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# STUDIA PRAWNICZE

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# THE LEGAL STUDIES



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# Counter-limits doctrine in the jurisprudence of the Constitutional Tribunal (until 2015)[1]

**Abstract**
The analysis herein, while mainly descriptive, presents the main foundations of the Constitutional Tribunal's jurisprudence in matters of hierarchical control of the constitutionality of laws concerning the EU. It distinguishes some principles, concepts and constitutional theories which, according to the Constitutional Tribunal, set the limits of European integration. The main thesis of the paper is that, in this context, the basic and decisive rule is the supremacy of the Constitution, which does not have exceptions or limitations. A hypothesis was also formulated that the Solange II maxim does not reflect the actual state of European constitutionalism, in which the level of protection of fundamental rights is significantly increased while possible collisions between the level of protection of fundamental rights in the EU and the Member States should be solved by means of the clauses provided in Articles 51–54 of the EU Charter of Fundamental Rights.

[1] This paper is a thoroughly modified, supplemented and updated version of the German article: A. Wróbel, *Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts*, 'ERA Forum' 2013, vol. 13, Issue 4, pp. 491–510.

## I. General notes

The objective of this paper is to briefly present the constitutional limits of European integration resulting from the provisions of the Constitution of the Republic of Poland and their interpretation by the Constitutional Tribunal. These limits are then conceptualized as an institution of constitutional law functionally equivalent to the institution of *controlimiti* developed in the case-law of the Italian Corte Costituzionale[2].

One common feature of these two institutions is to define the basic principles of the constitutional order, which defines the limits of transferring state sovereignty in the process of European integration. While in the case-law of the Corte Costituzionale these boundaries have been understood uniformly and consistently throughout the entire history of this doctrine as the basic, highest principles of the constitutional order and inviolable personal rights, the Polish Constitutional Tribunal sets these boundaries much more broadly (see below).

These differences are particularly justified by the fact that the Italian constitution does not include provisions which amount to integration standards or limitations, and therefore *controlimiti* is of an unwritten, strictly judicial nature, but is ultimately equipped with a constitutional rank resulting from active reinterpretation, especially of Article 11 of the Italian constitution[3]. Meanwhile, the Constitution of the Republic of Poland, which has no reference to the European Union or European Union law, contains provisions regarding international organization and international law, interpreted by the Constitutional Tribunal as referring directly to Poland's membership in the EU and to the relationship between EU law and Polish law, which obviously enriches the Polish doctrine of counter-limits with other, specific and defined constitutional principles and values (see below).

## II. The constitutional foundations of the counter-limits doctrine

At the outset, we should point out that unlike the majority of the constitutions of EU Member States, the Constitution of the Republic of Poland does not use the terms 'European Union', 'EU law' or 'European integration'. Constitutional issues related to Poland being a Member State of the European Union – such as

2 Cf. P. Faraguna, *Ai cofini della Costituzione. Principi supremi e identità costituzionale*, Milano 2015; *I controlimiti. Primato delle norme europee e difesa deli principi costituzionali,* ed. A. Bernardi, Napoli 2017.

3 A. Kustra, *Ewolucja wykładni art. 11 Konstytucji Włoch z 1947 r. w orzecznictwie Sądu Konstytucyjnego*, 'Europejski Przegląd Sądowy' 2008, No. 9, p. 58–62.

the procedure and scope of transfer of 'some' competences, the constitutional status of the European Union and EU law in the Polish legal and constitutional jurisprudence of Polish courts and the Constitutional Tribunal with respect to EU law – are settled and analyzed based on and in the context of the constitutional norms that refer to international organizations and international law. Such provisions include norms referred to in the doctrine as integration standards[4], namely Article 90 of the Constitution (defining the procedure for delegating the competences of an international organization) and Article 91 thereof (regulating the constitutional status of international law in the Polish juridical order, including the principle of this law's primacy over other laws and the principle of the direct application of international law in the Polish juridical order). Thus, there is no doubt that such standards also include Article 9 of the Constitution, which states the obligation of the Republic of Poland to comply with binding international treaties.

The Constitution lacks provisions which directly concern the European Union and EU law, but this does not mean that the issue of European integration is not a fundamental constitutional matter. Both the doctrine and judicial opinions recognize unanimously and unambiguously that said constitutional norms concern this issue because, firstly, the term 'international organization' used therein (Articles 90 and 91) also includes transnational organizations such as the European Union and, secondly, European Union treaty law falls within the scope of the term '(ratified, binding) international agreement' (Articles 9, 90 and 91) and EU derivation law qualifies as a 'law established by an international organization' (Article 91(3))[5] As a result, the aforementioned constitutional norms referring *expressis verbis* to international agreements and international organizations constitute a normative basis for the formation of two constitutional standards, namely the standard on traditional international treaties and international organizations – such as the UN – and the EU standard concerning transnational law and supranational organizations that exemplify EU law and the European Union. This does not mean, however, that classical rules for the interpretation and application of international law apply to the European Union and EU law since both the doctrine and judicial opinions recognize and acknowledge specific, constitutive features or properties of the EU juridical order, which differentiate them from international law, such as the effectiveness, direct effect or primacy of EU law.

4 A. Kustra, *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009.

5 Cf. the judgment of the Constitutional Tribunal in Case K 24/04: 'the constitutional status of law established by the European Union bodies is similar to the status of standards included in ratified international agreements, referred to in Article 91 of the Constitution'.

However, the above provisions are not applied and interpreted by the Constitutional Tribunal in isolation from other provisions of the Constitution, especially when it comes to settling conflicts between EU law and Polish law or between the competences of European tribunals and the competences of the Constitutional Tribunal. The provision of Article 8 stating the absolute superiority and primacy of the Constitution to legal provisions in force on the territory of the Republic of Poland is a prime example – one of many – whose significance may be greater or lesser, depending on the context, such as the principle of democracy and the principle of sovereignty (Article 5), the principle of democratic law (Article 2), the principle of the unitary character of the state (Article 3) and the competences of the Constitutional Tribunal (Articles 188–197). The application of these provisions by the Constitutional Tribunal is characterized by the fact that in the argumentative layer they are used mainly if not exclusively either to indicate the limits of European integration in an institutional sense or to define the limits of 'influence' of EU law on the Polish constitutional juridical order, especially regarding the supremacy of EU law over Polish law.

The counter-limits doctrine of the Constitutional Tribunal is therefore based on two groups of provisions of the Constitution of the Republic of Poland. The first group includes the provisions of the Constitution referring directly to international law and international organizations, reinterpreted by the Constitutional Tribunal as also regulating the character and place of EU law and the European Union in the Polish constitutional jurisdiction (integration standards), while the other group comprises those which are not strictly integrative/limitative but are used by the Constitutional Tribunal to set the boundaries of European integration, especially including the impact of EU law on the Polish constitutional juridical order (non-integrative norms).

## III. The limits of transferring competences of the Republic of Poland to the European Union

The issue of transferring the competences of the Republic of Poland to the EU as a special type of international organization of a supranational character is regulated by Article 90 of the Constitution. The procedure of transferring competences and their scope and boundaries poses significant constitutional problems. Article 90 provides that the transfer may take place in the following circumstances: 1) under international treaty, 2) the law approving the ratification of such an international agreement is adopted by a qualified majority in the parliament, 3) consent to the ratification of this agreement may be adopted by a nationwide referendum, 4) the Sejm [Polish lower house of Parliament] shall decide the choice of the mode of ratification or ratification referendum.

As the Constitutional Tribunal emphasized in Paragraph 3.2 of judgment K 18/04 of May 11, 2005, (judgment on the Treaty of Accession), 'Ratification of such an agreement is made in a manner with clearly stricter requirements than the ratification of other agreements, made with the prior consent of the Sejm and the Senate expressed in the law. Said stricture consists of raising the threshold of the necessary majority in the Sejm and the Senate from the standard (relative) majority to a majority of two-thirds of the votes in both the Sejm and the Senate, or alternatively, (by a relevant resolution in the Sejm adopted by an absolute majority), on authorization for ratification, granted in the form of a nationwide binding referendum'. In the opinion of the Constitutional Tribunal, 'the Polish constitutional legislative body, aware of the significance of agreements on delegating the exercise of the competences of public authority bodies in 'certain matters' to an international organization or international body … introduces important safeguards against a transfer of competences which is too easy or is insufficiently legitimized outside the system of state authorities of the Republic of Poland. Said safeguards apply to all transfers of competences to the bodies of the Communities and the European Union' (Paragraph 3.3 of judgment K 18/04)[6].

While procedural problems related to the transfer of competences of the European Union do not raise any special objections or disputes[7], the Constitution does not specify the scope of said transfer; it only provides that the Republic of Poland may delegate 'the powers of state authorities in certain matters', so the problem of a constitutionally acceptable scope of cases that may be transferred to the EU remains disputable. The jurisprudence of the Constitutional Tribunal shows that the spirit of the constitutional definition of 'competences of state authorities in certain cases' results in several limitations: firstly, the 'prohibition of transfer of all competences of a given authority, transfer of competences in all matters in a given area, as well as a prohibition of transferring competence regarding the substance of cases defining the authority of a given state authority' (K 18/04, Point 4.1); secondly, integration standards (Articles 90 and 91) 'cannot give rise to the transfer to an international organization (or its authority) authorization to legislate or make decisions that would be contrary to the Constitution of the Republic of Poland' and 'cannot be used to transfer

6 For a broader view on the constitutional forms and conditions for the ratification of an international agreement, see the Constitutional Tribunal judgment in Case 33/12; 2; J. Kranz, A. Wyrozumska, *Powierzenie Unii Europejskiej niektórych kompetencji a traktat fiskalny*, 'Państwo i Prawo' 2012, No. 7, pp. 20–36.

7 However, for the political dispute over the mode of ratification of the Treaty of Accession with Croatia or the procedure for ratifying the so-called fiscal pact, e.g., M. Dobrowolski, *W sprawie trybu ratyfikacji przez Rzeczpospolitą Polską traktatu fiskalnego*, 'Państwo i Prawo' 2013, No. 6, pp. 41–57.

competences to the extent that would cause the Republic of Poland to cease to function as a sovereign and democratic state' (K 18/04; Point 4.5); thirdly, 'the subject of the transfer retains the trait of staying 'compliant with the Constitution' [treated integrally, together with the Preamble] as the 'highest law of the Republic' and the possible change … of the subject of the transfer (transferred competences) requires compliance with the rigors of amending the Constitution specified in Article 235 of this law, i.e., respecting the norms of the Constitution as 'the supreme law of the Republic of Poland' (K 18/04, Point 84); fourthly, 'it is necessary … to define the areas as precisely as possible and to indicate the scope of competences covered by the transfer' (K 18/04, Point 4.1; K 32/09, Point 2.5; K 33/12 6.3.2); fifthly: 'in the sphere of competences transferred, states relinquished the authority to take autonomous legislative action in internal and international relations, which does not lead to a permanent limitation of the sovereign rights of these states, because the transfer of competences is not irreversible and the relations between exclusive and competitive competences are of a dynamic nature' (judgment of the Constitutional Tribunal of November 24, 2010, K 32/09); sixthly, the Constitutional Tribunal shares the view expressed in the doctrine that 'constitutional identity is a concept that defines the scope of 'exclusion from the power to transfer the matter being part of … the 'hard core'', which is essential for the foundations of the state system' (K 32/09, Point 2.1; K 33/12, Point 6.3.3); and seventhly, the Constitutional Tribunal is competent to assess the compliance of the scope and procedure of transferring competences with the Constitution, while 'the assessment of constitutionality may concern both the law itself (its contents) and the activities used to introduce this agreement into the Polish juridical order. The latter activities include various forms of consent to ratification' (K 18/04 Point 1.3).

The doctrine emphasizes that although the Constitution of the Republic of Poland does not contain inflexible provisions, such as Article 79 Paragraph 3 GG, the above-mentioned thesis of the Constitutional Tribunal's judgments clearly show that the transfer cannot lead to 'a loss of sovereignty, the establishment of a federal state in the EU, the disappearance of any of the constitutional state bodies or the deprivation of all constitutional powers guaranteed thereto'[8] nor to a loss of constitutional or national identity[9].

8 A. Kustra, *Przepisy i normy integracyjne…*, p. 75.

9 K. Wójtowicz, *Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE – uwagi na tle wyroku TK z 24.11.2010 r.*, 'Europejski Przegląd Sądowy' 2011, No. 11, pp. 4–11.

## IV. The Constitutional status of EU law in the juridical order of the Republic of Poland versus the principle of the supremacy of the Constitution (Article 8)

The problem of the place of EU law in the Polish legal system and mutual relations between EU law and Polish law were fully presented in the justification of the judgment of the Constitutional Tribunal regarding the Treaty of Accession. In this judgment, the Tribunal used three assumptions, namely the concept of the 'multicomponent legal system' applicable in the Republic of Poland, the principle of the autonomy of the 'components' of this system and the principle of the uniformity of the legal system. The special focus of the Constitutional Tribunal accepted that 'the legal consequence of Article 9 of the Constitution is the constitutional assumption that in the Republic of Poland, apart from the norms (regulations) established by the national legislator, regulations (provisions) are also in force which were created outside the system of national (Polish) legislative bodies. Consequently, the constitutional legislator consciously accepted that the legal system in force in the Republic of Poland would be that of a multicomponent nature. In addition to legal acts laid down by national (Polish) legislative bodies, acts of international law also apply and are applied in Poland' (K 18/04, Point 2.2). The Constitutional Tribunal further assumed that 'Community law is not a fully external right applicable to the Polish state. In the part constituting the treaty law, it arises through the acceptance of treaties concluded by all Member States (including the Republic of Poland). However, in the part constituting a Community constitution (derivative) law, it is created with the participation of representatives of the governments of the Member States (including Poland), in the Council of the European Union and representatives of European citizens (including Polish citizens) in the European Parliament'.

The Constitution, following the regulations in Article 9, Article 87, Paragraph 1 and in Articles 90–91, recognizes this multicomponent structure of regulations in force in the Republic of Poland and provides for a special mode of implementation for it. Finally, the Constitutional Tribunal declares an important and completely correct view that 'the constitutional Polish legislature stands on the uniformity of the legal system regardless of whether or not this system's laws are the result of the action of the national legislature or were established as international regulations (of a different scope and nature) covered by the constitutional catalog of sources of law'. To a certain extent, this fundamental thesis dissents with the view that 'the very concept and model of European law has created a new situation in which autonomous legal orders are applicable side by side. Their interaction cannot be fully described with the traditional concepts of monism and dualism in the system of internal–international law' (K 18/04, Point 6.3). As a result, the position of the Constitutional Tribunal

regarding the place of EU law in the Polish legal order is ambiguous and inconsistent because it oscillates between soft monism – personalized in the concept of a multicomponent, but uniform Polish juridical order – and a soft duality based on the specific autonomy of both juridical orders[10]. This ambiguous position of the Constitutional Tribunal regarding the place of EU law in the Polish constitutional order was accepted in later jurisprudence[11]. The Tribunal also accepted that 'in the Republic of Poland, apart from the norms (regulations) laid down by the national legislature, regulations (provisions) are in force outside the system of national (Polish) government bodies' (Point 2.1). In this judgment, the Constitutional Tribunal also stated – recalling the judgment on the Treaty of Accession – that 'subsystems of legal regulations originating from various legislative centers should coexist on the basis of a mutually friendly interpretation and cooperative co-application. Any contradictions should be eliminated by applying an interpretation that respects the relative autonomy of European law and national law. This interpretation should also be based on the assumption of mutual loyalty between the EU institutions and the Member States' (Point 2.6).

The Constitutional Tribunal points to the possibility of conflicts between these (autonomous) systems, especially 'if there were an irremovable contradiction between the norm of the Constitution and the norm of Community law, being a contradiction which cannot be eliminated by applying an interpretation that respects the relative autonomy of European law and national law' (K 18/04 Point 6.3). According to the Constitutional Tribunal, 'this contradiction cannot be solved in any way in the Polish legal system by the recognition of the supremacy of the Community norm over the constitutional norm. Nor could it lead to the loss of the binding force of a constitutional norm and replace it with a Community norm or to limit the scope of application of that norm to an area which was not covered by the regulation of Community law' (K 18/04 Point 6.4). This categorical statement leaves no doubt that the Constitutional Tribunal holds the

10 Cf. the monistic approach represented as part of Constitutional Tribunal judgment K 24/04, which states that 'European Union law becomes, together with the progressive integration process, an ever more significant – in terms of quantity and quality – segment of law applicable in each Member State. Cf. as well that even in the spheres regulated by European Union law, the Constitution still remains … 'the highest law of the Republic of Poland'. Cf. Judgments of April 27, 2015, File Ref. Nos. P 1/05, OTK ZU No. 4/A/2005, item 42; May 11, 2005, K 18/04, OTK ZU No. 5/A/2005, item 49; and November 29, 2010, File Ref. No. K 32/09, OTK ZU No. 9/A/2010, item 108.

11 Cf. especially the judgment on the Treaty of Lisbon and the judgment in Case SK 45/09, which summarized the current position of the Tribunal on the matter as follows: 'today, the juridical order in Europe is – for EU Member States – a multicomponent order that includes treaty norms and was established by the EU institutions and norms in the national order. It is also a dynamic system: the relationship between the EU and national orders is subject to evolution along with changes in EU law' (Point 2.1).

primacy of the Constitution over the primacy of Community law. The Tribunal justified this by stating that 'norms of the Constitution in the area of individual rights and freedoms set a minimum and impassable threshold, which cannot be reduced or challenged as a result of the introduction of Community regulations'. In this respect, from the point of view of protection of the rights and freedoms explicitly defined in it, the Constitution plays its role as a guarantor in relation to all active entities in the sphere of its application. The 'European-law-friendly' interpretation has its limits. Under no circumstances can it lead to results which contradict the clear wording of constitutional norms and impossible agreement for the minimum guarantees provided for by the Constitution. Thus, the Constitutional Tribunal does not recognize the possibility of challenging the binding force of a constitutional norm by the mere fact of introducing a contradictory Community regulation into the system of European law.

In judgment SK 18/04, the Constitutional Tribunal emphasized the primacy of the Constitution in relation to the primacy of Community law, stating that 'the principle of the primacy of Community law over national law is strongly exposed by the case-law of the Court of Justice of the European Communities'. This state of affairs is justified by the objectives of European integration and the need to create a common European legal space. This principle is undoubtedly an expression of striving to guarantee the uniform application and enforcement of European law. However, on an exclusive basis, it does not determine the final decisions taken by sovereign Member States in the conditions of a hypothetical clash between the Community juridical order and constitutional regulation. In the Polish legal system, decisions of this type should always be made taking into account the content of Article 8 Paragraph 1 of the Constitution, which states that the Constitution remains the highest law of the Republic (Point 7).

Summing up the significance of the Constitution of the Republic of Poland in the juridical order in force after accession, the Constitutional Tribunal stated, 'the supremacy of the Constitution over the entire juridical order in the matter of sovereignty of the Republic of Poland manifests itself in several areas. Firstly, the European integration process related to the transfer of competences in some cases to Community (EU) authorities is lodged in the Constitution of the Republic of Poland. The mechanism of Poland's accession to the European Union finds a clear legal basis in constitutional rules. The validity and effectiveness of this mechanism depends on the fulfillment of the constitutional elements of the integration procedure, including the procedure for delegating competences. Secondly, the supremacy of the Constitution is confirmed by the constitutionally determined mechanism of constitutional review of the Treaty of Accession and acts constituting its integral components. This mechanism was based on the same principles upon which the Constitutional Tribunal may adjudicate on the conformity of ratified international treaties to the Constitution. In

this situation, other acts of the primary Community and the European Union annexed to the Treaty of Accession are also subject to oversight, albeit indirectly. Thirdly, the provisions [norms] of the Constitution as an overriding act that expresses the sovereign will of the nation cannot lose their binding force or be changed by the very fact of an irremovable contradiction developing between certain provisions [Community acts and the Constitution]. In such a situation, the sovereign Polish constitutional legislature retains the right to decide independently how to resolve this contradiction, including the desirability of a possible amendment to the Constitution itself' (Point 7).

The position of the Constitutional Tribunal on the conflict between the exceptional and absolute EU principle of the primacy of EU law over national law – including the Constitution – resulting from Article 8 of the Constitution, which includes the principle of the Constitution's supremacy in Poland, is definitely monistic and corresponds to the principle of uniformity and multi-constitutionality of Polish law. The supremacy of the Constitution of the Republic of Poland over EU law (primary and secondary) is both absolute – in the sense that it does not suffer any restrictions – and unlimited, in the sense that it concerns both treaty law and secondary law. Although the Constitutional Tribunal refers to constitutional guarantees concerning civil rights and freedoms, it does not limit the impact of the principle of Constitutional supremacy on EU law to only these provisions of the Constitution, but it extends this principle to every case of explicit contradiction between EU law and other provisions of the Constitution. As a result, the EU principle of the primacy of EU law meets a strict boundary in the principle of the supremacy of the Constitution. Moreover, it does not seem that the interpretation of the Constitution (constitutional models) made by the Constitutional Tribunal in accordance with EU law fulfills the functions of the conflict of law rule, i.e., the directive which settles the contradictions between EU law and the Constitution, because this contradiction only reveals itself as a result of the interpretation process. From the jurisprudence of the Constitutional Tribunal, it seems that the only such rule without any exceptions or limitations is the constitutional principle of the supremacy of the Constitution (Article 8).

## V. Principles, institutions, concepts and constitutional theories as determinants of the borders of European integration

In its jurisprudence, the Constitutional Tribunal refers to several principles, legal institutions, constitutional concepts and theories, which in its opinion define the boundaries of European integration in the procedural and institutional sense

(transfer of competences to the EU) and in the substantive sense (maintaining the balance between the subjectivity of the EU and the subjectivity of EU Member States). Some of them are used as a constitutional argument for the maintenance of the Tribunal's competence in the oversight of the constitutionality of EU law. These especially include the principle of sovereignty, the principle of the protection of fundamental rights, the principle of the protection of constitutional/national identity and the principle of supremacy of the Constitution (see above, Point III).

## 1. Sovereignty

The basic argument of the Tribunal, often used to justify and define the constitutional limitations of European integration, is undoubtedly the argument of the sovereignty of the state[12]. The most developed concept of state sovereignty in terms of Poland's integration with the EU was presented by the Tribunal in the judgment of Case K 32/09 (ratification of the Treaty of Lisbon). The starting point is the conviction that the concept of sovereignty is subject to evolution as a result of both the processes of the democratization of modern states protecting human rights and international law, globalization and European integration. In the Court's opinion, 'Sovereignty is no longer perceived as an unlimited possibility of influence on other states or as an expression of power not subject to external influences; on the contrary, the freedom of state actions is subject to international legal restrictions. At the same time, however, from the point of view of the contemporary Polish doctrine of international law, sovereignty is an inherent feature of the state that allows us to distinguish it from other entities of international law. The attributes of sovereignty include: exclusive jurisdictional jurisdiction over a state's own territory and citizens, exercising foreign policy competences, deciding about war and peace, the freedom to recognize states and governments, establishing diplomatic relations, deciding on military alliances and membership in international organizations and conducting independent financial, budgetary and fiscal policies'. Referring these considerations to European integration, the Tribunal emphasized that 'in terms of competences transferred, states relinquished the powers to take autonomous legislative action in internal and international relations, but this does not lead to a permanent limitation of the sovereign rights of these states because the transfer of competences is not irreversible; relationships between exclusive and competitive competences are dynamic. Member States have only accepted the obligation to jointly perform state functions in the cooperation areas and as long as they maintain their full capacity to determine the forms of state functions, coexistent

12 *Sovereignty and trans-nationality vs. European integration*, ed. J. Kranz, Warsaw 2006.

with the competence to 'determine their own competences', they will remain sovereign entities in the view of international law. There are complicated processes of interdependencies between the Member States of the European Union connected with entrusting the Union with some of the competences of organs of state authority. However, these states remain subjects of the integration process; they retain the 'competence of competences' while the form of international organization remains the model of European integration'.

Moreover, according to the Constitutional Tribunal, 'incurring international obligations and exercising them does not lead to the loss or limitation of the state's sovereignty, but is a confirmation of it, and belonging to European structures is not in fact a limitation of state sovereignty, but an expression of it. In order to assess the state of Poland's sovereignty after joining the European Union, the resulting decisive importance is to create the basis for membership in the Constitution as an act of the sovereign power of the nation. The basis for membership in the European Union is, moreover, an international treaty ratified in accordance with constitutional rules with consent granted via a nationwide referendum. In Article 90, the Constitution allows the transfer of competences of state authorities only in certain cases, which in the light of Polish constitutional jurisprudence means a ban on the transfer of all competences of a given authority, the transfer of competences in all matters in a given area and the transfer of competence regarding the essence of matters determining the authority's authority; a possible change of the mode and subject of the transfer requires compliance with the rigors of changing the Constitution' (Point 2.1).

As a result, 'accession to the European Union is perceived as a kind of limitation of the sovereignty of the state, which, however, does not mean abolishing it and is related to the compensating effect manifested as the possibility of shaping decisions taken in the European Union. … Member States of the European Union retain sovereignty due to the fact that their constitutions, which are an expression of state sovereignty, retain their meaning'. Referring to the normative content of Article 4 of the Treaty on European Union (TEU), the Tribunal emphasized that 'the interpretation of treaty provisions aimed at the abolition of state sovereignty or the or threats against national identity or taking over sovereignty of non-transferred powers beyond its limits, would be contrary to the Treaty of Lisbon. The treaty clearly confirms the importance of the principle of preserving sovereignty in the process of European integration, which is fully aligned with the determinants of the European integration culture formulated in the Constitution' (Point 2.2).

## 2. Fundamental rights and civil liberties

The argument derived from the protection of fundamental rights is relatively rarely cited in the justifications of the judgments of the Constitutional Tribunal regarding European integration.

In the judgment on the Treaty of Accession (K 18/04), the Tribunal only emphasized that 'the Constitution of the Republic of Poland and Community law are based on the same set of common values that set the nature of a democratic state under the rule of law and the catalog and content of fundamental rights. … The consequence of the legal system axiology common to all countries is also the fact that the rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and those resulting from the constitutional traditions common to the Member States form – pursuant to Article 6 Paragraph 2 of the TEU – the general principles of Community law … . This circumstance significantly facilitates the use and mutually friendly interpretation of national and Community law' (Point 8.3).

However, the broader argument, based on the Solange II case-law reasoning, was presented by the Constitutional Tribunal in its judgment in Case SK 45/09. Right at the beginning, the Tribunal assessed the current legal status of the protection of fundamental rights in the EU, stressing the high priority of this protection both in EU law, confirmed by the Charter of Fundamental Rights, and in the constitutional order of the Member States. According to the Tribunal, the above 'determines the substantial axiological convergence of Polish and EU law'. However, this does not mean 'identical legal solutions in both juridical orders' (Point 2.10). Next, in order to determine the future method of overseeing the compliance of EU law (treaty and secondary law) with the Constitution, the Tribunal presented the essential elements of the FTK case-law in matters of Solange II and the ECtHR in the Bosphorus case-law, consequently assuming that 'there are premises for adopting a similar approach in overseeing the constitutionality of EU law in Poland' (Point 8.4). This approach, based in part on the presumption of the conformity of EU law to the Constitution, has – according to the Tribunal – important procedural consequences. 'In the event of lodging a constitutional complaint in which the conformity of a derivative act under the Constitution is challenged, the fulfillment of this obligation becomes eligible. The petitioner should then be required to indicate what constitutes a violation of his freedoms or rights, i.e., by presenting arguments for substantive non-compliance of the provisions forming the subject of the complaint with the provisions of the Constitution, while also duly substantiating that the contested act of derived EU law significantly reduces the level of protection of rights and freedoms compared to the one guaranteed by the Constitution. This credibility is

a necessary component of the requirement to accurately demonstrate the manner of violation of freedoms or rights' (Point 8.5).

## 3. Constitutional identity, national identity and the identity of the state

In the judgment on the Treaty of Lisbon, the Constitutional Tribunal referred to the category of constitutional identity or national identity as a normative concept which limits the scope of transfer of EU competences and as a constitutive element of the principle of state sovereignty. Moreover, the Constitutional Tribunal recognizes that the equivalent of the concept of constitutional identity in European primary law is the concept of national identity. In the first sentence of Article 4 (2) of the Treaty of Lisbon, the first sentence referring to the European Union states that 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional …'. Constitutional identity is closely related to the concept of national identity, which also includes tradition and culture' (Point 2.1). Referring to the views of the doctrine, the Constitutional Tribunal stated that competences covered by the prohibition of transfer constitute constitutional identity and thus reflect the values on which The Constitution is based. Constitutional identity is therefore a concept which defines the scope of 'exclusion from the power to transfer the matter belonging … to the «hard core», cardinal for the foundations of the system …, the transfer of which would not be possible under Article 90 of the Constitution'. However, the Tribunal did not specify the nature and significance of the relationship of the constitutional identity, national identity and state identity.

Meanwhile, the meaning of the term 'national identity' as construed in Article 4 Paragraph 2 is controversial[13] because it is unclear, firstly, whether national identity is a cultural phenomenon that needs to be defined by referring to a cultural, historical or linguistic context, or whether it is a legal concept that can be meaningfully defined in the context of the constitutional order of an EU Member State; and secondly, whether the term 'national identity' is a concept of EU law which requires an autonomous interpretation by the Court of Justice (CJ) or a 'common' concept of both juridical orders – the meaning of which must be jointly defined by the Constitutional Courts of the Member States – or

13 *National Constitutional Identity and European Integration*, eds. A.S. Arnaiz, C.A. Lliviña, Cambridge-Antwerp-Portland 2013; *Constitutional Identity in the Age of Global Migration*, eds. J. Bats, L. Orgad, 'German Law Journal' 2017, vol. 18, No. 7, pp. 1587–1822; M. Bainczyk, *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, M. Polzin, *Verfassungsidentität. Ein normatives Konzept des Grundgesetzes?*, Tübingen 2018.

whether it is a term that can only be interpreted by constitutional tribunals of the Member States.

According to Article 4 Paragraph 2 TEU, the national identity of the Member States is inextricably linked to their political and constitutional structures, which means, firstly, that national identity is defined in reference to the (basic) political and constitutional structures of the Member States – or, in other words, the content constituting the national identity is determined by referring to the national constitutional order[14], thus excluding the wider context of culture, heritage, tradition, ethnicity, language or history, unless the constitutional order is treated as a cultural category[15] – and secondly, that the term 'national identity' is not an EU law subject to the autonomous interpretation of the CJ, but is a common concept for the two legal systems, – the EU and the Member State – whose importance will be determined jointly by the CJ and Constitutional Tribunals of the Member States. Given that constitutional tribunals use the formula of national identity to determine the constitutional limitations on the transfer of competences to the EU and the scope of application of the primacy of EU law, including the justification of its jurisdiction to assess the constitutionality of EU derivative law, it is not difficult to see that this formula can generate conflicts over competences and jurisdiction, especially since the CJ seems to continue to adhere to the principle of the absolute primacy of EU law, while constitutional tribunals adhere to either an absolute principle of the supremacy of their Constitution – as with the Polish Constitutional Tribunal – or non-absolute, as with the Italian Corte Costituzionale.

It is clear from the case-law practice so far that both the Constitutional Tribunals of the Member States, albeit to a lesser extent and from a different perspective, point to these constitutional values, principles, laws, institutions and procedures that form the nucleus of national identity. The Constitutional Tribunals of the Member States seem to share a common understanding of national identity, which, in their opinion, requires the protection and respect of the 'statehood of the Member States as such, the protection of the form of government and fundamental principles of the state system (e.g., federalism, regional and municipal government), the protection of democracy, the state's rights and the essence of fundamental rights[16]'. According to the Constitutional Tribunal, 'irrespective of the difficulties associated with establishing a detailed catalog of non-transferable competences, it is necessary to include in the matter of a total prohibition of these competences provisions which define the principles

14 A. von Bogdandy, S. Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 'Common Market Law Review' 2011, vol. 48, Issue 5, p. 1429.

15 P. Häberle, *Europäische Verfassungslehre*, Baden-Baden 2011.

16 A. von Bogdandy, S. Schill, *Overcoming absolute primacy…*, p. 1439–1440.

of the Constitution and provisions regarding the rights of the individual that determine the identity of the state, including in particular the requirement of the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity, the requirement to ensure better implementation of constitutional values, the prohibition of transferring authority and the competence to create competences' (judgment on the Treaty of Lisbon). There is no doubt here that the wider the constitutionally defined scope of the concept of 'national/constitutional identity', the wider the range of possibilities to contest the absolute principle of the primacy of EU law, to justify the absolute supremacy of the constitution against EU law or to limit the scope of competences transferred to the Union 'in some cases' – all the more so when the catalog of the elements of this identity is broad and open, as in the aforementioned judgment of the Constitutional Tribunal regarding the Treaty of Lisbon.

The provision of Article 4 Paragraph 2 TEU requires the European Union to respect national identity. That provision cannot be used to formulate either the absolute primacy of the constitutional values and principles that comprise the national identities of the Member States or the recognition by the Member States of the a+bsolute primacy of EU law. This provision is intended to prevent disproportionate intrusion of EU law into domains covered by national identity[17]. As a result, the EU, as part of the obligation to respect the national identities of the Member States, should first of all identify and define those components of national identity that may be relevant to specific EU activities in the implementation of Treaty tasks; secondly, should consider these components when determining the structure and objectives of these measures; and thirdly, out of the effective means of implementing these tasks apply those that least restrict the national identity of the Member States.

## 4. Democracy and a democratic state of law

The Tribunal refers to the concept of a democratic state, the principle of democracy or a democratic state of law primarily as a limit on the transfer of competences for the benefit of the Union. For example, in a judgment on the Treaty of Accession, the CT stated that 'neither Article 90 Paragraph 1, nor Article 91 Paragraph 3 may constitute the basis for the transfer to an international organization (or its authority) of the authorization to legislate or to make decisions that would be contrary to the Constitution of the Republic of Poland. In particular, the normalization indicated herein cannot be used to transfer any competences that would result in the Republic of Poland ceasing to function as a sovereign

17 Ibid., p. 1440.

and democratic state'. Furthermore, according to the Tribunal, the principle of democracy is one of the basic common values which constitute the basis for the Constitution and EU law (ruling on the Treaty of Accession), while acknowledging that 'the principle of a democratic rule of law remains, as its very name suggests, a rule referring to the functioning of states, while not necessarily to international organizations' (Treaty of Accession). In the opinion of the Tribunal, democracy is 'an expression of the principle of sovereignty' (Treaty of Lisbon) and one of the fundamental elements of state/constitutional/national identity, and is therefore a component of the hard core of matters which cannot be transferred to the Union (Treaty of Lisbon). As assessed by the CT, the process of European integration 'essentially' corresponds to 'both the standards of constitutionality and the requirements related to the democratic legitimacy of such activities' (Treaty of Lisbon). 'The boundary of competence transfer is also axiologically determined in the sense that the Republic and the 'organization' or 'organ' to which the competences have been transferred must combine 'a common system of universal values, such as a democratic system and respect for human rights' (Treaty of Lisbon). The Constitutional Tribunal also sees restrictions on the democratic legitimacy of the European Union, stating that 'the Treaty of Lisbon contains provisions to strengthen the position of national parliaments as the basis for strengthening the democratic legitimacy of the Union'. This aspiration was expressed in Article 12 of the Treaty on European Union, according to which national parliaments 'actively contribute to the proper functioning of the Union' by a) receiving from the Union institutional information and drafts of EU legislative acts, (b) upholding respect for the principle of subsidiarity, (c) taking part in the mechanisms for assessing the implementation of Union policies within the areas of freedom, security and justice, and by engaging in the political control of Europol and assessing the activities of Eurojust, d) participating in the procedures for amending the Treaties, (e) receiving information on applications to join the Union, and f) participating in parliamentary cooperation between national parliaments and the European Parliament'. Recognizing this emancipation of national parliaments, the Tribunal notes that 'it is up to the Polish Parliament to decide on the extent and implementation of European policy and on the intensity and consequences created by the Treaty of Lisbon, which it will pursue'.

## VI. Competences of the Constitutional Tribunal within the scope of the constitutionality of EU law

The views of the Constitutional Tribunal on their own competence to assess and rule on the compliance of EU law with the Constitution have evolved significantly. Whereas in its previous judgments the Constitutional Tribunal considered

it inappropriate to decide on the constitutionality of primary EU law, with the exception of the accession treaty and secondary law, in newer judgments it has assumed that it is competent to assess the conformity of EU law to the Constitution and to adjudicate thereon. The Constitutional Tribunal expressed its restraint regarding the admissibility of adjudicating on the constitutionality of primary EU law in its judgment in Case K 18/04 (Treaty of Accession) stating that 'the Constitutional Tribunal is not authorized to carry out an independent assessment of the constitutionality of primary European Union law'. On the other hand, such competence serves the Tribunal [as a tool] against the Accession Treaty as a ratified international treaty (Article 188 Point 1 of the Constitution)[18]. This position changed radically in the judgment in Case K 32/09 (Treaty of Lisbon), in which the Tribunal explicitly considered itself competent to assess the constitutionality of the Treaty of Lisbon, affirming the constitutionality of some provisions of the Treaty. The justification for its own cognition was justified by the Tribunal due to procedural considerations, namely that 'the jurisdiction granted to the Constitutional Tribunal in Article 188 Point 1 of the Constitution to adjudicate in matters of «compliance of laws and international treaties with the Constitution» does not differentiate between said powers of the Tribunal depending on the mode of expressing consent for ratification. Therefore, the Constitutional Tribunal is competent to examine the constitutionality of international treaties ratified under prior consent expressed in the law'.

Similarly, the Constitutional Tribunal initially considered itself unfit to oversee the constitutionality of EU secondary law. In the decision of December 17, 2009 in Case U 6/08, the Tribunal stated that 'pursuant to Article 188 Points 1–3 of the Constitution … the Tribunal's audit covers laws, international treaties and legal regulations issued by central state authorities. This framework for the Tribunal's jurisdiction leaves certain issues outside the scope of its oversight, such as a law established by an international organization, referred to in Article 91 Paragraph 3 of the Constitution – i.e., secondary EU law. The lack of indication in the enumerative catalog provided in Article 188 Points 1–3 of the Constitution of the secondary EU law as an object of constitutional review prevents the Tribunal from ruling on its compliance with the Constitution'.

18 The final Judgment of the Constitutional Tribunal in Case 33/12, in which the Constitutional Tribunal stated that 'by means of oversight of a law expressing consent for ratification, oversight of the international treaties is executed indirectly, under the assumption that if the agreement contains provisions contravening the Constitution, the law approving the ratification of such an agreement is also contrary to the Constitution (…). Obviously, it is not oversight of the constitutionality of an international treaty as construed in Article 188 Point 1 of the Constitution, but an analysis of its wording, as a condition necessary for the adoption of a law expressing consent to ratification, consistent with the Constitution'.

On the other hand, in the judgment in Case SK 45/09, the Tribunal took a different position, considering its competence for overseeing the EU regulation's compliance with the Constitution. Justifying this view, the Constitutional Tribunal noted that 'the situation in the present case is different than in Case U. 6/08, ended with the decision of December 17, 2009 (OTK No. 11/A/2009, Item 178). In the justification of that decision, the Tribunal expressed the *obiter dicta* opinion of the inadmissibility of a constitutional review of the standards of EU secondary law. However, the cited case was initiated at the request of a group of deputies and concerned the abstract oversight of norms. In such proceedings, the scope of the Court's cognition is comprehensively specified in Article 188 Points 1–3 of the Constitution.' Meanwhile, in the proceedings initiated by a constitutional complaint, 'a normative act, as construed by Article 79 Paragraph 1 of the Constitution, may be not only a normative act issued by one of the Polish authorities, but also, after fulfilling further conditions, an act issued by an international organization body of which the Republic of Poland is a member. This applies primarily to acts in the scope of European Union law, set up by the institutions of this organization. Such acts are part of the juridical order in force in Poland and they determine the legal boundaries of an individual.' In the Tribunal's view, 'an EU regulation demonstrates the features of a normative act as construed in Article 79 Paragraph 1 of the Constitution'. Thus, the Constitutional Tribunal concluded that 'EU regulations, as normative acts, can be subject to an audit of their compliance with the Constitution in proceedings initiated by a constitutional complaint. The fact that these are acts of EU law, although also constituting part of the Polish juridical order, affects the specificity of this oversight exercised by the Constitutional Tribunal'.

The Constitutional Tribunal also determined the potential effects of a possible declaration of unconstitutionality of the EU regulation. It assumed that 'in the scope of acts of Polish law, a consequence is the loss of the binding force of norms inconsistent with the Constitution (Article 190 Paragraphs 1 and 3 of the Constitution). With regard to EU secondary legislation, this kind of effect would not be possible because the Polish authorities do not decide on the binding force of such acts. The consequence of the ruling of the Constitutional Tribunal would only be to deprive EU secondary laws of the possibility of being applied by the Polish authorities and exerting legal effects in Poland. The consequence of the Constitutional Tribunal's judgment would therefore be to suspend the application of EU law norms that are inconsistent with the Constitution', which in turn could be a reason for the European Commission to initiate proceedings against Poland related to a violation of obligations under the treaties (Articles 258–260 Treaty on the Functioning of the European Union [TFEU]). According to the Tribunal, the ruling on the incompatibility of EU law with the Constitution should therefore be of an '*ultima ratio* nature and occur only

when all other methods of settling the conflict with the norms of the EU juridical order would fail', namely, 'a) introducing amendments to the Constitution, b) taking actions aimed at introducing changes in EU regulations or c) making a decision on withdrawing from the European Union. Such a decision should be taken by the sovereign, which is the Polish People, or a state authority that can represent the People in accordance with the Constitution'. The Tribunal stated that 'ignoring this last solution, which should be reserved for exceptional cases of the most serious and irremovable conflict between the foundations of the constitutional order of the Republic of Poland and EU law, it should be assumed that after the ruling of the Constitutional Tribunal on the incompatibility of specific norms of EU secondary law with the Constitution, it would be necessary to take immediate action to remove this condition.

The constitutional principle of Poland's favorable view of European integration and the Treaty principle of loyalty of the Member States to the Union require that the effects of the Tribunal's decision be postponed pursuant to Article 190 Paragraph 3 of the Constitution'. In this context, it is necessary to point to the general position of the Constitutional Tribunal expressed in the justification of the judgment of June 26, 2013 in Case K 33/12, which states that 'the Constitutional Tribunal is not competent to adjudicate on the validity of European Union acts'.

## VII. Pro-Union interpretation ('favorably disposed' towards EU laws) of the Constitution/patterns of oversight of the constitutionality of law

In matters of 'integration', the Constitutional Tribunal referred to the problem of interpretation in the reconstruction of the constitutionality of law, defining one type of interpretation as 'an EU-friendly interpretation/understanding of its law.' This interpretation is updated in cases where there are many interpretative options and the interpreted provision needs to be given the meaning of 'the closest solutions adopted in the European Union' (K 12/00). In its judgment in Case K 33/03, the Tribunal stated that in the construction of the constitutionality pattern, an EU-friendly interpretation (construction) requires the following two indications: 'firstly, this interpretation can be made to be conditional on (and only on) Polish law lacking a clear indication of a different approach to the problem [strategy for solving it] …, and secondly, if there are several possibilities of interpretation, the one closest to the Community achievement (*Acquis Communautaire*) should be chosen'. In the Tribunal's opinion, 'this obligation is aimed at ensuring compatibility of internal law and European law' (K 34/03), while 'the interpretation of applicable legislation should take into account the

constitutional principle of favoring the process of European integration and cooperation between countries' (K 11/03). An interpretation which is 'friendly to European law' has its limits. Under no circumstances can it lead to results which are contrary to the clear wording of constitutional norms or which do not agree with the minimum guarantees provided by the Constitution. Thus, the Constitutional Tribunal does not recognize the possibility of challenging the binding force of a constitutional norm by the mere fact of introducing a contradictory Community regulation into European legal system (K 18/04). On the other hand, in the judgment on the Treaty of Lisbon, the Tribunal stated that there is no 'possibility to amend the Constitution by way of an interpretation of friendly European integration'.

Apart from doubts about the unclear structure and content of the duty of a 'friendly' interpretation and groundlessly giving it a moral–ethical[19] rather than a normative character, it seems that this is a classic case of consistent interpretation as a kind of systemic interpretation, that is, the obligation to interpret constitutional patterns in accordance with EU law. The CT jurisprudence shows that the interpretation which is 'friendly' to European law has its limits determined by the principle of the supremacy of the Constitution, and consequently, cannot lead to the implementation of the principle of supremacy of EU law versus the norms of the Constitution[20].

## VIII. Judicial dialogue

Judicial dialogue, understood both formally – as institutionalized forms and methods of cooperation between courts and judges as parts of formally separate legal systems – and colloquially – as non-institutional methods of cooperation – can be viewed as one of the constitutional methods for resolving conflicts or disputes between the law of a Member State and European Union law, and – albeit arguably – between the jurisdiction of EU courts and the jurisdiction of constitutional tribunals of the Member States. The above systemic and jurisdictional conflicts exemplify the tension between the principle of the primacy of EU law and the principle of the supremacy of the Constitution (see Point III above) and a clear jurisdictional conflict between the jurisdiction of the CJ to examine and rule on the compliance of EU secondary law with the Treaties and the competence of the Constitutional Tribunal to examine the compliance of EU secondary law with the Constitution, and to adjudicate on the unconstitutionality of this law.

19 According to this criterion, the judgment of the Constitutional Tribunal in Case SK 45/09 should be considered 'unfriendly' or hostile to European law.

20 A. Sołtys, *Obowiązek wykładni prawa krajowego,* Warszawa 2015, p. 691.

The position of the Constitutional Tribunal on the division of functions regarding the oversight of EU legal acts between the CJ and the CT is based on the assumption that 'the Court of Justice safeguards EU law. On the other hand, the Constitutional Tribunal is to safeguard the Constitution', which in the Tribunal's opinion may lead to a conflict between the rulings of the Constitutional Tribunal and the Court of Justice. Next, the Constitutional Tribunal, citing the principle of the supremacy of the Constitution, stated that 'it is obliged to construe its position in such a manner that in matters of the principle of the Constitutional dimension, it will preserve the position of the 'last word judgment' in relation to the Polish Constitution.' Furthermore, it recognized that 'the Court of Justice and the Constitutional Tribunal cannot be set against each other as competing courts. It is not only a matter of eliminating the phenomenon of duplication of two tribunals or a two-track approach to adjudicating on the same legal problems, but also dysfunctionality in the relations between the EU and the Polish juridical order.' According to the Tribunal, 'it is important recognize the indicated differences in the roles of both Tribunals and to assign the CJ competence in matters of the final interpretation of EU law and to ensure uniformity of its application in all Member States, as well as the sole discretion on the compatibility of secondary legislation with treaties and general principles of EU law.

Thus, the subsidiary character of the Constitutional Tribunal's competence to examine the compliance of EU law with the Constitution should be considered in this context. Before deciding on the incompatibility of a secondary law with the Constitution, one should be sure as to the content of the EU secondary law norms which are the subject of oversight. To this end, a request for a preliminary ruling may be submitted to the Court of Justice under Article 267 TFEU with regard to the interpretation or validity of provisions that raise doubts'. Clearly, therefore, the Constitutional Tribunal admits that it is competent to pose a legal question to the CJ pursuant to Article 267 TFEU, which functionally serves as an effective tool to resolve potential competence and system conflicts. There is also no doubt that there exists a broad, though not always justified, form of horizontal dialogue, using in the argumentative sphere the jurisprudence of other constitutional courts regarding the constitutional boundaries of European integration, in particular the German Federal Constitutional Court. The judgment in Case SK 45/09 in essence was based on an analogy from the case-law of Solange II, which may raise doubts; however, due to the different constitutional regulations in both countries and the insufficient consideration of the consequences of adopting the Charter of Fundamental Rights – whose provisions may prove sufficient for the construction of conflict rules for resolving systemic and jurisdictional conflicts – and the consequences of the principle of national/constitutional identity as limiting the principle of the primacy of EU law and strengthening the principle of the supremacy of the Constitution, as

well as a high degree of convergence of constitutional rights and freedoms with EU fundamental rights and freedoms guaranteed by the European Union Convention on the protection of human rights and fundamental freedoms. It should also be noted that inasmuch as the Solange case-law may apply, if it is proven that the level of protection under EU law, including the CJ jurisprudence, has been so low since the Solange II ruling was issued that it does not conform to the necessary standard of protection according to the Basic Law, the Constitutional Tribunal assigns a much wider scope to Solange case-law when it states that it is only necessary to 'substantiate' that a 'contested act of secondary EU law' – and therefore not 'the level of protection under EU law', as in the Solange case-law – 'significantly reduces the level of protection of rights and freedoms compared to the ones guaranteed by the Constitution'.

The constitutional and legal circumstances which confronted the Constitutional Tribunal in Case SK 45/09 are a classic situation of competition between legal systems and jurisdictional systems[21], which – due to the lack of clear and transparent conflict-of-law rules or their mutual exclusion, as found in the case with respect to the primacy principle of EU law and the principle of the supremacy of the Constitution – leads to both systemic (in terms of substantive law) and jurisdictional (in institutional and legal terms) conflicts that cannot be reasonably solved without violating the autonomy of one of the subsystems of the 'multi-component law system applicable in the Republic of Poland', especially when we assume that according to what many theories and pluralistic ideas postulate, that the relations between EU law and the law of the Member States are not hierarchical and that EU law does not rest at the top of this system. When it comes to institutional conflict, the situation is obvious because the EU regulation, according to the law and jurisprudence of the CJ, cannot be the subject of decisions of national courts – including constitutional courts – and the determination of non-compliance with EU law is the exclusive competence of the CJ.

Meanwhile, in the judgment in Case SK 45/09, the Constitutional Tribunal recognized that an EU regulation can be investigated in terms of compliance with the Constitution and that it is the CT who is competent in this matter. The rationale of the jurisdiction of both Tribunals regarding the assessment of the correctness of the EU regulation and a resolution on this subject – apart from the relevant Treaty and constitutional provisions – designate to the competences of the CJ and the CT, respectively, two basic structural principles, namely, the principle of the primacy of EU law and the principle of the supremacy of the Constitution, sometimes considered as the basic collision rules. The problem lies in the fact that in this particular case, these conflict rules are mutually exclusive

21 A. Kustra, *Kolizje norm konstytucyjnych i wspólnotowych w ujęciu teoretycznoprawnym*, 'Europejski Przegląd Sądowy' 2007, No. 5, pp. 23–31.

because they justify the jurisdiction of both Courts to the same extent; they differ 'only' in the criterion of oversight (compliance with the Treaties and compliance with the Constitution) and in the consequences of finding non-compliance with the Treaties and non-compliance with the Constitution (invalidity or 'suspension of use').

## IX. Recapitulation

The Constitutional Tribunal, like the vast majority of constitutional courts and tribunals, first and foremost classifies the principle of state sovereignty, the principle of protection of fundamental rights, the principle of constitutional identity, the principle of a democratic state of law, the principle of supremacy of the Constitution and the principle of the exclusive competence of the Constiutional Tribunal in the scope of deciding on constitutional compliance of the law in force in the Republic of Poland, including EU law. These constitutional principles, constituting the basic constitutional principles of the Republic of Poland, are related to other constitutional principles, such as the principle of an interpretation of the Constitution which is favorable to EU law, the principle of openness of the national legal order to international law (Article 9 of the Constitution) or the principle of a multi-component legal system in the Republic of Poland in relation to the principle of the uniformity of the legal system of the Republic of Poland and the principle of the autonomy of EU law and Polish law. The above principles determine the boundaries of integration with the European Union in the constitutional procedure of transferring competences to the European Union and they prevent the phenomenon of creeping EU competences, subjecting these processes to the oversight of the Constitutional Tribunal, which not only evaluates accession procedures and instruments of ratification, but also other acts of EU law in terms of their compliance with the Constitution, including the aforementioned principles.

The ontological status of the principles that set the constitutional boundaries of European integration is diverse. Among these principles/boundaries, there are rules qualified as the basic/supreme/highest constitutional principles of the state, such as the principle of the supremacy of the Constitution, the principle of sovereignty, the principle of democracy, the principle of the protection of fundamental rights or the rule of law, having a clear mandate in the provisions of the Constitution, and rules of constitutional principle, which are the result of an active interpretation by the Constitutional Tribunal of a complex of numerous constitutional provisions, such as the principle of respecting constitutional/national/constitutional identity. The relationship between these constitutional principles is, of course, extremely complex. It suffices, however, to

point out that both the principle of the supremacy of the Constitution and the principle of respecting the constitutional identity are potentially the most limiting for the process of European integration, especially as regards setting the absolute limits of this integration and the primacy of EU law. This stems from their nature and the functions they perform in the process of reconstructing the constitutional pattern in matters pertaining to EU law. Both of these principles have in substance the widest scope and, in essence, absorb other principles. The principle of the supremacy of the Constitution encompasses all provisions of the Constitution of the Republic of Poland, which means that any contradiction between EU law and any provision of the Constitution will always be resolved by the Constitutional Tribunal in accordance with the Constitution. The principle of respecting constitutional identity has a somewhat narrower scope, while still being broad and open. As a result, the equally complex problem of mutual relations between constitutional principles determining the boundaries of European integration – both in the institutional (transfer of competences) and in the normative sense (the impact of the EU primacy on the constitutional order) – is revealed.

The principles of European integration are confronted with the constitutional principle favoring international law (Article 9), reinterpreted by the Constitutional Tribunal as a principle favoring European integration. In its judgment SK 45/09, the Tribunal – pointing to various ways of avoiding the state of incompatibility between EU law and the Constitution – unequivocally stated that 'the Constitution has been unequivocally guaranteed the status of the highest law of the Republic of Poland. At the same time, this regulation also carries an obligation to respect and favor the rules of international law if properly formulated and binding in the Republic of Poland (Article 9 of the Constitution). '… Any contradictions should be eliminated by applying an interpretation that respects the relative autonomy of European law and national law'. This interpretation should also be based on the assumption of mutual loyalty between the EU institutions and the Member States. This assumption generates – on the part of the Court of Justice – a duty to favor domestic legal systems, and on the part of the Member States the duty of the highest standard to respect EU standards'.

On the other hand, in the judgment No. K 33/12, the Constitutional Tribunal stated that 'the Constitution specifies the relations between international and national law primarily in accordance with the principles of the common good, sovereignty, democracy, the rule of law and a favorable attitude towards international law. Based on these principles, we can deduce that Poland is opening up to the international order. The effect of transferring competences is usually a complex system of dependencies between the state, its authorities and the supranational organization. Therefore, the transfer of competences should always be assessed from the point of view of the principles shaping 'the

constitutional identity'. Thus, the Tribunal seems to reduce the meaning of the provision of Article 9 of the Constitution in the context of the relationship between EU law and the Constitution of the Republic of Poland to the issue of interpretation as an instrument to ensure compliance of EU law with the Constitution, while omitting other, more important functions of Article 9, such as strengthening the position of international law, meaning that the EU, in the national order has an obligation to respect and enforce judgments of international courts – meaning the European courts, including the CJEU. Ultimately, therefore, the principle of favoring EU law has its limits in the supremacy of the Constitution over EU law.

This limit is confirmed by the statement of the CT of June 2, 2015 P 72/15, that an interpretation favorable to European law can in no case lead to results contrary to the clear wording of constitutional norms and unconformable minimum guarantees guaranteed by the Constitution.

The Polish doctrine of constitutional and European law is dominated by the position which approves CT jurisprudence regarding the constitutional boundaries of European integration[22]. On the other hand, the position of the Constitutional Tribunal is criticized in terms of the doctrine regarding the absolute supremacy of the Constitution over EU law, and in particular the admissibility of the Constitutional Tribunal reviewing compliance of EU law with the Constitution – especially the secondary law – as evidently contrary to the position of the Tribunal in the Foto-Frost case-law; this criticism intensified after the judgment was issued by the Constitutional Tribunal in Case SK 45/09 (EU regulation)[23].

In conclusion, it should be emphasized that the formula – or rather the Solange II maxim – on which the Constitutional Tribunal based its arguments in judgment SK 45/09 exhausted its persuasive capability, especially in view of the significant progress in the protection of fundamental rights at the level of the EU and the Council of Europe and the new possibilities offered by the Treaty of Lisbon (respecting the national identities of the Member States), as well as the horizontal provisions of the EU Charter of Fundamental Rights regarding the relations between EU law and the constitutions of the Member States.

22 Cf. K. Wójtowicz, *Sądy konstytucyjne wobec prawa Unii Europejskiej*, Warszawa 2012, passim.

23 T. Jaroszyński, *Glosa do wyroku TK z dnia 16 listopada 2011 r. SK 45/09*, 'Państwo i Prawo' 2012, No. 9, p. 130–135; P. Bogdanowicz, P. Marcisz, *Glosa do wyroku TK z dnia 16 listopada 2011 r., SK 45/09*; 'Europejski Przegląd Sądowy' 2012, No. 9, p. 47–52. Cf. E. Etynkowska, *Glosa aprobująca do wyroku Trybunału Konstytucyjnego z dnia 16 listopada 2011 roku, sygn. akt SK 45/09*, 'Przegląd Prawa i Administracji' 2012, vol. XC, p. 122 and following.

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## SUMMARY

This study describes the constitutional foundations of the counter-levels doctrine developed by the Constitutional Tribunal referring to the relations between the Constitution of the Republic of Poland and European Union law and political relations between the Republic of Poland and the European Union as a supranational organization. In the study I identify constitutional principles, theories and concepts that serve the Constitutional Tribunal to define the limits and conditions for Poland's membership in the European Union and to determine the relationship between Polish constituional law and European law. These principles, theories and concepts include the principle of supremacy of the constitution, the principle of Poland s oppening to international law, the principle of sovereignty, the principle of civil rights and freedoms, the principle of constitutional identity, the principle of democracy and the rule of law law and the principle of the (consistent) interpretation of Polish law in accordance with EU law. The study also considers the competences of the Constitutional Tribunal in relation to European Union law.



**Keywords**

consistent interpretation, supranational organisation, European Union, Constitutional Tribunal, counter-limits doctrine, constitutional identity, supremacy of the constitution, supremacy of the EU-law, secondary legislation, Solange-Case law

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# Freedom of Contract against the Constitutional Non-discrimination Principle

**Abstract**
The purpose of the theoretical considerations contained in this article is to attempt to define the ways to eliminate conflicts between the constitutional non-discrimination principle, as a reflection of the equal treatment principle, and the freedom of contract principle, as a reflection of the constitutionally protected party autonomy principle, which is a foundation of private law.

On the background of the horizontal effect (radiation) of constitutional fundamental rights on individual rights, a question arises about which criteria shall decide in practice about the resolution of conflicts between the aforementioned principles within diversified trading, including mass consumer trading. In particular, a very important issue in the context of European standards, including European model law, is the question about the legal remedies (of a property [pecuniary] and non-property [nominal] nature) which may serve to eliminate the consequences of infringement of non-discrimination rights in the process of contracting. There is also the question of how far in scope the traditional civil law remedies serving the protection of personal rights – apart from instruments established by non-discrimination regulations – may find application in this field if vivid manifestations of non-discrimination violate human dignity, which is the foundation of the protection of personal rights.

# 1. Jurisprudence against the horizontal effect of non-discrimination

## 1.1. Indirect or direct binding force of constitutional fundamental rights in contractual relations between private parties

In these times of profound societal changes, particularly the increased international and national protection of universal human rights and the axiological convergence of legal systems on a global and European scale, one can observe a long-lasting, intensifying process of the publicisation of private law as a traditional branch of the national legal system, aiming at the protection of private rights. The saturation of private law, being since Roman times 'under the care' of public law, with imperative norms (*ius cogens*), results in narrowing of private autonomy (*ius dispositivi* norms) in the name of an obligatory alignment of the 'bargaining power' private autonomy) of potentially weaker parties in legal trading. Some traditional sections of this law, serving to protect the interests of the potentially weaker party to the contract, such as labour law or consumer law, are gaining the features of public law, not to mention the process of publicisation of competition protection law or the area of public – private partnership[1].

Within the contemporary legal system, one of the essential sources of publicisation is 'the constitutionalisation of private law', named the horizontal effect (radiation) in the doctrine, or the horizontal binding force (in the direct or indirect form) of constitutional fundamental rights (*Drittwirkung*), which are objective principles of the whole legal system, and, at the same time, individual rights of a person, serving to protect the endangered sphere of human freedom. It is widely accepted that an individual (a person) as the subject of a set of personal rights (public or private) may demand from the state the protection of those rights and may decide independently whether to take advantage of these rights[2].

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1 J. Habermas, *Faktyczność i obowiązywanie*, Warszawa 2005, p. 420; B. Skwara, *Publicyzacja prawa prywatnego na tle niemieckiego orzecznictwa konstytucyjnego poświęconego mocy obowiązującej praw człowieka* [in:] *Ewolucja demokracji przedstawicielskiej w krajach Europy Środkowej i Wschodniej*, eds. M. Paździor, B. Szmulik, Lublin 2013, p. 340; A. Sobczyk, *Wolność pracy i władza*, Warszawa 2015, p. 20; A. Żurawik, *Problem publicyzacji prawa prywatnego w kontekście ustrojowym*, 'Państwo i Prawo' 2010, No. 5.

2 Cf. among others: M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych*, Kraków 2014, p. 52; A. Bator, A. Kozak, *Wykładnia prawa w zgodzie z Konstytucją* [in:] *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska-Jaśkiewicz, Kraków 2005, p. 43; B. Skwara, *Drittwirkung jako przejaw publicyzacji prawa prywatnego* [in:] *Państwo i prawo wobec współczesnych wyzwań. Księga jubileuszowa Profesora Jerzego Jaskierni*, ed. R.M. Czarny, K. Spryszak, Toruń 2012, p. 230; K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 50.

In these days of universal protection of human rights, constitutional axiology – including constitutional norms guaranteeing fundamental rights – is not limited to typically vertical relationships (individual – state), but it also determines the nature of relations between equivalent private individuals, influencing both legislation of private law and its application (judicial decisions).

In the doctrine, there is actually no consensus on the manner and extent of the horizontal impact (binding force) of constitutional rights and freedoms, but it seems to be accepted that the stronger the impact, the stronger the connection of a particular kind of legal relationship (section of private law) with the public sphere (the state) can be observed[3]. Generally, in national jurisprudence – as with the jurisprudence of many other countries, both of the Anglo-Saxon tradition[4] and the continental one[5], this belief is becoming more popular, not so much in terms of the direct binding force of constitutional fundamental rights, but of the indirect impact, which can be defined as the transference of constitutional fundamental rights onto horizontal relationships (between private individuals), bearing in mind the application of mechanisms of private law, in particular the general clauses connected with fairness (justice).

The view on the indirect horizontal binding force of individual rights (radiation) is getting strengthened in national doctrine, the judicature of the Constitutional Tribunal (TK), and in courts of general jurisdiction. At the base of the view on the Constitution's impact of the entirety of social – economic life, including the relationships of a private nature (horizontal relationships), was there foremost the idea of withdrawal from the concept of the Constitution as a political declaration in favour of the position of the normative nature, influencing the judicial practice[6].

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3 J. Limbach, *Promieniowanie Konstytucji na prawo prywatne*, 'Kwartalnik Prawa Prywatnego' 1999, No. 3, p. 406; E. Łętowska, *Promieniowanie orzecznictwa Trybunału Konstytucyjnego na poszczególne gałęzie prawa* [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik, Warszawa 2006, p. 535; J. Podkowik, *Problem horyzontalnego działania praw jednostki w orzecznictwie sądów w sprawach cywilnych* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015, p. 91; B. Skwara, *Horyzontalny skutek praw i wolności jednostki w systemie Konstytucji RP* [in:] *Dylematy praw człowieka*, eds. T. Gardocka, J. Sobczak, Toruń 2008, p. 350; P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003.

4 For more about the doctrine of 'state action' and its critical evaluation, compare: J. Wróblewska, *Rozwój doktryny* state action *w orzecznictwie sądowym USA* [in:] *Sądy i trybunały wobec problemu …*, pp. 43–59.

5 Cf. B. Banaszak, *Koncepcje horyzontalnego działania (obowiązywania) podstawowych praw jednostki w orzecznictwie sądowym RFN* [in:] *Sądy i trybunały wobec problemu …*, pp. 31–58.

6 M. Florczak-Wątor, *Rola sądów i trybunałów w kształtowaniu koncepcji horyzontalnego działania praw jednostki* [in:] *Sądy i trybunały wobec problemu …*, p. 74; J. Podkowik, *Wolność umów i jej ograniczanie w świetle Konstytucji RP*, Warszawa 2015, p. 35.

The basic importance in the sphere of the impact of constitutional norms on private relations, however – including judicial practice – is attributed to the clause of the direct application of constitutional norms (Art. 8 (2) Constitution), as far as they have a self-executing nature (hypothesis, disposition, and sanction) and do not refer to ordinary acts (statutes). This clause confirms the belief that constitutional norms defining rights and freedoms also have a horizontal effect (indirect or direct) but in respect to the nature of the relationships between private individuals – in particular as regards the parties of a weaker bargaining position (e.g., workers' rights, consumer rights, tenants' rights) – who are also awarded direct protection in constitutional norms[7].

As a consequence of the limited – in practice – possibility of the independent application of the Constitution to the sphere of relationships between individuals, defined as the indirect horizontal effect of fundamental rights, the indirect horizontal effect of constitutional rights – known as the radiation of constitutional rights or co-application of the constitution and statutes by the courts – is becoming the main model, as it is in the practice of other European countries, not excluding the concept of what is known as the positive protective obligations of the state (guaranteed ones) in order to protect the potentially weaker party of the contract against the stronger one[8].

Along with the strengthening – in theory and in practice – of the concept of the indirect horizontal effect of constitutional rights, implemented mainly by the courts, as the combined impact of statutes (acts) and the Constitution (using the mechanisms of private law), a question has appeared regarding how conflicts between different constitutionally-protected fundamental rights should be resolved. In this regard, the constitutional proportionality principle (Art. 31 (3)) is useful – as an optimising instrument which makes it possible to define the scope of the constitutional effect on different rights and to indicate the need to balance the values (rights). On the *in abstracto* level, this is done by the Constitutional Tribunal as a court of law, and on the level of specific civil cases (*ad casum*) it is done by courts of general jurisdiction (courts of facts), following the 'recommendations' (aims) of the legislature.

There is an *opinio communis* that the constitutional proportionality principle – applicable not only in the vertical sphere, but also with regard to

7 A. Mączyński, *Bezpośrednie stosowanie Konstytucji przez sądy*, 'Państwo i Prawo' 2000, No. 5, p. 3; B. Skwara, *W obronie bezpośredniego horyzontalnego obowiązywania praw człowieka*, 'Przegląd Sądowy' 2017, No. 1; S. Wronkowska, *W sprawie bezpośredniego stosowania Konstytucji*, 'Państwo i Prawo' 2001, No. 9, p. 4.

8 For the different concepts of the horizontal effect of fundamental rights on individual rights, compare M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych…*, p. 63.; M. Safjan, *O różnych metodach oddziaływania praw podstawowych na prawo prywatne*, 'Państwo i Prawo' 2014, No. 2.

horizontally balancing conflicting interests of equivalent private individuals – and, as grounds for interpreting legal regulations by courts in specific civil cases, - should not lead either to favouring or discriminating against the protection of individual rights of one party over another[9].

The *ad casum* settlement of the aforementioned conflicts of constitutional rights by applying the proportionality principle is of the utmost importance in the process of resolving difficult cases between private individuals. It refers, in particular, to situations where the conflict has at its core constitutional rights which are protected in a similar way, but, at the same time, have fundamental importance for private law as a traditional component of the legal system[10].

In the area of the horizontal effect of the constitutional, fundamental rights of an individual, it is a particularly difficult problem to eliminate the conflicts between the fundamental principle of the freedom of the party's will – including freedom of contract, which is legally reinforced by the constitutional freedom of an individual (Art. 31 (1)), as well as in the freedom of economic activity (Arts. 20 and 22) – and the scope of the similarly protected constitutional principle of equal treatment (equality before the law: Art. 32 (1)), as a formal expression of justice (fairness), whose negative reflection in accordance with the doctrine of private law is the constitutional non-discrimination principle (the prohibition of unequal treatment) in social and economic life (Art. 32 (2))[11].

In the doctrine, it a widely accepted view that the line the courts should not cross is the inadmissibility of questioning the binding force of mandatory binding legal regulations (*ius cogens*) without first using the method of legal questions to the Constitutional Tribunal, as well as an imposition on one party of the duty to perform a legal act (i.e., direct action) in order to realise the freedom of another individual or the creation of a contractual civil relationship as long as a statutory legal norm does not establish it[12].

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9 J. Podkowik, *Problem horyzontalnego działania…,* p. 91; also cf. A. Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie*, Warszawa 2010; J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008.

10 Cf. M. Safjan, *Autonomia woli a zasada równego traktowania* [in:] *Zaciąganie i wykonywanie zobowiązań*, eds. E. Gniewek, K. Górska, P. Machnikowski, Warszawa 2010, p. 357.

11 Ibid., p. 373, R. Trzaskowski, *Zakaz dyskryminacji w prawie umów* [in:] *Europeizacja prawa prywatnego,* vol. II, eds. M. Pazdan, W. Popiołek, M. Rott-Pietrzyk, M. Szpunar, Warszawa 2008, p. 593.

12 See J. Podkowik, *Problem horyzontalnego działania…*, pp. 112–113; cf. A. Sobczyk, *Problem horyzontalnego działania praw jednostki w orzecznictwie sądów pracy* [in:] *Sądy i trybunały wobec problemu…*, pp. 115–129.; J. Ciapała, *Horyzontalny wymiar praw konstytucyjnych na podstawie wybranego orzecznictwa w sprawach gospodarczych* [in:] *Sądy i trybunały wobec problemu…*, pp. 129–148; P. Tuleja, W. Białogłowski, *Problem horyzontalnego działania praw jednostki w orzecznictwie Trybunału Konstytucyjnego* [in:] *Sądy i trybunały wobec problemu…*, p. 79.

## 1.2. Constitutional principles of equal treatment and of freedom of contract as a normative expression of the principle of the freedom of the parties' will

The freedom of contract principle (Art. $353^1$ Civil Code [CC] in connection with Art. 22 Constitution) as a normative expression of the principle of the freedom of the parties' will, constituting the foundation of private law, and approved by Constitution of the Republic of Poland, international conventions, and European law, does not exclude its conflict between it and other fundamental rights, including the constitutional principle of equal treatment, whose expression is the non-discrimination principle (Art. 32 (2) Constitution).

Moreover, the conflict between these principles is somehow included in their functioning because the freedom of contract, which assumes the freedom of private individuals to shape a legal relationship, allows – within the limits of legal order (statutes) and moral values (general clauses of fairness nature) – subjectivism and arbitrariness, including unequal treatment as a result of a game of interests. In particular, it is widely accepted that in the process of contracting it is permissible to differentiate the legal situation of private individuals (contractors) if an objective and rational justification of unequal treatment exists, i.e., if it is confirmed by justice (fairness) or other constitutional values. It is even argued that inequality 'negotiated freely' is the power of private law – excluding, however, inequality forced by a party who is economically and intellectually stronger[13].

This raises the question of which criteria should resolve conflicts between the freedom of contract principle, which approves of subjective choices of the parties to the contract within the limits of legal regulations and moral norms, and the equally fundamental equal treatment principle, which is an axiological foundation of the European legal system and guarantees formal justice in legal trading, but at the same time weakens the arbitrariness of those regulations. How can one exclude unequal treatment forced by the economically stronger party in the process of contracting, without infringing the freedom at the same time?

In Polish jurisprudence, there is a consistent view that in the sphere of private law – i.e., the horizontal impact of constitutional fundamental rights (individual–individual) – in which the proportionality principle is applied (Art. 31 (3) Constitution) as a limitation clause (optimising) which serves to

13 M. Safjan, *Autonomia woli a zasada równego …* [in:] *Zaciąganie i wykonywanie zobowiązań …*, p. 376; Id., *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania*, 'Kwartalnik Prawa Prywatnego' 2009, No. 2; also cf. P. Machnikowski, *Swoboda umów według art. $353^1$ kc. Konstrukcja prawna*, Warszawa 2005; R. Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych. Art. 3531 kc*, Kraków 2005.

solve axiological conflicts, the equal treatment principle has a narrower application than in the vertical sphere (individual–public authority body), addressed to the lawmaker. It is influenced by the priority of the freedom of contract principle (the freedom of the parties' will) as a foundation of private law, which allows differentiation of the parties to the limits of discrimination, that means unequal treatment of the partners as regards legal relations not having the public law characteristics[14].

In case of a conflict, in a particular situation, between the equal treatment principle and the freedom of contract principle, the advantage always goes to the non-discrimination principle if the inequality of treatment refers to a relationship in the public sphere or is connected with the public sphere, *ipso facto* threatening the dignity of an individual and his/her fundamental rights, but the freedom of contract principle prevails if they are relationships of a solely private nature, not connected with the public sphere, both in the functional aspect (carrying out tasks of a public nature), as well as the individual aspect (the potential cooperation of private persons and public bodies)[15].

It is also a commonly accepted view that the equal treatment principle finds a wider application in the sphere of private law in negative terms, i.e., in the form of the non-discrimination principle understood as a qualified form of unequal treatment referring to particularly gross cases of unequal treatment. It is assumed, not without a discrepancy between the positions of theoreticians of private law and constitutionalists, that the range of manifestation of non-discrimination as a mechanism of compensating for the freedom of the weaker party's will depends on objective criteria (factors). In this respect, basic importance is brought to the public dimension of the benefits on offer (goods or services) and the constitutionally protected dignity of an individual (individual, personal features of the party), and, in particular, the deficit in the depth of consensual equality and the kind of interests being protected, chiefly those in which true freedom of the party's will may not be disclosed because of a definite advantage of one party (e.g., an entrepreneur, employer, or owner) weakening the freedom of the other party's will (e.g., an employee, consumer, or tenant)[16].

Labour law and consumer law are naturally applicable in the field of non-discrimination in contracting since they are areas of law within which the

14 M. Safjan, *Autonomia woli a zasada równego traktowania*…, p. 377; also cf. *Ustawowe ograniczenia swobody umów. Zagadnienia wybrane*, ed. B. Gnela, Warszawa 2010.

15 Cf. J. Podkowik, *Wolność umów i jej ograniczanie* …, p. 54; J. Sawiłow, *Swoboda umów – kompetencja czy prawo podmiotowe? O użyciu pojęcia kompetencji do objaśnienia problematyki swobody umów w nauce prawa cywilnego* [in:] Ibid.

16 Cf. M. Safjan, Autonomia woli a zasada równego traktowania…, p. 373; J. Podkowik, Konstytucyjna zasada równości i zakaz dyskryminacji w prawie cywilnym, 'Kwartalnik Prawa Prywatnego' 2016, No. 2, p. 263.

entrepreneur (employer) is directly obliged to observe constitutional axiology in terms of the protection of consumers or employees. The rights of consumers or employees as legal rights of a public nature result first of all from statutes (acts), not contracts, which may sometimes infringe on fundamental constitutional rights[17].

### 1.3. Non-discrimination as protection against a qualified form of unequal treatment in contract law

In the literature, it is rightly noted that contemporary contract law, which serves large-scale, global trading, creates many opportunities for discrimination, i.e., actions which unequally treat the equal: from an ungrounded differentiation of persons when selecting a partner (by unfavourably forming the contracts for selected partners), through engaging parties to the contract, to actions which discriminate against third parties[18].

In the doctrine of constitutional law, non-discrimination – which has an axiological foundation in the concept of equal and inalienable human dignity as the contemporary foundation of freedoms and rights – is perceived as a meta-law (a barrier clause) defining the implementation of the equal treatment principle and other freedoms and rights fairly and efficiently[19].

Enforcing the universal equal treatment principle (in the vertical and horizontal scale), non-discrimination – which originates in public law – undoubtedly weakens the practical impact of the principle of the freedom of the parties' will, and especially the freedom of contract, as a principle of private law, in accordance with which parties are allowed to choose their partners at their discretion, not excluding the possibility of eliminating from this process some specified persons according to their own beliefs as long as it is done within the legal limits of this discretion (the Constitution, statutes, and general clauses concerning justice).

Hence, this raises the question about the nature and the scope – and, in particular, the criteria – of the impact of this public prohibition on the private

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17 For more, see A. Sobczyk, *Wolność pracy i władza*, Warszawa 2015, p. 17; J. Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009, p. 131.; M. Szydło, *Wolność działalności gospodarczej jako prawo podstawowe*, Bydgoszcz–Warszawa 2011, p. 76.

18 R. Trzaskowski, *Zakaz dyskryminacji w prawie umów …*, p. 595; Cf. A. Mączyński, *Konstytucyjne podstawy ochrony praw konsumentów* [in:] *Prawa człowieka, społeczeństwo obywatelskie, państwo demokratyczne. Księga jubileuszowa dedykowana prof. P. Sarneckiemu*, eds. P. Tuleja, M. Florczak-Wątor, S. Kubas, Warszawa 2010.

19 In the matter of non-discrimination as a clause-barrier, i.e., a legal norm not permitting for exception from its application and not being connected with proportionality mechanism, compare J. Podkowik, *Konstytucyjna zasada równości…*, p. 263.

law principle of the freedom of contract because non-discrimination – coming from public law – may in fact weaken the scope within which the freedom of contract may be manifested, but should not annihilate it.

Constitutional norms, which are a starting point for considerations regarding the nature of non-discrimination – connected with human dignity – do not leave any doubt about the fact that the party who is protected against discrimination is 'any private individual' who is active in society, in the political, social and, in particular, economic aspects – i.e., in the public sphere. In that sphere, no party should be exposed to discrimination, not only from other natural persons, as sole entrepreneurs, but also from legal entities (e.g., multinational corporations, banks, or other financial institutions), which, as parties with vast bargaining power – including the creators of general terms for trading purposes – are commonly the perpetrators of discrimination.

In the constitutional meaning, such a partner cannot be discriminated against 'for any reason', which means that the catalogue of those reasons is open and variable, and that, through establishing that catalogue, ratified international agreements, being a part of the national legal order, may be helpful because they contain an appropriate specification of personal characteristics which may in practice constitute a reason for discriminating against natural persons in legal trading[20].

The above means that the grounds for the legal qualification of non-discrimination for the purpose of private trade – particularly in terms of consumer trade or labour law – are not only constitutional norms (Art. 32 (2) Constitution), but also ratified 1) by Poland's international agreements on the protection of human rights and citizen's rights, which protect human rights (an individual's) rights of public nature, 2) by EU law (treaties and secondary law), which fiercely combat discrimination, as well as 3) national ordinary statutes (acts), including the national Act on Non-discrimination[21], and 4) by civil code regulations on the protection of personal rights (Arts. 23 and 24 CC), which qualify infringement on non-discrimination as a kind of civil offence. These aforementioned regulations contain extended non-discrimination regulations which prohibit discrimination in the public sphere, as well as in different aspects of this sphere, including the social and economic area, not excluding the process of contracting especially, as long as the goods and services are offered in public.

One should share the view that discrimination means a qualified (gross) manifestation of unequal treatment because of the violation of constitutionally

20 J. Podkowik, *Konstytucyjna zasada równości*…, p. 256.

21 The Act on the implementation of some regulations of the European Union within equal treatment from December 3, 2010 (Dz. U. 2010, No. 254, item 1700; i.e., Dz. U. 2016, item 1219), called the Act on non-discrimination.

protected dignity (personal characteristics), in particular of the potentially weaker party. What matters here is 'oppression' in private legal trade, if the trade is of a public nature, particularly of persons or social groups or the limitation of their rights because of individual, personal characteristics, which are generally independent of the individual – e.g., race, nationality, sex, religion, etc.). However, so called ordinary contractual inequality – as regards the selection of a contractor from the same group of people with similar characteristics or differentiation of equivalence of benefits in the contracts - may not be treated as discrimination[22].

With reference to contract law, non-discrimination is determined by personal criteria of discrimination, which are enclosed in non-discrimination regulations more broadly than in traditional personal rights because the scope of protection includes not only values already recognised as personal rights, but also legally protected values such as using the goods or services offered in public. It is, therefore, of great importance that the combination of the contracting process with the public dimension of private trading in which the freedom of the party's will may commonly not manifest in reality because of a negotiating advantage of the other party (e.g., in employment or consumer trading).

In the doctrine of constitutional law, it is a commonly accepted view that non-discrimination as a barrier clause constitutes constitutional limit on personal freedom to perform conventional legal acts of a civil nature or to make statements when purchasing goods or providing services, i.e., an individual's activity in the social and economic areas[23]. Therefore, in the theoretical sphere, recognising non-discrimination as a limitation of the freedom of contract it is not an acceptable view, because such a freedom does not include discriminatory behaviours at all[24].

The opinion that non-discrimination is a constitutional limit on personal freedom (opportunity to choose) when performing conventional legal acts deserves approval in reference to the areas of legal trading under the control of constitutional lawmakers because of their public features, such as labour law, whose predominant characteristic is its public nature; consumer relations, following the publicisation of labour law; or the legal sphere of the protection of fair competition, which has the protection of public interests at its core. In this area, the general non-discrimination principle has full constitutional reasoning and direct horizontal effect.

22 M. Safjan, *Autonomia woli a zasada równego traktowania …*, p. 357; Cf. B. Gronowska, *Porównywalność sytuacji jednostek jako przesłanka dyskryminacji – uwagi na tle orzecznictwa strasburskiego*, 'Europejski Przegląd Sądowy' 2013, No. 6, p. 4.

23 J. Podkowik, *Konstytucyjna zasada równości…*, p. 264.

24 Ibid.

There are, however, No. theoretical or semantic barriers – in the field of private law, an itemised field of the legal system – against describing the non-discrimination principle – in the meaning resulting from the Constitution and international norms, as a 'limitation of the freedom of contract principle', which emerges from 'statutes' in the meaning of Art. 353 CC because interpretation of this last concept as used in the aforementioned is included in the Constitution, international conventions, and EU law.

## 2. European Union law as grounds for combating discrimination in private trading

The horizontal effect of fundamental rights, and the combating of discrimination is undoubtedly confirmed as one of the tasks of treaty law (Arts. 3 and 4 TEU) by the judicature of the Court of Justice of the European Union (CJEU), which makes creative use of the German doctrine *Drittwirkung*.

EU jurisdiction treats non-discrimination as a fundamental treaty principle of European law – which applicability extends to relations between private individuals – constituting at the same time one of the guarantees of the implementation of the European principle of the free movement not only of people, but also of goods and services, as well as the free conduct of business[25].

In accordance with CJEU jurisdiction, non-discrimination because of nationality (citizenship) applies not only to actions of public authorities, but also to actions of other organisations of the state which establish rules about collective labour law and the provision of services (e.g., sports associations). The CJEU has stated in a few verdicts that non-discrimination in a gainful activity because of nationality which results from treaty law constitutes a control criterion of the legality of contracts and regulations which do not come from public authorities.

The horizontal effect of norms on non-discrimination in the area of workers' rights has been confirmed by the CJEU in cases concerning equal pay of women and men for the same work or work of the same value, as well as combating discrimination because of age – assuming that the national court is obliged

25 Cf. M. Domańska, *Zasada równości (zakaz dyskryminacji)* [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, T. 1, ed. A. Wróbel, Warszawa 2010, p. 162; J. Sozański, *Znaczenie wspólnotowego zakazu dyskryminacji…*, p. 82, M. Taborowski, *Poziom ochrony praw podstawowych wynikający z Karty praw podstawowych UE jako przeszkoda dla przystąpienia UE do Europejskiej konwencji praw człowieka*, 'Europejski Przegląd Sądowy' 2015, No. 12, pp. 28–34; A. Wróbel, *O niektórych aspektach koncepcji praw podstawowych UE jako zasad*, 'Europejski Przegląd Sądowy' 2014, No. 1, p. 106; J. Sozański, *Znaczenie wspólnotowego zakazu dyskryminacji dla Polski*, 'Przegląd Sądowy' 2004, No. 6, p. 81.

to guarantee the implementation of the non-discrimination principle in matters of age by not applying any national law regulations contrary to this principle. Moreover, the CJEU stressed the horizontal effect of treaty norms prohibiting the application of anti-competitive practices to the disadvantage of the weaker company. The CJ also derived from treaty norms the prohibition of cartel agreements and of abuse of a dominant position, both addressed to entrepreneurs[26].

The jurisdiction of the CJEU concerning the horizontal effect of European law – treaty norms and directive regulations – indicates that the view on the horizontal effect of this law has at its roots a broad interpretation of the concepts of 'state' and 'public authority' and/or a wider interpretation of the duties of stronger partner towards a potentially weaker partner[27].

However, European jurisprudence generally understands by the concept of 'discrimination' only such actions that do not have objective and rational grounds and simultaneously do not maintain a justified proportion between the measures applied and the purpose predicted to be achieved[28].

European case studies inspire the jurisprudence line of member states, including the Polish Constitutional Tribunal, which treats the constitutional non-discrimination principle as a correlate of the observation of the principle of equality and indicates the inadmissibility of introducing regulations which differentiate the legal situation of the addressees of legal norms solely because of individual characteristics of those addressees[29].

European Union *acquis* in terms of combating discrimination is generalised by model EU law – in particular, the Draft Common Frame of Reference (DCFR) – as the grounds for the unification strategy of European private law, according to which everyone has the right not to be discriminated against on the grounds of their gender, ethnicity, or race, as a consequence of a contract or another legal act whose subject is to guarantee the access or supply of goods or services available in public (Art. II–2.101 DCFR).

With reference to contract law, non-discrimination is determined by such basic criteria as the natural, personal characteristics of the contracting party (gender, ethnicity, race, etc.) or the type of contract in the context of the way the

26 B. Skwara, *Horyzontalne obowiązywanie praw podstawowych w orzecznictwie ETS* [in:] *Sądy i trybunały wobec problemu horyzontalnego…*, pp. 59–79; Cf. J. Maliszewska-Nienartowicz, *Zakaz dyskryminacji ze względu na wiek w świetle rozstrzygnięć TS wydanych w okresie 2010–2013*, 'Europejski Przegląd Sądowy' 2014, No. 5, p. 30.

27 B. Skwara, *Horyzontalne obowiązywanie…*, p. 75.

28 M. Safjan, *Autonomia woli a zasada równego traktowania…*, p. 373; Idem, *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania*, 'Kwartalnik Prawa Prywatnego' 2009, No. 2, p. 298.

29 Cf. verdict of Constitutional Tribunal from July 5, 2011, P14/10, OTK ZU A 2011, No. 6, Item 49 and J. Podkowik, *Konstytucyjna zasada równości i zakaz …*, p. 258.

goods and services are offered. This means that non-discrimination because of the personal characteristics of the contractor refers to goods or services available in public, i.e., any kind of trading. As a consequence, this prohibition does not generally operate outside the scope of the public offering of goods and services – that is, in private relations, of a family or social nature.

The prohibition of the unequal treatment of contracting parties has a fundamental importance in – apart from the public nature of offering the goods or services – the process of the publicisation (constitutionally protected) of the sphere of entering employment contracts and in consumer trading; it is also acquiring more and more characteristics of a public nature, in which there are potentially weaker parties (employees or consumers) who are exposed to discrimination from stronger parties (economically and intellectually)[30].

## 3. Act on non-discrimination and other national statutes (acts) containing regulations about combating discrimination in legal trading

In the Polish system of law, the specialised legal act directed towards combating discrimination in accordance with European standards is the Act from December 3, 2010 on the implementation of some EU regulations in terms of equal treatment[31], called the Act on Non-discrimination – which prohibits discrimination because of some criteria defined therein (personal characteristics) regarding access to benefits from the goods or services offered in public. This act includes not only a legal definition of discrimination (direct and indirect), but also regulations aimed at protecting the party being discriminated against in the process of eliminating the consequences of the infringement of personal rights as a result of discriminatory actions. The act implements sanctions of a private nature.

The aforementioned act, which also applies in private trading (concluding a contract), binds to EU secondary law, which defines discrimination very broadly. In accordance with the regulations of that act, direct discrimination shall be prohibited; this is defined as a natural person being treated less favourably because of personal characteristics (e.g., sex, race, ethnicity, nationality, religion, confession, opinion, disability, age, or sexual orientation) than another person is/was/would be treated in a comparable situation (e.g., when concluding a loan agreement).

The concept of indirect discrimination (also prohibited), however, is to be understood as a situation where – because of the aforementioned personal

30 B. Skwara, *Horyzontalne obowiązywanie praw podstawowych*..., p. 61.

31 Dz. U. 2010, No. 254, item 1700 (i.e., Dz. U. 2016, item 1219).

characteristics and, as a result of a seemingly neutral regulation, a criterion applied, or an action taken – there appear or could appear unfavourable disproportions or a particularly unfavourable situation for a natural person (e.g., commanding restaurant staff not to serve customers because of the colour of their skin), unless the regulation, criterion, or action is objectively justified in the view of a legitimate purpose which is to be achieved, and the measures undertaken are appropriate and necessary (e.g., the requirement to wear a festive outfit as a condition of entering a place).

The protection against the discrimination of natural persons – both direct and indirect – because of individual, personal characteristics is clearly defined in respect to the spheres of influence, including social and economic areas, such as undertaking and performing business and professional activities – in particular, as part of an employment relationship or providing work on the basis of civil law contracts – undertaking vocational education and joining and taking part in trade unions, employers' organisations and professional self-governments.

The Act on non-discrimination – which defines the prohibited forms of unequal treatment, particularly in socioeconomic areas – also includes procedural guarantees aimed at combating discrimination. First of all, the act states that in cases of violation of the equal treatment principle, the Civil Code and Civil Procedural Code are to be applied; additionally, the party discriminated against is granted facilitation in the sphere of evidence. The party discriminated against must only lend credence to the fact of discrimination, and the discriminating party shall prove that he/she has not committed a violation of the equal treatment principle.

Apart from the Act on non-discrimination, the Labour Code also includes extended legal regulations in the area of concluding employment contracts. Its regulations, similarly to the Act on non-discrimination, define – for the purposes of labour law – direct and indirect discrimination, and they establish appropriate sanctions in case of violation.

Prohibitions of discrimination are also included in normative acts of an economic nature, such as the acts on combating unfair competition and on the protection of competition and consumers, or the public procurement law. The regulations contained therein also establish sanctions in case of violation of that prohibition by parties in economic trading.

'Juridical support' in the process of combating discrimination as a civil wrong (unlawful act) is also provided by Civil Code regulations on the protection of personal goods when, in the process of concluding a contract, there is a violation of a value recognized by jurisprudence as 'personal goods', but also as so-called legally protected interests.

## 4. Legal grounds to eliminate the consequences of the violation of non-discrimination in the process of concluding contracts

In a theoretical sense, the evaluation of violating the prohibition of unequal treatment in the process of concluding contracts (non-discrimination) may be based on a constitutional norm either directly, that is, with direct reference to the Constitution along with the horizontal application of fundamental rights, or indirectly, that is, with the application of the mechanisms of private law, including general clauses of justice[32].

Jurisprudence – derives the assessment directly from a constitutional norm as a 'stronger approach' – and indicates a higher practical usefulness of referring to general clauses – as a mechanism better adjusted to the axiology of private law and to the concept of radiation of constitutional rights on private law – understood as interpretative co-application of the Constitution and regular statutes (acts)[33].

The general sanction arising from introducing discriminatory provisions of the contract (e.g., as to personal characteristics) is the invalidity of those provisions because they exceed the limits of the freedom of contract and of performing legal actions, and more precisely, they are contrary to Civil Code regulations (Art. $353^1$ CC in connection with Art. 58 § 1 CC)[34].

It seems, however, that in cases when only some contract provisions have a discriminatory element, the party discriminated against may demand only those provisions be struck, not the entire contract – or that the contract be modified and so that its content excludes discriminatory clauses. The decision in such a matter is taken by the court.

Such an action is admitted by the 'pro-European' interpretation (consistent interpretation) of Art. 58 § 1 and 3 CC, which allows 'another consequence' than the absolute invalidity of a contract containing a discriminatory clause. The priority of 'another consequence' over invalidity is determined *in concreto* by the

32 Cf. M. Safjan, *Autonomia woli a zasada równego traktowania…*, p. 379; R. Trzaskowski, *Zasada dyskryminacji w prawie umów…*, p. 614.

33 M. Safjan, *Autonomia woli a zasada…,* pp. 379–380; Cf. P. Czarny, *Trybunał Konstytucyjny a wykładnia ustaw w zgodzie z Konstytucją* [in:] *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska, Warszawa 2005, p. 67.

34 In the matter of the invalidity of the contract, compare M. Gutowski, Nieważność czynności prawnej, Warszawa 2006; T. Gizbert-Studnicki, *O nieważnych czynnościach prawnych w świetle koncepcji czynności konwencjonalnych*, 'Państwo i Prawo' 1975, No. 4; M. Grochowski, *Wadliwość umów konsumenckich (w świetle przepisów o nieuczciwych praktykach rynkowych)*, 'Państwo i Prawo' 2009, No. 7; Z. Radwański, *Jeszcze w sprawie nieważności czynności prawnych*, 'Państwo i Prawo' 1986, No. 6; P. Skorupa, *Normatywne modele sankcji nieważności bezwzględnej a nieistniejąca czynność prawna*, 'Studia Prawnicze' 2010, No. 1, pp. 31–86.

interpretation of the purpose of the Act, done in the process of judicial application of the law, taking into account a proportional reaction to the defectiveness of a legal contract[35].

It is up to the court in a particular case to decide what kind of sanction (proportionate and efficient) should be recognised as 'another consequence' in order to replace contractual, discriminatory provisions (contrary to the act) with regulations resulting from acts, the principles of social co-existence, or from established habits (Art. 56 CC)[36].

In the search for the sources of sanctions of a civil nature – in case of a contradiction between the content of a contract and the non-discrimination principle – the regulations of the Act on non-discrimination may be useful because – since it definitely prohibits discriminatory actions – it establishes remedial sanctions applicable to private law[37].

In accordance with the Act on non-discrimination, everyone for whom the equal treatment principle has been violated (e.g., employee, consumer, or tenant) has an established right to compensation, taking into account the regulations of civil code, that is, first of all to fully redressed damages to property (lost benefits)[38].

Within the pro-European interpretation of national regulations (consistent interpretation) in judicial decisions, there has been noted a positive tendency to wide interpretation of compensation, including not only damage to property, but also nominal damage. The regulation concerning the possibility to

35 Cf. R. Strugała, *Prywatnoprawne skutki naruszenia zakazu nierównego traktowania – uwagi de lege lata i de lege ferenda*, 'Europejski Przegląd Sądowy' 2016, No. 4, p. 16; R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych*, Warszawa 2013, p. 547; A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2015, p. 571.

36 In national doctrine 'another consequence' in the meaning of Art. 58 CC is generally considered to be a sanction – different from invalidity – exceeding the limits of the freedom of contract as far as it results from specific provisions (R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem*.., pp. 48). The judicature follows this direction and in the matter of interpreting of 'another consequence' – with reference to credit agreements containing currency option clauses, they allow – as an extreme solution – the replacement of an invalidity clause, as a judicial sanction, referring to the principles of social coexistence: – compare the verdict of the Supreme Court II CSK 768/14 and II CSK 750/15.

37 R Strugała, *Prywatnoprawne skutki naruszenia* …, p. 16.

38 Cf. Art. 13 of the Act on Non-discrimination and R. Strugała, *Prywatnoprawne skutki naruszania*…, p. 15; Cf. M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2011, p. 220; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych*, Warszawa 1975, p. 5; B. Lewaszkiewicz-Petrykowska, *Zasada pełnego odszkodowania (mity i rzeczywistość)* [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, eds. W. Popiołek, L. Ogiegła, M. Szpunar, Kraków 2005.

claim damages has become grounds to award monetary compensation alone to the party being discriminated against[39].

However, even in the context of European law, which provides far-reaching protection against discrimination, it would be problematic to construct – on the side of the party being discriminated against – a general right to demand the conclusion of a contract corresponding to the content of that right. In fact, European law (Art. II.2:104 DCFR and Art. III.3:101/1 DCFR) allows a claim for the conclusion of a contract whose conclusion has been refused in the conditions of discrimination of the party entitled (or fulfilment of the performance if the contract has been concluded), but in the doctrine it is rightly stated that this may occur only in special cases, particularly if the discriminating party concludes contracts of that kind *en masse*, and the party being discriminated against does not have access to goods or services of that kind at all or their access is significantly limited. Demanding (forcing) the conclusion of a contract would be valid in the situation of adhesive contracts if the entrepreneur avoids the obligation without justified reasons (e.g., in the area of services of general interest)[40].

Apart from general provisions of the Civil Code – which establish invalidity of a contract because it contains discriminatory provisions – other sanctions (another consequence) than the invalidity of the contract (limited judicial sanction) are also allowed, as long as this results from special provisions (e.g., the Act on the Protection of Competition and Consumers, the Act on Combating Unfair Competition, or the Act on Non-discrimination) as grounds for claims of damages owing to discriminatory reasons in economic trading; Civil Code provisions may have definite meaning in combating discriminatory actions about the protection of personal goods so long as in the process of concluding a contract there is a violation of values commonly recognised as personal interests. Undoubtedly, vivid manifestations of discrimination in legal trading, leading *ad casum* to an evident violation of recognised personal interests (e.g., honour, or freedom of religion) defy human dignity as a foundation of personal goods, in particular, the right to privacy as a basic good. What is more, potential sanctions – which the legislator allows against the violation of personal goods within general tort

39 Cf. verdict of the Supreme Court from November 19, 2010, III CZP79/10, LEX No. 612168, as well as the verdict of the Supreme Court from September 15, 2015, III CZP107/14, OSNP 2016, No. 2, item 16; J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010; M. Wachowska, *Zadośćuczynienie pieniężne za doznaną krzywdę*, Toruń 2007; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych*.., pp. 43–125.

40 Cf. M. Safjan, *Autonomia woli a zasada…*, p. 381; R. Trzaskowski, *Zakaz dyskryminacji w prawie umów*.., pp. 614–15.

protection – are directionally consistent with the standard of the protection against discrimination required by European law[41].

General Civil Code provisions about the protection of personal interests make it possible for the person harmed by a discriminatory differentiation of the parties (because of personal characteristics) to enjoy, first of all, non-pecuniary remedies. The party discriminated against by a refusal to conclude a contract may enjoy claims for the removal of the consequences of infringement. In particular, they can demand the submission of a statement of relevant content and appropriate form or can demand the withdrawal of a public offer which includes manifestations of discrimination (when, for example, a job offer for a translator in a construction company excludes women from applying). The party discriminated against whose personal interests have been infringed upon owing to discriminatory actions may demand proprietary remedies, such as damages aiming to remedy proprietary loss, as well as claims for solely monetary compensation for moral harm (mental suffering)[42].

However, in comparison with European non-discrimination law, the protection against discrimination on the grounds of general Civil Code provisions has its imperfections, limiting the scope and the likelihood of its manifestation because – according to the civil code – the scope of this protection includes only the values recognized (by the legislature and the judiciary) as personal interests, excluding legally protected values, e.g., discriminatory refusal to benefit from goods or services offered in public. Moreover, it is commonly accepted that at the root of the proprietary remedies, including claims for solely monetary compensation for harm caused by the infringement of personal interests, there should be an unlawful act (tort), which denotes culpability of the violator, as a subjective premise; such a premise is not required by non-discrimination European law[43].

Judicial protection does not exhaust institutional legal remedies of an individual against discrimination in legal trading. A private individual who has not received satisfactory protection against discriminatory actions may enjoy a constitutional complaint – aimed at protecting individual rights, freedoms, and interests. In a constitutional complaint, which is available for a final judgment court or of a public administration body, a party may take exception to the fact that a particular court judgment has been issued on the grounds of a statute or normative act which is incompatible with Constitution. The consequence of a potential declaration of non-compliance of a court judgment's normative basis

41 R. Strugała, *Prywatnoprawne skutki naruszenia…*, p. 15.

42 Cf. T. Targosz, *Roszczenia służące ochronie dóbr osobistych* [in:] *Media a dobra osobiste*, eds. J. Barta, M. Markiewicz, Warszawa 2009; J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010.

43 Cf. R. Strugała, *Prywatnoprawne skutki naruszenia …*, p. 15.

is the resumption of court proceedings, conducted without the legal act whose unconstitutionality was declared by the Constitutional Tribunal[44].

After the exhaustion of available, national remedies, the party being discriminated against has the right to submit an individual complaint against the state to international bodies of human rights protection if there was a significant violation on the part of organs of state authority of individual rights protected by international conventions on the protection of human rights which have been ratified by Poland. The protection of individual rights in proceedings before international bodies supports the national system, but strict, procedural requirements do not make it easier for an individual to quickly pursue claims because of a violation of their individual rights through discrimination[45].

The variety of legal grounds as well as the diversity of remedies serving to eliminate the consequences of infringement of non-discrimination in legal trading (in the process of contracting) raise one's hopes for efficient protection; however, previous experience in this area – both European and national – does not warrant optimism[46].

44 Cf. A. Barczak, *Skarga konstytucyjna w sprawach cywilnych i administracyjnych w orzecznictwie Trybunału Konstytucyjnego*, Part 1, 'Transformacje Prawa Prywatnego' 2000, No. 3.; Ibid. Part 2, 'Transformacje Prawa Prywatnego' 2000, No. 4.

45 Cf. H. Bajorek-Ziaja, *Skarga do Europejskiego Trybunału Praw Człowieka oraz skarga do Europejskiego Trybunału Sprawiedliwośc*i, Warszawa 2006, p. 23; P. Grzegorczyk, *Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym*, 'Przegląd Sądowy' 2006, No. 6; M.A. Nowicki, *Europejska konwencja praw człowieka. Wybór orzecznictwa*, Warszawa 1999; P. Walczak, *Warunki dopuszczalności skargi indywidualnej na podstawie Europejskiej konwencji praw człowieka*, 'Państwo i Prawo' 1993, No. 8; and A. Paprocka, *Ochrona przed dyskryminacją ze strony podmiotów prywatnych jako pozytywny obowiązek państwa – uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka* [in:] *Horyzontalne oddziaływanie Konstytucji Rzeczpospolitej Polskiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności*, eds. A. Młynarska-Sobaczewska, P. Radziewicz, Warszawa 2015, p. 209.

46 Cf. M. Wieczorek, K. Bogatko, A. Szczerba, *Postawy sędziów wobec zjawiska dyskryminacji oraz ocena przepisów antydyskryminacyjnych – wyniki monitoringu* [in:] *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*, eds. M. Wieczorek, K. Bogatko, Warszawa 2012, p. 165; Cf. P. Borecki, *Zakaz dyskryminacji ze względu na wyznanie lub światopogląd*, 'Studia Prawnicze' 2015, No. 4, pp. 90–92.

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# SUMMARY

The research carried out within seems to confirm the view that in the sphere of horizontal impact of constitutional rights the prohibition of unequal treatment has a narrower application than in the vertical sphere addressed to the state (public authorities), because the principle of the constitutionally protected freedom of contract (freedom of the parties' will) – which constitutes the foundation of private law – allows differentiation of the two parties of the contract to the limits of discrimination – i.e., gross, subjective, and unreasonable inequality forced by the stronger party with the violation of legally protected natural, personal characteristics of the weaker party.

In the sphere of concluding contracts, the scope of using non-discrimination as a mechanism for compensating for the freedom of will of the potentially weaker party to the contract is determined by objective criteria such as constitutionally protected human dignity (individual, personal characteristics) in connection with the public dimension of the goods or services on offer. In particular, the protection against discrimination includes those areas of contracting in which the real freedom of will may not manifest because of a definite advantage of one party (e.g., an entrepreneur, employer, or landlord) weakening the other party's autonomy (e.g., an employee, consumer, or tenant). Not without reason, non-discrimination finds a natural application in labour law and consumer law. Infringement of the non-discrimination principle exposes the violator, in particular, to civil sanctions (of a proprietary and non-proprietary nature).

A general sanction resulting from infringement of non-discrimination, i.e., from introducing discriminatory provisions to the contract, is the invalidity of those provisions, not excluding remedial sanctions, such as the right to demand proprietary damages or a claim for solely monetary compensation, without the need to determine the fault of the violator. Non-discriminatory regulations not only protect the party to the contract in case of infringement of personal interests which are well-established in the jurisprudence, but also against infringement of the legally protected interests in the process of contracting.

**Keywords**
constitutionalisation of private law, equal treatment principle, constitutional prohibition of discrimination, human dignity, freedom of contract principle, natural personal characteristics, goods or services offered in public, remedies for the protection of personal goods (proprietary and non-proprietary)

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# A new concept of criminology for the labour market

**Abstract**
There are numerous pathologies in the labour market. However, until now, no effort has been made to approach this subject from the perspective of criminology. In this study, I use the conceptual apparatus of criminology to create a model describing negative phenomena on the labour market. The key element of this model is referred to as a labour market delict (violation), a term which denotes any behaviour by a participant in this market which may lead to infringement of the rights of or damages to the possessions of another market participant, or which may create a threat to the common good, such as social order or justice, or which puts into question the economic and social meaning of work. Delicts of the labour market can be recognized in several areas, such as those involving wages, partner obligations, safety, or duties towards the workplace. The article also contains a theoretical model of labour market delicts and an analysis of preliminary empirical survey of this issue.

## Introduction

The aim of this study is to draw attention to phenomena in the labour market which, although not criminal by nature, can definitely be considered negative. It is obvious that there are many pathologies at play in the labour market[1], but until now there has been little study of such phenomena as the effects of specific actions on the market where those seeking work meet those searching for workers. Obviously, employers' analytical approach has been dominated by economic concerns[2], where indicators such as profit/loss are crucial, or by considerations of the effectiveness of employment from a purely legal standpoint[3]. When the human dimension appears in the workplace, it is often limited to the question of whether or not employee's rights have been violated[4]. For some time, considerations have also come forth whose recurring theme is the question of whether some of the market participants have been victims of discrimination[5].

However, it is worth completing this picture by including the criminological aspect in the analysis of the labour market, with a particular emphasis on the most important elements from a criminological perspective, that is, a reflection on the genesis (etiology) of specific behaviours and an analysis of their phenomenal forms (phenomenology)[6].

This last issue seems to be particularly interesting. In my opinion, there are many situations in the labour market which participants perceive as negative but which are a social aspect of specific interactions, and society does not always share the opinion of those interested. A typical example would be behaviours bearing the characteristics of sexual harassment (i.e., 'dirty jokes'), which the jokes' tellers and some recipients treat as fun, but for other recipients may be a source of trauma. To learn more about the nature and dynamics of such events, it is worth looking at them from the perspective of criminology. The key concepts of this study are criminology and its relation to the labour market[7].

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1 *Pracodawcy na potęgę łamią przepisy. Trzeba zmienić prawo* http://tvn24bis.pl/wiadomosci-gospodarcze,71/pracodawcy-na-potege-lamia-przepisy-trzeba-zmienic-prawo,485006.html (July 2018).

2 *Podstawy ekonomii*, ed. R. Milewski, Warszawa 2001, p. 279 et seq.

3 E. Kryńska, E. Kwiatkowski, *Podstawy wiedzy o rynku pracy*, Łódź 2013.

4 A. Drozd, *Ochrona danych osobowych pracownika (kandydata) po nowelizacji kodeksu pracy*, 'Praca i Zabezpieczenie Socjalne' 2004, vol 1.

5 K. Kędziora, K. Śmiszek, *Dyskryminacja i mobbing w zatrudnieniu*, Warszawa 2010.

6 An example is a study in which the authors examine the relationship between employee solidarity and the tendency toward deviant behaviour in organisations. See: Y. Itzkovich, S. Heilbrunn, *The Role of Co-Workers' Solidarity as an Antecedent of Incivility and Deviant Behaviour in Organisations*, 'Deviant Behaviour' 2016, vol. 37, Issue 8.

7 Although I am aware that defining criminology in a legal letter is a risky procedure, I base this on the assumption that this text may also reach those who know more about the

Criminology is a 'social science dealing with the study and gathering of comprehensive knowledge about crimes, as a particular form of deviant behaviour, crime – as a social phenomenon – the perpetrators of crime, the victims of crime, and the institutions and control mechanisms that societies create to prevent and combat crime'[8]. Behind this 'synthetic' definition are extensive reflections on the genesis and nature of individual behaviour seen in its social context and extensive considerations of crime as a mass phenomenon, which is not the simple sum of individual behaviours and is subject to modification by extremely complicated processes. Criminology is also a science concerning the perpetrator of a crime, which is perceived as an entity that acts (rationally or irrationally), but whose actions can be analysed as one of the forms of its expression. On the other hand, we can look at the victim of a crime, which is not always just a passive 'object' under the perpetrator's influence, but also an active participant in some criminal events. Finally, criminology is the science of all that can be defined as a social reaction to crime; in other words, it comprises various ways of controlling crime as a mass phenomenon.

The presented definition is still too imprecise to serve the analysis that I would like to carry out in this text, so it is worth briefly expanding on each of its individual elements. At the beginning, an important question arises: What is a crime? Is it enough to say that a crime is everything that criminal law recognises as a crime? Without prejudging the answers, the question can be asked a bit differently: what crimes stand out from other crimes as individual or social? Imagine an observer who sees a man striking the window of a car. His first thought is the conviction that the man is doing something wrong. If the observation ended at this stage, the observer would retain this conviction, but his observation would not be completely precise as he did not know the reason for the action he observed. He would have been more certain in his conviction had he seen the perpetrator take a briefcase from the car and run away – then his assumption would have been that the briefcase was stolen. But would he have the same certainty if the perpetrator of the window's destruction simply drove off in the car? Not necessarily. Perhaps, in that case, the person was the owner of the car and he was unable to force the door open in the normal way, so he had to break the glass. The situation would be different if the observer saw the person strike the window and then pull a small child or a dog out of the car. Then, the observer would have to define the behaviour of this person as a good deed and an act of determination to help. In this way, we draw attention to the fact that for

labour market, and that criminology was not necessarily the subject of their in-depth studies. I feel somewhat more comfortable defining the labour market, although I also know that knowledge on this subject is extensive.

8 J. Błachut, A. Gaberle, K. Krajewski, *Kryminologia*, Gdańsk 1999, p. 19.

a criminologist, the behaviour itself (damage to the glass) would undoubtedly be considered negative in appearance, although it is not enough to prejudge the act as criminal or even pathological in character (theft or vandalism) without all of the facts.

Criminology is also a science which studies two entities involved in criminal behaviour[9], one being the perpetrator and the other being the victim. However, here too, we also encounter some difficulties in creating a definition, not as to who is the perpetrator and who is the victim, because this is a relatively simple matter, but on the level of reflection of the term 'man'. As there are so many concepts of a man, it is not without significance which of them we use to answer this question. For example, on the basis of the behaviourist theory, man appears as an 'outside-steered' subject. Regarding this, J. Kozielecki says that man is reactive, i.e., susceptible to stimuli coming from the environment and strongly addicted to them[10]. In turn, the psychodynamic concept developed a fundamentally different vision of a man, whom Kozielecki calls 'imperfect' and who is controlled by internal motivational forces[11]. With such fundamentally different descriptions of a human being, how can one speak of a universal understanding of a functioning subject?

I draw attention to equally significant differences in the approach to the subject of crime in the field of criminal law and criminology. Criminal law will only ask whether X has committed a crime and whether we can blame him. It will also ask whether Y can be considered a victim of the perpetrator's actions and whether the situation has any consequences. Critical reflection accompanying the justice system is also important for criminology. If we adhere to the classical school of thought, then we see an individual equipped with free will, so the same person when taking action contrary to the law must be held responsible and must take account for the consequences of their actions. This concept is different when we look at a man through the prism of positivist thought, because from that perspective he can appear as an independent entity, subject to numerous influences and determinants, which he often cannot overcome[12]. In each of these situations, the issue of the legal liability of the perpetrator can be seen completely differently.

Finally, we come to the last issue. If criminology is to be a science of social reaction to a crime, we must take our analysis further and define the society whose response we want to investigate. After all, depending on the vision of the

9 For better clarity, I omit the so-called victimless crimes, that is, those directed against such common good as public order or road safety.

10 J. Kozielecki, *Koncepcje psychologiczne człowieka*, Warszawa 1995, 'p. 19 et seq.

11 Ibid., p. 101 et seq.

12 J. Błachut, A. Gaberle, K. Krajewski, *Kryminologia…*, p. 41 et seq.

society we adopt to investigate, we will also describe the social mechanisms of controlling crime differently. To avoid going too far into detail, let's just say that where members of society reach a high level of agreement as to the basic norms and values that underlie their society, then it is much easier to determine what is right and what is wrong. This agreement makes it easier to say who is a criminal and who is not. However, in such a society where there is turmoil from a number of conflicts, such as the rich being afraid of the poor, uniformed governmental agencies terrorizing civilians, and 'the North hating the South', then the matter of differentiating good and evil becomes more complicated[13]. For many, even such obvious negative behaviour as murder can be the subject of strong condemnation, while for others such acts can represent the manifestation of supreme devotion to the common cause. In Rwanda, two decades ago, every Hutu who killed a Tutsi gained the respect of his community, and anyone who did not accept this fact faced having to pay with their own health or life[14].

From a social science perspective, if the object of criminology is to make all behaviour that deviates from the norms which have been established in the mode of normally functioning social practice, then its scope broadens substantially. Then, criminology may deal with such obvious problems as prostitution or drug addiction, but other behaviours may also enter its sphere of influence as well, such as family dysfunctions or hooligan behaviour in stadiums. This area of interest for criminology causes it to become a meta-reflection on the state of society in general, raises questions about the origin of the social order, and considers the social consequences of deficiencies in the human condition. This is precisely why in the field of criminology, the pathological behaviour discussed herein can be applied to the labour market.Criminology is a relatively young science, but it has already become independent enough that it has developed its own internal structure as well as its own research instruments[15]. Of course, criminology is a combined product of sociology, psychology, pedagogy, and law, but it also successfully develops and enriches everything taken from its roots.

The second concept which appears in the title of this study and which needs to be defined is the labour market. A well-developed contemporary society which functions within a democratic legal order and is subject to economic market logic develops several basic markets, including the commodity market, the financial market, or the services market, but a labour market is created as well. The latter is defined as 'the place where the exchange of labour services between employees and employers takes place, and the size of said transactions

13 L. Falandysz, *W kręgu kryminologii radykalnej*, Warszawa 1986, p. 10 et seq.

14 J. Reginia-Zacharski, *Rwanda. Wojna i ludobójstwo* Warszawa 2012.

15 See: Kryminologia, ed. W. Świda, Warszawa 1977. Also: O. Dahlback, *Analyzing rational crime – models and methods*, Dordrecht-Boston-London 2003.

and their conditions, and in particular the price of these services, i.e., salary' is agreed upon[16].

The essence of each of the listed markets – including the labour market – is that it satisfies the needs of its participants effectively, as far as possible in a given situation. It is assumed that an entity's or individual's presence on the market is voluntary and that the key instrument of the market game is the price, because 'the market is a process by which the buyer and seller determine what they want to sell or buy and under which conditions'. When the price is used in a constructive way, it leads to the formation of relations between market participants, who can discuss and strive for equivalence of mutual benefits. On the other hand, the market is a place where the principle of competition applies, thanks to which the prices of goods and services are determined, including the price of labour. Finally, there is also the state's role in the market – a quite specific role, that of a regulator only to the necessary extent. The labour market may be a bit different, but I will return to this issue.

Unlike in a market economy, the labour market is defined in the economy as planned or demand-resolving, a feature which is lacking in a market as such[17]. In fact, it is the state that takes over the role of the market; it plans the needs and decides about the turnover of goods and services, and the circulation of capital is almost non-existent. When it comes to the labour market, the principle of full employment applies and the status of employment must be constantly balanced. In order for the balance of work to be consistent, there should be as many jobs as needed and remuneration – except for minor exceptions – should be set from the top down.

The attempt to find a compromise between these two extremes of the continuum results in what is known as the social market economy[18], which is supposed to creatively combine market principles from the economic layer with human sensitivity. The state does not interfere in the market but reserves the right to ensure that the best working conditions are in practice and that people's wages are appropriate. When it comes to the functioning of the labour market, the creators of the social market economy point out that although human work is the commodity in demand, the worker – as an entity equipped with dignity (from which numerous laws arise) and endowed with individual characteristics – is subject to special state protection[19].

16 E. Kryńska, E. Kwiatkowski, *Podstawy wiedzy o rynku pracy*…, Łódź 2013., p. 11.

17 *Podstawy ekonomii*, ed. R. Milewski…, p. 67 et seq.

18 *Społeczna gospodarka rynkowa,* ed. R.W. Włodarczyk, Warszawa 2010.

19 J. Wratny, *Państwo jako regulator stosunków pracy – tendencje zmian*, 'Praca i Zabezpieczenie Społeczne' 2004, vol 10.

The labour market is fundamentally different from other markets. For example, there is an exchange of goods on the commodity market, which results in a change in ownership of those goods. However, the specificity of the labour market is such that a special employment relationship is established. If the commodity of the labour market is work, as in other markets, the 'carrier of the commodity' also participates in making market decisions, because the employee offering the commodity of their work makes the final decision.

In the case of the labour market, the market game functions differently. For example, in the commodity market, the concept is referred to as 'a process helping buyers and sellers determine the prices and quantity of goods to be bought or sold'. On the commodity market, such interaction is in some sense objective and economists have developed a number of formulas to explain the mechanisms of the mutual influence of such market elements as the price, supply, demand, or quality of goods[20]. If a customer can check the quality of available goods, then in choosing a specific product he may be guided by rational principles, even when there is an element of subjective evaluation (i.e., aesthetic values). As for the quality and price of work, the matter is much more complicated. Of course, when the supply of labour increases, its price decreases, but there are no rational premises for assessing which work will be better, as is possible in the case of other goods. Although employment specialists are constantly working out the criteria for making this assessment objective, it will always be much more subjective. And as long as there is an element of subjectivism in the assessment, there is a danger of abuse or injustice.

Another important difference results from the fact that both goods and capital are brought to market because they were made for that purpose and the fact that it depends on the will of the owners as to if and when this takes place. On the other hand, individuals bring their offer of work to market in order to gain the means necessary for their survival, as well as to exercise their right to work. These points are included in the catalogue of human rights. Admittedly, these are not in the catalogue of personal and political rights, but they belong to the group of economic, social, and cultural rights ('second generation')[21]. Although no unemployed person will win a court case with a state that there is no job for her/him, the right to work obliges the state to strive to ensure that this right is guaranteed to the fullest extent possible.

What also fundamentally differentiates the labour market from other markets is the number of participants, because there are far more participants in the former. The key actors – employers, employees, and the state (as a regulator) – are

20 *Podstawy ekonomi…*, p. 97 et seq.

21 W. Osiatyński, *Prawa człowieka i ich granice*, Kraków 2011, p. 184 et seq.

joined by rather specific entities, such as employment agencies, trade unions, confederations of employers, social institutions, or local governments.

The two most important elements of any market are supply and demand[22]. These are also present on the labour market, where they are defined specifically. In the simplest terms, the supply of labour is the number of people who want to work for a given wage during a given period[23]. Demographic factors that affect labour supply include natural growth, population movement in the form of immigration and emigration, such ecological variables as the dominant place of residence – in the city or the countryside – and the educational system, including vocational education.

The demand for labor is the request of employers, including companies and agencies, for workers[24]. The demand for work is also described by the market opportunities (absorptivity) of a certain group of people. Among the most important factors affecting the demand for labour are labour costs, labour productivity, the demand for goods, and the demand for services. As already mentioned, the subject of the transaction on the labour market is work, for which the employee receives specific remuneration from the employer. It is worth noting that this is only the very traditional view of the labour market, because one of the newer phenomena is 'labour leasing'[25], i.e., the 'renting' of employees to employers along with remuneration for the service. The effects of this process will be discussed later.

## Labour market law

The existence of a place where employers and employees meet is connected with a whole range of legal regulations on the labour market, with particular emphasis on the conditions of work performance, employee safety, financial remuneration, or the prohibition of compelling someone to work (with certain exceptions).

Poland is party to all of the most important international conventions, including, above all, the conventions of the International Labour Organization (ILO), such as Convention No. 95 ILO of 1 July 1949 on the Protection of Wages[26] and Convention No. 138 of the ILO of 26 June 1973, regarding the

22 *Podstawy ekonomii…*, p. 99 et seq.

23 E. Kryńska, E. Kwiatkowski, *Postawy wiedzy o rynku pracy…*, p. 67 et seq.

24 Ibid., p. 93.

25 K. Zioło-Gwadera, *Leasing pracowniczy jako forma zatrudnienia w dobie kryzysu*, 'Zeszyty Naukowe Uniwersytetu Szczecińskiego. Ekonomiczne Problemy Usług' 2010, vol. 43.

26 Dz. U. 1955, No. 38, item 234.

lowest age of admission for employment[27]. The former convention provides, among other things, that earnings should be paid regularly and that salary payment methods should not deprive the employee of the opportunity to abandon their work (Article 12). According to the latter convention, each member of the ILO undertakes to pursue a national policy aimed at ensuring the effective abolition of child labour (Article 1).

From the point of view of the purpose of this study, the ILO convention which refers to the prohibition of forced labour and all forms of exploitation is important. The key in this regard is Convention No. 29 of 28 June 1930, concerning forced or compulsory labour[28]. In light of this treaty, 'forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which said person has not offered himself voluntarily'. Nearly 30 years later, the Supplementary Convention No. 105 of the ILO, of 25 June 1957, on the abolition of forced labour[29] was adopted; it is important because it is a practical development of previously formulated ideas. In contrast, the latest achievement of the ILO in terms of the regulation of forced labour is the Protocol from 2014 to ILO Convention No. 29 on forced labour, which has redefined the state's responsibilities in the area of eliminating forced labour[30].

Finally, there is the question of protecting the weakest participants in the labour market, namely children. In this respect, two significant documents should be noted. The first is ILO Convention No. 138 of 1973 regarding the lowest age of admission to employment[31] and – complementing this agreement – Convention No. 182 of the ILO of 17 June 1999, regarding the prohibition and immediate action to eliminate the worst forms of child labour[32].

In Europe, the key role is played by the European Convention for the Protection of Human Rights and Fundamental Freedoms[33] (also known as the European Convention on Human Rights). The problem of forced labour is expressly referred to in this treatise, as Article 4 states, 'No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour[34].

27 Dz. U. 1978, No. 12, item 53.

28 Dz. U. 1959, No. 20, item 122.

29 Dz. U. 1959, No. 39, item 240.

30 Poland ratified this Protocol in 2016.

31 Dz. U. 1978. No. 12, item 53.

32 Dz. U. 2004, No. 134, item 1474.

33 Dz. U. 1993, No. 61, item 284.

34 According to Art. 4 of the Convention, there are also situations when we cannot talk about forced labour: 'For the purpose of this Article the term 'forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious

As far as the national legal order is concerned, the most important legal act in this respect is of course the Constitution of the Republic of Poland, which contains several provisions relating to the protection of employees' rights. The most important is Article 24, stating: 'Work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work'. It is worth stressing that the protection of labour has been included among the most important constitutional principles of the state. By placing this provision in Chapter I of the Constitution, entitled 'Rzeczpospolita (Republic)', the constitutional legislator decided about the importance of the protection of workers' rights in Poland. However, there is no explanation of what job protection means. From the content of Article 24 of the Constitution of the Republic of Poland, it can be concluded that only by the state may or shall legal mechanisms exist which allow the state to exercise control over the performance of work[35].

Some of these mechanisms are mentioned in Article 65 of the Constitution of the Republic of Poland, which in a way supplements Article 24 of the Constitution, which guarantees everyone the freedom to choose the place and practice of their work. In light of Art. 65 (1), public authorities cannot impose a job or decide on the choice of profession and place of performance[36]. In a sense, this implies that the Constitution establishes a ban on forced labour, although this is not directly mentioned in its provisions. The writers of the Constitution did not use any phrase stating that forced labour is forbidden, or that the exploitation of an employee is prohibited; however, based on the wording of the provision discussed here (Art. 65 (1)), one can argue that forcing people to work is prohibited. In the opinion of commentators, this provision guarantees the right to choose and practice a profession and to choose a place of work, as well as the right to be protected against forced labour[37].

Also, Polish labour law does not contain a clearly expressed ban on forced or compulsory labour[38]. However, there are provisions that protect the freedom of work and which protect the employee against exploitation and being forced to work. First of all, reference should be made to the basic principles of labour law,

objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations'.

35 P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dn. 2 kwietnia 1997 r.,* Warszawa 2000, p. 37.

36 L. Garlicki, *Konstytucja Rzeczypospolitej Polskiej. Komentarz IV*, Warszawa 2005, p. 3.

37 K. Sobczak, *Gospodarka w ujęciu konstytucyjnym*, 'Przegląd Ustawodawstwa Gospodarczego' 1997, No. 12, pp. 2–7.

38 Ł. Wieczorek, *Praca przymusowa. Zagadnienia prawne i kryminologiczne*, Warszawa 2017.

which are included in the First Section of Chapter II of the Labour Code[39]. A crucial role should be given to Art. 10 (1) of the Code, which states that 'everyone has the right to freely chosen work. No one may be prohibited from exercising his profession except in the cases specified in the act'. The constitutional principle of the freedom to choose a job and the form of its provision in this way also amounts to a ban on forcing people to work. Such an interpretation is confirmed in many of the documents of international law cited above, in particular, the European Social Charter of 1996[40].

A specific complement to the principle of the freedom to work is the content of Article 11 of the Labour Code, in which the legislator formulated the key principle of mutual relations between the parties to the employment relationship: 'The employer is obliged to respect the dignity and other personal rights of the employee'. Although written generally, this is an important provision, as it transfers the fundamental principle of human rights, which is the absolute respect for human dignity, to the foundation of labour law.

From the perspective of labour market problems, the provisions of the Act of 20 April 2004 on the promotion of employment and labour market institutions should be noted[41]. This is one of the most important legal acts that create the legal and organisational foundations for the functioning of the labour market in Poland. However, the most important provision of this law seems to be the very extensive Art. 1, in which the legislator defines the subjective scope of statutory regulations and formulates the obligations of the state in the field of employment promotion and the protection of the labour market[42].

Because victims of various violations of labour market rules are often foreigners, it is worth noting the content of Art. 120 of this act, because it applies in its entirety to the employment of these people[43]. In Paragraph 1 of said provision, the legislator unambiguously penalises illegal entrustment of work to a foreigner. The next part refers to situations where the perpetrator leads the foreigner to work illegally, but he does so 'by misleading the foreigner, exploiting an error, using the foreigner's official dependence or inability to properly

39 Dz. U. 1974, No. 24, item 141.

40 Dz. U. 1999, No. 8, item 67.

41 Dz. U. 2004, No. 99, item 1001.

42 Article 1. The Act defines 1) the tasks of the state in the field of employment promotion, mitigating the effects of unemployment and professional activation and 2) the state's tasks in the field of employment promotion, alleviating the effects of unemployment and professional activation are implemented by labour market institutions working toward: a) full and productive employment; b) the development of human resources; c) high quality work; d) stronger integration and social solidarity; and e) increased mobility on the labour market.

43 On the same issue, see: J. Filipowicz, Z. Lasocik, Ł. Wieczorek, *Handel ludźmi do pracy przymusowej w Polsce – analiza sektorów podatnych na pracę przymusową oraz analiza istniejącej struktury pomocy ofiarom pracy przymusowej w Polsce*, Warszawa 2010.

understand the action taken'. An interesting solution is also brought forth by the provisions of Para. 5 of this article, in which it states that a person who, by means of misleading, exploits a mistake is punished … 'leads another person to entrust illegal work to a foreigner'. In this way, the Polish legislator penalises job placement which is carried out in bad faith.

Important provisions for the functioning of the labour market and the elimination of criminal-like behaviour can be found in Art. 121 of the act discussed here. Paragraph 1 provides punishment for a person who runs an employment agency without a legally required entry of clients in the relevant register. A similar punishment is threatened to a person who, 'while running an employment agency receives other paid work from the person for whom he or she is looking for a job, or who provides assistance in choosing the appropriate profession and place of employment, additional fees' (Para. 2). Charging for help in finding jobs is one of the most negative examples of the labour market and is clearly stigmatised at the level of international norms and standards[44].

The functioning of the labour market, including employment agencies, is also regulated by the Act of 9 July 2003 on the employment of temporary workers[45], which is sometimes referred to as the Labour Leasing Act[46]. A significant innovation of this regulation is the introduction to the language of legal transactions the term 'employer-user', which refers to an entity who employs temporary workers. One does not need extraordinary sensitivity or extensive linguistic knowledge to note that defining an employer as a 'user' brings the employee to the level of an object or tool. In my opinion, this is another example of a delict (violation) of the labour market, this time committed by the legislature. To a limited extent, the criminal provisions of this act protect employees' interests in the areas of safe and hygienic working conditions, work stations being equipped with appropriate machines and devices, the provision of drinks, meals, clothing, and footwear, and the provision of information on occupational risks (Art. 27).

44 Cf. *Guidelines to prevent abusive recruitment, exploitative employment and the trafficking of migrant workers in the Baltic Sea region,* ed. L. Sorrentino, A. Jokinen, Helsinki 2014.

45 Dz. U. 2003, No.166, item 1608.

46 I have serious doubts as to whether this term can be applied to a person.

## Criminology for the labour market

After determining the most important terminological and legal issues, it is time to visit the main question: What is criminology of the labour market and how does it differ from criminology in general? The answer must be divided into several stages. The first will be to identify the object of interest in the criminology of the labour market, which I propose to describe as a delict of the labour market. A 'delict' is a legal concept derived from the Latin word *delictum*, meaning an unlawful act or offense[47]. At the same time, since antiquity the term 'delict' has been connected with the domain of private law. The equivalent of a delict in the sphere of public law was a prohibited act (crime), whose name comes from the Latin word *crimina*[48]. Nowadays, the notion of delict is used to describe an act which is not permitted under civil, administrative, or constitutional law.

By the term 'delict of the labour market', I suggest a means to recognise any behaviour of market participants that may lead to damages to the possessions of or infringement of the rights of another market participant, or behaviour that poses a threat to any common good, such as social order or justice, as well as those threats that put into question the economic[49] and social[50] value of work.

When describing criminal phenomena, criminology employs a number of instruments, thanks to which it is possible to assess the real scale of these phenomena and their social significance. The simplest procedure of this type is the preparation of relevant statements based on available statistical data. However, in criminology, instruments that allow the relativisation of crime data are also used, among which the most important is the 'crime rate'[51], which with great simplicity informs how many crimes of a certain type or types are committed per every 100,000 inhabitants of a country. Thanks to this, we can conduct deeper studies of a society's saturation of criminal activities, both in time and in space.

I believe that a similar instrument would be extremely useful for describing and analysing any disturbances of the labour market. That is why I propose to develop a new instrument, which I am working on, as degrees of disruption

47 W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych*, Warszawa 1985, p. 91.

48 One of the best known Roman *paremia* states that '*Crimina morte extinguuntur*', that is, the crime expires as a result of the perpetrator's death, Cf. K. Burczak, A. Dębiński, M. Jońca, *Łacińskie sentencje i powiedzenia prawnicze*, Warszawa 2007, p. 29.

49 Here, work is understood as one of the three factors of production, in addition to land and capital.

50 Here, work is understood as human capital, being a common good of society.

51 The crime rate describes the number of crimes affecting every 100,000 inhabitants of a country, province, or county.

of order on the labour market. This level could be measured by the number of delicts of the labour market per 100,000 employed persons. Of course, this measure will never be as precise as the crime rate, because there is no criminal code for the labour market in which all delicts are precisely described. However, it seems that by achieving a certain uniformity in the categorisation and interpretation of negative events in the labour market, it may prove to be a useful instrument for analysing social changes in this sector.

Creating such instruments and others which describe the labour market somewhat differently than it has previously been described seems sorely needed. I see two important reasons for this. The first is related to the growing chaos on the labour market, which often directly translates into violations of employee rights. The second is connected with the role of the state in this market, which remains insufficient.

Let's look at these two issues from a slightly broader perspective. In each country there are problems that draw the attention of politicians and the public. In Poland, the main public issues currently are perceived threats to democracy, the independence of the judiciary, the level of integration with the European Union, and the need to block the influx of migrants. Nevertheless, crime is still the current and favourite topic of politicians and public opinion. Politicians easily formulate threats against criminals, indicating that their place is in prison, which is sometimes decided upon by state institutions and leads to an increase in the severity of the law. In matters of the labour market, this is not the case. Here the role of the state is more than limited. On the basis of statements made by the representatives of the authorities, it is possible to propose that the state has handed the matter over to the market. The ruling authorities seem to say if the market is doing so well with prices, it will also manage jobs and their provision. However, the market has not managed this because it has become a site of numerous pathological phenomena, which are referred to herein, including those of a criminal nature. Any statements about the quality of the labour market come mainly from trade unions and the employees themselves. The state must fulfil its own responsibilities and take on the role of effective regulator of the labour market.

The second step in the process of creating the foundations for criminology of the labour market is the formulation of a theoretical model that can be helpful in diagnosing phenomena (positive and pathological) that occur in this market. Such a model can also be useful in defining delicts of the labour market. Drawing inspiration from the findings of criminology, the model referred to here could resemble the following:


**Figure 1.** The theoretical model of violations of social order on the labour market[52]

In order for a breach of social order in the labour market to be brought about, it is necessary to physically converge the above three elements in time and space[53]. In practice, this means a situation in which a 'meeting' of the employee and the employer takes place, and one of these entities – most often the employer – violates the interests of the other party, e.g., by proposing very unfavourable employment conditions, and the other party (the employee) accepts these terms because they have no choice. Such a violation occurs because one of the parties has a decisive advantage, such as an economic advantage, and there is no effective safeguard that would ensure no harm is committed. Therefore, it is the state that must establish itself as a guardian for the labour market.

To illustrate the considerations presented here I will use an example given by one of my PhD candidates, who has been working in the field of including disabled people in the workforce for a number of years. The basic problem these people face as far as work is concerned is that, basically, employers do not take into account their disabilities or limitations of movement. Oftentimes the actual goal

52 The inspiration to give shape to this scheme came from the well-known work: L.E. Cohen, M. Felson, *Social Change and Crime Rate Trends. A Routine Activity Approach*, 'American Sociological Review' 1979, No. 4.

53 See: Ibid., p. 589; also: J. Błachut, A. Gaberle, K. Krajewski, *Kryminologia*, Gdańsk 1999, p. 184; *The SAGE Glossary of the social and behavioural sciences*, ed. L.E. Sullivan, Los Angeles-London-New Delhi-Singapore-Washington DC 2009, p. 454.

of the employer is to obtain government subsidies resulting from the employment of a disabled person. Would it not be better for such persons if in their scope of responsibilities or place they were not treated as 'fictional' employees?

In my opinion, this situation is a typical delict of the labour market. Nothing in the actions of such an employer–perpetrator bears the marks of a crime; on the contrary, we are ready to thank them for employing a person with a serious motor deficit or disability. But when matters are examined a bit more closely, it turns out that the employee cannot work effectively because there are no special provisions made regarding their disability. Such employees often cannot move about freely and are unable to qualify themselves for a bonus; in many cases they face humiliating situations, such as needing the assistance of other employees to use the toilet. At first glance, there are benefits for the disabled on the market, but a closer look reveals the many disadvantages they must face. This is the essence of a delict on the labour market.

A third step in establishing criminology in the labour market could be to map out its core departments. It seems that there is no need to reinvent the wheel, so I propose to use existing criminology methodology. A small reminder is that criminology's basic areas of interest are the structure of crime, its dynamics, the aetiology of individual and collective behaviour, and phenomenology. Therefore, after applying this approach directly to the labour market, one can say that the basic sections of criminology in the labour market are as follows:

– the nature and structure of delicts of the labour market,
– the phenomenology of delicts of the labour market,
– the aetiology of delicts of the labour market,
– the dynamics of delicts of the labour market,
– pathological phenomena on the labour market.

Thanks to the existence of the criminal code on criminological grounds, the description of the structure of crimes is not a problem. Most often, they can be analysed by defining the type of crime in terms of a good that is protected by law. Therefore, the crime structure is a derivative of the system of the penal code. In the labour market the case looks quite different because we must deal with behaviours that do not always meet the qualifications of a crime *per se* and most often are specific violations of the principles of social co-existence or the legitimate interests of another party. Therefore, it is worth attempting to set out specific areas where there may be violations of the social order in the labour market and which can be used to create a structure of delicts of the labour market.

The first of these areas is the economic dimension of the labour market; in this respect, the key categories that should be taken into account are the employer's profit, the employee's income, and manufactured goods and services – here, infractions can relate to anything related to the pathological desire to maximise profits with a minimum of expenditure. Equally, this may be expressed by an

understatement of employees' salary, unjustifiably coercing employees to exceed fixed working times, employees committing fraud in the calculation of effective working hours, or employees submitting dishonest documentation of their qualifications.

The second area is setting the obligations of labour market participants towards the state. First of all, this involves taxation as well as social insurance contributions – in this respect, any act that ultimately leads to tax depreciation can be considered an infraction (of course, tax fraud is a crime from a completely different area).

Another area is the obligations of labour market participants towards one another, which in practice boils down to the expectation of decent behaviour between partners. In my opinion, two obvious examples of violations of such a principle would be a superior directing ambiguous sexual content to subordinate employees or an employee disseminating false information (rumours) about the employer or a supervisor.

Regarding duties, the obligations of the labour market participants towards the workplace should not be forgotten. In my opinion, examples of a delict of the labour market would include a failure to report or carry out necessary repairs of a building or device which could lead to a serious threat, or the toleration of emissions of harmful substances into the environment.

Another important area of analysis is everything related to the 'human dimension' of work. A typical example would be the employment of disabled people for the sole purpose of gaining profits resulting from their status, while no efforts are made to give such people a sense of fulfilment in the workplace. I would also consider employers lowering the amount of holiday leave or neglecting the construction of necessary sanitary infrastructure, or employees extorting undue benefits of this type, to be delicts from this area.

Another source of pathology on the labour market is a specific balance of market powers which is definitely unfavourable towards employees. Until recently, due to the economic situation, it has been typical for the market to favour employers, as they were the ones dictating terms and conditions. Although the situation is changing and the unemployment rate has fallen[54], the dominance of employers strengthening their position at the expense of less effective employee organisations nevertheless remains a fact. This is due to the growing role of intermediaries and employment agencies that eliminate or substantially limit the typical employee–employer relationship. In practice, this means companies closing human resources departments and using specialised institutions that offer work to people. One of the effects of this is 'labour leasing',

54 *Spada bezrobocie w Polsce – w kwietniu wyniosło 9,6 proc. To najmniej od 24 lat*. PAP, 12.05.2016.

which – although fully legal – in my opinion, is the source of many pathologies and should be treated as a delict of the labour market.

Another important area is safety – this comprehensive category includes everything that falls under the terms of health and safety, including the personal safety of all market participants. For an obvious delict of the labour market in this area, I would consider unsafe or potentially fatal social work conditions, for example, workplaces where the necessary facilities for personal hygiene at the end of a shift (for example, in a mine) are not provided. In the sphere of security, I would also include such practices as employers tolerating or instigating various forms of violence between employees.

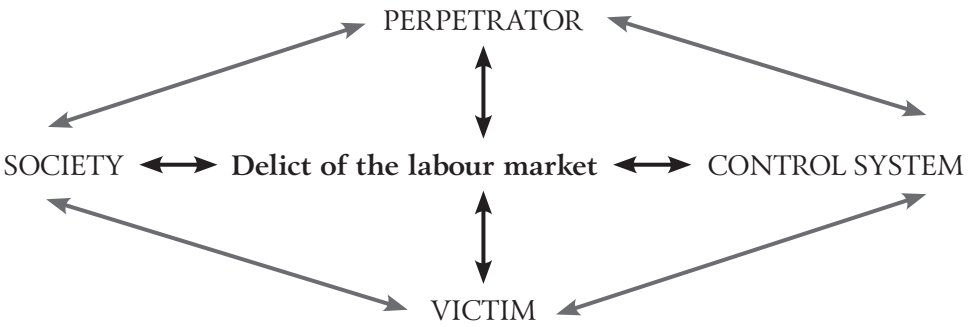
The last area is authority (power) which is understood here in the classic sense, as the ability to take decisions and to influence the behaviour of others[55]. The employment relationship is in many respects connected with subordination and power, which results, for example, from the content of Article 22 of the Labour Code. The list of labour market delicts in this area is relatively long. According to my assessment, this would include arbitrary dismissal for non-economic reasons, non-transparent hiring practices, the retention of foreign employees' forms of identification, the hindrance of visa extensions, unjustified fees charged for performing administrative tasks, all forms of discrimination, and various forms of blackmail from trade unions directed towards employers or company management.

## Phenomenology of delicts of the labour market

Having established pre-designated areas in which labour market delicts can occur, it is possible to focus on defining their social context. To do this properly, we must consider the five basic components[56], namely: a delict of the labour market – as a central category – and the key actors, i.e., the perpetrator and the victim, society, and the social system of behavioural control. In graphical form, this dependency system might look like as follows:

55 S. Ossowski, *O strukturze społecznej*, Warsaw 1982, p. 23 et seq.

56 One of the inspirations for creating this scheme was the analysis of the relationship between the causes and consequences of crime proposed by Frank Schmalleger and presented in the form of an extensive diagram. See F. Schmalleger, *Criminology today. An Integrative introduction*, New Jersey 1999, p. 33.




Let us try to read the content of particular dependencies, starting with the horizontal axis. The labour market is a social product, in the sense that its shape depends on society. The more developed a society is and the more caring the state is, the better the labour market functions. But it is also society that determines what kind of behaviour is considered negative, what is positive, and what behaviour is ignored. As for the control system, it is extremely extensive and includes formal and informal control[57]. In an extreme case, this control takes the form of criminal law, which should be constructed in such a way as to raise as few objections as possible. This is possible when there is consent in society as to the basic values, social preferences, and reasons for social condemnation. The social control system is comprised of all those mechanisms that make the effect of social arrangements serious and receive social sanction.

But the social control system does not always work effectively, which can sometimes have a negative impact on the functioning of the entire social system. This happens when it does not prevent specific negative behaviours or reacts badly when they occur. Perhaps the best example is the operation of the state apparatus, which is too weak and too dependent on employers to limit the use of discriminatory civil-law contracts (sometimes called 'junk' contracts) instead of standard employment contracts or fair civil-law contracts. In this respect, the state is not fulfilling its role or acting preventively[58].

On the vertical axis of the diagram are the two key actors of social interaction – which here we endeavour to call a violation of order on the labour market – that is, the perpetrator and the victim. Their status towards each other determines the existence of an agreed definition of delicts of the labour market.

57 B. Szacka, *Wprowadzenie do socjologii*, Warsaw 2013, p. 161 et seq.

58 There are ongoing attempts to regulate this issue, but for now they have been crowned with partial success. See: *Co dalej z umowami śmieciowymi?* http://infostrow.pl/wiadomosci/co-dalej-z-umowami-smieciowymi/cid,73121; *Zmiany w Kodeksie pracy. Koniec śmieciówek?* http://superbiz.se.pl/wiadomosci-biz/zmiany-w-kodeksie-pracy-koniec-smieciowek_863826.html.

If there was no such definition, then their mutual relationship would be determined according to another scheme.

Let us use an example from the field of *savoir vivre*. It is a good practice that people greet each other when meeting in a small space (a corridor, lift, etc.). In France, this type of behaviour is common; in Poland there is no such habit. When a Pole enters a lift, (s)he most often does everything in his/her power to convince the other person that (s)he is not there. In France such behaviour would be considered rude, while in the Poland it is commonplace.

Everyone accepts that social events are interpreted differently depending on the cultural context and practices of the society[59]. This pattern fully applies to the labour market, especially in the context of a serious problem, which is the creation and use of dependencies resulting from the existence of two key roles: the employer and the employee. It is worth devoting a moment to the issue of relativising assessments of specific pathological behaviours in this specific system.

Although we use the term labour market here, in fact this term should be in quotation marks, because the 'labour market' is not and cannot be a 'normal' market. Let us add to the arguments that have already been discussed extensively one more argument, formulated by the market philosopher Michael Sandel, who said it is time to start demystifying the market and to realise that not everything is for sale, as we have thought. This author demonstrated that the belief in the omnipotence of the market is dangerous because it threatens the idea of equality, and it leads to the erosion of the most important values. Even the wealthy admit there are things that money just cannot buy[60].

This does not mean that we reject wealth and the fact that the rich have more. If someone is an entrepreneur developing a serious business or the president of a large bank, we readily accept that (s)he may have a large house and a luxury car. But if this rich entrepreneur hires a young woman to clean his/her flat and requires that she do it in lacy underwear (an actual example from field research carried out by one of my co-workers), then the question arises whether he is abusing his position as employer. As for the woman's reaction, perhaps depending on the financial situation she is in, she either accepts or rejects the job offer. If she is in an extremely difficult situation and accepts this offer, then we are dealing with a situation of inequality. We cannot accept this inequality as easily as we can accept the fact that someone has a luxury car and someone else does not. So we ask: Does the employer's wealth and the woman's poor economic situation allow the former to set such requirements? Intuition says

59 Such assumptions lie at the core of the Chicago School. See: J. Szacki, *Historia myśli socjologicznej*, Part II, Warsaw 1981, p. 644 et seq.

60 M. Sandel, *What money can't buy. The moral limits of markets'*, New York 2012; M. Sandel, *Czego nie można kupić za pieniądze*, Warsaw 2012.

No. But it is worth going beyond intuition and defining this situation in terms of a labour market delict. There seem to be two possible variants.

In the first variant, the subject of the contract between the parties is housekeeping. The employer expects that it will be done professionally and quickly, and that the work will be performed in lacy underwear. In this particular case, the subject of the transaction is not only the work of a young woman, but it also includes observing her young, attractive, and scantily clad body. While paying for the job is not in doubt, the concern is about paying for a view of the woman's body. But we must clearly state that the employer's specific expectation does not match the features of any criminal offense.

The second variant of the situation may be fundamentally different. In this scenario, the subject of the contract between the employer and employee is that the young woman agrees to reveal her body and to wear lacy lingerie once a week for 4 hours in a place indicated by the employer. From the negotiations between the parties to the contract, it depends on whether at this time the young woman will perform any sort of cleaning activities or not. Similarly to the previous situation, the employer cannot be accused of any criminal charge, but it would be difficult not to assess his behaviour negatively in purely moral terms. If the employee is not being compelled and has accepted the terms of the contract, then the employer's expectation can be considered a whim, and the whim is not punishable.

Although both situations seem to be clear, let us try to subject them to axiological assessment as well. From this perspective, we can say that in the first situation, our doubts are raised by the additional requirement of the employer regarding the employee's 'uniform'. Even if the remuneration is very high, it still must be viewed as a negative effect of inequality. I do not question that the employer is rich and the girl is poor. But I ask, can this obvious inequality lead to this form of abuse? In my opinion, the answer is, No.

The second situation is more obvious in this respect, because a specific contract for the provision of quite special work (walking about partially dressed) has been concluded. If the potential employee was aware of the type of work involved, then we do not include moral categories in the assessment of this situation. After all, women earn their living as models or in similar careers and their work does not raise any objections. Of course, there are exceptions, such as situations involving young girls or when fashion demands lead to serious disorders like anorexia.

Summing up these considerations, one can say that the first case would be a delict of the labour market, but probably not the latter. In the first case inequality and economic coercion would exist, while not in the latter. I do not put matters categorically, because the social dimension of the situation and its social meaning can be interpreted differently by individual participants of the labour market.

Let us take another example. In order to remain in the circle of moral behaviour, let us assume that taking advantage of dependence, a young and rich employer living in a small town uses his employee, a young attractive woman raising a child alone, for sexual purposes. To make the analysis difficult, let us assume that the behaviour of the employer is not typical of rape, but rather the seduction of a dependent person combined with additional payment (e.g., bonuses). The described situation may mean something different for each participant in this interaction, but also as active labour market actors. Consider this point by point:

- for the young entrepreneur, it may be another successful 'conquest', though admittedly a bit forced by circumstances, but the woman did not resist and she received some benefits;
- for the young woman, it may involve humiliation and a trauma that she must endure, because her predicament (a small child and limited economic options) is extremely difficult;
- for any witnesses of this event – e.g., other women from the same company – the observed situation may be a source of frustration and jealousy that the rich, young employer pays attention to this woman and not another;
- for some members of the victim's family, (indirect participants in the labour market) who do not know the truth, this situation may be a source of pride that a rich businessman is interested in their daughter or relative;
- for others, the behaviour of the woman may seem heroic, as they may admire her for how bravely she tolerates this humiliation for the sake of her small child;
- for a labour inspector, policeman, or trade union activist who is aware of the employer's habits, this may be a situation of professional frustration, because everything is arranged so that the perpetrator cannot be charged, because he has not violated any legal norms.

This difficult and complicated social situation was created on the labour market and is associated with the provision of work. It would not have happened if there was not a strong economic dependence between the actors, or if it was not a small town where there were few job opportunities, or if this young woman was not a single mother raising a small child. But it would be less difficult if the labour market was better controlled both by the state and by other social actors, such as non-governmental organisations. Looking at the problem from a research point of view, it can be assumed that criminology of the labour market – even more than classical criminology – should be a science on the borderline of law, especially labour law, social psychology, and social work.

## Delicts of the labour market in the practice of social life

In order to move beyond the circle of theoretical considerations, I made an attempt to empirically determine when phenomena are considered negative by employees. For this purpose and for the purpose of this study, my co-worker[61] and I conducted a very preliminary survey on a targeted sample of 50 people, residents of the Mazovian Voivodeship of Warsaw and the surrounding area. The study took place in the autumn of 2014. The researcher gave the respondents a questionnaire with a few questions about their experience in connection with finding a job. The respondents were young people aged 20–35, mostly women (30 women and 20 men), all of them working or looking for work in the Mazovian Voivodeship. They were relatively well-educated and almost 3/4 of the respondents had higher education or they were enrolled at university. The number of respondents obviously does not meet the criteria of a representative sample. However, although there was a small sample size, our goal was to create the first, preliminary catalogue of negative behaviours on the labour market (delicts of the labour market) and this goal was achieved[62].

We asked the respondents, first of all, whether during the search for a job something they could describe as a negative personal experience occurred. Respondents had complete freedom in naming and describing these experiences. It should be emphasised that in the question we emphasised we were interested in personal experiences, not in second-hand information. Here is the catalogue of the negative phenomena indicated by the respondents:

- the lack of an employment contract or the offer of a 'junk contract',
- low remuneration,
- experience requirements, without offering young people the chance to gain such experience,
- nepotism in employment, connections, filling positions with family, the claim that nowadays you can only get a good job by 'knowing the right person',
- incompatibility of the job offer with reality (e.g., working as a restaurant manager in practice turns out to be cleaning and working in the kitchen),
- irregular remuneration (sometimes waiting several months for salary payments),
- the lack of breaks or very few breaks during working hours,
- an excessive number of tasks imposed,

61 The survey was conducted by Marta Romańczuk, who collaborated with the Human Trafficking Studies Centre of the University of Warsaw.

62 The report is a working document and has not been published (in the possession of the author).

- criticism of the employee and his/her quality of work,
- the use of an official position for private purposes (e.g., ordering payments for private bills, or asking employees to look for practice exams for the national junior high school exam of the supervisor's children),
- inappropriate sexual behaviour, e.g., proposals to meet outside of work,
- frequent telephone calls for work-related issues after working hours or on days off,
- ridicule of an employee in front of others,
- unprofessional job interviews that looked more like a 'casting' audition,
- interviews conducted in the presence of other applicants for the same position, and
- disrespect for new employees, disrespectful treatment, and conflicting assignments.

Interestingly, none of the respondents chose the answer from the questionnaire, '*I have not had any negative experience in the labour market*'. This small sampling allows us to formulate a cautious but categorical conclusion that pathological phenomena in the labour market are quite common. And if this is true, this sector of social and public life should be regarded as in need of a bit more systematic research and, in the long term, intervention as well, perhaps first and foremost from the state.

Only the women surveyed were asked whether they ever had an 'immoral' job offer or questions or suggestions of a potentially sexual nature from a potential employer when looking for a job. It turned out that one in three respondents (about 10), at least once in their life, had met with such a situation, and for the majority, such situations had happened more than once. However, it should be pointed out that the most common types of propositions were sent via e-mail in response to a job search notice posted on the Internet. These were direct suggestions of regular intimate meetings in exchange for remuneration, or meetings after work, as an additional 'obligation' to the offered position of an assistant, secretary, or similar clerical vacancy.

Two women reported ambiguous propositions during their interviews; these suggestions were not formulated explicitly, but in a veiled way, for example, '*Would you like to make an appointment with me for a coffee after work? Of course, it will be additionally rewarded*'. Both of these women were under 23 years of age.

## Conclusion

The labour market is one of the most forgotten areas of social life in Poland. Left to itself as a free market game, somewhat disregarded by politicians and almost abandoned by the state, it has become a place for the emergence of various

pathological phenomena: from widespread use of discriminatory contracts to ambiguous sexual behaviour of employers. It seems that the idea of developing a new area of social analysis, which could be the criminology of the labour market, is timely and needed.

Elementary knowledge about the functioning of society and the economy suggests that the key to understanding human behaviour is the motivations that guide people, or the stimuli to which they respond. In the practice of social life, we all learn to control these motivations and to respond to stimuli. At the level of the social activity of the individual, both of these factors should act to encourage people to do as much good and as little harm as possible. In practice, it usually does not work so simply and people continue to do wrong, highlighting the need for wrongdoings in the labour market to be investigated.

Simplified, it could be said that there are three basic motivational mechanisms that stimulate behaviour: economic motivations, social motivations, and moral motivations[63]. Each of these can be used to analyse the reasons why people do something wrong or why they do not. There are three 'explanations' of avoidance: 1) I do not violate law because it does not pay to do so; 2) I do not do wrong because I do not want other people to hold a negative opinion of me; and 3) I do not do wrong to others because I think this is bad and I will not feel good about it.

Finally, I ask the question of whether and to what extent these three mechanisms can be applied to the analysis of labour market pathology and, in the future, to its rehabilitation?

63 S.D. Levitt, S.J. Dubner, *Freakonomia. Świat od podszewki*, Gliwice 2006, p. 42 et seq.

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## SUMMARY

The aim of this study is to draw attention to phenomena in the labour market which – although not specifically ruled as criminal by nature – can definitely be considered negative or questionable. As the labour market is a highly important sphere of social life, I have attempted to describe this type of phenomena using conceptual apparatus and by following an analytical criminology workshop. To this end, I created a pathology description model for the labour market, the central element of which is a new descriptive category defined as a delict (violation) of the labour market. An important supplement to this model is a proposed new social climate measurement instrument, which, as in criminology, refers to the degree of disturbance of order in the labour market. This level can be measured by the number of labour market delicts per 100,000 employed persons. Negative behaviour in the labour market, herein called delicts, can occur in all dimensions of labour market functioning. Violations of the social order may refer to economic issues, such as wages, employers' and employees' obligations towards one another, and to social issues or important issues concerning work safety – all of which are discussed in some detail. A brief analysis of international and domestic law regulations that control the most important issues related to the functioning of the labour market is presented in the article. I also propose a theoretical model of violations of social order for the labour market and a pattern of dependencies between individual participants of the labour market. The article ends with an analysis of the results of a preliminary survey on behaviours which are not recognised as offenses but considered by employees to be negative.



**Keywords**
criminology, labour market, delict, negative behaviour, forced labour

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# Compliance policy as a manifestation of legal pluralism

**Abstract**
The aim of article is to describe the role of 'compliance norms', which functions as a preventive tool, also deters potential perpetrators of crimes and protects private entities from liability. Author analyzes the system of compliance norms in the context of compliance with criminal law as part of the phenomenon of legal pluralism.

The social, cultural, and technological changes related to the processes of globalisation affect not only social events and interpersonal relationships, but also systems of norms. One situation which can be observed within this context is the development of normative spaces that function alongside state law. State law has never been isolated from external influences, but historically speaking – especially in recent centuries, at a time when nation-states were the basic forms of organising societies – it was state law that constituted the basic system of norms in a given territory. In addition to state law, there were other normative systems – often cross-border ones – in particular, canon law, common law, feudal law, Roman law, and *lex mercatoria*[1]. In the twentieth century, we can also observe an international law becoming more significant in determining the

1 Cf. B.Z. Tamanaha, *Understanding Legal Pluralism. Past to Present, Local to Global*, 'Sydney Law Review' 2008, vol. 30, p. 377 and others.

behaviour of the individual, and – since the mid-twentieth century, on the European continent – the growing importance of EU law.

In fact, contemporary man, when living in the territory of a given state, simultaneously operates within many normative spaces and is obliged to comply with norms resulting from different norm systems. Attempts to conceptualise this phenomenon on the grounds of legal science are made on the basis of the theories of legal pluralism.

Legal pluralism has been the subject of lively debate in legal literature for several decades around the world[2], and in Poland as well[3] So far, however, a uniform theory of legal pluralism has not been developed, which primarily results from discrepancies in the definition of the term 'law' by researchers dealing with legal pluralism.

Without entering into a discussion about the validity of the various theories of legal pluralism found in the literature, it is worth emphasising that a common feature is the way they draw attention to the issue of the multiplicity of legal systems, or more broadly speaking, normative systems[4]. Regardless of how one defines and understands the law, one cannot help noticing that today, in the same geographical area, several normative systems coexist in the social order. Law in a positive sense is only one of them. Some of these other systems have a supranational origin, while others originate outside of any state. All of them, however, impose on an individual some obligation regarding a particular manner of behaviour.

I have already taken on legal pluralism as a research subject[5]. This article, however, serves to broaden the scope of current research. The purpose of this study is by no means to attempt to define the concept of 'law' or to formulate a theory of pluralism, but simply to apply the conceptual framework and the theory of legal pluralism – or more broadly speaking, normative pluralism[6] – to an analysis of new trends in crime prevention.

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2 Cf. Ibid., p. 376.

3 Cf. J. Winczorek, *Pluralizm prawny wczoraj i dziś. Kilka uwag o ewolucji pojęcia* [in:] *Pluralizm prawny: tradycja, transformacje, wyzwania*, eds. D. Bunikowski, K. Dobrzeniecki, Toruń 2009, p. 13.

4 Cf. S. Ehrlich, *Wiążące wzory zachowania. Rzecz o wielości systemów norm*, Warsaw 1995, passim; Idem, *Norma. Grupa. Organizacja*, Warszawa 1998, p. 62 and others.

5 C. Nowak, *Wpływ procesów globalizacyjnych na polskie prawo karne*, Warszawa 2014, p. 39 and others.

6 The concept of 'normative pluralism' was also used by J. Griffiths in the work: J. Griffiths, *The Idea of Sociology of Law and its Relation to Law and to Sociology* [in:] *Law and Sociology*, ed. M.D.A. Freeman, Oxford 2006, pp. 63–64 https://dx.doi.org/10.1093/acprof:oso/9780199282548.003.0004. This concept seems more accurate for the description of compliance norms.

The starting point for the following analysis is the claim that among the entities whose law-making authority is likely to determine people's conduct, the role of private-sector entities – especially transnational corporations[7] – has increased in recent decades. The rules of conduct created by international companies are growing in number and are simultaneously gaining more and more importance, in the context of criminal law as well. A special role in these organisations is played by the norms included under 'compliance', which functions as a preventive tool, meant to deter potential perpetrators of crimes and to protect private entities from liability. This article serves as an attempt to show the system of compliance norms as part of the phenomenon of legal (normative) pluralism. At the beginning of the discussion, however, it is necessary to clarify two points.

First of all, I must address the problem of terminology. In Polish legal language, different terms are used to describe the issue of compliance, including compliance, compliance policy, compliance culture, and compliance programmes. There are also the concepts of 'compliance norms' and 'adherence norms'. In turn, the Polish legislature uses the phrase 'the system of monitoring the compliance of activities with the law' or shorter: 'compliance supervision'. In this study, I will use the synonyms which most accurately reflect, in my opinion, the normative and systemic nature of the regulatory feature we are dealing with: compliance norms and compliance policy.

Secondly, it should be noted that compliance norms, which are intended to bring about compliance of the organisation's activities with existing laws, may cover a wide range of issues. However, due to my research interests, for the purpose of this study, compliance will be perceived only in the context of compliance with criminal law, as an instrument which serves to limit the liability of natural and legal persons for committing a prohibited act.

In my opinion, the genesis of compliance norms is connected with the growth of the processes of globalisation in the late 20th century[8]. Along with the economic expansion of private-sector entities, increased competition, and the pursuit of profit, these entities were willing to engage in illegal activities, which, in turn, was associated with a significant increase in legal risk for these entities. There is no doubt the basic risk associated with running a business is the risk of economic failure and, consequently, a lack of a profit, as securing a profit is,

7 This term will be used as T. Braun understands it: as a special type of enterprise which conducts business on an international scale, most often with a complex ownership structure consisting of interrelated entities and shared authorities at the highest level of consolidation. Cf. T. Braun, *Unormowania compliance w korporacjach,* Warszawa 2017, p. 57.

8 Some authors, however, compare their activities to the rules imposed on members of medieval merchant guilds. Cf. T. Braun, *Unormowania compliance w korporacjach…*, p. 23.

after all, the essence and the purpose of running a business[9]. However, the legal risks – in particular those related to liability of a repressive nature – have become more and more important in recent years for the activities of business entities (especially in the US, initially). Their greater importance was connected with, firstly, the growth in economic crime; secondly, the increased investigative output of state organs against perpetrators of white-collar crime; and thirdly, the birth and development of the concept of the criminal liability of legal entities. The compliance policy which originated in the United States, therefore, is a tool for limiting the legal risks related to running a business, both by companies and by the natural persons managing them. In the US, these risks emerged when it came to light that American corporations attempted to bribe foreign public officials and when federal legislation aimed at preventing and combating this type of behaviour was introduced[10].

In general, the risks associated with repressive liability can be divided into two categories. In the chronological development of the law, the criminal responsibility of natural persons came first – as responsibility based on culpability. Managers (including board members and supervisory board members) and employees, even associates of the company, are all subject to criminal liability.

The second form of responsibility, also related to running a business, is the liability of legal entities. The basic *ratio legis* of this form of liability is, firstly, the removal of any benefits arising from the offense committed from the entities that actually benefited from it, and, secondly, the need to hold to account those entities that in fact contributed to the commission of a prohibited act[11]. In Poland, the liability of legal entities is based *de lege lata* on the rules provided for in the Act from 28 October 2002 on the liability of collective entities for acts prohibited under penalty of law[12]. This responsibility in Polish law is currently constructed as a liability, which depends – in both financial and procedural terms –on the responsibility of a natural person associated with a collective entity.

The formation of the liability of legal entities for prohibited acts committed on their behalf was a turning point in the fight against economic crime. The sanctions which were applied to legal entities, especially in the US, were in fact

9 According to Art. 2 of the Act from 2 July 2004 on the freedom of economic activity, Dz. U. 2017, item 2168, as amended, business activity is an activity targeted at generating profit.

10 The 1977 Foreign Corrupt Practices Act. Cf. C. Nowak, *Korupcja w polskim prawie karnym na tle uregulowań międzynarodowych*, Warszawa 2008, p. 99 and the literature quoted there.

11 Dz. U. 2018, item 703 with amendments.

12 The reasons for introducing the liability of legal entities for crimes have been widely discussed by R.S. Gruner, *Corporate Criminal Liability and Prevention*, New York 2017, pp. 2–13 and others.

severe. On the other hand, managers of legal entities realised that most often, due to the number of staff employed and to practical considerations, they do not have the actual ability to control the behaviour of their employees at all times – even though the managers will be held accountable if their staff engage in illegal activities. Therefore, the managers, for themselves and on behalf of the companies they managed, were interested in developing tools that would protect them from allegations of illegal activity. Compliance is a response to their needs in this regard: it is a tool of exculpation, designed to reduce or even completely eliminate one's accountability.

Compliance means agreement. In legal contexts, the term compliance refers to the process of creating, adopting, and enforcing standards (rules and procedures) within an organisation which ensure its activities are in compliance with the law[13]. The main goal of this process is to make the organisation compliant with statutes of applicable positive law, in particular labour law, financial law, environmental law, repressive law, and especially criminal law. In addition, it can be pointed out that an organisation's implementation and adherence to compliance standards is designed to prevent financial losses or the loss of reputation and trust, but this is a secondary goal of compliance. From a legal point of view, conformity norms are the most important; nevertheless, one must remember compliance policy is also an element of corporate governance – that is, modern business management.

The content and scope of compliance norms in a company is determined by several normative areas. First of all, supranational regulations, including international law and EU law, play a role in their formulation. Secondly, a company must protect itself against the consequences of violating national law; therefore, compliance norms must refer to lower-level acts and any applicable laws of a regulatory nature. Thirdly, compliance standards include internal regulations – in particular, company policies and corporate charters, as well as soft law instruments, i.e., standards accepted by the company, which may include codes of ethics and best practices. It is also worth pointing out that private entities are self-regulated in the area of soft law[14] which in some sectors of the economy is very

13 B. Jagura proposes differentiating compliance in the material sense from compliance in the formal sense. Cf. B. Jagura, *Rola organów spółki kapitałowej w realizacji funkcji compliance,* Warszawa 2017, p. 32. In turn, T. Braun formulates a mixed definition. Cf. T. Braun, *Unormowania compliance w korporacjach…*, p. 13.

14 According to the definition proposed by P. Trudel, 'Self-regulation refers to standards voluntarily developed and adopted by those who are involved in some activity.' Cf. P. Trudel, *Quel droit et quelle regulation dans le cyberspace?*, 'Sociologie et Sociétés' 2000, No. 2, p. 205.

actively developed, not only independently by corporations but also by trade associations within particular spheres of the economy[15].

The standards that are subject to compliance policy usually concern three issues: the prevention of non-compliance, the detection and response to non-compliance, and improvements within the company which can avoid such non-compliance in the future. An important tool for building a compliance policy in an organisation is risk analysis, i.e., identifying critical points of the organisation's operations that may be used for fraud.

Therefore, compliance policy typically aims to regulate several areas of the company's operations. First of all, it refers to standards for settling matters (in particular, entering into contracts) which seek to ensure that the behaviour of employees and associates of the company in relations with others from outside of the organisation who cooperate with the company – such as contractors – remains consistent with applicable laws (e.g., regarding corruption, money laundering, and environmental protection). Secondly, compliance norms also apply to the rules of communication within the corporation to prevent an act of non-compliance with the potential for liability being committed or identified as part of the company's operations. In particular, this includes providing channels of communication (even anonymous ones) to the people in charge of the company and to those responsible for ensuring the company's activities adhere to the law[16]. Thirdly, compliance policy comprises a code of ethics in the company, which aims to internalise the provisions of state law and internal procedures defined by other standards of compliance.

As was already mentioned, the concept of introducing comprehensive compliance policies was originally developed by private-sector entities in the US as a tool to defend themselves against allegations from law enforcement agencies and the judiciary system. With time, however, with the progress of globalisation and the growing presence of American corporations in other countries, it began to spread. Initially, such policies were in force in the subsidiaries of US-based companies, as part of transnational corporations, and they later appeared in enterprises operating exclusively on a national scale as well. These companies employ 'compliance officers,' whose duties include drawing up drafts of legal instruments containing compliance standards, which are then adopted by the

15 For example, the Wolfsberg Group, which comprises 13 banks operating on a global scale, has significant law-making activity in the banking sector. See https://www.wolfsberg-principles.com (accessed on 11/10/2018).

16 In this context, attention should be paid to the problem of protecting whistleblowers, that is, employees who report non-compliance they discover within their organisation to superiors or state authorities. In Poland, the issue of whistleblower protection, especially in the workplace, is currently not regulated. For more, see: http://www.batory.org.pl/programy_operacyjne/przeciw_korupcji/wsparcie_i_ochrona_sygnalistow (accessed: 11/10/2018).

company's management, as well as ensuring compliance with these standards in the day-to-day work of the organisation. In addition, compliance norms are typically an element of employee training provided to new hires, and more broadly speaking, adherence to those norms is one of the basic duties of employees.

This essentially means that numerous groups of people employed by individual corporations are bound not only by the norms of universal law, but also by internal rules included in the compliance policies of their organisations, rules which define, among other things, the principles of employee behaviour and communication with others both within the organisation and outside of it. Compliance norms are binding and involve sanctions – not conventional ones, known from positive law, but no less severe – the most severe ones being the loss of one's job, and thus one's source of income. In this way, compliance policy shapes the conduct of those obliged to abide by it. As a result, in my opinion, the standards included in a compliance policy can be regarded as a normative system.

At the same time, compliance policy is an example of a transnational normative system: the standards of conduct that it comprises apply to the employees of a given enterprise (transnational corporation) regardless of their place of work. Therefore, compliance norms cross national borders, as well as cultural barriers, leading to uniformity in procedures and employee conduct within the organisation around the globe. As a consequence, they constitute a separate level of regulation[17] in the complicated modern structure of intersecting normative systems that regulate the operations of legal entities.

It is worth noting that the importance of compliance policy as a set of rules determining people's conduct – rules which were voluntarily and spontaneously developed by private-sector entities – is modified and transcends the scope of a given organisation. Internal compliance norms are typically shaped by the enterprise in question, though this undoubtedly happens in relation to state law. In time, however, trade associations started to play the role of lawmaker in this area, bringing together entities operating in a specific sector of the economy.

The most developed compliance standards apply to the financial sector – in particular, to capital markets – and this applies to Poland as well[18]. There are a number of legal instruments that recommend the implementation of a compliance policy, with varying degrees of obligation for those the policies would address.

One of the most important non-binding legal acts is undoubtedly 'Good Practices of Stock Exchange Listed Companies', the 2016 version of which

17 W. Twining, *General Jurisprudence. Understanding Law from a Global Perspective*, Oxford 2009, p. 70.

18 Cf. T. Braun, *Unormowania compliance w korporacjach…; B. Jura*, B. Jagura, *Rola organów spółki…*

stipulates, 'a listed company has effective systems of internal control, risk management, and supervision of compliance with the law, as well as the function of an effective internal audit, appropriate for the size of the company and the type and scale of its operations'. This general obligation is further specified in the following way: 'The system of supervision of compliance serves to examine the adherence of the company's activities in all areas and aspects of these activities with applicable law, internal regulations, and voluntary standards'.

In recent years, however, in Poland as well, we can observe the development of the state's involvement in the creation of compliance norms. This process has been most evident in the US, where the existence of a compliance programme, as laid out by federal guidelines[19], is a prerequisite for mitigating liability and penalties for criminal acts committed by legal persons[20].

In this respect, the Polish legislature has adopted two strategies. The first one is to introduce the obligation of private sector entities operating in certain sectors of the economy to implement a compliance policy, while refraining from regulating in detail the content of compliance standards that make up the compliance policy. The second strategy, however, is to introduce binding recommendations concerning the content of compliance norms.

An example of the first strategy is the rules that apply to banks. In the 2007 amendment to the Banking Law Act[21], the obligation for banks to set up an internal control system was introduced, the purpose of which, according to Art. 9c, was 'to support decision-making processes which contribute to ensuring: 1) the effectiveness and efficiency of the bank's operations, 2) the reliability of financial reporting, and 3) the compliance of the bank's operations with the law and internal regulations'.

The refinement of this norm was made pursuant to the 2015 amendment[22]. Art. 9c (1) of the Banking Law Act now states that 'the objective of the internal control system is to ensure: 1) the effectiveness and efficiency of the bank's operations; 2) the reliability of financial reporting; 3) compliance with the bank's risk management principles; and 4) compliance of the bank's operations with laws, internal regulations, and market standards'. In turn, according to Art. 9c (2), it is necessary to distinguish within the internal control system 'a compliance cell

19 United States Sentencing Commission, 2016. Chapter 8 – Sentencing of Organizations, § 8 B 2.1, https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8 (accessed: 11.10.2018).

20 United States Sentencing Commission, 2016. Chapter 8 – Sentencing of Organizations, §8C2.5.

21 The Act from 26 January 2007 amending the Banking Law Act, Dz. U. 2007, No. 42, item 272.

22 The Act from 5 August 2015 on macro-prudential supervision over the financial system and crisis management in the financial system, Dz. U. 2015, item 1513.

tasked with identifying, assessing, controlling, and monitoring the risk of non-compliance of the bank's operations with the law, internal regulations, and market standards as well as with submitting reports in this respect.'

The regulations relating to compliance policy in the field of trading in financial instruments are much more extensive. Within the EU, instituting a control system of compliance is the responsibility of investment firms, pursuant to Art. 6 of Commission Directive 2006/73/EC from 10 August 2006, which introduces implementation measures to Directive 2004/39/EC of the European Parliament and Council with regard to organisational requirements and operating conditions for investment firms and the concepts defined for the purposes of this Directive[23]. This provision was specified in Polish law in § 24 of the Regulation of the Minister of Development and Finance from 29 May 2018 regarding detailed technical and organisational conditions for investment companies and banks referred to in Art. 70 (2) of the Act on trading in financial instruments and fiduciary banks[24].

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23 OJ L (Official Journal of the European Union) 241, 2 September 2006, pp. 26–58.

24 Dz. U. 2018, item 1111.

1. The legal compliance monitoring system adopted by investment firms includes:
   1) the type and scope of the activity carried out by the investment firm, including brokerage activities referred to in Art. 69 Paras. 2 and 4;
   2) technical and organisational solutions used to conduct brokerage activities;
   3) the number of persons performing brokerage activities;
   4) the number and categories of clients;
   5) the type of financial instruments being brokered; and
   6) risks related to the activities of the investment firm, including brokerage activities, risks related to the business model, and systems used in the business conducted by the investment company.
2. The investment firm shall separate in its structure a unit for the supervision of compliance with the law. If it is justified by the type and scope of activities carried out by the investment firm, the activities of monitoring compliance with the law may be performed as part of a single-person job. In such a case, the provisions of the regulation concerning the cell for compliance with the law are applicable to the one-person position of supervision of compliance.
3. Where justified by the circumstances specified in Art. 22 (4) of Regulation 2017/565, monitoring the compliance of activities may be performed by a member of the board of directors.
4. A person who performs legal compliance activities – in the case of a single-person position or the person who manages the compliance control unit (supervisor) – reports to the member of the board of directors who has been assigned such competence in the relevant internal regulations of the investment firm. […]
8. The supervisory inspector, depending on the needs, at least once a year, shall draw up a written report on the functioning of the monitoring system of compliance with the law, which shall include in particular:
   1) an assessment of the adequacy and effectiveness of the adopted system for monitoring the compliance of activities with the law in the period to which the report refers;

An example of the second of strategy of the Polish legislature – and, at the same time, the most far-reaching example of a national compliance policy – is the draft bill on transparency in public life from 12 December 2017[25]. Chapter 10 of this bill, entitled 'Counteracting corrupt practices', contains specific provisions requiring the implementation of specific compliance standards aimed at preventing corruption. According to the provisions of the draft bill, this obligation will apply to two types of entities: medium-sized or large enterprises as defined by the Act of 2 July 2004 on the freedom of economic activity (Article 70 of the draft) and persons managing an entity in the public finance sector (Article 71 of the draft).

The most interesting issue here is the provision which obliges entities in the public finance sector to implement an anti-corruption compliance policy. This is the clearest example of transplanting the concept of compliance standards from the private sector to the public sector.

The relevant provision in the bill is very detailed. The purpose of internal anti-corruption procedures was to counteract the crimes specified in Arts. 228, 230, 230a, 231 § 2, 246, 250a, 286, 296, and 305 of the Act from June 6, 1997 of the Penal Code; Art. 46 (1), Art. 46 (4) and Art. 48 of the Act from

2) a description of the actions taken during the period to which the report applies by the unit for supervising compliance as part of performing duties with reference to identified risks related to the activity of the investment company, including those related to brokerage, risks associated with the business model, and the systems used in the activities conducted by the investment company;
3) an indication of the measures taken or proposed in cases of non-compliance with legal provisions regulating the conduct of brokerage activity or the determination of the risk of such non-compliance;
4) a description of significant issues related to the functioning of the compliance monitoring system, other than those specified in Points 1–3, which occurred since the submission of the previous report.

9. The supervisory inspector shall simultaneously submit the report referred to in Para. 8 to:
1) the member of the bank's board of directors who supervises the conduct of brokerage activities and to the supervisory board, in the case of a bank conducting brokerage activities;
2) the board of directors and the supervisory board, in the case of a brokerage house established as a partnership or a limited liability company;
3) general partners who have the right to run the company's business and the supervisory board, in the case of a brokerage house established as a limited joint-stock partnership;
4) general partners or limited partners who have the right to run the company's business, in the case of a brokerage house established as a limited partnership, a limited liability partnership, or an unlimited partnership.

10. The provisions of Paras. 1–9 do not apply to a foreign investment firm.

[25] The draft bill is available (in Polish) on the website of the Government Legislation Centre: https://legislacja.rcl.gov.pl/projekt/12304351/katalog/12465401 (accessed 11.10.2018).

June 25, 2010 on sport; and Arts. 54 (1), 54 (2), 54 (3) of the Act from May 12, 2011 on the reimbursement of medicines, food for particular nutritional purposes, and medical devices. The content and purpose of compliance norms were defined as follows: 'The term «using internal anti-corruption procedures» means that organisational, personnel, and technological measures are taken to counteract the creation of an environment conducive to corruption crimes, in particular by 1) developing a code of ethics for the entity, a declaration rejecting corruption, signed by each employee, associate, or soldier in the unit; 2) familiarising employees with the principles of criminal liability for the offenses referred to in Para. 1; 3) identifying positions particularly vulnerable to corruption and identifying the inherent corruption threats for the entity; 4) defining an internal procedure and guidelines regarding gifts and other benefits given to employees; 5) refusing to take decisions based on corrupt activities; 6) developing procedures for informing the appropriate manager within the entity about corrupt offers and situations generating an increased risk of corruption; and 7) developing internal procedures for dealing with non-compliance'.

This draft bill has not yet been adopted, and the government has focused on preparing an amendment to the Act on the Liability of Collective Entities for Prohibited Actions. This amendment's objective is to change the procedural model for the liability of collective entities by making it independent from the liability of natural persons who commit an act for the benefit of a legal entity. It is also possible to tighten the sanctions imposed on collective entities. The amendment is meant to include provisions instating an obligation for an organisation to introduce a compliance policy.

The statement which I expressed elsewhere that in the context of criminal law, the state is still the strongest and most significant law-making entity[26], both at the national and supranational level, is still valid, as is the claim that the role of the state in the process of creating norms for preventing and combating crime is undergoing a transformation.

The state unquestionably remains the main creator and enforcer of criminal laws. However, faced with various forms of economic crime, the state must resort to new, non-traditional responses to crime, and to new mechanisms for the prevention of crime. A compliance policy is a private – though partly public – instrument for the prevention of crime, based on ethical principles and corporate governance within the organisation. However, corporations do not invest considerable effort into its creation and implementation selflessly. On the contrary, a compliance policy has a very pragmatic side: it is profitable for corporations because if the worst-case scenario occurs and a natural person associated with the organisation commits a crime, the organisation can discharge itself

26 Cf. C. Nowak, *Wpływ procesów globalizacyjnych…*, p. 46.

of liability thanks to its compliance policy. It can even be said that by creating a national compliance policy, that is, by introducing into state law the requirement of instituting such a policy, the state obliges corporations to monitor themselves and to voluntarily report non-compliance, including crimes, to the state. However, compliance policy also pays off for the state, because it leads to a decrease in the occurrence of crimes. We are dealing here with a transactional approach to law, characteristic of common law systems, where the preventive objective prevails over the repressive goal.

The normative system, which compliance norms make up and which was originally created spontaneously for the needs and activities of private entities, has undergone an interesting transformation, because it has been taken over by positive law as an effective and pragmatic crime prevention tool. However, the private entity is still the direct creator and enforcer of compliance norms within compliance policy, even if their content, at least in general terms, is specified in positive law. Thus, as a set of norms obliging the addressees to behave a certain way, compliance policy is another normative system that makes up a complicated picture of the normative pluralism with which an individual is faced.

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## SUMMARY

The aim of article is to describe the role of 'compliance norms', which functions as a preventive tool, also deters potential perpetrators of crimes and protects private entities from liability.

Author distinguishes two strategies, which have been selected by the Polish legislature, and deals with concrete examples and their peculiarities in Polish law. The first one is to introduce the obligation of private sector entities operating in certain sectors of the economy to implement a compliance policy, while refraining from regulating in detail the content of compliance norms.


**Keywords**
compliance norms, compliance policy, legal pluralism, criminal law

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# The Consistency of Polish Competition Law with ICN Recommendations – the Example of the Merger Notification Obligation[1]

**Abstract**
The regulation of the merger notification obligation lies at the heart of the system of merger control. It defines what transactions are caught under the scrutiny of competition authorities, and which undertakings are obliged to notify them. The International Competition Network (ICN), which is a virtual network of competition authorities, has developed a series of recommendations for the proper construction of a merger notification obligation. The analysis presented here is limited to substantive provisions and the merger procedure itself is not covered by the paper. The article aims to confront the ICN Recommendations and the Polish regulations. It will identify areas of compatibility and discrepancy between the two sets of norms. The conclusions may serve as a basis for further development and the fine-tuning of the Polish merger control system. The analysis will also contribute to scholarship on the influence of transgovernmental networks on domestic legal order and the administrative practice of public authorities.

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**Abstrakt**
Określenie prawnego obowiązku zgłaszania koncentracji jest kluczowym elementem systemu kontroli koncentracji. Regulacja ta wskazuje jakie koncentracje podlegają obowiązkowi ich zgłoszenia do organu antymonopolowego oraz na jakim przedsiębiorcy ten obowiązek spoczywa. Międzynarodowa Sieć Konkurencji (ICN) stanowiąca wirtualną sieć organów konkurencji stworzyła serię wytycznych w jaki sposób należy konstruować obowiązek zgłoszenia koncentracji w prawie krajowym. Przedmiotem analizy są jedynie regulacje materialnoprawne, zaś regulacje procesowe pozostają poza przedmiotem analizy. Celem artykułu jest porównanie wytycznych ICN z przepisami polskimi. Zidentyfikowane zostaną pola spójności i rozbieżności pomiędzy regulacjami polskimi i wytycznymi ICN.

Wyniki przeprowadzonych badań mogą stanowić dobrą podstawę do dalszego rozwoju i doskonalenia polskiego systemu kontroli koncentracji. Przeprowadzona analiza wzbogaci również dotychczasowe badania dotyczące wpływu ponadnarodowych sieci organów administracji na krajowy porządek prawny i praktykę organów administracji publicznej.

## Introduction

Merger control aims to prevent anticompetitive concentrations from adversely affecting market structure and harm consumers. It is neither possible nor justifiable to review all mergers. Therefore, when introducing the merger control regime, legislators around the world limit the scope of the antimonopoly review to only potentially problematic transactions. A properly designed merger obligation will prevent competition authorities from scrutinising trivial transactions and allow them to concentrate their scarce resources on reviewing exclusively potentially problematic mergers. The substantive scope of merger review is of crucial importance to undertakings, because it may limit or increase transaction costs exponentially. The problem became more evident together with proliferation of merger control regimes, which resulted in the obligation to notify the same transaction in multiple jurisdictions[2]. It should not be surprising that transgovernmental networks of competition authorities began to analyse this problem and to address it by adopting recommendations and other soft law

2 The first comprehensive report capturing this phenomenon was published by the OECD. See D. Wood, R. Whish, *Merger cases in the real world. A study of merger control procedures*, Paris 1994.

documents concerning the proper regulation of the merger control system, and the growing need for international convergence in this area of antitrust.

The aim of this article is to confront recommendations on merger notification obligations issued by the largest network of competition authorities, i.e. the International Competition Network (ICN), with the relevant Polish provisions. The effect of this confrontation will show the possible impact on the domestic legal order of the soft law adopted by transgovernmental networks. In addition, the results will be relevant for discussions on how networks can ensure that their members comply with the soft law rule they together approved. The analysis provided in the article is limited to substantive issues. Procedural issues are also relevant, but it would require extensive additional research and it would be hardly possible to present them within one article[3]. The article is structured as follows: first, the ICN will be introduced together with a brief presentation of the ICN recommendations on the merger notification obligation. It will be followed by a concise description of the Polish merger control system and its main developments in relation to the merger notification obligation. Subsequent sections offer a detailed analysis of the Polish merger notification obligation, including turnover criteria, substantive criteria and exemptions. The final section shows the level of compliance of Polish rules with the ICN recommendations and is followed by conclusions.

## ICN Recommendations in relation to the merger notification obligation

The ICN is a virtual and informal network established on October 25, 2005 in New York by 14 high representatives of competition authorities[4]. The ICN is currently the largest network of competition authorities from all over the world and is open to any new agency that wishes to join the network[5]. The ICN has a flexible organisation and is project-oriented. It is led by the Steering Group

3 The detailed analysis of the Polish merger procedure and its comparison to internationally recognised standards is provided by M. Błachucki: M. Blachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012, pp. 114 – 127; M. Błachucki, *Postępowanie antymonopolowe w sprawach koncentracji w świetle aktów prawa wtórnego Rady Europy* [in:] *Kierunki rozwoju prawa administracyjnego,* ed. R. Stankiewicz, Warszawa 2011, pp. 9–22.

4 The origins of ICN are discussed by Y. Devellennes, G. Kiriazis, *The Creation of an International Competition Network*, 'Competition Policy Newsletter' 2002, No. 1, pp. 25–26.

5 It consists of almost 120 jurisdictions bringing together almost all functioning national competition authorities. There is only one major exception – the People's Republic of China. However, after the merger of three Chinese competition authorities into one, the likelihood of China joining the ICN has increased.

and most of the work takes place within working groups[6]. It fits the practical needs of competition agencies who want to develop their expertise in the area of competition law. The ICN is open to non-governmental advisors who participate in the work of the network. The ICN is an information network that enables its network members to share information and exchange their experience in the field of competition policy. The network is devoted exclusively to competition law and policy covering all crucial areas of antitrust, namely antitrust, unilateral conduct, merger control and institutional and policy issues of antitrust enforcement. It organises conferences, workshops and webinars as well as teleconferences depending on the needs of its members. The ICN is primarily a soft law network that has adopted numerous recommendations and best practices, as well as handbooks and manuals for the competition community[7]. Those documents are ultimately aimed at the progressive convergence of the administrative practice of national competition authorities and national competition laws. The ICN is probably the most successful network of competition authorities and constitutes the best solution for the development of international antitrust rules and cooperation in the absence of any likelihood of adopting an international antitrust treaty[8].

There are three soft law documents of ICN related to the construction of the merger notification obligation: 1) ICN Guiding Principles for Merger Notification and Review[9], 2) ICN Recommended Practices for Merger Analysis[10], and 3) ICN Recommended Practices for Merger Notification and Review Procedures[11]. Those documents are of a different character and length, but they are all relevant for the analysis of the subject. The second and the third documents are accompanied by comments prepared by the ICN Merger Working Group. Those

6 At present there are five ICN working groups: Advocacy, Agency Effectiveness, Cartel, Merger and Unilateral Conduct.

7 The list of the ICN's soft law documents may be found in *ICN Work Products Catalogue (June 2016)*, http://www.internationalcompetitionnetwork.org/uploads/library/doc1002.pdf (accessed 15/08/18) and *Summary of ICN Work Product 2016–2017*, http://www.internationalcompetitionnetwork.org/uploads/library/doc1100.pdf (accessed 15/08/18).

8 For more analysis on the ICN please refer to *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, ed. P. Lugard, Cambridge–Antwerp–Portland 2011. In Polish literature, the ICN is discussed by B. Michalski, *Międzynarodowa koordynacja polityki konkurencji,* Warszawa 2009, pp. 201–230; R. Molski, *Prawo antymonopolowe w obliczu globalizacji*, Bydgoszcz–Szczecin 2007, pp. 72–74; M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012, pp. 81–82.

9 http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf (accessed 01/08/2018).

10 http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (accessed 01/08/2018).

11 http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf (accessed 01/08/2018).

comments are updated periodically and offer more detailed analysis of particular standards.

The first document has been historically the first and the most general document in the area of merger control. The ICN Guiding Principles for Merger Notification and Review is a short set of basic and fundamental guidelines for the merger review system. The document expresses the most important principle – sovereignty of all jurisdictions. This principle means that all countries are free to choose the most appropriate merger control rules for them. However, when choosing the merger rules for a particular jurisdiction, the public authorities should follow the third guiding principle – non-discrimination on the basis of nationality. Finally the seventh guiding principle calls upon jurisdiction to seek the convergence of merger review processes toward agreed best practices.

The second document is devoted to a substantive analysis of notified mergers. However, one of the agreed standards may be also applicable to merger notification obligation. The principle I.B recommends that 'a jurisdiction's merger review law and policy should provide a comprehensive framework for effectively addressing mergers that are likely to harm competition significantly'. Comments made by the ICN Merger Working Group underline that merger control rules should be flexible and enable competition authorities to capture and review all problematic merges. Therefore, merger rules should be broad enough to cover potentially anticompetitive transactions, regardless of how the transaction is structured. As a result, the power to review a merger should not be based on the form or technicalities of a merger agreement. Finally, any exceptions to the merger notification obligation should be avoided or limited and narrowly drawn, clearly delineated, and reviewed periodically.

The ICN Recommended Practices for Merger Notification and Review Procedures is the most comprehensive soft law document adopted by the ICN relating to merger control obligation and merger procedure. First it recommends how the concertation for the purpose of merger control should be defined. Jurisdictions should be careful with this definition and make sure it covers 'transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure' (I.A[12]). Furthermore, national legislators should clearly define 'concentrations'. The recommended method is by preparing a list of 'categories of transactions, such as share acquisitions and acquisitions of assets', together with defining crucial concepts, 'such as the acquisition of «control» or of a «competitively significant influence», as defined by the reviewing jurisdiction' (I.B). Secondly, the ICN recommends that national legislators limit the obligation to notify mergers only to those

12 The numbers in brackets indicate the number of specific recommendation from the ICN document.

'transactions that have a material nexus to the reviewing jurisdiction' (II.A). In order to establish an adequate material nexus, it should be based on *appropriate standards* (II.B). Furthermore the nexus of the concentration should only be related to 'activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory, and/or by reference to the activities of the acquired business in the jurisdiction' (III.C). The third set of recommendations underline general legislative principles. It is crucial that 'notification thresholds should be clear and understandable' (II.D). Furthermore, should the national legislator choose the mandatory notification system, 'thresholds should be based on objectively quantifiable criteria' (II.E). Some of recommendations echo the previously mentioned principles such as the need to 'periodically review their merger control provisions to seek continual improvement' (XIII.A) and the need to promote the convergence of national merger control provisions towards recognised best practices (XIII.B).

This brief recapitulation of the ICN recommendations on the merger notification obligation shows that the ICN tries to achieve a coherent level playing field for merger control systems around the world. The network promotes clear and objective rules for the construction of the notification obligation in order to facilitate their application and eliminate jurisdictional problems. The inevitable consequence of applying the ICN recommendations is a significant reduction in the number of notifications. It is also clear that the ICN is trying to limit the merger control system to purely competition-related principles, which leaves any non-competition-related values out of the picture. Such an ambitious goal will not always fit into the national legislators' agenda. Furthermore, in spite of the ICN's absolutist approach to merger control, in the real life merger control systems often serve not only competition-related goals. Therefore, some inconsistencies between ICN recommendations and national provisions should be expected in all jurisdictions.

## Merger control in Poland – overview of the system

The merger control system in Poland is based on the Antimonopoly Act[13] and two implementing regulations[14]. Furthermore, there are two sets of guidelines issued by the Polish competition authority: one devoted to jurisdictional and

13 The Act on Competition and Consumer Protection of February 16, 2007, Dz. U. 2018, item 798.

14 Regulation of the Council of Ministers of December 23, 2014 on the notification of intended concentration of undertakings, Dz. U. 2018, item 367 and Regulation of the Council of Ministers of December 23, 2014 on the calculation of the turnover of undertakings participating in the concentration, Dz. U. 2015, item 79.

procedural aspects of merger control,[15] and the other one dealing with substantive merger analysis.[16] The case law of Polish courts in relation to merger control is very scarce and offers very little if any real guidance. Therefore, the crucial role in the development of the Polish merger control system lies in the hands of the Polish antimonopoly authority, which is solely responsible for merger control in Poland[17]. The President of the Office for the Competition and Consumer Protection (OCCP) is the antimonopoly authority in Poland. The antimonopoly authority is a central public administration authority that has two main domains of activity: first, 'traditional' antitrust matters connected with the protection of competition (in the public interest), and the second one connected with the protection of consumer interests. The antimonopoly authority in Poland is not independent and the President of the OCCP has no fixed term of office and may be dismissed at any time and for any reason by the Prime Minister. The OCCP has exclusive jurisdictional powers and relies completely on an inquisitorial system of proceedings. The authority initiates, investigates and decides on merger cases. The OCCP has powers to clear a merger, order remedies or prohibit a transaction. Appeals against the rulings of the antimonopoly authority are heard by the antimonopoly court[18]. Administrative courts play only a subsidiary role in antimonopoly adjudications. The OCCP is composed of the central office in Warsaw, and nine regional offices. The central office consists of 21 divisions and one of them is the Department of Concentration Control. This department deals exclusively with merger control and the regional offices play no role in merger control in Poland. This brief introduction shows that merger control in Poland is based on a centralised and inquisitorial system, with the antimonopoly authority playing a pivotal role. The basic weaknesses of Polish public enforcement of competition law are the wide jurisdictional portfolio of the OCCP, which has an adverse effect on the competition enforcement ratio, along with the weak position of the antimonopoly authority in the Polish public administration system[19].

15 Office for Competition and Consumer Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, available in Polish at http://uokik.gov.pl/wyjasnienia_i_wytyczne.php.

16 Office for Competition and Consumer Protection – Clarifications concerning the assessment by the President of the OCCP of the notified concentrations, available in Polish at http://uokik.gov.pl/wyjasnienia_i_wytyczne.php.

17 There are sectoral regulators (for example, the Office for Electronic Communications, the Financial Supervisory Authority and National Council for Radiophone and Television) that may review mergers in parallel to the competition authority but their review is limited exclusively to regulatory issues.

18 The official name of the antimonopoly court is the Court for Competition and Consumer Protection.

19 For a general overview of Polish competition law, please refer to M. Błachucki, *Polish Competition Law – Commentary, Case law and Texts*, Warsaw 2013.

To supplement this overview of the institutional and procedural aspects of merger control in Poland, a concise picture of substantive merger control provisions will be presented. Under Polish law, the notification obligation is based on two sets of criteria. First, it is the type of transaction. Second, the turnover generated by the parties to the concentration and their capital groups. Both sets of criteria must be fulfilled in order to establish an obligation to notify the transition to the President of the OCCP. The Polish antimonopoly law does not introduce a definition of a concentration, but indicates what kinds of transactions are considered to be concentrations. The Polish system of merger control is based on the compulsory notification of all transactions meeting the notification criteria. Mergers are reviewed through the prism of a significant impediment to effective competition (SIEC) test. The supplementary test is the public interest test. Jurisdictional issues will be further discussed in detail, but first historical developments will be discussed. Such an analysis will show what drove those normative changes, and whether the ICN recommendations have been identified as a source of any legislative amendments.

## Merger obligation – history of Polish regulation

The merger control system has been functioning in Poland since 1990. It was introduced by the first modern Antimonopoly Act of 1990[20]. At first, undertakings were obliged to notify an intention to merge or transform in order to establish a new company whenever the new undertaking gained a dominant position, or if one of the parties to the concentration already enjoyed a dominant position. There were no turnover criteria. The antimonopoly authority had two months to take a decision. A merger, acquisition or establishment of a new undertaking could be implemented if the antimonopoly authority did not oppose it. A significant amendment took place in 1995[21]. The most important change concerned the introduction of turnover criteria[22]. Three new types of concentrations became notifiable – the acquisition of assets, the acquisition of minority shareholdings[23] and the same person assuming the function of a director, deputy director,

20 Act on Counteracting Monopolistic Practices of February 24, 1990, Dz. U. 1990, No. 14, item 88.

21 Act of February 3, 1995 amending the Act on Counteracting Monopolistic Practices, Dz. U. 1995, No. 41, item 208.

22 It was a combined turnover of ECU 5 mln or ECU 2 mln depending on the type of concentration, irrespective of where it was achieved. In bank merger cases, the turnover criterion was set at ECU 50 mln.

23 Any acquisition or subsequent acquisitions of 10%, 25%, 33% and 50% were notifiable.

member of the managing or controlling body, member of revision commission or position of head accountant of competing undertakings. Those changes have been justified by the need to modernise the Polish merger control system and made it more effective and to harmonise Polish competition rules with EC standards[24]. In practice, the notification obligation was widened way beyond any reason, which resulted in a geometric increase in the number of notifications. The most significant part of notifications concerned the privatisation of previously state-owned companies[25]. The subsequent amendment resulted from the Act of October 22, 1998 amending the Act on Monopolistic Practices[26]. The amendment aimed to speed up the merger control process by excluding from the notification obligation all mergers of undertakings when their combined turnover did not exceed ECU 25 million. Notification was not mandatory in the event that the entity acquiring shares in another undertaking resulting in achieving less than 10% of votes at a general assembly or assembly of partners.

Since the adoption of the act of 1990, the economic and political situation of Poland has substantially changed. Hence a new Antimonopoly Act was adopted in 2000[27]. The establishment of a free-market economy and the accession to the European Union shortly after created an impulse for the adoption of a new antimonopoly act. There were several reasons for this act: 1) the significant transformation of the Polish economy; 2) the rearrangement of Polish legislation after the adoption of the Constitution in 1997[28]; 3) the need for an effective legal instrument of competition protection; 4) the harmonisation of Polish law with EC standards[29]. The Antimonopoly Act of 2000 substantially amended the merger control system. The combined turnover was increased up to EUR 50 mln, irrespective of where it was achieved. The act of 2000 limited the types of transactions when notification was necessary, i.e. in cases of mergers, acquisitions and joint-ventures. In addition, notification was also compulsory in situations of quasi-concentrations as follows: 1) taking over or acquiring shares in another undertaking resulting in achieving at least 25% of votes at a general assembly or assembly of partners; 2) the same person assuming the function of

24 I.B. Nestoruk, *Kontrola koncentracji w prawie antymonopolowym – obowiązek zgłoszenia zamiaru koncentracji*, 'Przegląd Ustawodawstwa Gospodarczego' 2008, No. 9, pp. 15–16.

25 P. Lissoń, *Kontrola koncentracji gospodarczej w procesach komercjalizacji i prywatyzacji przedsiębiorstw państwowych*, 'Ruch Prawniczy, Ekonomiczny i Socjologiczny' 1998, Issue 2, pp. 59–62.

26 Dz. U. 1998, No. 154, item 938.

27 The Act on Competition and Consumer Protection of December 15, 2000, Dz. U. 2000, No. 122, item 1319.

28 Constitution of the Republic of Poland of April 2, 1997, Dz. U. 1997, No. 78, item 483 with further amendments.

29 T. Niedziński, R. Stankiewicz, *Kontrola koncentracji przedsiębiorców w ustawie o ochronie konkurencji i konsumentów z 15 grudnia 2000 r.*, 'Radca Prawny' 2003, No. 5, p. 77.

a member of the managing or controlling body of the competing undertakings; 3) initiating to exercise the rights arising from the shares taken over or acquired without prior notification.

The act of 2000 established several exemptions from the obligation to notify the concentration. Firstly, concentrations of insignificant market relevance were exempted. This lack of relevance was identified in cases, where: 1) the turnover of the acquired undertaking did not exceed the equivalent of EUR 10 million in the Republic of Poland, during either of the two accounting years preceding the notification; 2) the combined market share of the undertakings intending to concentrate does not exceed 20%; 3) a financial institution acquires shares on a temporary basis with a view to reselling them. The first exemption was perceived well, although it was hard to find a rational explanation why it is limited to certain types of concentration[30]. The turnover threshold of EUR 10 million was regarded as set at the optimum in the reality of the Polish economy. Nevertheless, a 20% market share in the second exemption was criticised as set at too high a level[31]. Apart from the mentioned exemptions, there were also three more, though of less practical importance. Merger exemptions were amended once in 2004[32]. First, the 20% market share exemption has been repealed. Second, the general rule was introduced according to which no merger exemptions were applicable provided that that concentration leads to creating or strengthening a dominant position.

In 2007, the present Antimonopoly Act was adopted. The official justification for passing a completely new competition act was rather limited and weak. It was argued that the new Antimonopoly Act is an answer to changing market conditions and codifies the administrative practice of the Polish competition authority and judicial developments. The major change concerned the turnover criteria[33]. The act of 2007 kept most of the transactions as types of concentrations and it limited the number of exemptions. Together with the introduction of the new Antimonopoly Act, minority shareholding and interlocking directorates were exempted from the notification obligation. They are no longer regarded as forms of concentrations. The change was made in order to reduce the number of merger notifications and to reduce the transaction costs of undertakings. Those types of concentrations presented 10% to 15% of all merger cases

30 Not covering minority shareholding or interlocking directorates which were also notifiable at that time.

31 J. Olszewski, *Nowa ustawa o ochronie konkurencji i konsumentów* cz. II, 'Monitor Prawniczy' 2001, No. 15, p. 776.

32 Act of April 16, 2004 amending the Act on Competition and Consumer Protection and other acts, Dz. U. 2004, No 41, item 208.

33 Combined domestic turnover of EUR 50 mln and worldwide turnover of EUR 1 000 mln.

notified to the antimonopoly authority in the period of 2000–2007. The obligation to notify the acquisition of minority shares was perceived as an unnecessary burden on undertakings. Several undertakings were fined for a failure to notify those types of transactions. Furthermore, the previous experience of the antimonopoly authority with controlling minority shareholdings proved that those transactions were unproblematic. They are no longer treated as mergers since they fall outside the list of merger notifiable transactions[34]. Generally, the current Antimonopoly Act slightly limited and rationalised the notification obligation.

The current Antimonopoly Act was amended in 2014[35]. The new rules limit the scope of jurisdiction of the authority by clarifying that all types of transactions where the target company or acquired assets do not exceed EUR 10 mln of turnover generated in Poland are exempted from the notification obligation. The jurisdiction of the OCCP has been extended in order to capture what are known as staggered transactions[36]. Those provisions were based on relevant EU competition rules[37]. Under the previous regulations, it was not clear whether such transactions were notifiable. The OCCP ruled in several decisions that parties are obliged to notify such transactions[38]. However, the antimonopoly court took the opposite opinion[39]. Under the new rules, all transactions that take place within two years between the same individuals or undertakings consisting of an acquisition of undertakings or assets belonging to the same capital group must be notified as one concentration. This attempt to capture staggered transactions aims to preventing undertakings from avoiding merger scrutiny by artificially dividing one transaction into several concentrations. The overall evaluation of the amendment is positive, though there are still some concerns regarding the wording of the new provisions[40].

34 Under the current regime, minority shareholding and interlocking directorates may be only reviewed under the antitrust rules. So far there have not been any cases of this type settled by the Polish competition authority.

35 Act of June 10, 2014 on amending the Act on Competition and Consumer Protection and the Code of Civil Procedure, Dz. U. 2014, item 945.

36 N. Levy, *European Merger Control. A Guide to the Merger Regulation*, vol. 1, Newark 2007, p. 5.

37 A. Bielecki, *Koncentracje podzielone lub krocz*ą*ce w unijnym systemie kontroli koncentracji przedsiębiorstw,* 'internetowy Kwartalnik Antymonopolowy i Regulacyjny' 2018, No. 3(7), pp. 24–25.

38 Decisions of the OCCP of February 11, 2004, No. RPZ-2/2004, nyr and of February 11, 2004, No. RWR 7/2004, nyr.

39 Judgments of the Court for Competition and Consumer Protection of March 21, 2005, XVII Ama 29/04, nyr and of October 5, 2005, XVII Ama 38/04, nyr and judgment of the Court of Appeals of April 28, 2008, VI ACa 1288/07, nyr.

40 M. Błachucki, *Latest Revision of Polish Competition Law*, 'Österreichische Zeitschrift für Kartellrecht' 2015, No. 1, pp. 25–26.

## Merger obligation – turnover thresholds

The general and historical sections showed that the basic criteria in the Polish merger control system are the turnover ones. These criteria are objective in nature – the calculation of turnover is specified in the implementing regulation mentioned earlier. It should be noted, however, that the turnover calculated for the purpose of these criteria include the turnover of all undertakings engaged in concentration, as well as any other undertakings in the capital groups to which the undertakings directly taking part in the concentration belong. Pursuant to Article 13 (1) of the Antimonopoly Act, a concentration is subject to notification if:

1. the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1,000,000,000, or
2. the combined turnover of undertakings participating in the concentration in the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50,000,000.

Both criteria are independent of each other and the transaction may fulfil just one of them. It is worth underlining that the transaction does not have to take place in Poland in order to require notification, as long as the worldwide turnover criterion is met. It results in a situation where purely extraterritorial transactions fall under the Polish merger notification obligation. This usually takes place in cases of foreign joint ventures that are being established far away from Poland, for example in the People's Republic of China.

However, one evident problem is that the turnover values were set in 2000 and have not been changed since[41]. The present value of turnover for the purpose of establishing the notification obligation may not be fully adequate for the proper functioning of the Polish merger control system. The arbitrary value of EUR 1 000 mln for worldwide turnover may seem adjusted to transnational transactions, but the Polish competition authority has never supplied any data on how this value was calculated, and why it has not been changed. Furthermore, the last two decades of EUR 50 mln value domestic turnover has proved to have become too high for certain transactions of a purely local nature. There were several local mergers that escaped the scrutiny of the Polish competition authority due to not meeting the domestic turnover criterion, even though they seemed problematic[42]. This suggests that a significant reform of turnover criteria is highly desired.

41 In 2007, the worldwide criterion of EUR 1 000 mln has been introduced.

42 The best example of this would be the merger between the Polish subsidiaries of Wolters Kluwer and LexisNexis, which resulted in the creation a dominant position of Wolt-

## Merger obligation – substantive thresholds

The second part of the merger notification obligation concerns the type of transactions regarded as concentrations. Unlike in EU law, the Polish Antimonopoly Act has not introduced the definition of a concentration. This absence of a general definition results in a situation that even temporary market structures need to be notified. Nowhere in the Polish competition act is there any indication that the concentration ought to be created on a long-lasting basis[43]. This leads to a situation that even consortia that are set up to develop one-off projects need to be notified if they meet transaction-type criteria[44]. Pursuant to Art. 13 (2) of the Antimonopoly Act, notifiable concentrations covered by the antimonopoly act are as follows:

1. a merger of two or more independent undertakings;
2. a takeover – by way of acquisition or entering into possession of shares or other securities, or in any other way taking direct or indirect control over one or more undertakings by one or more undertakings;
3. the creation by undertakings of one joint undertaking;
4. the acquisition by the undertaking of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded the equivalent of EUR 10,000,000 in the Republic of Poland.

The list of notifiable merger transactions is exclusive and of a jurisdictional nature, and under the merger control rules the President of the OCCP may not investigate transactions that are not listed in the Antimonopoly Act.

The first type of transaction is not problematic. Two or more previously independent undertakings merge into one legal entity combining all their assets.[45] The second type of transaction may be more burdensome. A takeover takes place whenever one undertaking acquires exclusive or shared control over other independent undertaking(s). The crucial concept here is 'taking over control'. It is defined in Art. 4 (4) of the Antimonopoly Act. According to this provision, 'taking over control' means any form of direct or indirect acquisition of powers by an undertaking, allowing the undertaking, to exert, individually or jointly, taking into account all legal or factual circumstances, a decisive influence

ers Kluwer on the national market for legal databases. The OCCP initiated explanatory proceedings but found no grounds to conclude that the lack of notification constituted a violation of the notification obligation (Case No DKK2–404/5/14).

43 Judgment of the Court of Appeals of October 13, 2011, VI ACa 381/11, nyr.

44 A good example is the case where two construction companies established a consortium to build a train station (Decision of the OCCP of October 4, 2012, No. DKK 105/2012).

45 S. Gronowski, *Polskie prawo antymonopolowe (zarys wykładu)*, Warsaw 1998, p. 319.

upon another undertaking or other undertakings. Such powers follow in particular from:

a) holding, directly or indirectly, a majority of votes in the meeting of company members or a general shareholders' meeting, also in the capacity of a pledgee or user, or in the management board of another undertaking (dependent undertaking), including based on agreements with other persons,
b) the right to appoint or recall a majority of the members of the management board or supervisory board of another undertaking (dependent undertaking), including based on agreements with other persons,
c) members of the undertaking's management board or supervisory board constituting more than half of the members of another undertaking's (dependent undertaking's) management board,
d) holding directly or indirectly a majority of votes in a dependent partnership or in the general meeting of a dependent cooperative, including based on agreements with other persons,
e) holding a title to all or part of the property of another undertaking (dependent undertaking),
f) a contract that envisages managing another undertaking (dependent undertaking), or that undertaking transferring its profits.

The analysed notion of 'control' is quite broad, in order to include any form of decisive influence over another undertaking based on *de iure* or *de facto* actions.

In practice, the most problematic in interpretation are cases concerning the acquisition of assets, and especially the core concept of 'assets'. For the purposes of provisions on merger control, assets should be understood as all or part of an enterprise of another undertaking. Pursuant to Article 55 (1) of the Civil Code, the enterprise is an organised group of intangible and tangible components intended for pursuing economic activity, including in particular:

a) a designation individualising the enterprise or its separate parts (name of the enterprise),
b) the ownership of immovable or movable property, including equipment, materials, goods and products and any other material rights to immovable property or movable property,
c) rights resulting from lease and rent agreements for immovable or movable property and the right to use immovable or movable property resulting from other legal relations,
d) claims, rights in securities and cash,
e) concessions, licences and permits,
f) patents and other industrial property rights,

g) copyrights and related property rights,
h) trade secrets,
i) books and documents relating to the economic activity[46].

In a recent decision, the Polish antimonopoly authority found that, undertakings entering in a long-term lease agreement regarding a petrol station is treated as an acquisition of assets[47]. This interpretation was supported by the courts[48]. Similarly, the two-year lease agreement of a chicken farm has been treated as a notifiable merger[49].

The creation of a joint venture is the last of the statutory examples of notifiable merger transactions and it is one of the most common, apart from the acquisition of control, forms of concentration reviewed by the President of the OCCP. The establishment of a joint undertaking usually takes place through the establishment of commercial companies (limited liability company, joint stock company, general partnership, limited partnership and limited joint-stock partnership) and cooperatives. However, it is not required to notify the President of the OCCP about undertakings establishing a civil partnership[50]. It should be stressed that the obligation to notify the intention to concentrate consisting in the establishment of the joint undertaking by undertakings arises only in the event when more than one undertaking participates in establishing a joint undertaking. Thus, such an obligation does not arise in the situation of establishing a joint undertaking by just one undertaking, or in the event of establishing a joint undertaking by one undertaking and one or more entities not being undertakings. In order for such a concentration to be subject to the notification to the President of the OCCP, the process of establishing the joint undertaking should therefore involve at least two undertakings[51].

Under Polish law, all kinds of joint venture are notifiable irrespective of their concentrative or cooperative character[52]. Furthermore, the Polish antimonopoly law does not distinguish between joint ventures aimed at long-lasting performance of commercial activity and joint ventures created on a temporary basis. However, the notification obligation may be established only if an

46 Office for Competition and Consumers Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, point 2.5.

47 Decision of the OCCP of December 31, 2014, No. DKK 173/2014, nyr.

48 The judgment of the Court for Competition and Consumer Protection of March 7, 2016 (XVII AmA 14/15), nyr and the judgment of the Court of Appeals of October 2, 2017 (VI ACa 715/16), nyr.

49 Decision of the OCCP of September 19, 2017, No. DKK 145/2017, nyr.

50 Office for Competition and Consumers Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, point 2.4.

51 Ibid.

52 R. Stankiewicz, *Joint ventures w prawie antymonopolowym*, 'Przegląd Prawa Handlowego' 2007, No. 8, pp. 15–17.

independent undertaking is created. If the joint venture consists purely of the exchange of knowledge or commercial activities without establishing a separate undertaking structure it is not regarded as a merger. The antimonopoly act does not provide for specific requirements in relation to the joint undertaking (contrary to EU regulation 139/2004, where it is required from the joint undertaking to perform the functions of an autonomous economic entity on a permanent basis). The establishment of a joint undertaking that will not perform all the functions of an autonomous undertaking on a permanent basis (e.g. products manufactured by the joint undertaking will be supplied exclusively or primarily to founding undertakings or capital groups to which founders belong), should also be notified to the President of the OCCP[53].

Last but not least, it should be mentioned that the Polish competition authority treats transactions as joint ventures when, in order to create a joint undertaking, one of participants establishes a new company and then the other participants purchase or take up its shares. Moreover, the OCCP treats transactions the same way when, in order to establish the joint undertaking, participants of a concentration use an existing undertaking. In practice, it is very difficult to distinguish between the creation of a joint venture on the basis of an existing undertaking and the acquisition of joint control over an undertaking[54]. The source of the problem is that there are different rules on the calculation of the turnover depending on the type of transaction. When establishing a joint venture, the combined turnover of all capital groups that create the joint venture is included, but when it is an acquisition of joint control it is the turnover of the active capital group and the turnover of the acquired company (not the entire capital group to which it belongs) that is included. It results in a situation when, depending on the interpretation of the particular transaction, the obligation to notify the merger may arise or not. This creates significant legal uncertainty for undertakings.

## Merger obligation – exemptions

Notification criteria are based on formal premises and derived from substantive factors. Therefore there is a need to relax these formal premises by introducing exemptions. Those exemptions aim to eliminate from scrutiny any transactions

53 Office for Competition and Consumer Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, point 2.4.

54 J. Lenart, T. Kaczyńska, *Kiedy utworzenie nowej spółki nie będzie kwalifikowane jako utworzenie nowego przedsiębiorcy (joint venture)? Praktyczne rozważania dotyczące problematyki joint venture w polskim prawie konkurencji*, 'internetowy Kwartalnik Antymonopolowy i Regulacyjny' 2016, No. 1 (5), pp. 43–16.

that are insignificant or, by their nature it is unlikely that they may cause any competitive problems. Article 14 of the Antimonopoly Act indicates that the obligation to notify the intention to concentrate does not apply where:

1. the turnover of the undertaking over which control is to be taken in accordance with Article 13 (2) did not exceed the equivalent of EUR 10,000,000 in the Republic of Poland in any of the two financial years preceding the notification;
2. a financial institution whose normal activities include investing in shares in other undertakings, for its own account or for the account of others, which acquires or takes over shares, on a temporary basis, with a view to reselling them, provided that the resale takes place within one year from the date of the acquisition or take over, and that:
   a) this institution does not exercise the rights arising from these shares, except for the right to a dividend, or
   b) exercises these rights solely in order to prepare for the resale of the entirety or part of the undertaking, its assets, or these shares;
3. the undertaking acquires or takes over shares, on a temporary basis, with a view to securing debts, provided that the undertaking does not exercise the rights arising from these shares, except for the right to sell;
4. the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over by a competitor or a participant of the capital group to which the competitors of the target undertaking belong;
5. the concentration applies to undertakings participating in the same capital group.

All the exceptions are of an absolute character. If a transaction fulfils any of premises set out in Article 14, it is exempted from the scrutiny of the antimonopoly authority, even if it is or may be anticompetitive. The most important is the first exemption. Together with special rules on calculating the turnover, it constitutes the most frequent situation when undertakings are exempted from the obligation to notify the merger. When interpreting the fourth exemption, it should be remembered that it applies only to insolvency proceedings taking place in Poland and conducted according to Polish provisions. Interestingly, the competitors are excluded from enjoying this exemption. It is also worth noting that all types of transactions are covered by this exemption[55].

55 Under the previous rules, the acquisition of assets were not covered by this exemption. A. Adamczyk, *Obowiązek zgłoszenia do UOKiK zamiaru koncentracji w postępowaniu upadłościowym*, 'Przegląd Prawa Handlowego' 2010, No. 5, p. 24.

## Compatibility and discrepancy between the ICN Recommendations and the Polish regulation

An analysis of Polish provisions on the merger notification obligation through the prism of the ICN recommendations shows that they are compatible only to a certain extent. Polish provisions are surely an expression of the sovereignty of Polish legislator, who constructs the merger notification autonomously and so the scope of the obligation differs (to some extent) from other jurisdictions (including EU competition rules). Similarly, Polish provisions provide for a very wide scope of the merger notification obligation. As a result, the Antimonopoly Act provides for a very wide scope of merger notification obligation. It applies to a variety of transactions, including extraterritorial ones. Merger thresholds are objective, i.e. turnover and type of transaction. The previously applicable dominance threshold has been eliminated in the current Antimonopoly Act. The calculation of turnover has improved immensely through the years. In particular, it is clear now that in the case of acquiring assets or taking over another undertaking, the turnover of the selling group that is not being transferred to the acquiring party is not to be considered when applying the merger notification thresholds. The exhaustive list of notifiable transactions includes only typical transactions and quasi-concentrations, such as the acquisition of minority shareholdings or interlocking directorates, are no longer covered by the merger notification obligation. Furthermore, the list of exemptions properly excludes from the merger scrutiny those transactions that are likely to be unproblematic, like internal group restructuring. To improve the clarity and general understanding of the merger notification obligation provisions, and to increase legal certainty of undertakings, the OCCP has adopted jurisdictional, procedural and analytical guidelines. In principle, it is a good practice recommended by the ICN, the other issue is the quality of these guidelines.

The core regulation of the merger notification obligation is in line with ICN recommendations, but there are also visible discrepancies between the Polish provisions and the ICN recommendations. First some general observations will be presented. There is no doubt that Polish provisions are far from being clear and precise[56]. That deprives undertakings on many occasions from legal certainty when planning their transactions. What is even more troublesome is that the lack of legal certainty is often a result of guidelines prepared by the OCCP, and not the Antimonopoly Act itself. Furthermore, the merger thresholds do not

56 R. Stankiewicz, *Dysfunkcjonalność niektórych norm prawa antymonopolowego przewidujących obowiązek zgłoszenia zamiaru koncentracji przedsiębiorców (uwagi na tle prawa unijnego)* [in:] *Dysfunkcje publicznego prawa gospodarczego,* eds. M. Zdyb, E. Kruk, G. Lubeńczuk, Warszawa 2018, p. 274.

go through any sort of periodical review and adjustment to a changing economic environment[57]. The turnover thresholds have not been updated for almost two decades. During this period, the Antimonopoly Act has been amended on several occasions, and some of those changes concerned merger control provisions. This clearly proves that neither the OCCP nor the Polish legislator express any willingness to analyse the adequacy of turnover thresholds or the proper design of the concentration definition, together with the types of notifiable transactions. This highlights the problem of improperly designed turnover thresholds.

At present, many transactions do not have any material nexus to the Polish jurisdiction. This is due to the existence of the worldwide turnover criterion. This turnover concerns mostly sales generated outside of Poland, and has no relevance to the situation on the Polish market. It is unclear why this threshold was introduced, or why it is still in force. At the same time, some transactions escape the scrutiny of the Polish competition authority because the domestic thresholds are set at too high a level. There is also a significant problem resulting from the lack of any definition of concentration. Hence there is an absence of requirement that concentrations should result in a durable combination of previously independent entities or assets. As a result, many temporary transactions are covered by the obligation to notify. Furthermore, even though the list of types of notifiable transactions provided by the Antimonopoly Act clearly identifies what are the types of notifiable agreements, the official interpretation offered by the OCCP leads to significant problems in identifying types of transactions and creates a dilemma as to whether they are notifiable or not. At the same time, the jurisdictional guidelines were updated only once, when significant changes to the merger procedure were implemented. Finally, the OCCP has failed to regularly update the guidelines, despite the many developments that have taken place since they were adopted i.e. 2009, which are not included in the guidelines. Such an update would be required in relation to the most confusing types of mergers, i.e. the acquisition of assets and joint ventures.

The identified areas of discrepancies should be a starting point for a discussion on future amendments to the Polish merger control system. Such discussions should be as comprehensive as possible and include not only the ICN recommendations, but OECD recommendations as well, together with views of Polish academics, practitioners and undertakings. The ICN recommendations constitute a proposal for a change and the OCCP should thoroughly analyse them before presenting well-reasoned proposals. Ignoring the ICN or OECD proposals, not to mention opinions from Polish academics and practitioners, is a long and controversial practice of the Polish competition authority and the

[57] S. Dudzik, *Kontrola koncentracji w świetle ostatnich zmian ustawowych*, 'internetowy Kwartalnik Antymonopolowy i Regulacyjny' 2015, No. 2(4), pp. 40–41.

Polish legislator (which was shown in the historical section). Such conclusions should not be understood as full support for complete compliance of the Polish merger control provisions with the ICN recommendations[58]. I argue for making a conscious decision by the Polish legislator on the future amendment of the Polish merger control system and taking into consideration all possible experience and opinions.

## ICN dilemma – How to make recommendations effective?

The ICN is a virtual and informal transgovernmental network of competition authorities. It is an information network that primarily relies on soft law documents adopted by the ICN. However, the visible and impressive achievements of the ICN in the area of adopting recommendations and best practices are mirrored by equally visible inconsistencies between the ICN recommendations and national merger provisions of its members. Studies have been undertaken exploring reasons explaining why network members decide not to follow network recommendations[59]. There might be objective and subjective reasons behind these discrepancies, and some of them are independent of competition agencies involved in the works on the ICN. Even though no one expects full compliance of all jurisdictions with the ICN recommendations, the level of inconsistencies remain significant. It was supported by the ICN study on the compliance of member jurisdictions with merger recommendations[60]. The results of this study were not very optimistic. The conclusions of this study pointed out that 'a clear majority of jurisdictions have not yet made implementation a priority and it is clear that achieving implementation will be a significant challenge, notwithstanding the consensus and momentum arising from their development and adoption'[61]. The next ICN survey also identified similar inconsistencies, but it concluded that the situation has improved and that there have been

58 I believe that the OCCP should construct Polish merger control provisions so as they create an optimal scrutiny system. Particular provisions may remain contrary to the ICN recommendations. For example, I have argued elsewhere that I strongly believe the market share threshold served its purpose in the Polish merger control system and so should be reinstated. See M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012.

59 S.J. Evenett, A. Hijzen, *Conformity with International Recommendations on Merger Reviews. An Economic Perspective on 'Soft Law'*, 'University of Nottingham, Research Paper' 2006, No. 4, pp. 30–39.

60 J.W. Rowley QC, A.N. Campbell, *Implementation of the International Competition Network's Recommended Practices for Merger Review. Final Survey Report on Practices IV-VII*, 'World Competition' 2005, vol. 28(4), pp. 533–588.

61 Ibid., p. 559.

'a tiny fraction of agencies who have made changes that do not conform to the Recommended Practices, and no agency has engaged in reforms that change an ICN-compliant regime to a non-compliant one'[62]. Those surveys show that ICN is aware of its Achilles heel, i.e. the insufficient level of implementing the network's recommendations.

There are a number of ways in which the ICN may encourage greater convergence among its members. The ICN may call for greater involvement of non-governmental advisors who may indicate deficiencies of the national merger control systems. Furthermore, the network may engage in direct contact with particular agencies assisting them in the development of national merger control rules. The ICN may push for changes that may be directly implemented by agencies themselves without the involvement of the national legislator or government. The network may also take a step-by-step approach, meaning that it should encourage its members to comply with more general recommendations before gradually passing on to more detailed ones. Last but not least, the ICN may begin conducting peer reviews of particular countries on a voluntary basis. When advocating for a more active approach from the ICN to the implementation of the network's recommendations, one should be aware that it may adversely affect the willingness of particular jurisdictions to engage in works of the ICN. The success of the ICN lies within its informality, elasticity and the lack of enforcement powers. Therefore different levels of implementation of particular recommendations by national jurisdictions may be directly connected to the nature of this transgovernmental network.

Even though many jurisdictions have problems with the implementation of the ICN recommendations, it should not be treated as an excuse for the OCCP to ignore the network's soft law. Should the Polish antimonopoly authority decide to deviate from previously agreed best practices, such a decision ought to be made consciously and after careful consideration of international recommendations. In addition, in recent years the Polish antimonopoly authority has presented a rather passive attitude towards the ICN, which has been reflected by a low level of participation in the network's activities. Therefore, a more active approach is advisable. Officials from the OCCP should more eagerly engage in particular working groups of the ICN, which should correspond to the particular needs of the Polish competition authority. The greater involvement of the OCCP in the works of the ICN will lead to a greater chance of achieving a cognitive

62 M. Coppola, C. Lagdameo, *Taking Stock and Taking Root. A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures* [in:] *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, ed. P. Lugard, Cambridge–Antwerp–Portland 2011, p. 315.

convergence among all cooperating officials[63]. Such a cognitive convergence is often a prerequisite for the administrative convergence of practices of national competition authorities. The last stage of this convergence process is likely the harmonisation of hard law national rules. Last but not least, the greater the participation of the OCCP officials in the works of the ICN, the greater is the chance for the development of daily international administrative cooperation between national competition authorities from different jurisdictions.

## Conclusions

The merger notification obligation plays a crucial role in the optimal construction of a merger control system. The ICN recommendations may serve as an important source of assistance for national authorities when designing relevant national provisions. The Polish legislator is very reluctant to admit any foreign influence over legislative changes. The only exception is the influence of the 'acquis communitaire'. The OCCP has never officially acknowledged the influence of the ICN recommendations on Polish legislation or administrative practice. This is especially surprising, given how many of the Polish competition authority's resources have been invested in the Polish competition authority participating in the network (including organising the annual conference). What is even more worrying is that the OCCP has never expressed any desire in pursuing convergence to the best practices and international standards of merger control (the OCCP similarly ignores the recommendations and conclusions from peer reviews undertaken by the OECD[64]). Despite this official denial of the ICN's influence, it is possible to speculate on the informal influence that has shaped Polish merger provisions. When analysing the history of Polish merger rules, there is a visible tendency towards greater conformity of those rules with the ICN recommendations. This tendency may suggest that participation in the work of the ICN has indeed stimulated Polish officials and resulted in altering their administrative practice, ultimately encouraging the amendment of Polish merger control provisions. On the other hand, the absence of any official recognition of external influence from the ICN may be driven by political considerations. Furthermore, there may also be a practical side to such a policy. By officially ignoring the influence of the ICN recommendations, the OCCP does not need to explain why there are so many discrepancies between them and the

63 D.K. Tarullo, *Norms and Institutions in Global Competition Policy*, 'The American Journal of International Law' 2000, vol. 94, No. 3, pp. 479, 495.

64 M. Błachucki, *The role of the OECD in development and enforcement of competition law*, 'e-Pública – Revista Eletrónica de Direito Público' 2016, vol. 3, No. 3, p. 190.

Polish provisions. This may provoke a relevant question though – why does the Polish competition authority support the adoption of recommendations by the ICN, while simultaneously refusing to follow them? The answer to this question would require more of a political analysis rather than a legal one.

It is worth emphasising that identifying possible inconsistencies between the Polish provisions and the ICN recommendations is not a purely academic exercise. It would be naïve to assume that all jurisdictions will be totally in line with international standards, since any provision must fit into the national legal system and reflect the political choice of the national sovereign. Therefore, one should not *a priori* exclude the possibility that there might be a good justification why Poland's merger provisions do not comply with international standards, though neither the OCCP nor the Polish legislator have ever presented any. What is even more important is that the identified discrepancies between the ICN recommendations and the Polish merger provisions are also indicated by Polish academics and practitioners as problematic and defective. This is a clear sign that there should be a comprehensive amendment of the merger control system in Poland. It also supports the view that international standards may be beneficial for the design of national provisions, where they are based on the shared experience of various jurisdictions from all over the world. The ICN delivers such standards, but it lacks any powers to enforce them. Nonetheless, the ICN should invest more resources in monitoring compliance with the adopted recommendations and continue to place persuasive pressure on national jurisdictions for greater convergence. The last word will still be with national legislators, who may choose to retain full sovereignty over inefficient national merger control systems, but the cost of this choice will then be incurred by undertakings and consumers.

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## SUMMARY

The article presents the Polish regulation on the merger notification obligation in the context of the ICN Recommendations. The analysis is limited to substantive provisions and the merger procedure is not covered. The article aims to identify the extent to which the Polish provisions comply with internationally recognised recommendations. First it introduces the International Competition Network and its soft law documents related to the merger notification obligation. The next part describes the Polish system merger control, i.e. basic concepts and relevant historical developments. This is followed by a detailed analysis of the substantive regulation of the obligation. The article discusses turnover criteria, substantive criteria and exemptions to the notification obligation. It is then confronted with the ICN Recommendations. The comparison proves that the Polish merger obligation regulation has developed independently of the ICN Recommendations, and that there are visible discrepancies between the Polish provisions and the ICN soft law. It is argued that several amendments to the Polish provisions are needed. The ICN Recommendations may assist in this process, but most importantly it should address the real needs of the effectiveness of the Polish system of merger control. The article highlights that the ICN lacks an effective system of compliance scrutiny, and that this may undermine the overall achievements of the network. It is suggested that peer review should be implemented and that the broader engagement of OCCP officials in the works of the ICN and other transgovernmental networks is required.



**Keywords**
competition law, merger control, International Competition Network, soft law, recommendations, Polish law

# STRESZCZENIE

**Spójność polskiego prawa konkurencji z wytycznymi Międzynarodowej Sieci Konkurencji – na przykładzie przepisów o obowiązku zgłaszania zamiaru koncentracji przedsiębiorców**

Artykuł omawia polskie przepisy ustanawiające obowiązek notyfikacji koncentracji Prezesowi UOKiK, konfrontując je z rekomendacjami ICN dotyczącymi tego zagadnienia. Przedmiotem badania są wyłącznie regulacje materilano-prawne z pominięciem analizy procedury antymonopolowej w zakresie kontroli koncentracji. Celem badań jest zidentyfikowanie w jakim zakresie Polskie przepisy są zgodne z międzynarodowymi standardami.

Na wstępie omówiono ICN i zaprezentowano dorobek sieci w zakresie regulacji obowiązku notyfikacji koncentracji. W kolejnej części przedstawiono podstawowe cechy polskiego systemu kontroli koncentracji oraz najważniejsze historyczne zmiany tych regulacji. Następnie przeprowadzona została szczegółowa analiza elementów konstrukcyjnych obowiązku notyfikacyjnego, obejmująca: kryteria obrotowe, kryteria transakcyjne oraz wyłączenia spod obowiązku notyfikacyjnego. Analiza porównawcza wytycznych ICN i polskich przepisów odnoszących się do obowiązku notyfikacyjnego ujawniła obszary widocznych niezgodności. Może ona stanowić punkt wyjścia do ewentualnych zmian polskiego prawa konkurencji. Jednocześnie, choć wytyczne ICN mogą być jedną z inspiracji zmian, to ewentualna nowelizacja ustawy antymonopolowej powinna też uwzględniać niedoskonałości wykryte w procesie stosowania ustawy.

W artykule podkreślono, że ICN nie ma skutecznego mechanizmu zachęcania swoich członków do konwergencji ich przepisów krajowych, co w dłuższej perspektywie może podważać istotność jej dorobku. Z tego względu sformuowano postulat wprowadzania mechanizmu przeglądów partnerskich w działalności ICN oraz zwiększenia zaangażowania przedstawicieli UOKiK w pracach sieci.

**Słowa kluczowe**
prawo konkurencji, kontrola koncentracji, Międzynarodowa Sieć Konkurencji, prawo miękkie, wytyczne, prawo polskie

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# New Legal Status of State Attorney Office

**Abstract**
The purpose of the considerations hereinunder is an attempt to define a new, legal status of State Attorney Office (State Representation Office) of the Republic of Poland (RP), constituting – in theory – the completion of the construct of State Treasury as an administrator of public property, combining modernity and tradition in the area of counseling and state representation in court (for the purpose of litigation).

Against the background of the changes having been introduced, involving, in particular, extension of competences of State Attorney Office of RP, there appears a question if the model of state representation constructed in a centralized way – defined in trading as 'model of traditional modernity' will provide effective representation and protection of state property.

## 1. Nature and functions of State Attorney Office

In accordance with Polish tradition State Attorney Office has always been a completion of the construct of State Treasury as an administrator of public (state) property, Office which – with breaks – has performed the functions of institutional, legal representative (in court) of State Treasury in the form of a state office, modeled on Austrian solutions. To some extent its organization reminded of a law firm, composed of a body of lawyers (attorneys and legal advisors) with a special employee status[1].

The concept and construct of State Attorney Office (SAO) as a legal representative (in court) of state treasury (fiscus) is significantly influenced by the legal model of state treasury (fiscus) as an administrator of public property, determining the legal construct and the range of tasks and competences of SAO, as a specific state bar.

In theory, State Attorney Office of the Republic of Poland (SAO RP) as an institution with judicial, litigious and advisory functions in the area of the protection of public property largely remains in legal symbiosis with the construct of State Treasury (fiscus), symbolizing the state in private trading. Both legal institutions aim to guarantee efficient protection of state property interests in legal trading and are placed on the borderline of two regulatory methods – i.e. public (imperious) method and cooperative (non-imperious) one. Hence, not without a reason theoretical searching for a balance point has been raising constant controversy inspired not only by its juridical complexity, but also by dominance of one-sided point of view, determined my the preferred regulatory method[2].

In contrast to European, in particular, continental legal tradition, having been shaped since Roman times, according to which fiscus embodies state as a public law entity having by its very essence capacity in private law, in national doctrine fiscus (called State Treasury) as a special entity of private law, regardless of the fact that it is deprived of basic characteristics of a conventional private law entity (lack of legal entity's bodies, of statutes, of registered office, nor is it subject to entry in the public register of legal entities), but at the same time,

1 S. Bukowiecki, *Prokuratoria Generalna Rzeczypospolitej Polskiej*, 'Gazeta Administracji i Policji Państwowej' 1924, No. 38, p. 806; Z. Cybichowski, *Encyklopedia podręczna prawa publicznego (konstytucyjnego, administracyjnego i międzynarodowego)*, vol. II, Warszawa [no release year], pp. 785–787*; Prokuratoria Generalna, 200 lat tradycji ochrony dobra publicznego*, ed. L. Bosek, Warszawa 2016, pp. 113.

2 More about it – compare A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu Prokuratorii Generalnej RP jako instytucjonalnego zastępcy prawnego (procesowego) państwa (Skarbu Państwa) w obrocie prywatno-prawnym*, 'Studia Prawnicze' 2017, No. 1, pp. 23–56; A. Bierć, J. Mucha-Kujawa, *Teoretyczno-prawne poszukiwania sposobu 'oznaczenia' państwa w obrocie prywatno-prawnym*, 'Studia Prawnicze' 2016, No. 2, pp. 49–105.

in practice, it benefits, to some extent, from imperious instruments by shaping property relations of the state[3]. The dissonance mentioned above requires conducting harmonization and legislative activities taking into account European perspective[4].

In national doctrine, in accordance with which the views on the status of State Treasury are still inconsistent, there is marked, however, evolution in the direction of treating State Treasury, being an equivalent of fiscus in European countries, as an entity of public law to ensure consistency of the concept of State Treasury on the basis of the entire law system but not only private law[5].

The above mentioned direction of theoretical searching seems to harmonize with the development of national public law regulations in the area of functioning the State Treasury as a legal entity. Legislative practice clearly proves that State Treasury benefits, in legal trading, from instruments of public authority in a way proper for public law entities, and not private law persons[6].

Manifestations of preference of State Treasury, which more and more extensively benefits from authority powers granted by the regulations of numerous statutes, undermine the myth of State Treasury as a private law person, which functions equally to a natural person as a private individual in private law trading. It guides national theoretical thought rightly in the direction of European solutions, treating fiscus (state treasury) as a public law entity which keeps authority powers to the extent necessary (typical of public law entities) and, hence, may perform in trading on the basis of relative equality with an individual[7].

Completing the construct of State Treasury in the functional sphere, State Attorney Office has been directed to implement the function of specific statutory

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3 A. Karczmarek*, O władczych uprawnieniach Skarbu Państwa,* 'Radca Prawny. Zeszyty Naukowe' 2015, No. 1 (2), pp. 144–162; J. Jacyszyn, *Wokół instytucji Skarbu Państwa*, 'Rejent' 1992, No. 10, p. 19.

4 *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej,* ed. Z. Radwański, Warszawa 2006, p. 45.

5 Among many compare: N. Gajl, *Skarb Państwa*, Warszawa 1996, pp. 189–209; A. Całus, *Problematyka prawna Skarbu Państwa*, 'Biuletyn Rady Legislacyjnej' 1995, No. 6, pp. 12–37; C. Kosikowski, *Polskie publiczne prawo gospodarcze*, Warszawa 1998; R. Tupin, *Skarb Państwa w okresie reform i przemian własnościowych*, 'Przegląd Ustawodawstwa Gospodarczego' 1996, No. 4.

6 A. Karczmarek, *O władczych uprawnieniach…*, pp. 144.

7 P. Laband, *Das Staatsrecht des Deutschen Reiches*, Bd. 4, 4. neubearbeitete Auflage, Tübingen-Leipzig 1901, pp. 341–345; W. Mallmann, *Leitsätze des Berichterstatters über: Schranken nichthoheitlicher Verwaltung*, [in:] *Verträge zwischen Gliedstaaten im Bundesstaat. Schranken nichthoheitlicher Verwaltung Aussprache zu den Berichten in den Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Köln vom 12. bis 15. Oktober 1960*, eds. H. Schneider, W. Schaumann, W. Mallmann, K. Zeidler, Berlin 1961, p. 207.

(legal) representation of State Treasury in legal trading[8]. In particular, it performs the function of a legal representative, especially – representative for the purpose of litigation of State Treasury and state legal entities before the national and international courts, as well as – the advisory function of state bodies in the area of legislative and property practice of the state.

## 2. Origin and evolution of State Attorney Office on the ground of Polish law

On the ground of Polish law, the beginnings of the institution of legal representation (for the purpose of litigation) of the state date back 19th century[9], but the special development of this institution falls on the interwar period[10].

The example for Polish, prewar legislator was constituted by centralized model of legal representation (for the purpose of litigation) of the state established in Austria in the form of a special institution – Financial State Attorney Office (*Finanzprokuratur*)[11] – established for legal advisory and representation for the purpose of litigation of the property interests (treasury) of the state[12] affecting European solutions in this matter at present times.

SAO RP, established on the ground of a decree dating the year 1919, aimed to ensure the state a uniform and high-standard legal protection[13]. That was intended to be a centralized office, in personal, administrative and economic

8 Cf. A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu* …, p. 46.

9 State Attorney Office from the times of Polish Kingdom (Royal Resolution on the matter of establishment of State Attorney Office, Official Journal of Polish Kingdom, part 2, No. 8, pp. 116–139).

10 Decree on the matter of establishment of State Attorney Office of the Republic of Poland dating 7th February 1919, Dz. U. 1919, No. 14, item 181; The Act dating 31st July 1919 on the matter of establishment of State Attorney Office of the Republic of Poland, Dz. U. 1919, No. 65, item 390. Ordinance of the President of the Republic of Poland dating 9th December 1924 on the matter of the change of the system of State Attorney Office of the Republic of Poland, Dz. U. 1924, No. 107, item 967.

11 Imperial Regulation dating 21st December 1850 on the matter of establishment of Treasury State Attorney Office, Official Journal No. 188 and Ministry Regulation dating 9th March 1898 on the matter of official instructions for c.k. Treasury State Attorney Office, Official Journal No. 41 dating 1898; Compare: J. Windakiewicz, *Zadania Prokuratury Generalnej i jej stanowisko w procesie cywilnym*, 'Głos Adwokatów' 1926/4, p. 117; J.J. Litauer, *Prokuratoria Generalna Rzeczypospolitej Polskie*j, 'Gazeta Sądowa Warszawska' 1920, No. 4, p. 27.

12 Compare J. Mucha-Kujawa, *Ewolucja regulacji prawnej Prokuratorii Generalnej w Polsce na tle rozwiązań austriackich*, 'Studia Prawnicze' 2012, No. 4, pp. 53; *Prokuratoria Generalna, 200 lat* …, p.114.

13 J. Sobkowski, *Podmioty gospodarki uspołecznionej jako strona procesu cywilnego*, Poznań 1960, p. 139.

matters directly subordinate to the President of the Ministers[14], independent in performing its functions.

State Attorney Office was assigned many tasks which have not lost their importance at present times. First of all, SAO performed legal advice (e.g. issuing legal opinions at matters concerning legal and property interests of the state and of legal entities treated equally to State Treasury, as well as interests of state administration in general; expressing opinions – at the wishes of the Council of Ministers or individual ministers – about drafts acts (bills) and draft regulations from the legal, organizational and legislative technique point of view, and, in particular, from the point of view of private law, property and administrative interests of the State; substantive representation (e.g. cooperation with concluding legal contracts and with drawing up acts and legal documents on private law and property matters of the state and of legal entities treated equally to State Treasury); representation for the purpose of litigation (e.g. conducting legal disputes about legal and property interests of the State and of legal entities treated equally to State Treasury; representation for the purpose of litigation of public interests (in case of lack of competent bodies and State Attorney Office has been called by the authorities); representation of legal and property interests of State Treasury and of legal entities treated equally to State Treasury and interests of state administration in proceedings before courts of public law and administrative authorities). Representation for the purpose of litigation, performed by SAO RP, included all actions in civil proceedings before all courts and judicial authorities existing on the territory of the Republic of Poland, in litigious and out of dispute proceedings[15].

The legal status of SAO RP was confirmed by the Act dating 31st July 1919 on the matter of the establishment of State Attorney Office of the Republic of Poland[16], which actually copied the regulations about the construct of SAO RP defined in the decree dating 7th February 1919[17], extending the representation for the purpose of litigation performed by SAO RP in such a way that it included the representation for the purpose of litigation in general on matters of property interests of the state and legal entities treated equally to the state, and, what is

14 Art. 5 Decree on the matter of establishment of State Attorney Office of the Republic of Poland dating 7th February 1919, Dz. U. 1919, No. 14, item 181.

15 More about it: J. Mucha-Kujawa, *Ewolucja regulacji prawnej* …, pp. 54–55.

16 The Act dating 31st July 1919 on the matter of the establishment of State Attorney Office of the Republic of Poland, Dz. U. 1919, No. 65, item 390.

17 State Attorney Office was counted to 'central offices, extending its activity over all the territory of Poland, subordinate to the ministers, but having some degree of independence'. *Encyclopedia of the law being in force in Poland*, vol. I, No. II, *Ustrój władz administracyjnych państwowych i samorządowych*, ed. A. Peretiatkowicza, Poznań 1925, p. 21.

more, SAO RP was entrusted the duty of drawing up opinions on draft acts and draft regulations from the point of view of the protection of state interests[18].

Transformations in the organizational field of the state, including passage of March Constitution[19], caused reorganization of many state institutions. That process also comprised SAO RP, which resulted in the change of the structure of State Attorney Office of the Republic of Poland[20], including – subordination of the President of State Attorney Office and all State Attorney Office of the Republic of Poland to Minister of the Treasury (not as it was before to the Council of Ministers, wherein State Attorney Office still remained a separate office in relation to Minister of the Treasury[21].

Ordinance of the President of RP dating 1924 maintained the competences of State Attorney Office of RP to perform legal defense of legal interests of the State to the widest extent possible[22] (i.e. representation of the State in court proceedings and administrative proceedings), establishing State Attorney Office as an attorney of the State, appointed solely to represent widely understood Treasury in court[23]. The range of activity of State Attorney Office of RP also included representation before administrative authorities, cooperation with concluding contracts, as well as legal advice. It, moreover, comprised both private law and public law interests of the State, defense of territory rights of the State, and of the rights and claims to foreign states resulting from international agreements and treaties[24].

Legal representation of the interests of the state (of public law and of private law character) performed by SAO RP comprised representation for the purpose of litigation at matters concerning property and public interests and rights of the state, including – all actions in civil proceedings before all courts existing

18 SAO RP was 'so to say attorney of the state, i.e. counsel for the defense and legal advisor' Z. Cybichowski, *Encyklopedia podręczna prawa publicznego* vol. II…, pp. 785–787. State Attorney Office was also defined as a government institution, defending in courts property rights of the state *Encyklopedia powszechna dla wszystkich*, ed. S. Lam, Warszawa [no release year], p. 597. Also compare J. Mucha-Kujawa, *Ewolucja regulacji prawnej* …, pp. 56–64.

19 The Act dating 17th March 1921 Constitution of the Republic of Poland (Dz. U. 1921, No. 44 position 267).

20 Ordinance of the President of the Republic of Poland dating 9th December 1924 on the change of the structure of State Attorney Office of the Republic of Poland, Dz. U. 1924, No. 107, Item 967.

21 B. Markowski, *Administracja skarbowa w Polsce*, Warszawa 1931, pp. 118–119; C. Kosikowski, *Pozycja prawna Ministra Skarbu w Polsce międzywojennej*, 'Finanse' 1973, No. 8, pp. 55–69; J. Sobkowski, *Podmioty gospodarki uspołecznionej*.., p. 144.

22 S. Ehrlich, *Rola Prokuratorii Generalnej w aparacie państwowym*, 'Biuletyn Urzędniczy' 1938, No. 5–6, p. 9.

23 S. Gołąb, *Organizacja sądów powszechnych*, Kraków 1938, p. 103.

24 L. Górnisiewicz, *Prokuratoria Generalna Rzeczypospolitej Polskiej*, 'Śląsko-Dąbrowski Przegląd Administracyjny' 1946, No. 11–12, p. 8.

on the territory of RP (before labor courts, arbitration courts), in litigious and out of dispute proceedings[25], as well as representation on property and public interests and rights of the state in proceedings before courts of public law and administrative authorities[26], issuing – at the wishes of state authorities – legal opinions at matters concerning property and public interests of the State, providing legal advice and cooperation with drawing up legal acts regarding rights and interests of the State.

The intention of the interwar legislator was to draw the widest possible borders of the activity of State Attorney Office, which resulted from the regulation defining the scope of activity of SAO RP, according to which SAO RP performed the defense of the interests of the State as an entity of public (international) law, and not the defense of the interests of the State as a private law entity, as well as from naming it State Attorney Office of the Republic of Poland[27].

The special legal status of State Attorney Office of RP manifested itself also on the procedural (in court) ground – the position of State Attorney Office in a civil lawsuit was privileged[28] (e.g. entities that SAO represented were exempt from court fees[29], they were waived the immediate enforceability of judgments[30], in cases in which SAO represented the state, the copy of the judgment with reasons was served on the parties by the court[31]), and the powers of SAO to act in accordance with its own convictions protected the interest of the state against instituting ungrounded and unreasonable cases.

In the ordinance there was copied, among others, included in the Act dating 1919, the principle of the responsibility of the President, the President of the Division, the Delegate and every officer of SAO for any material damage for State Treasury or for legal entities mentioned in the ordinance arisen as a result of gross negligence or obvious breach of official duties. Entities that contributed to arising material damage were obliged to compensation.

25 S. Gołąb, *Organizacja sądów powszechnych..*, p. 104; E. Wengerek, *Obsługa prawna organów państwowych oraz jednostek gospodarki uspołecznionej*, Poznań 1967, p. 18.

26 State Attorney Office took part in such proceedings in Poland and abroad as well as before foreign courts if it was granted the representation by administrative authorities appointed to the board or supervision over a particular legal entity or over a specific field of state administration.

27 S. Ehrlich, *Rola Prokuratorii Generalnej…*, p. 9.

28 J. Sobkowski, *Podmioty gospodarki uspołecznionej…*, pp. 144–145.

29 Ordinance of the President of the Republic of Poland dating 24th October 1934, Provisions on court fees, Dz. U. 1934, No. 93, item 837.

30 Ordinance of the President of the Republic of Poland dating 29th November 1930, Civil Proceedings Court, Dz. U. 1930, No. 83, item 651.

31 S. Gołąb, *Organizacja sądów powszechnych…*, pp. 105–106; J. Windakiewicz, *Zadania Prokuratury Generalnej…*, p. 122.

State Attorney Office existed in the form presented above up to 1951, when the change of economic system in the direction of planned economy caused the reconstruction of all legal and social system in Poland including performing legal protection of the state and its interests. State Attorney Office of RP, presenting centralized system of legal representation, was replaced by Office of Legal Representation[32], and the representation of state entities was entrusted to its directors or representatives, which allowed independent activity of particular state entities and transition to deconcentration of the system of legal protection of the state[33].

## 3. Reactivation of State Attorney Office during the economic reconstruction of the system towards the market direction

Social and economic transformations in the end of the eighties, in particular, the transition from the system of planned economy to market economy, as well as numerous legal proceedings in privatization cases that took place in Poland after 1989, all that intensified interest in the problem of the models of protection of state property and state representation in private trading, including – undertaking discussion about establishing an institution aimed to ensure efficient protection of state property in private trading on the example of prewar State Attorney Office of the Republic of Poland.

Both in Parliament, as well as among the representatives of the doctrine there have been discussions over the scope of tasks, functions and the construct of the institution aimed to protect the state and its property. In particular, the idea behind it was to establish an institution connecting to Polish tradition, but intended to guarantee efficient protection of the state property and its

32 Decree dating 29th March 1951, Dz. U. 1951, No. 20, item 159.

33 Decree dating 2nd June 1954 on representation in court of authorities, offices, institutions and state enterprises, Dz. U. 1954, No. 25, item 93. The reason for the abolition of the institution - State Attorney Office was the impossibility to 'reconcile organizational and economic independence of economic state entities in terms of the management of state property allocated to them in order to perform their planned tasks with the system of concentration of legal representation, limiting the independence of the activity of those entities on the important section of the protection of socialist state property (…) The system of concentration was supposed to be responsible for having influence on the weakening of responsibility of the director of that entity for the proper performance of all the entrusted tasks (…)'. J. Sobkowski, *Podmioty gospodarki uspołecznionej…,* p. 149.

representation in modern legal trading, especially, in the face of some pathological phenomena connected with the process of ownership transformations[34].

The Act[35], which ground constituted government draft act dating 16th September 2004[36], only partially restored centralized system of state protection and representation as State Attorney Office of State Treasury (incomplete, partial reactivation of the institution of central character), connecting to State Attorney Office of the Republic of Poland from the period of the Second RP and Austrian Financial State Attorney Office. At the same time, previous decentralized (dispersed) system of state property protection was maintained, which was based on the protection of state property by every entity administering an item of state property in the scope of its own tasks.

Reactivated State Attorney Office of State Treasury was intended to secure and defend the interests of State Treasury, to strengthen the rule of law and contribute to limit financial losses of the State[37], as well as – to standardize legal representation of State Treasury before national and international courts (performed up to 2005 in a decentralized way by different state bodies)[38].

Reactivated State Attorney Office of State Treasury, however, had the narrowest – in comparison to Polish regulations from the Second RP and Austrian

34 T. Gruszecki, *Chodzi o funkcje czy o symbol? Nieporozumienia wokół Prokuratorii Generalnej*, 'Rzeczpospolita' 1998, No. 119 (22.05.1998); J. Wierzbicki, *Problematyka zastępstwa procesowego Skarbu Państwa. Projekt ustawy o Prokuratorii Generalnej*, 'Przegląd Ustawodawstwa Gospodarczego' 1998, No. 11, p. 20; R.A. Tupin, *Geneza reaktywowania Prokuratorii Generalnej w III Rzeczypospolitej* [in:] *Prawo i Państwo. Księga jubileuszowa 200-lecia Prokuratorii Generalnej Rzeczypospolitej polskiej*, ed. L. Bosek, Warszawa 2017, pp. 102–109.

35 The Act dating 8th July 2005 on State Attorney Office of State Treasury (Dz. U. 2016, item 1313 and 1579).

36 Government draft act dating 16th September 2004, parliamentary printing No. 3259. After 1989 there were numerous draft acts on state attorney office, e.g. parliamentary draft act on State Attorney Office, which came in on 19th March 1998, was passed on 8th January 1999, but finally was vetoed by the President of RP, draft act of the parliamentary club of Polish Peasants' Party dating 14th June 2002 (parliamentary printing No. 1834) and draft act of the parliamentary club of League of Polish Families dating 19th March 2004 (parliamentary printing No. 2791). Also compare: M. Bajor-Stachańczyk, J. Lipski, P. Krawczyk, *O Prokuratorii Generalnej w Polsce – historia i teraźniejszość*, 'Biuro Studiów i Ekspertyz' 2003, No. 984, pp. 3–6; J. Wierzbicki, *Problematyka zastępstwa procesowego…*, pp. 18–21; R. Mastalski, *Opinia o projekcie ustawy o Prokuratorii Generalnej Rzeczypospolitej Polskiej (draft version May 1998)*, 'Przegląd Legislacyjny' 1998, No. 1–2, pp. 204–206; A. Szajkowski, *Opinia o projekcie ustawy z dnia 12.03.1999r. o Prokuratorii Generalnej Rzeczypospolitej Polskiej*, 'Przegląd Legislacyjny' 1999, No. 2, pp. 101–105; J. Frąckowiak, *O projekcie ustawy o Prokuratorii Generalnej Skarbu Państwa (draft version 17th August 2004)*, 'Przegląd Legislacyjny' 2004, No. 5(45), pp. 84–86.

37 M. Przychodzki, R. Tupin, *Wprowadzenie* [in:] *Komentarz do ustawy o Prokuratorii Generalnej Skarbu Państwa*, ed. M. Dziurda, Warszawa 2006, p. 12.

38 Reasons to draft act on General State Attorney Office of State Treasury dating 16th September 2004, printing No. 3259, point I, General reasons, p. 1.

regulations – scope of competences, i.e. the scope of tasks and the scope of activity. It was deprived of many competences, which SAO RP used to have traditionally, in particular as to representation for the purpose of litigation in administrative cases and to representation for the purpose of litigation of state legal entities, which in accordance with the Act on the principles of exercising powers inhered on to State Treasury[39], belonged to the scope of the concept of 'state treasury'[40]. Moreover, SAO of State Treasury (ST) never represented state legal entities. It was not until 2015 that SAO ST obtained the competences to perform (to a limited extent) representation for the purposes of litigation of state legal entities[41].

Statutory tasks of General State Attorney Office of State Treasury mentioned in a narrow way, impeding comprehensive protection of state property they were: firstly – performing representation for the purpose of litigation limited to civil matters, i.e. to representation before courts of general jurisdiction and Supreme Court[42]. That meant exclusion form the representation for the purpose of litigation in administrative matters, and also – in criminal cases, even if State Treasury was the victim; secondly - issuing opinions in a narrow range[43], leaving, in principle, out of range of the competences of State Attorney Office the appraisal of legal actions even of considerable value or of draft of contracts on legal advice; thirdly - issuing draft normative acts at matters concerning rights or interests of State Treasury, as well as regulating proceedings before courts, tribunals and other adjudicating bodies, which brought positive results because government legislator did not only obtain a helpful assessment as regards expected social – economic effects of draft regulations, but also the litigation risk assessment.

The limitation of the competences of SAO ST to performing only representation before courts of general jurisdiction and before Supreme Court with exclusion of administrative cases impeded, in a significant way, the protection of state property in the so – called reprivatization cases taking place before administrative courts, but also prevented jurisprudence impact on administrative

39 Dz. U. 1996, No. 106, item 493 with amendments.

40 The concept State Treasury was used in divergent meanings: differently in the Act on General State Attorney Office of State Treasury and in the Act on the principles of exercising powers inhered on to State Treasury. Also compare: J. Mucha-Kujawa, *Ewolucja regulacji prawnej …*, pp. 74–75.

41 The Act dating 5th August 2015 on the change of the act on General State Attorney Office of State Treasury and some other laws, Dz. U. 2015, Item 1635.

42 Compare M. Dziurda, *Prokuratoria Generalna i jej kompetencje* [in:] *Sine Ira et Studio. Księga jubileuszowa dedykowana Sędziemu Jackowi Gudowskiemu*, eds. T. Ereciński, P. Grzegorczyk, K. Weitz, Warszawa 2016, pp. 1249.

43 The scope of the subject of the opinions issued by SAO was narrower than those issued on the ground of prewar regulations. S. Płaza, *Historia prawa w Polsce na tle prawno porównawczym. Okres międzywojenny*, part 3, Kraków 2001, p. 728.

proceedings as a result of which were issued administrative decisions in violation of the law, favoring reprivatization claims' traders[44].

Such partially restored State Attorney Office of State Treasury did not have the possibility to mediate effectively between two or more state legal entities in order to reach an out-of-court agreement, to issue amicable opinions. Arbitration dispute resolution at matters concerning state property was not in the centre of competences of State Attorney Office of State Treasury.

Against narrow scope of competences of reactivated SSAO ST in national literature there have shown up varied positions as to the nature (type) of legal representation being at matters here. In functional terms SAO ST was treated as an organizational (statutory) representative of State Treasury similarly to the bodies of every legal entity[45], or it was recognized as a special organizational structure (institution) with statutory defined function in the sphere of representation[46] or as an institutional representative (proxy) of State Treasury at all matters in which State Treasury is represented with taking procedural (legal) actions before court[47].

44 *General State Attorney Office shall defend and anticipate. Interview with prof. L. Boskiem, the President of General State Attorney Office of RP*, 'Rzeczpospolita' dating 2.01.2017, http://www.rp.pl/Prawnicy/301029972-Prokuratoria-Generalna-SP-ma-bronic-i-przewidywac.html/#ap-5

45 Z. Radwański, *Prawo cywilne – część ogólna*, 9. edition, Warszawa 2007, p. 192; *System Prawa Prywatnego, Prawo cywilne – część ogólna*, vol. I, ed. M. Safjan, Warszawa 2007, p. 1059; A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu…*, pp. 26; also cf. J. Mucha-Kujawa, *Teoretycznoprawne aspekty przedstawicielstwa organizacyjnego jako pragmatycznego sposobu reprezentacji osoby prawnej*, 'Studia Prawnicze' 2017, No. 3, pp. 149–170.

46 W. Szydło, *Przedstawicielstwo ustawowe jako forma reprezentacji*, 'Studia Prawnicze' 2008, No. 2, p. 120.

47 H. Pietrzkowski, *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych*, Warszawa 2010, pp. 51–53.

## 4. Full return to traditional model of State Attorney Office of the Republic of Poland as a central legal representative (for the purpose of litigation) of State Treasury (fiscus) with wide advisory and litigious (proceedings) competences

From the point of view of the protection of public good narrow scope of tasks of SAO ST from 2005 was criticized and undoubtedly contributed – together with transformation of economic centre of the state, including decentralization of the institution of State Treasury[48] and strengthening the competences of state organizational entities in terms of management of state property – to return to traditional model of State Attorney Office as a central legal representative (for the purpose of litigation) of State Treasury with wide protective competences made to European measure and needs of contemporary state[49]. It was finally decided to come back to traditional model of SAO ST of the Republic of Poland as a central legal representative of State Treasury with wide advisory and proceedings competences[50].

New, however, to a large extent traditional model of State Attorney Office of RP has found expression in the Act dating 15th December 2016[51], which changing the name from State Attorney Office of State Treasury to State Attorney Office of the Republic of Poland changed the scope of its tasks as well. New model of SAO RP connects 'tradition with modernity' in the field of advice and legal representation, which rules have been 'consolidated and improved' in

48 The construct of State Treasury was changed pursuant to the Act dating 16th December 2016 on the regulations introducing the act on the principles of state property management (Dz. U. 2016, item 2260) in the direction of decentralization of State Treasury (among others liquidation of the Ministry of State Treasury). Those changes were accompanied by strengthening of the centralized way of legal representation (for the purpose of litigation) as State Attorney Office.

49 K. Głogowski, R. Tupin, *Prokuratoria Generalna logicznym…*; J. Mucha-Kujawa, *Ewolucja regulacji prawnej…*, pp. 65.

50 More about it: A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu …*, pp. 47–50.

51 The Act dating 15th December 2016 on General State Attorney Office of the Republic of Poland, Dz. U. 2016, item 2261 annulled the Act on 8th July 2005 on General State Attorney Office of State Treasury (Dz. U. 2016 position 1313 with amendments). Come back to traditional model of SAO RP coincided in time with the bicentennial jubilee of establishing General State Attorney Office of RP and was accompanied by publishing the commemorative book – *Prokuratoria Generalna, 200 lat tradycji ochrony dobra publicznego*, ed. L. Bosek, Warszawa 2016.

order to increase the quality of legal protection and to reduce the costs of legal support[52].

It is worth highlighting that it was of utmost importance just the change of the name of the institution from State Attorney Office of State Treasury to State Attorney Office of the Republic of Poland, determining the competences and the main goal of functioning State Attorney Office of RP – representation and protection of property interests of the state (as an entity of public law, which because of its public law character also acts in private trading managing public property). The aforementioned change indicates that the range of competences of State Attorney Office of RP (SAO RP) has been significantly extended – in particular in terms of representation of State Treasury in civil proceedings, i.e. before courts of general jurisdiction and Supreme Court, as well as before administrative courts, representation of legal entities, there have also been introduced changes as to the organization of SAO RP.

With reference to traditional tasks of State Attorney Office from the interwar period but in a modern perspective (similar to the tasks of contemporary Financial State Attorney Office of Austria), the legislator extended, in a very far-reaching way the competences of SAO RP in relation to previous state. SAO RP as a 'state law firm' has become the main (central) legal advisor and representative for the purpose of litigation in national and international cases with limited possibility to reach for legal advice from private law firms or to appoint 'an external representative'. Only in special cases if there is needed the knowledge of foreign law or of the procedure of a third country, SAO RP may entrust representation in court or performing specific legal actions to an 'external' representative. In the course of international proceedings SAO RP may also request (commission) opinions, analyses or reports to people knowledgeable in a particular field[53].

In the new institutional and legal form SAO RP shall protect the rights and interests of the Republic of Poland in a 'safe and effective' way, including State Treasury and state property not belonging to State Treasury, and its competences are divided into obligatory and not obligatory ones.

In terms of representation performed by SAO RP the legislator moved away from the previous narrow definition of 'representation for the purpose of

52 In accordance with the reasons to draft act on General State Attorney Office of the Republic of Poland dating 22nd November 2016 (printing No. 1055, p. 1) the act takes into account 'the achievements of General State Attorney Office of State Treasury, as well as functioning in the Second Republic of Poland General State Attorney Office of the Republic of Poland, General State Attorney Office of Polish Kingdom, Galician Treasury State Attorney Office, and the achievements of other European countries where there are specialized bodies of state lawyers'.

53 A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu …*, pp. 47 – 48.

litigation' for a general term 'representation', including actions in all proceedings which refer to the competences of SAO RP. *De lege lata* this representation includes actions in civil, penal and administrative proceedings, before courts, tribunals and other adjudicating bodies in international relations, in proceedings before Constitutional Tribunal[54].

Representation performed by State Attorney Office has obligatory or not obligatory character[55]. Within obligatory representation we distinguish: representation fully obligatory (exclusive), i.e. representation of State Treasury before Supreme Court and representation of State Treasury before arbitration courts (on the territory of RP, abroad or if it is not indicated) regardless of the amount in dispute and representation limited because of the subject or entity, including representation of State Treasury before courts of general jurisdiction, representation of legal entities before courts of general jurisdiction, Supreme Court and arbitration courts[56].

In case of exclusive representation of State Treasury before Supreme Court there may be two groups of situations – depending on whether State Attorney Office continues the representation performed before courts of general jurisdiction, or if the representation of SAO RP begins in the proceedings before Supreme Court when State Attorney Office joins pending proceedings in place of an entity which has represented State Treasury so far (participation of SAO RP was not obligatory at previous stages of the proceedings or it did not assume representation on the ground of statutory authorization)[57].

However, representation of State Treasury before courts of general jurisdiction is obligatory in cases for the revocation of an arbitration award, for the recognition or the declaration of the enforceability of the arbitration award or the settlement concluded before it.

Within the other type of obligatory representation, that is limited because of subject or entity, the representation does not include cases considered in first instance before lower district courts (cases for reconciliation of the contents of the land and mortgage register with the actual legal status, for declaration of acquisitive prescription, and the value of the subject matter exceeds the amount of 1 000 000 PLN).

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54 Reasons to government draft act on General State Attorney Office of the Republic of Poland, printing, No. 1055, p. 5.

55 More about it – cf. M. Dziurda, *Pojęcie i rodzaje zastępstwa w ustawie o Prokuratorii Generalnej Rzeczypospolitej Polskie*j [in:] *Prawo i Państwo. Księga jubileuszowa 200-lecia Prokuratorii Generalnej Rzeczypospolitej polskiej*, ed. L. Bosek, Warszawa 2017, pp. 645–701.

56 Also cf. A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu …*, p. 49.

57 Cf. M. Dziurda, *Zastępstwo Skarbu Państwa przez Prokuratorię Generalną Rzeczypospolitej Polskiej w postępowaniu cywilnym*, 'Polski Proces Cywilny' 2017, No. 3, pp. 360.

Another limitation of obligatory representation refers to representation of legal entities. There are limitations as to the entities[58] and they include representation before Supreme Court, representation of State Treasury, of state organizational without legal personality entities or of government administration bodies before administrative courts; of the Republic of Poland before courts, tribunals and other adjudicating bodies in international relations, of legal entities before courts of general jurisdiction and Supreme Court in cases mentioned in the Act (art. 12 par. 6–7 of the Act on SAO RP).

The second function of SAO RP, next to representation, is issuing opinions and providing advice[59].

Opinion – making competences of SAO RP as to legal actions performed by entities representing State Treasury have also significantly been strengthened. In terms of the quality of the protection of state property it deserves approval to issue opinions as to legal actions obligatorily (e.g. as to tenders for road infrastructure, for IT service) with the value above 100.000.000 PLN, as well as to legal advice agreements in which the amount of remuneration for the services rendered exceeds 500.000 PLN on an annual basis, and even – legal advice agreements in which the maximum amount of remuneration has not been determined. Legal opinions do not have, as a matter of fact, binding power because, what matters here, is not the expression of consent for concluding the contract but, undoubtedly, in such an opinion, SAO RP may draw attention to some threats (risks) connected with the drafted contract with the aim to avoid litigation in the future[60].

Manifestation of traditional modernity of the model of SAO RP is the fact of performing the legal representation of state organizational entities and legal entities, as well, but it does not mean full legal service. Representing legal entities with State Treasury share or state legal entities refers only to the most important litigations and requires consent from statutory authorities of those entities.

Representation of legal entities comprises representation of state legal entities different from State Treasury[61], legal entities with State Treasury share[62],

58 Issued on the ground of art. 12 (3) of the Act on General State Attorney Office of RP.

59 A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu …*, pp. 48–49.

60 Ibid., p. 48.

61 The category 'state legal entities' has been defined in a separate legal act, i.e. in the Act dating 16th December 2016 on the principles of state property management (Dz. U. 2016, item 2259), also compare: M. Dziurda, *Zastępstwo osób prawnych przez Prokuratorię Generalną Rzeczypospolitej Polskiej*, 'Polski Proces Cywilny' 2017, No. 4, p. 560.

62 Cf. A. Adamus, *Spółka z udziałem państwowym a przepisy o zarządzaniu mieniem państwowym*, 'Monitor Prawniczy' 2017, No. 8; A. Szumański, *Nowe regulacje prawne spółek z udziałem Skarbu Państwa z uwzględnieniem zmian w kodeksie spółek handlowych obowiązujących od 1.01.2017r.,* 'Przegląd Prawa Handlowego' 2017, No. 3.

legal entities with state legal entities share, as well as legal entities with State Treasury share and other state legal entities[63].

The aforementioned entities, defined by the legislator as 'entities being represented', have been indicated in an adequate regulation of the Prime Minister[64]. It should be stressed that enumeration of entities being represented in a special catalogue aims to guarantee the protection of rights and interests of the entities being represented, of the principles of competition law, of respecting the rights of minority shareholders, including the subject of their activity, and, in particular, the importance of business activities for the interests of the state. There appears a tendency to point out the entities being represented the widest possible way, which shall guarantee the widest possible protection of state property, including – that belonging to state legal entities different from State Treasury.

Representation of legal entities also has obligatory or not obligatory character. Obligatory representation, performed *ex lege* in specific categories of cases, includes: firstly, proceedings before courts of general jurisdiction in cases considered in first instance by higher district court in cases in which the amount in dispute exceeds 5.000.000 PLN (and as a consequence also before Supreme Court – Art. 12 (9)), and secondly, representation before arbitration courts in cases in which the amount in dispute exceeds 5.000.000 PLN. That representation with reference to state legal entities is obligatory, but in case of legal entities with State Treasury share is performed with their consent, which has a general character.

Not obligatory representation varies depending on the entities to which it refers. Firstly, in case of legal entities nominally mentioned in the regulation of the Prime Minister State Attorney Office may assume representation of such an entity in any civil case (in which representation is not obligatory) at its request. Secondly, State Attorney Office may perform representation of legal entities (state legal entities, legal entities with State Treasury share or other state legal entities not mentioned in the regulation of Prime Minister) on the command of Prime Minister if it is needed for the protection of important rights and interests at matters concerning state property regardless of the amount in dispute, but with the consent of the legal entity. It must be stressed that assuming representation of the entity being represented may follow at any stage of the proceedings (also before its initiation)[65].

63 See: A. Bierć, J. Mucha-Kujawa, *Teoretyczno-prawne poszukiwania…*, pp. 88; J. Bodio, W. Graliński, *Ewolucja zakresu kompetencji Prokuratorii Generalnej Rzeczypospolitej Polskiej*, 'Rejent' 2018, No. 2, p. 28.

64 Regulation of the Prime Minister dating 11th May 2017, item 938 with amendments.

65 Cf. M. Dziurda, *Konstrukcja i zasady zastępstwa osób prawnych przez Prokuratorię Generalną Rzeczypospolitej Polskiej*, 'Przegląd Sądowy' 2017, No. 10.

Moreover, SAO RP has the possibility to join any case which concerns state property, also led by companies with the State Treasury share. It may also refer some cases to state organizational entities at their request or *ex officio*. It is about cases called 'trivial' which do not pose a threat to state property or provoke difference of opinions in jurisprudence[66].

General SAO RP has been equipped with wide competences as to representation for the purpose of litigation which do not limit to civil cases but it also comprises administrative cases, and even penal, but in penal proceedings SAO RP may assume representation only at the reasoned request of an entity representing State Treasury.

Except for extended representation of the Republic of Poland before courts, tribunals and other international bodies, if the protection of important rights or interests of RP requires it, State Attorney Office has also in their competences: a) representation of government administration bodies (before courts of general jurisdiction and Supreme Court); b) representation of State Treasury, of state organizational entities without legal personality or of government administration bodies (in proceedings before administrative courts), c) representation of legal entities (before courts of general jurisdiction, arbitration courts and before Supreme Court), d) presentation of important views for the cases in litigation (to courts of general jurisdiction, administrative courts, Supreme Court, Constitutional Tribunal).

The premise justifying the assumption of representation of government administration bodies before courts of general jurisdiction and Supreme Court shall be the protection of important rights or interests of RP, that is public interest, which is realized by some bodies of government administration, equipped with specific judicial capacity. They are regulatory bodies (e.g. the President of Competition of Consumer Protection Office, The Energy Regulatory Office, the President of Social Security Office, tax authorities). The Assumption of representation may take place at any stage of the proceedings, including before Supreme Court.

In the proceedings before administrative courts, however, SAO RP may assume representation at a reasoned request of a government administration body, state organizational entity without legal personality or an entity representing State Treasury as long as it finds the basis in judicial capacity of those entities. SAO RP, however, may not assume representation if there is a conflict of interests between those entities (e.g. if the participant in the administrative proceedings is a government administration body and at the same time State Treasury or state organizational entity without legal personality).

66 A. Bierć, J. Mucha-Kujawa, *W kierunku tradycyjnego modelu …*, pp. 48–49.

The President of SAO RP took over some part of competences previously performed by the minister of State Treasury in the scope of supervision over State Treasury property and received new tasks in the organizational and litigation (proceedings) area. Here belongs: a) settlement of disputes at matters concerning rights and interests of State Treasury between state organizational entities without legal personality; b) settlement of competence disputes in the scope of representation in court of State Treasury; c) organization of Arbitration Court with State Attorney Office and providing there services by the Office of State Attorney.

New organizational and litigious (proceedings) tasks of the President of SAO RP are the answer to some problems appearing in this matter in practice. Authorization of the President of SAO RP to settle disputes at matters concerning the rights and interests of State Treasury – within the entities representing State Treasury – shall be an instrument *ultima ratio* because settlement of those disputes may not happen in court because of lack of judicial capacity of those entities. Authorization of the President of SAO to settle competence disputes in the scope of representation in court is intended to eliminate procedural complications which appear within so called negative competence disputes if the bodies of state organizational entities question their competences in terms of representation in court of State Treasury[67].

What deserves approval and is an expression of modern attitude to settle disputes is establishment of permanent Arbitration Court with SAO, which is competent to settle disputes between different from State Treasury state legal entities, legal entities with State Treasury share or state legal entities. The abovementioned Arbitration Court may, similarly to other arbitration courts, conduct mediation.

Bearing in mind the changes that have been introduced, which aim, in particular, to extend the tasks and competences of State Attorney Office, the question remains open as to the evaluation of the effectiveness of the construct of State Attorney Office as a 'highly specialized institutional representative (…) of rights and interest of the Republic of Poland'[68]. Functioning of State Attorney Office will show whether constructed in a centralized way model of state representation in trading as a 'model of traditional modernity' will ensure effective representation and protection of state property.

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67 M. Dziurda, *Reprezentacja Skarbu Państwa w procesie cywilnym*, Kraków 2005, pp. 245; G. Bieniek, H. Pietrzkowski, *Reprezentacja Skarbu Państwa i jednostek samorządu terytorialnego*, Warszawa 2006, p. 136; M. Jaślikowski, *Wniosek sądu o wskazanie organu właściwego do podejmowania czynności procesowych za Skarb Państwa*, 'Iustitia' 2017, No. 3; A. Bierć, J.Mucha-Kujawa, *W kierunku tradycyjnego modelu Prokuratorii Generalnej RP…*, pp. 47–50.

68 Reasons to the draft act on State Attorney Office of the Republic of Poland dating 22nd November 2016, printing No. 1055, p. 1.

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## SUMMARY

The considerations carried out here above seem to confirm that State Attorney Office of the Republic of Poland is an institutional legal representative of the state (fiscus) in property cases of national and international character.

In the new organizational and legal shape SAO RP connects to traditional model of that institution, functioning before in Polish legal system. The legislator extended the competences of contemporary State Attorney Office of the Republic of Poland in a far-reaching way in relation to previous situation, constructing State Attorney Office as the main (central) legal advisor and representative for the purpose of litigation in the sphere of mainly property rights of the state in national and international cases with the limited possibility to reach for legal advice from private law firms, or appointing 'external representatives'.

In the new institutional and legal shape SAO RP shall protect, in a 'safe and effective' way, the rights and interests of the Republic of Poland, including of State Treasury and state property not belonging to State Treasury, and its competences divide into obligatory and not obligatory ones.

**Keywords**
State Attorney Office of the Republic of Poland, State Treasury, fiscus, protection of state property, representation, legal representation, right of representation

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# Liability in Polish law for infringement of the pre-contractual obligation to inform

**Abstract**
In contemporary contract and consumer law, obligations to inform are an example of instruments (protective ones) which imposes on business entities a duty to make a statement of knowledge (a representation), the content of which is determined by regulations and the purpose of which is to aid the consumer in taking a well-informed, rational decision. Appropriate regulations referring to liability for failing to carry out this obligation to inform aim to maintain optimal trust between the contracting parties and, as a result, lead to a balance in the parties' position, at the same time upholding the principle of the freedom of contract.

In accordance with the fundamental assumption in European consumer law, one's liability towards a consumer should meet the criteria of both efficiency and proportionality, which means that one should not strictly consider such liability purely formally, i.e., as maintaining an economic balance between the parties. The sanction the company shall incur is to serve the actual satisfaction of the interests of the consumer, and not only to make a profit. Additionally, the sanctions for neglecting the obligation to inform are expected to encourage companies to comply with them. Neglecting this obligation to inform in the pre-contractual phase may take the form of not providing information which is required and explicitly defined by law or providing incomplete information. A large amount of detail in determining a business's responsibility is presumed

to guarantee the consumer knowledge of his/her rights and to enable him/her to evaluate the risks resulting from entering into a particular transaction. One must not, however, ignore the fact that providing excessive, thus illegible, information must be treated equally to non-disclosure of such information, which may result in infringement of the aforementioned regulations.

Neglecting the obligation to inform may also arise in such a case where the consumer is not provided with a particular piece of information, despite the lack of a definite legal basis in this regard – such as a detailed regulation contained in an act – but such a duty would result from a general loyalty duty between the contracting parties.

In the beginning, it should be noted that the liability for an infringement of the pre-contractual obligation to inform is characterised by system heterogeneity. In particular, it refers to the distinct consumer protection regime. It is very often the case that depending on the contractor's status (professional or non-professional) the legal consequences of failing to inform or improperly informing are framed in different ways. One must bear in mind the difference between solely the failure to inform or to improperly carry out the pre-contractual obligation to inform (pursued within pre-contractual liability, fundamentally according to an *ex delicto* regime) and the consequences arising from the content of the delivered information, i.e., the guarantee of definite elements in the legal relationship of an obligatory nature (assigned to the classic liability in an *ex contractu* regime).

The subject of civil liability for the infringement of duties to inform can be analysed from two perspectives: firstly, from an economic point of view, i.e., whether for the aggrieved party and for the market at large it would be more favourable for the infringement of the duty to inform to be pursued within an *ex contractu* or *ex delicto* regime, and secondly, from the perspective of the theory of law, whether for the system of contract law it would be better for this liability to be pursued within an *ex contractu* or *ex delicto* regime. In response to the second question, the position of academics is that the liability for the violation of trust due to failing to properly inform the consumer should be pursued in an *ex delicto* system in order to maintain the internal cohesion of contract law[1].

[1] S. A. Smith, *The Reliance Interest in Contract Damages and the Morality of Contract Law,* 'Issues in Legal Scholarship' 2001, vol. 1, No. 1, pp. 1–38; P. Mitchell, J. Philips, *The Contractual Nexus*, 'Oxford Journal of Law Studies' 2001, No. 22, p. 114.

## The nature of pre-contractual liability for the infringement of obligations to inform

Regulations establishing pre-contractual obligations for businesses to inform members of the public are aimed at equipping the clients with honest and reliable information which enables them to take a rational decision about whether to be bound by a definite contract. Infringement of this duty may become grounds for liability of the business after fulfilling specified premises.

In the Polish civil law doctrine, the concept of liability is not uniformly understood. In the broader meaning of the word, liability means the inevitability of having to bear the consequences – negatively qualified in a particular legal system – of an event of law, also evaluated negatively by a legal norm[2]. The duty to fulfil the obligation for compensation may be defined by law or may result from a contract.

In Polish and European literature, two main civil liability regimes are commonly accepted: the tortious one (*ex delicto*) and the contractual one (*ex contractu*). In line with an *ex delicto* regime, the source of obligation formed between the aggrieved party and the responsible one is constituted by the damage being a standard consequence of a damaging event, the so-called tort, or an unlawful act defined by a legal norm. Within contractual liability, the basis is the damage caused by the failure to inform or to improperly carry out the obligation resulting from the contract. Academics point out that these two regimes of liability are becoming hard to distinguish in practice[3]. What's more, in international trade dealings we can observe a gradual harmonisation of the tortious and contractual liability systems. The traditional distinction between these two types of civil liability is becoming less and less accurate due to the dynamic unification of the general principles by which they were distinguished[4]. One of the reasons for this phenomenon is the steady growth of the risk principle, including its modification based on unlawfulness, bearing in mind the simultaneous and steady

2 *System Prawa Prywatnego*, vol. 1, ed. M. Safjan, Warszawa 2012, p. 45; W. Kocot, *Odpowiedzialność przedkontraktowa*, Warszawa 2013, p. 49; Z. Radwański, A. Olejniczak, *Zobowiązania,* Warszawa 2010, p. 31; A. Stelmachowski, *Zarys teorii prawa cywilnego,* Warsaw 1998, pp. 209–13; M. Kaliński, *Szkoda na mieniu i jej naprawienie,* Warsaw 2011, pp. 7; W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice,* Warsaw 1972, p. 13.

3 J. K. Kondek, *Jedność czy wielość reżimów odpowiedzialności odszkodowawczej w prawie polskim – przyczynek do dyskusji de lege ferenda*, 'Studia Iuridica' 2007, vol. 47, p. 167.

4 J. Rajski, *Ewolucja odpowiedzialności cywilnej w prawie niektórych państw obcych* [in:] *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego,* eds. J. Błeszyński, J. Rajski, Warszawa 1985, pp. 220; M. Kaliński, *Szkoda na mieniu…,* p. 31.

decrease of the role of the culpability principle as the traditional premise from which the obligation to redress damages in a civil law system arises.[5]

In Polish law, culpability is still seen as a general rule of tortious liability. According to European model rules, however, on the grounds of Art. VI.-I:101 (1) in connection with Art. VI.-I:103 of the Common Frame of Reference (DCFR), a natural or legal person who suffered important material or non-material damage may demand its redress from the person who caused it not only on purpose or by negligence, but also in cases where a different principle of liability is applicable.

The abovementioned model regulations indicate that *ex delicto* liability is rather based on a far-reaching objectification of the concept of culpability, in particular, on the separation of its objective element, i.e., unlawful practice, as an independent premise of liability[6]. Academics maintain the position that unlawfulness means not only the infringement of commonly accepted rules of conduct, established by the norms of positive law, but also by the principles of justice, good faith, honesty, or fair dealings.

Unlawfulness, originating from the risk principle, enhances the protection of the aggrieved party's interests, in an obvious way, mitigating the duty of evidence on his/her side[7]. To be awarded damages, he/she must establish that the harm is the consequence of the debtor's conduct, contrary to legal regulations, common reason, justice, good faith, honesty, or fair dealings.

Current model regulations on contractual liability, both international and European, are of an openly objective nature. Bearing the European model regulations in mind, one should notice that the abovementioned liability is seen broadly, embracing not only the obligation to redress material loss, but also the obligation to remove any consequences of the inconsistency between the fulfilment of the obligation and the content of the contract. Hence, the damage applies to any damages which are not financial in nature (Art. III.-3:701 Para. 3 DCFR).

Compensatory liability constitutes a special type of civil liability. The compensatory character of civil liability is determined by whether, as a consequence of debtor's behaviour which is contrary to the dealings (actions) resulting from the disposition of a specific norm, there arises some damage to the creditor's assets (property), and the creditor gains the right to redress it, then in terms of damage to property payment of compensation is the usual form.

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5 W. Kocot, *Odpowiedzialność przedkontraktowa …,* p. 51; A. Stelmachowski, *Zarys teorii prawa…,* p. 220; W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje …,* p. 28, 203.

6 W. Kocot, *Odpowiedzialność przedkontraktowa…,* p. 52.

7 *System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak, Warszawa 2008, pp. 353, 356.

The compensatory function of liability for damages undoubtedly influenced the extension of the borders of civil indemnification to the pre-contractual phase. The creation of trust between the parties, which constitutes a reference point to evaluate the appropriateness of their behaviour, shall be treated as a circumstance determining claims arising from pre-contractual liability.

Until recently, the commonly presented view, e.g., in Anglo-Saxon legal culture, has been one where the freedom of contract principle does not allow the imposition on the parties of any kind of obligations in the pre-contractual phase, and where the parties shall be able to decide autonomously under which conditions they want to negotiate a contract. At present, this approach is acceptable to a lesser extent because of a rising number of behaviours standing contrary to the principles of fair dealing and justice (honesty).

An appropriately defined scope of pre-contractual liability is meant to prevent a state of contractual imbalance arising as a consequence of a behaviour contrary to the law or to fair dealings. Bearing in mind the criterion of the origin of pre-contractual liability, it should be stressed that it divides into either the one which beginning marks violation of the good faith principle, established in the act or resulting from fair dealings, in the pre-contractual phase, or the other, classic contractual liability, which arises as a result of behaviour which is contrary to a pre-contractual agreement[8].

In the literature a view is presented where pre-contractual liability has the characteristics of both an *ex delicto* and an *ex contractu* regime[9]. On the one hand, this type of liability is a consequence of the violation of a general duty not to harm (*alterum non laedere*), which makes it similar to *ex delicto* liability. On the other hand, liability for compensation, which is a consequence of violating the loyalty principle and trust, because of their relative character *(inter partes*), brings it closer to *ex contractu* liability because an obligation relationship arises *ab initio* between individual parties; that is, from the beginning there is no doubt who is burdened with the consequences of the violation of loyalty and trust.

In Polish doctrine there is little controversy over the fact that pre-contractual liability has the characteristics of compensatory liability, in particular, in terms of the obligation understood from the side of negative consequences (compensatory sanction) stemming from improper dealings of the party not obliged to conclude a contract[10]. In light of the dogmatics of Polish civil law, some doubts in the doctrine arise as to the fact of comprising with compensatory

8 W. Kocot, *Odpowiedzialność przedkontraktowa …,* p. 54.

9 Ibid., p. 66.

10 Cf. P. Machnikowski, *Odpowiedzialność przedkontraktowa – jej podstawy, przesłanki i funkcje* [in:] *Europeizacja prawa prywatnego,*vol. 1., eds. M. Pazdan, W. Popiołek, E. Rott–Pietrzyk, M. Szpunar, Warszawa 2008, pp. 700. He suggests the division because of the function criterion compensatory liability performs in trading: the regulations which refer to the obliga-

liability every case of pre-contractual liability, especially in terms of the regulations referring to the obligation to form a contract whose actual purpose is not as much redressing the damage but executing a specific behaviour based on the principle of the real performance of obligations[11].

## Liability in Polish law for improperly carrying out an obligation to inform: selected legal grounds

Bearing in mind the problems considered in the essay below it is worth stressing that in respect to legal qualifications of pre-contractual compensatory liability, the greatest controversy in literature is provoked by – more and more commonly applied by the legislature, and not guaranteed by any sanction – the pre-contractual obligation of the business to inform, especially towards the consumer.

In case of infringement of the statutory obligation to inform, a typical pre-contractual relationship is protected from the moment a consumer's trust is abused by a business regarding the contents of a signed contract, at which moment he/she gains the right to seek compensation to redress the damage (the moment of arising the trust is not decisive here)[12]. It is a dissimilarity in relation to traditional regimes of compensatory liability because, e.g., the traditional premise of compensatory liability in an *ex delicto* regime is constituted by the harmful behaviour of one party, being in its nature an unlawful act, and within an *ex contractu* liability it is the failure to properly carry out an obligation. The company's duty to provide information to the consumer prior to concluding the contract is unilateral because even if the consumer cooperates with the reception of the information provided to him/her, this cooperation is his/her right, not an obligation. *De lege lata,* the origin of the business's obligation is constituted by its actions, not by the implied will of the parties[13].

In case of infringement of the obligation originating from a statute, the element of unlawfulness – which constitutes the main premise of liability in an *ex delicto* system in the context of obligatory consumer information – shall be connected with the obligatory contents of this information. A particular difficulty

tion to enter into a contract with a definite party, and the other ones which shape the compensatory sanctions for a definite behaviour of a party.

11 W. Kocot, *Odpowiedzialnośćprzedkontraktowa…,* p. 56.

12 R. Szostak, *Odpowiedzialność cywilnoprawna za uchylenie się od obowiązku przedkontraktowej informacji konsumenckiej* [in:] *Czyny niedozwolone w prawie polskim i prawie porównawczym. Materiały IV ogólnopolskiego zjazdu cywilistów – Toruń 24–25 czerwca 2011*, ed. M. Nestorowicz, Warszawa 2012, p. 539.

13 W. Czachórski, A. Brzozowskiego, M. Safjan, E. Skowrońskiej–Bocian, *Zobowiązania – zarys wykładu,* Warszawa 2009, p. 127.

for the consumer, bearing in mind *ex delicto* liability, is constituted by the need to prove culpability, and the consequence of such a construct as the lack of a claim (the possibility to demand) for providing him/her reliable information at a point before the damage occurs. Requiring information on the grounds of demanding compliance with the act shall not be identified with the above[14]. Considering the abovementioned incidents to be under compensatory liability causes specific legal consequences, such as the admissibility of general provisions referring to a causal relationship, the method and scope of damage restitution (Art. 361 CC), contributing of the harmed party (Art. 362 CC), and the moment when the amount of compensation shall be established (Art. 363 CC).

In the literature it is widely accepted that compensatory liability for improperly carrying out the pre-contractual obligation to inform in an *ex contractu* regime is connected with the concept of the protection of the legitimate parties' expectations[15]. The principle of the protection of the legitimate parties' expectations results from legal tradition or from the theory of the rule of law. This construct, formulated on the grounds of German doctrine and judicature, is based on the principle of the protection of trust, treated as the foundation of the rule of law. In light of its assumptions, while interpreting a declaration of will or of knowledge (a representation), one should take into account not only the actual intentions of the person making this declaration but also the cognitive abilities of typical addressees so that legitimate expectations as to the potential consequences of the declaration may be considered[16]. The actions of both parties to the contract shall fulfil the requirement of predictability, and the parties may trust that their proceedings in line with the law shall enjoy legal protection.

The tortious character of liability is connected with the concept of the protection of the parties' trust, including the institutions of private law serving as tools which – with the help of the legal system – supports the trust of one party towards another, which is necessary to take a decision to be bound by the contract. In an *ex delicto* regime of liability, repairing (redressing) the damage becomes an original performance of the obligee, and the creditor does not have to have any kind of obligation relationship with the debtor before causing damage[17].

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14 This concept is based on treating in the same way a tort (a wrongful behaviour) and an infringement of a previously-created relationship in a statute (act), based on the duty not to do harm to the other party (in this case a positive duty, such as the duty to provide information). Cf. W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje…*, p. 240.

15 A. R. Macsim, *The New Consumer Right Directive: A Comparative Law and Economics Analysis of the Maximum Harmonisation Effects on Consumer and Business*, Aarhus 2012, p. 41–57.

16 A. Bierć, *Zarys Prawa Prywatnego. Część ogólna,* Warszawa 2015, p. 537.

17 *System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak, Warszawa 2014, p. 26.

Standing on the position that infringement of a pre-contractual obligation to inform should be pursued within an *ex delicto* regime of liability, it follows that the consumer does not have so much the right to demand reliable information from the business, as the right to demand that it respects the statutory obligation to inform which is imposed on it.

In line with the present Polish regulations there are no grounds to derive an obligatory pre-contractual bond between the parties. Moreover, in the literature there is a view that the rule is a lack of information – there are advisory duties in the pre-contractual phase, and each party is obliged to guard their interests independently, in particular when it comes to any knowledge indispensable to evaluating the possible benefits and risks connected with a particular transaction[18]. Undoubtedly, the duty to provide the other party with reliable and straightforward information at his/her request results from the principle of fair dealings, and any violation shall be sanctioned with the liability for misrepresentation (providing false data). There is, however, a lack of an unambiguous meter to set limits to the obligation to inform resulting from good faith.

Bearing in mind the functionality of the legal system, an *ex contractu* regime of liability is more effective for the harmed party since it is possible to individualise the information within an obligation relationship. Additionally, the company's standard of diligence (as a liability debtor) is maintained on a higher level, and the harmed party is not burdened with the obligation to prove culpability.

At the end of the considerations presented above, it is worth stressing that in some cases, e.g., in financial services, which are characterised by a high level of complexity and specialisation, the liability of the company for an infringement of the pre-contractual obligation to inform may be greater than with conventional services. Such services are provided by financial institutions – commonly, although not exclusively, banks – which are recognised in jurisdiction and in academic circles as institutions of public trust[19].

Recognising banks as institutions of public trust may on a deontological level become the grounds to burden them with an additional, contractual obligation to inform. The legal system, undoubtedly, in a decidedly more detailed way than in the case of some other entrepreneurs, creates and maintains the image

18 P. Machnikowski, *Prawne instrumenty ochrony zaufania przy zawieraniu umowy*, Wrocław 2010, p. 194; T. Sójka, *Cywilnoprawna ochrona inwestorów korzystających z usług maklerskich na rynku kapitałowym*, Warszawa 2016, p. 118.

19 *Prawo bankowe. Komentarz,* Vol. 1–2, ed. F. Zoll, Warszawa 2005, p. 118; Z. Ofiarski, *Prawo bankowe. Komentarz*, Warsaw 2013, p. 27; A. Janiak, *Bank jako instytucja zaufania publicznego*. 'Glosa – Przegląd Prawa Gospodarczego' 2003, No. 2, p. 17. A different opinion is represented by: A. Chłopecki, *Bank jako instytucja zaufania publicznego w wymiarze cywilnoprawnym* [in:] *Oblicza prawa cywilnego. Księga Jubileuszowa dedykowana Profesorowi Janowi Błeszyńskiemu,* ed. K. Szczepkowska–Kozłowska, Warszawa 2013, p. 66.

of banks as institutions of an exceptional character, under special supervision of the state. It does not seem to provoke much controversy in the doctrine that the specifics and complexity of financial services and the position of banks as institutions of public trust translates into higher requirements in terms of the diligence of the services provided by them.

Bearing in mind the specifics of the obligation to inform while providing financial services, it must also be mentioned that there is a connection between the loyalty duty to provide information in obligation relationships and the general requirements regarding the due performance of obligations, set out by the principles of social coexistence since any behaviour contrary to deontological principles – i.e., incorrectly providing the consumer (client) with information or failing to provide it at all – is contrary to the principles of social coexistence, such as the principle of honesty, the principle of trust, and the due diligence principle.

The purpose of the regulations establishing a pre-contractual obligation to inform – and in the case of financial services, to warn – is the protection of the property interests of the consumer. Infringement of the above-mentioned regulations may become grounds for compensatory liability of entrepreneur business, and in the case of financial services, the financial institution may become liable under Art. 415 CC if all the conditions of this liability are fulfilled.

In case of infringement of a company's obligation to inform, as a rule, in line with Art. 6 CC, the consumer is burdened with the obligation to prove it. Unfortunately, in practice this is met with a lot of difficulties, in particular with the need to prove a negative fact, i.e., the non-occurrence of a particular behaviour. In the literature it is pointed out that under such circumstances, ease of evidence shall be applied in the matter, e.g., in terms of *prima facie* proof[20].

Further, in cases where the harmed party is the client of a financial institution, he/she is burdened with proving the adequate cause-and-effect relationship between the infringement of the pre-contractual obligation to inform and the harmful transaction conducted by the institution. In practice, the client is obliged to prove that if the financial institution had performed its obligation to inform correctly, his/her decision to sign the contract in question would have been different. Bearing in mind the non-individualised and rather general character of the obligation to inform, particularly in terms of the regulations referring to financial services, it may become complicated for the harmed party to prove a cause-and-effect relationship.

20 P. Tereszkiewicz, *Obowiązki informacyjne w umowach o usługi finansowe,* Warszawa 2015, p. 662. It must be stressed that within the *prima facie* proof it would be enough to prove the circumstances during which it came to the creation of a financial institution's obligation to inform clients in order to recognise the infringement of the above-mentioned duties as probable.

Having considered the amount of damage resulting from a financial institution's infringement of its obligation to inform, as a rule it may differ, depending on the type of financial service. Nevertheless, in practice, it occurs most often together with providing investment services. The damages in such a case constitute the difference between the value of the financial instruments actually acquired and the hypothetical value of the consumer's investment if the financial institution had performed the obligatory obligation to inform correctly[21]. The value of the client's investment is the amount of money invested by him/her in the financial instruments that caused damage – with the assumption that if the financial institution had performed the obligation to inform correctly, then the client would not have gone through with the transaction in question – or the value of other instruments that would not have caused such damage to the client and in which the investor would have invested had the financial institution properly carried out the obligation to inform them.

In line with Art. 361 § 1 CC, when calculating the amount of damage caused to the investor such a difference in the value of the investment shall only be allowed if it results from non-performance of an obligation to inform and, moreover, if it constitutes an adequate consequence of the infringement of the obligation to inform; that is, the difference between the value of the investment with the obligation to inform correctly performed by the entrepreneur and the value of the investment with an infringement of said duties[22]. That calculation constitutes the consequence of the function of the adequate cause-and-effect relationship as a factor which limits the amount of damage that shall be compensated. Hence, it is not possible to compensate, among others, the consumer's loss in property caused by a reduction in the value of the financial instruments resulting from any circumstances other than incorrectly informing or failing to inform at all. Only the damage resulting from the client taking a poor investment decision as a result of an infringement of the obligation to inform shall be compensated for. The loss in property is constituted by the difference between the surplus of the amount paid as a consequence of acquiring the financial instruments in relation to their current market value, not the whole value of the acquired financial instruments[23].

In the literature it is a commonly accepted view that, as a rule, the consumer's damages in financial services, such as lost benefits, shall be compensated for as well[24]. It is indicated that the investor is in such circumstances obliged to prove

21 Ibid., p. 652.
22 T. Sójka, *Cywilnoprawna ochrona inwestorów …*, p. 109.
23 Ibid., p. 110.
24 Ibid., p. 111.

high probability of achieving them[25]. The burden of proof lies with the investor to prove if the company had correctly performed the obligation to inform him/her, it is highly probable he would have invested in different financial instruments that would have guaranteed him/her a definite profit on the investment, e.g., interest on a bank deposit[26]. The interest not earned from the missed investment opportunity would have been damage (loss) such as lost benefits. The investor would have to prove the circumstances that his intention was to purchase a financial service that would guarantee him/her a definite profit, but as a result of an infringement of the obligation to inform he purchased a different service.

## Conclusions

The Polish regime of consumer protection shows many weaknesses, especially within the regulations regarding the liability for a company's infringement of their pre-contractual obligation to inform. In particular, in Polish law there is a visible lack of defined general legal consequences of failing to provide obligatory information or providing it in an incomplete, unclear way, while not intending to mislead the other party. The existence of trust between the contracting parties shall be treated as a premise which decides claims for compensatory pre-contractual liability. This results from the rising importance of the compensating function of compensatory liability, which has brought about the extension of the limits of civil indemnification to the pre-contract stage. This extension was accompanied by a process of moving away from the classic causative individual liability in favour of guarantee – distributive liability, which has led to the supremacy of the previous principle of culpability. This questioning of the premise of culpability coincided in time with the increased risk principle in compensatory relations in an *ex delicto* regime.

In light of the dominant views presented in the doctrine – both Polish and foreign, in particular the French and German ones – one should agree with the position about the independence of the claims arisen before concluding the contract, which results from the tortious (*ex delicto*), or possibly autonomous nature of pre-contractual liability on the grounds of the construct of *culpae in contrahendo*. The above-mentioned liability results directly from a statute or indirectly from the principles of private law, such as the principles of good faith, honesty, or fairness (justice). Its basis is constituted by the state of legitimate expectations of the party whose trust has been violated by dishonest, disloyal proceedings (dealings) of his/her negotiating partner. A properly framed scope of pre-contractual

25 *System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak, Warszawa 2014, pp. 138.
26 T. Sójka, *Cywilnoprawna ochrona inwestorów…*, p. 111.

liability aims to prevent the forming of a contractual imbalance as a consequence of the actions of one party standing contrary to law or fair dealings.

The above-mentioned approach is in line with the solutions presented in European model law, particularly in respect to the compensatory liability for failing to properly inform which the business shall bear regardless of whether the contract was eventually signed. On the grounds of model solutions, in case the harmed party seeks redress (compensation) for damages resulting from an improperly conducted contract, the scope of the damages may also include the damage suffered in the pre-contract stage because of improperly fulfilling the obligation to inform (Art. II.-3:109 Para. 3 DCFR).

*De lege ferenda*, some modifications should be introduced to the system of *ex delicto* liability for the infringement of an obligation to inform in the pre-contractual phase so that it is more favourable to the harmed party. This liability shall be detached from the need to prove the culpability premise or reversing the burden of proof should at least be considered, as with the regime of *ex contractu* liability. In European judicature, there has been a very noticeable tendency, for a long time, to move away from the culpability premise while proving liability for damages occurring in the pre-contractual stage. In particular, what is meant here is the damage resulting from any violations (infringements) before concluding the contract in the context of a tender relationship. Nevertheless, *de lege ferenda*, such a concept should be considered in relations between a business and a consumer. One possible solution would be to extend the autonomous grounds of liability, based on the protection of trust as in Art. 72 § 2 CC, which shall be framed as a general liability for damages arising in the pre-contractual phase in an *ex delicto* regime. It would be important to detach it from only the negotiated mode of contract negotiation and to replace the concept of 'fair dealings' with the more objective concept of 'good faith,' better known in European, continental legal systems. Bearing in mind the requirement of making the protection of the harmed party more real, one should support the need to objectivise this liability, at least in relation to the consumer, towards abolishing the culpability premise and basing it on the risk principle. A modified version of liability could comprise at least consumer relations. Liability on the grounds of the culpability principle constitutes a great difficulty for the harmed party as well, to which the low number of verdicts in this matter testify. Making the protection of the weaker party to the transaction more substantial and basing this new liability on the risk principle would undoubtedly be a more efficient sanction in line with the requirements of European lawmakers.

As to the scope of the compensation for infringement of pre-contractual duties, it seems right to limit the extent of compensation to the limits of negative contractual interests, taking into account that this is how the regular predictability for damages in the pre-contractual phase is framed. On the other hand, it is

not possible to fully reject the view in accordance with which the concept of full compensation would better implement (realise) the idea of efficient liability for infringement of the obligation to inform which is promoted by European lawmakers. Moreover, it would undoubtedly mobilising companies more to encourage them to honestly inform their consumers about any risks connected with the contract, in particular, that it may often happen that the actual damages being in a casual relationship with the informative infringement exceeds the limit of negative contractual interests and the conditions of real satisfaction of the interests of the harmed party do not allow to cover it. It should be stressed that the tendency in European model law – e.g., PECL – is not to place limits on compensation for damages suffered in the pre-contractual phase (Art. 2:301 PECL).

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## SUMMARY

In contemporary contract and consumer law, obligations to inform are an example of instruments (protective ones) which imposes on business entities a duty to make a statement of knowledge (a representation), the content of which is determined by regulations and the purpose of which is to aid the consumer in taking a well-informed, rational decision. Appropriate regulations referring to liability for failing to carry out this obligation to inform aim to maintain optimal trust between the contracting parties and, as a result, lead to a balance in the parties' position, at the same time upholding the principle of the freedom of contract.

In line with the general assumption accompanying European consumer law, liability towards the consumer should meet the criteria of both efficiency and proportionality, which means that one should not solely consider the liability purely formally, i.e., as maintaining the economic balance of the two parties. The sanction companies shall incur should serve the actual satisfaction of the interests of the client, and not only to make his/her financial accounts positive. Additionally, the sanctions for infringement of the obligation to inform are designed to encourage businesses to comply with them.

The Polish model of consumer protection through information is characterised by several weaknesses, in particular, in the scope of pre-contractual liability for a company's infringement of the obligation to inform. It is especially problematic that Polish law does not define general, legal consequences of failing to provide obligatory information, or providing it in an incomplete, unclear manner while not intending to mislead the other party.



**Keywords**

pre-contractual liability, compensatory liability, obligation to inform, pre-contractual obligation to inform, damages, trust, infringement of pre-contractual obligation to inform

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