zając, *O konieczności regulacji prawnej biobanków*, "Państwo i Prawo" 2012, no. 7, pp. 64–77.

4 The work was supported by the National Science Center, Poland Grant Number 2016/23/D/HS5/0041.

5 J. Pawlikowski, *Biobankowanie ludzkiego materiału biologicznego dla celów badań naukowych – aspekty organizacyjne, etyczne, prawne i społeczne*, Lublin 2013, p. 12.

Undoubtedly, biobanks all over the world, including Europe, are now experiencing a "boom". They are both private and public institutions that collect samples of genetic material for scientific, clinical or policing purposes[6].

Biobanks are created encompassing only the collection of samples from people with a specific mutation, e.g. a specific genetic mutation, as well as population biobanks that store and use genetic material collected from different people regardless of their specific mutations belonging to a specific population[7]. The former make it possible for researchers to work on the etiology and methods of treatment of specific diseases, while the latter make it possible to learn about so-called population diseases occurring with high frequency in humans[8].

Thanks to biobanks, scientists can use samples not only taken from their patients/donors, but can conduct research on a large amount of biological material from different donors[9]. Therefore, it is impossible not to appreciate the great importance of biobanks for the possibility of researching many diseases and for finding medicines for some of them. Thanks to the existence of biobanks of human tissues, it is possible to perform scientific research on a very large number of samples that are not otherwise available to scientists. Without biobanks, it would not be possible to develop medicine, pharmacy or genetics[10].

Nine years ago the idea of biobanking was recognized by *Time* magazine as one of the leading ideas that can change the world[11], and in 2013, on the basis of Art. 187 TFEU[12], the Biobanking and Biomolecular Resources Research Infrastructure ERIC was established, which became a network enabling the exchange of biological samples and data related to them for scientific purposes between European countries. Poland initially participated in the work of BBMRI. The status of ERIC as an observer evolved to that of a full member of this European network in 2016[13].

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6 D. Krekora-Zając, *Zgoda na przetwarzanie danych przez biobanki dla celów naukowych* [in:] A. Białek, M. Wróblewski (ed.), *Wybrane aspekty praw człowieka a bioetyka,* Warszawa 2016, p. 52.

7 E. Bartnik, *Biobanki jaki przyszłość nauki*, "Studia Iuridica" 2018, no. 73, pp. 9–13.

8 J. Pawlikowski, *Ochrona praw dawców w wybranych europejskich biobankach populacyjnych*, "Diametros" 2012, no. 32, pp. 91–92.

9 C. C. George, *The European Bank for Induces Pluripotent Stem Cells (EBiSC): Opportunities & Challenges Through Public–Private Collaboration*, "Stidia Iuridica" 2016, no. 73, p. 29.

10 Ibid.

11 A. Park, *10 Ideas Changing the World Right Now. Biobanks,* Time, 12.03.2009, http://content.time.com/time/specials/packages/article/0,28804,1884779_1884782_1884766,00.html [access: 22.07.2019].

12 J. Reichel, *EU Governance for Research and Ethics in Biobank* [in:] D. Mascalzoni (ed.), *Ethics, Law and Governance of Biobanking. National, European and International Approaches*, Spiringer 2015, p. 175.

13 M. Witoń, D. Strapagiel, J. Gleńska-Olender, A. Chróścicka, K. Ferdyn, J. Skokowski, L. Kalinowski, J. Pawlikowski, B. Marciniak, M. Pasterk, A. Matera-Witkiewicz, Ł. Kozera,

Currently, the activity of biobanks in Poland is not licensed or registered by the state, therefore it is not possible to precisely determine the number of biobanks and their organizational rules. As part of a project carried out by a consortium of Polish biobanks, BBMRI.pl, and funded by the Ministry of Science and Higher Education, work on the organization of a biobank network has been underway since 2017. At the moment, the Polish Network of Biobanks has over 42 members and observers[14]. The vast majority of biobanks are created in hospitals and are public entities. Some of them are completely unique, as in the case of brain cell biobanks (located at the Institute of Psychiatry and Neurology in Warsaw), which constitute one of the largest collections of such cells in Europe. There are also biobanks / biorepositories run by private entities, e.g. pharmaceutical companies and biotechnology companies. In addition, it should be emphasized that the first three biobanks of the general population have been founded in Wrocław, Gdańsk and Łódź[15].

3. Conducting biomedical research on human biological samples under the Act on the Professions of Physician and Dentist and The Code of Medical Ethics

The Polish law lacks not only specific legal regulations for biobanking, but also for conducting biomedical research. In practice, this means that the only special legal regulation relating to the conduct of scientific research involving humans is the Act on the Professions of Physician and Dentist[16]. On the basis of this Act, it is permissible to conduct scientific research on a human being as a medical experiment. These regulations, however, do not apply to biobanking and conducting scientific research on a human biological sample, both due to the construction of the notion of a medical experiment in Polish law and to historical reasons.

The necessity to create legal norms with regard to human experiments throughout Europe arose from the result of the Nuremberg trials, in which the

Organization of BBMRI. Pl: The Polish Biobanking Network, "Biopreservation and Biobanking" 2017, no. 3, pp. 264–269.

14 A. Chruścicka, A. Paluch, A. Matera-Witkiewicz, *Polska Sieć Biobanków rozwija się i zaprasza do współpracy*, Biotechnologia.pl, 30.07.3019, https://biotechnologia.pl/biotechnologia/polska-siec-biobankow-rozwija-sie-i-zaprasza-do-wspolpracy,18949 [access: 30.07.2019].

15 Ł. Kozera, D. Stapagiel, J. Gleńska-Olender, A. Chróścicka, K. Ferdyn, J. Skokowski, L. Kalinowski, J. Pawlikowski, B. Marciniak, M. Pasterk, A. Matera-Witkiewicz, M. Lewandowska-Szumieł, M. Piast, M. Witoń, *Biobankowanie ludzkiego materiału biologicznego dla celów naukowych w Polsce i Europie,* "Studia Iuridica" 2018, no. 73, pp. 13–29.

16 Ustawa o zawodach lekarza i lekarza dentysty z 5 grudnia 1996 r., Dz.U. 2019, item 537.

cruelty of human experience was demonstrated[17]. Legal norms have been created in both international law and in national legal regimes, stating fairly restrictive rules for conducting experiments on people so that such cruel practices will never happen again. The aforementioned Nuremberg Code set out ten basic principles for conducting experiments on people[18].

In Polish national law, conducting an experiment is only allowed on the basis of Art. 39 of the Constitution[19] and Art. 21–29 of the Act on the Professions of Physician and Dentist. According to Art. 39 of the Constitution, "No one can be subjected to scientific experiments, including medical, without voluntary consent." The constitutional regulation therefore only refers to experiments conducted on humans, but not on human biological samples[20]. L. Kubicki[21] pointed out in an article that a study that is not carried out directly on a human being, but would involve manipulation of environmental factors that could pose a threat to humans, can also be considered a medical experiment performed on a human. Similarly, Art. 21 of the Act on the Professions of Physician and Dentist indicates that a medical experiment can be carried out only on humans, not on human biological samples[22].

The rules of medical experiments have been regulated in Polish law for years and elaborated by prominent representatives of the legal doctrine[23].

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17 https://avalon.law.yale.edu/imt/judgen.asp [access: 30.07.2019].

18 A. Wnukiewicz-Kozłowska, Eksperyment Medyczny na organizmie ludzkim w prawie międzynarodowym i europejskim, Wrocław 2004, pp. 39–46.

19 Constitution of the Republic of Poland of 2 April 1997, (OJ L No. 78., item 483).

20 M. Królikowski, K. Szczucki [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, vol. 1, *Komentarz art. 1–86*, Warszawa 2016, p. 957.

21 L. Kubicki, *Medyczny eksperyment badawczy (warunki dopuszczalności w prawie polskim)*, "Państwo i Prawo" 1988, no. 7, p. 54.

22 M. Gałązka, L. Bosek, Eksperyment medyczny [in:] L. Bosek, A. Wnukiewicz-Kozłowska (ed.), *Szczegółowe świadczenia zdrowotne*, Warszawa 2018, p. 54.

23 A. Wnukiewicz-Kozłowska, *Eksperyment Medyczny na organizmie ludzkim w prawie międzynarodowym i europejskim*, Wrocław 2004; L. Bosek, *Podstawy i zasady odpowiedzialności cywilnej za szkodę wyrządzona uczestnikowi eksperymentu medycznego – de lege ferenda i de lege lata* [in:] M. Boratyńska (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warszawa 2016, pp. 495–523; P. Konieczniak, *Eksperyment medyczny* [in:] E. Zielińska, M. Boratyńska, P. Konieczniak (ed.), *Regulacja Prawna czynności medycznych*, Warszawa 2018, pp. 64–113; M. Gałązka, L. Bosek, *Eksperyment medyczny* [in:] L. Bosek, A. Wnukiewicz-Kozłowska (ed.), *Szczegółowe świadczenia zdrowotne* Warszawa 2018, pp. 45–84; M. Sośniak, *Uwarunkowania prawne dopuszczalności eksperymentów medycznych na ludziach*, "Państwo i Prawo" 1985, no. 5, pp. 31–42; J. Różyńska, *Eksperyment genetyczny dwa w jednym?,* "Prawo i Medycyna" 2016, no. 4, pp. 5–31; R. Kubiak, *Zgoda uczestnika eksperymentu cz I*, "Prawo i Medycyna" 2000, no. 8, pp. 44–59; Id., *Warunki prawne dopuszczalności eksperymentów medycznych – wątpliwości dotyczące regulacji w świetle konwencji bioetycznej* [in:] O. Nawrot, A. Wnukiewicz-Kozłowska (ed.), *Temida w dobie rewolucji biotechnologicznej. Wybrane problemy bioprawa*, Gdańsk 2015, pp. 133–162; L. Kubicki, *Medyczny*

Therefore, in Polish law a medical experiment is always an experiment on a human being[24] – it consists in giving the participant experimental substances, using certain research methods, and thus always an intervention on the human body – violation of integrity. The risks[25] associated with a medical experiment are real threats to the life and health of the participant in such an experiment. For this reason, in Polish law, it was accepted that such an experiment is possible only in exceptional situations, including after obtaining the explicit consent of the participant, but also after the approval of an entity independent from the participant of the intention to carry out the experiment, i.e. the bioethics commission.

In addition, the field of biobanking entails completely different threats to the participants than in the case of a medical experiment. As regards biobanking in law, European[26] and American[27] doctrine, it is indicated that these threats are related to the privacy[28] and autonomy of donors, but never to life and health.

In the doctrine, there are also sometimes references to the notion of a genetic experiment (based on the Code of Medical Ethics). According to A. Wnukiewicz-Kozłowska[29], all forms of application of genetics to the human

eksperyment badawczy (warunki dopuszczalności w prawie polskim), "Państwo i Prawo" 1988, no. 7, pp. 54–64, P. Konieczniak, *Eksperyment naukowy i techniczny a porządek prawny*, Warszawa 2013; U. Olędzka, *Eksperyment medyczny w stanach nagłych i stanach bezpośredniego narażania życia*, "Prawo i Medycyna" 2004, no. 16, pp. 112–115; M. Kopeć, *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, Warszawa 2016, pp. 625–656; K. Sakowski, *Eksperyment medyczny* [in:] E. Zielińska (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, Warszawa 2014, pp. 501–553; J. Brańszyński, *Podstawy badań eksperymentalnych*, Warszawa 1992; M. Czarkowski, J. Różyńska, *Świadoma zgoda na udział w eksperymencie medycznym*, Warszawa 2008; M. Nestorowicz, *Eksperyment medyczny w świetle prawa (podstawy prawne, odpowiedzialność ubezpieczenia)* "Prawo i Medycyna" 2004 special issue, pp. 27–38; M. Nowak, *Prawne formy zgody pacjenta na eksperyment medyczny (zagadnienia cywilnoprawne)*. "Prawo i Medycyna" 2005, no. 3, pp. 45–57; M. Safjan *Wybrane aspekty eksperymentów medycznych na człowieku (problem legalności i odpowiedzialności cywilnej),* "Studia Iuridica" 1994, vol. XXVI, pp. 65–89.

24 P. Konieczniak, *Eksperyment medyczny…* p. 78.

25 L. Bosek, M. Gałązka, *The doctrine indicates the fact that it is controversial to define an acceptable level of such risk* [in:] *Szczegołowe świadczenia zdrowotne…* p. 72.

26 H. Gottwei, *Biobanks for Europe. A challenge for governance. Report of the Expert Group on Dealing with Ethical and Regulatory Challenges of International Biobank Research,* Luxemburg 2012.

27 S. J. Carnahan, *Biobanking newborn bloodspots for genetic research without consent,* "Journal of Health Care and Policy" 2011, no. 14, pp. 299–330.

28 S. Penasa, I. de Mideuel Beriain, C. Basbosa, A. Białek, T. Chortara, A.D. Pereira, P.N. Juménez, T. Sroka, M. Tomasi, *The EU General Data Protection Regulation: How will it impact the regulation of research biobanks? Setting the legal frame in the Mediterranean and Eastern European area*, Medical Law International, 02.04.2018, https://doi.org/10.1177/0968533218765044 [access: 21.08.2019].

29 A. Wnukiewicz-Kozłowska, *Eksperyment medyczny…* p. 145.

body constitute a genetic experiment (research on human embryos in vitro as well as genetic tests, genetic manipulations, gene therapy and scientific explanation of the causes and mechanisms of inheritance are genetic experiments). This position is also shared in publications by M. Świderska[30]. The Code of Medical Ethics also establishes that a physician participating in research aimed at identifying the carrier of a disease gene or genetic susceptibility to illness can only conduct it for health purposes, or as scientific research related to such purposes after obtaining the patient's consent and providing a genetic consultation. Therefore, it should be stressed that Art. 51h of the Code of Medical Ethics does not recognize genetic testing for scientific purposes as a medical experiment.

In summary, six main reasons should be indicated as to why biobanking cannot be considered a medical experiment.

First of all, as demonstrated by the analysis, an experiment consists in affecting the human body; this may be a threat to one's life or health, but biobanking does not refer to human intervention, and the sampling itself is not very invasive (most often it involves collection of saliva, urine, blood or the use of biological samples that remain after medical procedures).

Secondly, at the time of obtaining a sample, it is not possible to inform the donor about any subsequent scope of research on the sample. This sample can be used for several decades after collection in various studies conducted by researchers from multiple scientific centers.

Thirdly, it is not possible to obtain consent *in concreto* for each research project – the idea of biobanking assumes that researchers use ready-made cohorts and do not go through the process of obtaining consents in each case. Obtaining such specific consent in every case would undoubtedly be an excessive burden on the donor, who would have to return in each case to the biobank. In the European discussion on biobanking, different conceptions of consent are adopted, though increasingly the need to obtain broad consent or switch to an opt-out system is indicated.

Fourthly, obtaining separate permission from a bioethical commission for each study would make it essentially pointless to create biobanks, since every researcher would have to go through the procedure for registration of a medical experiment. A good and hitherto commonly used standard is obtaining the consent of a bioethics commission for a research project rather than for a medical experiment.

Fifthly, it should be clearly stressed that research on human biological samples within biobanks is conducted not only by physicians but also by biologists, geneticists, biotechnologists and other researchers.

30 M. Świderska, *Zgoda pacjenta na zabieg medyczny*, Toruń 2007, p. 314.

Sixthly, in Poland there are pediatric biobanks, and conducting an experiment on children which does not provide them with a therapeutic benefit is legally prohibited.

4. Biobanking as an emanation of the constitutional freedom of scientific research

Because there is no specific legal regulation regarding scientific biobanks, the rules regarding the admissibility of their functioning should be interpreted from the legal system as a whole, thus defining the boundaries of research on human biological samples within which they can operate and indicating the boundaries of this freedom[31].

Freedom of scientific research is one of the fundamental human and civil rights protected directly in the Polish Constitution[32]. According to Art. 73 of the Constitution, everyone is guaranteed the freedom of artistic creation, scientific research and the proclamation of their results, freedom of teaching and the freedom to use cultural goods. It is pointed out that this freedom is most widely associated with the acquisition and dissemination of information also in the public interest[33].

The Constitution grants broad protection to entities exercising the freedom of research – it does not limit the scope of freedom of scientific research. The freedom under consideration encompasses the research activities not only of scientific employees whose duties include conducting scientific research, but also the activities of other people who, also without any formal connections with the scientific sector, carry out activities consisting in conducting scientific research. The guarantees contained in Art. 73 of the Constitution protect the individual and other legal entities from unjustified interference by the state in the subject matter and methods of scientific research as well as in the content and methods of teaching. Such a broad protection indicates directly that scientific freedom is a universal value, and its limitation is possible only when necessary for the protection of other constitutional values. Constitutional

31 K. Łakomiec, *Wybrane konstytucyjne aspekty funkcjonowania biobanków populacyjnych,* "Państwo i Prawo" 2014, no. 12, pp. 54–64.

32 W. Brzozowski, *Konstytucyjna wolność badań naukowych i ogłaszania ich wyników* [in:] A. Wiktorowska, A. Jakubowski (ed.), *Prawo nauki. Zagadnienia wybrane*, Warszawa 2014, pp. 25–45; S. Gardocki, *Wolność badań naukowch* [in:] *Uniwersalny i regionalny wymiar ochrony praw człowieka. Nowe wyzwania – nowe rozwiązania. vol. 3*, Warszawa 2014, pp. 301–311.

33 M. Królikowski, K. Szczucki [in:] M. Safjan, L. Bosek (ed.), Konstytucja RP…, pp. 1685–1686.

freedoms, including the freedom of scientific research, may be limited only on the basis of Art. 31 para. 3 of the Constitution and are subject to the principle of proportionality[34].

This principle requires that the measures least burdensome on the individual must be chosen from among effective measures restricting the exercise of freedoms and rights, and the legislator makes it a reimbursement when the illness is no more than is necessary for a constitutionally founded and justified purpose. Restrictions may be established in law and only then as are necessary in a democratic state for its security or public order, or for the protection of the environment, health and or morals, or the freedoms and rights of other people – they may not violate the essence of freedoms and rights[35].

This means that in other situations the Constitution establishes the primacy of freedom of scientific research in such a way that where the legal order does not set clear boundaries and the consequences of breaching them, conducting scientific research is permissible, and the legislator, public administration and all other entities are obliged to refrain from interfering in this freedom. The researcher, however, is always obliged to adhere to ethical principles in his work, resulting from codes of good practices and normative documents of a soft-law nature. Above all, he cannot allow a situation in which the interests of society or scientific objectives prevail over the good of the individual. Scientific progress should be made with respect for the dignity[36] of every human being, which also extends to respect for the body and its parts, even after death. The researcher should take care to preserve the confidentiality of all information that could pose a direct or indirect risk to the deceased or his relatives. An accepted ethical norm in scientific research is also the principle that the human body or its parts cannot in themselves constitute a source of financial benefits. Researchers and people accumulating human biological material should be characterized by an attitude free of stigmatization and discrimination of the donors of material, their families, as well as persons belonging to a specific ethnic group. The activities of collecting and storing biological material should be done by people with knowledge and experience in the collection, processing and storage of biological material, as well as awareness of legal and ethical aspects related to the collection and long-term storage of human biological material and data.

34 M. Szydło, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP. vol. I. Komentarz art. 1–86*, Warszawa 2016, pp. 799–805.

35 M. Królikowski, K. Szczucki, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP…*, p. 1686.

36 Ibid., p. 1685.

The Constitution does not define the concept of scientific research. In the Polish law, therefore, each entity implementing the definition of scientific research given above enjoys constitutional protection. There is no doubt that the constitutional norm in this area is quite general, and therefore the principles of conducting research on human cells and tissues should be regulated by a lower-order act.

Scientific freedom is also protected under Polish private law. The Polish Civil Code in Art. 23 also encompasses non-pecuniary values accompanying scientific, artistic, inventive and rationalizing creative activity. According to P. Pazdan[37], the products of scientific research are protected directly by the provisions of Art. 23 and 24 of the Civil Code. This means that an individual whose scientific activity is threatened by someone else's activity may demand the cessation of such conduct, and if property damage resulted from such infringement, the aggrieved party may demand that it be remedied pursuant to general regulations.

Rights in personam in the field of creativity, including science, are also entitled to protection as provided for in the provisions of the Copyright Act[38]. Due to the link between the artist and the work, rights in personam in the form of scientific creativity are also protected on the basis of copyright law when they fulfill the prerequisites for recognition as a work[39].

It should be emphasized that despite some social concerns, the freedom of scientific research, including research into human biological samples, is a protected value throughout the entire Polish and European legal systems[40]. Within the meaning of the Constitution, it is protected as human freedom, without subjective limitations.

There is no doubt that conducting scientific research is associated with many social concerns[41]. In terms of research on human biological samples, these mainly concern the rights of donors, patients and participant. Those rights are

37 M. Pazdan, [in:] M. Safjan (ed.), *Prawo cywilne – cześć ogólna, vol. I*, Warszawa 2012, pp. 1258–1260.

38 Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych, Dz.U. 2019, item 1231.

39 A. Wojciechowska, *Czy autorskie dobra osobiste są dobrami osobistymi prawa cywilnego*, "Kwartalnik Prawa Prywatnego" 1994, no. 3, p. 371.

40 Article 13 EU Charter of Fundamental Rights; I. Spigno, *Freedom of Science Research, Max Planck Encyclopedia of Comparative Constitutional Law,* 01.2018, https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e169 [access: 20.08.2019]; J. Rezmer, *Wolność badań naukowych w świetle prawa międzynarodowego,* Toruń 2015.

41 Reports: J. Domaradzki, *Postawy społeczne wobec biobankowania ludzkiego materiału biologicznego*, http://bbmri.pl/pl/elsi/89-raport-postawy-spoleczne-wobec-biobankowania-ludzkiego-materialu-biologicznego and J. Domaradzki, *Genetyzacja społeczna w kontekście biobankowania*, http://bbmri.pl/pl/elsi/88-raport-genetyzacja-spoleczna-w-kontekscie-biobankowania [access: 21.08.2019].

the most import boundary of the freedom of biomedical research and the foundation of biobanking.

5. Rights of participants, donors and patients in biobanking

The Polish and global discussion on biobanks has been focused on the issue of donor rights for years. Interestingly, there are some universal donor rights independent of national legal regulations[42]. Despite the lack of a specific act on biobanking and conducting research on human biological samples, donor rights are the subject of the main legal publications on biobanking in Poland. They are derived from basic human rights and personal rights.

The first of these rights is the right to autonomy[43]. It assumes that consent to transfer a biological sample to a biobank should be independent of consent for any medical service and that it may be withdrawn at any time. It is worth pointing out in this respect that the postulates of Polish donors are far more extensive. Research conducted by J. Pawlikowski[44] clearly shows that donors expect respect for autonomy. There is no acceptance in this respect for a broad formula of consent or replacement consent, and in particular for consent to the use of blank data. Also, due to limitations in the scope of further control and obtaining feedback, 70% of respondents expressed support for coding their data rather than full anonymization[45]. This clearly shows the need for potential donors to be given a guarantee of the greatest possible autonomy in terms of transferred data and samples[46]. This respect for autonomy also assumes that potential donors have an impact on the selection of studies that are conducted on their sample. Postulates in this regard were shaped negatively in terms of subject matter, i.e. as the possibility of stating that some research (e.g. on cloning[47]) should not be conducted on a given sample or data, and subjectively, i.e. that specific entities (e.g. commercial or foreign[48]) will not be able to conduct research using a given sample or data.

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42 A. Janecka-Chabior *Sytuacja prawna biobanków* [in:] E. Kabza, K. Krupa-Lipińska (ed.), *Prawo cywilne w świetle obecnej regulacji i pożądanych zmian,* Toruń 2013, p. 264.

43 D. Krekora-Zając, *The Rights of Donors to Autonomy and Privacy as the Basis for the Functioning of Biobanks in Times of Big Data*, "Studia Iuridica" 2018, no. 73, p. 66.

44 J. Pawlikowski, *Biobankowanie…* p. 192.

45 Ibid., p. 175.

46 D. Mascalzoni, *Zgoda dynamiczna w projekcie Chris Study,* "Studia Iuridica" 2016, no. 73, pp. 43–46.

47 Ibid., p. 152.

48 Ibid., p. 117.

Therefore, recognizing not only the right to autonomy as a lack of compulsion to participate in research, but also as being an active participant in research, has become a new trend[49]. It should be emphasized that respondents have expressed similar demands in both American and European research[50].

The second right, distinguished by K. Łakomiec[51], is the right to privacy and information autonomy. Analyzing the jurisprudence of the Polish Constitutional Tribunal, the author indicates several basic threats related to the functioning of biobanks. First of all, he indicated that the threat to privacy is not only related to the fact of storing data, but also to the fact that a large amount of data about a given individual is combined in the biobank, including health data with identification data. Secondly, he argues that the fact that biobanks store and process data without specifying a time frame may potentially entail greater interference with individual rights. The third and last threat in this regard is data sharing by biobanks. He postulates that in order to reduce interference with the information autonomy of the individual, it is necessary to clearly specify the requirements that these entities must meet in order to use the data. Łakomiec[52] points out that in order to avert these threats, the legislator should introduce a range of constitutional guarantees such as statutorily determined procedural and technical guarantees for the secure processing of personal data; limiting the catalog of data processors to a minimum as dictated by the type of data and the purpose of processing; defining the time frame for data processing; introduction of an effective mechanism for anonymization; introduction of provisions enabling stable financing and maintenance of databases to ensure their smooth functioning in the era of dynamic development of modern technologies and the various types of risk associated with it[53].

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49 J. Domaradzki, J. Pawlikowski, *Public Attitudes toward Biobanking of Human Biological Material for Research Purposes: A Literature Review,* "Public Health" 2019, no. 12, p. 2209.

50 A. Lemke, A.W. Wolf, J. Hebert-Beitne, M.E. Smith, *Public and Biobank Participant Attitudes toward Genetic Research Participation and Data Sharing*, "Public Health Genomics" 2010, no. 13, pp. 368–377; M. Prictor, H.J.A. Teare, J. Kaye, *Equitable Participation in Biobanks: The Risks and Benefits of a "Dynamic Consent" Approach*, Frontiers in Public Health, 05.08.2018, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6133951/pdf/fpubh-06–00253.pdf [access: 21.08.2019]; N.I. Heredia, S. Krasny, L.L. Strong, L. von Hatten, L. Nguyen L., B.M. Reininger, L.H. Mc Neil, M.E. Fernández, *Community Perceptions of Biobanking Participation: A Qualitative Study among Mexican-Americans in Three Texas Cities*, "Public Health Genomics" 2017, no. 20, pp. 46–57.

51 K. Łakomiec, *Biobanki w dobie Big Data z perspektywy prawa konstytucyjnego,* "Studia Iuridica" 2018, no. 73, pp. 105–116.

52 Ibid., p. 115.

53 Verdict of Poloish Constitutional Tribunal of 20 January 2015, K 39/12, "Orzecznictwo Trybunału Konstytucyjnego - seria A" 2015, no. 1, item 2.

An important aspect of the right to privacy in the context of biobanking is protection of donor privacy[54], understood as protection of donor-related information[55]. It consists of the protection of personal data processing, protection against discrimination and the right to be informed (to know[56]) and not to be informed (to ignorance[57]). These rights have been significantly modified[58] by the GDPR[59]. The use of personal data for the purposes of scientific research and biobanking under the GDPR involves the possibility of many restrictions on the rights of the persons from whom the data originates[60]. In particular, it should be noted that the GDPR allows the secondary use of personal data for scientific purposes (without obtaining a new consent), limiting the right to be forgotten and limiting the information obligations of the data controller[61].

The third important problem in the field of biobanking for scientific purposes is the obligation to provide donors with information relevant to their health discovered somewhat accidentally as part of conducted research, so-called incidental findings. According to Art. 9 of the Act on Patient Rights and Patient Ombudsman[62], the patient has the right to obtain all information

54 J. Pawlikowski, *Ochrona prywatności dawców w kontekście biobankowania ludzkiego materiału biologicznego dla celów badań naukowych* [in:] O. Nawrot, A. Wnukiewicz-Kozłowska (ed.), *Temida w dobie rewolucji biotechnologicznej – wybrane problemy bioprawa*, Gdańsk 2015, p. 163.

55 For an overview of European legal regulations on the subject, see D. Krekora-Zając, *Charakter prawny genomu ludzkiego* [in:] A. Bobko, K. Cynk (ed.), *(Gen)etyczna przyszłość człowieka*, Rzeszów 2016, p. 142 et seq.; D. Krekora-Zając, *Prawo do materiału genetycznego człowieka*, Warszawa 2014, p. 53.

56 J. Bovenberg, T. Meulenkamp, E. Smets, S. Gevers, *Biobank Research: reporting Results to Individual Participants*, "European Journal of Health Law" 2009 no. 16, p. 229 et seq.

57 B. M. Knoppers, *The right not to know*, "Journal of Law, Medicine and Ethics" 2014 no. 6, p. 2.

58 Z. Warso, *Przetwarzanie danych osobowych do celów badań naukowych w świetle ogólnego rozporządzanie o ochronie danych osobowych* [in:] A. Białek, M. Wróblewski (ed.), *Wybrane aspekty praw człowieka a bioetyka*, Warszawa 2016, pp. 41–50; D. Krekora-Zając, *Zgoda…*, pp. 51–64.

59 General Data Protection Regulation OJ L 119, 04.05.2016; cor. OJ L 127, 23.5.2018

60 B. Marciniak, P. Topolski, D. Strapagiel, *Anonimizacja w dobie wielkich danych – sytuacja biobanków w kontekście RODO,* "Studia Iuridica" 2018, no. 73, pp. 73–86; A. Mednis, *Ochrona danych genetycznych jako danych osobowych*, "Studia Iuridica" 2018, no. 73, pp. 87–104; S. Penase, A. Dias Pereira, I. De Miguel Berian, P.N. Jiménez, C. Barbosa, T. Sroka, A. Białek, M. Tomasi, T. Chortara, *The EU General Data Protection Regulation: How will it impact the regulation of research biobanks? Setting the legal frame in the Mediterranean and Eastern European area,* Medical Law International, 02.04.2018, p. 11 et seq., http://journals.sagepub.com/doi/abs/10.1177/0968533218765044 [access: 21.07.2019].

61 I. Budin-Ljøsne et al., *Feedback of Individual Genetic Results on Research Participants. Is it Feasible in Europe?*, "Biopreservation and Biobanking" 2016, no. 2, pp. 241–248.

62 Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta (Dz.U. 2019, item 1127).

about his health. This is a prerequisite for making an autonomous and informed decision about the choice of therapy. Therefore, a physician who receives any information, including from scientific research, that is relevant to the patient's health is required to disclose it to the patient. In practice, such an obligation can be difficult to implement, because biobanks are not always informed about the discoveries of scientists to whom they provide samples, and these scientists obtain pseudo-anonymized data or even data without any means of identification. However, it is increasingly pointed out that donors are becoming active participants in biobanking (e.g. through co-creation of the principles of biobank operation), and the obligation to provide information on discoveries relevant to donor health should be envisaged as part of each project[63].

The fourth important issue with biobanking is determining the rights to a human biological sample and the rules for transferring it to other research units or scientists. The transfer of samples and data takes place on the basis of a Material Transfer Agreement and a Data Transfer Agreement. These agreements are concluded using standard contracts whose provisions are created by individual biobanks or scientific and medical organizations[64]. They specify not only the rules for submitting the sample or data but also any payment, intellectual property rights to the results of tests carried out with the use of samples, copyrights for the publication of results and the possibility of using the samples or data by the recipient[65].

The last significant problem is determining the legal status of the person from whom a sample is taken[66]. In theory it can be concluded that most human biological samples are collected during medical procedures, and therefore the donor is also a patient and is entitled to all rights under the Act on Patient Rights and Patient Ombudsman[67]. In practice, however, such a solution will not be possible in all cases. Firstly, because the donor will not always be a person seeking health services or using the health services of an entity providing health services or a person performing a medical profession. Not all biobanks must be entities providing health services within the meaning of Art. 2(1)0 of the Act of 15 April 2011 on Medical Activity[68]. Secondly, some biobanks collect human biological samples

63 I. Budin-Ljøsne et al., *Feedback of Individual…*, pp. 241–248.

64 D. Krekora-Zając, *Biobanki* [in:] E. Zielińska, M. Boratyńska, P. Konieczniak (ed.), *Regulacja prawna czynności medycznych,* Warszawa 2019, pp. 145–146.

65 T. Margoni, *The role of material transfer agreements in genetics databases and bio-banks* [in:] G. Pascuzzi (ed.), *Comparative issues in the governance of research biobanks,* Cham 2013, p. 236.

66 D. Krekora-Zając, *The Rights…*, p. 63; Id., *Ludzka próbka biologiczna wykorzystywana dla celów naukowych jako przedmiot prawa cywilnego*, "Studia Prawnicze" 2015, no. 3, pp. 89–134.

67 Id., *Biobanki…* p. 142.

68 Ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej, Dz.U. 2018, item 2190.

even without the need to violate bodily integrity, such as samples of saliva or urine, and without the involvement of medical personnel. Thirdly, even when the sample was collected during the provision of a health service (e.g. during surgery or blood collection for diagnostic purposes), patient rights do not in fact cover what is most important for biobanking, i.e. its further processing for scientific purposes. In practice, patient rights will not protect samples that are no longer needed for diagnostic or therapeutic processes and can only be classified as medical waste.

6. Conclusions

The lack of legal regulation of biobanks in Poland has become an impulse to develop regulations for the functioning of biobanks based on basic constitutional values related to human rights, and to create rules of conduct based on internationally recognized donor rights. This trend is particularly visible within the standards[69] created by BBMRI[70], in which donors' rights to privacy and autonomy are key issues[71]. In addition to the standards mentioned above, work is underway on the adoption of a code of conduct regarding the processing of personal data by biobanks in Poland[72], where by creating detailed rules for the protection of donor data, a whole system of protection of donor rights at the European level has been created. An undoubted advantage of such approaches to developing regulations is the fact that they are created jointly by lawyers specializing in various fields of law, doctors, quality specialists, sociologists, bioethics, philosophers and representatives of patient organizations. Issues surrounding biobanking are becoming an increasingly important element of legal discourse in both Poland and Europe as a whole.

69 *Quality Standards for Polish Biobanks, Prepared by the Team for Quality Assurance and Management System (QMS) operating within the BBMRI.pl consortium*, K. Ferdyn, J. Gleńska-Olender, K. Zagórska, M. Witoń, I. Uhrynowska-Tyszkiewicz, A. Matera-Witkiewicz (ed.), Wrocław 2018.

70 Those Quality Standards for Polish Biobanks have been accepted for evaluation as European guidelines by BBMRI. ERIC. http://bbmri.pl/pl/qms/84-standardy-jakosci-dla-biobankow-polskich-zaakceptowane-do-ewaluacji-jako-wytyczne-bbmri-eric [access: 13.08.2019].

71 K. Ferdyn, J. Gleńska-Olenader, M. Witoń, K. Zagórska, Ł. Kozera, A. Chróścicka, A. Materia-Witkiewicz, *Quality Management System in the BBMRI.pl Consortium: Status Before the Formation of the Polish Biobanking Network, Biopreservation and Biobanking*, 22.04.2019, https://www.liebertpub.com/doi/full/10.1089/bio.2018.0127 [access: 13.08.2019].

72 https:// bmri.pl/pl/elsi/67-kodeks-postepowania-w-sprawie-przetwarzania-danych-osobowych-dla-celow-badan-naukowych-przez-biobanki-w-polsce [access: 13.08.2019].

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SUMMARY

The paper discusses some interpretative trends in Polish legal doctrine facilitating derivation of the principles of biobank operations in Poland from basic constitutional freedoms and personal rights. Biobanking is a relatively new idea in both Poland and Europe, therefore the considerations begin with a description of the specifics of establishing biobanks in Poland against the background of the development of this idea around the world. Then, the legal basis for conducting scientific research on human biological samples is considered based on the only institution regulated by Polish law related to conducting research on the human body, i.e. the regulation of medical experiments. Due to the inadequacy of the regulation of experiments for conducting research on human biological samples, an attempt is made to elaborate the deliberations of the Polish doctrine regarding the freedom of scientific research and basing the functioning of biobanks on this freedom. However, it is impossible to write about biobanks without considering the rights of donors, therefore the last part of the article shows how representatives of the doctrine of Polish law derive from national law universal rights of donors recognized throughout Europe.

The summary of the article describes attempts to create Polish soft law regulations that are being implemented by European biobank associations.

Keywords: biobank, consent, privacy, data protection, human biological samples, freedom of science, donors right, MTA, DTA, biomedical research

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