CONTEMPORARY PROBLEMS AND CHALLENGES OF PRIVATE LAW

EDITORS
ALICJA TOMASIK, KAROLINA MAGOŃ,
MAŁGORZATA LUBELSKA-SAZANÓW, EWA ROTT-PIETRZYK

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INTRODUCTION

Dear Readers,

The book you are reading is a product of a conference with the same name – *Contemporary Issues and Challenges for Private Law* – that took place on 21-22 October 2021. The conference was organised by the Civil Law Scientific Circle "*Sapere aude!*" at the Faculty of Law and Administration at the University of Silesia in Katowice, Poland. Due to the COVID-19 pandemic, the conference was held online, which allowed it to gather highly prominent civil law professors from all over the world.

The first day of the conference covered lectures from speakers representing three continents (Europe, Asia and North America), namely: prof. Patrick R. Hugg (Loyola University, New Orleans), prof. Agnieszka McPeak (Gonzaga University School of Law), prof. dr. Schulte-Noelke (University of Osnabrück, University of Nijmegen), and from Poland: prof. dr hab. Longchamps de Berier (Jagiellonian University in Krakow), prof. UŚ dr hab. Maciej Szpunar (University of Silesia in Katowice, the European Court of Justice), prof. ALK dr hab. Maciej Zachariasiewicz (Kozminski University), prof. dr hab. Fryderyk Zoll (Jagiellonian University in Krakow/ELSI, University of Osnabrück). Invitation of the excellent guests as a speakers was possible thanks to the support of prof. dr hab. Ewa Rott-Pietrzyk, prof. dr hab. Rafał Blicharz, and dr Małgorzata Lubelska-Sazanów, who – as the supervisor of the Civil Law Scientific Circle "*Sapere aude!*" – organised the conference, together with students from the Scientific Circle, in particular Wojciech Wydmański and Karolina Magoń, who put an enormous amount of time and effort to make it happen.

The second day of the conference saw a series of oral presentations from young researchers – law students or PhD students from a range of Polish

universities. This monograph covers papers on the basis of those presentations. The initiative to publish a monograph with these texts, which are unique and worth sharing with a wider public, grew out of the academic idea of cooperation between students from various universities. Hence, this is a book published by the students from the Civil Law Scientific Circle "*Sapere aude!*" for other students and PhD students. In addition, the time between the conference and the publication of the book meant that some of those hard-working members of the Scientific Circle who initiated the project have since moved on and left newer members to carry on the task and bring it to fruition. This, therefore closes the circle of sharing knowledge and experience between older and younger law students, all playing their part in the activities as part of "*Sapere aude*!".

It is important to note that, before preparing these written texts for publication, the authors were able to present their concepts in oral speeches and confront their ideas – also in the spirit of scientific confrontation – with other doctoral students and the audience in an oral form, as well as engaging in discussions with listeners. This significantly improved the quality of their written studies. The discussions often led to the author either shifting their position or bolstering their arguments in favour of it. Due to the international nature of the conference, the speeches and texts are in English, which constituted an additional challenge for these young Polish researchers. However, due to the length of the publication process, it should be borne in mind that the texts included in the monograph have been drafted in accordance with the law as it will be in 2022.

The topics presented in the monograph refer to contemporary issues for private law in a broad perspective. This book therefore covers a broad scope of problems, including competition law, the GDPR, tourism legislation, mediation, environmental protection, warranty issues and more.

As a supervisor of the Civil Law Scientific Circle "*Sapere aude!*", I hope this book will constitute an important step in the authors' careers and provide a valuable source of information for those interested in the topics presented here.

Editors

KATARZYNA BUKALSKA, MA[1]

THE PRACTICAL APPLICATION OF THE INSTITUTION OF THE REQUEST FOR DISCLOSURE OF EVIDENCE IN POLISH CASES REGARDING CLAIMS FOR DAMAGES CAUSED BY INFRINGEMENTS OF COMPETITION LAW

Summary: The paper discusses the practical application of the institution of the request for disclosure of evidence, introduced into the Polish legal system in 2017 by the Act on claims for damages caused by infringements of competition law. The Act implements Directive 014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Four years after the introduction of the request for disclosure into the Polish civil procedure, the first issues regarding the practical application of this institution emerged. First, it is not clear how a claim and loss suffered should be substantiated, which is a basic requirement for a request to be admitted. Second, doubts have been raised as to the required degree of precision of a request. Third, the permitted personal scope of the disclosure remains debatable.

Keywords: request for disclosure, disclosure of evidence, competition law, interchange fee, plausibility of claim, claims for damages

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ABBREVIATIONS:
CCP – Polish Code of Civil Procedure
CJUE – Court of Justice of the European Union
CPR – Civil Procedural Rules
EU – European Union
FRCP – Federal Rules of Civil Procedure

ACT ON CLAIMS FOR DAMAGES CAUSED BY INFRINGEMENTS OF COMPETITION LAW

The Act on claims for damages caused by infringements of competition law (hereinafter: Act)[2] entered into force on 27 June 2017. It implements into the Polish legal system Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter: Directive)[3]. The purpose of the Directive is to facilitate and harmonise the rules for claiming damages for infringements of antitrust law in EU Member States.

In accordance with recital 4 of the Directive, the right to compensation for harm resulting from infringements of EU and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the European Union.

More than four years after the implementation, the first reflections on the practical application of the procedural solutions introduced by this Act, in particular the institution of the request for disclosure of evidence, may be presented. These reflections have been prompted by pending cases for damages caused by infringements of Article 6(1) of the Act on competition and consumer

[2] Act of 21 April 2017 on claims for damages caused by infringements of competition law, 2017 Journal of Laws, item 1132.
[3] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, L 349/1.

protection[4], as well as Article 101(1) of the Treaty on the Functioning of the European Union concerning interchange fees.

This paper attempts to analyse some of the most important issues related to the practical application of the institution of the request for disclosure, *i.e.* the requirement of the plausibility of a claim (4.1), the required degree of the preciseness of the description of evidence to be provided in the request (4.2), as well as the permitted personal scope of the disclosure (4.3). The aforementioned issues will be approached primarily from a practical perspective. Yet, before they are discussed, some introductory remarks need to be made. Firstly, the basis of the institution of the request for disclosure will be explained (2). Secondly, a factual and legal background of interchange cases will be presented (3).

A REQUEST FOR DISCLOSURE OF EVIDENCE

The request for disclosure was introduced into the Polish civil procedure as means to facilitate the enforcement of damages in cases regarding the infringement of competition law. It is an institution based on procedural solutions of common law countries, such as *discovery* in the United States (Rule 26 of the Federal Rules of Civil Procedure, hereinafter: FRCP) and *disclosure* in the United Kingdom (Rule 31.6 of the Civil Procedural Rules, hereinafter: CPR). In general, these institutions allow the parties to request the other party to list and disclose documents relevant to the case at an early stage of the proceedings (or even before – Rule 26(3) of FRCP, Rule 31.16 of CPR). Subsequently, each party has the right to decide what evidence obtained from its opponent it will file in support of its claims. As a result, the parties can obtain more facts to prove their claims[5], and the chances for the court to determine the relevant facts of the case are increased.

The Polish Code of Civil Procedure (hereinafter: CCP) in Article 248 provides for the possibility to request the court to oblige the opponent or a third party to submit a specific document to the court. However, the case law on Article 248 indicates that in order to obtain the evidence, the petitioner needs to indicate the requested document very precisely[6]. Therefore, Article 248 cannot be used

[4] Act of 16 February 2007 on competition and consumer protection, 2021 Journal of Laws, item 275.

[5] MURRAY P.L., STÜRNER R., *German civil justice*, Durham, North Carolina 2004, p. 239.

[6] SIEŃKO M. [in:] *Code of Civil Procedure. Commentary*, M. Manowska (ed.), LEX 2021, commentary to Article 248, para. 1 (access: 13.02.2022); Judgement of the Court of Appeal in Poznań of 29 January 2019, I ACa 346/18, LEX nr 2669807 (access: 13.02.2022); Judgement of the Court of Appeal in Warsaw of 18 June 2019, VI ACa 195/18, LEX nr 3103606 (access: 13.02.2022).

to obtain certain categories of documents the existence of which is reasonably believed by the party, but the party has no knowledge as to their specific content, form, *etc.* On the other hand, as noted in recital 15 of the Directive, competition law cases are characterized by a certain information asymmetry. That is why Member States need to ensure that claimants are afforded the right to disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. Therefore, Article 248 turns out to be insufficient to achieve the objectives of the Directive.

For this reason, Article 17(1) of the Act introduced into the Polish civil procedure the institution of the request for disclosure of evidence. According to this provision, upon request of a claimant who has made their claims plausible and who has undertaken to ensure that the evidence obtained as a result of the request will be used only for the purpose of the pending proceedings, the court may order the defendant or a third party to disclose evidence or even a category of evidence. Upon slightly less rigorous conditions, a request for disclosure may also be submitted by the defendant.

According to the Act, in order for the court to issue an order requiring the defendant or a third party to disclose evidence:

1. the claimant shall substantiate its claim (Article 17(1));
2. the request must indicate the facts to be proved and describe the evidence as precisely as possible (Article 19 (2));
3. the disclosure must not violate the principle of proportionality (Article 21(2)).

When assessing the prerequisite of proportionality, the court shall take into consideration the legitimate interests of the parties and the third party who, according to the request, is in possession of particular evidence. The legitimate interests shall be assessed by taking into account, in particular:

1. whether the request for disclosure is substantiated in the light of the facts established so far and the evidence available;
2. the scope and cost of the disclosure;
3. whether the request does not constitute a general search for information (a so-called *fishing expedition*, that is non-specific or overly broad search for information that is unlikely to be of relevance for the parties to the proceedings[7]);

[7] Recital 23 of Directive 2014/104/EU.

4. whether, and to what extent, the requested evidence violates the confidential information of the entity obliged to disclose.

The unclear nature of the abovementioned criteria ("as precisely as possible" or "proportionality") creates a number of practical problems both at the stage of formulating requests as well as at the stage of their assessment by the court. At the same time, a refusal to disclose evidence creates the risk of severe financial sanctions[8], including an obligation to pay the costs regardless of the outcome of the case, and – with regard to the parties – the risk of the statements of the opposing party relating to facts which were to be established based on the requested evidence being considered proven (Article 27(1)). It is therefore worth reviewing how these issues have been addressed in cases to date.

INTERCHANGE CASES IN POLAND

The interchange fee is a fee paid by each merchant that provides its customers with the option to pay for goods or services by card and is calculated as a certain percentage of the transaction value. Interchange fees are the main part of the fees charged to merchants by acquiring payment service providers for every card-based payment transaction. The fee is then transferred to banks – issuers of payment cards. The pressure from the banks to receive higher interchange fees leads to distortions of competition between acquiring payment service providers[9].

The cases regarding the alleged overcharge of the interchange fee have been initiated in Poland since May 201. In all those cases, claimants seek damages in the amount of the difference between the interchange fee actually paid between 2008 and 2014 and the value that should have been paid, if an anti-competitive agreement between banks and card organisations had not existed. According to the claimants, an excessive level of interchange fees between 2008-2014 was a consequence of an anti-competitive agreement between banks and card organisations. In order to substantiate their claims, claimants filed requests for disclosure of evidence pursuant to Article 17 of the Act. The interchange

[8] A final decision ordering the disclosure of evidence, after it has been given an enforcement clause, constitutes an enforcement title. The provisions of CCP on enforcement of an obligation to perform irreplaceable actions by the debtor, *i.e.* Articles 1050 and 1050[1] of CCP, apply in this respect. A single fine imposed on this basis may amount to a maximum of PLN 10,000. At the same time, the total sum of fines may amount to as much as PLN 1,000,000.

[9] Regulation (EU) 2015/751 of the European Parliament and the Council of 29 April 2015 on interchange fees for card-based payment transactions, L 123/1.

cases have clearly demonstrated a number of essential practical problems with the institution of a request for disclosure of evidence.

IMPORTANT ISSUES RELATED TO THE PRACTICAL APPLICATION OF THE INSTITUTION OF THE REQUEST FOR DISCLOSURE

REQUIREMENT OF PLAUSIBILITY OF CLAIM AND LOSS SUFFERED

A basic condition for granting a claimant's request for disclosure is that the claim asserted is plausible (Article 17(1) of the Act). This condition does not apply to requests filed by the defendant. As indicated by the Court of Appeal in Cracow in the judgement of 15 June 2015, I ACz 1036/15: "(...) a claim is deemed plausible if, at first sight, that is without going into all possible factual and legal aspects of the case, in the light of the statements made by the claimant, supported by evidence (…) there is a chance that the claimant is entitled to its claim. Therefore, the informal character of the plausibility of a claim results in the lack of the necessity to present irrefutable evidence".

In cases for damages for infringements of competition law, the relaxation of the standard of proof at the initial phase of proceedings is of particular importance. For example, if proceedings concern the effects of an informal restrictive agreement, it is practically impossible for claimants to independently obtain irrefutable evidence of that agreement in the form of internal correspondence, minutes, *etc.* As a consequence, the aggrieved party is deprived of the ability to pursue its claims. The institution of request for disclosure prevents such situations by providing the claimant with an opportunity to obtain the necessary evidence from the defendant or even a third party, as far as the existence of an anti-competitive practice is likely in the light of the claims and evidence submitted by the claimant to date. However, as practice shows, the distinction between proving and a mere plausibility of a claim is not at all obvious. In particular, there are doubts as to what is necessary to make plausible: (i) the existence of an anti-competitive practice, and (ii) the existence of loss and its amount.

First, it should be emphasized that the court's assertion that the defendants have acted unlawfully is not a prerequisite for assessing the claims. It is in the course of further proceedings – including through the assessment of the disclosed evidence – that the court examines whether the alleged conduct of the defendants actually took place and whether it has been unlawful or not. As it was

pointed out in Huhtamäki v. Commission[10], in most competition cases, the existence of an anti-competitive practice or agreement is inferred from a number of circumstances and evidence which, taken together, in the absence of other possible explanations, constitute evidence of an infringement of competition law. The request for disclosure cannot therefore be dismissed on the grounds that the statement of claim and the documents attached thereto do not enable an unequivocal conclusion as to the existence of an infringement. It is sufficient that the statements and evidence submitted by the claimant, when assessed together, point to a real possibility of an infringement. Only the court's assertion that the requested evidence is not useful to prove the claim may constitute grounds to dismiss the application for disclosure.

Secondly, in order for a request for disclosure to be admissible, it is sufficient only to make plausible, and not to prove the fact of having suffered loss and the amount thereof. In competition law cases, proving those elements is particularly complicated and can generally never be carried out with complete accuracy. This is due to the strong asymmetry of information between the parties and the need to build an economic model representing the hypothetical state of the market in the absence of infringement[11].

The question is even more complex if one takes into account the multilevel structure of the market. In order to contest the existence and the amount of loss suffered by the claimant, the defendant may invoke the passing-on defence[12]. Passing-on is a concept well accepted in economic theory; it refers to the situation where the damage caused by illegal conduct is transferred to the next level of the production chain as a result of increasing of the prices of products sold to customers[13]. Consequently, the benefits that an intermediary undertaking has obtained by raising their own prices must be deducted from the damages that

[10] Judgement of the General Chamber (Seventh Chamber), 11 July 2019, T-530/15, *Huhtamäki et Huhtamaki Flexible Packaging Germany v. Commission*, ECLI:EU:T:2019:498, para. 37. See also Judgement of the Court, (First Chamber), 25 January 2007, C-403/04P, C-405/04 P*, Sumitomo Metal Industries and Nippon Steel v. Commission,* EU:C:2007:52; Judgement of the Court (Fourth Chamber), 6 December 2012, C-441/11, *Commission v. Verhuizingen Coppens,* EU:C:2012:778; Judgment of the General Court (Second Chamber), 2 July 2011, T-113/07, *Toshiba v. Commission,* EU:T:2011:343.

[11] *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, 2013, C 167/19, para. 3.

[12] *European Commission, Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, Brussels, 2008, p. 7-8., eur-lex.europa.eu/legal-content/ALL/?uri=COM:2008:0165:FIN (access: 13.02.2022).

[13] BOTTA M. *The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive,* „European Review of Private Law", 2017, Issue 5, p. 883.

can be claimed against an upstream supplier[14]. In interchange cases, passing-on defence comes down to the allegation that merchants include the overcharge in the price of goods or services, thereby shifting it to customers.

Nonetheless, despite what defendants in interchange cases seek to argue, the fact that passing-on is a well-known mechanism[15] does not mean, that it needs not to be proven. As pointed out by the CJUE in Comateb, "it cannot be generally assumed that the charge is actually passed on in every case"[16]. At the same time, Article 13 of the Directive makes it clear that it is for the party which invokes passing-on to prove the existence and extent of pass-on of the overcharge[17]. Therefore, a mere allegation that an overcharge was passed on is not sufficient to dismiss a claim on the grounds that the claim has not been proven. All the more so, it should not constitute grounds for dismissing a request for disclosure submitted by the claimant. A comprehensive assertion of passing-on requires an in-depth economic analysis conducted by experts appointed by the court, which – in many cases – will be performed on the basis of information obtained through the disclosure[18].

REQUIRED DEGREE OF PRECISENESS OF THE DESCRIPTION OF EVIDENCE PROVIDED IN THE REQUEST FOR DISCLOSURE

Another controversial issue in relation to requests for disclosure is the degree of precision of the description of evidence to be included in the request. According to Article 19(2) of the Act, the evidence must be described "as precisely as possible".

Therefore, this provision – in contrast to the aforementioned Article 248 of the CCP – allows the request to cover not only a specific item of evidence, but even a certain category of evidence. It is then necessary to indicate the

[14] HELLWIG M., *Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist's Perspective*, Max Planck Institute for Collective Goods, Bonn 2006, Issue 22, p. 2.
[15] BOTTA M. *The Principle of Passing on…*, p. 898.
[16] Judgement of the Court, 14 January 1997, C-192/95, *Comateb*, ECLI:EU:C:1997:12, para. 25. For instance, in the judgement of the UK Competition Appeal Tribunal, 14 June 2016, *Sainsbury's Supermarkets v. MasterCard,* [2016] CAT 11, para. 485, regarding interchange fees, The UK Competition Appeal Tribunal rejected the passing-on defense brought up by Mastercard.
[17] See also WAELBROECK D., SLATER D., EVEN–SHOSHAN G., *Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative report*, Brussels 2004, p. 110; BOTTA M. *The Principle of Passing on…*, p. 889; See also Judgement of the Court, 25 February 1988, C-331/85*, SA Les Fils de Jules Bianco and J. Girard Fils SA v. Directeur Général des douanes et droits indirects*, EU:C:1988:97.
[18] PEYER S., *Compensation and the Damages Directive*. CCP Working Paper, p. 17, ssrn.com/abstract=2654187 (access: 13.02.2022).

essential characteristics of this category that would make it possible to identify its designators. According to Article 19(2) of the Act, a request shall indicate in particular the nature, subject matter, time and place of origin of the category of evidence, as well as any other essential characteristics allowing for their identification. According to recital 16 of the Directive, the category of evidence should be defined by indicating the common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, or the time during which they were drawn up. These characteristics should be defined as precisely and narrowly as possible, on the basis of the facts reasonably available.

As it is not difficult to see, the degree of precision of the description of the circumstances listed in the Directive can vary greatly. For instance, the "subject matter" of a document is both "the existence of an anti-competitive agreement" and "the arrangements made at the meeting on a certain date". Similarly, the time when the document was created could just as well be defined as a range of several years or a specific date. The question therefore arises as to when the court will be entitled to dismiss a request for disclosure on the grounds of non-fulfilment of the requirement of description precision.

There is no doubt that the description of an item of evidence must be sufficiently precise to enable the execution of a possible order for disclosure. However, as indicated in recital 14 of the Directive, evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by the claimant. For this reason, the imposition of some unrealistic requirements as regards the degree of precision of requests for evidence could unduly impede the exercise of their right to full compensation.

A description of evidence requested does not have to include a reference to specific documents, but should at the same time enable the obliged party to select them. Moreover, for the purpose of the interpretation of the request, the obliged party should not rely solely on the description of evidence provided by the requesting party. The description of evidence should be interpreted in the context of other submissions of the requesting party, in particular in the light of the evidence thesis provided. In case of serious doubts, a court can always call a plaintiff to clarify the requests.

PERMITTED PERSONAL SCOPE OF DISCLOSURE

In light of Article 17(1) of the Act, a request for disclosure may be addressed both to a party to the proceedings and to a third party. According to Article 21(2) of the Act, while assessing the proportionality of the disclosure, a court shall take into consideration, *inter alia,* the scope and costs of the disclosure, especially for third parties.

It is pretty obvious that disclosure of evidence entails some costs. The obliged party needs to devote its operational resources to identify, select, and submit the requested evidence. The so-called opportunity cost*, i.e.,* the cost of the time that is devoted to the disclosure rather than to something else[19] should also be taken into consideration.

If the obligation to disclose rests on a party to the proceedings, the estimated costs resulting therefrom for the obliged party[20] shall be weighed against the expected benefits of obtaining the requested evidence for the requesting party. The situation is somewhat different in relation to obliged third parties. Therefore, the question arises whether an obliged third party may effectively refuse to disclose evidence by invoking the possibility of obtaining the same items of evidence from a party to the proceedings.

In general, the possibility to obtain a particular item of evidence from a party to the proceedings should speak in favour of rejecting an identical request addressed to a third party. Otherwise, if obliged to disclose, a third party needs to be reimbursed by the requesting party for the costs incurred. Having no legal interest in a specific outcome of the case, entities not participating in proceedings should not be burdened with any costs on this account. A similar approach was adopted for example in Article 251 of CCP, according to which a third party has the right to claim reimbursement of expenses incurred with regard to the production of a document requested pursuant to Article 248 of CCP.

[19] *Ibidem*, p. 13

[20] In jurisdictions representing a loser-pays principle (like Poland), the estimation of the costs of disclosure incurred by the obliged party will depend on the perception of the probability of winning the case. See PEYER S., *Compensation and the Damages Directive*…, p. 14; COOTER R.D., RUBINFELD D.L., *An Economic Model of Legal Discovery*, The Journal of Legal Studies, 1994, Vol. 23, No. 1, pp. 435-463; HAY B.L., *Civil Discovery: Its Effects and Optimal Scope*, The Journal of Legal Studies, 1994, Vol. 23, No. 1, pp. 481-515.

CONCLUSIONS

The main purpose of this paper was to present preliminary reflections on the practical use of the institution of the request for disclosure of evidence in Polish courts. The request for disclosure of evidence is a novelty in the Polish civil procedure, significantly diverging from the previously available tools of evidentiary proceedings. The first cases pending on the basis of the Act have highlighted a number of difficulties associated with its practical application. Some of them are inevitable derivatives of the specificity of competition litigation. Others result from the incompatibility between the request for disclosure, which is typical for the common law system, and the Polish civil procedure. Nevertheless, it is to be hoped that a better understanding of the mechanics of this institution – both by courts and by attorneys – will contribute to the improvement of its application in subsequent cases.

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Judgement of the UK Competition Appeal Tribunal, 14 June 2016, *Sainsbury's Supermarkets v. MasterCard,* [2016] CAT 11

PRAKTYCZNE ZASTOSOWANIE INSTYTUCJI WNIOSKU O WYJAWIENIE ŚRODKA DOWODOWEGO W POLSKICH SPRAWACH DOTYCZĄCYCH ROSZCZEŃ O NAPRAWIENIE SZKODY WYRZĄDZONEJ PRZEZ NARUSZENIE PRAWA KONKURENCJI

Streszczenie: W artykule omówiono praktyczne zastosowanie instytucji wniosku o wyjawienie środka dowodowego, wprowadzonej do polskiego porządku prawnego w 2017 r. ustawą o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Ustawa implementuje dyrektywę Parlamentu Europejskiego i Rady nr 014/104/UE w sprawie niektórych przepisów regulujących dochodzenie roszczeń odszkodowawczych z tytułu naruszenia prawa konkurencji państw członkowskich i Unii Europejskiej na mocy prawa krajowego. Po czterech latach od wprowadzenia do polskiej procedury cywilnej instytucji wniosku o wyjawienie pojawiły się pierwsze problemy związane z jej praktycznym stosowaniem. Po pierwsze, nie jest jasne, w jaki sposób należy uprawdopodobnić roszczenie i poniesioną szkodę, co jest podstawowym warunkiem uwzględnienia wniosku. Po drugie, pojawiły się wątpliwości co do wymaganego stopnia precyzyjności żądania. Po trzecie, dyskusyjny pozostaje dopuszczalny zakres podmiotowy ujawnienia.

Słowa kluczowe: wniosek o ujawnienie, ujawnienie dowodów, prawo konkurencji, opłata interchange, uprawdopodobnienie roszczenia , roszczenia odszkodowawcze

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CIVIL LIABILITY FOR PERSONAL DATA BREACH IN THE JUDICIAL DECISIONS OF THE POLISH COURTS IN THE LIGHT OF THE GDPR

Summary: One of the consequences of violating the rules of personal data processing under the General Data Protection Regulation (GDPR) is the imposition of civil liability on both the personal data controller and processor. The purpose of this article is to outline the principles and prerequisites for such liability based on CJEU[2] case law and established doctrine. The theoretical considerations in the first part of the paper are supplemented by conclusions resulting from the analysis of the case law of Polish courts adjudicating in cases regarding personal data breach.

Key words: GDPR, liability for damages, compensation, personal data

INTRODUCTION – PROTECTION OF PERSONAL DATA IN EUROPEAN UNION LAW

The protection of individuals regarding the processing of personal data is considered one of the fundamental human rights. Article 8 (1) of the Charter of Fundamental Rights of the European Union[3] and Article 16 (1) of the Treaty on the Functioning of the European Union[4] establish that everyone has a right to the protection of his or her personal data.

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[2] Hereinafter referred to as Court of Justice of the European Union.

[3] Act of 7 December 2000, Charter of Fundamental Rights of the European Union, 2012/C 326/02.

[4] Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, hereinafter referred to as the "TFEU".

In our present era, marked by rapid technological advancement and ongoing globalization, this right has become even more important. The scale of collection and sharing of personal data, especially in cyberspace, has increased significantly. Technology has enabled both private companies and public authorities to make use of personal data in their activities on an unprecedented scale to pursue their activities. Moreover, individuals themselves are using the various benefits of the Internet more and more frequently and willingly, leaving an increasing amount of information about themselves in cyberspace[5]. Therefore, as stated in recital 7 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC[6], these developments require a robust and more coherent data protection framework within the EU, backed by strong enforcement mechanisms, given its pivotal role in fostering the trust necessary for the digital economy's growth across the internal market. Therefore, empowering individuals to exercise control over their personal data is vital, while also strengthening the legal and practical assurances for both individuals and institutions, including economic operators and public authorities.

In order to ensure a high and consistent level of protection of individuals and to remove the barriers to the flow of personal data within the Union and to ensure an equivalent level of protection of the rights and freedoms of natural persons in relation to the processing of such data in all Member States, the European Parliament and the Council decided to amend the previous legislation and enact the General Data Protection Regulation, also knowns as the GDPR, with the intention to ensure a consistent and uniform application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data across the European Union[7].

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[5] For example - the proportion of 16- to 74-year-olds in the EU27 who ordered or bought goods or services online for private use was 60 %, 14 pp. higher than in 2014 (46%) (source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Digital_economy_and_society_statistics_-_households_and_individuals/pl (accessed 12.12.2021). According to information from 2019 report by the agency Hootsuite and We Are Social, Poles spend an average of about 6 hours and 2 minutes online per day (S. Kemp, *Digital trends 2019: Every single stat you need to know about the internet*, https://thenextweb.com/news/digital-trends-2019-every-single-stat-you-need-to-know-about-the-internet (accessed 12.12.2021), of which about 2.5 involve using social networks (D. Georgiev, *How Much Time Do People Spend on Social Media in 2020?,* https://techjury.net/blog/time-spent-on-social-media (accessed 13.12.2021).

[6] CELEX: 32016R0679, hereinafter referred to as the "GDPR".

[7] Hereinafter referred to also as the "EU".

It should be noted that previously, the issue of compensation for personal data breach did not raise serious doubts in the doctrine. Until 24 May 2018 the issue of data protection in the European Union was govern by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[8], which in Article 23 obliged the Member States only to ensure that any person who suffered damage as a result of an unlawful processing operation would be compensated. For example, the Polish Act of 29 August 1997 on Personal Data Protection[9], while implementing the aforementioned Directive 95/46/EC into national law, did not contain specific provisions pertaining to the civil liability of the data controller. Consequently, in the light of the then-existing legal framework, the controller's liability was based on the provisions of the general principles of tort liability found in the Polish Civil Code[10].

Since 25 May 2018, the date of application of the GDPR, there is a specific regulation regarding liability for personal data breaches in the EU, and thus also in the Polish legal system. Among these is administrative liability, which can result in the competent national authority imposing financial penalties of up to 20 million euros or 4% of the company's annual turnover. In addition, there is a civil liability for damages arising from violations of the provisions governing personal data processing. This is stipulated in Article 82(1) of the GDPR, which provides that "Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered".

Therefore, the prerequisites for liability for personal data breach, pursuant to Article 82 of the GDPR are as follows:

1. the data subject must suffer pecuniary or non-pecuniary damage;
2. there must be a breach of the provisions of the GDPR or of the delegated and implementing acts adopted pursuant to the GDPR and of the Member State's law further specifying that regulation, committed by the data controller or processor[11];

[8] CELEX: 31995L0046, hereinafter referred to as the "Directive 95/46/EC".
[9] Act of 29 August 1997 on Personal Data Protection, consolidated text: Journal of Laws of the Republic of Poland 2018, item. 723.
[10] Act of 23 April 1964, Civil Code, consolidated text: Journal of Laws of the Republic of Poland 20121, item 2459
[11] See recital 146 of GDPR.

3. there should be a causal link between the damage and the breach established;
4. the infringer must be found guilty of an infringement of the GDPR.

LIABILITY FOR PERSONAL DATA BREACH AND THE NOTION OF DAMAGE UNDER THE GDPR

When analyzing the first of the above-mentioned conditions, due to the legal nature of the regulation, which has a general application, is binding in its entirety and is directly applicable in all Member States (Article 288 TFEU), as well as following the principles of autonomous interpretation of EU law in the spirit of *effet utile* - the notion of damage should be interpreted in line with the current and future case law of the Court of Justice of the European Union[12]. Recital 146 of the GDPR also explicitly indicates that: "the concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law".

Moreover Recital 75 of the GDPR provides examples of economic and non-economic damage listing, *inter alia,* discrimination caused by violation of data protection rules, identity theft, financial loss, damage to reputation, violation of the confidentiality of personal data protected by professional secrecy or any other significant economic or social damage. These provisions clearly indicate the intention of the EU's legislator to assign an autonomous and broad meaning to the notion of damage under the regulation. It is essential to note that this definition does not have to correspond to the meaning of damage established under national legal systems. Instead, it should be shaped in accordance with the case law of the CJEU. Therefore, what are the designations of the notion of "damage" in the view of this authority?

The answer to this question is complex because the CJEU has not yet provided a precise definition of "damage" in the context of liability for personal data breach. The case-law of the EU courts in this area, issued before the GDPR came into force, is somewhat fragmented. The CJEU's general consideration of damage, which has been developed in relation to areas of EU law other than data

[12] STRUGAŁA R., *RODO a odpowiedzialność odszkodowawcza. Podstawowe problemy odpowiedzialności za szkodę spowodowaną nieprawidłowym przetwarzaniem danych osobowych*, „Monitor Prawniczy" 2018, No. 17.

protection, must therefore be taken into account. Examining the extensive body of case law related to damage, we can identify several key aspects concerning it.

The very wording of Article 82 of the GDPR explicitly implies that the concept of damage includes both pecuniary and non-pecuniary damage, which remains in line with the previous CJEU's understanding of this concept[13]. The damage should also be actual and certain, and not hypothetical and potential. The CJEU allows for some uncertainty in determining the exact amount of the damage, but this does not change the fact that, from an economic perspective, it should be possible to estimate the damage[14]. As K. Biczysko-Pudełko points out, this does not rule out the possibility of incurring liability for future damage, because this may take place when the damage remains foreseeable with a high probability of occurrence, even if its size cannot be determined on the date of adjudication[15].Thus, once it is established that the damage is imminent, it is sufficient to reserve the right to determine the amount of damage that the entity would ultimately have to compensate and to limit the claim to establishing its liability[16]. The CJEU also takes a cautious approach to claims for damages which encompass not only actual loss (*damnum emergens),* but also lost profits (*lucrum cessans)*[17]. The legitimacy of the latter is subject to certain conditions, such as possession by the injured party of a legal title to obtain the said benefits, and that the sole reason for their loss was the unlawful conduct of the other party[18].

Regarding the event causing the damage - it should be unlawful and the norm violated by it should be a source of rights for individuals. Moreover, there shall be a causal link between the event causing the damage and the resulting harm. Due to the fact that the nature of such causality has not been specified either in Article 82 of the GDPR or in its recitals, it is not clear which concept of causality the EU legislator has opted for. As a result of that, several positions have emerged in the doctrine.

M. Jagielska and M. Jagielski in their analysis of this gap concluded that

[13] CJEU judgement of 12 March 2002, case number C-168/00, *Simone Leitner v. TUI Deutschland*, ECLI:EU:C:2002:163.

[14] CJEU judgement of 9 November 2006, case number C-243/05, *Agraz, SA and Others v Commission of the European Communities,* ECLI:EU:C:2006:708.

[15] BICZYSKO-PUDEŁKO K., *Cywilnoprawna odpowiedzialność dostawcy usług cloud computing w świetle przepisów Ogólnego Rozporządzenia o Ochronie Danych Osobowych - wybrane problemy*, Warszawa 2021, s. 227.

[16] CJEU judgement of 2 June 1976, case number C-56–60/74, *Kurt Kampffmeyer Mühlenvereinigung KG and others v Commission and Council of the European Communities*, ECLI:EU:C:1976:78.

[17] *Ibidem.*

[18] *Ibidem*, the case regards unlawful conduct of EU bodies.

the resolution of this issue will be subject to the relevant statutory provisions regarding disputes with a "foreign element"[19]. On the other hand, R. Strugała advocates constructing the causal link in accordance with the principles of EU law, in line with the current and future case law of the CJEU[20]. Another author, M. Górski, argues for the application of the interpretation rules developed within the framework of liability for damages for breaches of EU law, thus endorsing the assumption of a direct (adequate) relationship[21]. This is a relation, in which the damage is considered an ordinary and normal consequence of unlawfulness. The author duly argues that the formula of liability for damages for breach of EU law does not depend on the type of entity that is the perpetrator of the breach, so it does not matter whether the violator is a state, an individual, or the European Union itself, which gives it a universal character. However, as K. Biczysko-Pudełko points out, there are doubts in legal scholarship, according to which the condition of the directness of the causal link - although examined within the framework of article 340 paragraph 2 TFEU - has not been sufficiently defined in the jurisprudence of the CJEU[22].

The last condition stems from Article 82(3) of the GDPR, however only from its Polish language version. According to this provision, controller or processor is exempted from liability for damages for a data breach if they prove that they are in no way at fault for the event that caused the damage. Although the majority of the Polish doctrine representatives argue that this wording, with its direct reference to "fault", supports a clear case for tort liability[23], there are also opposing views.

For instance, R. Strugała suggests that the historical interpretation, as well as comparison with the content of other language versions of the GDPR imply that the premise of this liability is not fault at all, but that the liability is rather based on the principle of unlawfulness (where the data controller is held liable for

[19] JAGIELSKA M., JAGIELSKI M., *W poszukiwaniu prawa właściwego dla cywilnoprawnych roszczeń odszkodowawczych z tytułu naruszenia RODO (art. 82 RODO),* „Problemy Prawa Prywatnego Międzynarodowego" 2015, Vol. 28, s. 58.

[20] STRUGAŁA R., *RODO a odpowiedzialność odszkodowawcza*…

[21] GÓRSKI M., [in:] *Ogólne rozporządzenie o ochronie danych osobowych. Komentarz*, M. Sakowska-Baryła (ed.), Warszawa 2018, s. 581.

[22] BICZYSKO-PUDEŁKO K., *Cywilnoprawna odpowiedzialność dostawcy*…, s. 238, TABOROWSKI M., *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe*, Warszawa 2012, s. 156.

[23] See GUMULARZ M., *Wpływ regulacji odpowiedzialności odszkodowawczej w ogólnym rozporządzeniu o ochronie danych osobowych na systemy prawa prywatnego państw członkowskich,* „Europejski Przegląd Sądowy" 2017, No. 5, s. 35; FAJGIELSKI P., *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz,* Warszawa 2021, s. 645; LEGAT O. [in:] *Ustawa o ochronie danych osobowych. Komentarz,* B. Marcinkowski (ed), Warszawa 2018, s. 227.

damages resulting from its own acts or omissions) or even strict liability (e.g. where the data controller is held liable for damages caused directly by the processor). In terms of historical interpretation, several courts in EU member states have leaned towards adjudicating strict liability for controllers' responsibility for damage caused by processors[24].

Another argument pertains to the linguistic interpretation of the Polish text of GDPR in comparison to other language versions. In the Italian, German and English language versions of the GDPR, the content of Article 82 mirrors Article 23 of Directive 95/46/EC (the "legal predecessor" of the GDPR). As in the Directive, most language versions of Article 82 of the GDPR assume that a controller or processor may be exempted from liability by proving that they are not responsible for the event giving rise to the damage. Similarly, the Polish version of Directive 95/46/WE also used the formula of the "proof of lack of responsibility". Therefore, there is no particular reason why in the Polish language version of the GDPR in Article 82 - as opposed to the other language versions - the phrase "proof of lack of responsibility" was replaced with the formula "proof of absence of fault".

As a consequence, although the liability for personal data breaches discussed in this paper does not seem to belong to the liability based on the principle of fault, the doubts will probably last until the CJEU will clarify the circumstances that exempt from this liability. This clarity could come soon, given the preliminary questions referred to the CJEU in 2021 by the Austrian Supreme Court[25] and the Bulgarian Administrative Court[26]. Nevertheless, irrespective of the above doubts, it should be noted that regardless of the terms used in Article 82, the circumstances releasing the controller or processor from liability cannot be interpreted by referring to the concepts established in national law. Even if the use of the term 'fault' in this provision is deemed correct, it should be understood in accordance with EU law, not necessarily in alignment with the interpretation of this term in Polish case law.

[24] STRUGAŁA R., *RODO a odpowiedzialność odszkodowawcza*…

[25] Request for a preliminary ruling from the Oberster Gerichtshof lodged on 12 May 2021, Case C-300/21, *UI v Österreichische Post AG*.

[26] Request for a preliminary ruling from the Varhoven administrativen sad (Bulgaria) lodged on 2 June 2021, Case C-340/21, *VB v Natsionalna agentsia za prihodite*.

SELECTED POLISH COURTS' CASE-LAW REGARDING COMPENSATION FOR PERSONAL DATA BREACH

At this point it is necessary to delve into the interpretation of the liability described earlier and the dilemmas presented in the case law of Polish courts. Until this day[27], out of 5 cases[28] in which the courts considered the application of Article 82 of the GDPR, only in one case did the court prepare an extensive legal analysis of the described problem. In the other remaining cases, the courts either rejected or dismissed the complaints.

The one judgment issued by the District Court in Warsaw of 6 August 2020 awarding damages for breach of personal data protection concerned mainly the breach of the principle of data minimization. Summarizing the facts of the case – the claim against the insurance company was brought by a person who had taken out the car insurance as the owner of the vehicle. Full details of that person (including her name, address of residence, PESEL number, telephone number, as well as vehicle details) were provided to the individual that was injured in the accident caused by the insured car.

In its ruling the District Court in Warsaw acknowledged that there were legal grounds for transferring the data but emphasized that the level of detail provided (such as the inclusion of the PESEL or telephone number) by the company exceeded what was necessary. The court emphasized a breach of one of the key principles of the GDPR, namely - that the processing of personal data should be adequate, relevant and limited to what is necessary for the purposes for which the data are processed. According to the claimant's assertions in the statement of claim, the aforementioned event put her under "constant stress" due to concerns about the use of her personal data. For these reasons, the claimant sought compensation in the amount of 10,000 zlotys for the non-material damage suffered. Taking into account all circumstances and consequences of the breach of personal data security, the court held that 10,000 zlotys would be too much and awarded damages in the amount of 1,500 zlotys.

[27] Legal status as of 2nd February 2022.

[28] Judgment of the District Court in Warsaw - XXV Civil Division of 6 August 2020, Case XXV C 2596/19; Judgment of the District Court in Piotrków Trybunalski - IV Criminal Appeal Division of 7 August 2018, Case IV Ka 400/18; Judgment of the Provincial Administrative Court sitting in Warsaw of 26 May 2020 Case II SA/Wa 554/20; Order of the Provincial Administrative Court based in Warsaw of 21 September 2020, Case II SA/Wa 814/20, Judgment of the Provincial Administrative Court in Warsaw of 10 December 2020, Case II SA/Wa 740/20.

What is particularly important, the Court held that the prerequisites of civil law liability for infringement of personal data under the GDPR are the same as in the case of infringement of personal rights (Article 23 of the Polish Civil Code). Hence, the injured party has to prove the fact of infringement of a particular good and the illegality of the infringement, as well as the fact of suffering harm as a result of the infringement and the fault of the infringer. Therefore, the court first considered the criterion of fault, a point of contention, and essentially applied the Polish Civil Code to interpret this concept, instead of analyze it in the light of EU law.

CONCLUSIONS

To conclude, the case-law on compensation for personal data breach is still developing in Poland. The judgment described above can be seen as a precedent and its imperfections should not be repeated in further judgments. It is highly likely that the number of damages awarded for violation of personal data will only increase as people's awareness of privacy protection rises. Consequently, there will be a growing need for Polish courts to develop a consistent adjudicatory framework that aligns with the GDPR.

Legal status as of February 2, 2022.

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Judgment of the District Court in Piotrków Trybunalski - IV Criminal Appeal Division of 7 August 2018, Case IV Ka 400/18.

ODPOWIEDZIALNOŚĆ CYWILNA ZA NARUSZENIE OCHRONY DANYCH OSOBOWYCH W ORZECZNICTWIE POLSKICH SĄDÓW W ŚWIETLE RODO

Streszczenie: Jedną z konsekwencji naruszenia zasad dotyczących przetwarzania danych osobowych wynikających z Rozporządzenia 2016/679 (RODO) jest odpowiedzialność cywilna administratora danych osobowych i podmiotu przetwarzającego. Celem niniejszego artykułu jest przybliżenie zasad i przesłanek powyższej odpowiedzialności na tle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej oraz stanowisk doktryny. Rozważania teoretyczne zawarte w pierwszej części pracy uzupełniają wnioski płynące z analizy orzecznictwa polskich sądów, wyrokujących w sprawach o naruszenie danych osobowych.

Słowa kluczowe: RODO, odpowiedzialność za szkody, odszkodowanie, dane osobowe

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THE IMPORTANCE OF WARRANTY AND GUARANTEE FROM THE PERSPECTIVE OF POLISH CIVIL LAW AND IN THE EUROPEAN PERSPECTIVE AS INSTRUMENTS OF BUYER PROTECTION IN A CONTRACT OF SALE

Summary: The starting point of the authors' considerations is a discussion of the essence of warranty and guarantee in general, followed by a look at how they function in the Polish legal system and their role in protecting the buyer by presenting the regulations concerning these instruments. Next, the authors evaluate Polish solutions concerning warranty and guarantee from the perspective of buyer protection and indicate which of them are the most beneficial. Then, the authors present the challenges awaiting the institution of warranty and guarantee related to the phenomenon of deterioration of the quality of many products caused by the pandemic, which leads to reflection whether the current regulations in this field are sufficient. Later, the authors focus on the functioning of warranty and guarantee on the international area and present differences in the functioning of warranty and guarantee in other European Union countries. The paper ends with a summary in which the authors evaluate the usefulness of warranty and guarantee and its purpose that is to protect the consumer.

Key words: warranty, guarantee, sales contract, buyer, seller, buyer protection, consumer

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INTRODUCTION

The purpose of the text is to present the essence and functioning of warranty and guarantee, as well as to present the differences between the mentioned institutions in Polish civil law against the background of EU directives, taking into account the situation of the consumer. It seems fundamental, the best way to describe the functioning of warranty and guarantee is by characterising its gist. A definition of a warranty can be found in the Polish Civil Code in Article 556. It reads as follows "The seller shall be liable to the buyer where the item sold has a defect (statutory warranty)." In the case of a guarantee, we do not have to look far either because, the article 577 § 1 of the Civil Code states that "Issuance of a guarantee shall be effected upon making a guarantee statement, which sets forth the guarantor's obligations and the buyer's entitlements where the thing sold fails to have properties specified in such statement. A guarantee statement may be made in advertising." While comparing these two articles together, we can already notice the first fundamental difference, consisting in the fact that the warranty functions in each case of a contract of sale, while guarantee, as it results from the reading of the quoted article – only in the case when it's granting in the form of a guarantee statement. As we can see, both of these institutions function in parallel in the Polish legal system and occupy an extremely important place in connection with the contract of sale. Generally, they have a common aim - protection of the buyer. In addition to Polish civil law, regulations on buyer protection can also be found in EU regulations, which will be discussed later in the text. However, these institutions should not be confused.

WARRANTY AND GUARANTEE IN THE POLISH LEGAL SYSTEM

First, the focus should be on how warranty functions in the Polish legal system. Namely, the starting point is the fact that the institution of warranty at the contract of sale provides for a seller's liability towards the buyer for defects of the object of sale, providing in case of their occurrence special protection of the interests of the buyer. In the Polish Civil Code, regulations of warranty can be found in articles 556-576. They distinguish two types of defects of a solid thing, namely, physical defects and legal defects. A physical defect is defined in article

556^1 § 1 of the Civil Code[3]. It is worth noting that the phrase "in particular" means that we are dealing with an illustrative enumeration, not *numerus clausus*. In this context, also important is § 3 of this article[4]. Physical defects include the lack of properties of the object, the existence of which was assured by the seller. The assurance can be done by declaring the quality by using appropriate certificate markings, specifying the shelf life, and sometimes by advertising. The concept of physical defects should be applied to goods that are not tangible, e.g., to the sale of energy[5]. Legal defects are characterised in article 556^3 of the Polish Civil Code[6]. It is worth mentioning that a legal defect also occurs when the seller is only a co-owner of the item. From the viewpoint of liability, the sale of a defective item is assessed as improper performance of an obligation, and consequently, the seller may be attributed to fault under article 471 of the Polish Civil Code et sequens. However, it is important to keep in mind the purpose of these regulations, which is to protect the buyer, so the civil law constructs a special system of liability of the seller in case of selling defective product, called a warranty for defects. The prerequisites for liability and the scope of the buyer's rights are more stringent than under the general principles of article 471 et sequens. The seller cannot exempt himself from this liability by showing that he is not at fault for causing the defect in the sold thing; he is liable even if he could not have known of the defect[7]. The warranty covers physical defects that existed at the moment when the danger of accidental loss or damage of the item passed to the buyer, so the seller is relieved of liability under warranty if the buyer knew of the defect at the

[3] "A defect is the lack of conformity of the item sold with the contract. The item sold lacks conformity with the contract in particular if:
1) it fails to have a property, which a thing of that kind should have regarding the purpose stipulated in the contract or arising from the circumstances or its intended use;
2) it fails to have a property, about which the seller has assured the buyer, specifically by presenting to the buyer a sample or a model;
3) it fails to lend itself to the purpose, which the buyer indicated to the seller at the conclusion of the contract, and the seller failed to make a reservation to such an intended use;
4) it was released to the buyer incomplete."

[4] "An item sold shall also have a defect in the case of its incorrect installation and start-up where such activities have been performed by the seller or a third party for which the seller is liable or by the buyer where they have followed the instruction manual received from the seller."

[5] RADWAŃSKI Z., PANOWICZ- LIPSKA J. *Zobowiązania - część szczegółowa*, Warszawa 2022, p. 34-35.

[6] "An item has a legal defect if it is the property of a third person, it is encumbered with the right of a third party, or if the limitation in the use or management of the item results from a decision or ruling of the competent body. In the case of the sale of a right, a legal defect may also consist in the non-existence of the right. Other defects are physical defects".

[7] RADWAŃSKI Z., PANOWICZ- LIPSKA J. *Zobowiązania - część szczegółowa...*, *op.cit.,* s. 36.

time of the conclusion of the contract of sale or, with respect to things specified as to species and future, except for the consumer buyer - at the time of delivery of the thing. There is then an implied consent of the buyer to purchase incomplete goods[8]. The seller is liable for defects that arise later if they resulted from a cause inherent in the sold thing at the same time. It is also important to pay attention to the buyer's acts of care. It is about examining the item released by the seller and notifying the seller of the discovered defect in the item sold within a relevant time[9]. These issues are regulated differently depending on the type of entities making the sale. As far as legal defects are concerned, the exercise of warranty rights for them is not dependent on the seller being notified of their occurrence. Here, when a third party makes a claim against the buyer regarding the item sold, then the buyer should immediately notify the seller. If the prerequisites for liability under the warranty for physical defects are met, the buyer may exercise one of these rights: make a declaration of withdrawal, make a declaration to reduce the price, demand that the item be replaced with a defect-free item, or demand removal of defects.

Next, the focus should be on the second institution that serves to protect the interests of the buyer, namely, the guarantee. As mentioned earlier, the guarantee is defined in article 577 § 1 of the Polish Civil Code[10]. The guarantor in the guarantee statement can freely shape the premises and scope of his obligations towards the buyer. As for the warranty period, it is up to the guarantor to determine it and he is free to do so, but § 4 of this article contains a norm *ius dispositivum* stating that it is two years from the date of handing over the product to the buyer. What is critical - the guarantee given to the buyer in the contract of sale is accessory, which means it depends on a valid contract of sale. The guarantee does not arise *ex lege*, but it arises from a legal act. Moreover, its granting by the guarantor is voluntary.

[8] KATNER W. J., PISULIŃSKI J. [in:] *System Prawa Prywatnego... op. cit.*, p. 143-144.
[9] KLICH M., *Rękojmia przy sprzedaży*, https://kruczek.pl/rekojmia-przy-sprzedazy (access: 21.02.2022 r.).
[10] "The provision of a guarantee shall be made by submitting a guarantee statement which shall determine the obligations of the guarantor and the entitlement of the buyer where the benefit is not covered by the characteristics set out in that statement. A guarantee statement can be made in an advertisement."

CONSUMER PROTECTION IN A PANDEMIC: GUARANTEE AND WARRANTY DYNAMICS

At this point, it becomes necessary to discuss the impact of the pandemic on consumer protection institutions. Undoubtedly, the emergence of the virus has turned many aspects of life upside down, and industrial production has not spared the problems either. Many industries have had to deal with reduced production due to supply chain disruptions. The automotive and high-tech industries are currently experiencing a global shortage of semiconductors due to the lockdown associated with the Covid 19 virus. This in turn is leading to quality issues for individual goods, which consumers are facing already. All of this makes the institutions of warranty and guarantee more widely used in practise.

Additionally, the pandemic has changed our consumer habits. Last year Gemius study[11], reported that as many as 77% of Polish respondents had made purchases on the Internet. According to the DPD's E-shopper Barometer Report[12], 39 percent of e-purchasers discovered one or more new online stores during the pandemic period, and as many as 29 percent of consumers took advantage of previously unfamiliar, smaller e-stores. With such a reality, where distance shopping has become a crucial part of everyday life, consumer protection in case of possible product defects becomes an essential element for the law to fulfill its role. The question that arises in this era of new challenges is whether the existing regulations in EU countries are sufficient.

EU DIRECTIVES: TRANSFORMING CONSUMER PROTECTION IN EUROPE

An extremely important element of consumer law in Europe are the European Union directives. They have had a great influence on the shape of regulations concerning warranty and guarantee in the states of the EU. This measure has unified the regulations in many key areas for consumer protection. The biggest change for the institutions in question was introduced

[11] 77% of Internet users buy online. E-commerce in Poland report. https://www.gemius.com/all-reader-news/id-77-of-internet-users-buy-online.html (access: 21.02.2022).
[12] Barometr E-shopper 2020: E-konsumenci w pandemii bardziej otwarci na nowości. https://www.laj.pl/artykul/barometr-e-shopper-2020-e-konsumenci-w-pandemii-bardziej-otwarci-na-nowosci (access: 21.02.2022).

by Directive 1999/44/EC[13]. Some of the most important provisions can be identified from among its contents.

Under Article 2(1) of the Directive, "the seller must deliver to the consumer goods, which are in conformity with the sales contract"[14]. The parties will thus be able to decide what characteristics the goods should have and what situation will constitute a lack of conformity with the contract. The seller is also liable for the lack of conformity of the items, which were bought by the consumer. Article 3 of the Directive sets out four rights that consumers have under the non-conformity of consumer goods with the contract of sale: repair or replacement of the goods, price reduction, and withdrawal from the contract. Importantly, the consumer does not have a choice of rights, but if one of the three conditions is met, he may, according to Article 3(5) of the directive, demand an appropriate price reduction or rescission of the contract if he is not entitled to require either repair or replacement of the goods, or if the seller has failed to remedy the damage within a reasonable time, or if the seller has failed to remedy the damage without major inconvenience to the buyer.

As we mentioned, the amendment was central to introducing consumer protection standards in EU countries, including around guarantees and warranties. However, it did not stop there - further many new solutions were introduced that improved and modernised the older regulations. One of them is the Directive (EU) 2019/771[15]. European Union countries were required to implement the regulations with effect from January 1, 2022. One of the most important changes in the draft is the distinction of the conformity of goods with the contract into: subjective conformity and objective conformity.

The former, subjective conformity means that the goods sold correspond to their description, type, quality, or compatibility. Additionally, they must also be objectively compatible with the contract, which means that the goods, among other things, are suitable for the purposes for which they are usually used. A new element will also be the introduction of a sequence of rights available to the consumer. The first option will be for him to demand that the goods to be brought into conformity with the contract. The consumer will be able to choose

[13] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12–16).
[14] *Ibidem*.
[15] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. (OJ L 136, 22.5.2019, p. 28–50).

between replacing or repairing. Only if the seller fails, the buyer can demand a price reduction or ultimately for termination of the contract. We can see that these changes are designed to improve elements already effective in place and they are positive for the consumer, but also for the seller.

EU CONSUMER RIGHTS: DIVERSE IMPLEMENTATIONS

The next important thing is how the EU countries have implemented the standards set forth in the Directives. Thanks to the EU policy, their core has been unified, which has a positive impact from the consumer's viewpoint. The review of legislation in diverse countries, facilitated by the activities undertaken by the European Consumer Centres[16], enables identification of differences in the protection of consumer rights.

Article 2 of the 1999 Directive on the conformity of goods with a contract has been successfully introduced into the system of the European Union countries. However, some countries have further modified this aspect. In most EU countries, consumers cannot claim a product defect if they knew about it before the purchase, but only in some if the consumers themselves or materials supplied by them caused the defect. A minority of states have also introduced such inability when the defect was caused by product wear and tear.

Regarding the duration of the warranty, a two-year period has been transposed into national law in most EU member states, but here too there are exceptions. Sweden has extended the legal warranty period for all types of goods to 3 years. Ireland, on the other hand, has not introduced any such term. Instead, it has introduced a general limitation period for legal action for breach of contract, which is 6 years. The Finnish Consumer Protection Act, on the other hand, states that a product is defective if it does not work as one would normally expect. In the case of second-hand goods, states have mostly dealt with this problem in two ways: either by extending the same time limit as for new products or by introducing the possibility of shortening the time limit, but this cannot be less than one year.

According to article 5(3) of the Directive, any lack of conformity that becomes apparent within six months of delivery is deemed to have existed at the time of delivery. Some countries have extended this period to improve

[16] European Consumer Centres Network, *Legal guarantees and commercial warranties on consumer goods in the EU, Iceland and Norway,* 2019.

the situation for the consumer. This is 1 year for Poland and Slovakia and 2 years for Portugal and France.

On the hierarchy of remedies available to the consumer, most countries provide for repair or replacement, or, if this is impossible or not possible within a certain time or without significant inconvenience for him, a partial or full refund. In Poland, however, the seller may, under certain conditions, refuse his choice of remedy and offer an alternative solution. In Denmark, the consumer can demand a refund right away if the defect is significant, but not if the seller offers to repair or replace the product. In Latvia, he is only entitled to repair or replacement in the first instance. Only if this is impossible or cannot be done within a reasonable time, the purchaser can request a partial or full refund.

In terms of the time to arrange a remedy, in most countries, the first is repair or replacement and this is established by the statement "reasonable time". In Bulgaria, France, and Luxembourg the time limit is 1 month, and in Hungary, the seller must try repairing the equipment within 15 days. If repair or replacement is impossible in this term, the seller must provide a partial or full refund. In Bulgaria, this must be done in 1 month, in Germany, Lithuania, Malta, and Sweden within a reasonable time frame. In 10 countries, during repair or replacement, the 2-year legal warranty is suspended and continues as soon as the consumer receives the repaired or replaced item. In Austria, Croatia, and Greece, the new two-year warranty period starts when the repaired or replacement item is delivered to the consumer. In Denmark, however, the new two-year legal guarantee period starts when the replacement item is delivered to the consumer. In Denmark, in the case of repair, the consumer can claim a 3-year warranty period if the same defect occurs again. We can see that despite the implementation of EU regulations harmonising the most important issues from the consumer's viewpoint, individual countries have decided to modify their regulations. This is certainly also a matter of adaptation to local conditions, but also a desire to increase consumer protection relative to the minimum required. The Finnish solution stating that a product is defective when it does not work if could be expected is an extremely interesting way out providing the flexibility to adapt the warranty period to the specifics of the product, but so is the Swedish one extending the warranty to 3 years. As far as remedies are concerned, the Danish solution seems to be an interesting one, allowing demanding a refund immediately when the defect is significant. Once the repaired product reaches the consumer, the best option for him seems to be those that provide a new guarantee and not just a continuation of the previous one.

CONCLUSIONS

To sum up, Polish solutions in the field of buyer protection in the contract of sale such as warranty and guarantee give reason to believe that the buyer is sufficiently protected. He always has a warranty available and sometimes also a guarantee, which function independently of each other, and it is up to the buyer to decide which he will use. Both means of protection have their advantages and disadvantages; however, one may be more inclined to believe that a guarantee is more beneficial because of its specificity. The EU should see what solutions have worked in individual countries and then introduce them to a wider number of countries. This will allow consumer protection to adapt to rapidly changing realities.

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ZNACZENIE RĘKOJMI I GWARANCJI Z PERSPEKTYWY POLSKIEGO PRAWA CYWILNEGO ORAZ W PERSPEKTYWIE EUROPEJSKIEJ JAKO INSTRUMENTÓW OCHRONY KUPUJĄCEGO W UMOWIE SPRZEDAŻY

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Słowa kluczowe: rękojmia, gwarancja, umowa sprzedaży, kupujący, sprzedawca, ochrona kupującego, konsument

JAN SOBIECH[1]

TOURIST EVENTS DURING THE COVID-19 PANDEMIC IN VIEW OF POLISH LAW

Summary: The COVID-19 pandemic has brought a new perspective on travel. This applies not only to their practice but also to the legal standpoint, with all the associated consequences. This article aims to present the most relevant aspects related to the organization of tourist events during the COVID-19 pandemic. This problem, in these extraordinary circumstances, is a major challenge for both tour operators and tourists. The article will raise current issues related to the cancellation of the trip from both the tour operator and the tourist, as well as matters linked with incurring additional, previously unforeseen costs. No less important, also from the legal-practical point of view, is the issue of compliance of national regulations with the EU provisions in this area. The Polish legislator's transgression of EU law could potentially result in financial liability of the Republic of Poland not only towards EU authorities for breach of procedures but also, and perhaps most importantly, towards citizens pursuing their claims in court proceedings.

Keywords: Tourist events, COVID-19, domestic law, EU law, withdrawal from a contact

INTRODUCTION

The outbreak of the coronavirus has resulted, in that, because of safety reasons, various restrictions, and limitations are being imposed. This means that the trip that awaits tourists will be very different from the ones they were deciding on before the pandemic. It is therefore not the same standard and conditions of the trip that a consumer decided to pay for. As a result of COVID and the security measures in different countries, travel abroad has completely changed its shape.

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The article aims to present specific problems related to the application of Polish consumer law, concerning important issues faced by both consumers and tour operators during the coronavirus pandemic. These include the issue of withdrawal from/cancellation of a travel contract or incurring additional, previously unforeseen costs. This includes such detailed issues as who bears the cost of a coronavirus test.

Another, no less important element of this article, in which the Polish consumer law implements the EU law, is the issue of reimbursing a consumer for the costs of the tourist event. Poland, in its legislation, has introduced postponing the effectiveness of withdrawal from an agreement and refunding money after 194 days from the termination of an agreement. However, the European Commission does not agree with such measures and considers them to be contrary to the EU directive, which is also a vital and recurring problem for consumers and tour operators.

To properly present this issue, there will also be a reference to the facts which may also be helpful in daily tourist situations. To better understand the issue, an exemplary and interesting court judgment will be presented in this context.

THE EU DIRECTIVE 2015/2302 ON PACKAGE TRAVEL AND LINKED TRAVEL ARRANGEMENTS AND THE ACT OF 24 NOVEMBER 2017 ON TOURIST EVENTS AND RELATED TOURIST SERVICES

The EU passed Directive 2015/2302 on package travel and linked travel arrangements (hereinafter referred to as: PTD)[2]. Under the PTD, the organizer of a package is responsible for the performance of all services forming part of the package, irrespective of whether those services are to be performed by the organizer itself or by other service providers. COVID-19 triggered the application of the PTD provisions concerning: “unavoidable and extraordinary circumstances" which are defined in art. 3(12) PTD as “a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken”. Significant risks to human health, such as the outbreak of a serious disease

[2] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (Dz.Urz.UE L 326/1).

at the travel destination or its immediate vicinity, should've been qualified as such unavoidable and extraordinary circumstances[3].

According to art. 12(2) PTD the traveler has the right to terminate the package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. While it remains unclear which particular area is covered by the term "immediate vicinity", it seems probable that this kind of right to terminate the contract will apply to COVID-19 circumstances like a high risk of infection at a destination, a hotel/restaurant operation ban in that place, or a landing ban for flights departing from the destination country, etc.[4]

The member EU states were obliged to implement the PTD in their own legal systems. Accordingly, Poland passed the Act on Tourist Events and Related Travel Services of 24 November 2017 (hereinafter referred to as: ATE)[5]. According to its art. 47(4) a consumer may withdraw from the contract due to unavoidable and extraordinary circumstances at the venue or its immediate vicinity that significantly affect the execution of the tourist event or the transportation of travelers to the destination.

The ATE, nor PTD, doesn't define closer these "extraordinary circumstances". There's only a reference in the so-called preamble of PTD regarding point nr 31, which says: "This may cover for example warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination as agreed in the package travel contract".

Consequently, interpretation has been left to the courts, administrative bodies, and, in the main, tour operators and travelers. A coronavirus pandemic can be considered an "unavoidable and extraordinary circumstance". It can be argued that the coronavirus pandemic is not a *force majeure*. It is important to

[3] European Commission, *Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements,* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0090&from=EN, (dostęp: 27.01.2022 r.), s. 1, 14.

[4] WUKOSCHITZ M., *Tour Organisers and Suppliers: Partners or Opponents in the Crisis?* [w:] *Legal Impacts of COVID-19 in the Travel, Tourism and Hospitality Industry,* C. Torres, F. Javier Melgosa Arcos (red.), Estoril-Salamanca-Milan 2022, s. 80.

[5] Ustawa z dnia 24 listopada 2017 r. o imprezach turystycznych i powiązanych usługach turystycznych (Dz.U. z 2017 r. poz. 2361 ze zm.).

remember that "force majeure" does not imply the absence of fault and is one of the exonerative categories that to be associated with strict liability. Incidentally, it may be pointed out that the provisions of the travel agencies do not refund money in case of *force majeure* or an epidemic is null and void[6].

In this case, a consumer is not charged with the cancellation costs. Thus, the tour operator is not entitled to deduct any costs from the amount paid for the tourist event. However, a consumer is not entitled to any compensation or damages from the organizer. The tour operator must return the money to a consumer within 14 days of the effective date of cancellation (art. 47 (6) of ATE).

WITHDRAWAL FROM/CANCELLATION OF A TRAVEL CONTRACT – SPECIAL DOMESTIC REGULATIONS

The Act of March 2, 2020, on special solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases, and crises caused by them, (hereinafter referred to as: Shield 2.0.)[7] introduced special regulations concerning withdrawal by a consumer from a contract on participation in a tourist event due to a COVID-19 epidemic and termination by an entrepreneur of a contract on the organization of a cultural, entertainment, or sports event due to a COVID-19 epidemic.

According to art. 15k of the Shield 2.0. the cancellation of the participation agreement by a consumer or the termination of the participation agreement by the tour operator that is directly related to the outbreak of the SARS-CoV-2 virus shall be effective as of 180 days from the date of the traveler's notification of the cancellation or the tour operator's notification of termination. A consumer has a choice, and instead of waiting for a refund within the above-mentioned period, may agree to receive in return from the tour operator a voucher to be redeemed against future travel events within a year from the date on which the travel event was to take place (art. 15k (2)). The value of the voucher may not be less than the amount paid towards the performance of the existing contract for the travel event (art. 15 (3)). These regulations are *lex specialis* to those from art. 47 (4-6) ATE.

[6] DUDZIEC-RZESZOWSKA W., *Prawo odstąpienia podróżnego od umowy o udział w imprezie turystycznej na tle ustawy o imprezach turystycznych i powiązanych imprezach turystycznych,* „Studia Iuridicia Toruniensia", 2020, t. 26, s. 134–135.

[7] Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych (Dz.U. z 2020 r. poz. 374 ze zm.).

What's important, under the procedure of directive implementations, domestic provisions couldn't be less favorable for consumers than PTD rules[8].

Such postponement of the effectiveness of the declaration makes it necessary for the organizer to reimburse the fees and payments made by the traveler within 14 days from the date on which the declaration becomes effective, and the effectiveness of the declaration becomes effective 180 days after the date of the notification of withdrawal. This means that the claim for reimbursement of fees and payments is due after a total of 194 days from the date of notification of cancellation by one party to the other or from the date of conclusion of the agreement on cancellation[9].

The second option for consumers is to obtain a voucher from the tour operator. It may be concluded that the voucher referred to in Shield 2.0. is a specific type of document, attesting to the existence of certain rights of a person named in it, and resulting from the legal relationship linking the issuer of the voucher and the obligor of the document are the parties to the legal relationship between the person named in the voucher and the person named therein. The issuer of the document and obliged to provide the service is the tour operator, and the entitled person – the beneficiary – is the traveler who previously agreed to participate in a tourist event. The voucher has a specific monetary value, and it cannot be exchanged for cash. In case of loss of the voucher, it is possible to issue a duplicate[10].

CASE STUDY

I had a trip to Cyprus purchased. Departure was to take place on July 1, 2020. However, it turned out that under the decisions of the Cyprus government will be allowed only tourists who have a certificate, issued by a private or public institution within 72 hours before departure, that they have undergone a coronavirus test and the result is negative. Since I was to spend my vacation with my family (4 people in total), taking the test is a big financial burden for me. In addition, no one can guarantee

[8] That issue is a separate problem, that wouldn't be extended in this article, so more about it alongside with possible consequences of multifarious collisions between Polish and EU regulations i.a. SZMAK S., SZMAK K., *Odroczenie skuteczności odstąpienia od umowy o udział w imprezie turystycznej – regulacja art. 15k ustawy COVID-19 w świetle dyrektywy 2015/2302,* „Transformacje Prawa Prywatnego", 2021, nr 3, s. 87–90, 94–97.

[9] MARAK K., *Regulacje prawne wprowadzone w celu przeciwdziałania skutkom epidemii wirusa SARS-CoV-2 w zakresie wykonania umów o udział w imprezie turystycznej oraz skutki tych regulacji dla organizatorów turystyki i podróżnych,* „Iustitia", 2020, nr 4, s. 203.

[10] Ibidem, s. 205.

that I will be able to receive the test results and certificate within 72 hours before departure. Can I cancel the trip at no cost?

The ATE contains provisions that give a consumer the possibility to terminate the contract at no cost in case of extraordinary circumstances and force majeure. The need to do expensive tests at your own expense (with 4 people it is a cost of about 2000 PLN) and the high probability of not receiving the results of these tests and a certificate within 72 hours are among these situations.

At the end of 2019, I booked a trip abroad. Unfortunately, as it turns out, many restrictions are waiting for me on the spot - closed attractions, limited possibility to use the beach, the need to walk in masks, and disinfecting hands. I do not like the idea of such a vacation - my trip was supposed to look completely different. Is this grounds for a cost-free withdrawal from the contract?

The coronavirus outbreak has resulted in various restrictions and limitations being put in place for safety reasons. This means that the trip that awaits tourists will be significantly different from the one they decided on before the time of the pandemic. So, it is not the same standard and conditions of the trip that a consumer decided to pay for. As a result of COVID and the security measures in place in various countries, the overseas trip has completely changed its shape.

A consumer would be in a different legal position if he or she decided to purchase a trip at a time when an outbreak had already occurred. Such a decision means that the customer is aware of the COVID situation and possible risks (such as the availability of attractions on site and other restrictions) during the trip. In such a case, we cannot speak of the occurrence of unavoidable and extraordinary circumstances and therefore a consumer would not be able to withdraw from the contract on this basis at no cost.

The country I am traveling to requires that I submit a COVID test. Who covers the cost of this test?

Individual countries, fearing an increase in the incidence of coronavirus, are choosing to introduce restrictions for visitors. Some of them have introduced the requirement for visitors to have a negative result on COVID, with the proviso that such a test is valid for a specific period (e.g. 72 hours). The obligation to test is imposed by individual country authorities, not by tour operators. It is therefore the responsibility of the consumer to take the test and pay for it. The additional steps and costs associated with the need to conduct a COVID test constitute

additional and unforeseen expenses. Therefore, in such a situation, the consumer can withdraw from the contract at no cost based on art. 47 (4) ATE[11]

At the end of this chapter, there is an interesting state of fact and subsequent verdict that could be summoned based on one of the Polish recent judgments[12]. On December 8, 2019, the plaintiff agreed with the defendant company to participate in an eight-day pilgrimage to I., which was to take place from March 9-16, 2020. The total cost of the pilgrimage was set at 790 USD and 1650 PLN. On account of the planned trip, the claimant made advance payments in the amounts of 1650 PLN and 590 USD. On March 3, 2020, the plaintiff, due to the prevailing COVID-19 pandemic, rescinded her contract with the defendant, and the defendant acknowledged acceptance of the rescission.

On March 6, 2020, the organizer of the pilgrimage announced on a social media site that the planned pilgrimage to the Holy Land was canceled due to the prevailing pandemic. Additionally, he informed pilgrimage participants of this fact in writing. In a letter dated 23 April 2020, the defendant company informed the claimant that it would receive a refund within 14 days after 180 days from the date of withdrawal from the agreement, i.e. on 12 September 2020 at the earliest. By letter dated 15 September 2020, the defendant informed the claimant that it was extending the settlement deadline to 31 December 2020. At the same time, the defendant offered the claimant to exchange the current liabilities for a voucher, whose value would be increased by PLN 50. The claimant did not agree to the defendant's proposal.

In the opinion of the District Court, the claimant's impatience and intransigence, lack of understanding and consideration of the consequences of the epidemic situation not only for the tourism industry, but also for the entire world, as well as her refusal to accept the respondent's proposals for settlement in the form of a voucher, constitute an abuse of rights referred to in art. 5 of the Civil Procedure Code, and thus her claim for payment of interest on the principal amount was dismissed.

[11] MIŚ M., *Problemy konsumenckie w dobie epidemii koronawirusa,* Wrocław 2020, s. 6–8, 9.
[12] Wyrok SR Szczecin-Centrum w Szczecinie z dnia 23 listopada 2021 r., IC 525/21, LEX nr 3281675.

THE TOURIST REFUND FUND (TRF)

From October 1, 2020, the provision of art. 15ka-15kc of the so-called Shield 5.0. took effect[13]. It allows travelers to apply for a refund for a travel event not made due to the COVID-19 pandemic. According to its art. 15ka the tour operator must make a payment of 7.5% of the total value of the disbursements covered by his application. Additionally, he shall make a payment of 2.5% or 4% (depending on the size of the entrepreneur) of the total value of the disbursements covered by the application submitted by him. The applications are handled and verified by the Insurance Guarantee Fund (IGF). Applications can only be submitted via the Fund's website after a user account has been set up. The person entitled to receive a refund is the traveler who has agreed to participate in a tourist event.

The IGF after receiving applications from the tour operator and the traveler examines whether they are complete and whether the data given by the organizer and the traveler are consistent. The IGF has 30 days from the date of receipt of the latest of these applications, considering the availability of funds in the TRF. If further investigation is required, the deadline is extended to 4 months from the date of receipt of the latter of these applications. If the review is successful, the Fund has 14 days under the Act to make the refund to the traveler's account. Under the law, refunds could be claimed up to December 31, 2020, but verification of claims was still ongoing until the end of March 2021.

The TRF operating at the IGF was a form of assistance not only for travelers affected by the pandemic but also for the entire tourism industry. Companies and tour operators didn't have sufficient funds to settle with customers for canceled trips. They had already made advance payments to airlines and hotels while booking their services, and when the pandemic broke out, they had trouble recovering the money from foreign contractors who hid behind their costs.

In connection with the issue of deadlines for the return of payments to travelers from the TRF, the following conclusions arise. First, the procedure is completely unknown to the PTD and leads to an extension of the time limit reimbursement of prepayments in a manner incompatible with it. Second, even though the traveler has made such an attempt, that procedure does not provide

[13] Ustawa z dnia 17 września 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (Dz.U. z 2020 r. poz. 1639 ze zm.).

a guarantee to the traveler that he will receive a refund of the deposit. Thus, it is in some way an uncertain procedure (in which case general solutions remain for the traveler, just as if the traveler does not use the procedure at all). Third, for reasons that are difficult to understand, the procedure is in practice realistically only available to a fraction of travelers, as not every traveler can submit the relevant application via the website of the IGF. Thus, this solution, which is also available to a part once again leads to an extension of the time limit for repayment payments to travelers and for that reason, having regard to the requirement of the abovementioned art. 12(4) of the PTD, it must be assessed critically from the point of view in question[14].

SUMMARY

The issue of tourist events organized during the COVID-19 pandemic is an extremely complex problem, both on the part of the tour operator and the traveler. Due to the multifaceted nature of this topic, only the most important, in the author's opinion, issues are presented, among which practical aspects were emphasized. The above mentioned regulations relative to travel events in the era of coronavirus appear to be temporary, but its reuse in other pandemics that may affect our societies cannot be ruled out.

From the point of view of the interests of travel agents, the existing regulations in the Polish legal system, regardless of the question of their abovementioned compliance with European law, in practice result only in postponing the fulfillment of tourist entrepreneur's services. Aid to the travel industry means some limited assistance for clients of travel agencies, but concerning tour operators themselves, it is not direct material assistance. The question arises as to whether the tour operator may claim compensation from the State Treasury and on what basis. However, the answer to such a question, although extremely important, exceeds the framework of this article.

On the other hand, it should be noted that the legislative support for tour operators, which was justified in principle and forced by the outbreak of the coronavirus, was introduced using inappropriate methods. In the long term, in addition to the possible difficulties of recovering the money paid by travelers, the

[14] CYBULA P., *Prawidłowa implementacja prawa unijnego czy wsparcie przedsiębiorców? O dylematach regulacyjnych w czasach Covid-19 na przykładzie problemu terminu zwrotu przedpłat podróżnym przez organizatorów turystyki,* „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego", 2021, t. 19, s. 67.

regulation may result in a decrease in consumer confidence in both the state and tour operators. In such a situation, it is impossible not to get the impression that the applied solution, despite its short-term effectiveness, had the opposite effect to the one intended.

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WUKOSCHITZ M., *Tour Organisers and Suppliers: Partners or Opponents in the Crisis?,* [in:] *Legal Impacts of COVID-19 in the Travel, Tourism and Hospitality Industry,* C. Torres, F. Javier Melgosa Arcos (ed.), Estoril-Salamanca-Milan 2022.

Wyrok SR Szczecin-Centrum w Szczecinie z dnia 23 listopada 2021 r., IC 525/21, LEX nr 3281675.

IMPREZY TURYSTYCZNE W OKRESIE PANDEMII COVID-19 W ŚWIETLE POLSKIEGO PRAWA

Streszczenie: Pandemia COVID-19 przyniosła nowe spojrzenie na podróże. Dotyczy to nie tylko ich praktycznego, lecz także prawnego aspektu, ze wszystkimi konsekwencjami z tym związanymi. Niniejszy artykuł ma za zadanie przedstawić najistotniejsze zagadnienia związane z organizacją imprez turystycznych w czasie pandemii COVID-19. Kwestia ta, w tych nadzwyczajnych okolicznościach, stanowi duże wyzwanie zarówno dla organizatorów wycieczek turystycznych, jak i samych turystów. W artykule podniesione zostaną aktualne problemy związane z odwołaniem wycieczki zarówno ze strony organizatora wycieczki, jak i turysty, a także zagadnienia związane z ponoszeniem dodatkowych, nieprzewidzianych wcześniej kosztów. Nie mniej istotna, także z prawno-praktycznego punktu widzenia, jest kwestia zgodności krajowych regulacji z przepisami unijnymi w tym zakresie. Wykroczenie przez polskiego ustawodawcę poza granice prawa UE mogłoby potencjalnie skutkować odpowiedzialnością majątkową Rzeczypospolitej Polskiej nie tylko wobec organów unijnych za naruszenie procedur, ale także, a może przede wszystkim, względem obywateli dochodzących swoich roszczeń w postępowaniach sądowych.

Słowa kluczowe: Imprezy turystyczne, COVID-19, prawo krajowe, prawo UE, odstąpienie od umowy

JAKUB ZWIERZCHOWSKI[1]

ENVIRONMENTAL PROTECTION AND CIVIL CODE OF THE PEOPLE'S REPUBLIC OF CHINA – HOLISTIC INSTRUMENT OF SUSTAINABLE DEVELOPMENT[2]

Summary: Nowadays, sustainable development is considered to be one of the key State policies worldwide. Its nature and basic assumptions lead to its implementation into various branches of law, both public and private. In 2020 the first-ever Civil Code was established in the People's Republic of China. Apart from the very fact of its establishment, attention should also be paid to its innovativeness – holistic approach to some aspects of sustainable development. In China, this phenomenon is referred to as the *greening of private law* and it leads to the implementation of not-traditional private law values. Aim of this study is to present and analyze newly established legal instrument within the Chinese Civil Code – Art. 9, the so-called Green Principle and its specific provisions within the separate Books of Civil Code, concerning: property, contract and tort.

Keywords: sustainable development, private law, environmental protection, civil code, China

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[2] This paper is based on the author's LL.M thesis: ZWIERZCHOWSKI. J *Normatywny wyraz tzw. zielonej zasady w Kodeksie cywilnym Chińskiej Republiki Ludowej z 2020 r. i jej znaczenie dla prawa prywatnego* [*Normative expression of the Green Principle under People's Republic of China 2020 Civil Code and its significance for private law*].

INTRODUCTION

SUSTAINABLE DEVELOPMENT AND *GREENING OF CIVIL LAW*

Progressive climate change, gradual depletion of natural resources, environmental degradation and other factors have in the recent decades made the term "sustainable development" a global synonym for the discourse on the well-being and future of our civilization. The career of this concept on a global scale does not mean that its material scope and nature are understood in the same way, as it is the subject of numerous doctrinal and expert polemics[3] and unification attempts[4]. Adopting a legal framework is a crucial issue in tackling global challenges. To do so policymakers and legislators try to adapt the concept of sustainable development from just a general idea to something more concrete and regulatory. There are ongoing discussions as how to adapt the States' business models[5], how the climate litigation should be approached[6], how to reshape the chain supply system to make it more sustainable[7], how to adjust the property, contract and tort laws, in a way to be more conducive to the environment[8]. The currently established legal framework in the domain of public law – generally the field of environmental protection law – is considered not to be enough. The answers to the contemporary challenges should be to develop more holistic legal instruments, not only in the field of public but also private law.[9]

People's Republic of China (hereinafter: China, PRC) has established specific approach. Besides adoption of typical legal framework on environmental

[3] World Commission on Environment and Development (Brundtland Commission), *Our Common Future,* Oxford University Press, Oxford, 1987.
[4] United Nations Conference on Environment & Development Rio de Janeiro, Brazil 3-14 June 1992, *Agenda 21.*
[5] SZYJA P., *The role of the state in creating green economy*, „Oeconomia Copernicana" 2016, Vol. 7 No. 2, pp. 207-222.
[6] BOUWER K., *The Unsexy Future of Climate Change Litigation*, „Journal of Environmental Law" 2018, Vol. 30, Issue 3, pp. 483–506, MCDONALD J., MCCORMACK, P., *Rethinking the role of law in adapting to climate change,* WIREs Clim Change, 2021, vol. 12, issue 5.
[7] ULFBECK V., HANSEN O., *Sustainability Clauses in an unsustainable Contract Law?*, „European Review of Contract Law" 2020, Vol. 16, No. 1, pp. 186-205.
[8] AKKERMANS B., VAN DIJCK G., *Sustainability and private law,* Eleven International Publishing, Hague 2020, MATTEI U., QUATRA A., *The turning point in private law: Ecology, Technology and the Commons,* Edward Elgar Publishing Limited, Cheltenham 2019.
[9] CAPRA F., MATTEI U., *The Ecology of Law: Toward a Legal System in Tune with Nature and Community,* Berett-Koehler Publishers, Oakland 2015.

protection based on the public law – Constitution[10] and Laws and regulations – there is also an evidence of private law institutions.[11] Some Chinese legal scholars believe that certain sustainable development challenges – especially environmental protection – cannot be answered with solely public law, and thus approach it holistically.[12] According to *Lv Zhongmei*, environmental protection issues are related to the ownership of resources, economic turnover, protection of personal rights and torts, what institutionally connects them with the private law. The traditional approach to civil law, emphasizing individual rights and values, leads to the marginalization of the social well-being. Therefore, there is a need for a different approach to civil law, so that it ensures, among others, the implementation of environmental protection into private law. This sustainable development theory[13] within the private law is regarded for the Chinese legal scholars as the *greening of civil law*.[14] Under the newly enacted Civil Code of the People's Republic of China (CC) [15] – which is effective since 1st January 2021 – there are provisions connecting environmental protection and private law relationships. Most notable, the Art. 9 CC, referred, by the Chinese legal scholars, as the *Green Principle* (*Green Principle*)[16], states that when conducting civil activity, a person of civil law shall act in a manner that facilitates conservation of resources and protection of the ecological environment.

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[10] Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress on December 4 1982 with further amendments. http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml (access 18.01.2022).

[11] ZWIERZCHOWSKI J., ROTT-PIETRZYK E., *Polish and Chinese approach to environmental law*, „Suleyman Demirel University Bulletin: Social Sciences" 2020, Vol. 53, No. 2, pp. 27-34.

[12] 曹明德, 徐以祥, 中国民法法典化与生态保护, 现代法学, 2003, vol. 4, pp. 17-23 [CAO M., XU Y., *Chinese codification and environmental protection*, Contemporary Legal Studies], 王利明, 民法典的时代特征和编纂步骤, 清华法学, 2014, Vol. 6 [WANG L., *Specifics of times and steps toward Civil Code*, Qinghua Legal Studies], 石佳友, 治理体系的完善与民法典的时代精神, 法学研究, 2018, Vol. 1, pp. 3-21 [SHI J., *Perfection of the Governance and the Spirit of the Times of Civil Code*, Legal Research].

[13] However it is important to note, that under Chinese political rhetoric, specific concept has been coined – *ecological civilization* (生态文明); *See,* GORON C., *Ecological Civilisation and the Political Limits of Chinese Concept of Sustainability*, „Power and Knowledge in 21st Century China: Producing Social Sciences" 2018, Vol.4, pp. 39-52.

[14] 吕忠梅, 如何"绿化"民法典 [LV Z., *How to „green" Civil Code*]. Available at: [https://www.sohu.com/a/305994578_773108] last access: 24.01.2022, 吕忠梅, 民法典"绿色化"与环境法典的调适, 中外法学 2018, vol. 4 [LV Z., *Greening of Civil Code and Adjustment of Environmental Code*, Chinese and Foreign Laws].

[15] Civil Code of the People's Republic of China adopted at the Third Session of the Thirteenth National People's Congress on May 28 2020. For this study, the State Councils' official translation of CC was used, http://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html (access 18.01.2022).

[16] Green Principle is a literal translation of the Chinese term "绿色原则".

AIM OF THE STUDY AND METHODOLOGY

Aim of this study is to present and analyze newly established legal instrument within the Chinese CC – *Green Principle* and its specific provisions within the separate branches of CC. This study applies traditional doctrinal legal research methodology, closing to the descriptive level of research and type of research which is empirical (identification of the valid law) and explanatory (explaining the law), following with the evaluation of the gathered material for the final remarks[17]. Research is conducted by analyzing laws, policies and other documents with the support of scholarly research. For the Chinese sources of law, there were used official translations, and if these were not available, self-conducted translations. For the best result in the analysis of Chinese legal theory, research relating Chinese law was mainly conducted with the use of works of Chinese academics. Gathered sources were analyzed in both English, Chinese and Polish.

ENVIRONMENTAL PROTECTION AND CHINESE CIVIL LAW

GREEN PRINCIPLE

Until the adoption of CC in 2020, there was ongoing discussion as how to carry out the *greening of civil law* and two main approaches emerged. First, legislative, which considered introduction of the new provisions to the civil law that would exercise the protection of environment and natural resources. Second, judicial, assuming that it should be achieved through the interpretation of the already existing fundamental principles[18] of civil law. Ultimately, the legislative approach was favored, as the judicial deemed insufficiently effective due to pressing environmental issues. [19] With the enactment of CC, the phenomenon of the *greening of civil law* came into life. The significance of the most notable

[17] VAN HOECKE M., *Legal Doctrine: Which Method(s) for What Kind of Discipline* [in:] *Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline,* VAN HOECKE M. (ed.), London, 2011, pp. 1-18.

[18] Chinese scholars generally recognize 6 fundamental principles: principle of equality (Art. 4 CC), principle of voluntariness (Art. 5 CC), principle of equity (Art. 6 CC), principle of good-faith (Art. 7 CC), principle of public order and good customs (Art. 8 CC) and *Green Principle* (Art. 9 CC); *See,* 王利明，民法，中国人民大学出版社，Beijing, 2018, pp. 21-33 [WANG L., *Civil Law*, Renmin University Press].

[19] 尹田， 民法基本原则与调整对象立法研究，法学家， 2016 vol.5, pp. 10-19, [TIAN Y., *Basic Principles of Civil Law and Legislative Research on Adjustment Objects*, The Jurist].

"eco-provision" – the *Green Principle* under Art. 9 CC[20] – is underlined due to the fact, that it is situated in the group of norms referred to as the fundamental principles of civil law.

Within the private law system of China, scholars identify norms defined as fundamental principles of civil law[21]. These indefinable (general, vague) provisions formulated *explicite* in the Title I CC are the basis for the formulation and interpretation of private law provisions[22], thus having impact on the *de lege ferenenda* and *de lege lata* aspects. These norms impact whole civil law regime and their function is to "reflect key policies and concepts of human activities".[23] Fundamental principles are ought to be "externalization of internal values of civil law"[24] and key element to the application of private law and loophole filing process[25]. Some Chinese scholars state that this normative shape of principles is reflection of the basic assumptions of Chinese private law.[26] The implications of this legislative technique and theory are ought to intuitively deliver the essential guiding-values for the society.[27]

The functioning of the *Green Principle* is not left to itself. To correctly implement environmental protection into the civil law system, Chinese legislator decided to enact relevant specific provisions.

SPECIFIC ENVIRONMENTAL PROTECTION PROVISIONS

[20] Art. 9 CC When conducting a civil activity, a person of the civil law shall act in a manner that facilitates conservation of resources and protection of the ecological environment.

[21] In this paper I reduced some of the nuisances of Chinese legal theory, e.g., discussing the differences in the theory of "principle"（原则） and "fundamental principle"（基本原则） and the notion of the fundamental principle of civil law（民法基本原则）. According to Zou Yu, there is distinction between principles of law（法律原则）, fundamental principles（基本原则） and general principles（一般原则）. *See,* 邹瑜，法学大辞典，中国政法大学出版社，Beijing, 1991 [YU Z., *Legal Dictionary, China University of Political Science and Law Press]:* "法的基本原则在法的体系结构中居于核心地位，起到最根本的指导作用；法的一般原则是法的基本原则的派生，是基本原则在法的体系各部分中的相对具体化" [The fundamental principles of the law occupy the core position in the legal system and play the most fundamental guiding role; the general principles of the law are the derivation of the fundamental principles of the law, and they are the relative specifics of the fundamental principles in each part of the legal system.]

[22] 王利明，民法，中国人民大学出版社，Beijing, 2018, pp. 21-33 [WANG L., *Civil Law*, Renmin University Press].

[23] 邹瑜， 法学大辞典， 中国政法大学出版社， 1991 Beijing, pp. 420-421 [YU Z., *Legal Dictionary*, China University of Political Science and Law Press].

[24] *Ibidem*.

[25] 于莹，民法基本原则与商法漏洞填补 ，中国法学，2019, vol. 4 [YU, Y. *Basic Principles of Civil Law and Loophole Filling in Commercial Law,* Chinese Law].

[26] 易军，民法基本原则的意义脉络，法学研究，2018, vol. 6 [YI. J. *The Context of the Basic Principles of Civil Law,* Legal Studies].

[27] 朱广新，超越经验主义立法：编纂民法典，中外法学，2014, vol. 6, issue 26 [ZHU G., *Beyond Empirical Legislation: Compilation of Civil Code,* Chinese and Foreign Law].

UNDER CIVIL CODE

As discussed, *Green Principle* as a fundamental principle of civil law is ought to influence the interpretation and application of all the private law provisions. The purpose of this value-norm is to strike a balance between private economic interests and common environmental interests. However, apart from the declaratory function, in order to be able to serve as a basis for individual decisions, it was necessary to establish specific provisions within the separate CC's Books:

1. Book I General Part, Title I General Provisions (Art. 9);
2. Book II Rights in rem, Title VI Ownership of Building's Units (Art. 286), Title X General Rules on Usufruct (Art. 326), Title XII Right to Use Land for Construction Purposes (Art. 346);
3. Book III Contracts, Title IV Performance of Contracts (Art. 509), Title VII Termination of Rights and Obligations under a Contract (Art. 558), Title IX Sales Contract (Art. 619, 625, 655);
4. Book VII Tort liability, Title VII Liability for Environmental Pollution and Ecological Damage (Art. 1229-1235).[28]

Property law

Traditionally, restrictions on rights in rem regarding environmental resources[29] and environmental protection are imposed under the public law, e.g., environmental law, mining law, water law. Private law restrictions on this subject are usually achieved by the institution of *immisions*[30]. Due to the *Green Principle*s' normativity, environmental resources and environmental protection have become a new private-law-restriction for exercising property rights. [31]

In the previously binding legal framework, under Art. 83 Property Law of the PRC it was provided the obligation for owners of buildings to comply to

[28] The lex specialis were chosen based on the search of chosen words: "环境" (environment – searched in the context of natural environment), "节约 (conservation – searched in the context of saving of natural resources) and "回收" (recycling).

[29] Art. 9 Constitution of PRC All mineral resources, waters, forests, mountains, grasslands, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grasslands, unreclaimed land and beaches that are owned by collectives as prescribed by law.

[30] As an example, Art. 906 Bürgerliches Gesetzbuch effective as of 1st January 1900.

[31] 郑少华，王慧，绿色原则在物权限制中的司法适用， 清华法学， 2020, vol. 4, pp. 159-179 [ZHENG S., WANG H., *Judicial application of Green Principle and property law restrictions,* Qinghua Legal Studies].

the relevant laws and regulations and management rules[32]. However, with the amendment, under Art. 283 CC[33], owners obligation is specified that the building must be adapted to the requirements of saving natural resources and protecting natural environment. These requirements are laid down in the relevant laws and regulations and must be reflected in the property management agreement[34] established by owners.[35]

Natural resources are the state-owned property.[36] They are both of economical and ecological nature and are the basis for socio-economic development. Being a public good, environmental resources are not to serve the interests of the individual but of the society. [37] This issue led to the specific regulation of the *Green Principle* in Art. 326 CC[38]. Unlike the exercise of ownership rights, right to use poses a potentially greater risk. According to *Sun Youhai*, this is due two reasons. First, human nature – the right of use is associated with the *usufruct* and therefore the user will not treat the property "with heart" as its own. Secondly, motivation – the system of remunerated right to derive profit from environmental resources

[32] Property Law of the People's Republic of China (Adopted at the Fifth Session of the Tenth National People's Congress on March 16, 2007). Art. 83 Owners shall observe the relevant laws and regulations and the management rules and agreements. With respect to a person who randomly discards garbage, discharges pollutants, makes noises, keeps animals in violation of regulations, erects structures against rules, occupies passages, refuses to pay property management fees, etc., thus infringing on the lawful rights and interests of another person, the owners' assembly and the owners' committee shall, according to the relevant laws and regulations and the management rules and agreements, have the right to require the person to discontinue such infringement, eliminate the hazards, clear away the obstructions and compensate the losses entailed. The owner whose lawful rights and interests are infringed on may bring a lawsuit to the people's court against such acts.

[33] Art. 286 CC The unit owners shall abide by laws, regulations, and the stipulations on management, and their relevant acts shall meet the requirements of conserving resources and protecting the ecological environment. With respect to the emergency measures and other management measures implemented by the government in accordance with law that are carried out by the property management service enterprise or other managers, the unit owners shall, in accordance with law, be cooperative.

[34] A management agreement is a legal act adopted by a developer and construction unit or all owners of premises in a building (housing association). It regulates rights, obligations and responsibilities of the owners. Typically, a management contract concluded by a development and construction unit is only temporary.

[35] 最高人民法院民法典贯彻实施工作领导小组， 中华人民共和国民法典物权编理解与使用 第286条，人民法院出版社，Beijing, 2020, pp. 421-427 [Supreme People's Court Civil Code Implementation Leading Group, *Interpreation and Application of Property Law under the Civil Code of the People's Republic of China, Art. 286*, People's Court Press].

[36] Id 28.

[37] 张牧遥，论自然资源使用权上公共价值的制度实现， 学术交流， 2021, vol. 2 [ZHANG M., *On systematic realization of public interest in the right to use of natural resources*, Academic Exchange].

[38] Art. 326 CC A usufructuary shall, when exercising his right, abide by the provisions of laws on the protection, rational exploitation, and utilization of resources and the protection of the ecological environment. The owner may not interfere with the exercise of such rights by the usufructuary.

under Chinese law is based on the right of use, so the user seeks the greatest possible material benefit. Thus, will not pay attention to the issues related to environmental protection.[39]

Art. 346 CC[40] has specific consequences for Chinese private law. Chinese real rights do not serve the purpose of private real estate market.[41] Under the PRC legal system, real estate cannot be owned by an individual. This goal is achieved by another property law institution– the right to use. In relation to land real estate, the exercise of the right of *usufruct* has equally important consequences as the exercise of ownership rights. In China, the use of the land property is carried out, particularly, through the right to use the land for construction purposes. This right contributed to the rapid development urbanization in PRC[42] – one of the major socio-economic challenges, impacting natural environment.[43] Thus, as public administration authorities allow for the intensive use of, e.g., agricultural land for construction purposes[44] special attention is drawn to the issues of spatial planning.[45]

Contract law

Traditional values of civil law protecting the autonomy of parties and market economy are evolving and begin to be replaced by others. The influence of the social justice values on the private law legislation is undeniable.[46] It leads to potential restrictions of the freedom of contract in exchange for, *inter alia*, protection of the "weaker" party. However, the implementation of the *Green Principle* within the obligation regime is problematic. Chinese legislator still saw

[39] 孙佑海，物权法与环境保护，环境保护，2007, vol. 5 [SUN Y., *Real rights and environmental protection*, Environmental Protection].
[40] Art. 346 The right to use a lot of land for construction purposes shall be created in conformity with the requirements for conservation of resources and protection of the ecological environment, and in compliance with the provisions of laws and administrative regulations on the planned use of the lot, and may not impair the rights to usufruct already created thereon.
[41] CHEN Z., *Contemporary Chinese Law*, China Prosecution Publishing House, Beijing 2009.
[42] The most radical form of overurbanization is probably the phenomenon of under-occupied developments in China – "ghost towns". *See* LI M., *Evolution of Chinese Ghost Cities – Opportunity for Paradigm Shift? The Case of Changzhou*, China Perspectives, 2017, vol. 1, pp. 69-78.
[43] LIU. T, *China's Urban Construction Land Development: The State, Market, Peasantry in Action,* Springer, Singapore, 2020, pp. 61-97.
[44] YU Z., WU C., TAN Y., ZHANG X., *The dilemma of land expansion and governance in rural China: A comparative study based on three townships in Zhejiang Province,* Land Use Policy, 2018, vol. 71, pp. 602-611.
[45] Id 34, Art. 346, pp. 734-739.
[46] MARINI G., *Some thoughts for a critical comparison in contract law*, Comparative Law Review, 2017, vol. 8 no. 1.

the need to adapt contract law, to another idea – ecology.

Art. 509 CC[47] defines basic rules for contract performance. Comparing to the previous legal regime[48], paragraph 3 was added, which is a sign of the *Green Principle.* Similarly, to the principle of good faith, *Green Principle* applies parties at the time of negotiation, submission of an offer, performance and termination of the contractual relationship as to avoid wasting environmental resources and polluting environment.[49]

Enactment of CC led to the amendment of the Art. 92 Contract Law of the PRC[50], which provided that after the expiration of contractual rights and obligations, parties shall act according to the principle of good faith, performing the obligations such as notification, mutual assistance and customary confidentiality. Currently, under the Art. 558 CC[51], previous post-contractual obligation was expended with the retrieval[52] obligation.[53]

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[47] Art. 509 CC The parties shall fully perform their respective obligations as contracted. The parties shall comply with the principle of good faith, and perform such obligations as sending notices, rendering assistances, and keeping confidentiality in accordance with the nature and purpose of the contract and the course of dealing. The parties shall avoid wasting the resources, polluting the environment, or damaging the ecology in the course of performance of the contract.

[48] Contract Law of the People's Republic of China (Adopted at the Second Session of the Ninth National People's Congress on March 15 1999).

[49] 最高人民法院民法典贯彻实施工作领导小组， 中华人民共和国民法典合同编理解与适用 第509条，人民法院出版社，Beijing, 2020, pp. 338-345 [Supreme People's Court Civil Code Implementation Leading Group, *Interpretation and Application of Contract Law under the Civil Code of the People's Republic of China, Art. 509*, People's Court Press].

[50] Contract Law of the People's Republic of China (Adopted at the Second Session of the Ninth National People's Congress on March 15 1999). Art. 92 After the termination of rights and obligations under a contract, the parties shall perform the duties of notification, assistance and confidentiality in light of the principle of good faith and in accordance with trade practices.

[51] Art. 558 CC After the parties' claims and obligations are terminated, the parties shall, in compliance with the principle of good faith and the like, perform such obligations as sending notification, rendering assistance, keeping confidentiality, and retrieving the used items according to the course of dealing.

[52] This is one of the examples of problematic translatory issues. Original Chinese version of the Art. 558 CC 债权债务终止后，当事人应当遵循诚信等原则，根据交易习惯履行通知、协助、保密、旧物回收等义务. The term in Chinese "回收" can be both translated to "recycling" and "retrieving". However, both terms in English lead to very different post-contractual obligation. However, due to the official translation available on the State Council website, it can be argued that for the purpose of Art. 558 CC, the meaning of "回收" stands for "retrieving". *See,* Art. 625 CC – translation and original version.

[53] The obligation to retrieve used items is to be considered comprehensively, considering; accepted commercial practices, expiry of claims, requirements established by laws and regulations, cost, as well as the convenience of the process. *See*, Id 48 Art. 558, pp. 603-612.

Art. 619 CC[54] specifies the method of sending the item as well as the method of packing the item of sale, it the seller is obliged to send it. This provision was enacted due to the robust development of the e-commerce sector. Online sales have led to an increase in the number of goods that need to be packed. This issue is related not only to the seller, but also to the buyer, who after receiving the goods must process the packaging elements of the sold goods. Chinese legislator decided to solve this problem at the source by establishing legal obligation for the seller. With the Art. 619 CC, unless there was no other individual agreement on the packaging method, the packaging of the sale item should be recyclable.[55]

Art. 625 CC[56] provides that the buyer has the right to require the seller to accept the object of sale after its expiry of service. An additional obligation of seller regards recycling[57] of the sale items such as electronical appliances, cars, lead-acid batteries. Art. 625 CC is seen to be the *pressure clause*, pushing for the optimization of produced items and adjusting the common commercial behavior of the parties of contracts.[58]

Under Art. 655 CC[59] if the recipient of energy does not use it in accordance with the legal acts and the contract, he is liable for damages. Customer's obligation to repair the damage arises when he breaches the relevant electricity regulations[60] and electricity sales contract. This provision distinguishes two forms of liability: administrative and civil liability. Civil law liability arises due to the violation

[54] Art. 619 CC A seller shall deliver the subject matter in compliance with the packaging method as agreed in the contract. Where there is no agreement between the parties on the packaging method or the agreement is unclear, if the packing method cannot be determined according to the provisions of Art. 510 of this Code, the subject matter shall be packed in a general way, or, in the absence of a general way, in a manner sufficient to protect the subject matter and conducive to saving resources and protecting the ecological environment.

[55] Id 48, Art. 619, pp. 976-978.

[56] Art. 625 CC Where, in accordance with the provisions of laws and administrative regulations or as agreed by the parties, the subject matter shall be recycled after expiration of its valid service life, the seller has the obligation to recycle the subject matter by himself or by an authorized third person.

[57] Compare with Id 51. Art. 625 CC依照法律、行政法规的规定或者按照当事人的约定，标的物在有效使用年限届满后应予回收的，出卖人负有自行或者委托第三人对标的物予以回收的义务.

[58] 段文晓， 民法典各分编(草案)中“绿色”革新之立法评析， 北京政法职业学院学报, 2019, vol. 2 [DUAN W., *Comments regarding the "green" innovations in the Civil Code*, Journal of Beijing Vocational College of Political Science and Law].

[59] Art. 655 CC A consumer shall use the electricity in a safe, economical and planned manner in accordance with the relevant regulations of the State and the agreement between the parties. Where a consumer fails to use the electricity in accordance with the relevant regulations of the State or the agreement between the parties, and thus causes losses to the supplier, the consumer shall bear the liability for compensation.

[60] Relevant electricity regulations – Energy Law of the People's Republic of China (Adopted at the Seventeenth Session of the Eighth National People's Congress on December 28 1995).

of relevant contractual clauses regarding energy saving and planning, while the burden of proof lies with the supplier.[61]

Tort law

Contrary to other civil law branches, tort law and civil liability has the greatest potential for establishment of environmental protection private law instruments[62]. During CC legislative works, there were discussions whether civil liability in environmental protection should be established under the Environmental Protection Law[63] or the CC. Ultimately, partly, due to the process of *greening of civil law* a separate Title in the Tort liability Book was established. The consequence is the establishment of the "polluter pays" principle and the order of responsibility for repairing environmental damage (firstly – perpetrator, secondly – State).[64]

Under Title VII Liability for Environmental Pollution and Ecological Damage, Chinese legislator made a distinction between two objects of delict: environment and ecological system (ecosystem).[65] Logic of the distinguishing above concepts under Art. 1229 CC[66] is that environmental pollution can lead to the destruction of the ecosystem and the destruction of the ecosystem can lead to the pollution of the environment.[67] Responsibility for damage caused by environmental pollution is divided according to the source of pollution: emissions of substances and energy emissions. However, the responsibility

[61] Id 48, Art. 655, pp. 1164-1167

[62] MATTEI U., QUATRA A., *The turning point in private law: Ecology, Technology and the Commons,* Elgar Studies in Legal Theory, Cheltenham 2019, pp. 121-146.

[63] Environmental Protection Law of the People's Republic of China (Adopted at the Eleventh Session of the Standing Committee of the Seventh National People's Congress, December 26 1989).

[64] 刘士国：民法典"环境污染和生态破坏责任"评析， 东方法学，2020, vol. 4, pp. 196-204 [LIU S., *Civil Code Commentary: liability for polluting environment and harming ecological system*, Eastern Legal Studies].

[65] Both terms are derived, detailed normative expression used in Art. 9 CC. "Environment" (环境) and "ecological system" (生态) under Title VII of CC Tort liability Book and "Ecological environment" (生态环境) under Art. 9 CC.

[66] Art. 1229 CC A tortfeasor who has polluted the environment or harmed the ecological system and thus causes damage to others shall bear tort liability.

[67] 王利明， 民法典中环境污染和生态破坏责任的亮点， 广东社会科学，2021，vol. 1 [WANG L., *Highlights of Environmental Pollution and Harming Ecological System under the civil liability in the Civil Code,* Guangdong Social Sciences].

for the destruction of the ecosystem relates to the object of damage, i.e.: biodiversity, landscape and forms of nature protection.[68]

Art. 1230 CC[69] specifies the burden of proof for the damage on the environment and ecosystem. Due to the nature of the environmental violations, the causal relationship and the collecting evidence are particularly complex. Thus, under Art. 1230 CC burden of proof was put on the perpetrator.

Under Art. 1231 CC[70], Chinese legislator decided to shape the responsibility on an individual basis depending on the scope and degree of damage to the ecosystem as well as the amount, type and concentration of emissions committed by perpetrators.[71]

Pursuant to Art. 179 CC[72] which sets the institution of punitive damages, the Art. 1232 CC[73] establishes specific liability for perpetrators. Enactment of punitive damages in a dispute arising from environmental pollution or ecosystem destruction in Art. 1232 results from the nature of the dispute – its subject matter and the length of the trial.[74] The application of punitive damages by the court is to be made only in special situations, provided that the relevant conditions are met.[75]

Art. 1233 CC[76] is an amendment to Art. 68 Tort Liability Law of the PRC[77]. Pursuant to the provision before enactment of CC, in the event of damage caused

[68] 最高人民法院民法典贯彻实施工作领导小组， 中华人民共和国民法典侵权责任编理解与适用 第1229条，人民法院出版社，Beijing 2020, pp. 500-516 [Supreme People's Court Civil Code Implementation Leading Group, *Interpretation and Application of Tort Law under the Civil Code of the People's Republic of China, Art. 1229*, People's Court Press].

[69] Art. 1230 CC Where any dispute arises from environmental pollution or ecological damage, the actor shall bear the burden to prove that he should not be liable or that his liability could be mitigated as provided by law, and that there is no causation between his act and the damage.

[70] Art. 1231 CC Where environmental pollution or ecological damage is caused by two or more tortfeasors, the extent of liability of each tortfeasor shall be determined according to the factors such as the type, concentration, and quantity of discharge of the pollutants, the way, scope, and degree of damage to the ecological system, and the impact of the act on the consequences of damage.

[71] Id 67, Art 1231, pp. 524-531.

[72] Art. 179 CC (..) Where punitive damages are provided by law, such provisions shall be followed.

[73] Art. 1232 CC Where a tortfeasor intentionally pollutes the environment or harms the ecological system in violation of the provisions of law, resulting in serious consequences, the infringed person has the right to request for the corresponding punitive damages.

[74] First, the damage must be done by the perpetrator when he is aware of the harmful effect of the behavior. Secondly, deliberate environmental pollution or destruction of the ecosystem must violate the law. Thirdly, the damage must have serious consequences which are harmful to the public interest. *See*, Id 67 Art. 1232, pp. 532-539.

[75] *Ibidem*.

[76] Art. 1233 Where environmental pollution or ecological damage is caused owing to the fault of a third person, the infringed person may claim compensation against either the tortfeasor or the third person. After making compensation, the tortfeasor has the right to indemnification against the third person.

[77] Tort Liability Law of the People's Republic of China (Adopted at the Twelfth Meeting of the Standing Committee of the Eleventh National People's Congress on December 26 2009).

by environmental pollution due to the fault of a third party, the aggrieved party may claim damages from both the perpetrator and the third party. As part of the CC regulations, the amendment distinguished the delict of environmental pollution and damaging ecosystem.

Lastly, both Art. 1234 CC[78] and 1235 CC[79] are *lex specialis* under Title VII. They jointly define the rights and obligations in public interest litigation. Art. 1234 CC sets special right for the public authorities and organizations authorized by law (social organizations, NGOs) – right to participate in the process of repairing damaged environment. Responsibility for repair rests directly on the perpetrator of the tort, where he is obliged to perform independent or commissioned repair within a reasonable time. However, in a situation where the perpetrator fails to perform the repair obligation in the prescribed period, fails to fully repair the natural environment, or the repair fails to meet the relevant requirements, the repair of the natural environment is to be performed by public administration agencies.[80]

Art. 68 For damages caused by environmental pollution through the wrongdoing of a third party, the infringed may seek compensation from the polluter and from the said third party. After making compensation, the said polluter shall be entitled to seek reimbursement from the said third party.

[78] Art. 1234 CC Where a tortfeasor causes damage to the ecological environment in violation of the State regulations and restoration is possible, the State authorized agencies or the organizations authorized by law have the right to request the tortfeasor to bear the responsibility for restoration within a reasonable period of time. Where the tortfeasor fails to restore it within the time limit, the State authorized agencies or the organizations authorized by law may initiate the restoration on its own or entrust it with others, provided that any expenses thus incurred shall be borne by the tortfeasor

[79] Art. 1235 CC Where ecological damage is caused in violation of the State regulations, the State authorized agencies or the organizations authorized by law have the right to request the tortfeasor to compensate the following losses and expenses: (1) losses caused by loss of service function from the time the ecological environment is damaged to the time the restoration is completed; (2) losses caused by permanent damage to the function of the ecological environment; (3) expenses for investigation, appraisal, and assessment of the damage to the ecological environment; (4) expenses for cleaning-up the pollution and restoring the ecological environment; and (5) other reasonable expenses incurred to prevent the occurrence or aggravation of the damage.

[80] Even before the enactment of the CC, the Supreme People's Court determined the content of compensation for environmental damage due under civil liability. However, due to the *greening of civil law*, the Chinese legislator enumerated the claims of public administration bodies and social organizations from tortfeasor under Art. 1235 CC. *See*, Id 67 Art. 1234-1235, pp. 548-576 and 最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释 [Supreme People's Court, *Interpretation of Several Issues concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigation Cases*], https://www.court.gov.cn/zixun-xiangqing-13025.html] (access: 20.01.2022).

CONCLUSION

Importance of the sustainable development policies is unquestionable. The influence of its elements, such as environmental protection and environmental sustainability into private law can of course be purely considered from the perspective of *publicization of private law*. Nonetheless, a consequence of the assumption of sustainable developments' holistic nature is its appropriate adaptation into the legal system, applying both to the public and private law. Chinese private law regime proposes this type of approach.

Seems that the most interesting implications are related to the very establishment of the *Green Principle*. Enactment of Art. 9 CC implemented non-traditional private law value-norm into the legal system. This approach is a breakthrough. It opens a gateway that allows for direct shaping of civil law relationships, considering environmental protection. *Green Principle*, even if it aims for the positive transformation of the whole private law value system, might bring unignorable risks, even for a cross-border trade. From jeopardizing the individual autonomy in civil activities[81] to the possibility of the parties argumentation that their position is more environmentally friendly than the other. Moreover, application of Art. 9 CC, with its general phrase to "act in a manner that facilitates conservation of resources" creates the possibility of free recognition by the judiciary, potentially limiting the market freedom. Considering the role of the PRC judiciary in the policy implementation process[82], the *Green Principle* may pose a real threat to judicial practice, leading to an increased State intervention in the sphere of private law.

Assessing the importance of the *greening of private law* phenomenon in the Chinese context is difficult to examine from a purely dogmatic point of view. Firstly, in general, it is due to the nature of Chinese in-development legal system, its vagueness and generality.[83] Moreover, it is required to consider the specificity of the PRC legal system. As an example, the issues raised within the property law are generally related to the specifics of Chinese land property ownership, with the probable *ratio lege* of shifting the burden of environmental protection responsibility from the state administration to the real estate developers.

[81] 樊勇， 私人自治的绿色边界，华东政法大学学报， 2019, vol. 2, pp. 116-123 [FAN Y., *The Green Boundaries of Private Autonomy*, Eastern China University of Political Science and Law Journal].

[82] ZHU M., *The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?*, Transnational Environmental Law, 2021, pp. 1-21.

[83] CAO D., *Chinese Law a Language Perspective*, Routledge, New York 2016, pp. 94-102.

Secondly, due to inaccuracies regarding the theoretical assumptions of the *Green Principle*. This is related not only to the *Green Principle* itself, but also its place in the system as the fundamental principle of civil law – its notion, meaning and interaction with other principles.[84] However, it might be possible in a few years after the establishment of jurisprudence and development of legal research of CC. Nonetheless, as of today, this is not entirely possible. Perhaps the establishment of the *Green Principle*'s *lex specialis* in contract law together with the principle of good faith and their interaction between each other will contribute to such discussions.

Finally, *greening of civil law* and *Green Principle* can be regarded not only from the standpoint of legal sciences but also from the other social sciences perspective – as an instrument of social engineering, e.g., manipulating the social behavior (*social pressure clause*) or influencing the environmental awareness of lawyers. Thus, introducing such a powerful abstract into the system should not be ignored by the comparative law discipline. Especially today, in the era of common-worldwide challenges bold and innovative solutions should be sought.

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JAKUB ZWIERZCHOWSKI

OCHRONA ŚRODOWISKA A KODEKS CYWILNY CHIŃSKIEJ REPUBLIKI LUDOWEJ – HOLISTYCZNY INSTRUMENT ZRÓWNOWAŻONEGO ROZWOJU

Streszczenie: Współcześnie zrównoważony rozwój uważany jest za jedną z kluczowych polityk państw na całym świecie. Jego charakter i podstawowe założenia prowadzą do implementacji w ramach różnych gałęzi prawa, zarówno publicznego jak i prywatnego. W 2020 r., w Chińskiej Republice Ludowej ustanowiono pierwszy w historii Kodeks cywilny. Oprócz samego tego faktu, należy również zwrócić na jego innowacyjną zawartość – holistyczne podejście do niektórych elementów zrównoważonego rozwoju. W Chinach zjawisko to jest określane mianem *zielenienia prawa prywatnego* i prowadzi do implementacji nietypowych wartości dla prawa prywatnego. Celem niniejszego opracowania jest przedstawienie i analiza nowo powstałego instrumenty prawnego w ramach Chińskiego Kodeksu Cywilnego – Art. 9 tzw. Zielonej Zasady i jej szczegółowych przepisów w ramach odrębnych Ksiąg Kodeksu, dotyczących: praw rzeczowych, praw obligacyjnych i czynów niedozwolonych.

Słowa kluczowe: zrównoważony rozwój, prawo prywatne, ochrona środowiska, kodeks cywilny, Chiny

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THE LEGAL POSITION OF THE MEDIATOR UNDER AUSTRIAN AND POLISH LAW – A COMPARATIVE ANALYSIS

Summary: Austria was a European country to systematise the regulations of mediation in the civil matters. The mediation model adopted in ZivMediatG can serve as an example for improving Polish regulations of mediation. The article analyses the status of a mediator in terms of formal requirements and attempts to describe regulations of mediator's position in the Austrian law.

Keywords: mediation, alternative dispute resolution, Austrian law, mediator

INCRODUCTION

The current Austrian regulation of mediation as a method of dispute resolution dates back to 1994/1995[3], when pilot projects, initiated in 1993 by the Ministry of Justice and the Ministry of Family Affairs, were launched in the courts of Vienna and Salzburg. Development of statutory regulation of mediation began after submitting a report to the parliament in 1997. It should be emphasised that the project was carried out with the great participation of experts and practitioners. In 1999, the legislation was introduced to regulate the

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[3] RECHBERGER W. H., *Mediation in Austria*, „Ritsumeikan Law Review" 2015, No. 32, p. 65.

mediation in the family law – matrimonial issues; and then, in 2001, the scope of mediation was extended to parental issues. The experience of Austria shows high usefulness of mediation in family law disputes, which influenced the expansion of the jurisdiction of the mediation institutions. The previous achievements of the Austrian mediation practice and the positive reception of the institution of mediation led to the adoption of the Act on Mediation in Civil Matters in 2003. There was an extensive public consultation on the draft while the law was being developed.[4]

The Austrian model of regulating the mediator profession, which was developed as a result of this country's experience, differs from the Polish model. The positive experience of Austria could be the basis for considering an amendment to the Polish model of mediation regulation.

AUSTRIAN CIVIL MEDIATION

Mediation in Austria has generally stated a goal of conflict "resolution". Mediation can be used to resolve conflicts in various spheres of life; in the case of the Austrian Civil Mediation Act, its scope is limited to the matters of the civil law.[5] It regulates the conduct of mediation in cases for which the civil courts have jurisdiction. The Austrian Civil Mediation Act (ZivMediatG) contains detailed provisions, including the detailed provision on the Mediation Advisory Board, list of mediators, rights and obligations of registered mediators, suspension of time limits and training for mediators.[6] The implemented framework emphasises the volitional character of the parties in resolving their disputes and the development of a solution by the parties - with the help of a neutral, independent third party.[7] The Austrian model incorporates an elective form of dispute resolution, including mediation. The parties are free to choose the mediator.[8] The Austrian model assumes a facultative form of participation in the mediation. The courts cannot force mediation participants to take action to end the conflict in mediation

[4] HOPF G., *Gerichtsexterne Mediation: Erfahrungen mit dem österreichischen Mediationsgesetz,* „Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law" 2010, No. 74(4), p. 760.
[5] *Ibidem*, p. 761.
[6] STEFFEK F., *Rechtsvergleichende Erfahrungen Für Die Regelung Der Mediation*, „Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law" 2010, No. 74(4), p. 848.
[7] RECHBERGER W. H., *Mediation in…*, *op. cit.*, p. 61.
[8] SCHUSTER M., *Die Auswahl eingetragener Mediatoren in Österreich. Das Prinzip der freien Wahlmöglichkeit*, „Die Mediation" 2018, No. IV, p. 72.

or to choose this procedure.[9] This is reflected in the case law of the Oberste Gerichtshof.[10]

The Austrian system allows mediation outside of the system contained in the Civil Mediation Act (ZivMediatG).[11] The entry into the list of mediators is made by administrative procedure.[12] It should be emphasised, however, that mediation by persons outside the list of mediators maintained by the Minister of Justice does not enjoy the privileges contained in the Act.[13] The act mainly regulates the profession of mediator by creating a list of mediators, setting up training requirements and defining a mediator's rights and obligations. This list is available through an online system maintained by the Minister of Justice. The list shows the mediator's name, education, address, date of birth, specialisation, contact details, and optionally the languages in which the mediator mediates, as well as a photograph of the mediator.

The Austrian legislator's approach to mediation is outlined at this point. Mediation in the Austrian law is regulated through the prism of the mediator. In the case of Polish legislation, the Polish legislator has regulated the function of the mediator in several regulations. The legal position of the mediator is regulated in Article 183^2 of the Code of Civil Procedure, and the matter of his or her impartiality in the following Article 183^3. The requirements for permanent mediators are contained in Article 157a of the Act on the Common Court System. It should be acknowledged that most legislators in European countries have not introduced a legal definition of mediation.[14]

The Austrian legislator has defined mediation as "an activity based on the voluntariness of the parties in which a neutral intermediary (mediator), trained in mediation, using recognised methods systematically promotes communication between the parties in order to enable the parties to resolve the conflict on their own responsibility. This definition has been positively evaluated by researchers.[15]

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[9] MAYR P. G., *Alternative Dispute Resolution (ADR) in Austrian and European Law*, [in:] *Cross-border civil proceedings in the EU*, Rijavec V., Ivanc T. (red.), Maribor 2011, p. 6.

[10] Ruling of Oberste Gerichtshof (Supreme Court) of 26. April 2017 r., ref. 7Ob46/17s, Rechtsinformationssystem des Bundes.

[11] MAYR P. G., *Alternative Dispute…*, *op. cit.*, p. 6.

[12] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 766.

[13] GREGER R., *Qualitätssicherung der Mediation im internationalen Vergleich*, „JuristenZeitung", 2011, no. *66* (5), p. 230.

[14] FEEHILY R., *Commercial Mediation: Commercial Conflict Panacea or an Affront to Due Process and the Justice Ideal?*, „The Comparative and International Law Journal of Southern Africa" 2015, No. 48(2), p. 348.

[15] CAPONI R., *"Just Settlement" or "Just About Settlement"? Mediated Agreements: A Comparative Overview of the Basics*, „Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law" 2015, no. *79*(1), p. 130.

The Austrian Mediation Act (ZivMediatG) does not have a definition of mediator. According to § 3 (1) (2) of the ZivMediatG, only persons entered in the list of mediators maintained by the Minister of Justice are defined as mediators. The list consists of circa 2000 mediators.[16] It should be emphasised, however, that persons conducting mediation that is not mediation in the terms of the Act are outside the scope of the Act.[17] Mediators who are not included in the list must clearly inform the parties.[18] A model based on a nationwide list of mediators is described by academics as a centralised model.[19]

The Act stipulates formal requirements that determine which persons can be registered as mediators. Section 9 of the Austrian Act on Mediation (ZivMediatG) sets out the requirements for mediators.[20] The Austrian legislator has specified four requirements for enrolment as a mediator: age, relevant qualifications, being a trustworthy person and having adequate insurance.[21] The reasoning behind this regulation is to ensure that the mediator has sufficient life experience and maturity. In addition, as stated in § 11 (2) sentence 2 of the Austrian Act on Mediation (ZivMediatG), the mediator must not have any criminal record. A clean criminal record is not mandatory if the applicant is engaged in other activities that require clean criminal record. This certificate must not have been issued three months before the application is made to the Minister of Justice. The Austrian legislator has set the age limit for acting as a mediator at the minimum age of 28.

Section § 9 (2) of the Austrian Act on Mediation (ZivMediatG) also indicates the obligation to have suitable premises for mediation. As explained in the legislative intent statement of the draft, this is required for practical reasons. The explanatory memorandum uses the example of family mediation, where it is pointed out that a neutral venue helps to conduct mediation.

An important provision from the point of view of comparing the Polish and Austrian regulations is § 10 (1) Austrian Act on Mediation, which states that only those who have completed certified courses that meet the requirements of § 29 Austrian Act on Mediation are qualified.[22] An important aspect of assessing the qualifications of persons applying to be a mediator is to take into account the knowledge and skills that representatives of certain professions have acquired

[16] SCHUSTER M., *Die Auswahl…*, *op. cit.*, p. 72.
[17] MAYR P. G., *Alternative Dispute…*, *op. cit.*, p. 6.
[18] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 766.
[19] STEFFEK F., *Rechtsvergleichende…*, *op. cit.*, p. 876.
[20] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 765.
[21] MAYR P. G., *Alternative Dispute…*, *op. cit.*, p. 6.
[22] *Ibidem.*

before applying to be a mediator. It should be pointed out here that the Austrian legislator was listed, among the others legal professions, psychologists, experts, academic lecturers - although in the explanatory memorandum to the law it indicated that this is not a closed list, and each case must be individually examined. Importantly, the Austrian legislator has stipulated the need for the confirmation of membership of certain professional groups, e.g., a group of attorneys or the confirmation of an academic title.

For training in the postgraduate system for lawyers, mediation is one of the optional pathways.[23] An important element of mediation regulation in Austria is the training system. In the explanatory memorandum to the draft law, it was indicated that the ability to mediate in civil matters can only be acquired through comprehensive, targeted training. The assessment of professional qualifications is based on a regulation in which the Minister of Justice lays down more detailed rules on the training of mediators.[24] The training system was based on an interdisciplinary approach.[25] The Austrian legislator assumed a division of the training into theoretical and practical parts. The legislator determined the number of time units for training between 300 to 500.[26] The content of the training (the division) was based on the remarks of the experts. The theoretical part includes: "an introduction to the issues of the history and development of mediation, including its basic assumptions and guiding principles; the process, methods and stages of mediation, with particular emphasis on the negotiation and solution-seeking approach; fundamentals of communication, in particular techniques of communication, questioning and negotiation, discussion and moderation, with particular emphasis on conflict situations; conflict analysis areas of application of mediation; personality theories and psychosocial forms of intervention; ethical issues in mediation, in particular the position of the mediator; legal, especially civil, issues of mediation as well as legal issues of conflicts particularly vulnerable to mediation".

While the practical part involves: "individual self-awareness and practical seminars to practise mediation techniques using role-play, simulation and reflection; peer group work; case work and accompanying participation in practice supervision in the field of mediation". The training of mediators is carried out through special courses included in a list maintained by the Minister

[23] RECHBERGER W. H., *Mediation in…*, *op. cit.*, p. 67.
[24] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 765.
[25] ALEXANDER N., *Mediation in Civil Procedure – A Comparative Perspective*, ssrn.com/abstract=3756846 (access: 13.02.2022).
[26] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 765.

of Justice.[27] The explanatory memorandum emphasised that the training work should be conducted in groups of appropriate size.

The Austrian model also provides for continuous upkeep of the mediators' competence. Mediators are registered on the list for a period of five years. It is possible to extend the period of being a mediator within the terms of the Austrian Act on Mediation, for a period of 10 years. The application for extension shall be submitted no more than one year before the expiration date of the inclusion in the list and no more than three months after the expiry. A mediator must meet the initial requirements for mediation in order to remain on the list. The Austrian legislator has also opted for an obligation to further develop the professional qualifications of mediators. § Section 20 of the Austrian Act on Mediation regulates the obligation of mediators to receive training, in mediation, of at least 50 hours over a period of five years.[28]

In the mediation, the Austrian approach assures that the mediator remains unaffiliated with either party. This is emphasised by § 1(1) of the Austrian Act on Mediation indicating that the mediation is conducted by a neutral mediator. In addition, the provisions of the Austrian Act on Mediation exclude the mediator's participation if he or she was a party, party representative, advisor, or decision-making body in the conflict between the parties.[29] It should be pointed out that some academics consider this regulation being general.[30]

The main advantages of mediation conducted within the Austrian Act on Mediation are the protection of confidentiality and suspension of time frames, which does not occur in mediation not conducted within the ZivMediatG. The doctrine additionally adds to the advantages, due to the opinion of practitioners, also the obligation of continuous training.[31] The commencement and proper continuation of mediation by a registered mediator suspends the commencement and continuation of the statute of limitations and other time frames provided for the commencement of legal proceedings and the assertion of rights that are the subject of mediation. In mediations outside the Austrian Act on Mediation (ZivMediatG), the time limits for court

[27] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 769.
[28] SCHUSTER M., *Fortbildungsnachweis Intervision*, „Die Mediation", 2020, no. II, p. 78.
[29] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 764.
[30] GREGER R., *Qualitätssicherung der…*, *op. cit.*, p. 231.
[31] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 778.

proceedings continue to run, despite the ongoing mediation.[32] [33]

The Austrian Act on Mediation (ZivMediatG) also regulates previously mentioned confidentiality.[34] According to § 18 of the Austrian Act on Mediation (ZivMediatG), the mediator "shall be obliged to keep secret the facts which were entrusted to him, or which became known to him in the course of the mediation." This obligation extends to the court proceedings.[35] This makes it impossible for the parties to infer evidence resulting from the mediation. The mediator's liability, in the event of a disclosure, is not excluded under any circumstances; this also applies to court proceedings and to extraordinary situations, for example, where the mediator's life is in danger. Persons who cooperate with the mediator are also subject to this obligation.[36] § Section 31 introduces a penalty for disclosing or making use of facts that originate from the mediation and thus violate a person's legitimate interest, will be sentenced by the court to imprisonment of up to six months.

The Austrian legislator has also opted for the need to insure that in order to prevent possible claims related to the mediator's activity, the mediator has an obligation to conclude a liability insurance contract.[37] In order to practise as a "registered" mediator, a mediator must have such a policy.[38] The insurance must be valid for the entire duration of the person's work.[39] The insurer must be authorised to do business in Austria, the sum insured per case must be at least 400,000 euro and exclusion or suspension of liability is not possible. The amount was deemed appropriate by the Austrian legislator for reasons of proportionality between the premiums and the need to safeguard the parties.

It is also worth to note the existence of a mediation council in Austria, which the legislator has equipped with consultative competences towards the minister. It is not composed exclusively of representatives of the legal profession, including for example psychologists. Moreover, it also consists of representatives of mediation associations. It is worth emphasising that the Austrian legislator has specified that the council would have a role in the certification of the mediation centres, and in the selection of mediators.

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[32] RECHBERGER W. H., *Mediation in…*, *op. cit.*, p. 64.
[33] MAYR P. G., *Alternative Dispute…*, *op. cit.*, p. 7.
[34] STEFFEK F., *Rechtsvergleichende…*, *op. cit.*, p. 875.
[35] RECHBERGER W. H., *Mediation in…*, *op. cit.*, p. 65.
[36] *Ibidem.*
[37] MAYR P. G., *Alternative Dispute…*, *op. cit.*, p. 6.
[38] GREGER R., *Qualitätssicherung der…*, *op. cit.*, p. 232.
[39] HOPF G., *Gerichtsexterne Mediation…*, *op. cit.*, p. 771.

POLISH LAW PERSPECTIVE

Polish law is less comprehensive in regulating the profession of mediator. In accordance with Article 183^2 § 1, a mediator can be a natural person who has full legal capacity and enjoys full public rights. Full legal capacity is held by any adult who is not incapacitated. A person who has reached the age of 18 is considered an adult. An exception is a minor who as a result of marriage (Article 10-15 of the Civil Code) acquires the age of maturity and does not lose it if the marriage is invalidated.[40] In the second paragraph, the legislator additionally excluded the possibility of mediation by judges.[41]

In the case of the Civil Procedure Code, the legislator has not additionally regulated the mediator. He provided for broader regulation in the case of permanent mediators in the Law on the Common Court System, indicating additional requirements for mediators.

The solutions concerning mediators introduced on 1st of January 2016 are a response to the objections raised that the requirements concerning the person of the mediator (Article 183^2 § 1 and 2 of the Code of Civil Procedure) are too liberal. The intention of the legislator was to enhance the prestige and quality of mediation.[42] The legislator in regard to the CCP has indicated the requirements related to knowledge and skills of conducting mediation. He has increased the age requirement to a minimum of 26 years of age. He has introduced the obligation to know the Polish language, own a clean criminal record and be entered in the list of permanent mediators kept by the presidents of the district courts.[43]

Article 157b § 1 of the Act on the system of common courts provides that entry in the permanent mediators' list is to be made by the president of a district court by way of a decision issued at the request of the person seeking entry. The application for the entry in the permanent mediators' list under the Article 157b § 2 of the Act on the system of common courts must be accompanied by statements or documents attesting to compliance with the conditions referred to in Article 157a points 1-5 of the Act on the System of Common Courts.

[40] STEFAŃSKA E., [in:] *Codes of Civil Procedure. Commentary. Tom I. Art. 1-477(16)*, M. Manowska (ed.), Warsaw 2021.
[41] TELENGA P. [in:] *Codes of civil procedure. Volume I. Commentary to Articles 1-729*, A. Jakubecki (red.), Warsaw 2017.
[42] *Ibidem*
[43] GAJDA-ROSZCZYNIALSKA K., FLEJSZAR R., *Organisational aspects concerning mediation* [in:] *Mediation. Theory, norms, practice*, Araszkiewicz M., Czapska J., Pękala M., Płeszka K. (eds.), Warsaw 2017.

However, the Polish legislators have neither specified how to define knowledge and skills in mediation, nor have they specified how to verify the knowledge requirement. It should be noted here that in the justification for the amendments, the legislator pointed precisely to the verification of competence as an important goal of the amendments draft.[44] An issue raised in the doctrine is the inability of Presidents of District Courts to verify the documents submitted by mediators.[45]

The WSA in Poznań, interpreting the provisions of the Act on Proceedings in Common Courts, stated that: "For the above reasons, when interpreting this provision systemically, it must be considered that this "knowledge" provided for by the Act must be at a level that distinguishes the candidate for permanent mediator from other mediators. On the other hand, "mediation skills" should be understood as the proven experience that an incumbent mediator should possess. The President of the District Court, by his decision on entry in the list of permanent mediators, confirms to the parties to the proceedings with his own authority that a given person not only has the knowledge and skills necessary for the parties to reach a settlement, but also the public confidence to resolve their disputes."[46]A different position in relation to the WSA verdict is indicated by some doctrine representatives.[47] A similar position has been expressed by the administrative courts.[48] The doctrine points out the great imprecision of the legislator regarding the requirements.[49]

RECOMMENDATIONS ARISING FROM THE COMPARATIVE STUDY

A comparative analysis of Austrian and Polish mediation law reveals significant differences in the degree to which the institution of mediation is regulated, which may indicate a need for reform in the Polish legal system. In particular, Austrian legislation provides an extensive structure for the

[44] DĄBROWSKI M., *Mediation in accordance with the provisions of the Code of Civil Procedure*, Lublin 2019, p. 80.
[45] *Ibidem.*, p. 93-99.
[46] Ruling of the WSA in Poznań of 25 January 2018, ref. III SA/Po 634/17, LEX no. 2490704.
[47] DĄBROWSKI M., Mediation in…, *op. cit.*, p. 101.
[48] Ruling of the WSA in Gliwice of 1 March 2017, ref. III SA/Gl 1487/16, Ruling of the WSA in Poznań of 25 January 2018, ref. III SA/Po 634/17
[49] DĄBROWSKI M., *Criterion of knowledge and skills as a requirement for permanent mediators - gloss to the judgement of the Voivodeship Administrative Court in Poznań of 25 January 2018, ref. III SA/PO 634/17*, „Studia Prawnicze KUL" 2019, no. 79(3), p. 212.

mediation institution, encompassing mediator qualifications, which presents a prospective blueprint for Poland. The implementation of amendments to the Polish regulations has the potential to enhance the popularity, trustworthiness, and effectiveness of mediation within the Polish legal system. Nonetheless, it is essential to consider the implementation of specific solutions.

The allocation of the administration of mediation lists between the presidents of different district courts may also be questionable, which can make mediators' qualifications inconsistent in Poland.[50] The Polish regulation favours, in contrast to the Austrian one, the possibility of having different standards for permanent mediators.

The lack of a requirement for civil insurance also raises serious doubts. It should be pointed out here that the Polish legislator might be following the example of the Austrian legislator. However, it should be stressed that the amount specified by the Austrian legislator may raise doubts when transposed to the Polish regulations.

On the basis of an analysis of Austrian regulations, one should also consider requiring a uniform list of permanent mediators, maintained by a central authority, and professionalising the training program. Some mediation centres can serve as a good practice for developing regulations concerning the system of training mediators. Polish legislators should follow some of the Austrian solutions in order to ensure higher quality and popularity of mediation, as well as its highest possible quality. As Alexander N. states: „With the global trend towards the institutionalisation of mediation, national law and legal systems will continue to exert a greater influence on the practice of mediation. Simultaneously, converse trends towards globalisation and seamless transacting require flexible dispute resolution processes that transcend national systems."[51] For these reasons, it is important to draw on the experience of other countries, particularly the leader in mediation in Europe, Austria, in order to improve the institution of mediation.

The key elements of the Act include the voluntary nature of mediation, the neutrality of the mediator, the confidentiality of mediation and, furthermore, the empowerment of the Ministry of Justice to keep a list of registered mediators and to create official centres for their training and education, which could serve as a model for the Polish legislator. Mediation will develop farther, and for that reason alone appropriate legislative action is required.

[50] *Ibidem*, p. 211.
[51] ALEXANDER N., *Mediation in…*, *op. cit.*

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POZYCJA PRAWNA MEDIATORA W PRAWIE AUSTRIACKIM I POLSKIM – ANALIZA PORÓWNAWCZA

Streszczenie: Austria była jednym z państw europejskich, które usystematyzowało regulacje dotyczące mediacji w sprawach cywilnych. Model mediacji przyjęty w ZivMediatG może stanowić wzór do prac nad poprawą polskiej regulacji mediacji. Artykuł stanowi analizę statusu mediatora pod względem wymagań formalnych oraz jest próbą opisu regulacji pozycji mediatora w prawie austriackim.

Słowa Kluczowe: mediacja, alternatywne rozstrzyganie sporów, prawo austriackie, mediator

The book you are reading is a product of a conference with the same name – Contemporary Issues and Challenges for Private Law – that took place on 21-22 October 2021. The conference was organised by the Civil Law Scientific Circle "Sapere aude!" at the Faculty of Law and Administration at the University of Silesia in Katowice, Poland. Due to the COVID-19 pandemic, the conference was held online, which allowed it to gather highly prominent civil law professors from all over the world.

[...]

The topics presented in the monograph refer to contemporary issues for private law in a broad perspective. This book therefore covers a broad scope of problems, including competition law, the GDPR, tourism legislation, mediation, environmental protection, warranty issues and more.

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