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On Modern Crime – Money Laundering and Cryptocurrencies

Wokół współczesnej przestępczości – pranie brudnych pieniędzy a kryptowaluty

Streszczenie

Artykuł dotyczy procederu prania brudnych pieniędzy z wykorzystaniem walut wirtualnych. Zjawisko to nabiera znaczenia, gdyż stanowi dosyć łatwy sposób zalegalizowania bezprawnie uzyskanych środków majątkowych. Względna anonimowość użytkowników oraz ciągły rozwój technologiczny sprzyjają przestępczej działalności i opracowywaniu nowych strategii. W artykule przybliżono pojęcia prania brudnych pieniędzy oraz kryptowalut, a także poddano analizie wskazany proceder.

Słowa kluczowe: kryptowaluty, pranie brudnych pieniędzy, przestępczość zorganizowana, waluta wirtualna

Abstract

The article concerns the practice of money laundering with the use of virtual currencies. This phenomenon is gaining in importance because it is a relatively easy way to legalise unlawfully obtained assets. The relative anonymity of users and the constant technological development favour criminal activity and the development of new strategies. The article introduces the concepts of money laundering and cryptocurrencies, and analyzes the procedure indicated.

Key words: cryptocurrencies, money laundering, organised crime, virtual currency

1. Introduction

This study is a reflection on the problem of contemporary economic crime. Money laundering, which will be presented in the article, constitutes a phenomenon that has been appearing for many years. The aim of this article is to present

the illegal practice of money laundering in Poland using virtual currencies, which has recently been rapidly growing in interest. The justification for undertaking the considerations is the problem with detecting contemporary crime that appears in this area. When undertaking research on this phenomenon, attention should be paid to its dynamic nature[1] and the related emergence of new methods of money laundering. The subject of the study is to examine the issue of the emergence of the illegal process, methods and basic aspects related to money laundering, primarily taking into account transactions made using cryptocurrencies. The adopted research method is based on the analysis of the literature and studies on the discussed topic, as well as the legal regulations.

2. The concept of money laundering

The process of money laundering and financing of terrorism, called *anti-money laundering*, constitutes a category of economic crime that should be considered difficult for authorities to detect. Its scope includes, among others, processes related to making deposits and withdrawals, the purpose of which is to legalise unlawfully obtained funds.[2] It is worth emphasising that police practice does not show any particular differences between the nature of money laundering crimes and the nature of legal business activities in the field of market processes.[3]

Money laundering should be considered to be the concealment, by means of various activities, of the illegally obtained benefits, which determines the possibility of safe (unpunished) inclusion of them in legal financial and economic transactions.[4] It is irrelevant whether the activities as a result of which the assets were obtained were carried out on the territory of the Republic of Poland or on the territory of another state. Three consecutive phases can be distinguished:

1) placement, consisting in introducing funds to a financial system,
2) layering, consisting in separating them from their illegal origin,
3) integration, consisting in creating an explanation of the origin of certain property values.[5]

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[1] M. Kaczmarski, *Przeciwdziałanie praniu pieniędzy. Krytyczne spojrzenie na taktyczne i prawne aspekty zwalczania prania pieniędzy w Polsce*, Warszawa 2016, p. 28.

[2] T. Safjański, *Pranie pieniędzy – mechanizmy przestępcze oraz zarys systemu przeciwdziałania* [in:] *Przestępczość gospodarcza. Istota zjawiska. Zasady odpowiedzialności, mechanizmy przestępcze i metody działania sprawców*, eds. P. Łabuz, I. Malinowska, M. Michalski, T. Safjański, Warszawa 2018, p. 165.

[3] *Ibid.*

[4] E. Pływaczewski, *Pranie brudnych pieniędzy*, Toruń 1993, p. 33.

[5] T. Safjański, *Pranie pieniędzy*.., p. 166.

Therefore, one can distinguish activities aimed at hiding unlawfully obtained income, its origin or illegal use, as well as masking activities aimed at creating its seemingly legal origin. The subject of such actions are property values derived from a punishable act.

The following two elements that complement the definition of money laundering need to be pointed out:

1) abuse of the financial market,
2) preservation of the financial value of illegal funds and freedom to manage them.[6]

The Polish legislator indicates the definition of money laundering on the basis of the Act of National Law of 1 March 2018 on Counteracting Money Laundering and Financing of Terrorism (consolidated text of Journal of Laws of 2021, item 1132, hereinafter referred to as the AML Act), meaning the act specified in Article 299 of the Act of 6 June 1997 – Criminal Code (consolidated text of Journal of Laws of 2021.2345) according to which these are means of payment, financial instruments, securities, foreign currency values, property rights or other movable or immovable properties derived from benefits related to the commission of a criminal act. The perpetrator's actions and preparation for the actions appear to be punishable. They include: receiving, possessing, using, transferring, exporting abroad, concealing, making transfers, conversions, assisting in the transfer of ownership, possession or other activities aimed at hindering the detection of the criminal origin of the obtained assets.

Legislation on an EU basis presents money laundering as an intentional crime, consisting in converting, transferring, concealing the source and hiding property in the knowledge that it comes from a criminal activity. Counselling and facilitation are also punishable.[7]

In view of the globalisation of the financial market, this phenomenon has acquired a cross-border nature.[8] The increase in the threat of the indicated practice was caused by the development of the market, as well as the use of modern payment technologies.[9] Internationality is characterised by the fact that the course of certain phases of the process may take place outside the borders of the Republic of Poland. The above feature is characterised by two main advantages. Firstly, the cross-border nature of the process puts obstacles in the way for law enforcement authorities to

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[6] E. Pływaczewski, *Pranie...*, p. 34.

[7] Article 1(3) of Directive of the European Parliament and of the Council (EU) 2015/849 of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Financing of Terrorism, amending Regulation of the European Parliament and of the Council (EU) No 648/2012 and repealing Directive of the European Parliament and of the Council 2005/60/EC and Commission Directive 2006/70/EC (Official Journal of EU…, p. EU L 141, p. 73).

[8] P. Chodnicka-Jaworska, *Ryzyko prania pieniędzy*, Warszawa 2020, p. 7.

[9] *Ibid.*

reach out to criminals. Secondly, it also allows for obtaining additional benefits in third countries, which are the so-called tax oases.[10] At this point, the role which banks have in the circulation of financial resources should be emphasised, which makes them one of its most important links. Thanks to the banking system, money is transferred and subsequently subjected to "cleaning" in the next phase. A person acting on behalf and in favour of the bank is obliged to register the transaction and persons participating in it under penalty of perjury. Acts such as failure to take the official action, entering false data or disclosing information are punishable acts.

Money laundering is a complex act consisting of several actions, the ultimate purpose of which is to conceal the illegal source of the benefits obtained. This process qualifies as an organised crime because of its multi-stage nature and comprehensive organisation.

In order to prove the completion of an illegal process, it is necessary to discover the sources of assets of criminal origin and to show a direct link with the original crime. This is a *sine qua non* condition for bringing the perpetrators to criminal responsibility.

3. The concept of cryptocurrency

Starting to consider the issue of cryptocurrencies, also referred to as pseudo-currencies, one should first think about what they are. They should be treated as the next stage in the evolution of electronic means of payment without an issuer.[11] Legislators do not use the term cryptocurrency, but use the term virtual currency instead. In a study published in July 2014, the European Banking Authority (hereinafter referred to as EBA) defined it as a digital representation of value not issued by a central bank or public authority, not necessarily linked to a country's currency, but recognised by natural and legal persons as a means of payment.[12] It should definitely be distinguished from electronic money, which is a conventional currency, and from fiat money such as the Polish zloty or the euro. R.M. Lastra classifies cryptocurrencies as alternative money.[13]

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[10] E. Pływaczewski, *Pranie*…, p. 36.

[11] W. Srokosz, *Kryptowaluty – nowy kierunek badań*, Przegląd Prawa i Administracji 2015, https://repozytorium.uni.wroc.pl/Content/117084/PDF/10_Srokosz_W_Kryptowaluty_nowy_kierunek_badan.pdf (access: 16 June 2021); footnote more broadly: W. Srokosz, *Prawo a rozwój elektronicznych środków płatniczych w XXI wieku* [in:] *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym – ocena dokonań i wnioski na przyszłość*, ed. Z. Ofiarski, Szczecin 2014, pp. 841–849.

[12] https://www.eba.europa.eu/sites/default/documents/files/documents/10180/657547/81409b94-4222-45d7-ba3b-7deb5863ab57/EBA-Op-2014-08%20Opinion%20on%20Virtual%20Currencies.pdf?retry=1;

[13] R.M. Lastra, *International Financial and Monetary Law*, Oxford 2015, p. 4.

The Polish legislator decided to include a legal definition in the AML Act. According to it, virtual currency is understood as a digital representation of value, which is not: legal tender issued by the NBP, foreign central banks or other public administration bodies, an international unit of account established by an international organisation and accepted by individual countries belonging to or cooperating with this organisation, electronic money within the meaning of Article 2 point 21a of the Act of 19 August 2011 on payment services (consolidated text of Journal of Laws of 2021, item 190), a financial instrument within the meaning of Article 2 (1) of the Act of 29 July 2005 on trading in financial instruments (consolidated text of Journal of Laws of 2021, item 328), bill of exchange or cheque – and is exchangeable in business transactions for legal tender and accepted as a means of exchange, and may be electronically stored or transferred or may be the subject of electronic commerce.

Bitcoin is considered to be the most popular virtual currency, introduced at the turn of 2008 by a person presenting himself as Satoshi Nakamoto.[14] Its expansion took place thanks to the Internet. Bitcoin is a unit of payment that is stored in information systems. Monetary units are stored in the computer's memory or on external servers of specific entities that store them.[15] Due to the fact that a cryptocurrency is located in a distributed accounting system, difficulties are encountered in tracking its path. It is worth paying attention to the case law of the Supreme Administrative Court which stated that "the exclusive right to issue money belongs to the National Bank of Poland. Moreover, Articles 31 and 32 of the Act of 29 August 1997 on the National Bank of Poland (consolidated text of Journal of Laws of 2020, item 2027) provide that the monetary signs of the Republic of Poland are banknotes and coins for the zloty and grosz. Therefore, bitcoin is not a common form of money, because it is not entitled to the attributes of legal tender in the light of the applicable legal order."[16]

Since cryptocurrencies have appeared in circulation, the Polish Financial Supervision Authority and the National Bank of Poland have begun to conduct intensified information campaigns, raising the awareness of people who intend to invest in them.[17] The Polish Financial Supervision Authority reminds the public, in the issued warnings, of the risks associated with the acquisition and trading in broadly understood pseudo-currencies.[18] The market related to their turnover is

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[14] N. Poręba, P. Szypołowska, *Kryptowaluty – aspekty prawne, psychologiczne i ekonomiczne* [in:] *Przestępczość gospodarcza. Przyczyny, przejawy, zwalczanie*, ed. W. Dadak, Kraków 2019, p. 114.

[15] *Ibid.*

[16] Judgment of the Supreme Administrative Court in Warszawa of 6 March 2018, II FSK 488/16, LEX No. 2464858.

[17] N. Poręba, P. Szypołowska, *Kryptowaluty*…, p. 120.

[18] https://www.knf.gov.pl/knf/pl/komponenty/img/Ostrzezenie_UKNF_o_ryzykach_zwiazanych_z_nabywaniem_oraz_z_obrotem_kryptoaktywami_72241.pdf (access: 15 May 2021).

characterised by high volatility. An example is the valuation of bitcoin (BTC), which on www.coindesk.com on 26 January 2017 was valued at about 900 US dollars, while on 17 December 2017 it already cost about 19,160 US dollars. In less than a year, one bitcoin lost the value of almost 16,000 US dollars, as it cost about 3,200 US dollars on 14 December 2018. The above shows significant fluctuations in the value of its exchange rate, indicating the instability of trading.[19]

When researching cryptocurrencies, both technological and economic aspects should be taken into account.[20] Their constant and dynamic development affects the difficulties associated with legislation. The continuous increase in popularity poses challenges for national and EU legislators regarding the legal regulation of virtual currency trading.

4. Money laundering with the use of cryptocurrencies – introduction

Considerations of money laundering with the use of cryptocurrencies have become an interesting topic. Nowadays, virtual currencies pose a serious threat to the safe circulation of financial resources. The process of "cleaning" money takes place in three phases, which were mentioned in the earlier part of the study. Due to the existing threats, it is believed that pseudo-currencies can be used in any of them.[21] For example, bitcoin is often used to pay for illegal activities, which shows its success in the Sheep Marketplace, a service that supports the flow of transactions in the trade of drugs or other illegal goods.[22] The anonymity in cryptocurrency trading is conducive to the ease of their transfer between interested parties, regardless of the borders of the state. This is a factor serving the layering phase. Some countries consider it a legally permitted means of payment. This allows for new ways of integration in the indicated area.

In order to introduce money, criminals need a meticulous plan so as to legalise illegal assets while eliminating the risk of discovering a connection with their criminal origin.[23] Cryptocurrencies can be used for this purpose by mixing services.

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[19] *Ibid.* (access: 16 May 2021).

[20] W. Srokosz, *Kryptowaluty…* (access: 17 April 2021).

[21] M-C. Frunza, *Cryptocarrencies: A New Monetary Vehicle* [in:] *Solving Modern Crime in Financial Markets, Analytics and Case Studies*, ed. M-C. Frunza, Oxford 2016, p. 64.

[22] J. Konieczny, R. Parbucki, R. Wielki, *Kryptowaluty. Perspektywa kryminologiczna i kryminalistyczna*, Warszawa 2018, p. 84.

[23] M. Levi, *Money for Crime and Money from Crime: Financing Crime and Laundering Crime Proceeds*, European Journal on Criminal Policy and Research 2015, Vol. 21, No. 2, pp. 274–297.

Dutch scientists have conducted empirical and experimental research in this field. They concluded that the interest of criminals in money laundering could be high. The advantage of this is not only anonymity, but also a significant reduction in the cost of this process.[24] Criminals take action to optimally reduce the cost of their illegal activities. They are guided by the rationality of choices.

5. Domestic regulations on money laundering using a cryptocurrency

As national and international organisations tighten up their requirements and rules in the scope of anti-money laundering and counteracting the financing of terrorism, criminals are looking for new ways of acting to hide their source and legalise the proceeds of the criminal activity. Due to the rapid development of new technologies and changing circumstances, it is not an easy task to update and adapt legal regulations that provide protection and counteract illegal practices.

The Act on Counteracting Money Laundering and Financing of Terrorism is the first regulation in Polish legislation relating to cryptocurrencies. Due to significant shortcomings in legal regulations regarding the market of these currencies, this Act was amended in 2021. The amendments were caused by the need to implement into Polish law EU regulations contained in Directive of the European Parliament and of the Council (EU) 2015/849, as amended by the V AML Directive, as well as to the recommendations published by the Financial Action Task Force. The justification for the changes was the progressive technological development, and, therefore, the growing number of frauds and undesirable practices. W. Srokosz analysed the above issue more broadly in his book.[25]

In fact, only to a certain extent does the Act concern money laundering. The regulations are primarily aimed at limiting the possibility of tax avoidance.

In the area of cryptocurrencies, the AML Act applies to entrepreneurs who provide such services as: exchange between virtual currencies and FIATs (exchange offices, exchanges)[26], exchange between virtual currencies (exchange offices, exchanges), intermediation in exchange between virtual currencies and FIATs or

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[24] R. Wegberg, J-J. Oerlemans, O. Deventer, *Bitcoin Money Laundering: Mixed Results? An Explorative Study on Money Laundering of Cybercrime Proceeds Using Bitcoin*, Journal of Financial Crime 2018, Vol. 25, No. 2, pp. 419–435.

[25] More broadly: W. Srokosz, S. Bala, T. Kopyściański, *Kryptowaluty jako elektroniczne instrumenty płatnicze bez emitenta*, Wroclaw 2016.

[26] See: M. Szwed-Ziemichód, *Nowe przepisy AML a działalność w zakresie kryptowalut*, https://msztax.pl/nowe-przepisy-aml-a-dzialalnosc-w-zakresie-kryptowalut/ (access: 16 June 2021).

between virtual currencies, maintaining virtual currency accounts. The amended Act applies in particular to entities such as exchange offices, cryptocurrency exchanges and entities that are responsible for providing cryptocurrency wallets.

The entities referred to above are obliged to obtain an entry in the register of activities in the field of virtual currencies kept in electronic form by the Minister of Finance. This entry determines the possibility of conducting business, and the provision of these services without fulfilling the obligation of entry may result in the imposition of a penalty of up to 100,000 zlotys.

From 2021, the obligations regarding "financial security measures", that is the obligations to verify all customer data that need to be performed and to have evidence of their execution for at least 5 years (Article 34 of the AML Act) have been extended.

Previously, they were used in the situation of establishing relationships with clients of a lasting nature (in particular, for example, starting to run a cryptocurrency wallet for a client) or performing the so-called occasional transactions (i.e. all transactions that are not transactions as part of a permanent relationship with the user) with a value of 15,000 euros or more, or being a transfer of funds (not cryptocurrencies) above 1,000 euros (Article 35 of the AML Act). The provision of Article 35 of the AML Act in its new wording extends the catalogue of activities also to transactions that are so-called occasional transactions and constitute a transfer of virtual currency with the equivalent of 1,000 euros and above.[27] The introduced threshold of 1,000 euros is quite low and the amounts at this level certainly do not serve to finance, for example, the purchase of weapons on the black market.

This means that in order to transfer cryptocurrencies in the amount of more than 1,000 euros, it is necessary to apply to the customer a complete catalogue of financial security measures. This includes the determination of personal data, citizenship, PESEL number or date of birth, information on the identity document, address, determination of the data of the beneficial owner, determination of the data of the representative and verification of all these data, in accordance with the AML Act). It is reasonable to adopt the solution, adopted by the legislator, that evidence should be available to confirm this, also in an electronic form (Article 37 of the AML Act).

In view of the above, the clarification of the provisions of the AML Act primarily includes cryptocurrency exchange offices. Increasing the obligation to identify and verify the customer and the need to make an entry in the register of cryptocurrency exchange offices makes it necessary to comply with the applicable

[27] See. Legal Geek, *Zmiany prawne w 2021 r. – AML w kantorach kryptowalut*, https://legalgeek.pl/zmiany-prawne-w-2021-r-aml-w-kantorach-kryptowalut-2/ (access: 02 July 2021).

AML/CFT regulations (*Counter Financing of Terrorism*), as well as to assess the risk of services provided by the exchange office in the area of AML/CFT. They are to be the basis for the solutions designed by the exchange office regarding the identification and verification of the client and the beneficial owner, as well as solutions designed in the system used by the exchange offices to reduce the identified risks.

The above legal regulations enable to modify the business model so that it is considered fully compliant with the law. The consequence of these activities is the impact on *onboarding* of the client, who may be discouraged from using the services of an exchange office due to the need to use many verification measures.[28]

To combat the illegal procedure of money laundering, a Minister competent for public finances, who is the supreme body of financial information, as well as the Head of the National Tax Administration as the General Inspector of Financial Information (GIIF) were appointed. It is worth paying attention to the taxation aspect. Funds derived from crime cannot be taxed. The tax authority, unable to prove their illegal origin, in view of the tax proceedings carried out, has the possibility to consider them as not covered by disclosed sources or coming from undisclosed sources and, consequently, to tax them at a significant sanction rate of 75%.[29]

The General Inspector supervises the performance of obligations by obliged institutions in the field of counteracting money laundering and financing of terrorism. In practice, controls regarding cryptocurrency-related activities are rare. The GIIF shall annually publish data indicating the number of individual inspections. In recent years, several dozen of them have been carried out. In 2018, there were 8 inspections, in 2019 there were 7, and in 2021 there were 9 inspections, one of which only concerned a currency exchange office.[30] Small cryptocurrency exchange offices are usually not subject to inspections by the GIIF because, as one can notice, they are not carried out frequently enough.

The first proceedings in the case of money laundering using bitcoins in Poland took place already in 2014.[31] Unfortunately, it was not disclosed to what effect. With the use of a certain operator of the Internet exchange, there was an attempt to "clean" the money. The customer, using "malware", made a purchase of bitcoins. Suspicious

[28] *Ibid.* (access: 03 July 2021).

[29] A. Nowak, *Kryptowaluty a pranie pieniędzy. Pranie pieniędzy jako przestępstwo XXI wieku* [in:] *Przestępczość XXI wieku. Szanse i wyzwania dla kryminologii*, eds. E.W. Pływaczewski, D. Dajnowicz-Piesiecka, E. Jurgielewicz-Delegacz, Warszawa 2020, pp. 314–315.

[30] See reports of General Inspector of Financial Information on the implementation of the Act of 1 March 2018 on counteracting money laundering and financing of terrorism in 2018, 2019, 2021, https://www.gov.pl/web/finanse/sprawozdania-roczne-z-dzialalnosci-generalnego-inspektora-informacji-finansowej (access: 21 July 2021).

[31] A. Nowak, *Kryptowaluty a pranie pieniędzy*..., p. 323.

transactions were blocked by the operator based on the obtained data on the purchase transaction and information about the transfer of bitcoins.[32]

6. Difficulties in preventing money laundering

The relative anonymity associated with the circulation of cryptocurrencies seems to be an essential feature of the indicated process. It can be considered as a factor hindering the prevention and counteracting money laundering. Difficulties in linking a specific person to a wallet address do not make it easier to detect specific stages of the procedure, becoming a significant challenge for law enforcement agencies.[33] This problem is also seen in tax avoidance issues.

The cross-border nature of the process complicates the detection of perpetrators for law enforcement agencies. Illegal transactions are often carried out in countries that do not have appropriate legal instruments in this area. In order to be able to effectively track criminals, a high level of cooperation between authorities on an international level is essential.[34]

Another difficulty in preventing and counteracting money laundering using cryptocurrencies is the decentralisation of cryptocurrency markets. The dispersion in question is somehow the main idea of creating virtual currencies[35], and it is difficult to eliminate.

In addition, people involved in cryptocurrency trading must also protect their data so as to avoid possible hacker attacks or identity theft attempts. They do this, among other things, by properly encrypting the data. Criminals can also act in this way, just like legitimate users. It should also be noted that the activities of law enforcement agencies are limited by regulations on the protection of privacy or the protection of personal data. This undoubtedly creates difficulties for the agencies in tracking specific people.[36]

It is worth emphasising that the indicated category of criminal activity is specific. Therefore, it is essential for law enforcement agencies active in this field to have specialist knowledge in this area. Cryptocurrency crime can be classified as an

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[32] *Ibid.*, p. 323, https://www.gov.pl/web/finanse/sprawozdania-roczne-z-dzialalnosci-generalnego-inspektora-informacji-finansowej.

[33] D. Bryans, *Bitcoin and Money Laundering: Mining for an Effective Solution*, Indiana Law Journal 2014, Vol. 89, No. 1, p. 447.

[34] J. Konieczny, R. Parbucki, R. Wielki, *Kryptowaluty…*, p. 107.

[35] *Ibid.*

[36] European Parliament, Directorate-General for Internal Policy of the European Union, R. Houben, A. Snyers, *Cryptocurrencies and blockchain: legal context and implications for financial crime, money laundering and tax evasion*, European Parliament, 2018, https://data.europa.eu/doi/10.2861/280969 (access: 21 June 2021).

area of cybercrime. Connections with information technology and economics can be distinguished here. Legal regulations and police practice are not fully developed in this matter. It should be the responsibility of law enforcement authorities to constantly educate themselves and improve their qualifications. To achieve the right level of knowledge and become a valued specialist, one needs to educate oneself on one's own initiative. Unfortunately, police officers show reluctance to acquire new knowledge. The prevailing belief is *learning on the job*, that is limiting oneself to collecting experience only by practice.[37] Such an attitude definitely does not serve a quick and accurate detection of crimes in the area of cryptocurrencies.

7. Summary

It is incorrect to say that virtual currencies are a source of crime themselves. The research conducted as part of this study has shown that criminals' interest in using cryptocurrencies for illegal purposes is increasing. A significant problem is concluding criminal transactions using them. In the long run, an intensive increase in the use of cryptocurrencies for the process of "cleaning" money on the international scale can be expected. This is definitely facilitated by the development of information technology, new technologies, easy access to information or a lack of effective legal regulations. Legislation at the national level is not able to fully adapt to the changing circumstances associated with dynamic technological progress and new strategies developed by criminals.

In addition, there is a tendency of some perpetrators to be guided by their relative rationality and economics of actions. There are individuals who take into account the above aspects when making decisions. In order to reduce the cost of their illegal services, they use modern methods that are possible thanks to the use of virtual currencies.

So far, it has not been possible to create a method / an algorithm that would effectively serve to detect crimes using cryptocurrencies. The highly complex nature of the activities and the constantly increasing organisational complexity are caused by the continuous development of the strategy of criminals. Striving for full traceability of perpetrators may prove impossible. Then, if there is no chance of identifying people, conducting proceedings appears to be pointless.

The threat of cryptocurrency crime should be considered as a threat to the security of the financial market, both domestic and global. Technological advancement and global cooperation on many servers and in many countries are

[37] *Ibid.*, pp. 108–109.

definitely not conducive to improving the detection of this type of crime. In order to be able to effectively counteract illegal processes, it is necessary to set up specialised structures in law enforcement agencies, consisting of valued and experienced specialists in the fields of organised and financial crime, cybercrime and computer forensics. Taking such steps is the basis for achieving real and measurable effects in detecting criminal activities.

Money laundering with the use of cryptocurrencies is directly related to the virtual sphere. However, it should be noted that it is not limited to this plane, because some implications can also be felt in the real world. The result of the actions taken may be such events as kidnappings, extortion or blackmail[38].

In conclusion, the constant and rapid development in the field of virtual currencies is used by criminals to carry out illegal money laundering activities. This phenomenon is becoming more important because it is a relatively easy way to legalise income of criminal origin. In order to counteract this process, it appears necessary for individual countries to take decisive steps consisting in strengthening organisational structures, proper training of state officials and developing effective cooperation with law enforcement agencies on an international level. Twenty-first-century crime poses challenges to state authorities, especially legislators. Certainly, it is necessary to develop uniform international legal regulations that would really serve to combat illegal practices.

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Polskie Towarzystwo Prawa Wyznaniowego

Prawo zakonnika do otrzymania świadczenia pielęgnacyjnego z tytułu rezygnacji z zatrudnienia lub innej pracy zarobkowej (obowiązków duszpasterskich). Glosa aprobująca do wyroku WSA w Bydgoszczy z dnia 14 grudnia 2021, II SA/Bd 1043/21

The right of clergymen to receive a care benefit as a result of resignation from gainful employment (pastoral duties). Approving gloss to the judgement of WSA in Bydgoszcz of 14 December 2021, II SA/Bd 1043/21

Abstract

A person who resigns from a job or does not take up new gainful employment in order to take care of a person who is obligated to pay maintenance may apply for a care benefit. The relevant court judgement indicates that the benefit in question may also be obtained by a clergyman. The Polish state, recognising the autonomy of the Church, also recognised the "ecclesiastical form of employing priests". A clergyman can actually resign from undertaking pastoral activities. Otherwise, preventing the clergy from getting the care benefit would be contrary to the principle of equality, expressed in article 32 of the Constitution of the Republic of Poland.

Key words: autonomy of the Church, employing clergy, care benefit, family support

Streszczenie

O świadczenie pielęgnacyjne może ubiegać się osoba, która rezygnuje lub nie podejmuje zatrudnienia lub innej pracy zarobkowej w celu sprawowania opieki nad osobą, na której ciąży obowiązek alimentacyjny. Glosowane orzeczenie wskazuje, że przedmiotowe świadczenie może uzyskać także osoba duchowna (zakonnik). Państwo polskie, uznając autonomię Kościoła, uznało także

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„kościelną formę zatrudniania księży". Duchowny może faktycznie zrezygnować z podejmowania czynności duszpasterskich. Uniemożliwienie duchownym korzystania ze świadczenia pielęgnacyjnego byłoby wbrew zasadzie równości wyrażonej w art. 32 Konstytucji RP.

Słowa kluczowe: autonomia Kościoła, zatrudnianie księży, alimentacja, wsparcie rodziny

Stan faktyczny

Decyzją z dnia … czerwca 2021 Burmistrz Miasta i Gminy J. odmówił W.K. (skarżącemu) świadczenia pielęgnacyjnego z tytułu rezygnacji z zatrudnienia lub innej pracy zarobkowej, wnioskowanego na legitymującą się orzeczeniem o znacznym stopniu niepełnosprawności matkę – Z.K., skarżący, będący zakonnikiem, oprócz wniosku do organu przedstawił korespondencję z kurią. Składały się na nią: wniosek złożony do kurii w marcu 2021 r., w którym prosił o umożliwienie rezygnacji z pracy duszpasterskiej i parafialnej z powodu konieczności opieki nad swoją matką, a także pisemna odpowiedź kurii, która w dniu 13 maja 2021 r. zwolniła skarżącego z przedmiotowych obowiązków na okres jednego roku. Organ odmówił udzielenia świadczenia, wskazując w uzasadnieniu, że przyczyną odmowy jest fakt, że niepełnosprawność matki skarżącego istnieje od maja 2000 r., a więc nie powstała w okresach wskazanych w art. 17 ust. 1b pkt 1 lub 2 ustawy z dnia 28 listopada 2003 r. o świadczeniach rodzinnych[2] (dalej: u.ś.r.).

Skarżący odwołał się od przedmiotowej decyzji. Wskazał na orzeczenie TK z dnia 21 października 2014 r.[3] SKO decyzją z dnia … lipca 2021 r. utrzymało w mocy rozstrzygnięcie organu I instancji. Zakwestionowało istnienie przesłanki negatywnej wynikającej z art. 17 ust. 1b u.ś.r. w świetle wyroku TK. Organ stwierdził, że w przedmiocie wniosku o przyznanie świadczenia pielęgnacyjnego nie uwzględnia się art. 17 ust. 1b u.ś.r. w zakresie, w jakim różnicuje on prawo do świadczenia dla osób sprawujących opiekę nad osobą niepełnosprawną po ukończeniu przez nią wieku określonego w tym przepisie, ze względu na moment powstania niepełnosprawności. Tym niemniej, organ odwoławczy uznał odmowę świadczenia za zasadną, twierdząc, że zatrudnieniem lub inną pracą zarobkową w rozumieniu art. 17 ust. 1 w zw. z art. 3 pkt 22 u.ś.r. nie jest wykonywanie obowiązków duszpasterskich i parafialnych. Zdaniem SKO obowiązki wykonywane przez duchownego w parafii nie odpowiadają klasycznemu zatrudnieniu w rozumieniu prawa pracy: duchowni nie mają pracodawcy wypłacającego wynagrodzenie (nie jest nim biskup ani parafia), utrzymują się z dobrowolnych ofiar wiernych, podlegają władzy zwierzchniej biskupa diecezjalnego, a jej podstawy określa Kodeks Prawa Kanonicznego. Tym samym, zdaniem SKO, nie można w sprawie uznać, by skarżący w rozumieniu u.ś.r. zrezygnował z zatrudnienia bądź go nie podejmował.

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[2] Tj. Dz. U. 2022, poz. 615.

[3] K 38/13.

Skarżący odwołał się od decyzji organu II instancji. W uzasadnieniu zarzucił m.in.: podjęcie przez organy obu instancji decyzji bez wszechstronnego wyjaśnienia okoliczności sprawy, z pominięciem słusznego interesu strony rezygnującej z zatrudnienia lub innej pracy zarobkowej w celu sprawowania opieki nad osobą niepełnosprawną; powołanie się na art. 3 pkt 22 u.ś.r., w którym definicja „zatrudnienia lub innej pracy zarobkowej" nie wyklucza możliwości otrzymania świadczenia pielęgnacyjnego przez osobę duchowną, a jedynie przedstawia różne aktywności zawodowe lub zarobkowe; naruszenie konstytucyjnej zasady równości obywateli wobec prawa oraz zasady sprawiedliwości społecznej.

Podstawa prawna

Podstawę prawną glosowanego orzeczenia stanowią przepisy art. 3 ust. 22 oraz art. 17 ust. 1 u.ś.r. Pierwszy z nich głosi, że: „Ilekroć w ustawie mowa jest o zatrudnieniu lub innej pracy zarobkowej – oznacza to wykonywanie pracy na podstawie stosunku pracy, stosunku służbowego, umowy o pracę nakładczą oraz wykonywanie pracy lub świadczenie usług na podstawie umowy agencyjnej, umowy zlecenia, umowy o dzieło albo w okresie członkostwa w rolniczej spółdzielni produkcyjnej, spółdzielni kółek rolniczych lub spółdzielni usług rolniczych, a także prowadzenie pozarolniczej działalności gospodarczej".

Natomiast w drugim z przepisów ustawodawca skonstruował katalog osób uprawnionych do uzyskania świadczenia pielęgnacyjnego. Wskazał w nim, że przedmiotowe świadczenie z tytułu rezygnacji z zatrudnienia lub innej pracy zarobkowej przysługuje m.in.: „innym osobom, na których zgodnie z przepisami ustawy z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy ciąży obowiązek alimentacyjny, z wyjątkiem osób o znacznym stopniu niepełnosprawności – jeżeli nie podejmują lub rezygnują z zatrudnienia lub innej pracy zarobkowej w celu sprawowania opieki nad osobą legitymującą się orzeczeniem o znacznym stopniu niepełnosprawności albo orzeczeniem o niepełnosprawności łącznie ze wskazaniami: konieczności stałej lub długotrwałej opieki lub pomocy innej osoby w związku ze znacznie ograniczoną możliwością samodzielnej egzystencji oraz konieczności stałego współudziału na co dzień opiekuna dziecka w procesie jego leczenia, rehabilitacji i edukacji".

Stanowisko WSA w Bydgoszczy

WSA w Bydgoszczy uznał odwołanie za zasadne. Kwestia daty powstania niepełnosprawności matki skarżącego przestała mieć wpływ na wynik sprawy i nie

jest już istotna. Kluczowe dla sprawy pozostało ustalenie czy skarżącemu przysługuje świadczenie pielęgnacyjne z tytułu rezygnacji z działalności duszpasterskiej, rozumianej jako zatrudnienie lub inna praca zarobkowa. WSA podniósł, że kwestią bezsporną jest, że skarżący jest synem Z.K. legitymującej się orzeczeniem o uznaniu za trwale niezdolną do samodzielnej egzystencji oraz uznaniem jej niepełnosprawności w stopniu znacznym.

Jak podniósł WSA w Bydgoszczy, odnośnie do wykładni terminu „zatrudnienie lub inna praca zarobkowa", orzecznictwo wiąże go z określonymi stosunkami prawnymi, a nie okolicznościami faktycznymi[4]. Stąd samo wykonywanie pracy lub uzyskiwanie wynagrodzenia nie jest wystarczające do uznania, że jest to zatrudnienie lub inna praca zarobkowa w rozumieniu u.ś.r. Powyższa wykładnia i ustalenia organu odwoławczego, zdaniem WSA w Bydgoszczy, są wadliwe i niepełne dla rozstrzygnięcia sprawy. Zdaniem WSA, badając formę zatrudnienia osoby duchownej, należy skorzystać z prawa wewnętrznego danego związku wyznaniowego, któremu ona podlega. Ustawodawca powszechny nie powinien się w tej materii wypowiadać, w tym nie powinien kwalifikować tej relacji jako danego rodzaju stosunku prawnego prawa powszechnie obowiązującego pomiędzy pracodawcą a pracownikiem. Kościół katolicki (którego przedstawicielem jest skarżący) rządzi się w swoich sprawach własnym prawem, a jedną ze sfer autonomicznie regulowanych w ramach wewnętrznego prawa wyznaniowego jest kwestia funkcjonowania kapłanów tegoż związku, w tym ich utrzymania. Kwestię wynagradzania kapłanów Kościoła rzymsko-katolickiego regulują przepisy Kodeksu Prawa Kanonicznego[5] (dalej: KPK), w szczególności kan. 281, a także przepisy rozdziału 5. Instrukcji Konferencji Episkopatu Polski w sprawie zarządzania dobrami doczesnymi Kościoła[6]. Jak uznał WSA w Bydgoszczy, byłoby nie do pogodzenia z zasadami autonomicznego (co gwarantowane prawem powszechnie obowiązującym) państwa prawa, gdyby osoba będąca obywatelem RP, a jednocześnie realizująca się zawodowo w strukturach autonomicznego związku wyznaniowego, została wyłączona spod opieki państwa. Jak wskazał WSA, dualizm systemów prawa świeckiego i wyznaniowego nie oznacza wykluczenia stosowalności

[4] Zob. Wyrok NSA z dnia 2 czerwca 2017, I OSK 572/16, z dnia 10 sierpnia 2020, I OSK 467/20, z dnia 24 sierpnia 2021, I OSK 889/21, orzeczenia dostępne na stronie orzeczenia.nsa.gov.pl [dostęp: 20.12.2021].

[5] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), cz. II, s. 1–317, tekst polski: *Kodeks Prawa Kanonicznego. Przekład polski zatwierdzony przez Konferencję Episkopatu Polski*, Pallottinum, Poznań 1984.

[6] *Instrukcja Konferencji Episkopatu Polski w sprawie zarządzania dobrami doczesnymi Kościoła przyjęta Decyzją nr 1/2015 Rady Biskupów Diecezjalnych z dnia 25 sierpnia 2015*, https://episkopat.pl/wp-content/uploads/2016/04/INSTRUKCJA_dobra_doczesne.pdf [dostęp: 21.12.2021].

przepisów prawa powszechnie obowiązującego do tych obywateli państwa, którzy podlegają jednocześnie prawu wyznaniowemu. Zastosowanie prawa powszechnie obowiązującego wobec obywateli będących w powyższej sytuacji (których status życiowy i zawodowy regulowany jest w znacznym stopniu wewnętrznymi przepisami autonomicznego związku wyznaniowego) wiąże się z koniecznością uzupełnienia prostej wykładni językowej o dyrektywy wykładni celowościowej i funkcjonalnej oraz prokonstytucyjnej.

WSA potwierdził stanowisko organu odwoławczego, że osoby duchowne nie uzyskują zarobków w „klasycznym tego słowa znaczeniu", tj. w ramach wynagrodzenia za wykonywaną pracę na podstawie stosunku pracy opisanego w art. 22 §1 ustawy z dnia 26 czerwca 1974 Kodeks pracy[7] (dalej: kp) ani w warunkach działalności opisanej w art. 3 pkt 22 u.ś.r. Tym niemniej dochód duchownego jest efektem – jak to uznał WSA – swoistej działalności zawodowej. Istota wynagrodzenia za pracę i dochodu osiąganego z tego tytułu sprowadza się do tego samego, a mianowicie do zapewnienia środków finansowych umożliwiających egzystencję i funkcjonowanie w społeczeństwie. Z drugiej strony, art. 3 pkt 1 lit. b u.ś.r. za dochód uważa także dochód z działalności podlegającej opodatkowaniu na podstawie przepisów ustawy z dnia 20 listopada 1998 r. o zryczałtowanym podatku dochodowym od niektórych przychodów osiąganych przez osoby fizyczne[8] (dalej: u.z.p.d.). Regulacjom wskazanej ustawy, w jej rozdziale 4, podlegają osoby duchowne. Podatek płacony na tej podstawie przez osoby duchowne zasila z kolei budżet państwa, z którego finansowane są m.in. programy pomocy społecznej. Osoby duchowne podlegają także obowiązkowemu ubezpieczeniu społecznemu[9]. Stąd forma aktywności zawodowej osoby duchownej podlega więc takiemu samemu reżimowi zabezpieczenia społecznego. Tym samym pozbawienie osoby duchownej możliwości skorzystania z prawa do świadczenia pielęgnacyjnego byłoby zdaniem WSA niezgodne z zasadą równości wobec prawa, naruszeniem zasady niedyskryminacji (art. 32 Konstytucji RP[10]) oraz sprawiedliwości społecznej (art. 2 Konstytucji RP). Stąd, mimo że przepis art. 3 ust. 22 u.ś.r. nie odnosi się bezpośrednio do duchownych, to należy w zastosowanej wykładni aplikować go także do ich sytuacji. Zatem pozbawienie możliwości uzyskiwania tego dochodu

[7] „Przez nawiązanie stosunku pracy pracownik zobowiązuje się do wykonywania pracy określonego rodzaju na rzecz pracodawcy i pod jego kierownictwem oraz w miejscu i czasie wyznaczonym przez pracodawcę, a pracodawca – do zatrudnienia pracownika za wynagrodzeniem", tj. Dz. U. 2020, poz. 1320, z 2021, poz. 1162, z 2022, poz. 655.

[8] Tj. Dz. U. 2021, poz. 1993, 2105, 2427.

[9] Zob. art. 6 ust. 1 pkt 10 w zw. z art. 8 ust. 13 ustawy z dnia 13 października 1998 o systemie ubezpieczeń społecznych, tj. Dz. U. z 2021, poz. 423.

[10] Konstytucja RP z dnia 2 kwietnia 1997, Dz. U. 1997, nr 78, poz. 483.

związane z koniecznością sprawowania opieki nad niepełnosprawnym członkiem rodziny stawia osobę duchowną w analogicznej sytuacji jak w przypadku osób rezygnujących z zatrudnienia w formach wskazanych w art. 3 pkt. 22 u.ś.r.

WSA uchylił decyzję obu instancji i skierował sprawę do ponownego rozpatrzenia. Sąd nakazał wzięcie pod uwagę bliższych okoliczności i zbadanie w szczególności: ile czasu zajmują skarżącemu czynności podejmowane przy matce, czy piecza sprawowana nad nią pozwala skarżącemu na podejmowanie czynności zakonnych w pełni czy w ograniczonym zakresie. Jeśli zakres byłby jedynie ograniczony, to czy przełożyłoby się to na prawo skarżącego do otrzymywania środków utrzymania. WSA zwrócił także uwagę, że ewentualna odmowa świadczenia mogłaby mieć miejsce, gdyby skarżącemu pomimo urlopu w wykonywaniu czynności zakonnych przysługiwały jakieś środki na utrzymanie od Kościoła katolickiego lub gdyby okazało się, że piecza sprawowana nad matką nie wymaga urlopowania skarżącego z czynności zakonnych w tak dużym zakresie, by stracił on prawo do otrzymywania środków utrzymania.

Ocena stanowiska WSA w Bydgoszczy

Stanowisko WSA w Bydgoszczy należy ocenić aprobująco. Na wstępie warto zauważyć, że przepisy konstytuujące instytucję świadczenia pielęgnacyjnego budziły wiele problemów interpretacyjnych. Co istotne dla glosowanego wyroku, często stosowano wykładnię rozszerzającą przepisów prawnych, uznając wykładnię ścisłą za niewłaściwą. Przykładem tych wątpliwości jest choćby wskazane orzeczenie TK odnośnie do wieku powstania niepełnosprawności u osoby, na którą opiekun może ubiegać się o świadczenie[11]. Inną kwestią jest wykładnia przepisu zawierającego termin „rezygnacji z zatrudnienia". Sądy administracyjne opowiadały się za stanowiskiem, że o świadczenie pielęgnacyjne mogą ubiegać się

[11] TK w wyroku z dnia 21 października 2014, K 38/13 orzekł, że art. 17 ust. 1b u.ś.r. w zakresie, w jakim różnicuje prawo do świadczenia pielęgnacyjnego osób sprawujących opiekę nad osobą niepełnosprawną po ukończeniu przez nią wieku określonego w tym przepisie ze względu na moment powstania niepełnosprawności, jest niezgodny z art. 32 ust. 1 Konstytucji. Przy czym określając skutki wejścia w życie przedmiotowego wyroku, TK orzekł, że swoim wyrokiem nie uchyla ani art. 17 ust. 1b u.ś.r., ani decyzji przyznających świadczenia, tak samo jak wyrok ten nie kreuje „prawa" do żądania świadczenia dla opiekunów dorosłych osób niepełnosprawnych, jeżeli niepełnosprawność podopiecznych nie powstała w okresie dzieciństwa. Tym samym TK orzekł ostatecznie o niekonstytucyjności jedynie części normy wynikającej z art. 17 ust. 1b u.ś.r., pozostawiając poprawienie tego stanu prawnego bez zbędnej zwłoki ustawodawcy, zob. B. Chludziński, *Art. 17 Świadczenie pielęgnacyjne z tytułu rezygnacji z zatrudnienia lub innej pracy zarobkowej* [w:] *Świadczenia rodzinne. Komentarz,* red. P. Rączka, WKP 2021, Legalis [dostęp: 27.12.2021].

osoby, które nie tylko rezygnują z zatrudnienia, ale także go nie podejmują[12]. Do uzyskania świadczenia jest uprawniona osoba, która nie pozostaje w zatrudnieniu i to bez względu na okoliczności[13]. Z drugiej strony, przyjęcie wskazanej wykładni spowodowało w praktyce, że osoby nieaktywne zawodowo wręcz „wyszukiwały" osób niepełnosprawnych – członków własnych rodzin – celem uzyskania przedmiotowego świadczenia, nie podejmując jednak faktycznego sprawowania opieki nad nimi. Chcąc zaradzić tej niepokojącej tendencji, postanowiono, że zasadne będzie za każdym razem badanie faktycznych okoliczności sprawy oraz weryfikowanie związku przyczynowo-skutkowego między niepodejmowaniem zatrudnienia (lub rezygnacją z niego) a sprawowaniem osobistej opieki nad osobą niepełnosprawną[14].

Poza tym z krytyką ze strony TK spotkała się ścisła wykładnia przepisu art. 17 ust. 1 u.ś.r. dotyczącego podmiotów, które mogą uzyskać omawiane świadczenie. Chodziło mianowicie o to, czy beneficjentem świadczenia może być małżonek osoby niepełnosprawnej[15]. Małżonek jest bowiem wykluczony z katalogu osób uprawnionych przez wykładnię ścisłą przywołanego przepisu. Nie bez znaczenia dla obowiązku alimentacyjnego pozostaje fakt, że na małżonkach, w rozumieniu art. 23 ustawy z dnia 25 lutego 1964 Kodeks rodzinny i opiekuńczy[16] (dalej: kro), ciąży obowiązek wzajemnego wsparcia i pomocy. Ponadto, w rozumieniu art. 27 kro, obydwoje małżonkowie są zobowiązani, według ich sił i możliwości zarobkowych i majątkowych, przyczyniać się do zaspokajania potrzeb rodziny, którą przez swój związek założyli. Stąd za trafną należy uznać wypowiedź TK, który wskazał, że należy oddać prymat wykładni celowościowej i systemowej nad językową, uznając że pozostawanie w związku małżeńskim przez osobę wymagającą opieki nie powinno stanowić przesłanki odmowy świadczenia pielęgnacyjnego. Co więcej, TK stwierdził, że zastosowanie wykładni językowej wskazanego przepisu jest niedopuszczalne, bo pozostaje w sprzeczności z podstawowymi wartościami konstytucyjnymi, jak: ochrona małżeństwa i dobra rodziny (art. 18 i 71 Konstytucji RP) oraz równości wobec prawa (art. 32 Konstytucji RP)[17].

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[12] Zob. Wyrok WSA w Łodzi z dnia 5 lutego 2014, II SA/Łd 1146, LEX nr 1429759 [dostęp: 20.12.2021].

[13] B. Chludziński, *Art. 17 Świadczenie pielęgnacyjne z tytułu rezygnacji z zatrudnienia lub innej pracy zarobkowej* [w:] *Świadczenia rodzinne. Komentarz*, red. P. Rączka, WKP 2021, Legalis [dostęp: 27.12.2021].

[14] K. Małysa-Sulińska, *Art. 17. Ustawa o świadczeniach rodzinnych. Komentarz*, LEX 2015 [dostęp: 27.12.2021].

[15] Zob. Postanowienie TK z dnia 1 czerwca 2010, P 38/09, OTK-A 2010, nr 5, poz. 53.

[16] Tj. Dz. U. 2020, poz. 1359.

[17] K. Małysa-Sulińska, *Art. 17. Ustawa o świadczeniach rodzinnych. Komentarz*, LEX 2015 [dostęp: 27.12.2021].

Innym przykładem zastosowania wykładni rozszerzającej przepisu art. 3 ust. 22 u.ś.r. było udzielanie świadczenia pielęgnacyjnego rolnikom prowadzącym indywidualne gospodarstwo rolne. Początkowo przychylano się do tej możliwości, argumentując *a contrario*, że celem uzyskania świadczenia rolnik musiałby wyzbyć się swojego gospodarstwa. Taki zabieg nie byłby zgodny z celowością ustawy. Po czasie wycofano się jednak z tej możliwości. Sądy administracyjne uznawały, że wskazana działalność nie mieści się w formie zatrudnienia lub prowadzenia innej pracy zarobkowej. Sądy stawały na stanowisku, że rolnicy prowadzący gospodarstwo rolne nie mogą w równej mierze zrezygnować z zatrudnienia lub innej pracy zarobkowej, co inne osoby wykonujące wskazane w przepisie art. 3 ust. 22 u.ś.r. inne formy aktywności zawodowej. Jako rację odmiennej sytuacji rolników indywidualnych podawano, że są oni w innej sytuacji ekonomicznej i socjalnej[18]. Przedmiotowe stanowisko wyraził także NSA w 2012[19], który ostatecznie wykluczył tę możliwość, uznając, że przedmiotowy katalog tytułów należy wykładać ściśle[20]. Argumentem odrzucającym możliwość wnioskowania o świadczenie przez rolników indywidualnych było stanowisko o braku realnej możliwości rezygnacji z zatrudnienia.

Stąd być może problem będący przedmiotem orzeczenia jest kolejnym problemem interpretacyjnym i potwierdza wskazane szersze wątpliwości oraz rodzi pytanie o to, czy wykładnia ścisła przepisu zawierającego katalog tytułów zatrudnienia lub innej pracy zarobkowej, wskazany w art. 22 ust. 3 u.ś.r., jest właściwym zabiegiem interpretacyjnym? Uprawnienie do uzyskania świadczenia pielęgnacyjnego przez skarżącego, który rezygnuje z działalności duszpasterskiej, WSA w Bydgoszczy widzi w dwóch argumentach. Po pierwsze w innym systemie prawa, którym podlegają osoby duchowne, a który to system państwo polskie uznało w zasadach autonomii i niezależności Kościołów i związków wyznaniowych, zagwarantowanych w aktach normatywnych o najwyższej randze[21], a także po drugie w zweryfikowaniu, czy osoba duchowna jest w stanie w sposób rzeczywisty zrezygnować z działalności duszpasterskiej.

Przywołane autonomia i niezależność państwa i Kościoła katolickiego zostały zagwarantowane w art. 25 ust. 3 Konstytucji RP[22] („Stosunki między państwem

[18] T. Brzezicki, *Art. 3 Definicje* [w:] *Świadczenia rodzinne. Komentarz*, red. P. Rączka, WKP 2021, p. 27, Legalis [dostęp: 27.12.2021], zob. przywołane przez T. Brzezickiego wyroki, m.in.: Uchwała NSA (7) z 11.12.2012, I OPS 5/12; wyrok NSA z 24.07.2014, I OSK 968/14, z 21.04.2017, I OSK 3108/15, CBOSA [dostęp: 20.12.2021].

[19] Uchwała NSA (7) z dnia 11 grudnia 2012, I OPS 5/12, Legalis [dostęp: 20.12.2021].

[20] R. Kopania, *Świadczenie pielęgnacyjne a status rolnika* [w:] *Świadczenia rodzinne dla opiekunów. Komentarz*, red. R. Kopania, Legalis 2017 [dostęp: 27.12.2021].

[21] J. Krukowski, *Polskie prawo wyznaniowe*, Warszawa 2008, s. 74.

[22] Konstytucja RP z dnia 2 kwietnia 1997, Dz. U. 1997, nr 78, poz. 483; z 2001, nr 28, poz. 319; z 2006, nr 200, poz. 1471; z 2009, nr 114, poz. 946.

a kościołami i innymi związkami wyznaniowymi są kształtowane na zasadach poszanowania ich autonomii oraz wzajemnej niezależności każdego w swoim zakresie, jak również współdziałania dla dobra człowieka i dobra wspólnego") oraz w art. 1 Konkordatu[23] („Państwo i Kościół katolicki są – każde w swej dziedzinie – niezależne i autonomiczne oraz zobowiązują się do pełnego poszanowania tej zasady we wzajemnych stosunkach i we współdziałaniu dla rozwoju człowieka i dobra wspólnego").

Zakres autonomii nie został sprecyzowany w przywołanych aktach normatywnych, stąd konieczne jest sięganie do aktów rangi ustawowej[24]. Art. 2 ustawy z dnia 17 maja 1989 o stosunku Państwa do Kościoła katolickiego w RP[25] głosi, że: Kościół rządzi się w swych sprawach własnym prawem, swobodnie wykonuje władzę duchowną i jurysdykcyjną oraz zarządza swoimi sprawami". Natomiast art. 19 ust. 2 pkt 5 ustawy z dnia 17 maja 1989 o gwarancjach wolności sumienia i wyznania[26] stanowi, że: „Wypełniając funkcje religijne, kościoły i inne związki wyznaniowe mogą w szczególności […] zatrudniać duchownych". Z obu przywołanych przepisów, wykładanych łącznie, wynika, że prawo zatrudniania duchownych (w wewnętrznych jednostkach Kościoła) odbywa się na zasadach prawa kanonicznego, a nie polskiego. Jedynym elementem „kontroli zatrudnienia duchownych" przez prawodawcę polskiego jest obowiązek zgłoszenia się przez duchownych do właściwego miejscowo naczelnika urzędu skarbowego celem naliczenia podatku. Opodatkowanie dochodu zostało w Polsce uregulowane, obok ustawy o podatku dochodowym od osób fizycznych[27], także w u.z.p.d[28]. Słusznie stąd WSA zauważył, że osoby duchowne podlegają dwom systemom prawa i rolą prawodawcy świeckiego nie jest ingerowanie w „formę zatrudnienia" ustaloną przez odpowiednie organy Kościoła. Reasumując, należy stwierdzić, że uznając autonomię Kościoła, prawodawca polski zaakceptował także konsekwentnie formę zatrudnienia duchownych wskazaną przez prawo kanoniczne. Forma kościelna współistnieje z formami prawa polskiego, czego wyrazem jest choćby to, że, jak słusznie podkreślił WSA w Bydgoszczy, podatki opłacane przez duchownych należą do kategorii dochodu wskazanego przez przepisy u.ś.r. i zasilają funkcjonowanie socjalnych programów wsparcia rodziny, w tym także świadczenia

[23] Konkordat między Stolicą Apostolską i Rzecząpospolitą Polską, podpisany w Warszawie dnia 28 lipca 1993.

[24] B. Łukańko, *Kościelne modele ochrony danych osobowych*, Warszawa 2019, s. 51.

[25] Tj. Dz. U. 2019, poz. 1347.

[26] Tj. Dz. U. 2022, poz. 1435.

[27] Ustawa z dnia 26 lipca 1991 o podatku dochodowym od osób fizycznych, tj. Dz. U. z 2022 r. poz. 1, 24, 64, 138, 501, 558, 583, 646, 655, 830, 872.

[28] J. Wiśniewski, *Podatek dochodowy od osób fizycznych* [w:] *Meritum. Podatki 2022*, red. A. Kaźmierski, Warszawa 2022, s. 148.

pielęgnacyjnego. Osoby duchowne, jak wskazał WSA, podlegają poza tym obowiązkowi ubezpieczeń społecznych. Są obligatoryjnie objęte ubezpieczeniem emerytalnym, ubezpieczeniami rentowymi oraz ubezpieczeniem wypadkowym (art. 6 ust. 1 pkt 10, art. 12 ust. 1–2 ustawy z dnia 13 października 1998 o systemie ubezpieczeń społecznych[29])[30]. Uznanie pozycji osób duchownych w systemie zabezpieczenia społecznego rodzi zdaniem WSA konsekwencję w postaci uznania wobec osób duchownych także prawa do ubiegania się o świadczenie pielęgnacyjne.

WSA w Bydgoszczy wskazał unormowanie tylko jednego z wymiarów kościelnej formy zatrudnienia duchownych, którą jest sposób ich wynagradzania. Została ona unormowana w kan. 281 KPK oraz zinterpretowana w odpowiedniej Instrukcji Konferencji Episkopatu Polski. Trafniej byłoby jednak wskazać na kluczowe zasady rządzące się zatrudnieniem. Prawo kanoniczne nie zawiera skodyfikowanej postaci prawa pracy jak prawo polskie. Poszczególne przepisy znajdują się w różnych księgach KPK. Na użytek niniejszej glosy można przywołać kluczowe przepisy dotyczące zatrudniania duchownych podejmujących (jak skarżący) działalność duszpasterską. Należą do nich urzędy proboszczów i ich pomocników – wikariuszy. Przedmiotowe przepisy zostały wpisane do Księgi II KPK, zatytułowanej *Lud Boży*, do jej rozdziału VI zatytułowanego: *Parafie, proboszczowie i wikariusze parafialni*.

Prawo kanoniczne posługuje się kategorią „urząd" (munus), przez który rozumie jakiekolwiek ustanowione na stałe zadanie z postanowienia Bożego lub kościelnego dla realizacji celu duchowego (kan. 145 §1 KPK)[31]. Powierzanie kościelnych urzędów opiera się w Kościele na zasadzie posłuszeństwa, do okazywania którego duchowni (jak i świeccy) są zobowiązani wobec własnego przełożonego (biskupa). Jedynie prawnie uznana przeszkoda – jak głosi kan. 274 §2 KPK – usprawiedliwia duchownego od przyjęcia i wykonania powierzonego mu urzędu[32]. „Kościelna forma zatrudniania" duchownych nie opiera się więc na zasadzie równości stron. Charakteryzując urząd proboszcza, kan. 519 KPK stanowi, że jest on własnym pasterzem zleconej sobie parafii podejmującym całościową pasterską troskę o powierzoną mu wspólnotę pod władzą biskupa diecezjalnego. Proboszczem

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[29] Tj. Dz. U. 2022, poz. 1009, 1079, 1115, 1265.

[30] P. Stanisz, *Ubezpieczenia społeczne* [w:] *Prawo wyznaniowe*, red. A. Mezglewski, H. Misztal, P. Stanisz, Warszawa 2011, s. 307; tenże, *Ubezpieczenie społeczne duchownych w prawie polskim*, Lublin 2001, s. 134–141; I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2020, s. 111–114; T. Rakoczy, *Elementy korzystne dla duchownych w ustawie – System ubezpieczeń społecznych*, „Opolskie Studia Administracyjno-Prawne" 2009, nr 6, s. 189–201.

[31] J.I. Arrieta, *Władza rządzenia* [w:] *Kodeks Prawa Kanonicznego. Komentarz*, red. P. Majer, Kraków 2011, s. 163.

[32] T. Rincón-Pérez, *Święci szafarze, czyli duchowni* [w:] *Kodeks Prawa Kanonicznego. Komentarz*, red. P. Majer, Kraków 2011, s. 256–257.

może być jedynie duchowny mający święcenia prezbiteratu. Proboszcz winien cieszyć się stałością i dlatego uzyskuje mianowanie na czas nieokreślony. Proboszcza ustanawia biskup diecezjalny poprzez odpowiedni dekret (decyzję administracyjną). Zniesienie proboszcza z urzędu, obok dobrowolnej i przyjętej przez biskupa rezygnacji, jest możliwe po zajściu określonych prawem przesłanek i po zastosowaniu określonej prawem kanonicznym skomplikowanej procedury (kan. 1739–1752 KPK). Proboszcz, będący zakonnikiem, może być odwołany przez biskupa diecezjalnego w drodze swobodnej decyzji. Prawo kanoniczne określa zadania własne proboszcza (kan. 530 KPK), do których należą m.in.: udzielanie sakramentów mieszkańcom swojej parafii, administrowanie dobrami doczesnymi parafii, reprezentowanie parafii na zewnątrz[33]. Proboszcz ma także obowiązek prowadzenia ksiąg parafialnych, zgodnie z odpowiednimi przepisami prawa kanonicznego. Należą do nich w szczególności księgi chrztów, małżeństw i zmarłych. Na proboszczu ciąży obowiązek rezydowania w domu parafialnym, który może opuścić na czas wakacji i rekolekcji, określonych przez inne przepisy prawa kanonicznego[34]. Prawo polskie w art. 7 ust. 1 pkt 5 StKKatU uznaje parafię jako osobę prawną Kościoła katolickiego, jak i proboszcza jako jej organ (art. 7 ust. 3 pkt 5)[35]. Jeśli jest to konieczne lub pożyteczne, do właściwego wykonywania posługi pasterskiej w parafii biskup diecezjalny może przydzielić proboszczowi współpracowników, czyli wikariuszy. Wikariusza mianuje biskup diecezjalny w drodze swobodnego nadania. Zadaniem wikariusza jest wspomaganie proboszcza we wszystkich zadaniach za wyjątkiem sprawowania mszy świętej za parafian. Urząd wikariusza parafialnego swobodnie nadany może być także swobodnie zniesiony. Nie jest on stały[36]. Wraz z osiągnięciem 75. roku życia duchowni są proszeni o złożenie wniosku o zrzeczenie się urzędu. Biskup diecezjalny ma obowiązek rozważenia wniosku, a w razie jego przyjęcia musi zapewnić zrzekającemu się odpowiednie utrzymanie i mieszkanie (kan. 538 §3 KPK).

Utrzymanie materialne duchownych wykonujących działalność duszpasterską bazuje na ofiarności wiernych. Z racji wykonywania przez nich zadań parafialnych wierni składają ofiary, o których przeznaczeniu ma zdecydować biskup diecezjalny. Zgodnie z przywołanym przez WSA kan. 281 KPK, ich część winna

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[33] H. Misztal, *Osobowość cywilnoprawna kościołów i innych związków wyznaniowych* [w:] *Prawo wyznaniowe*, red. A. Mezglewski, H. Misztal, P. Stanisz, Warszawa 2011, s. 145.

[34] J. Calvo, *Parafie, proboszczowie i wikariusze parafialni* [w:] *Kodeks Prawa Kanonicznego. Komentarz*, red. P. Majer, Kraków 2011, s. 450–471.

[35] H. Misztal, *Osobowość cywilnoprawna kościołów*…, s. 145; G. Radecki, *Organy osób prawnych Kościoła katolickiego w Polsce (na styku prawa kanonicznego i prawa cywilnego)*, „Rejent” 2003, nr 7–8, s. 127–155.

[36] J. Calvo, *Parafie, proboszczowie*…, s. 468–471.

stanowić osobiste wynagrodzenie duchownych. Oprócz tego przychodu duchowni utrzymują się także z uzyskiwanych stypendiów z tytułu odprawianych mszy świętych. Co do zasady kapłan może każdego dnia odprawić jedną Eucharystię. Stypendia z kolejnej (odprawionej za zgodą prawa lub ordynariusza) ma obowiązek przekazać na cele wskazane przez ordynariusza. Przywołane zasady nie mają jednak ścisłego zastosowania w przypadku duchownych zakonników (którym jest skarżący), bowiem całość pozyskiwanych środków stanowi przychód osoby prawnej, do której należą zakonnicy. O osobistym przychodzie zakonników decydują przepisy zakonne[37].

Drugą kwestią, która domaga się weryfikacji, jest możliwość rzeczywistego zrezygnowania z podejmowania działalności duszpasterskiej, co stanowi warunek *sine qua non* uzyskania świadczenia. Stąd słusznie WSA w Bydgoszczy domagał się zbadania stanu faktycznego w przedmiotowym zakresie. Należy jednakże zauważyć, że skarżący we wniosku do organu administracyjnego o przyznanie świadczenia przedłożył pisemną odpowiedź swojej kurii, która zwolniła go z obowiązków duszpasterskich na okres jednego roku. Tym samym należy domniemywać, że rezygnacja z wykonywania posługi duszpasterskiej została umożliwiona. Przełożony kościelny, udzielając przedmiotowej zgody, winien jednakże zatroszczyć się o materialne utrzymanie swojego podwładnego i – zgodnie z sugestią WSA w Bydgoszczy – zapewnić stosowne środki albo upewnić się, że duchowny będzie uzyskiwał je z innych źródeł, np. ze świadczenia opiekuńczego. Ta kwestia nie została wystarczająco jasno zbadana. Pozyskiwanie środków kościelnych, zgodnie z założeniem poczynionym przez sąd, wykluczałoby możliwość udzielenia skarżącemu świadczenia. Pytanie jest o tyle ważne, że w diecezjach czy zakonach istnieją powołane ku temu fundusze w postaci tzw. wzajemnej pomocy kapłańskiej.

W tym miejscu warto udzielić odpowiedzi na pytanie, czy zgodnie z przepisami prawa kanonicznego Kościoła katolickiego duchowny może zaprzestać wykonywania czynności kapłańskich, do których został ustanowiony? Odpowiedź na to pytanie jest pozytywna. W sytuacji duchownego posługującego w duszpasterstwie, a więc także skarżącego, należy odróżnić czynności duszpasterskie, a więc wykonywane w ramach podjętego urzędu kościelnego (proboszcza lub wikariusza), od tych, które może wykonywać, czy też do których jest zobowiązany z racji pozostawania w stanie duchownym. Kapłan bowiem dla podtrzymywania własnego życia wewnętrznego jest zobowiązany do wykonywania pewnych czynności, które nie wynikają z wykonywanego urzędu. Należy do nich np. sprawowanie mszy świętej. Tę samą Eucharystię duchowny może sprawować z racji powierzonego

[37] T. Rincón-Pérez, *Święci szafarze…*, s. 263.

mu przez przełożonego urzędu, jak i nie będąc jego piastunem. Prawo kanoniczne w kan. 276 §2 pkt. 2 zachęca kapłanów do częstego, a nawet do codziennego, odprawiania mszy świętej[38]. Kapłan jest przez prawo kanoniczne ściśle zobowiązany jedynie do uczestniczenia w Eucharystii w niedziele i uroczystości nakazane. Realizując więc swoją duchowość, kapłan niepodejmujący żadnego urzędu, a więc będąc zwolniony z wykonywania czynności duszpasterskich, może codziennie sprawować mszę świętą. Analogicznie, w podobnej sytuacji jest każdy wierny świecki, będąc zobowiązanym do odmawiania codziennej modlitwy. Konsekwentnie jednakże, sprawując mszę świętą, celem budowania własnej duchowości, duchowny nie powinien aplikować do niej żadnej zewnętrznej intencji, za którą otrzymałby stypendium mszalne. Kapłan niewykonujący też żadnego urzędu duszpasterskiego nie powinien wykonywać czynności, które przywołane wcześniej przepisy prawa wiążą z urzędem proboszcza czy wspierającego go wikariusza. Tym bardziej nie powinien także otrzymywać żadnych środków materialnych, o których mowa w kan. 281 KPK, jak i w przywołanej Instrukcji.

Reasumując, katalog z art. 3 ust. 22 u.ś.r. nie może mieć w przypadku osób duchownych ścisłego zastosowania. Na podstawie uznania przez prawo polskie kościelnej formy zatrudniania duchownych usprawiedliwione jest zastosowanie jego wykładni rozszerzającej. Możliwa jest także (za wcześniejszą zgodą przełożonego kościelnego) rezygnacja z podejmowanej działalności duszpasterskiej. *A contrario*, wykluczenie rezygnacji z działalności duszpasterskiej jako przesłanki do ubiegania się o świadczenie pielęgnacyjne byłoby wbrew wykładni prokonstytucyjnej wynikającej z art. 32 Konstytucji RP.

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[38] T. Rincón-Pérez, *Święci szafarze...*, s. 259.

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Thin capitalisation – application and limitations under Polish tax law and EU Council Directive 2016/1164 (ATA Directive)

Niedostateczna kapitalizacja – zastosowanie i ograniczenia w świetle polskiego prawa podatkowego i dyrektywy Rady UE 2016/1164 (ATAD)

Streszczenie

Cel: W artykule przedstawiono zjawisko niedostatecznej kapitalizacji, a także przeprowadzono analizę jego istoty i zastosowania. Rozważania zostały dokonane na gruncie historycznego i aktualnego ustawodawstwa polskiego, z uwzględnieniem wpływu prawa unijnego, dzięki czemu możliwe było porównanie różnych systemowych rozwiązań w zakresie regulacji niedostatecznej kapitalizacji.

Metoda badawcza: Podstawą rozważań dokonanych w artykule są zarówno uchylone, jak i aktualne przepisy ustawy z dnia 15 lutego 1992 r. o podatku dochodowym od osób prawnych z zakresu niedostatecznej kapitalizacji. Z racji konieczności implementacji do polskiego systemu prawnego dyrektywy Rady UE 2016/1164 z dnia 12 lipca 2016 r. (dyrektywa ATAD), również jej treść została poddana analizie.

Wyniki: Zmiany w zakresie niedostatecznej kapitalizacji, wprowadzone na mocy implementowanej dyrektywy ATAD, należy uznać za korzystne dla systemu prawnego. Aktualne przepisy w znacznie bardziej klarowny i mniej podatny na manipulację sposób regulują problematykę niedostatecznej kapitalizacji niż uprzednio stosowane rozwiązania. Dodatkowo w sposób odpowiedni wyważają interesy zarówno państwa, jak i podatników.

Konsekwencje/Następstwa: Wprowadzone w całej Unii Europejskiej zmiany wynikające z postanowień dyrektywy ATAD, a uprzednio także działań OECD w ramach planu BEPS, powinny przynieść zamierzony skutek w postaci eliminacji przynajmniej części działań mających na celu agresywną optymalizację podatkową, nie naruszając przy tym w istotny sposób interesu podatników.

Wkład/Wartość dodana: W artykule przedstawiono analizę porównawczą uprzednich i aktualnych rozwiązań w zakresie niedostatecznej kapitalizacji, co pozwoliło na dokonanie oceny przepisów wprowadzonych przez polskiego ustawodawcę, jak i rozwiązań unijnych.

Słowa kluczowe: niedostateczna kapitalizacja, cienka kapitalizacja, unikanie opodatkowania, BEPS, dyrektywa ATAD

Abstract

Objective: This article aims to present the phenomenon of thin capitalisation as well as to analyse its essence and application. The considerations are based on the historical and current Polish legislation, taking into account the impact of EU law, which makes it possible to compare various regulatory solutions in terms of thin capitalisation.

Research Design & Methods: The considerations made in this article are based on both repealed and current provisions of the Act of 15 February 1992 on corporate income tax in the scope of thin capitalisation. Due to the need to implement EU Council Directive 2016/1164 of 12 July 2016 (ATA Directive) into the Polish legal system, its content has also been analysed.

Findings: Changes in the scope of thin capitalisation introduced by the implemented ATA Directive should be considered favourable for the legal system. The current regulations govern thin capitalisation in a much clearer and less manipulable way than the previous solutions. In addition, they appropriately balance the interests of both the state and taxpayers.

Implications / Recommendations: The EU-wide changes resulting from the provisions of the ATA Directive and previously also from the OECD actions under the BEPS Action Plan should have the intended effect of eliminating at least some of the aggressive tax optimisation activities without significantly affecting the interests of taxpayers.

Contribution / Value Added: The article presents a comparative analysis of previous and current thin capitalisation solutions, which allowed the evaluation of regulations introduced by the Polish legislator as well as EU solutions.

Key words: thin capitalisation, tax avoidance, BEPS, ATA Directive

JEL classification: K34

1. Introduction

According to the principle provided in the model system of tax law, the profits of a shareholder (stockholder) of a capital company – resulting from dividends attributable to its share in the share capital – are subject to double taxation. This means that a capital company which reported a profit from its activities must first pay corporate income tax. The profit taxed in this way may – depending on the decision – be paid out to shareholders (stockholders) as a dividend or left in the company's assets. However, choosing the first of the indicated solutions implies the necessity to pay another income tax which is personal income tax this time. In view of the adoption of such a solution, shareholders (stockholders) of capital companies are looking for various ways to reduce the tax burden. One of the ways this is made possible is through the phenomenon of thin capitalisation, which has been developed in practice. In its model formulation, it consists in interest-bearing loans granted to the company by its shareholder (stockholder), the profit from which, unlike dividends, is only subject to personal income tax. As a result of this activity, the shareholder (stockholder) shifts the source of his income from the dividend paid by the company to the repayment of the interest-bearing loan, thereby enjoying a significant tax benefit.

The subject of this article is to present the phenomenon of thin capitalisation, whereas its aim is to analyse the essence and application of thin capitalisation. These considerations will be presented on the basis of Polish legislation, taking into account the impact of EU law. This issue seems to be important mainly due to the increasing popularity of the thin capitalisation mechanism in capital companies, as well as due to the recent changes in tax law in this respect. Of particular importance in this case is the need to implement Council Directive (EU) 2016/1164 of 12 July 2016, also commonly referred to as the Anti-Tax Avoidance Directive (ATA Directive). It should be noted that the problem of broadly understood tax avoidance has increasingly become the subject of interest of international organisations in recent years, which, through the development of joint projects for many countries, aim to introduce a coherent tax policy, allowing the entire system to be sealed both in internal and international terms. For this reason, legislation on thin capitalisation, as one of the most common methods of tax avoidance, has also undergone major changes in Poland recently. A preliminary analysis of the introduced solutions makes it possible to pose a thesis that the legislator has grasped the phenomenon of thin capitalisation much more completely than before, regulating it in a manner adequate to market needs.

To assess the current legislation on thin capitalisation, the definition and advantages of using this institution will be presented first. Furthermore, due to the description of the already repealed provisions of the Corporate Income Tax Act (hereinafter the CIT Act), as well as the ATA Directive and the manner of its implementation, it will be possible to compare the previous and current solutions, and to assess the impact of EU measures on the Polish tax law system.

2. Nature and implementation of thin capitalisation

a. Definition and advantages of thin capitalisation

The thin capitalisation mechanism involves financing the activities of a capital company through loans granted by its shareholder (stockholder). As a result of this practice, the company incurs such significant costs that it does not report a profit from its operation.[1] By doing so, the shareholder can "transfer" the source of his earnings from the company's activities, which become interest on his loans instead of a standard dividend. Such steps are taken to ensure tax optimisation, which may occur when a country's tax system subjects interest

[1] See R. Krasnodębski, 2.2.1.2. *Niedostateczna kapitalizacja* [Thin capitalisation] in: *Opodatkowanie spółek* [Taxation of companies], ed. H. Litwińczuk, Warsaw 2016.

income to a more favourable tax treatment than the alternative dividend. In the absence of specific provisions to counteract thin capitalisation, such as those arising from Art. 4 of the ATA Directive, such a relationship will arise in most jurisdictions. The norms of Polish tax law, according to which the profits of capital companies are taxed twice from the perspective of their shareholder (stockholder), first as corporate income tax and then as flat-rate income tax on collected dividends, may be an example of this. For interest, contrary to the above, only the shareholder (stakeholder) is charged with the flat-rate income tax, as for the company itself, the repayment of the loan and interest will constitute a tax-deductible expense.[2]

Granting a loan by shareholders may also be more beneficial to them for other reasons than recapitalising the company by increasing their input. This includes not having to change the Articles of Association or maintaining the ownership structure, as contributions of various entities remain the same. In addition, such an activity may in some way "protect" against claims of company's external creditors because, in this situation, not only does the company's equity itself decrease – as potential profits become a loan with interest that must be repaid – but the shareholders (stockeholders) themselves also become the company's creditors. It is also worth noting that on the basis of Art. 9 sec. 10 letter i of the Act on Tax on Civil Law Transactions, loans granted by a shareholder (stockholder) to a capital company are exempt from tax on civil law transactions.

b. Applying thin capitalisation in cross-border relations

Further advantages for company's shareholders (stockholders) arise from the use of thin capitalisation in cross-border relations. An attempt may then be made to determine the most favourable state from a tax perspective for the residence of both the lender and the borrower. The first could be a resident of a low-tax country or the so-called "tax exile" in order not to be obliged to pay tax on interest income at all or to have the tax reduced as much as possible.[3] The borrowing company could in turn choose the state as its domicile, regardless of the amount of income tax it would not have to pay. The cross-border application of thin capitalisation is mainly dealt with in bilateral double taxation treaties between states, based on the model of the OECD Convention.[4]

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[2] See Article 15 sec. 1 of the Act on Corporate Income Tax (CIT).

[3] See H. Litwińczuk, 2.2.1.3. *Przerzucanie zysków w drodze nadmiernych płatności z tytułu odsetek* [Profit shifting through excessive interest payments] in: *Międzynarodowe prawo podatkowe* [International tax law], Warsaw 2020.

[4] See https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf.

c. Thin capitalisation as a form of tax avoidance

For the reasons mentioned above, thin capitalisation can be considered a form of tax avoidance. This concept should be understood as a measure that reduces tax burden as much as possible while pursuing the intended economic purpose of the entity.[5] The erosion of the tax base that occurs with the use of thin capitalisation as a method of recapitalising companies due to the benefits it brings to the companies' shareholders (stockholders) is also a very undesirable phenomenon for the Treasury, whose potential tax revenues are significantly reduced. For this reason, before the implementation of the ATA Directive was required, there were restrictions in the Polish legal system on the possibility of applying thin capitalisation.

3. Polish legislation on thin capitalisation prior to the ATA Directive

a. Amendments to regulations pursuant to the signature of accession treaty

The issue of applying thin capitalisation was systematised in Polish tax law even before the ATA Directive came into force. These provisions were intended to set a safe limit from the perspective of the legislator, which was to determine the maximum level of indebtedness of the company to its shareholders (stockholders).[6] Exceeding this limit would result in the company's inability to classify the loan-related costs as a deductible expense.[7] The first provisions in this area (Art. 16 sec. 1 points 60 and 61 of the CIT Act) came into force as early as 1 January 1999, but at first, they mainly concerned the situation of non-residents – persons without unlimited tax liability in Poland – as lenders.[8] Such a significant distinction between residents' and non-residents' positions was unacceptable under European law and, therefore, following the signing of the accession treaty and Poland's accession to the European Union, it was necessary to amend the regulations, which took place on 18 November 2004. It extended the application of Art. 16 sec. 1 points 60 and 61 of the CIT Act to domestic situations as well, although it

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[5] See Z. Kukulski, D. Strzelec, *Prawnopodatkowe ograniczenia swobody finansowania podmiotów zależnych* [Legal and tax obstacles to the freedom of financing subsidiaries], Krytyka Prawa [Criticism of the legal] 2013, vol. 5, p. 318–319 and the literature cited therein.

[6] See R. Krasnodębski, *2.2.1.2. Niedostateczna kapitalizacja* [Thin capitalisation] in: *Opodatkowanie spółek* [Taxation of companies], ed. H. Litwińczuk, Warsaw 2016.

[7] See Article 15 sec. 1 of the Act on Corporate Income Tax (CIT).

[8] Residents were subject to these regulations only if they benefited from tax reductions and exemptions under Art. 17 sec. 1 point 34 of the CIT Act.

should be noted that under one of the transitional provisions, interest on loans (credits) granted by resident taxpayers before 1 January 2005 went beyond Art. 16 sec. 1 points 60 and 61 of the CIT Act Discrimination against non-residents and thus continued for some time after the amendment was adopted.[9]

b. Restrictions under Art. 16 sec. 1 points 60 and 61 of the CIT Act as amended on 1 January 2015

Article 16 sec. 1 points 60 and 61 of the CIT Act were the basis for the (so-called "basic method") thin capitalisation provisions until the entry into force of the provisions implementing the ATA Directive, which occurred on 1 January 2018. Until then – in the wording of the provisions that came into force on 1 January 2015[10] – in order for the aforementioned limit to be exceeded, which prevents the company from recognising interest on a loan granted by a shareholder (stockholder) as a deductible cost, two conditions had to be met. One was related to the shareholding of the lending entity or the shareholder (stockholder) of the companies that are parties to the loan agreement, and the other, to the value of the loan. According to the first, the lender would have to be an entity holding, directly or indirectly, no less than 25% of the shares of the borrower company, or entities holding jointly, directly or indirectly, no less than 25% of the shares of that company. Alternatively, to avoid the possibility of applying thin capitalisation through transactions between two subsidiaries of the same entity, if the entity directly or indirectly holds not less than 25% each of the shares (stocks) in both companies, the condition is also met. It should be noted that the percentage indicated in the provision concerning the shares held by the entity should be determined taking into account the potential preference in terms of the number of votes per share.[11]

The second condition concerns the value of indebtedness of the company, which in respect of entities holding, directly or indirectly, not less than 25% of shares (stocks) of this company (or in respect of the company granting the loan and in respect of entities holding, directly or indirectly, not less than 25% of shares

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[9] See H. Filipczyk, A. Zalasiński, *1.3.2. Nowelizacja z dnia 18 listopada 2004 r.* [Amendment of 18 November 2004] in: *Polskie prawo podatkowe a prawo unijne. Katalog rozbieżności* [Polish tax law vs. EU law. Catalogue of discrepancies], eds. B. Brzeziński, D. Dominik-Ogińska, K. Lasiński-Sulecki, A. Zalasiński, Warsaw 2016.

[10] The content of Art. 16 sec. 1 points 60 and 61 of the CIT Act before the amendment of the Act which came into force on 1 January 2015 has been the subject of much controversy in the context of its practical application; see H. Litwińczuk, *20.3. Regulacje polskie* [Polish Regulations] in: *Międzynarodowe prawo podatkowe* [International Tax Law], Warsaw 2020.

[11] See R. Krasnodębski, *2.2.1.2. Niedostateczna kapitalizacja* [Thin capitalisation] in: *Opodatkowanie spółek* [Taxation of companies], ed. H. Litwińczuk, Warsaw 2016.

(stocks) of the company receiving the loan, pursuant to Art. 16 sec. 1 point 61 of the CIT Act, must exceed, including loan indebtedness, the total equity of the company receiving the loan. This meant that the company's indebtedness to the previously mentioned three groups of entities listed in Article 16 sec. 1 points 60 and 61 of the CIT Act could be at a maximum level of the company's equity capital. When this limit was exceeded, the value of the interest in the proportion in which the value of the debt in excess of the company's equity remains compared to the total amount of this debt, as determined on the last day of the month preceding the month in which the interest on the loans was paid, was not considered deductible.

c. Article 15c of the CIT Act as amended on 1 January 2015.

Apart from the amended provisions of Art. 16 sec. 1 points 60 and 61 of the CIT Act, prior to the implementation of the ATA Directive, thin capitalisation has been analysed by Article 15c of the CIT Act, which has been in force since 1 January 2015 – under the Act of 29 August 2014 amending the Corporate Income Tax Act, the Personal Income Tax Act and other acts. This provision introduced the so-called "alternative method of interest deduction", allowing taxpayers to choose a method of determining the interest limit other than that relating to the company,s debt level.[12] It was only possible to apply this method if the taxpayer decided to do so because the basic method was automatically applied in other situations. Pursuant to Art. 15c sec. 2 of the CIT Act: *Interest on loans, including interest on loans granted by non-affiliated entities, may be considered as tax-deductible costs in a fiscal year up to the amount corresponding to the product of the reference rate of the National Bank of Poland in force on the last day of the year preceding the fiscal year, increased by 1.25 percentage point and the tax value of the assets within the meaning of the accounting regulations, including the nominal value of the amounts of loans granted, except for intangible fixed assets. The value of such assets shall be determined as at the last day of the relevant fiscal year.* To discuss this provision, it is necessary to highlight its two aspects. The first is that the norm includes loans from entities not affiliated to the company. The second one is to make the amount of deductible interest dependent on the product of the reference rate set by the NBP [National Bank of Poland] – the Monetary Policy Council – Increased by 1.25% and the tax value of the assets within the meaning of Article 37 sec. 2 of the Accounting Act of 29 September 1994. Both of these terms need to be defined. The reference rate is the yield on money bills issued by the NBP in

[12] See R. Krasnodębski, *2.2.1.2.3. Alternatywna metoda rozliczania odsetek* [Alternative method of accounting for interest] in: *Opodatkowanie spółek* [Taxation of companies], ed. H. Litwińczuk, Warsaw 2016.

the course of basic open market operations, i.e. purchase or sale of short-term money bills on the interbank market.[13] Setting the reference rate is one of the basic actions that the MPC [the Monetary Policy Council] takes to regulate the amount of money in circulation. It should be noted that at the time the provision in question entered into force, the reference rate was 2%, but it has subsequently been reduced several times to as low as 0.10%[14], which would significantly limit the applicability of Article 15c of the CIT Act as worded on 1 January 2015. The tax base of assets, on the other hand, is defined as the amount that reduces the tax base in the event of an economic benefit being derived from it, either directly or indirectly.[15]

The alternative method thus differed from the basic method both in the choice of the criterion determining how to calculate the maximum value deductible using thin capitalisation (the product of the reference rate plus 1.25% and the tax value of the assets, and the value of the company's equity) and in the basis itself, which could not exceed the specified limit (the value of interest from both affiliated and non-affiliated entities, and the value of debt from subsidiaries). The alternative method, although considered in the doctrine as simpler and easier to apply[16] compared to the basic method, could only be applied for three years, as on 1 January 2018, Art. 15c of the CIT Act was amended following the implementation of the ATA Directive.

4. Restrictions under Art. 4 of the ATA Directive and their implementation in Polish tax law

a. ATA Directive - general characteristics

The purpose of Council Directive (EU) 2016/1164 of 12 July 2016 was to lay down rules to counter tax avoidance practices that have a direct impact on the functioning of the internal market. The content of the Directive and the actions set out therein were significantly influenced by the Organisation for Economic Co-operation and Development (OECD) report published on 19 July 2013, commonly known as the BEPS Action Plan. The document compiles 15 postulates outlining actions that should be taken by states to prevent tax avoidance. One of them was the need to limit

[13] See https://pozyczkiunijne.bgk.pl/moj-biznes/stopa-referencyjna-czym-jest-i-od-czego-zalezy-2526/.

[14] This was the lowest ever value of the reference rate in Poland.

[15] See Article 37 sec. 2 of the Accounting Act of 29 September 1994 (consolidated text: Journal of Laws of 2013, item 330, as amended); E. Walińska, *Ustawa o rachunkowości. Komentarz* [Accounting Act. Comments], Warsaw 2013, p. 454.

[16] See P. Małecki, M. Mazurkiewicz, *CIT. Podatki i rachunkowość. Komentarz* [CIT. Taxes and Accounting. Comments], 6th ed., Warsaw 2015, Art. 15(c).

the erosion of the tax base through the deduction of interest and other charges for financial services.[17] This demand is therefore precisely a matter of thin capitalisation.[18] As the BEPS Action Plan has been adopted by the G20, to which the European Union is a member, the content of the ATA Directive also covers this issue in Art. 4.

b. Article 4 of ATA Directive.

This provision normalised the limits related to thin capitalisation differently than the one applied so far in Poland, i.e. according to Article 4 sec. 1 of the ATA Directive, *the excess of borrowing costs is deductible in the accounting period in which they were incurred only up to 30% of the taxpayer's earnings before interest, tax, depreciation and amortisation (EBITDA).* In respect of the basic method used in Poland at that time (Art. 16 sec. 1 points 60 and 61 of the CIT Act), two aspects should be noted. The first of them is the Directive's use of the concept of *borrowing costs*, which in the context of a loan, means only the value of the interest that the company has to pay over a given period of time, i.e. the value of the loan itself and whether it comes from affiliated or non-affiliated entities is irrelevant. Pursuant to Art. 16 sec. 1 points 60 and 61 of the CIT Act, the total amount owed to the entities listed in those provisions is relevant. Both the value of the interest and the value of the loan itself are therefore included, and their sum may not exceed the value of the company's equity. When analysing both solutions, the superiority of Article 4 sec. 1 of the ATA Directive should be clearly stated. It is due to the fact that regulations applied in Poland at the beginning of 2015 could be "circumvented" to a significant extent by a shareholder (stockholder) of the company, who, by granting a loan with a low nominal value, but with a relatively high interest rate, still had the possibility to avoid taxation to a significant extent. However, this is not allowed by the EU solution as only borrowing costs are taken into account, which are deductible up to 30% of EBITDA for the settlement period.

The second aspect which differs the EU solution from the Polish one is that the maximum value of deductible costs depends not on the company's equity but on 30% of EBITDA. This concept (*earnings before interest, taxes, depreciation and amortisation*) has been negatively defined in the provision itself, as *the financial*

[17] See M. Czerwiński, A. Wieśniak-Wiśniewska, *Świat podatków po projekcie BEPS i jego wpływ na polskich podatników* [The post-BEPS tax world and its impact on Polish taxpayers], PP 2016, No. 6, p. 22.

[18] It is worth noting that certain thin capitalisation solutions suggested in the report were introduced into Polish tax law prior to the implementation of the ATA Directive, with the Act of 29 August 2014 amending the Corporate Income Tax Act, the Personal Income Tax Act and other acts, which entered into force on 1 January 2015. An example is the maximum ratio of 1:1 between the value of a company's debt and its equity, already discussed in the paper.

result of the taxpayer before interest, taxation, depreciation and amortisation. EBITDA could be defined positively as operating profit plus depreciation of fixed assets. Using this indicator seems to be a more appropriate solution in relation to Polish legislation. This is because a company's equity is a value that can be largely shaped by its shareholders (stockholders) in such a way as to ensure maximum tax optimisation when using the thin capitalisation instrument. EBITDA appears to be a more lender-independent measure, meaning it provides higher security for EU states. It should be noted that Member States could adopt an alternative measure, referring to the taxpayer's earnings before interest and taxes (EBIT) as well as determined in an equivalent manner to an indicator based on EBITDA.[19]

The assumptions of the ATA Directive in relation to the alternative method of interest deduction applied in Poland should also be regarded as more favourable. The advantages of EU solutions include their low complexity, linked only to the need to monitor EBITDA, and the lack of dependence on government actions (as with the alternative method to the reference rate set by the MPC). Solutions under Art. 4 of the ATA Directive are also characterised by uniformity and clarity which certainly contribute to the certainty and transparency of the tax system.

Article 4 goes on to set out how EBITDA is calculated (section 2), the derogations and exemptions from section 1 that may apply (sections 3 and 4), the rights of a taxpayer when it is part of a consolidated group for accounting purposes (section 5), and other solutions that may be envisaged by Member States (sections 6 and 7). The process of applying the method from Article 4 of the ATA Directive, as well as other solutions that have been adopted on the grounds of the Polish tax law, will be described later in this paper, within the discussion of the implementation of the Directive.

c. Implementation of Article 4 of the ATA Directive - Article 15c of the CIT Act.

The provisions implementing Article 4 of the ATA Directive into the Polish legal system entered into force on 1 January 2018, by virtue of the amendment to the Corporate Income Tax Act. To analyse the amended Article 15c of the CIT Act, it is first necessary to define three new concepts that have been introduced to the legal system along with the described changes. The first of these is *debt financing costs*, which are understood to be all costs associated with obtaining funds from other parties, including non-affiliated entities and with the use of those funds, in particular interests, including interests capitalised or included in the initial value

[19] See Recital 6 of the preamble to the ATA Directive.

of a tangible or intangible asset, fees, commissions, bonuses, interest part of the lease instalment, penalties and charges for late payment of liabilities and costs of hedging liabilities, including the costs of derivative financial instruments, regardless of to whom they were incurred.[20] Therefore, this concept includes the value of interest and other similar charges (excluding the value of the loan itself) associated with debt, whether from affiliated or non-affiliated entities. The second concept is *interest income*, which is income from interest, including capitalised interest, and other income economically equivalent to interest corresponding to the cost of debt financing.[21] It is somewhat the opposite of the first described concept, as it includes income related to loans granted by the company. The last element to be defined is *debt financing cost surplus*, i.e. the amount by which the debt financing costs incurred by a taxpayer and deductible in a fiscal year exceed the taxable interest income earned by him in that fiscal year.[22] Such a surplus is thus the difference between debt financing costs and the entity's interest income.

These three concepts have been used to describe the mechanism for limiting the possibility of using thin capitalisation, which is included in Article 15c sec. 1 of the CIT Act. According to this provision, entities which are corporate taxpayers are obliged to exclude from tax-deductible costs the costs of debt financing in the part in which the excess of the costs of debt financing exceeds 30% of the amount corresponding to the excess of the sum of revenues from all sources of revenues less revenues of an interest nature over the sum of tax-deductible costs less the value of depreciation and amortisation deducted as tax-deductible costs in a fiscal year, as referred to in Art. 16a-16m of the CIT Act and debt financing costs not included in the initial value of the tangible or intangible asset. The amount mentioned in the above provision is equivalent to EBITDA indicated in the Directive. To apply Article 15c sec. 1, it is necessary to calculate the value of the debt financing surplus and check whether it exceeds 30% of EBITDA. Any value above this limit must be excluded from deductible expenses. However, the Act provides two exceptions to the rule described above, which are indicated in Article 15c sec. 14 of the CIT Act. According to the first, Article 15c sec. 1 does not apply if the excess of the costs of debt financing does not exceed PLN 3 million in a given fiscal year. However, the second exemption to this provision applies to the so-called financial undertakings, the catalogue of which is listed in Article 15c sec. 16.[23]

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[20] See Art. 15c sec. 12 of the CIT Act.

[21] See Art. 15c sec. 13 of the CIT Act.

[22] See Art. 15c sec. 3 of the CIT Act.

[23] The catalogue includes entities such as domestic banks, SKOKs [Credit and Savings Unions] or numerous funds within the meaning of the Act of 28 August 1997 on the Organisation and Operation of Pension Funds.

Particular attention should be paid to the first of the exceptions. Thanks to its application, even if the excess of the entity's debt financing costs exceeds 30% of EBITDA, it can still be considered a tax-deductible cost if its value does not exceed PLN 3 million. Applying such a limit to small, sometimes also medium-sized and growing companies will many times allow their shareholders (stockholders) to completely shift the source of their income from dividends to interest on their loans. In relation to such entities, thin capitalisation regulations should be considered of secondary importance, as exceeding the barrier of PLN 3 million in excess of the costs of debt financing, in practice means that the company has to pay at least PLN 3 million in interest alone, without even taking into account the value of the loan. Setting the limit at this level demonstrates the legislator's objective, which is undoubtedly to limit thin capitalisation in relation to large, leading companies, often with a long-established position on the market. This approach should be considered as relevant as it allows significant tax optimisation for many family businesses, as well as for growing companies, allowing them to grow even faster. However, it should be noted that this regulation has led to two opposing views in the doctrine concerning the practical application of Article 15c sec. 14 point 1[24] According to the first one, upon exceeding the limit of PLN 3 million of debt financing surplus, a taxpayer may decide whether it is more beneficial for him to include PLN 3 million or the value of 30% EBITDA as tax-deductible costs. The opposite approach implies that the value of PLN 3 million is a kind of tax exempt amount, so that if the limit is exceeded, the taxpayer could deduct 30% of EBITDA, additionally increased by PLN 3 million. The first view, although less favourable to the taxpayer, is the more legitimate one. Its legitimacy derives both from an interpretation of the preamble to the ATA Directive and from a linguistic interpretation of Art.[25] 15c of the CIT Act.[26]

Article 15c also contains certain specific provisions, concerning the types of debt financing costs that are not taken into account when calculating surplus value[27],

[24] For more information, see M. Jarosławska-Gurgacz, *Ograniczenie kosztów finansowania dłużnego – analiza praktyki rynkowej oraz orzecznictwa po roku stosowania znowelizowanych przepisów o niedostatecznej kapitalizacji* [Limiting debt financing costs – an analysis of market practice and jurisprudence after one year of the application of the amended thin capitalisation provisions], PP 2019, No. 4, p. 38–44.

[25] See Recital 8 of the preamble to the ATA Directive.

[26] Otherwise – see K. Winiarski, *Formy przeciwdziałania unikaniu opodatkowania w polskim systemie prawnym w zakresie podatków dochodowych* [Forms of counteracting tax avoidance in the Polish income tax legal system]. *Wybrane problemy orzecznicze* [Selected jurisprudential problems] in: *Uszczelnienie systemu podatkowego w Polsce* [Tightening of the tax system in Poland], ed. D.J. Gajewski, Warsaw 2020.

[27] See Article 15c sec. 8 of the CIT Act.

long-term public infrastructure projects[28], capital groups[29], foreign establishments located in Poland[30], and the possibility of crediting debt financing costs excluded in a given fiscal year in the following 5 years.[31]

5. Conclusions

To draw conclusions with regard to the impact of EU solutions that have been introduced into the Polish legal system in the area of thin capitalisation through the necessity to implement the ATA Directive, it is necessary to summarise the hitherto considerations. According to the arguments presented in the paper, the impact of EU legislation should be considered favourable. Art. 15c of the CIT Act in the current wording appears to be a clear and unified provision, introducing the method that is much easier to apply and less susceptible to manipulation by the taxpayer or state authorities than those which were in force in Polish law before 2018. EBITDA appears to be a much more reliable measure for the safety of the tax system than shareholders' equity or the reference rate set by the MPC. The advantages over the previous solutions include the fact that there is a single method, instead of a division into basic and alternative options, as well as the introduction of a limit allowing the deduction of the excess of debt financing costs up to PLN 3 million regardless of EBITDA result, which makes it possible to obtain significant tax optimisation of small and medium-sized companies in the development stage. The aforementioned controversy with regard to the practical application of this limit should be regarded as a relatively insignificant problem, especially as it was resolved with the entry into force of the Act of 23 July 2021 on amending the Power Market Act and other acts, which clarified the content of Article 15c of the CIT Act unequivocally, favouring the solution adopted in this paper. However, the doctrine also critically assesses some other solutions of the Polish legislator. This includes provisions for independent entities that benefit from financing from non-affiliated entities, as well as groups of affiliated entities whose activities are not aimed at eroding the tax base. Solutions in this area are said to be too inflexible.[32] In spite of this, changes introduced in the area of thin capitalisation not only in Poland, but also in the entire European Union, under the provisions of the ATA Directive,

[28] See Article 15c sec. 9 and 10 of the CIT Act.

[29] See Article 15c sec. 2 and 11 of the CIT Act.

[30] See Article 15c sec. 20 of the CIT Act.

[31] See Article 15c sec. 18 and 19 of the CIT Act.

[32] See M. Jamroży, A. Łożykowski, *Ograniczenia kosztów finansowania dłużnego od 1.01.2018 r.* [Limitations of debt financing costs from 1 January 2018] PP 2018, No. 6, p. 36–41.

and previously the actions of the OECD under the BEPS action plan, should be regarded as appropriate. Over the next few years, their implementation should have the planned effect of eliminating at least some activities aimed at aggressive tax optimisation, without significantly affecting the interests of taxpayers.

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Preamble to the ATA Directive

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The right to clean air as a special form of the right to environmental protection - international and national regulations

Prawo do czystego powietrza jako szczególna postać prawa do ochrony środowiska – regulacje międzynarodowe i krajowe

Streszczenie

Artykuł jest próbą przedstawienia problematyki prawa do czystego powietrza i jego uregulowania w systemie prawnym na szczeblu międzynarodowym, regionalnym oraz wewnątrzkrajowym. Współczesne społeczeństwo posiada coraz większą świadomość ekologiczną, a przez to oczekuje od organów publicznych podjęcia odpowiednich kroków celem unormowania prawnego wspomnianego zagadnienia. Zaznaczyć należy, że szczególnie dużą rolę w tym procesie odegrały ONZ oraz Unia Europejska. Obie organizacje stworzyły szereg aktów dotykających omawianego zagadnienia w sposób pośredni, jak i bezpośredni. W artykule pochylono się nad zagadnieniami zarówno prawa do czystego środowiska, jak i prawa do czystego powietrza, podkreślono różnice między tymi pojęciami, a także przedstawiono ich wpływ na rozwój prawodawstwa. Bardzo istotnym z perspektywy omawianej materii jest także orzecznictwo polskich sądów w tym zakresie i stanowisko, jakie przyjęła judykatura, nie uznając prawa do czystego powietrza jako prawa podmiotowego przynależnego każdej jednostce, ale przynależne całemu społeczeństwu, tym samym zamykając drogę obywatelom do uzyskania zaspokojenia roszczeń z tytułu nieudolności państwa w utrzymaniu wyznaczonych standardów powietrza.

Słowa kluczowe: prawo do czystego powietrza, prawo do czystego środowiska, dobra osobiste, ekologia, ochrona środowiska, prawa człowieka

Abstract

The paper is an attempt to present the issue of the right to clean air and its regulation in the legal system at the international, regional and domestic level. Modern society shows an increasing awareness of the environment, and thus expects public authorities to take appropriate steps to regulate

this issue. It should be noted that the UN and the European Union have played a particularly important role in this process. Both organizations have created a number of acts, affecting the discussed topic in direct as well as indirect ways. What is more, the paper focuses on both the right to a clean environment and the right to clean air, emphasizing the differences between these concepts, as well as discussing their impact on the development of legislation. What is additionally very important from the perspective of the presented issue is also the jurisprudence of Polish courts in this area and the position adopted by the jurisprudence without recognizing the right to clean air as a subjective right belonging to each individual, but belonging to the whole society, ipso facto closing the way for citizens to obtain satisfaction of claims for the state's inability to maintain the set air standards.

Key words: right to clean air, right to clean environment, personal rights, ecology, environmental protection, human rights

I.

Nowadays, more and more people talk about ecology. This trend is not only positive, but above all very needed in view of the deepening climate crisis. Clean air is a prerequisite for the survival of the human species, and should therefore be a priority for both individual governments and ordinary people. However, the leaders of the world's largest countries do not seem to be interested in taking over initiative[1] in this area, which can be explained primarily by possible economic losses. Taking care of the environment, specifically of clean air, is unprofitable at this stage, and without top-down and systemic measures, ordinary people have very little chance of overcoming the ecological crisis alone. In order to start a real fight against air pollution, states – as they are mainly discussed here – should introduce appropriate legal regulations and instruments to enforce them.

Changes in law, which should also be emphasized, are of course taking place, but this process is too slow[2]. Individual countries or international organizations are

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[1] The irrationality of the actions of the leaders can be evidenced by the recent G20 Summit 2021 in Rome, at which the most influential people, who are at the head of global powers responsible for as much as 75% of greenhouse gas emissions, met to deliberate on economic and climate issues. The countries that are members of this group have both the means and real possibilities to change their climate policy, and yet these changes are minimal. Based on the press reports of the meeting of the group, we can read that in the near future significant and effective actions are to be taken to combat the climate crisis. This sounds absurd when one considers that the organization of the summit itself certainly did not serve the climate. At the end of the meeting, the leaders threw coins at the Trevi Fountain according to the local custom "to wish good luck in the fight against the climate crisis". If people who have the means to really win this fight entrust it to luck, the future of our planet does not look bright. Claude Forthomme, "G20, the Club of Richest Nations, Disappoints On Climate Change" https://impakter.com/g20-club-richest-nations-disappoints-climate/ (access: 22.02.2022).

[2] According to L. Karski, modern legislature is faced with the challenge of formulating a right or a collection of human rights to the environment. See. L. Karski, *Prawa człowieka i środowisko*, StudiaEcologia et Bioethicae 2006, No. 4, p. 310.

trying to introduce adequate changes in legal regulations and it is their analysis that is the subject of consideration in this paper. The aim of it is to present regulations strictly concerning the right to clean air at the global and regional levels, as well as at the national level. In this last case, when analyzing legal acts issued by Polish authorities, it will also be necessary to recall the relevant case-law of the Supreme Court.

At the very beginning of the considerations, the question should be asked about what the right to clean air is. This term is increasingly recurring in the public debate, sometimes put on an equal footing with other human rights. Therefore, it seems reasonable to agree on its correct understanding, genesis and legal basis in the various systems at each of the above-mentioned levels. In the course of the analysis, it is necessary to establish the legitimacy and possible enforcement of the right to clean air in international, EU and Polish law. These findings are made on the basis of research methods typical for legal sciences, i.e. linguistic-dogmatic, historical and comparative.

II.

Human rights, simply put, are "the special kind of subjective rights to which a person is entitled and which serve him by virtue of natural law"[3]. They do not exist, therefore, due to the fact of mere acknowledging their existence by states and legal systems, but only independently and they belong to every human being by the very fact that people possess an inherent human dignity which is inalienable. Taking into account the definition discussed, the right to clean air should certainly be included in the category of human rights and, more precisely, in the third generation of them[4]. Unfortunately, despite the obviousness of this statement, it does not mean that this right is universally guaranteed and protected by states which still quite skillfully evade responsibility for the state of the environment.

In the media, the term "the right to the environment" is repeatedly used, and it is often confused with the right to clean air. However, they are not identical, although they are very closely related. The right to a clean environment is a much broader concept, including both the right to clean air and, for example, the right to clean water. However, no document has been issued at either international or regional level which would confirm *expressis verbis* the existence of the right to the environment.

[3] M. Granat, *Prawo konstytucyjne*, Warszawa 2021, pp. 139–140.
[4] K. Drzewicki, *Trzecia Generacja praw człowieka*, Sprawy Międzynarodowe 1983, No. 10.

At this point, the legislative activity of the United Nations should be recalled in the first place[5]. Over the decades of the UN's existence, the problem of the right to the environment has been present quite frequently. And so, it was one of the subjects of the work of the World Conference on the Human Environment in Stockholm in 1972, where it was adopted that "a man has the right, among other things, to freedom, equality and appropriate living conditions, in the environment whose quality allows us to live with dignity and prosperity[6]." The adoption of a resolution by the UN Commission on Human Rights in 1994, which directly addressed people's right to the environment as a human right, should be seen as another breakthrough in the recognition of the right to live in a clean environment[7]. Resolution 48/13, adopted on 8 October 2021, by the Human Rights Council (UNHRC), a subsidiary body of the UN General Assembly, which replaced the above-mentioned Commission, was also a confirmation of the existence of the right to the environment. In this Resolution, the UNHRC recognised access to a safe and clean environment as a fundamental human right[8]. More specifically, according to the text of the Resolution, "a clean, healthy environment in the proper state of equilibrium is a human right[9]." Still, we are only talking about the right to clean environment.

The right to clean air, constituting the subject of consideration in this paper, which is a detailed specification of the right to the environment, is unfortunately not regulated in any of the basic and most important documents in the field of human rights developed by the United Nations. Suffice it to note that the right to clean air was not regulated either in the Universal Declaration of Human Rights of 1948, or in the International Covenants on Human Rights of 1966, or in any official document issued subsequently. However, this does not mean that such a law does not exist at all. In recent years, the existence of the right to clean air has been repeatedly confirmed directly or indirectly in case-law at both regional and national levels.

It seems that also the UN admits, with the requisite degree of certainty, the existence of the right to clean air, as evidenced by the statement of 2018 by the UN High Commissioner for Human Rights at the First Global Conference on Air Pollution and Health, who stated that "there is no doubt that all people have the right to breathe clean

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[5] T. Gadkowski, *Nowe instytucje współpracy w ramach systemu Organizacji Narodów Zjednoczonych na przykładzie międzynarodowego prawa ochrony środowiska* [in:] *System Narodów Zjednoczonych z polskiej perspektywy*, ed. E. Cała-Wacinkiewicz, Warszawa 2017, pp. 59–80.

[6] http://www.unic.un.org.pl/prawa-czlowieka/trzecia-generacja-praw-czlowieka/3205# (access: 18.02.2022).

[7] *Ibid.*

[8] M. Andrzejewska, UN Day 2021: *Dostęp do czystego, zdrowego środowiska będącego w stanie właściwej równowagi prawem człowieka*, https://www.gridw.pl/aktualnosci/unep/2923-un-day-2021-dostep-do-czystego-healthy-environment-being-in-a-state-of-proper-balance-of-human being (access: 9.02.2022).

[9] The human right to a clean, healthy and sustainable environment (A/HRC/48/L.23/Rev.1).

air[10].” Another confirmation can be found in the 2019 report prepared by the UN Special Rapporteur David R. Boyd and presented in Geneva, in which it was stated that “certainly, if there is the human right to clean water, there must be the right to clean air. Both are essential for human life, health and dignity[11].” The report itself was an attempt to answer the question of what the relationship between human rights and the right to clean air looks like. Particular emphasis is placed on the lack of a unified air quality system in most of the countries belonging to the organization and on the glaring consequences of this negligence, which we are already facing or will encounter in the near future[12].

In addition, David R. Boyd recommended to the UN General Assembly adopting a resolution on the right to clean air. In his opinion, taking such a step would certainly help to stimulate and direct actions aimed at improving the actual situation of the environment[13]. If the right to clean air had a legal basis, then it would be much easier to enforce its violations by states.

III.

In the context of the implementation of the right to clean air, it is worth mentioning the regulations introduced by the European Union. Although neither primary nor secondary law provides grounds for deriving an individual's substantive right to the environment, this right is present in EU legislation. This state of affairs results from the EU’s obligation to protect the environment and to improve its quality[14].

Article 37 of the Charter of Fundamental Rights of the European Union states that a high level of environmental protection and the improvement of environmental quality must be integrated into Union policies and ensured compliant with the principle of sustainable development[15]. However, this is not a precise regulation that would unequivocally indicate a specific human right[16].

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[10] https://breathelife2030.org/news/countries-legal-obligation-ensure-clean-air-says-un-human-rights-representative/ (access: 22.02.2022).

[11] Report number A/HRC/40/55 of 8 January 2019 https://publicystyka.ngo.pl/prawo-do-czystego-i-healthy-air-a-right-man (access: 22.02.2022).

[12] According to the data cited in the report, more than six trillion people (1/3 of whom are children) regularly inhale polluted air, which leads to health and life threatening conditions and, consequently, to the premature death of 7 million people. See https://breathelife2030.org/news/countries-legal- obligation-ensure-clean-air-says-un-human-rights-representative/ (access: 22.02.2022).

[13] https://www.ccacoalition.org/ru/node/3007 (access: 23.02.2022).

[14] K. Doktór-Bindas, *Prawo do czystego powietrza*, Przegląd Konstytucyjny 2020, No. 4, p. 104.

[15] More about the principle of sustainable development is written by E. Olejarczyk, *Zasada zrównoważonego rozwoju w systemie prawa polskiego – wybrane zagadnienia*, Przegląd Prawa Ochrony Środowiska 2016, No. 2, *passim*.

[16] J. Uliasz, *Prawa jednostki w zakresie ochrony środowiska* [in:] *Wolności i prawa ekonomiczne, socjalne i kulturalne w Konstytucji RP z 1997 r.*, ed. H. Zięba-Załucka, Rzeszów 2018, p. 243.

Article 191 of the Treaty on the Functioning of the European Union states that "Union policy on the environment contributes to the achievement of the following objectives: preservation, protection and improvement of the quality of the environment, protection of human health, prudent and rational use of natural resources, promotion of measures at international level to address regional or global environmental problems, in particular the fight against climate change[17]." The aforementioned provision is precise and clearly defines the objectives and principles pursued by the Union in the field of environmental protection. Paragraph 2 of the aforementioned article is also important. It states that the Union has as its objective a high level of environmental protection. It is based on the precautionary principle, the principle of preventive action, compensation for damage at source in the first place and the "polluter pays" principle. These elements shall be respected and, if necessary, enforced taking into account the particular circumstances typical of the various regions of the community. Taking into account the above, it can be concluded that the European Union considers the matter of environmental protection, including the provision of clean air standards, as important elements of its policy.

An important piece of legal act addressing the issue of the right to clean air is the Directive of the European Parliament and the Council on air quality and cleaner air for Europe. commonly known as the CAFE (*Clean Air For Europe*)[18]. This Directive sets out methods for assessing air quality, criteria for the assessment system and measuring points. It introduced the division of the Community into danger zones according to population density, as well as standardised methods for measuring pollution levels and collecting data[19]. The directive introduces EU air quality standards and is the basis for determining what clean air is from the Community perspective. Member States had the task of implementing the provisions of the Directive into their legal systems. However, the mere entry into force of the rules does not automatically make air quality better. It is necessary for public administration bodies and representatives of the business sector to act[20]. For their inactivity, the European Commission may hold individual Member States accountable before the Court of Justice of the EU. In 2018, this was the case of six Member States[21]. It should also be mentioned that in the same year, 29 proceedings were

[17] *Traktat o Funkcjonowaniu Unii Europejskiej* – wersja skonsolidowana/Traktat ustanawiający europejską wspólnotę gospodarczą (Journal of Laws of 2004, No. 90, *item* 864/2, as amended).

[18] EU Journal of Laws. L. of 2008 , No. 152, p. 1 as amended.

[19] *Ibid.*

[20] Cf. M. Czuryk, *Zadania organów administracji publicznej w zakresie ochrony środowiska*, Rocznik NaukowyWydziału Zarządzania w Ciechanowie 2009, No. 3–4 (III), p. 44 et seq.

[21] European Parliament Resolution of 13 March 2019 on Europe that protects: clean air for all (2018/2792(RSP).

pending in 20 countries for non-compliance with EU air quality limit values. In addition, in two-thirds of the Member States, the air pollution limit values are not respected[22]. This situation has not improved. It is enough to recall, for example, the communication of 12 January 2022 of the Chief Inspectorate for Environmental Protection on the current and forecasted air quality in Poland[23]. According to it, the alert level[24] was exceeded in the cities of the Wielkopolskie and Kujawsko-Pomorskie voivodships, while the information level[25] was exceeded in several voivodships, among others in Łódź and Pomorskie voivodeships. A similar picture emerges from the 2018 Air Quality Report drafted and published in 2020 by the European Environment Agency[26]. It indicates that the greatest threat to health is air pollution with particulate matter, nitrogen dioxide and tropospheric ozone. Areas where exceedances of the standards for the concentration of harmful substances occurred were inhabited by nearly a third of the EU population.

IV.

When discussing the right to clean air in the case of national law, it is necessary to point in the first place to the relevant constitutional provisions. The Constitution of the Republic of Poland of 1997 is a relatively young piece of legislation and thus contains many modern regulations that respond to the current needs of the human community[27]. Thus, Article 68(4) of the Polish Basic Law introduces an obligation on the public authority to prevent the negative effects of environmental degradation on health. The aforementioned duty requires the addressees to apply preventive measures, however, it does not define the means to be used to implement them[28]. Further duties of public authorities are defined in Article 74 of the Constitution. Thus,

[22] *Ibid.*

[23] https://powietrze.gios.gov.pl/pjp/content/show/1003522 (access 19.02.2022).

[24] Under Article 2 of the CAFE Directive, “alert threshold” means a level of a substance in the air above which there is a risk to health of the whole population resulting from short-term exposure to pollutants, and in the case of which Member States undertake immediate action.

[25] Under Article 2 of the CAFE Directive, “information threshold” means the level of a substance in the air above which there is a risk to human health resulting from short-term exposure to pollutants of particularly sensitive groups of the population, and in the case of which immediate and correct information is necessary.

[26] *Air quality in Europe – 2020 Report*, Luxembourg: Publications Office of the European Union, 2020.

[27] J. Sommer, *Prawo ochrony środowiska w systemie prawa polskiego*, Studia Prawnicze 2001, No. 3–4, pp. 283–307.

[28] M. Florczak-Wątor [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. II*, ed. P. Tuleja, LEX/el. 2021, Art. 68.

paragraph 1 of this provision introduces an obligation to pursue a policy which ensures ecological safety for present and future generations. Paragraph 2 introduces an obligation to protect the environment, and paragraph 4 introduces an obligation to support the activities of citizens to protect and improve the state of the environment. These tasks should be carried out by public authorities taking into account the principle of sustainable development[29]. Actions taken in this regard should include not only activities leading to the non-deterioration of the state of the environment, but also to its improvement. The provisions in question formulate the principles of conducting a state policy, however, they do not give rise to subjective rights of an individual[30]. What is of importance in this case is the fact that the cited provision is placed in the second chapter of the Constitution of the Republic of Poland which deals with human rights[31].

As previously presented in this paper, international regulations are beginning to include regulations touching on the matter of the right to a clean environment. The doctrine also signals a development of links between international human rights law and international environmental law, pointing to the desire to transform the right to the environment into a separate independent human right[32]. Hence, the Polish legislator may become inspired by this positive international trend over time and will make appropriate changes to the fundamental law in this area. At the end of this consideration, Article 86 of the Constitution needs to be mentioned as it imposes an obligation to protect the state of the environment. The addressees of this obligation are natural persons (citizens, foreigners, stateless persons) and legal persons as well as organizational units without legal personality, if they remain under the authority of the Republic of Poland[33]. It is worth emphasizing that it is incumbent on the State to create conditions enabling this obligation to be fulfilled[34]. Article 86 of the Constitution has not only a juridical but also an ethical dimension, because the environment has the character of a common good and every member of the human community should feel obliged to take care of it[35].

The issue of the right to a clean environment and the right to clean air has become the subject of wide interest of the media and public opinion thanks to the Resolution of the Supreme Court of 28 May 2021[36], which states, among others,

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[29] See K. Doktór-Bindas, *op. cit.*, p. 106.

[30] M. Florczak-Wątor [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. II*, ed. P. Tuleja, LEX/el. 2021, Art. 74.

[31] J. Uliasz, *op. cit.*, p. 244.

[32] L. Garlicki, M. Derlatka [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Volume II, ed. II*, ed. M. Zubik, Warszawa 2016, Art. 74.

[33] M. Florczak-Wątor, *op. cit.*, Art. 86.

[34] See. K. Doktór-Bindas, *op. cit.*, p. 109.

[35] W. Radecki, *Konstytucyjny obowiązek dbałości o stan środowiska i odpowiedzialność za jego pogorszenie*, Ochrona Środowiska. Prawo i Polityka 2000, No. 1, p. 2.

[36] Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item* 72.

that the right to live in a clean environment is not a personal right. Any consideration of the line of the case-law and any discussion of its validity or lack of it must begin with an explanation of what a personal right is[37].

In Article 23 of the Civil Code, such rights, as health, freedom, freedom of conscience, name and secrecy of correspondence are mentioned among others. This enumeration is illustrative, not enumerative. This is an open directory. Following Stanisław Dmowski, it should be noted that due to the above catalogue being open, there is a possibility of appearance and disappearance of other rights as a result of a change in social relations[38]. This is understandable, of course, because society is evolving together with its needs and priorities. Over the years, the right of the family to the intimacy and privacy of life have been added to the above-mentioned exemplary personal rights by doctrine and case-law. But what exactly are personal rights? One of the most popular definitions refers to "non-material values associated with the human personality, universally recognized in society[39]." Moreover, the rights arising from personal rights are absolute and effective *erga* omnes[40].

In the context of the right to clean air, a reference should also be made to Article 24 of the Civil Code, i.e. to the issue of the protection of personal rights, because both of these Articles function in an inseparable relationship. Only rights recognized as personal in case- law or doctrine are subject to the protection of personal rights. There also has to occur unlawful threat or infringement of such a right. For the real application of the protection of legal rights, the aggrieved person must demonstrate that there has been a violation or threat to a specific and universally recognized personal right, whereby it is indicated that it will be insufficient to invoke the violation of personal rights understood as a kind of discomfort, "some" harm or negative psychological experience. As it can be seen, the issue is quite problematic, especially in the context of legal practice, mainly when trying to answer the question of "what is protected by Article 24 of the Civil Code", to which, unfortunately, there is no clear answer. The issue of personal rights has been repeatedly raised in the jurisprudence of Polish courts and the Resolution of the Supreme Court of 2021 referred to above is not the first one.

Previously, this issue was the subject of a decision of the Supreme Court on 10 July 1975[41]. The case concerned a potential infringement of personal rights by

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[37] Act of 23 April 1964. Civil Code (i.e. Journal of Laws 2020 *item* 1740 as amended). https://sip.lex.pl/#/act/16785996?unitId=art(23) (access: 2022-04-09 23:26).

[38] S. Dmowski [in:] S. Dmowski, S. Rudnicki, *Komentarz do kodeks cywilnego*, 2011, com. to Art. 23, nt 7).

[39] P. Księżak [in:] *Kodeks cywililny. Komentarz. Część ogólna*, wyd. II, ed. M. Pyziak-Szafnicka, Warszawa 2014, com. to Art. 23.

[40] See K. Doktór-Bindas, *op. cit.*, pp. 115–116.

[41] Judgment of the Supreme Court of 10.07.1975, I CR 356/75, OSP 1976, No 12, *item* 232. https://sip.lex.pl/#/jurisprudence/520437841 [access: 2022-02-20 17:22].

contaminating a lake with oily substances harmful to health as a result of the action of state institutions. The state of fact should only seemingly be considered different from the issue of air pollution. The plea in the lawsuit indicated, among others, Article 23 of the Civil Code as the basis for its claims, because the pollution of the reservoir was to lead to the loss of aesthetic values of the adjacent areas and obviously threatened the health and life of residents, including the plaintiff. The case went before the Voivodeship Court in Szczecin which decided to dismiss the action, arguing that "the human right to an uncontaminated biological environment cannot be considered a personal right within the meaning of Article 23 of the Civil Code[42]." The judgement was appealed and the case went to the Supreme Court which again did not uphold the action due to the lack of proof of damage, however it was indicated at the same time that "the protection for infringement of personal rights could be granted, for example, in the case of littering of the garden under the window or unlawful obstruction of the view of the park – such cases would be the infringement of a specific personal right[43]." This indication is important from the perspective of the discussed topic. In other words, the court admitted that the human right to environmental protection and satisfying aesthetic sensations with the landscape can be protected under Article 24 of the Civil Code, but only if the infringed right is a personal right within the meaning of Article 23 of the Civil Code[44]. From the perspective of the twenty-first century, such a sentence may seem controversial. The society is more environmentally conscious. At the time of the judgment, environmental issues or the analyzed right to clean air did not seem to beof great importance.

Years later, a case relating to a similar matter was brought before the Supreme Court. This is the already mentioned Resolution of the Supreme Court of 28 May 2021[45]. It is a response to a legal question that was submitted by the court of appeal in connection with the adjudication on the case of a plaintiff who demanded compensation for a harm caused to him by serious violations of air quality standards that infringed his personal rights such as health, freedom and privacy. The presented claim led to the legal issue: "Does the right to live in a clean environment which allows breathing atmospheric air that meets the quality standards set out in the provisions of universally binding law, in places in which the person stays for a long time, in particular at the place of residence, constitute a personal right protected under Article 23 of the Civil Code in conjunction with Article 24 of the Civil Code and Article 448 of the Civil Code?[46]".

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[42] *Ibid.*

[43] *Ibid.*

[44] See K. Doktór-Bindas, *op. cit.*, pp. 116–117.

[45] Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item* 72. https://sip.lex.pl/#/jurisprudence/523273798/1?directHit=true&directHitQuery=III%20CZP%2027~2F20 (access: 2022-02-19 19:20).

[46] *Ibid.*

The Supreme Court, responding to the presented question, stated that the right to live in a clean environment is not a personal right. On the other hand, health, freedom and privacy are protected as personal rights (within the meaning of the aforementioned Articles), which can be infringed (threatened) by violations of air quality standards set out in the provisions of law[47]. Arguing the adopted position, the Supreme Court stated that personal rights have always accompanied a person and are related to him, and the perception of whether they have not been violated is significantly influenced by circumstances related to the time and place of making an assessment. States and situations which make it impossible to provide a minimum of human social needs are considered to be threats to human dignity. It is pointed out that the mere lack of access to a certain material good, even if it is commonly used and facilitates the satisfaction of living needs, is not tantamount to a violation of a personal right[48]. From the perspective of the discussed issue, it is worth noting that the Supreme Court pointed out that the natural environment of a man obviously does not have the characteristics of a personal right – it is a common good of humanity. It has a material substrate in the form of air, water, soil, or the world of plants and animals. At this point, it should be emphasized that without it, a man is not able to function, and that its most important element is air. This view is shared by the Supreme Court. However, the right to clean air is currently not considered to be a subjective right belonging to each individual. The environment belongs to everyone. Due to the nature of the good, which is the environment, regulations or postulates of its protection are found in many global, regional and national legal acts.

The conclusion is that the provisions cited in the judgment (constitutional and conventional) are not a direct basis for claims aimed at obtaining protection of personal rights in relations between civil law entities. Even if living in the environment in which air, soil and water corresponding to the standard established by science, conducive to the preservation of health and the realization by a man of his freedom in its various forms, is explicitly recognized as a human right, the natural environment will retain the character of a common good within the meaning of Article 23 of the Civil Code. Therefore, such a claim cannot be effective[49].

However, air quality can indirectly affect the violation of personal rights. As it has already been mentioned, personal rights are primarily health, freedom, and privacy. Developing science allows us to determine what standards air must meet in order to be considered healthy or "clean". Within the meaning of the Supreme

[47] See K. Doktór-Bindas, *op. cit.*, pp. 118–120.

[48] See Judgment of the Supreme Court of 7 December 2011, II CSK 160/11, OSNC 2012, No. 6, *item* 75.

[49] Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item* 72. https://sip.lex.pl/#/jurisprudence/523273798/1?directHit=true&directHitQuery=III%20CZP%2027~2F20 (accessed 2022-02-19 19:20).

Court, violation of standards or their one-off infringement, which have been defined by science and regulated by universally binding law, leads to violations of personal rights. However, this is only the case if such an omission or action results in a violation of health, liberty or privacy of a person[50]. In this case, it will be possible to make a claim for cessation or compensation for the infringement of personal rights.

The arguments set out in the legal justification of the above mentioned judgment clearly show that the environment has the character of a common good and in this form is to be protected by the entire human family[51]. However, it is necessary to consider the economic consequences of recognizing the right to clean air as a personal right. In such a case, many citizens of the Republic of Poland could make a similar claim against the Treasury of the State, invoking this form of interpretation of the already mentioned provisions of the Civil Code. Awarding compensation for poor air quality, which would be a violation of personal rights, could be devastating for the state economy and assets. Hence, it cannot be ruled out that the Supreme Court, in the course of work on this issue, could have taken into account the economic consequences of recognizing the right to clean air as a personal right[52].

V.

The subjective right of every human being, resulting from the natural law is a right to a clean environment. The natural environment is understood as a common good of all the members of the human family, which has a material substrate in the form of air, water, soil, the plant and animal world[53]. Breathing clean air is a sine qua non condition for a healthy life. It is, therefore, difficult to discuss the need to protect this part of the natural environment. Under the UN, the right to environmental protection was confirmed by the Resolution of 1994 issued by the UN Commission on Human Rights and by the Resolution No. 48/13 of 8 October 2021.

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[50] See e.g. ECtHR judgment of 9 December 1994, López Ostra v. Spain, No. 16798/90, ECtHR judgment of 24 July 2014, Brincat and Others versus Malta, No. 60908/11, 62110/11, 62129/11, 62129/11.

[51] Z. Łabno, *Dobro wspólne a prawo ochrony środowiska*, Państwo i Społeczeństwo 2004, No. 2, pp. 41–50.

[52] A similar line of argument was applied in the judgments drawn up by the District Court of Warszawa-Śródmieście of 24 January 2019 and the District Court of Miasto Stołeczne Warszawa of 1 October 2019. For more details, see K. Doktór-Bindas, *Prawo do czystego powietrza*, Przegląd Konstytucyjny 2020, No. 4, pp. 120–122.

[53] Resolution of the Supreme Court of 28 May 2021, III CZP 27/20, OSNC 2021, No. 11, *item* 72. https://sip.lex.pl/#/jurisprudence/523273798/1?directHit=true&directHitQuery=III%20CZP%2027~2F20 (access: 2022-02-19 19:20).

However, under the Universal Declaration of Human Rights of 1948 and the International Covenants on Human Rights of 1966, there is no specific right to clean air. Hence, the UN Special Rapporteur, in a 2019 report, analysed the issues related to this authorisation and unequivocally recommended to the UN General Assembly the adoption of a resolution introducing such a regulation. In this respect, however, the European Union is the most active, despite the lack of expression of the right to the environment in the founding documents and in the Charter of Fundamental Rights of the EU. The introduction of the CAFE directive[54] resulted in the standardization of clean air quality standards, a method of testing and a warning system. In many respects, the EU is an initiator of global change and its activities are of wide importance for change, not only on the old continent[55]. In connection with the right to a clean environment, the Constitution of the Republic of Poland of 1997 definitely stands out. It imposes on public authorities both the obligation to protect the environment and the obligation to prevent the negative effects of environmental degradation on health. Although these obligations are in the nature of programmatic norms, some representatives of the doctrine grant them the possibility of direct application[56]. The Constitution of the Republic of Poland is classified as very "pro-ecological" throughout Europe[57], which results from the fact that it is relatively young and contains modern provisions which were a response to the global and social situation at that time. The issue of the right to clean air has also been raised in the jurisprudence of Polish courts, in particular the Resolution of the Supreme Court of 28 May 2021 is of great importance here. It reflects on the right to live in a clean environment as a personal right protected under the provisions of the Civil Code. In its position, the Supreme Court did not agree with the presented issue, and even pointed out that the environment is a common good of all people, and its protection belongs in particular to the bodies of public authorities. Such a view cannot be denied partial validity, since it contributes to strengthening the principle of legal certainty. Probably the economic issue was also an important argument, and specifically encumbering the State Treasury

[54] Directive 2008/50/EC of the European Parliament and the Council of 21 May 2008 on air quality and cleaner air for Europe (EU Journal of Laws L of 2008 No. 152, p. 152 as amended).

[55] Recently, the question of the purity of indoor air has become increasingly highlighted. European Parliament Resolution of 13 March 2019 (Journal of Laws C 23, 21 January 2021, pp. 23–32.) concerning Europe, which protects clean air for all, indicates that nearly 90% of a person's time is spent indoors, and the air quality can be even worse than outside. It also points out the fact that 10% of non-communicable diseases in the world are caused by poor air quality. The European Parliament appealed to the European Commission to make it mandatory to certify indoor air quality in all new and renovated buildings in the European Union.

[56] K. Doktór-Bindas, *op. cit.*, p. 112.

[57] Czekałowska M., *Problem konstytucyjnych norm programowych dotyczących ochrony środowiska na tle wybranych regulacji ustawowych*, Zeszyty Naukowe Uniwersytetu Szczecińskiego 2015, No. 3.

with the obligation to pay compensation for violations of air purity standards. It should be remembered, however, that air quality in Poland and in Europe is not improving, which is confirmed by reports of relevant institutions formulated in this matter.

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Standards for safe use of medicinal products following the pattern of the distribution system for medicinal products in Japan

Standardy bezpieczeństwa stosowania produktów leczniczych na przykładzie systemu dystrybucji produktów leczniczych w Japonii

Streszczenie

Standardy bezpieczeństwa stosowania produktów leczniczych są dostosowane do systemu ochrony zdrowia, który ze względu na ograniczenia finansowe jest efektem kompromisów. Jedną z możliwości realizacji konstytucyjnego prawa do ochrony zdrowia jest określenie zasad dystrybucji produktów leczniczych. Model funkcjonowania aptek ogólnodostępnych powinien uwzględniać poziom rozwoju technicznego, kulturowego i wiedzy pacjentów/konsumentów o produktach leczniczych. Publikacja jest próbą odnalezienia elementów możliwych do implementacji w celu podwyższenia standardów dla procesu dystrybucji produktów leczniczych w Polsce.

Słowa kluczowe: prawo farmaceutyczne, pharmacovigilance, prawo medyczne

Abstract

Safety standards for medicinal products are adapted to health care systems, which, due to financial constraints, is a result of compromises. One way to influence the constitutional right to health care is to define the rules for the distribution of medicinal products. The model of operation of general pharmacies should take into account the level of technical and cultural developments and patient/consumer knowledge about medicinal products. The article is an attempt to find possible elements for implementation, in order to raise standards for the process of distribution of medicinal products in Poland.

Key words: pharmaceutical law, pharmacovigilance, medical law

Introduction

The article will present legal solutions regarding the distribution of medicinal products in Poland and Japan. The presented institutions take into account the

standards for *pharmacovigilance*[1], which is a priority for international pharmaceutical regulations. Safety is improved through rules on registration of medicinal products, reporting of adverse reactions and regulation of the distribution of medicinal products. To this end, mechanisms for the control and supervision of medicinal products and dietary supplements[2] are introduced in the European Union, and the sales system is subject to the international rules of Good Distribution Practice. The classification of medicinal products will also be discussed.

Sources of law[3]

The history of the Japanese pharmaceutical industry dates back to the *Yamato* period (from the mid-fourth century to the seventh century AD). At that time, medicines were available only to people born into the imperial family[4]. The first regulations on medicines were introduced in the nineteenth century. At that time, rules for marketing and handling of pharmaceutical products were drawn up[5].

[1] *Pharmacovigilance* is a process of monitoring the safety of medicines and taking measures to reduce the risks and increase the benefits of taking medicines. See more: European Commission, *Pharmacovigilance*, https://ec.europa.eu/health/medicinal-products/pharmacovigilance_en (access: 30.03.2019). About history and tasks of *pharmacovigilance*, see. More: G. Fornasier, S. Francescon, R. Leone, P. Baldo, *An historical overview over Pharmacovigilance*, source: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6132952/ (access: 30.03.2019).

[2] A medicinal product as a basic concept in the work will be used interchangeably with the term drug. Pursuant to Pharmaceutical Law, a medicinal product in accordance with Article 2(32) of the Act of 6 September 2001 Pharmaceutical Law (hereinafter referred to as the Ph. Law), Journal of Laws 2017.2211 IU, is a substance or mixture of substances presented as having prevention or treatment properties in case of diseases occurring in humans or animals or administered for diagnosis or restoring, improving or modifying the physiological functions of the body through pharmacological, immunological or metabolic action.

[3] At European Union level, the key regulation of medicinal products is Directive 2001/83/EC of the European Parliament and the Council of 6 November 2001 on the community code relating to medicinal products for human use (Journal of Laws 311 of 28.11.2001, p. 67), guidelines of 5 November 2013 on good product distribution practice concerning medicinal products for human use, 2013/C 343/01. The most important national legal acts are: the Ph. Law, Regulation of the Minister of Health of 13 March 2015 on the requirements of Good Distribution Practice.

[4] H. Wanabe, *Japoński rynek farmaceutyczny oraz firmy farmaceutyczne*, p. 3, Portal Promocji Eksportu, https://japan.trade.gov.pl/pl/f/download/fobject_id:195948 (access: 25.02.2018). According to another source, the *Yamato* period is dated to third-eighth centuries AD, see: U. Muszalska, *Początki państwowości Japonii* [in:] ed. M. Sadowski, A. Spychalska, K. Sadowa, *Ze studiów nad prawem, administracją i ekonomią*, Wrocław 2014, p. 53.

[5] Institute for International Cooperation Japan International Cooperation Agency, *Japan's Experiences in Public Health and Medical Systems. Towards Improving Public Health and Medical Systems in Developing Countries*, source: *https://www.jica.go.jp/jica-ri/IFIC_and_JBICI-Studies/english/publications/reports/study/topical/health/pdf/health_03.pdf*, p. 29 (access: 30.03.2019).

Changes in the regulations result from the revolution of the pharmaceutical industry and the adaptation of Japanese legislation to the realities of the current market[6]. The regulations on health care and pharmaceutical law are laid down in the Constitution of Japan. Article 25 indicates the basic duties of the state to maintain the health of its citizens and safeguard public health: *All citizens have the right to maintain a certain minimum level of healthy and cultural life. In all areas of life, the state makes efforts to introduce and expand social care and social security and public health*[7]. This provision establishes a legal norm analogous to that contained in Article 68 of the Constitution of the Republic of Poland[8]. In addition, Polish pharmaceutical law is affected by the norms of the European Union law, among others: the Treaty on the Functioning of the European Union[9], Directive 2001/83[10] and Regulation 726/2004[11].

The current binding act regulating pharmaceutical law is the *Pharmaceutical and Medical Device Act* (hereinafter: PMDL), which is a revision of the 1943 Act. The changes made in the field of *pharmacovigilance* are the result of the WHO's reaction to the occurrence of tragic adverse effects of thalidomide[12]. PMDL, like the Ph. Law. in Poland, has an impact on public health by guaranteeing the quality, effectiveness and safety of medicines, cosmetics and medical products. It is also intended to prevent and reduce the risks associated with the occurrence of side effects of the above-mentioned products[13].

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[6] K. Masuyama, S. Isobe, *Social change and Pharmaceutical Affairs Law*, Yakushigaku Zasshi. 2010;45(1):78–81. Japanese. PMID: 21032892 (access: 26.02.2018).

[7] T. Suzuki, *Konstytucja Japonii*, Warszawa 2014, art. 25.

[8] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997.78.483. Article 68 of the Constitution guarantees everyone, regardless of having Polish citizenship, the right to health protection. See: M. Gawrońska, *Prawo do ochrony zdrowia na gruncie Konstytucji Rzeczypospolitej Polskiej*, Przegląd Prawa Publicznego, 2/2014, pp. 7–17.

[9] Journal of Laws 2004.90.864/2. The Treaty imposes standards for the protection of human health (Article 168) respecting the responsibilities of the Member States to define their health policies as well as the organisation and delivery of health services and healthcare (Article 168(7)).

[10] Directive of the European Parliament and of the Council of 6.11.2001 on the community code relating to medicinal products for human use, EU Journal of Laws 1.2001.311.67. However, Member States have exclusive competence to determine health policy as well as the organisation and delivery of health services and medical care, are responsible for management of health services and medical care and the resources allocated to them. See. M. Malczewska, *Komentarz do art. 168 Traktatu o funkcjonowaniu Unii Europejskiej* [in:] ed. K. Kowalik-Bańczyk, M. Szwarc-Kuczer, A. Wróbel, *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz.* Volume II (*Articles 90–222*), Warszawa 2012.

[11] Regulation of the European Parliament and the Council of 32.03.2004 establishing the European Medicines Agency, UE Journal of Laws 1.2004.136.1.

[12] About the side effects of thalidomide and the actions taken by the international community on *pharmacovigilance*, see.: G. Fornasier, S. Francescon, R. Leone, P. Baldo, *A Historical Overview...*.

[13] M. Borkowski, *Bezpieczeństwo zdrowotne – wybrane prawa pacjenta w aptece*, Annales Universitatis Paedagogicae Cracoviensis, 3/2019, pp. 125 and 126.

The 2002 amendments to the PMDL increased the safety guarantees after the medicine was placed on the market. Modifications have also taken place in the system of licensing (approval) of medicinal products, affecting manufacturing companies that were responsible for putting safety measures in place within them, in compliance with international trends. These measures came into force on 30 July 2003, while the provisions modifying the manufacturing process, the placing of the product on the market and the rules on medical products came into force on 1 April 2005[14].

Classification of medicinal products

A medicinal product in Japanese law is defined as: 1. a drug listed in the pharmacopoeia[15]; 2. substances which are intended to be used for diagnosis, treatment or prevention of diseases in humans or animals and which are not equipment or instruments, including medical materials and sanitary materials; 3. substances having an effect on the vital functions of the human body or animals and which are not medical equipment[16].

The classification of medicinal products in Japan is different from the model adopted in Europe[17]. The Japanese law distinguishes pharmacy drugs – this concept includes prescription drugs and medicinal products that require consultation with a pharmacist. Their clinical efficacy is not the same as that of prescription drugs and they can be selected and used by the consumer/patient based on the information provided by the pharmacist. This category of products is sold exclusively in the *face-to-face* system (direct sales, in a public pharmacy).

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[14] Japanese Association of Pharmaceutical Manufacturers, *Pharmaceutical Laws and Regulations*, p. 12 et seq. http://www.jpma.or.jp/english/parj/pdf/2017_ch02.pdf [access: 27.02.2018].

[15] Pharmacopoeia is a type of pharmacy code – official list of medications authorised in the country or territory concerned, and a list with the same reservations of raw materials used for manual preparation of some of these drugs in a pharmacy.

[16] The classification of a product as a medicinal product is of great importance because of the different rules concerning placing on the market, sale and supervision of safety. Guidelines and studies have been prepared in the European Union, and they are intended to help manufacturers in the process of launching products. The Regulation of the European Parliament and Council (EC) No 1223/2009 of 30 November 2009 on cosmetic products (UE Journal of Laws 2009.342.59) and the judgement of the European Court of Justice of 30 November 1983 in Case C-227/82, Lendet Van Bennekom, ECR 1983 and the judgment of the Court of Justice of 20 March 1986 in Case 35/85 Gerard Tissier, Zb. Orz. 1986, p. 1207, in which it is stated that substances which, although not themselves presented as having medicinal properties or preventing disease, are nevertheless intended (alone or in combination with other substances) to be administered to humans should also be classified as a medicinal product.

[17] The Ph. Law. introduces a division according to the category of availability. We distinguish medicinal products: issued without a doctor's prescription, issued with a doctor's prescription, issued with a doctor's prescription for restricted use, issued with a doctor's prescription, containing narcotic drugs or psychotropic substances, specified in separate regulations, used only in inpatient treatment.

OTC drugs are divided into three groups: high-risk drugs, moderate-risk drugs, and low-risk drugs. Low-risk drugs can be sold online. Also OTC drugs that have received this category after switching from prescription drugs can be sold online three years after a change in their status and after a risk assessment[18]. In Japan, it has been also decided to introduce a division of medicinal products sold without a prescription and distinguish between: high-risk OTC drugs, relatively high-risk OTC drugs, and relatively low-risk OTC drugs[19]. Such a procedure is intended to clarify the rules for the distribution of these categories of drugs. The principles of distribution and *pharmacovigilance* put Japan at the forefront of countries in which the reporting of side effects (39%) is carried out by pharmacists in public pharmacies[20]. This may indicate a high level of patient confidence in pharmacists, which predisposes this professional group to increase its role in the pharmacovigilance system and the development of pharmaceutical care[21]. PMDL distinguishes another group, the so-called *quasi-drugs* – for which legal requirements are less restrictive, but the products require approval before they can be placed on the market[22].

A separate issue is *the pricing* of medicinal products in a health protection system and access to generic medicines[23], which can contribute to reducing the

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[18] Information in English on Japanese Regulatory Affairs, *Pharmaceutical Administration and Regulations in Japan,* source: http://www.nihs.go.jp/mhlw/yakuji/yakuji-e_20110502-02.pdf, pp. 21-22 (access: 21.03.2018).

[19] In the Ph. Law, only as regards veterinary medicinal products, there is an indication for the determination of the frequency of adverse reactions in the summary of product characteristics (Article 11(2)(4f)). The characteristics of a medicinal product for human use do not require inclusion of analogous data. The requirement to include information about possible side effects was introduced in § 6, point 5z of the Regulation of the Minister of Health of 20 February 2009 on the requirements for the labelling of the packaging of a medicinal product and the content of the leaflet.

[20] K. van Grootheest, S. Olsson, M. Couper, L. de Jong-van den Berg, *Pharmacists' role in reporting adverse drug reactions in an international perspective*, Pharmacoepidemiology and Drug Safety 7/2004, pp. 457–464.

[21] *Pharmaceutical care consists in continuously improving the way drugs are used. Maximizing the benefits of pharmacotherapy and avoiding the side effects of treatment requires cooperation between the patient, doctor, pharmacists and other medical professions.* See. The Supreme Chamber of Pharmacy, *Raport. Opieka farmaceutyczna. Kompleksowa analiza procesu wdrożenia,* source: https://www.nia.org.pl/wp-content/uploads/2021/04/raport_opieka_farmaceutyczna.pdf [access: 6.04.2021].

[22] By law, a product can be subordinated only into one category. About the so-called *borderline* products, see: Risk and Policy Analysts Limited, *Comparative Study on Cosmetics Legislation in the EU and Other Principal Markets with Special Attention to so-called Borderline Products,* source: https://rpaltd.co.uk/uploads/report_files/j457-final-report-cosmetics.pdf [access: 30.03.2021], p. 4. M. Siwiec, *Różnice pomiędzy produktem leczniczym a suplementem diety, wyrobem medycznym oraz środkiem spożywczym specjalnego przeznaczenia*, source: https://www.prawo.pl/zdrowie/roznice-pomiedzy-produktem-leczniczym-a-suplementem-diety-wyrobem-medycznym-oraz-srodkiem-spozywczym-specjalnego,262107.html (access: 23.06.2021).

[23] See: A. Zawada, A. Korecka-Polak, B. Kobuszewski, *Ceny leków – teoria i praktyka*, Zdrowie Publiczne i Zarządzanie, 4/2019, pp. 194–202.

cost of pharmacotherapy[24]. Most of the medicinal products sold in Japan are innovative medicines. Sales of generic medicines in 2005 accounted for just over 30%[25] of sales of medicinal products. Since then, there has been an increased focus on developing the Japanese pharmaceutical market and increasing domestic production by supporting generic drug manufacturers[26]. In 2020, the generic drugs market almost reached the assumed level of 80% share[27].

The development of generic drugs makes the domestic market of medicinal products independent of political turmoil and prices on international markets[28] and is an element of the pricing policy[29].

Sales and production of medicinal products in Japan

Starting a business requires a permit from the prefectural authorities[30]. Depending on the type of medicinal products produced/sold, different authorisations

[24] On the importance of generic drugs, their impact on reducing expenditure on health care, without compromising the quality of medical care provided, see: Opracowanie Polskiego Związku Pracodawców Przemysłu Farmaceutycznego, *Znaczenie rodzimej produkcji leków dla polskiej gospodarki*, Piguła, July 2015, www.pharmalogica.pl/pigulka-52-lipiec-2015,i3899?download=3587 (access: 26.02.2018).

[25] The share of sales of generic drugs in Poland in 2010 was 66%, Data from: Polish Information and Foreign Investment Agency, *Sektor farmaceutyczny i biotechnologiczny w Polsce,* p. 3, http://www.paih.gov.pl/files/?id_plik=19607 (access: 28.02.2018). For example, in the Czech Republic, in 2010, the generic medicine market reached 13.8%, M. Lorinczy, *Impact of the crisis on the pharmaceutical market in the Czech Republic and Hungary*, p. 23, http://www.wsb.edu.pl/container/FORUM%20SCIENTIAE/numer%202/forum-2-2013-art2.pdf (access: 28.02.2018).

[26] H. Watanabe, *Japoński rynek farmaceutyczny oraz firmy farmaceutyczne*, p. 11 et seq., source: https://japan.trade.gov.pl/pl/f/download/fobject_id:195948 (access: 27.02.2018). According to forecasts, 8 out of 10 medicinal products sold in Japan are to be generics, see T. Togashi, *Japan: Generic Leading Expansion,* source: https://ispe.org/pharmaceutical-engineering/march-april-2019/japan-generics-leading-expansion (access: 23.06.2019).

[27] A comparison of the market share of generic medicines since 2005 in Japan, see: *Volume share of generics in prescription drug market Japan 2005–2020,* source: https://www.statista.com/statistics/799622/japan-generics-market-volume-share/ (access: 20.06.2021). About the Japanese generic market, see: Japan Health Policy NOW, *Generic Drugs*, source: https://japanhpn.org/en/section-6-2/ (access: 30.03.2018); P. Reed Maurer, *Generics in Japan*, source: https://www.thepharmaletter.com/article/generics-in-japan (access: 23.06.2019).

[28] J. Woroń, *Leki oryginalne i generyczne, czyli dlaczego potrzebna jest indywidualizacja farmakoterapii*, Forum Zaburzeń Metabolicznych 1(4) 2010, p. 242.

[29] On the effectiveness of generic drugs, their role in pricing policy, see: A. Świerczyna, *Zasady obrotu lekami generycznymi w Unii Europejskiej – ograniczenia i bariery* [in:] ed. D. Kornobis-Romanowska, *Aktualne problemy prawa Unii Europejskiej i prawa międzynarodowego – aspekty teoretyczne i praktyczne*, Wrocław 2017, p. 207.

[30] On the Japanese administrative system, see: B. Woźniczko, *Japońskie władze samorządowe*, source: https://japan.trade.gov.pl/pl/japonia/adresy/223336, japonskie-wladze-samorzadowe.html (access: 30.03.2019).

are required for: manufacture/production of medicines of the first type (according to the classification of medicinal products given in the previous subsection), manufacture/production of medicines of the second type, etc.

The distribution of prescription drugs is reserved for pharmacies, and their distance sale (via the Internet) is prohibited. Only OTC drugs can be sold in this distribution channel, only if they are the subject of sale in stores[31]. Retail authorisations for medicinal products are divided into (Art. 25 of the PMDL): distribution in shops where it is possible to sell medicines without a prescription and to obtain information on pharmacotherapy; *door-to-door* distribution[32]; wholesale licence[33].

Wholesale requires a licence issued by the governor of the prefecture relevant to the seat of the enterprise (Art. 25(1) and Art. 31 of the PMDL). Wholesale is defined as the sale or supply of medicines to the owner of a pharmacy, a marketing authorisation holder, a manufacturer, or a shop (in the case of OTC medicinal products). Deliveries are permitted when the marketing authorisation for a medicinal product traded in Japan is held. An entrepreneur running a wholesaler or pharmacy is obliged to employ a pharmacist at the registered office in which the business activity is carried out (Art. 35(1) and (2) of the PMDL).[34] The license is issued for 6 years[35].

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[31] The solutions are close to those used in the Ph. Law. Retail trade in medicinal products in Poland is reserved for public pharmacies (Art. 68 of the Ph. Law) and pharmacy outlets (Art. 70(1) of the Ph. Law.). Rationing of the sales market is designed to counteract adverse phenomena that may occur during the marketing process, it also strengthens the institution of control and supervision of goods of particular value for the life and health of patients. For more on rationing and the justification for its application, see: R.J. Kruszyński, *Obrót detaliczny lekami. Zagadnienia prawne*, Warszawa 2014, pp. 90–147. Introduction of the *pharmacy for the pharmacist* is justified by "the protection of public health and, more specifically, the objective of ensuring a reliable and adequate quality supply of medicinal products to the public". *Uzasadnienie do projektu zmian ustawy Prawo farmaceutyczne*, source: http://webcache.googleusercontent.com/search?q=cache:6uvnrds1l8j:orka.sejm.gov.pl/druki8ka.nsf/0/defd45ce43627fb9c1258087005dd49d/%2524file/1126-justification.docx+&cd=1&hl=en&ct=clnk&gl=en&client=safari (access: 30.03.2019).

[32] Article 25 of the PMDL Act indicates the possibility of selling medicines in shops. Salesmen should be people with the knowledge and experience necessary to conduct retail business of medicinal products (Art. 28 of the PMDL). This type of distribution refers to the sale of non-prescription medicines with a relatively long expiration date and refers to the *door-to-door* sales system.

[33] About sales system, see: S. Tago, A. Ueda, R. Kudo, L. Guedson I. Godo, *Distribution and marketing of drugs in Japan: overview*, source: https://uk.practicallaw.thomsonreuters.com/5-618-3562?transitionType=Default&contextData=(sc. Default)&firstPage=true (access: 30.03.2019).

[34] S. Tago, A. Ueda, L. Guedson, R. Kudo, *Distribution and marketing of drugs in Japan: overview*, https://content.next.westlaw.com/Document/I611772994da011e598dc8b09b4f043e0/View/FullText.html?contextData=(sc. Default)&transitionType=Default&firstPage=true&bhcp=1 (access: 28.02.2018).

[35] I have not found any provisions on the requirement to employ pharmacists during a shift in a pharmacy, which should certainly be additionally checked. It would also be worth checking the obligation to provide access to a pharmacy for the local population (mandatory duty hours are approved in Poland by the District Council, after consulting the vogts (mayors, city presidents) of municipalities from the district and the pharmacy self-government – Article 94 (2) of the Ph. Law).

Such liberal legal solutions seem particularly interesting in the context of the Ph. Law amendment limiting the operation of public pharmacies only to entities that are pharmacists or companies in which the majority shareholders are pharmacists[36].

In the case of the manufacture of medicinal products, obtaining a permit to conduct a business activity is also conditional on expressing the opinion of the Office for Medicinal Products on this issue and compliance with Good Quality and Manufacturing Practice. The license/permit is valid for 5 years. The issue of the quality and safety of medicines, as well as the control of these indicators, lie with: Chief Specialist for Compliance with the Medicines Market, Quality Assurance Manager, and Safety Management Manager responsible for quality control. Control powers are also stipulated in Article 14 of the Act. Pursuant to its regulation, the Ministry of Health, Labor and Social Welfare and the Agency for Pharmaceuticals and Medical Devices have the authority to compliance of the manufacturer's actions with the recommendations for production safety. In practice, the Pharmaceutical and Medical Devices Agency examines applications for marketing authorisation. Prefectural Governors are responsible for issuing permits for the sale/manufacture of OTC drugs. All legal restrictions on trade in medicinal products are listed in the PMDL[37].

Entities controlling the market for medicinal products[38]

The retail market of medicinal products in Poland is regulated by the Ph. Law. The Voivodeship Pharmaceutical Inspector is an entity authorised to issue a permit to operate a public pharmacy, and the rules for issuing a permit are set out in Article 99 et seq. The Ph. Law, as an authorizing body, is entitled to inspect or control the

[36] More about the amendment of the so-called pharmacy for the pharmacist, see the website of the Supreme Chamber of Pharmacy: http://www.nia.org.pl/2017/06/26/nowelizacja-ustawy-prawo-farmaceutyczne-tzw-apteka-dla-aptekarza/ (access: 27.02.2018).

[37] T. Sueyoshi, T. Kanda, Y. Nishikawa, *Life sciences: product regulation and liability in Japan,* https://www.lexology.com/library/detail.aspx?g=7bf94885-2826-41ab-9350-bb7b8564b133 (access: 28.02.2018).

[38] This competence is exercised in the first stage of the approval of medicinal products for placing on the market by the Minister of Health, Labour and Social Welfare or the Governor of the Prefecture, who is obliged to send data and documents to check their compliance as to the quality of the product, efficacy and security. The condition for the authorisation of a medicinal product is its compliance with Good Manufacturing Practice defining legal standards that regulate the hygiene of production and are designed to prevent the production of products that do not meet the quality requirements. This system is designed to ensure consumer safety by guaranteeing the origin of products from authorised producers whose activities are regularly inspected by the relevant inspection bodies. See more: Official website of the European Commission, *Wprowadzenie do Dobrej Praktyki Wytwarzania*, source: https://ec.europa.eu/health/sites/health/files/files/eudralex/vol-4/2011_intro_en.pdf (access: 28.02.2018).

economic activity for which a permit has been issued (Art. 37at, (1) of the Ph. Law). In Japan, it is the prefecture's governor[39] who has control powers in the following areas: checking the status of an entrepreneur on the basis of the reports prepared by the relevant Ministry of Health, ordering an on-site inspection, recommending improvement in the event that the procedures used by the entrepreneur do not ensure adequate quality of production or internal supervision of medicines after placing them on the market does not comply with normative regulations[40]. In the event of a violation of the PMDL and related laws and regulations, the prefecture governor may revoke the license of the wholesale entrepreneur[41].

Prefectural governors are also responsible for appointing pharmaceutical inspectors whose task is to control the production, import, to label and advertise medicinal products. The inspection system also deals with detection of falsified drugs or low-quality drugs. Inspectors carry out an inspection, which also takes the form of supervision which shall take the following measures: withdrawal of the licence or the suspension of the economic activity of the entity distributing or producing medicinal products; withdrawal or amendment of an authorisation for a medicinal product; temporary suspension of the sale and disposal of medicines that do not comply with quality standards; order to withdraw products from the market; order to improve the condition of the infrastructure in which the economic activity covered by the authorisation is carried out[42].

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[39] This division corresponds to the Polish voivodships. Prefectures are administrative units larger than counties. See: Wikipedia, *Podział administracyjny Japonii,* source: https://pl.wikipedia.org/wiki/Podział_administracyjny_Japonii (access: 23.06.2021).

[40] This competence is based on the *Gyoseihido* institution, understood as "the idea of advice or instruction coming from top to bottom, i.e. within hierarchical dependencies", L. Leszczyński, *Japonia. Kontynuacje i negacje*, Lublin 1994, p. 39. It is an institution occurring in unequal relations, such as the one described, in which one of the entities has the so-called *empire*, e.g. administrative authority. See: U. Wach-Górny, W. Górny, *Instytucja gyoseihido jako japońska inspiracja dla rozwoju koncepcji alternatywnych form rozwiązywania sporów w prawie administracyjnym*, https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/45165/wach-gorny_gorny_instytucja_gyoseishido_jako_japonska_inspiracja_dla_rozwoju_2017.pdf?sequence=1&isAllowed=y (access: 28.02.2018). The performance of control activities therefore rests on the shoulders of the executive authorities. The performance of control activities therefore rests on the shoulders of the executive authorities. More on the Japanese administrative system, see: B. Woźniczko, *Japońskie władze samorządowe,* source: https://japan.trade.gov.pl/pl/japonia/adresy/223336,japonskie-wladze-samorzadowe.html (access: 30.03.2019).

[41] Article 75(1) of the PMDL. The same is true in the Ph. Law, which, for example, indicates in Article 37ap that it is the authorising authority that withdraws the authorisation in the cases referred to by law.

[42] Japan Pharmaceutical Manufacturers Association, *Pharmaceutical Administration and Regulations in Japan*, source: https://www.jpma.or.jp/english/about/parj/eki4g600000078c0-att/2020.pdf (access: 30.03.2021), p. 48.

Summary

Setting legal standards for the safety of using medicinal products requires a search for optimal legal solutions that will focus on the use of available technical infrastructure, defining tasks for medical professionals or defining the categories of products available on the market.

The rules for the distribution of medicinal products in Japan, in selected fragments, use legal solutions unheard of in the Ph. Law, The implementation of some of them could translate into pharmacovigilance standards in Poland[43]. This applies in particular to the institutions related to the distribution system and classification of medicinal products.

The Japanese system of grouping medicinal products according to the level of risk posed by their use, i.e. drugs are divided into three categories, depending on the severity of side effects, should be praised. The sale of medicines of the first category (with the most severe adverse reactions) requires the application of a safety management system to them. Polish solutions require that the characteristics of the medicinal product include the frequency of occurrence of adverse reactions.[44]

The need to consult a pharmacist when using certain OTC medicinal products should also be positively assessed, which may translate into a reduction in the abuse of medicinal products.

Adding *quasi-drugs* to product types could help solve interpretation problems with the so-called *borderline products*. The Japanese solution imposes high registration standards for this category of products, ensuring a high level of consumer/patient's rights to access a safe product.

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[43] The example for a possible increase in standards for pharmaceutical care would be the implementation of of consultation rooms, functioning in the United Kingdom, in which the patient can discuss the details of pharmacotherapy with an experienced pharmacist. See: P. Łasocha, P. Merks, A. Olszewska, *Farmacja szpitalna i kliniczna w Wielkiej Brytanii*, Farmacja Kliniczna 9/2013, pp. 527–530; See: P. Merks, A. Olszewska, Ch. Dehili, M. Allan, T. Kilpeläinen, M. Grabowska, M. Kozłowska-Wojciechowska, *Pokoje konsultacji jako jeden z mechanizmów wdrażania zaawansowanych usług farmaceutycznych w Polsce*, source: https://www.researchgate.net/profile/Piotr_Merks/publication/307397962_Merks_P_Olszewska_A_Dehili_Ch_Allan_M_Kilpelainen_T_Grabowska_M_Kozlowska-aWojciechowska_M_Consultation_room_as_one_of_the_important_aspects_of_implementation_of_advanced_pharmaceutical_services_in_Pol/links/57c53eac08aecd4514165830.pdf?origin=publication_detail (access: 30.03.2019).

[44] On the risk assessment of medicinal products, see. K. Orzeł, O. Żebrowska, K. Wołowiec, *Ocena bezpieczeństwa leku w kontekście oceny technologii medycznych*, source: https://power.aotm.gov.pl/static/Materialy/7.%20Ocena%20bezpieczeństwa%20leku%20w%20kontekście%20oceny%20technologii%20medycznych.pdf (access: 23.06.2021). Posting information about adverse effects in medicinal product characteristics is mandatory (Art. 11 of the Ph. Law.). In the leaflet, there should also be described, among others, the effects of overdose. See: K. Kumala, J. Piecha, R. Stankiewicz, *Charakterystyka Produktu Leczniczego* [in:] ed. R. Stankiewicz, *Instytucje rynku farmaceutycznego*, Warszawa 2016, LEX.pl.

The Japanese healthcare system is trying to take advantage of the potential of the pharmaceutical industry, which is able to produce safe and cheap generic drugs, just after the end of patent protection for innovative drugs. This is achieved, among others, by the Japanese government's use of financial incentives for hospitals, doctors and pharmacies to increase market share in generic medicines[45]. The system of distribution of medicinal products, by reason of the work ethos of pharmacists, the level of technical development, makes it possible to adopt liberal provisions concerning the operation of pharmacies[46].

List of abbreviations

PMDL – Pharmaceutical and Medical Device Act
Ph. Law. – Pharmaceutical Law

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[45] M. Ueyama, K. Idehara, Y. Onishi, M. Toumi, *Recent Japanese Generic Drug Policy and Future Directions*, source: https://www.valuehealthregionalissues.com/article/S2212-1099(20)30496-9/fulltext#relatedArticles (access: 23.06.2021).

[46] In Poland, the introduction of changes in the pharmaceutical care system is made by limiting the possibility of starting and performing pharmacy activities for people with a master's degree in pharmacy. See: The Supreme Chamber of Pharmacy, *4 lata „apteki dla aptekarza" – najważniejsze fakty dotyczące regulacji*, source: https://www.nia.org.pl/2021/08/18/4-lata-apteki-dla-aptekarza-najwazniejsze-fakty-concerning-regulation/ (access: 10.09.2021).

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