

TARAS SHEVCHENKO  
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# ACCESS TO JUSTICE IN EASTERN EUROPE

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and in Poland:  
Constitutional and European Legal Aspect  
in the Context of Independent Judiciary

Joanna May, Małgorzata Małczyk  
European Small Claims Procedure  
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### **Legal Practice**

Mykhaylo Shepitko  
Counteraction to Miscarriage  
of Justice in Ukraine

# ACCESS TO JUSTICE IN EASTERN EUROPE

*Supported by Law Faculty, Taras Shevchenko National University of Kyiv*

AJEE is an English-language journal covering various issues relating to access to justice and the right to a fair and impartial trial. The specific area of AJEE is East European law of such countries as Ukraine, Poland, Lithuania and other countries of the region due to special features of legal traditions' evolution. While preserving the high academic standards of scholar research, we also give the opportunity to young legal professionals and practitioners to present their essays of the most current questions.

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## ABOUT ISSUE 2/2019

This AJEE Issue 2 (3) contains research articles related to current topical reforms in the judiciary and procedural legislation development in Ukraine and Poland, prepared by academics and practitioners. The main goal of these reforms directs to increasing the level of trust to justice, as well as to ensure the efficiency and effectiveness in litigation.

Therefore, this Issue starts with a prominent essay written in cooperation by **Grzegorz Borkowski** from Poland and **Olga Sovgyria** from Ukraine, investigating various problems of judicial independence ensuring during the recent reforms in both countries and comparing it with the generally acknowledged international and European standards.

The next article is related to one significant issue of the EU and national procedural legislation of Member-States' interaction, in particular, European Small Claims Procedure and Polish civil procedure, prepared by **Joanna May** and **Malgorzata Malczyk**.

European Civil Procedure undoubtedly is a significant and fast-developing area of procedural law due to unique possibilities of cross border litigation for all the claimants in all of the EU Member-States courts according to the same procedure. Nevertheless, partly the procedural issues of national legislation play an important role in access to genuine European justice.

One more article in the current Issue is written by **Katarzyna Gajda – Roszczyńska** related to the interaction of national civil procedure and European civil procedure, in particular, the abuse of procedural rights in Polish and European civil procedure law within the notion of private and public interest.

Procedural law seems quite formal for participants due to all rules and requirements to documents. Will it violate the right to court and access to justice for humans? **Agnieszka Golab** has answered this question and shared her research results concerning the inadmissibility of civil proceedings and the so-called absolute procedural prerequisites.

The problem of the counteraction to miscarriage of justice in Ukraine is raised in the essay written by **Mykhaylo Shepitko**. The author highlighted this problem in three ways: from criminal law, criminal procedure and criminalistics' s area sides.

On behalf of the Editorial and Advisory Boards of the Journal, I would like to share our latest achievements, recognized by the well-known databases and the directory: our Journal has been included in the **Directory of Open Access Journals (DOAJ)**, indexed in **ERIH Plus** and listed in **Hein Online**.

This surely happened due to the fruitful cooperation of our team and all our prominent authors and reviewers, who help us to develop. We sincerely hope, that this news inspires all of us greatly and we will continue to work diligently!

Chief-Editor **Iryna Izarova**,  
Professor, Law Faculty,  
Taras Shevchenko National University of Kyiv, Ukraine



# CURRENT JUDICIAL REFORM IN UKRAINE AND IN POLAND: ONSTITUTIONAL AND EUROPEAN LEGAL ASPECT IN THE CONTEXT OF INDEPENDENT JUDICIARY

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Summary: 1. Introduction. – 2. The Judicial System of Poland at the Present Stage. – 2.1. Constitutional Tribunal. – 2.1.1. Composition of the Constitutional Tribunal. – 2.1.2. Refusal of Publication of Certain Judgments of the Constitutional Tribunal. – 2.2. The Common Courts System. – 2.2.1. Merger of the Functions of Minister of Justice and Prosecutor General and its Consequences. – 2.2.2. Court directors. – 2.2.3. Random Allocation of Cases. – 2.2.4. Judicial Appointments. – 2.2.5. Secondment of Judges. – 2.2.6. Appointment and Dismissal of Court Presidents. – 2.3. Supreme Court. – 2.3.1. Extraordinary Complaint (Article 86). – 2.3.2. Changes in the Structure of the Supreme Court. – 2.3.3. Lay Judges. – 2.3.4. Changes in Disciplinary Proceedings in Respect of the SC and the Common Judiciary. – 2.4. National Council for Judiciary. – 2.4.1. Entrusting the Sejm with the Competence to Elect the Members of the Council. – 2.4.2 Termination of Office of the Current Members of the Council. – 3. Judicial Reform in Ukraine in 2016: Problems of Implementation. – 3.1. General Characteristics of the Judiciary in Ukraine. – 3.2. Status of the Constitutional Court of Ukraine: Main Innovations. – 3.2.1. Statutory Aspect of the Independence of the Constitutional Court of Ukraine. – 3.2.2. Functional Aspect of the Independence of the Constitutional Court of Ukraine. – 3.2.3. Financial Aspect of the Independence of the Constitutional Court of Ukraine. – 3.3. Status of the Supreme Court and Courts. – 3.3.1. Statutory Aspect of the Independence of the Supreme Court and Courts of General Jurisdiction. – 3.3.2. Functional Aspect of the Independence of the Supreme Court and Courts of General Jurisdiction. – 3.4. Status of the High Council of Justice. – 3.4.1. Statutory Aspect of the Independence of the High Council of Justice. – 4. Concluding Remarks.

*Since the Revolution of Dignity in 2014, Ukraine has been carrying out revision and bringing to conformity with international standards of legislation in terms of judicial system and legal procedure. On 2 June, 2016 the law amending the Constitution of Ukraine in the part of justice, as well as the Law of Ukraine 'On Judicial System and Status of Judges' was adopted. On 13 July, 2017 a new Law of Ukraine 'On the Constitutional Court of Ukraine' was adopted. In the middle of December 2017, the election to the Supreme Court finished and its new composition was formed, at the same time the revision of all procedural codes took place. However, one of the main problems of the judiciary in Ukraine has been the problem of the judicial independence as a whole and in the part of independence of judges. The subject of this research is the question of judicial independence in the context of respective international standards.*

*Similarly, the aim of part of the paper about the judicial system of Poland is to show the legislative changes regarding the judiciary which took place in Poland recently, i.e. within the last 3 years. As the ongoing changes of functioning, competence and organization of the Constitutional Tribunal, common courts, the Supreme Court and the National Council of Judiciary have been observed and commented upon by various European institutions, they will be shown in relation to the common European standards regarding the judicial independence presented in opinions and reports of Venice Commission, European Network of Councils of Judiciary and Consultative Council of European Judges.*

*Keywords: Judicial System of Poland and of Ukraine, Judicial Reform, European Standards of Justice.*

## 1. INTRODUCTION

The axiom of modern constitutionalism is that the independence of judges and the judicial system as a whole is the first and most important guarantee of the right to a fair trial, which is guaranteed by the European Convention on Human Rights of 1950.<sup>1</sup> According to paragraphs 2 and 3 of Magna Carta of Judges (Fundamental Principles),<sup>2</sup> judicial independence and impartiality are essential prerequisites for the operation of justice. Judicial independence shall be statutory, functional and financial. Recommendation № 94 (12) emphasizes (in the first sentence of Principle 1.2) that 'the independence of judges should be guaranteed pursuant to the provisions of the Convention [for the Protection of Human Rights and Fundamental Freedoms] and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law'.<sup>3</sup> Thus, we try to

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1 The European Convention on Human Rights and Fundamental Freedoms of 04 November 1950, ratified by Ukraine with reservations on 17 July 1997 < [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) > accessed 4 May 2019.

2 Magna Carta of Judges (Fundamental Principles), Consultative Council of European Judges (CCJE), 17 November 2010, Strasbourg <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 4 May 2019.

3 Opinion No. 1 (2001) of the CCJE for the attention of the Committee of Ministers of the Council of Europe (CMCE) on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation No. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields), 23 November 2001, Strasbourg <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 4 May 2019.

show the state of the legislative regulation and the problem of the realization of the principle of independent modern judicial system of Poland, basing on the European standards presented by different international bodies, whereas of Ukraine on the basis of the abovementioned criteria: statutory, functional and financial.

The methodology of this study is of complex nature and includes dialectic, comparative, legal, systemic, logical, formal, structural and functional methods of scientific research.

In order to establish the limits of this research, it should be noted that the functioning of courts of general jurisdiction is the subject of constitutional and legal regulation only in general terms, since these issues are regulated by the norms of the respective branches of law. The subject of constitutional law are the norms that establish the foundations of the system of these bodies, the order of their formation, the key powers. Similarly, the European standards relate to general issues regarding the functioning of the judicial system and guarantees of judicial independence, leaving the margin of appreciation to the Member States. We will consider this issue in the publication on the basis of this approach.

## **2. THE JUDICIAL SYSTEM OF POLAND AT THE PRESENT STAGE**

### **2.1. CONSTITUTIONAL TRIBUNAL**

The first change in the legal system introduced in the course of the last three years, which needs to be shown not only with legal, but also with the factual background, is the reform of the Constitutional Court. The following issues will be discussed below:

1. Changing the composition of the Tribunal;
2. Refusal of publication of certain judgments of the Constitutional Tribunal;
3. Status of CT justices.

#### **2.1.1. Composition of the Constitutional Tribunal**

Constitutional Tribunal consists of 15 judges elected by Sejm (lower chamber of the Polish Parliament). On 8 October 2015 when three new Constitutional Tribunal judges were elected to replace those judges whose mandates were about to expire in November 2015, the Sejm – on the basis of Act of 25 June 2015<sup>4</sup> - appointed two additional judges ahead of time in order to replace two justices whose mandates would not actually have ended until December and whose successors, in light of applicable law, should have been selected during the next term of Parliament, which started on 12 November 2015. After the 2015 parliamentary election, new majority contested the election of not only two, but all the five judges of the Constitutional Tribunal (hereinafter – CT) elected on 8 October 2015 by the previous Sejm. On 25 November 2015 Sejm adopted resolutions invalidating the election of judges of the Constitutional Tribunal by the previous Sejm; on 9 December 2015 the Constitutional Tribunal found some of the provisions of Act of 25 June 2015 to be unconstitutional, thus invalidating the election of the two additional judges. At the same time, the Tribunal ruled that the election of the other three judges

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4 The Act was published in the Official Journal of Laws (*Dziennik Ustaw*) of 2015, position no. 1064.

by the previous Sejm had been constitutional and the Polish President was required to swear them in, which is a pre-condition for judges to start their service in the Tribunal. Nevertheless, they were not allowed to take up their duties, due to the refusal of the President of the Republic to accept their oaths.<sup>5</sup> On 19 December 2016, the President of the Republic signed the three new laws concerning the Tribunal and on the very same day, the President of the Republic appointed a judge, elected by the new Sejm, to the position of ‘acting President’ of the Constitutional Tribunal (a figure unknown to the Polish Constitution). The next day, on 20 December 2016, she admitted the three judges, nominated by the 8th term of the Sejm, to take up their function in the Tribunal and convened a meeting of the General Assembly for the same day. In spite of the fact that one judge was unable to participate and requested to postpone the meeting for the next day, judge Julia Przyłębska, as an “acting president” refused and, as a result to that approach, seven other judges also did not participate in the meeting. Only six judges, including the three, who had been unlawfully — according to the judgment of the CT — nominated, took part in the meeting and elected two persons, who were presented as candidates to the President of the Republic. One day later, i.e. on 21 December 2016, the President of the Republic appointed one of them, judge Julia Przyłębska, as a President of the Constitutional Tribunal.

As a consequence, in view of National Council of Judiciary, as well as many constitutionalists, the current composition of the CT (i.e. including the three judges elected for already occupied positions) raises issues as to the validity of its judgments and the principle of legal certainty. As a result, since the beginning of this constitutional crisis, the number of legal questions posed by ordinary courts to the CT has drastically decreased and many institutions, such as the National Council of the Judiciary, have decided not to address CT with legal questions.

The current system of election of CT judges was widely criticized. As stated by the Venice Commission in its opinion of 2016,<sup>6</sup> ‘A ruling party should not be in a position to have all judges appointed to its liking. (...) It must be stressed that under the current Constitution of Poland of 1997 judges of the CC are elected by the Sejm by a simple majority, which, in a situation where one party has a majority, creates a risk of politicisation of these elections. The Venice Commission recommended that ‘the Constitution be amended in the long run to introduce a qualified majority for the election of the Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism’. Due to the constitutional crisis in Poland, the European Commission triggered, for the first time, its new mechanism under the ‘Rule of Law Framework’ and, in its Recommendations of 27 July 2016 and 21 December 2016, it found that there was a ‘systemic threat to the rule of law (...) as the composition of Parliament changes after elections, the new Parliament must not be deprived of its power to take its own decisions on issues that arise during its mandate. It would be in conflict with democratic principles if Parliament could choose public officials including

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5 See: T T Konciewicz, ‘Of institutions, democracy, constitutional self-defence and the rule of law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond’ (2016) 53 (6) Common Market Law Review 1753.

6 Venice Commission, *Opinion on the Amendments to the Act of 25 June 2015 of the Constitutional Tribunal of Poland*, adopted at its 106th plenary session on 11-12 March 2016, CDL-AD(2016)001 and *Poland. Opinion on the Act on the Constitutional Tribunal*, adopted at its 108e session on 14-15 October 2016, CDL-AD(2016)026, p. 21.



judges (far) in advance even if the term of office expires within the term of office of the subsequent term of Parliament. Vice versa, the subsequent Parliament has to respect the decisions of the former Parliament with regard to appointments of public officials.<sup>7</sup> In this regard, one of the main European Commission demands was to ‘implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected; for this reason, the President of the Republic is required to urgently take the oath of the three judges elected by the previous legislature’.

### 2.1.2. Refusal of Publication of Certain Judgments of the Constitutional Tribunal

Between December 2015 and August 2016, a number of Constitutional Tribunal rulings were not published. The judgments of 9 March 2016 and of 11 August 2016 were not published by the Government. The prompt and undisturbed promulgation of judicial decisions is one of the prerequisites of judicial independence, which is in turn one of the pillars of separation of powers. This point was raised by in the point 8 of the Concluding Observations of the UN Human Rights Committee of 31 October 2016 on the seventh periodic report of Poland:

*‘The State party should ensure respect for and protection of the integrity and independence of the Constitutional Tribunal and its judges and ensure the implementation of all its judgments. The Committee urges the State party to immediately publish officially all the judgments of the Tribunal; refrain from introducing measures that obstruct its effective functioning and ensure a transparent and impartial process for the appointment of its members and security of tenure, which meets all requirements of legality under domestic and international law.’<sup>8</sup>* The European Commission demanded from Polish government to: publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and the judgment of 11 August 2016 concerning the law of 22 July 2016 on the Constitutional Tribunal and other judgments rendered after that date and future judgments; ensure that any reform of the law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, takes the Opinions of the Venice Commission fully into account and ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined.

As underlined by the Venice Commission in March 2016:<sup>9</sup>

*‘Decisions of a constitutional court which are binding under national constitutional law must be respected by other political organs; this is a European and international standard that is fundamental to the separation of powers, judicial independence, and the proper functioning of the rule of law. This is particularly valid in the case of the decision of the Tribunal on the nomination of new judges in October/December 2015. The Constitutional*

<sup>7</sup> Ibidem, 114.

<sup>8</sup> This document is available in English at <[www.tbinternet.ohchr.org](http://www.tbinternet.ohchr.org)> accessed 4 May 2019.

<sup>9</sup> Venice Commission, ‘Opinion no. 833/2015 of 11 March 2016 On amendments to the Act of 25 June 2015 on the Constitutional Tribunal’ CDL-AD(2016)001.

*Tribunal decided that the election of those judges, whose vacancy opened up in December 2015, i.e. after the new Sejm has resumed work, was not a competence of the old Sejm. This verdict has to be respected by the old government, now the opposition. The election of these judges by the 8th Sejm had a constitutional basis. On the other hand, the election of the judges who occupy a position that opened up during the mandate of the 7th Sejm has a constitutional basis as well and the new Sejm has to respect that election.'*

### **2.1.3. Status of Tribunal's Justices**

Most of the provisions related to the status of judges were introduced by the Act on the status of judges of the Constitutional Tribunal of 30 November 2016. On 15 September 2017, the aforementioned act was amended, mainly in regard of qualifications for the office of the Justice of Constitutional Tribunal. So far, to become a judge of the Tribunal, one had to be a person with a profound legal knowledge and meeting the requirements necessary to perform the office of a judge of the Supreme Court. After the changes, in order to become a judge of the Constitutional Tribunal, it is sufficient to meet the requirements necessary to apply for the position of the Supreme Administrative Court judge. The difference is that previously, at least a ten-year service as a judge, prosecutor, counsellor of the State Treasury Office or the profession of lawyer, legal counsel or notary in Poland was obligatory, while now it became sufficient to have worked in public institutions in positions related to the application or creation of administration law (which includes, for instance, the parliament). What is more, in exceptional cases, the President, at the request of the National Council of the Judiciary, may appoint a candidate with a shorter period of employment. Needless to say, lowering the requirements towards the justices of the constitutional court will not help in building the trust of the society towards the judiciary.

## **2.2. THE COMMON COURTS SYSTEM**

In this section, the following legislative changes which have been introduced since 2015 will be discussed:

- 1) Merger of the functions of Minister of Justice and Prosecutor General;
- 2) Changes in administrative and financial activity of courts;
- 3) Random allocation of cases;
- 4) New practices in appointment of Judges;
- 5) Changes concerning secondment of Judges;
- 6) New procedure of appointment and dismissal of Court Presidents.

### **2.2.1. Merger of the Functions of Minister of Justice and Prosecutor General and its Consequences**

In Poland the personal union of Minister of Justice (hereinafter – MoJ) and the Prosecutor General has been reintroduced. These two offices were merged by the 2016 Act on Public Prosecutor's Office.<sup>10</sup> That marks the return to the legal status from 31 March 2010.

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<sup>10</sup> Act of 28 January 2016 on the Prosecution Office.

This time, however, the power of the MoJ is broader and it determines MoJ's position within the judicial system: MoJ is interested in the court proceedings as the superior of all prosecutors, and, at the same time, has important powers vis-à-vis the courts and individual judges. The merger of the function also has its additional consequences with regard to disciplining of judges. The law amending the Law on Common Courts System, which entered into force on 12 August 2017, contains provisions aimed at disciplining judges, mainly related to the creation of disciplinary chamber in the Supreme Court. In addition, the Disciplinary Officer for judges of common courts and his two deputies are appointed for a 4-year term by the Minister of Justice (and not, as previously, the National Council of the Judiciary).

When the Supreme Court Disciplinary Officer (or the Ministerial Officer) refuses to institute disciplinary proceedings because he or she believes that there are no sufficient grounds to do so, a copy of the decision refusing to institute proceedings must be delivered to the Minister of Justice/General Public Prosecutor, who is entitled to raise an objection; then the Disciplinary Officer is obliged to institute disciplinary proceedings. The Minister's instructions concerning the further course of proceedings shall be binding on the respective Disciplinary Officer.

The recommendation of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges<sup>11</sup> indicates that the governments of the Member States should strive to implement the necessary measures to provide judges with training, status, position and remuneration corresponding to the gravity and dignity of the office and the scope of responsibility resting upon them. Assigning duties relating to the judiciary to other bodies, i.e. to the Minister of Justice, results in granting him the excessive power to supervise the administrative activities of courts. New provisions concerning the organisation of judicial disciplinary responsibility also contradict the European standards. Appointment of the prosecuting organ by the Minister of Justice and the interference of MoJ in the disciplinary proceeding at the level of the Supreme Court goes against the ENCJ recommendations from the 2015 Report,<sup>12</sup> whose conclusions state: 'There should be a separate body responsible for receiving complaints and the administration of them, independent of the Ministry of Justice and responsible only to the Judiciary.(...)' as well as 'There is also an obvious need for caution in the recognition of disciplinary liability of judges, which is based in the requirement to maintain judicial independence and freedom from any undue pressure exercised by other state branches of power'.

### 2.2.2. Court directors

Court directors, responsible for administrative and financial activity of the court, have become the superiors of all court staff with only judges remaining outside their scope of competence. The dependence of directors from the MoJ has been augmented by the changes introduced in March 2017 amendments to the Act on common courts system, abolishing transparent competition procedures in their appointment process. From May 2017 on, it is solely the Minister of Justice who can appoint and dismiss the

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11 Recommendation Rec No. R(94)12 (p. 4).

12 Report on Minimum Judicial Standards V – Disciplinary proceedings and liability of judges.

court directors at his discretion, without any role of court presidents.<sup>13</sup> Combining the functions of the Minister of Justice and Public Prosecutor General leads to a situation where external administrative supervision over common courts is exercised by a body also acting as public prosecutor before courts in criminal cases (empowered also to institute and participate in civil, as well as employment and social security proceedings). According to the National Council of Judiciary the above duality of tasks and duties resting with the Minister of Justice – Public Prosecutor General – poses a serious threat to the independence of the courts.

As stated in Venice Commission Opinion of 11 December 2017 ‘the mechanisms of accountability should not interfere with the independence of the judges, and of the bodies of judicial governance. The judiciary should be insulated from quickly changing political winds. The courts often have to adjudicate on conflicts between individual rights and the State, and that relationship is imperilled when the State takes over the control of judicial functions. The provisions enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law’.<sup>14</sup>

### 2.2.3. Random Allocation of Cases

The mechanism of random allocation of cases as a general rule in the common courts has been introduced by the Act 12 July 2017 on amendments to the Act – Law on Common Courts System.

The introduction of electronic system of random allocation of cases can be in general assessed positively, although the system in force so far (where the allocation of cases was done in accordance with the alphabetical and numerical system, as the decision on the allocation of a case to a given judge was, in principle, determined by the order of the cases incoming) did not require an immediate change. It was in accordance with Recommendation Rec (94)12<sup>15</sup> of the Committee of Ministers on the independence, efficiency and role of judges (repeated in similar form in the Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities): ‘*The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.*’ The ENCJ standards set out in Distillation report of 2016<sup>16</sup> and – in a more detailed manner – in the 2014 Report ‘Minimum Judicial Standards IV - Allocation of Cases’<sup>17</sup> are in general met by these solutions, as in particular: ‘*Individual cases should be assigned*

13 Changes introduced by Art. 1 point 4 c) of the Act of 23 March 2017 amending the Act on the system of common courts (Journal of Laws [2017] item 803), which entered into force on 4 May 2017.

14 See Venice Commission, ‘Opinion No. 904 / 2017’, 11 December 2017, P. 128.

15 Recommendation Rec No (94)12, Principle I, point 2 e).

16 European Network of Councils for the Judiciary, ‘Distillation of ENCJ Principles, Recommendations and Guidelines 2004-2016’ (p 11, pts 65-67) < [http://www.ejtn.eu/Documents/encj\\_distillation\\_report\\_2004\\_2016.pdf](http://www.ejtn.eu/Documents/encj_distillation_report_2004_2016.pdf)> accessed 4 May 2019.

17 Eleven standards set out in European Network of Councils for the Judiciary, ‘Minimum Judicial Standards IV’ (ENCJ Report 2013-14) 8-10.

to individual judges by a mechanism that safeguards the independence of the judiciary and excludes the possibility of any pre-determination of the decision. There should be an established and publicly available method of allocation of cases, governed by statute, regulation or judicial or administrative practice. (...) The following criteria should be paramount: the right to a fair trial; the independence of the Judiciary; the legality of the procedure; the nature and complexity of the case; the competence, experience and specialism of the Judge; the availability and/or workload of the Judge; the impartiality of the Judge; the public perception of the independence and impartiality of the allocation". It should be noted, however, that random allocation system does not pertain to the Supreme Court, where the Presidents of chambers have too much discretion in setting up panels, as raised by the Venice Commission:<sup>18</sup> *'In particular, the First President/ Presidents of Chambers should not have an unlimited discretion in setting up panels, distributing cases amongst them and assigning judges (and lay judges) to the benches'*. Also, the methods of electronic allocation of cases are set up at the discretion of the MoJ, which was criticized by the Venice Commission: *'However, in the Rules of Procedure the MoJ is competent to set 'detailed rules on the assignment of cases' and the 'method of random allocation of cases', and may also fix special rules where the random allocation of cases is impossible or inefficient. If there are to be exceptions to the general principle of random allocation of cases, they should be clearly and narrowly formulated in the law. Setting of the method of distribution of cases should not be within the discretionary power of the MoJ.'*<sup>19</sup> Nevertheless, the very idea of the random allocation of cases is not controversial, as long as the introduction of such a system is prepared in detailed way and the system does not allow the administrative power to have any influence on it.

## 2.2.4. Judicial Appointments

The practical application of existing law has also undergone certain changes in recent years. On 29 June 2016, the President of the Republic of Poland refused to appoint 10 judges presented by the National Council of the Judiciary of Poland with a motion for appointment.

The CCJE Bureau in its comments on 26 October 2016 emphasised that it considered that the decision of the President not to appoint as judges ten candidates presented by the National Council of the Judiciary was not in accordance with the CoE standards for judicial independence. The President of Poland should have followed the National Council's advice by appointing the nominated candidates as judges. He did not provide reasons for the decision not to appoint, and such lack of transparency in the procedure was not in line with the Council of Europe standards for judicial independence.<sup>20</sup> The Venice Commission in its Report on the Judicial Appointments stated that 'a judicial council should have a decisive influence on the appointment and promotion of judges'<sup>21</sup>.

18 Venice Commission, 'Opinion No 904 / 2017', 11 December 2017, CDL-AD (2017) 031, P. 19 (§ 88).

19 Ibidem, § 120.

20 See CCJE Bureau, 'Report on judicial independence and impartiality in the Council of Europe member States in 2017' Strasburg, 7 February 2018, CCJE-BU (2017) 11.

21 CCJE, 'Opinion No 403 on Judicial Appointments', 22 June 2007, P. 6 (§25).



### 2.2.5. Secondment of Judges

The secondment of judges to the higher tier court has now become easier. The practice shows that some of the judges recently seconded even became presidents of the higher instance courts. According to Article 77 of the Law on common courts system, since 3 April 2018 it is even possible for a judge of the district court to be seconded to the Supreme Court (so far, district court judges could have been only assistants of the Supreme Court Judges).<sup>22</sup> The decision shall be made by the MoJ at the request of the First President of the SC or President of a Disciplinary Chamber of the SC and the only requirement will be 10 years of professional experience. The secondment of judges to higher tiers of courts (in reasonable proportions and if justified by the situation and needs as well as the professional qualifications of the judge) as such could be seen as justified according to the European standards, yet the idea of appointment of lower tier court judges as higher courts presidents seems to contradict the standards from the CCJE Opinion No. 19 (2016): ‘The minimum qualification to become president of a court is that the candidate should have all the necessary qualifications and experience for appointment to judicial office in that court’.

Another issue which should be noticed is the number of the seconded judges in a certain court, especially with regard to the Supreme Court (there should be a reasonable proportion between the number of judges of a given court and the number of seconded judges); the law says nothing in this regard.

### 2.2.6. Appointment and Dismissal of Court Presidents

According to a transitional provision of the Act of 12 July (Article 17), within the 6-month period after the adoption of the Act (that is until 12 February 2018), the MoJ was able to dismiss and appoint courts’ presidents at their discretion (and, according to media report, the Minister has used his power in this period by removing 149 court presidents and vice-presidents, including 10 out of 11 presidents of courts of appeal).

After this transitional period the MoJ, according to the Act, retains the power to appoint and dismiss court presidents and vice-presidents but the MoJ decision on dismissal of court presidents/vice-presidents must be consulted with the National Council of the Judiciary. The MoJ decision can be overturned only by a qualified, 2/3 majority of Council’s members (so far, the ordinary majority was sufficient in this regard). Appointment of the presidents of any ordinary court is made by the MoJ alone, no substantive conditions required to this decision.

The requirements for the court president/vice-president’s function have also been lowered. Before August 2017, a judge of a lower tier court could not become a court president. The amendments to the law on common courts system provide that in the court of appeal, it will also be possible to appoint: regional court judge as a vice-president/president of the court of appeal, as well as a district court judge as a president/vice-president of the regional court. Both decisions shall be now made by the MoJ without

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<sup>22</sup> In fact, now it will be possible for a district court judge to become a Supreme Court judge, as requirement of 10 years’ experience spent in judiciary (regardless of the position in the structure of judiciary) is sufficient.

prior consultation with National Council of the Judiciary,<sup>23</sup> general assembly of judges of the area of jurisdiction or court college. The powers of MoJ vis-à-vis court presidents seem to broadly exceed the desired scope of competencies stemming from European standards. For instance, according to the Venice Commission recommendations from its Opinion of 2017: ‘The decision of the Minister of Justice to appoint/dismiss a court president should be subject to approval by the National Council of the Judiciary or by the general assembly of judges of the respective court, taken by a simple majority of votes. Ideally, general assemblies of judges should submit candidates to positions of presidents to the Minister of Justice for approval. The Minister of Justice should not have ‘disciplinary’ powers vis-à-vis court presidents; any sanction on court presidents should be imposed according to the same procedure as a disciplinary sanction against a judge.<sup>24</sup> The discretionary powers of the Minister of Justice with regard to the appointment and (in certain extent) dismissal of the court presidents seem not to be in line with CCJE Opinion No. 19(2016).<sup>25</sup> ‘The CCJE also wishes to stress that, irrespective of the existing rules of procedures and what bodies are empowered to decide which candidate will take on the position of court president, what is essential is that the best candidate is selected and/or appointed as stated in Recommendation CM/Rec(2010)12 and in CCJE Opinion No.1(2001): the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency. The CCJE is of the opinion that the judges of the court in question could be involved in the process. This can take the form of a binding or advisory vote. In some member states, presidents of courts are not selected and/or appointed but are elected by their peers - the judges of the court. The CCJE is of the opinion that in such a system, objective criteria of merit and competence should also prevail (...) The safeguards of irremovability from office as a judge apply equally to the office of a court president’. According to the Venice Commission ‘promotion’ implies *inter alia* appointment as a court president; the Venice Commission expressed a clear preference for a system where court presidents are elected by the judges of the respective court.<sup>26</sup>

### 2.3. SUPREME COURT

A new law on the Supreme Court was passed by Parliament at the end of 2017. Compared to the provisions in the current Law on the Supreme Court, the new act (which entered into force at the beginning of April 2018) introduces new solutions in the following areas:

- 1) New corrective institution of final judicial decisions called the extraordinary complaint;
- 2) Changes in the structure of the Supreme Court;

23 Positive opinion of the Council was obligatory for appointment of a court president.

24 Venice Commission, ‘Opinion No 904 / 2017’, 11 November 2017.

25 CCJE, ‘Opinion No 19 on the role of court presidents’, 8-10 November 2016.

26 Venice Commission and Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, ‘Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia’ CDL-AD(2014)031 § 84; See also Venice Commission, ‘Opinion No 855 / 2016’ CDL-AD(2017)018, 9 October 2017, § 81.

3) The participation of lay judges, as a social factor in certain proceedings before the Supreme Court (i.e. extraordinary complaints and disciplinary proceedings).

The new law on the Supreme Court was prepared without the proper consultation with the judiciary. As noted in the August 2017 Opinion, the CCJE has recommended that ‘the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system’. According to the opinion of judges of the Supreme Court, stated in the Supreme Court Resolution of 16 January 2018, new law on the Supreme Court has been prepared in violation of fundamental rules of law-making, without adequate consultation, with disrespect to revealed scientific opinions and positions of legal and academic organizations. Executive Board of European Network of Councils for the Judiciary (ENCJ) stressed that throughout the process that has led to the amendments, there has been no meaningful consultation with the National Council of Judiciary (KRS) or the judges themselves. According to ENCJ standards, the Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation. This is to ensure the independence of the judiciary. Judges and judicial councils should not be hostile to modernization and reform, provided always that the contemplated reforms are aimed at improving the quality of the justice system for the benefit of those that it serves. It is for this reason that judicial involvement in the reform process is essential: it provides the balance between the wishes of the elected government and the need to maintain judicial impartiality and the Rule of Law.

### **2.3.1. Extraordinary Complaint (Article 86)**

According to the new law it is possible to bring an extraordinary action before the Supreme Court from any final court ruling, if:

- 1) The decision violates the rules or the freedoms and rights of human and of the citizen specified in the Constitution,
- 2) Judgment significantly violates the law by its erroneous interpretation or misapplication,
- 3) There is an obvious contradiction of significant findings by the Court with the content of the collected evidence, and a judgment cannot be repealed or amended by other extraordinary remedies.

The extraordinary complaint, according to the first version of the adopted law, might have been brought only by specific bodies, i.e. the Prosecutor General, Ombudsman, a group of at least 30 MPs or 20 senators, and, within their scope of activities – the President of the General Counsel to the Republic of Poland, the Ombudsman for Children, the Ombudsman for Patients’ Rights, Chairman of the Financial Supervision Commission and the Financial Ombudsman. Finally, only the Prosecutor General and Ombudsman are entitled to bring the extraordinary complaint to the Supreme Court. The extraordinary complaint shall be filed within five years from when the contested decision became valid or, if there was a cassation procedure, within a year from when the cassation was heard. It is unacceptable to take account of the emergency action to the detriment of the accused lodged after 6 months from when either the decision became valid or the cassation was heard. Extraordinary complaints cannot be based on the same grounds, which had been the subject of cassation procedure. If Supreme Court takes the complaint into account, it

shall repeal the contested decision and, in accordance with the results of the hearing, shall decide on the merits of the case or shall refer the matter back to the competent court, if necessary, repealing also the judgment of the Court of first instance, or shall discontinue the proceedings. The Supreme Court shall dismiss an extraordinary complaint, if it finds no grounds for the setting aside of the judgment under appeal.

The extraordinary complaint shall be recognised by the Supreme Court panel composed of two judges of the Supreme Court sitting in the newly established Chamber of Extraordinary Control and Public Affairs and one lay judge of the Supreme Court, appointed by the First President (see below). If the complaint concerns an extraordinary decision of the Supreme Court, the case shall be recognised by the Supreme Court panel composed of five judges of the Supreme Court sitting in the Chamber of Extraordinary Control and Public Affairs and two lay judges of the Supreme Court.

What is important, during the period of three years from the date of entry into force of the Act (i.e. 2 April 2018), extraordinary complaint can be brought with respect to judgments ending the proceedings in matters which became final after 17 October 1997 which means that until April 2021 all judgments issued within the last 20 years may be repealed, by means of this new legal instrument.

As noted by the Consultative Council of European Judges (CCJE), ‘the enforcement of a decision must not be undermined by extraneous intervention whether from the executive or the legislator by imposing retroactive legislation’. Indeed, ‘the very notion of an “independent” tribunal set out in Article 6 of the ECHR implies that its power to give a binding decision may not be subject to approval or ratification, or that the decision may not be altered in its content, by a non-judicial authority, including the Head of State’. It has been noticed that the introduction of new appeals procedure, combined with the possibility to reopen numerous final judgments, also has to be considered in the broader context of an already overloaded judicial system, as demonstrated by the abundant recent case-law of the ECtHR concerning Poland on the excessive length of judicial proceedings. In that respect, structural features in a legal system that cause delays in judicial proceedings are not an excuse under Article 6 of the ECHR or Article 14 of the ICCPR, as well as Art. 47 of the European Charter of Fundamental Rights. In light of the foregoing, the introduction of this extraordinary review of final court decisions raises serious prospects of incompatibility with key rule of law principles, including the principle of *res judicata* and the right to access justice. It also runs the risk of potentially overburdening the Supreme Court. The same goals of protecting the rule of law and social justice could be achieved through the proper use of already available general or cassation appeals to ensure the rectification of judicial errors or other deficiencies before judgments become final and enforceable.

### **2.3.2. Changes in the Structure of the Supreme Court**

According to the new law it is the President of the Republic of Poland and not the General Assembly of the judges of the Supreme Court (as it has been so far) who issues the Rules of the Supreme Court that specify, among others, the number of judicial posts in the Supreme Court, including the number of posts in the particular chambers, the internal organisation of the Supreme Court, the rules of internal procedure and a detailed scope of jurisdiction and competences of judicial assistants.

The law provides for creation of two new Chambers of the Supreme Court – Chamber of Extraordinary Control and Public Affairs and the Disciplinary Chamber.

The Chamber of Control and Public Affairs shall hear extraordinary complaints. It shall also take over the cases from the public law area, previously dealt with by the Chamber of Labour, Social Insurance and Public Affairs (including resolution of electoral protests, protests against the validity of the a nationwide referendum and the constitutional referendum and to uphold the validity of the elections and referenda), as well as complaints about excessive length of proceedings before the ordinary and military courts.

Interestingly enough, the Disciplinary Chamber enjoys a special status among the Chambers of the Supreme Court. Part of the competences of The First President of the Supreme Court and the General Assembly of the judges of the Supreme Court shall be performed by the Head of the Disciplinary Chamber and the Assembly of the judges of the Disciplinary Chamber. The disciplinary chamber will be able to independently shape its budget, although the planned spending amount cannot be higher than 15% of the average expenditure of the Supreme Court.

The following matters are included in its scope of jurisdiction: 1) disciplinary cases concerning the judges of the Supreme Court; 2) disciplinary cases in which (on the basis of separate provisions) Supreme Court is competent (i.e. disciplinary matters relating to: prosecutors, advocates, solicitors, notaries, bailiffs, doctors and other professionals); 3) complaints concerning the excessive length of the proceedings in the Supreme Court.

The Military Chamber has been abolished, its 6 judges retired, and its material jurisdiction transferred to the Criminal Chamber.

As stated by the Venice Commission,<sup>27</sup> the power given to the President to issue the Rules of Procedure of the Supreme Court, especially with respect to the first Rules of Procedure, where this is done without requiring the opinion of the Supreme Court Board, is incompatible with the principles of judicial independence and of the separation of powers. It is recommended to retain the power to determine the regulations of the Supreme Court in the General Assembly of the Supreme Court or in some other independent judicial body such as the Board of the Supreme Court. Enhanced control of the President of the Republic of Poland over the work of the Chambers, and thus the Supreme Court as a whole, is unjustified and risks violating the principle of the independence of the judiciary.

### **2.3.3. Lay Judges**

It must be noted that in Poland the participation of lay judges in court proceedings has been diminished. What is more, lay judges never composed the benches in the Supreme Court, as it is a court of law, not the court of facts. According to the new law, lay judges will participate in panels which shall decide in disciplinary proceedings conducted before the Supreme Court and in cases of extraordinary complaints. Supreme Court lay judges would be selected by the Senate of the Republic for a 4 year term out of candidates reported by citizens, directly or through community organizations. The number of lay judges in the Supreme Court of State would be established by College of the Supreme Court.

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<sup>27</sup> European Commission for Democracy through Law, 'Opinion No. 904 / 2017', Strasbourg, 11 December 2017, CDL-AD(2017)031.



The Venice Commission reiterated that the Polish Constitution does not specify the forms of participation of members of the public in the administration of justice (see Article 182 of the Constitution), leaving this question to regulation by statute. In principle, mixed benches including professional judges and lay members/jurors exist in a number of modern European jurisdictions, but they are usually present in lower instances. In the jury trial the sole responsibility of jurors is to answer questions of fact. Lay members are usually absent from the high courts and this is for an obvious reason: such courts are called to examine complex questions of law.

In the opinion of the Venice Commission, the proposal to introduce lay members, in particular in the two special chambers of the SC, is dangerous for the efficiency and for the quality of justice. Venice Commission concluded that the proposal has evident similarities to the Soviet judicial system.<sup>28</sup>

The main change in the functioning of the Supreme Court, however, was aimed at lowering the retirement age, thus leading to getting rid of a profound number of the Supreme Court judges (similar regulations, i.e. lowering the retirement age, were introduced with regard to female judges in the ordinary courts). The adoption by Parliament of two Acts (on the Supreme Court and on the National Council of Judiciary) at the beginning of July 2017, provoked massive protests and demonstrations in Poland, including not only the Polish judiciary but the public at large, and was also strongly criticized by the CoE, the EU and range of international, i.e. ENCJ, CCBE, EAJ, AEAJ, and national Councils for the Judiciary in EU Member States. In particular, the CoE Secretary General sent a letter, of 18 July 2017, to the Speaker of the Polish parliament concerning the draft Act on the Supreme Court.

Nevertheless, it was the Court of Justice decision on interim measures, which made the Polish authorities to give up the idea of lowering the retirement of judges.

## **2.4. NATIONAL COUNCIL FOR JUDICIARY**

The act amending the law on the National Council of Judiciary introduces new solutions in the following areas:

1. Entrusting the Sejm (lower chamber of Parliament) with the competence to elect the members of the Council;
2. Termination of office of the current members of the Council.

### **2.4.1. Entrusting the Sejm with the competence to elect the members of the Council**

The amended law envisages that the 15 judges – members of the Judicial Council will be elected by Sejm by 3/5 majority, yet if Sejm fails to do so, ordinary majority applies. According to most scholars in Poland, entrusting Sejm with the competence to elect the judicial members of the Council deprives the members of the Council the feature of being the representatives of judicial self-government, is not in line with Article 10(1), Article 173 and Article 187(1)(2) of the Constitution and leads to the politicization of courts.

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28 European Commission for Democracy through Law, 'Opinion No. 904 / 2017' CDL-AD(2017)031, Strasbourg, 11 December 2017.

The constitutional issue is not in the majority of votes required to grant a mandate to a member of the Council, but in the very intention of entrusting the Sejm with the competence to do so.

The ENCJ standards<sup>29</sup> in this field stipulate that: *‘..... the mechanism for appointing judicial members of a Council must be a system which excludes any executive or legislative interference and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary.’* Another ENCJ standard is that at least 50% of the members of the Council should be judges, elected by their peers. It is obvious that the election of the judicial members of the Council by Parliament, whether by simple or qualified majority, is not in accordance with the ENCJ standards. Given that 15 judicial members are not elected by their peers, but receive their mandates from Parliament, six other members of the Council are parliamentarians, and four others are *ex officio* members including a person appointed by the President of the Republic (see Article 187 § 1 of the Constitution), the new law leads to a Council dominated by political nominees. The CCJE Bureau in its Opinion adopted on 7 April 2017 emphasised that it was concerned that the Act would be a major step backward from real judicial independence in Poland. The Bureau of the CCJE was deeply concerned, in particular, by the implications of the Act for the constitutional principle of separation of powers as well as that of the independence of the judiciary, as it effectively meant transferring the power to appoint members of the National Council of the Judiciary from the judiciary to the legislature. In order to fulfil the European standards on judicial independence, the judges-members of the Council should continue to be chosen by the judiciary. The Bureau also underlined that the pre-term removal of the judges currently sitting as members of the Council would not be in accordance with European standards on judicial independence.

#### **2.4.2. Termination of Office of the Current Members of the Council**

According to Articles 6 and 7 of the above-mentioned act, amending the Law on the National Council of Judiciary, the terms of office of current members of the Council who were elected from among judges of the Supreme Court, administrative courts, common courts and military courts for a constitutionally guaranteed 4-year term of office be terminated (which is clearly not in line with Article 187(3) of the Constitution). Moreover the term of office of the current members of the Council selected by the Parliament is not terminated, which means that the lawmaker does not treat the elected members of the Council in the same manner.

As Executive Board of European Network of Councils for the Judiciary (ENCJ) reiterated in its opinion: the amendments to the law on the National Council of Judiciary should not be seen as an isolated issue, but rather in conjunction with the amendments to the Act on the Ordinary Courts and the Act on the Supreme Court. Taken together, the recent amendments to the laws governing the judiciary seem like the legislature is trying to control the third power of the State, the judiciary. This is alarming and will potentially affect the position of and trust in the Polish judiciary in the European legal community. The Rule of Law is at the core of the European Union and is central to any democratic system. Respect for the Rule of Law is a prerequisite for the protection of all fundamental

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<sup>29</sup> European Network of Councils for the Judiciary, Executive Board Opinion, Brussels, 5 December 2017.

values listed in the Treaties, including democracy and fundamental rights. To uphold and protect the Rule of Law is a responsibility for both the Judiciary and the other State powers. For the effective preservation of the Rule of Law, independent and accountable justice systems are needed with fair and impartial courts as the key institutions. The fair and impartial courts are the key institutions of an independent judiciary. A key requirement for maintaining and enhancing mutual trust between judicial authorities in the EU, as a basis for mutual recognition of judicial decisions, is the independence, quality and efficiency of the judicial systems and respect for the Rule of Law.

### **3. JUDICIAL REFORM IN UKRAINE IN 2016: PROBLEMS OF IMPLEMENTATION**

#### **3.1. GENERAL CHARACTERISTICS OF THE JUDICIARY IN UKRAINE**

According to part 1, Article 6 of the Constitution of Ukraine,<sup>30</sup> state power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power. Chapter VIII of the Constitution of Ukraine 'Justice' is dedicated to the backgrounds of organization and activity of the judicial branch of power in Ukraine. Ukrainian researchers criticize the title of this section, claiming that it is better to change the name to 'Judiciary', which is used in most constitutions of the world.<sup>31</sup> Indeed, this title logically follows the structure and content of Article 6 of the Constitution of Ukraine. It is obvious, however, that in choosing the name of the said part, the Main Law creator's desire of administering real justice in Ukraine prevailed, which means exercising truly legal decisions regarding conflicts at hand. The judiciary has an important role and functions in relation to the other two pillars of power. It ensures that governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, that they comply with any relevant constitution or higher law (such as that of the European Union). To fulfill its role in these respects, the judiciary must be independent of these bodies, which involves freedom from inappropriate connections with and influence by these bodies.<sup>32</sup>

Today, Ukraine is on the way of building a judicial system capable of making judiciary decisions independently. And this study is devoted to the analysis of recent steps taken in the course of modern judicial reform, which began with the introduction of amendments to the Constitution of Ukraine on 2 June 2016.

Since our research is carried out in a constitutional and legal aspects, it will be logical to begin with an analysis of the essence of judicial reform in terms of reorganization of the status of constitutional justice in Ukraine.

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30 *Konstytutsiia Ukrainy [Constitution of Ukraine]: pryiniata na piatii ses. Verkhovn. Rady Ukrainy 28.06.1996*, Vidomosti Verkhovnoii Rady Ukrainy (1996) № 30, St. 141 < <http://zakon2.rada.gov.ua/laws/show/254k/96-bp> > accessed 5 May 2019.

31 See, for example, M Savenko, *The legal status of the Constitutional Court of Ukraine* (author's abstract of dissertation for the degree of candidate of legal sciences: specialty 12.00.02, Kharkiv 2005) 20, at 5.

32 Recommendation Rec (94)12.

## 3.2. STATUS OF THE CONSTITUTIONAL COURT OF UKRAINE. MAIN INNOVATIONS

### 3.2.1. Statutory Aspect of the Independence of the Constitutional Court of Ukraine

The status of the Constitutional Court of Ukraine is regulated in detail by a separate, XII Chapter of the Constitution of Ukraine named 'The Constitutional Court of Ukraine'. Such an approach to constitutional regulation of bodies of constitutional jurisdiction reflects, in general, the tendency that takes place in foreign countries. Thus, for instance, the Constitutions of France, Italy, Spain<sup>33</sup> also contain separate chapters on specialized bodies of constitutional control. It is constitution that determines the competence of a body of judicial constitutional control, the order of their forming, the procedure of appeal to them, and the consequences of recognition of a law as such, which doesn't conform to the constitution. Laws on constitutional courts adopted in development of constitutional statements are, as a rule, organic (constitutional). However, the legislative system of Ukraine doesn't include such category of laws as constitutional or organic. All of the laws in Ukraine are normal (ordinary). The latter as well includes the Law of Ukraine 'On Constitutional Court of Ukraine' of 13 June 2017, adopted to replace the Law of Ukraine 'On Constitutional Court of Ukraine' of 16 October 1996. Thus, according to the abovementioned Law of Ukraine 'On the Constitutional Court of Ukraine', the organization of the internal activities of the Court and the respective rules of procedure shall be established by the Rules of Procedure of the Constitutional Court of Ukraine (hereinafter – the Rules of Procedure) (Article 3 of the Law). The Court shall adopt the Rules of Procedure and their amendments during a special plenary session. The Rules of Procedure and their amendments are considered to be adopted if at least two quarters of the constitutional composition of the Court voted it their favour (Article 96 of the Law).

Arguments of the supporters of subordinate regulation of procedure of activities of the Constitutional Court of Ukraine mostly come to the fact that the rules of procedure of a body are an internal document which regulates the procedure of its activity and thus, it shall be adopted by the body itself. Moreover, the existence of veto right of the President of Ukraine upon the laws can be considered as a form of intervention in the internal procedure of activity of the Constitutional Court of Ukraine which shall operate independently from any influence. Also, the subjects with the right of legislative initiative can as well apply it to the statements of the code of procedure of the Constitutional Court of Ukraine in case of its approval by law.

Such position finds recognition in the documents of the European Commission 'For Democracy through Law' (Venice Commission). Thus, according to Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan (CDL-AD (2004)023)<sup>34</sup> (paragraphs 5, 6), the legal basis of the activity of each constitutional court is usually formed by three kinds of legal regulations having different positions in the hierarchy of

33 Thus, Chapter IX of the Constitution of Spain of 1978 is named 'On the Constitutional Court', Chapter IV of the Constitution of Italy of 1947 is named 'The Constitutional Court', Chapter VII of the Constitution of France of 1958 is named 'Constitutional Council'.

34 Venice Commission, 'Opinion on the rules of procedure of the Constitutional Court of Azerbaijan' CDL-AD(2004)023, Strasbourg, 23 June 2004 <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2004\)023-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2004)023-e)> accessed 5 May 2019.

norms of the domestic legal order of the state. They play different roles in the process of the complete and coherent legal regulation of the constitutional body. On the 'top' of this triad is usually the constitution establishing the jurisdiction of the court, the parties entitled to appeal as well as the constitutional principles on which the activity of the constitutional court is to be based. Laws on constitutional courts usually transform these constitutional principles into more concrete norms. Finally, the rules of procedure constitute the next and last level of this triad. They fill in practical details of the everyday judicial activity. The Rules of Procedure should be drafted by the constitutional court itself. Speaking about the way of approval of the rules of procedure of the Constitutional Court, the other document of Venice Commission (Opinion of European Commission 'For Democracy through Law' on the Rules of Procedure of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic CDL-AD (2015)023),<sup>35</sup> states that these rules should ideally be drafted by the court itself, which should enjoy a certain amount of autonomy within the limits of the constitution and the law that give the court the possibility of modifying the rules without the intervention of the legislator.

As a counter plea to the stated position we should mention that, firstly, the procedures of activities, specified in the Rules of Procedure of the Constitutional Court of Ukraine, cannot be solely internal because, as we know, there are other parties (physical and legal persons) in the constitutional procedure apart from the Court itself. This counter plea is especially important in the light of the introduction in Ukraine of the institute of constitutional complaint (which will be discussed later). Secondly, the exercising by the head of the state of veto right is possible on condition of non-conformity with a law of the Constitution of Ukraine. Moreover, such a law can be an object of constitutional control from the part of the Constitutional Court in future.

As we know, bodies of constitutional control, passing their resolutions or creating court precedents, can take an active part in the political life of the state and contribute to the implementation of the political course of the state. In doing so, they must depart from the principle of so-called political restraint, or political impartiality, the idea of which lies in the refusal of the abovementioned bodies to interfere in political issues and situations: their activity is limited to the consideration of exclusively legal issues.<sup>36</sup> Briefly characterizing the standards of the principle of impartiality in court activity in general, we should mention that, according to paragraph 2 Magna Carta of Judges, judicial independence and impartiality are essential prerequisites for the operation of justice.<sup>37</sup> The idea of the principle of impartiality is characterized as follows: when adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects — or may be seen as affecting — their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that 'no man may be a judge in his own cause'. This principle also has significance well beyond that affecting the particular

35 Opinion on the Rules of Procedure of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic CDL-AD(2015)023 <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)023-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)023-e)> accessed 5 May 2019.

36 V Tumanov, 'Constitutional backgrounds of the judiciary' in MV Bahlai, YuI Leibo, LM Entin (eds), *Constitutional law of foreign countries: textbook for high school* (Norma 2005) 409.

37 Magna Carta of Judges (Fundamental Principles), Consultative council of European judges (CCJE), 17 November 2010, Strasbourg <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 5 May 2019.



parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free, in fact, from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer to be free therefrom (paragraph 12 of Opinion No. 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges).<sup>38</sup> According to paragraph 20 of the Opinion No. 3 (2002) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, impartiality is determined by the European Court both according to a subjective approach, which takes into account the personal conviction or interest of a particular judge in a given case, and according to an objective test, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.<sup>39</sup> Paragraph 33 of the abovementioned Opinion indicates the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is, therefore, necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality. Analyzing the content of the Ukrainian legislation in this part, it is worth noting that, according to Article 148 of the Ukrainian Constitution, the judges of the Constitutional Court of Ukraine shall not belong to political parties, trade unions, take part in any political activity, hold a representative mandate, occupy any other paid office, or perform other remunerated work, except scholarly, teaching or creative activities.

However, judges in western European countries usually restrain themselves only from active participation in political party and trade union activity (not from being a member of a political party or trade union in general).

In Ukraine the question of political impartiality of judges of the Constitutional Court of Ukraine is especially sharp. Thus, the most problematic aspect of the implementation of this principle is the adoption of an unprecedented in the practice of world constitutionalism Decision of the Constitutional Court of Ukraine of 30 September 2010,<sup>40</sup> which proclaimed the Law of Ukraine 'On Amendments to the Constitution Ukraine' of 8 December 2004, No. 2222-IV to be incompatible with the Constitution of Ukraine (unconstitutional). In its activity the Constitutional Court of Ukraine also applies the principle of 'related initiative', according to which a court cannot examine

38 CCJE, 'Opinion No 1 on standards concerning the independence of the judiciary and the irremovability of judges' <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 5 May 2019.

39 CCJE, 'Opinion No 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality' <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 5 May 2019.

40 The decision of the Constitutional Court of Ukraine in the case of the constitutional petition of 252 People's Deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine 'On Amendments to the Constitution of Ukraine' of 8 December 2004 № 2222-IV (the case of adhering to the procedure for amending the Constitution of Ukraine) of 30 September 2010 No 20-пн/2010 <<http://zakon.rada.gov.ua/laws/show/v020p710-10>> accessed 5 May 2019.

the question of constitutionality of normative acts, including laws, by its own initiative.<sup>41</sup> This principle is also a constituent part of the principle of judicial impartiality.

### **3.2.2. Functional Aspect of the Independence of the Constitutional Court of Ukraine.**

This aspect of the independence means that it is the only body of constitutional jurisdiction with such procedure of formation and powers that allow it to maintain balance in the relations between the branches of power.

As it goes in the document of European Commission 'For Democracy through Law' (Venice Commission) 'The Composition of Constitutional Courts', December 1997, CDL-STD (1997)020,<sup>42</sup> notwithstanding the complexity of the various systems of the composition of constitutional courts, three main fields of legislative concern could be identified. These are balance, independence and effectiveness. Society is necessarily pluralist – a field for the expression of various trends, be they philosophical, ethical, social, political, religious or legal. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions. Given the diversity of constitutional justice systems, it is difficult to identify a set of minimum guarantees of independence to be provided in the composition of constitutional courts. Broadly, the following points may provide some guidance, though specific circumstances in a State may well justify a variation of these measures.

Let us compare the statements from the abovementioned recommendations of Venice Commission concerning the guarantees of constitutional courts independence with the guarantees secured in the legislation of Ukraine and determine respective problematic aspects.

1) Thus, according to the abovementioned recommendations of Venice Commission CDL-STD(1997)020, a ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of retirement. In the former case, reappointment would be possible either only once or indeed not at all (paragraph 10).

Parliamentary term in Ukraine is 5 years, whereas the term of office of a judge of the Constitutional Court of Ukraine is 9 years. The President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine. Thereby, not all subjects who appoint judges to the Constitutional Court of Ukraine are related to the parliamentary majority (ruling party). At the same time, according to Ukrainian experts, the model of the formation of

<sup>41</sup> Tumanov (n 46).

<sup>42</sup> Venice Commission, 'The Composition of Constitutional Courts' CDL-STD(1997)020 (December 1997) <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(1997\)020-rus](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1997)020-rus)> accessed 5 May 2019.

the Constitutional Court of Ukraine secured in the current legislation in Ukraine is not optimal, in connection with which the literature proposes to introduce such a formation of the Constitutional Court in Ukraine, which would be carried out on a competitive basis on the principle of rotation of a third of judges every three years from among the scholars and practitioners from various fields of law with the possible advantage of experts in the field of constitutional law.<sup>43</sup> 2) According to Venice Commission, the rules of incompatibility should be rather strict in order to withdraw a judge from any influence which might be exerted via his/her out-of-court activities (paragraph 5 of the document CDL-STD(1997)020).

This aspect has already been analyzed above in the research of the question of political neutrality of judges of the Constitutional Court of Ukraine.

3) As stated by Venice Commission, disciplinary rules for judges and rules for their dismissal should involve a binding vote by the court itself. Any rules for dismissal of judges and the president of the court should be very restrictive. Furthermore, special provision might be necessary in order to maintain the effective functioning of the court when vacancies arise (paragraph 6 of the document CDL-STD (1997)020).

In connection with the position of Venice Commission from the previous paragraph regarding the formation of constitutional courts, let us note the following changes in the formation of the Constitutional Court of Ukraine, which took place after the adoption of amendments to the Constitution of Ukraine of 02 June 2016.

The first novelty is that election of candidates for the post of judge of the Constitutional Court of Ukraine shall be conducted on competitive basis under the procedure prescribed by the law (part 3, Article 148 of the Constitution of Ukraine). Such a competition is currently in progress in Ukraine, so it will be possible to evaluate its results only afterwards.

Secondly, an important novelty in the aspect of guaranteeing independence of judges of the Constitutional Court of Ukraine is determining the grounds for termination of a judge's tenure without necessity to approve a special decision. According to the Constitution of Ukraine, such grounds include: 1) expiry of the term of judge's office; 2) his or her attainment of the age of seventy<sup>44</sup>; 3) termination of Ukraine's citizenship or acquiring by him or her the citizenship of another state; 4) taking effect of a court's decision on recognition or declaration of a judge of the Court missing or dead, or on recognition of a judge of the Court to be legally incapable or partially legally incapable; 5) taking effect of a guilty verdict against him or her for committing a crime; 6) death of a judge of the Constitutional Court of Ukraine. At the same time, after the amendments of 2016 to the Constitution of Ukraine, the grounds for dismissal of a judge of the Constitutional Court of Ukraine have been defined, which include the following: 1) inability to exercise his or her powers for health reasons; 2) violation by him or her of incompatibility requirements; 3) commission by him or her of a serious disciplinary offence, flagrant or permanent disregard of his or her duties incompatible with the status of judge of the Court or revealing

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<sup>43</sup> Savenko (n 41).

<sup>44</sup> Prior to the abovementioned changes, the powers of the judges of the Constitutional Court of Ukraine by age ceased on a general basis with judges of courts of general jurisdiction, that is, upon reaching the age of 65.

non-conformity with being in the office; 4) submission by a judge of statement of resignation or of voluntary dismissal from office. In these cases, dismissal of a judge of the Constitutional Court of Ukraine from his or her office shall be decided by not less than two-third votes of full Court.

It is important that during the judicial reform the previously existing principle of termination of powers of the judge of the Constitutional Court of Ukraine, in which the decision on dismissal was accepted by the subject that appointed him, was changed. Thus, the judge of the Constitutional Court of Ukraine when making appropriate decisions was forced to constantly 'consult' with the opinion of the subject which appointed him or her under the threat of possible dismissal from office.

4) Venice Commission also states that rules on appointment should foresee the possibility of inaction by the nominating authority and provide for an extension of the term of office of a judge until the appointment of his/her successor. In case of prolonged inaction by this authority, the quorum required to take decisions could be lowered (paragraph 4.3. of the document CDL-STD (1997)020).

The effective Law of Ukraine 'On the Constitutional Court of Ukraine' specifies the term during which the subjects of appointment of judges of the Constitutional Court of Ukraine shall appoint a judge in case of occurrence of a vacant office (3 months). However, this Law doesn't provide for the mechanisms solving of constitutional conflicts in case of prolonged inactivity of persons responsible for appointment of judges of the Constitutional Court of Ukraine. This gap of legal regulation needs settlement.

5) According to Venice Commission, the effectiveness of a constitutional court also requires there to be a sufficient number of judges, that the procedure would not be overly complex and that the court has the right to reject individual complaints which do not raise a serious issue of constitutional law. All of these points remain necessarily vague and will have to be adapted to each specific case. Taken together, they can, however, provide an idea of some issues to be tackled in order to create a balanced, independent and effective court (paragraph 10 of the document CDL-STD (1997)020).

Commenting on the changes in the functional component of the status of the Constitutional Court of Ukraine, first of all, the emergence in Ukraine of a new instrument for the protection of the constitutional rights and freedoms of a person and a citizen entitled 'constitutional complaint' should be noted.

The subject of the right to constitutional complaint in Ukraine is a person alleging that the law of Ukraine (or particular parts of it) applied in a final decision in his or her case contravenes the Constitution of Ukraine.

The entities of the right to a constitutional complaint do not include legal persons of public law. In particular, this means that a constitutional complaint is not open to local self-government. The constitutional amendments on local self- government have not yet been adopted and this question should be settled in a separate procedure within that framework.<sup>45</sup> A constitutional complaint is considered to be *admissible* if it complies with the formal requirements stipulated by the Law of Ukraine 'On the Constitutional

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45 See Venice Commission, 'Opinion on the Draft Law on the Constitutional Court of Ukraine' (9-10.12.2016 № 870/2016) <<http://www.scourt.gov.ua/clients/vsu/vsu.nsf>> accessed 5 May 2019.

Court of Ukraine, and in the event that:

1) all national judicial remedies have been exhausted (in the presence of a court decision approved in the order of appeal, which has come into force, and in the case of the possibility of a cassation appeal provided for by law – a court decision made in the cassation review procedure);

2) no more than three months have expired from the date of entry into force of the final court decision, in which the law of Ukraine (its separate provisions) has been applied.

Also, in the aspect of characteristics of the changes in the powers of the Constitutional Court of Ukraine, attention should be paid to the exclusion of such powers of the Constitutional Court of Ukraine as official interpretation of the laws. Formally, this authority has not yet been transferred to another entity. However, it is obvious that in this case there are prospects of securing an authentic interpretation of the laws that will be carried out by the body which legislates, that is, by the parliament.

The problem in Ukraine is that despite the fact that the changes to the Constitution of Ukraine in the part of justice were made back in June 2016 (and the norms of the Constitution of Ukraine, in accordance with its Article 8 are the norms of direct action), the Law ‘On the Constitutional The Court of Ukraine’ was adopted in July 2017. However, as of today none of the constitutional complaints submitted to the Constitutional Court of Ukraine has been considered.<sup>46</sup> At the same time, a positive phenomenon is the introduction of a new power of the Constitutional Court of Ukraine in the part of verification on compliance with the Constitution of Ukraine (constitutionality) of questions that are proposed to be put for the all-Ukrainian referendum on people’s initiative. Entities entitled to appeal to the Constitutional Court of Ukraine in this category of case include the President of Ukraine or not less than forty-five People’s Deputies of Ukraine (which equals 1/10 of the composition of the parliament of Ukraine). Earlier, the authority to verify the constitutionality of such issues was secured by the Central Election Commission (since 2012, when the new Law of Ukraine ‘On All-Ukrainian Referendum’<sup>47</sup> came into force). However, such a provision was actively criticized, as the Central Election Commission is not a body entrusted with a professional resource for a competent assessment of this category of cases. Opinion No. 13 (2010) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the role of judges in the enforcement of judicial decisions emphasizes that judicial independence and the right to a fair trial is in vain if the decision is not enforced.<sup>48</sup> That is why, from the point of view of ensuring the effectiveness of the implementation of the decisions of the Constitutional Court of Ukraine, amendments to all the procedural codes of Ukraine (which took place in connection with their updating in the end of 2017 in the form of adoption in a new wording) are important, especially the following provisions: 1)

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46 As of the end of January 2018, 503 constitutional complaints were received by the Constitutional Court of Ukraine, see <<http://www.ccu.gov.ua/novyna/konstytuciyni-skargy-shcho-nadiyshly-dokonstytuciynogo-sudu-ukrayiny-za-stanom-na-29-sichnya>> accessed 5 May 2019.

47 Zakon Ukrayini Pro vseukrayins'kiy referendum (the Law of Ukraine ‘On All-Ukrainian Referendum’) <<http://zakon.rada.gov.ua/laws/show/5475-17>><http://zakon.rada.gov.ua/laws/show/5475-17>> accessed 5 May 2019.

48 Opinion No. 13 (2010) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the role of judges in the enforcement of judicial decisions <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 5 May 2019.



established by the Constitutional Court of Ukraine unconstitutionality (constitutionality) of a law, another legal act or a separate provision applied (not applied) by the court in the decision of the case, if the court decision has not yet been executed, is the basis for review of court decisions in connection with exceptional circumstances in the administrative process (Part 5 of Article 361 of the Code of Administrative Proceedings of Ukraine<sup>49</sup>), as well as in civil process (paragraph 1, Part 3, Article 423 of the Civil Procedural Code of Ukraine<sup>50</sup>) and economic process (paragraph 1, Part, Article 320 of the Commercial Procedural Code of Ukraine<sup>51</sup>); 2) established by the Constitutional Court of Ukraine unconstitutionality, constitutionality of a law, other legal act or their separate provision, applied by the court in resolving the case, is the exclusive circumstance in which court decisions which have come in effect can be reviewed in a criminal proceeding (paragraph 1, Part 3, Article 459 of the Criminal Procedural Code of Ukraine<sup>52</sup>).

### 3.2.3. Financial Aspect of the Independence of the Constitutional Court of Ukraine

According to Article 48 of the Law of Ukraine 'On the Constitutional Court of Ukraine', expenditures to provide financial support for the operations of the Court shall represent a separate line in the State Budget of Ukraine. Expenditures to provide financial support for the operations of the Court may not be reduced in the current fiscal year. The number of expenditures to provide financial support for the operations of the Court in the following year may not be less than the amount of the expenditures in the previous fiscal year. The Court shall, in compliance with the Budget Code of Ukraine, act as a chief administrator of funds from the State Budget of Ukraine as regards financial support for its operations.

According to expert estimates, in 2016, with the amount of financing of the Constitutional Court of Ukraine of 99.9 million UAH, cash expenses amounted to 99.1 million UAH, or 99.2% of the annual plan. In 2016, the Constitutional Court of Ukraine held 329 sessions and plenary sessions, exceeding the planned number by 59. 120 sessions of the judges' panels were held while 132 were planned, during which 68 decisions were made, which is 3 decisions more than expected. In 2017, it was planned to consider and adopt 128 acts of the Constitutional Court of Ukraine (conclusions, decisions, resolutions), and 69 resolutions of the Boards of Judges of the Constitutional Court of Ukraine. Also, in 2017, additional UAH 2 million was required to be paid in response to the claims of judges of the Constitutional Court of Ukraine in retirement; otherwise, these payments would be compulsorily charged at the expense of the remuneration fund of employees and judges of the Constitutional Court of Ukraine. However, according to expert estimates, the indicators of performance specified in

49 Kodeks administrativnogo sudochinstva Ukrayini v redaktsiyi zakonu vid 03 jovtnia 2017 r. (The Code of Administrative Proceedings of Ukraine in the wording of 03 October 2017) <<http://zakon.rada.gov.ua/laws/show/2747-15>> accessed 5 May 2019.

50 Tsivil'niy protsesual'niy kodeks Ukrayini vid 18 beres`nia 2004 r., zi zminami (The Civil Procedure Code of Ukraine 18 March 2004 with changes) <<http://zakon.rada.gov.ua/laws/show/1618-15>> accessed 5 May 2019.

51 Gospodars'kiy protsesual'niy kodeks Ukrayini v redaktsiyi vid 15 groudnia 2017 r. (The Commercial Procedure Code of Ukraine in the wording of 15 December 2017) <<http://zakon.rada.gov.ua/laws/show/1798-12>> accessed 5 May 2019.

52 Kriminal'niy protsesual'niy kodeks Ukrayini vid 13 kvitnia 2012 r., zi zminami (The Criminal Procedure Code of Ukraine 13 April 2012 with changes) <<http://zakon.rada.gov.ua/laws/show/4651-17>> accessed 5 May 2019.

the passport of the budget program do not meet the criteria of realism, relevance and social significance in accordance with the Order of the Ministry of Finance of Ukraine No. 1536 'On Performance Indicators of the Budget Program' of 10 December 2010, registered in the Ministry of Justice of Ukraine on 27 December 2010 under №1353/18648. Most of the performance indicators of the budget program are descriptive and cost-oriented and are not focused on achieving strategic priorities and do not provide an opportunity to evaluate the effectiveness of the budget program.<sup>53</sup> The real quantitative indicators of the Constitutional Court of Ukraine activity in 2017 are: 3 decisions, no (!) opinions and 42 court resolutions.<sup>54</sup> This state of affairs is mostly due to the crisis within the Constitutional Court itself, which manifests itself, in particular, in the inability of the Court to elect a new head of the Constitutional Court of Ukraine.<sup>55</sup>

### 3.3. STATUS OF THE SUPREME COURT AND COURTS

#### 3.3.1. Statutory Aspect of the Independence of the Supreme Court and Courts of General Jurisdiction

Let us take a look at constitutional backgrounds of the organization of the Ukrainian judiciary. Thus, Article 125 of the Constitution of Ukraine stipulates that the system of courts in Ukraine is formed in accordance with the territorial principle and the principle of specialisation and is defined by the law. Court shall be created, reorganized or dissolved on the basis of a law, the draft of which is issued to the Verkhovna Rada of Ukraine by the President of Ukraine after consultation with the High Council of Justice. The Supreme Court is the highest judicial body in the system of courts of Ukraine. According to the law, high specialized courts may also operate. Administrative courts act with the aim of protection of rights, freedoms and interests of a person in the sphere of public relations. The creation of extraordinary and special courts is not permitted.

The Law of Ukraine 'On the Judiciary and the Status of Judges' of 02 June 2016 (with amendments) defines the organization of judicial power and the administration of justice in Ukraine, which operates based on the rule of law according to European standards and ensures the right of everyone to a fair trial.

According to the abovementioned Law, the composition of the Supreme Court includes: 1) Grand Chamber of the Supreme Court; 2) Administrative Cassation

53 Financial and Economic Analysis Office in the Verkhovna Rada of Ukraine, 'Information note on the financing of the Constitutional Court of Ukraine in 2016-2020', September 2017 <[https://feao.org.ua/wp-content/uploads/2017/10/17.10.2017\\_Constitution\\_judge\\_1\\_%D0%9C%D0%94.pdf](https://feao.org.ua/wp-content/uploads/2017/10/17.10.2017_Constitution_judge_1_%D0%9C%D0%94.pdf)> accessed 6 May 2019.

54 The Constitutional Court of Ukraine in numbers for the period from 01 January 2017 to 31 December 2017 <<http://www.ccu.gov.ua/publikaciya/konstytuciynny-sud-ukrayiny-u-cyfrach>> accessed 6 May 2019.

55 Thus, the three-year term of office of the chairman of the Constitutional Court of Ukraine Yuriy Baulin was terminated on 19 March 2017, since then the post of the court chairman is vacant. However, until a new court chairman is elected, Baulin continues to lead the court as an elderly judge. On 18 May, the Constitutional Court was unable to elect its head. The next voting was scheduled for 2 November, but the head of the Constitutional Court of Ukraine also was not elected on that day. According to the court rules, the head of the Constitutional Court of Ukraine should have been elected not later than two months before this post was vacant, that is, it should have taken place in early 2017. On 12 December 2017, the court was again unable to elect a new chairman in the absence of candidates. See: <<https://p.dw.com/p/2pFAP>> accessed 6 May 2019.

Court; 3) Commercial Cassation Court; 4) Criminal Cassation Court; and 5) Civil Cassation Court.

In general, the Law reflects the new structure, introduced by the amendments to the Constitution of 2016 which provide for the transition from a four-level system (including courts of first and second instances, high (specialized) appellate courts and the Supreme Court of Ukraine) to a three-level system (which now includes courts of first and second instances and the Supreme Court with integrated specialized cassation courts).

### **3.3.2. Functional Aspect of the Independence of the Supreme Court and Courts of General Jurisdiction**

Addressing the functional aspect of the characteristic of the Supreme Court independence, it is worth noting that an important criterion of judicial independence is not only the existence of legal guarantees of it, but also the perception of this power as independent by public; in other words, the attitude of public towards the judiciary and their perception of the judiciary as independent are very important factors of judicial independence. Thus, among the markers of sufficient constitutional and legal guarantees of judicial independence there are such questions as: Is the judiciary perceived as independent? What is the public's perception of possible political influences or manipulations in the appointment and promotion of the judges, as well as on their decisions in individual cases?<sup>56</sup>

According to Opinion No. 11 of the Consultative Council of European Judges to the Attention of the Committee of Ministers of the Council of Europe on the Quality of Judicial Decisions of 18 December 2008,<sup>57</sup> legal certainty guarantees the predictability of the content and application of the legal rules, thus contributing in ensuring a high quality judicial system (paragraph 47). Judicial procedure must be clear, transparent and predictable (paragraph g of Main Conclusions and Recommendations).

According to Recommendation No.R (95) 5 of the Committee of Ministers to Member States concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases,<sup>58</sup> appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims (Article 7).

In this context, it is noted that many OSCE participating States have systems in which a single supreme court is the ultimate arbiter on matters pertaining to the various branches of the law (criminal, civil, or administrative), including the United Kingdom (with some exceptions), Denmark, and the United States. It is understandable that

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56 Rule of Law Checklist, <[http://newjustice.org.ua/wp-content/uploads/2017/09/Rule\\_of\\_Law\\_Checklist\\_UKR.pdf](http://newjustice.org.ua/wp-content/uploads/2017/09/Rule_of_Law_Checklist_UKR.pdf)> accessed 6 May 2019.

57 CCJE, 'Opinion No 11 on the quality of judicial decisions' <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 6 May 2019.

58 Recommendation R (95) 5 of the Committee of Ministers to Member States concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases <[http://zakon5.rada.gov.ua/laws/show/994\\_153](http://zakon5.rada.gov.ua/laws/show/994_153)> accessed 6 May 2019.

the Ukrainian legislator has sought to impose a degree of unity in jurisprudence by merging the cassation courts and creating a Grand Chamber to resolve potential disparities in jurisprudence between the 'Courts' within the new Supreme Court. The Grand Chamber should have adequate competencies to resolve genuine jurisprudential disparities between the cassation courts within the Supreme Court. To avoid a fourth instance jurisdiction and at the same time ensure that jurisprudential unity can be achieved and then maintained, the Law and any procedural laws adopted to implement it could specify that appeals to the Grand Chamber should be limited to cases involving matters of principle or particular public importance, or where a gross injustice is caused to the petitioner.<sup>59</sup>

With regard to that, in the scope of this research it is worth to emphasize the authority of the Supreme Court to ensure equal use of legal norms by courts of different specializations in the way and order stipulated by the procedural law.

Thus, according to parts 5, 6, Article 13 of the Law of Ukraine on 'On the Judiciary and Status of Judges', conclusions regarding application of the law provisions specified in resolutions of the Supreme Court of Ukraine shall be mandatory for all government entities that use in their activity a legal act containing the respective legal provision. Conclusion regarding application of the law provisions specified in resolutions of the Supreme Court of Ukraine shall be taken into account by other courts in the application of such legal provisions.

This novelty was positively assessed by the Venice Commission, which noted that it seems to be a good solution in a system which while lacking a doctrine of binding precedents nevertheless seeks to provide for a consistent approach to legal interpretation.<sup>60</sup>

In civil law countries, court rulings, especially of a supreme court, have a wider importance than in the specific case in respect of which that ruling was given and, from this perspective, it can be considered a source of law (paragraph 13). Numerous supreme courts in civil law countries are now empowered to select cases with intention of setting standards that should be applicable in future cases. Therefore, in these cases, already one judgment of a supreme court, when it was reached with intention to set a precedent, can count as an authoritative case law (paragraph 14). The Supreme Court must ensure uniformity of the case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system (paragraph 20).<sup>61</sup>

Thus, for instance, according to Article 290 of the Code of Administrative Procedure of Ukraine, if one or several administrative courts have typical administrative cases in their proceedings, and the number of such cases defines the expediency of making a model

59 OSCE, ODIHR, 'Opinion on the Law of Ukraine "On the Judiciary and Status of Judges"' No JUD-UKR/298/2017 [RJU/AT] <<http://rsu.gov.ua/uploads/news/zusudoustriyvisnovkosce-d88675ed06.pdf>> accessed 6 May 2019.

60 Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law 'On the Judiciary and the Status of Judges' and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015) <[http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/229B826C8AC787DEC2257D87004987C3](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/229B826C8AC787DEC2257D87004987C3)> accessed 6 May 2019.

61 CCJE, 'Opinion No 20 on role of courts with respect to the uniform application of the law', Strasbourg, 10 November 2017 <<https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>> accessed 6 May 2019.

decision, a court which tries one or more of such cases can apply to the Supreme Court with a submission to try one of the cases by the Supreme Court as court of first instance.

### **3.4. STATUS OF THE HIGH COUNCIL OF JUSTICE**

#### **3.4.1. Statutory aspect of the independence of the High Council of Justice**

The High Council of Justice consists of twenty one members: ten of them shall be elected by the Congress of Judges of Ukraine among judges or retired judges; two of them shall be appointed by the President of Ukraine; two of them shall be elected by the Verkhovna Rada of Ukraine; two of them shall be elected by the Congress of Advocates of Ukraine; two of them shall be elected by the All-Ukrainian Conference of Public Prosecutors; two of them shall be elected by the Congress of Representatives of Law Schools and Law Academic Institutions.

The Law of Ukraine ‘On the High Council of Justice’ of 21 December 2016 governs the status, powers, principles of organisation, and the procedures of the High Council of Justice.

The Consultative Council of European Judges (hereinafter — the CCJE) considered that the European Charter — in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges – goes to a general direction which the CCJE had wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems.<sup>62</sup> Thus, the existence of the High Council of Justice is important, in particular, from the point of view of guaranteeing the judicial independence according to the international standards in this sphere.

As of today, most European States have introduced a body independent of the executive and legislature with an exclusive or lesser role in respect of appointments and (where relevant) promotions; examples are Andorra, Belgium, Cyprus, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, ‘the Former Yugoslav Republic of Macedonia’ and Turkey.<sup>63</sup>

It is worth pointing out that for Ukraine, as for the country with unstable democracy, it is important that the High Council of Justice shall be one of the segments of the mechanism providing for an independent judiciary; however, the Council itself shall be independent and ‘protected’, including the mechanisms of ‘restraint and counterbalance’, from the influence of the legislative and the executive branches of power, and from the head of state.

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<sup>62</sup> Recommendation No. R (94) 12.

<sup>63</sup> CCJE, ‘Opinion No 1 on standards concerning the independence of the judiciary and the irremovability of judges’ <[http://www.vru.gov.ua/content/file/Opinion\\_1-18.pdf](http://www.vru.gov.ua/content/file/Opinion_1-18.pdf)> accessed 6 May 2019.

#### 4. CONCLUDING REMARKS

It is obvious that every democratically elected government has the right to introduce reforms in different spheres of the State's activities. When the reform was promised during the elections, it is even a moral obligation to fulfil the promise.

Nevertheless, the government's power in this field is not unlimited. The limits are stated in the Constitution. Yet in Europe, the limits also stem from the standards worked out by the European community; standards which are results of discussions, compromises and different experience of European countries. Poland, as EU Member State, has to fulfil the standards of both the Council of Europe and the European Union. The Council of Europe standards regarding the judiciary may be found in the opinions, positions, statements etc. of Consultative Council of European Judges and Venice Commission, while EU standards are shown in the European Network of Councils of Judiciary works.

When comparing those standards to the recently introduced changes in the Polish legal system regarding the judiciary it seems that there are a lot of legislative changes introduced which are in breach of the European standards, according to the various European bodies. This may lead to many problems with relation to the functioning of the Polish courts and judges, e.g. courts of other EU Member States may refuse to perceive the Polish judiciary as independent, thus not applying the principle of mutual trust (see the decision of an Irish court refusing to execute the European Arrest Warrant on a Polish citizen). As a result, judgments of Polish courts might not be automatically executed in other European countries.

There is still hope, though, that those changes which go against the European standards of judicial independence will be reversed and that the Polish judiciary will not lose the guarantees of its independence. We must remember that all rights and freedoms guaranteed in the European Convention of Human Rights, as well as in the Constitution of the Republic of Poland will be of purely illusory nature if the right to fair trial is not guaranteed, and that the fair trial as such is not possible without judiciary which is institutionally independent from other branches of state power.

It is obvious that the changes which have happened in Ukraine in connection with the beginning of large-scale judicial reform implementation are generally positive and progressive. However, assessing the respective results of the reform we should consider that the legal part of the reform is only one of its constituents and thus, successful realization of all statements on the reformation of the judiciary status is possible only if the complex nature of these processes as well as political, social, economical, historical and other factors are taken into account.

Speaking about key aspects in need of attention and improvement, it is worth mentioning the following: 1) in the part of legal regulation of the status of Constitutional Court of Ukraine, the renovation of the system of legal acts regulating the organization and operation of the Constitutional Court of Ukraine should be improved and completed. In particular, the Rules of Procedure of the Constitutional Court of Ukraine should be adopted. However, the absence of the latter document should not be a reason for a body of constitutional jurisdiction not to fulfill their powers (as it happens today in the part of considering constitutional complaints), because the norms of the Constitution of Ukraine are direct-acting and their realization is possible in the absence of legislative and subordinate regulatory acts; 2) a gap which can potentially cause a constitutional



conflict needs legal regulation: the point is that the mechanism of influence on subjects who form the Constitutional Court of Ukraine in case of their inaction in the matter should be secured; 3) it is reasonable to extend the institute of constitutional complaint on subjects of local self-government; 4) it is necessary to activate the operation of the Supreme Court in the part of making model decisions; 5) the legal regulation of the mechanisms of interaction between the parliament, the President of Ukraine and the High Council of Justice, in particular, in the part of participation of the latter in the formation of legislation concerning legal proceedings and financing of the judiciary should be improved.

# EUROPEAN SMALL CLAIMS PROCEDURE AND ITS PLACE IN THE SYSTEM OF POLISH SEPARATE PROCEEDINGS

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Summary: – 1. Introduction. – 2. The Notion and Types of Separate Proceedings and Their Place in Court Civil Proceedings. – 3. Criteria for Distinguishing Separate Proceedings. – 4. European Small Claims Procedure as Separate Proceedings. – General Issues. – 5. Relationship Between the European Small Claims Procedure and Other Separate Proceedings. – 5.1. Order for Payment Proceedings. – 5.2. Writ of Payment Proceedings. – 5.3. Electronic Writ of Payment Proceedings. – 5.4. Simplified Procedure. – 5.5. European Order for Payment Procedure. – 6. Concluding Remarks.

*The European proceedings in cross-border cases, to which the European order for payment and the European Small Claims Procedures belong, were introduced into Polish legal system on 12 December 2008 as an alternative to the existing proceedings provided for in the laws of the Member States. The base for the application of the European Small Claims Procedure is Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing the European Small Claims Procedure.*

*The Polish legislator decided to place a modest regulation of these procedures amongst separate proceedings. To approximate the subject issue, the nature of the European Small Claims Procedure needs to be considered along with its relations with selected separate proceedings (such as order for payment proceedings, writ of payment proceedings, electronic writ of payment proceedings, simplified procedure and European order for payment*

procedure), the nature of which justifies including them in the group of accelerated and simplified proceedings.

*Keywords:* European Proceedings in Cross-border Cases, European Small Claims Procedure, Separate Proceedings, Accelerated Proceedings, Simplified Proceedings, Cross-border Cases.

## 1. INTRODUCTION

The European proceedings in cross-border cases, to which the European Order for Payment (hereinafter – EOP) and the European Small Claims Procedures (hereinafter – ESCP) belong, were introduced into Polish legal system on 12 December 2008 as an alternative to the existing proceedings provided for in Poland. The bases for the application of these proceedings are: in the case of the European order for payment, the provisions of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December, 2006, establishing the European order for payment procedure; and for European Small Claims Procedure – Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing the European Small Claims Procedure.

The court examines the case in the European Order Procedure or the European Small Claims Procedure if the conditions are met accordingly as set out in the provisions of Regulation No. 1896/2006 (Art. 505<sup>15</sup> § 1 of the Code of Civil Proceedings, hereinafter – the CCP) or Regulation 861/2007 (Art. 505<sup>21</sup> §1 of the CCP), and the common feature of these proceedings is the cross-border nature of the case, which is the basis for the decision.

The Polish legislator decided to place a modest regulation of these procedures amongst *separate proceedings*.<sup>1</sup> To approximate the subject issue, the nature of the European Small Claims Procedure needs to be considered along with its relations with other *separate proceedings*.

## 2. THE NOTION AND TYPES OF SEPARATE PROCEEDINGS AND THEIR PLACE IN COURT CIVIL PROCEEDINGS

The fact-finding proceedings have an essential position in court civil proceedings. Their purpose is to examine and resolve a civil case within the meaning of Art. 1 of the CCP. The fact-finding proceedings are divided into two modes: civil litigation and non-litigious proceedings. The model civil procedure mode includes in its scope ordinary proceedings (also referred to as proceedings on general principles) and separate proceedings (Art. 13 § 1 of the CCP).<sup>2</sup>

According to the assumptions of the legislator, the ordinary proceedings are those foreseen for the majority of civil cases. However, the successive increase in the number

1 These proceedings are optional in national cases, cf. Ł. Goździaszek, 'Europejskie postępowanie w sprawach drobnych roszczeń' (2009) No 9 Monitor Prawniczy 471.

2 Cf. M. Manowska, *Postępowania odrębne w procesie cywilnym* (LexisNexis 2010) 11 and subs.; M. Miszewski, *Proces cywilny w zarysie. Część pierwsza* (Księgarnia Wydawnictw Prawniczych i Naukowych 1946) 245.

of separate proceedings had such a consequence that proportionally to the increase in the number of cases heard in separate proceedings, their significance also grew.<sup>3</sup>

The legislator repeatedly uses the notions of *proceedings* or *separate proceedings* in the Code of Civil Proceedings, but fails to introduce their legal definition, whereby in the study of civil procedural law, it can be noticed that the understanding of these notions is not uniform.<sup>4</sup> Separate proceedings are referred to as a special procedure<sup>5</sup> or special litigious proceedings,<sup>6</sup> extraordinary proceedings,<sup>7</sup> or a special type of ordinary proceedings.<sup>8</sup>

Separate proceedings are regulated in the Code of Civil Proceedings in Title VII of the first book (Litigation), placed in the first part (Fact-finding proceedings). Title VII, consisting of thirteen sections, includes provisions from Art. 425 to Art. 505<sup>39</sup> of the CCP. However, this does not mean that there are thirteen separate proceedings, though it needs admitting that the system of the code has a certain impact on the identification of separate proceedings.

The classification of these proceedings is differently presented in the jurisprudence, which undoubtedly affects their number; nevertheless, the Code of Civil Proceedings indicates the following separate proceedings:<sup>9</sup>

- 1) Proceedings in Matrimonial Cases (Art. 425 - 452 of the CCP);
- 2) Proceedings in Cases Involving Parent-Child Relationship (Art. 453 - 458 of the CCP);
- 3) Proceedings in Labour Law Cases (Art. 459 - 476 and Art. 477 - 477<sup>7</sup> of the CCP);
- 4) Proceedings in Social Insurance Cases (Articles 459-476 and Art. 477<sup>8</sup> - 477<sup>14a</sup> of the CCP);
- 5) Proceedings in Cases Involving Infringement of Possession (Articles 478 - 479 of the CCP);
- 6) Proceedings in Cases Involving Competition and Consumer Protection, and on Practices Unfairly Using a Contractual Advantage (Art. 479<sup>28</sup> - 479<sup>35</sup> of the CCP);
- 7) Proceedings in Cases Pertaining to Energy Regulations (Articles 479<sup>46</sup> - 479<sup>56</sup> of the CCP);

3 W Broniewicz indicates that the proportions of cases examined in ordinary proceedings and in separate proceedings have been reversed, cf. W Broniewicz (updated by I Kunicki) in W Broniewicz, A Marciniak, I Kunicki (eds) *Postępowanie cywilne w zarysie* (Wolters Kluwer Polska 2016) 352.

4 More on differentiated understanding of the notion of 'separate proceedings' M Osowska-Grzelak, 'Wzajemna relacja postępowań odrębnych występujących w procesie cywilnym w ujęciu ogólnym - p. I', (2008) 13 *Monitor Prawniczy* 694 and subs, along with the literature cited there.

5 Cf. J Gudowski in T Ereciński (ed), *Kodeks postępowania cywilnego. Komentarz. Część pierwsza. Postępowanie rozpoznawcze. (Commentary. First Part. Fact-finding procedure)*, (Vol I, Lexis Nexis 2012) 175, who is of the opinion that separate proceedings make up a particular type of process, proper in cases, separated by the legislator – according to their features – from amongst all cases examined in the litigation. Cf. Miszewski (n 2) 149. T Ereciński aptly draws attention to the necessity to use the word 'Mode' only with reference to the civil litigation and non-litigious proceedings, cf. T Ereciński, 'Postępowania odrębne *de lege lata* i *de lege ferenda*' in H Dolecki, K Flaga-Gieruszyńska (eds), *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych, Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego, Szczecin-Niechorze 28-30.9.2007* (Conference materials of All-Poland Congress of the Chairs of Civil Proceedings, Szczecin-Niechorze 28-30.9.2007, CH Beck 2009) 1.

6 J Jodłowski (updated by J Lapierre, and then by K Weitz) in J Jodłowski, Z Resich, M Lapierre, M Misiuk-Jodłowska, K Weitz, *Postępowanie cywilne* (LexisNexis 2007) 41, who distinguishes (litigious) general proceedings and special litigations.

7 To distinguish from ordinary proceedings, or another ordinary litigation, cf. W Siedlecki in J Jodłowski, W Siedlecki, *Postępowanie cywilne. Część ogólna* (PWN 1958) 34.

8 Osowska-Grzelak (n 4) 700.

9 It is worthy of mentioning that the legislator plans to restore proceedings in commercial cases, although in a changed shape in its 25 October 2018 draft of the CCP.

- 8) Proceedings in Cases Pertaining to Telecommunication and Postal Regulations (Art. 479<sup>57</sup> - 479<sup>67</sup> of the CCP);
- 9) Proceedings in Cases Pertaining to Railway Transport Regulations (Art. 479<sup>68</sup> - 479<sup>78</sup> of the CCP);
- 10) Proceedings in Cases Pertaining to Water and Sewage Market Regulation (Art. 479<sup>79</sup> - 479<sup>88</sup> of the CCP);
- 11) Order for Payment Proceedings (Art. 484<sup>1</sup> - 497 of the CCP);
- 12) Writ of Payment Proceedings (Art. 497<sup>1</sup> - 505 of the CCP);
- 13) Simplified Procedure (Art. 505<sup>1</sup> - 505<sup>14</sup> of the CCP);
- 14) European Order for Payment Procedure (Articles 505<sup>15</sup> - 505<sup>20</sup> the CCP);
- 15) European Small Claims Procedure (Art. 505<sup>21</sup> - 505<sup>27a</sup> of the CCP);
- 16) Electronic Writ of Payment Proceedings (Art. 505<sup>28</sup> - 505<sup>38</sup> the CCP).

The system of the code itself allows to group separate proceedings, given certain common features, for instance, the legislator dealt in one section with proceedings in labour and social insurance law, order for payment and writ of payment proceedings or European procedure in cross-border cases. Depending on the adopted convention, it may be acknowledged that there are three separate proceedings,<sup>10</sup> following the system of the Code of Civil Proceedings, or else that each of these proceedings constitutes a separate procedure.<sup>11</sup> The jurisprudence also presents intermediate positions, which recognize the proceedings in labour law and social insurance cases as a single procedure, but the order for payment proceedings and the writ for payment proceedings as two separate ones.<sup>12</sup>

Dealing with the so-called regulatory proceedings is different from the point of view of Polish procedural law system, i.e. Proceedings in Cases Pertaining to Energy Regulations, Proceedings in Cases Pertaining to Telecommunication and Postal Regulations, Proceedings in Cases Pertaining to Railway Transport Regulations and Proceedings in Cases Pertaining to Water and Sewage Market Regulation. Each of them is dealt with in a separate section, although their essence and legal character would allow to find many common features.<sup>13</sup>

In turn, in the section devoted to proceedings in matrimonial cases, the legislator separates individual chapters to emphasize the differences between proceedings in cases of divorce and separation (Art. 425 - 435 and Art. 436 - 446 of the CCP) and other matrimonial cases (Art. 425 - 435 and Art. 447 - 452 of the CCP).<sup>14</sup> In this respect, opinions diverge also in the literature of the subject, whether we deal with one or two separate proceedings.

In the classification of separate proceedings, the understanding of matrimonial cases proceedings as one separate procedure dominates.<sup>15</sup>

The notion of *separate proceedings* shall be understood as proceedings different from their ordinary type, placed in the Code of Civil Proceedings in its first book of the first part, which confirms that separate proceedings are positioned within litigious

10 J Bodio in A Jakubecki (ed) *Kodeks postępowania cywilnego. Praktyczny komentarz* (Zakamycze 2005) 52.

11 Thus Gudowski (n 5) 175; Osowska-Grzelak (n 4) 694 and subs.

12 Thus Manowska (n 3) 16.

13 In the jurisprudence, the so-called regulatory proceedings had been included into commercial cases proceedings, before the laws dealing with them were cancelled cf. Osowska-Grzelak (n 5) 695 and subs.

14 cf. Broniewicz (n 4) 352 and subs.

15 Thus Manowska (n 2) 16; J Bodio (n 10) 52; Gudowski (n 5) 175.

procedure of cases examination.<sup>16</sup> Separate proceedings are either summarized and simplified proceedings or those differently regulated in consequence of special features of cases being their subject<sup>17</sup>. Each time, the presiding judge examines, already at the initial stage of the proceedings, the mode in which the case shall be examined and, when its hearing shall take place in the civil litigation, whether it shall be in accordance with the provisions on separate proceedings (Art. 201 § 1 of the CCP). The specificity of these proceedings, which is the basis for their separation, means that the court, when examining a case eligible for specific separate proceedings, first applies the provisions of a given procedure, and only in the absence of a different regulation, it will apply not contradictory, general provisions, regulating ordinary proceedings.<sup>18</sup>

### 3. CRITERIA FOR DISTINGUISHING SEPARATE PROCEEDINGS

In the literature on the subject, two basic criteria decisive what belongs to the given separate proceedings are indicated, namely the need to speed up and simplify the proceedings or the need to differentiate the cases due to the special properties that are their object.<sup>19</sup>

The first of these criteria, i.e. the need to speed up and simplify the proceedings, encouraged the legislator to establish the order for payment, the writ of payment, the simplified or electronic writ of payment proceedings, although this assumption is also evident, to some extent, in the norms of the proceedings in cases involving infringement of possession.<sup>20</sup>

Originally, in the order for payment and the writ of payment proceedings, and later also in the electronic writ of payment proceedings,<sup>21</sup> relatively simple cases were to be examined. The order for payment was issued at a closed session on the basis of factual circumstances invoked by the claimant in the lawsuit (thus, in the electronic writ of payment proceedings, as well as, in the writ of payment proceedings) and on the basis of documents attached thereto, (thus, in the order for payment procedure).

As the name already suggests, simplified proceedings, although the case is to be heard at the oral hearing, contain in the norms, regulating this procedure, a series of simplifications that have a major impact on their faster course. They concern, among other things, the obligation to file the lawsuit on an official form (Art. 505<sup>2</sup> of the CCP), the prohibition of claims cumulating and fragmentizing (Art. 505<sup>3</sup> of the CCP), the prohibition of changing the claim's subject and object (Art. 505<sup>4</sup> § 1 of the CCP), the right to renounce the justification being served, as well as, the right to appeal (Art. 505<sup>8</sup> § 2 and 3 of the CCP).

16 Manowska (n 2) 11; cf. also M Manowska, *Postępowanie nakazowe i upominawcze* (C.H. Beck 2001) 9 and subs.

17 W Siedlecki, *Postępowanie cywilne. Zarys wykładu* (PWN 1977) 16.

18 Cf. Gudowski (n 5) 176.

19 T Ereciński also indicates one essential criterion, and namely, the nature of the case, widely understood, both as 'objective' (resulting from a set out right or substantive law relationship) or 'simple' or else 'small', cf. Ereciński (n 5) 1 i 10.

20 This occurs because of the narrow scope of cognizance in these proceedings, limited to the fact of last possession and its infringement, independently of the property rights, cf. Ereciński (n 6) 8.

21 The electronic writ of payment proceedings were introduced by the 9 January 2009 Law on amendments to the Code of Civil Proceedings and Some Other Laws (J. of L. No 26, item 156) which came into force on 1 January 2010.



The European procedure in cross-border cases, some of the solutions characteristic for these proceedings taken into account, also allow to include them in the group of sped up and simplified proceedings, which is proved at least by the use of official forms or substantive consideration of the case *in camera*.

It is also worth underlining that some of the proceedings which make part of the so-called sped up proceedings feature an optional nature. The most expressive regulation related thereto is contained in Art. 484<sup>1</sup> § 2 of the CCP, according to which the court resolves the case in the order for payment proceedings upon the claimant's written request filed in the lawsuit.

In turn, in cross-border proceedings, this optional character is manifested in the claimant's will when they file the lawsuit on a special form, whereas in electronic writ of payment proceedings –when filing the lawsuit by means of the ICT system.

The writ of payment proceedings do not match this classification, because it is the presiding judge who decides that the writ of payment proceedings shall be applied to the case (Art. 201 § 1 of the CCP). The same applies to other separate proceedings, in which the classification of a case to particular proceedings is obligatory.

In the first place, simplified proceedings shall be mentioned in this group, which although summarized, have an obligatory character. An interesting solution in these proceedings are the rules that provide for an exception – cognizing a case, falling within the scope of simplified proceedings (Art. 505<sup>1</sup> of the CCP), without applying the provisions of this procedure, if the case is particularly complex or its resolution requires special knowledge (Art. 505<sup>7</sup> of the CCP). This is a unique legal norm that allows to switch from separate proceedings of an obligatory nature to ordinary proceedings. Since, as a rule, cognizance of cases eligible for separate proceedings is of exclusive character, it means that these cases cannot be examined in ordinary proceedings (absolute exclusivity). This rule has an exception, precisely in the abovementioned simplified proceedings (Art. 505<sup>7</sup> of the CCP), in the writ of payment proceedings and the electronic writ of payment proceedings. In the latter two proceedings, effective filing of opposition against an order for payment may lead to the referral to ordinary proceedings, unless the case is eligible for simplified proceedings (Art. 505<sup>1</sup> of the CCP), which suggests that separate proceedings can overlap (cross).<sup>22</sup>

The remaining separate proceedings have obligatory nature because of the specificity of cases recognized in them. In this case, the absolute exclusivity occurs, so these cases can be under examination only in specific separate proceedings for which a given case is eligible.

Most of these proceedings coincide with the second criterion of distinction mentioned above, which relates to the different regulation of cases (privileged) in consequence of their special features (object or subject privilege).<sup>23</sup> These cases are based on the criterion

22 Overlapping or else crossing of these separate proceedings with each other can occur in the case of pecuniary claims, which means that although the case is eligible for simplified proceedings or labour law cases proceedings, it may be referred by the presiding judge to a *camera* session so as to render a writ of payment (Art. 201 § 1 sentence 2 of the CCP), the claimant can also lodge an application for issuing an order of payment or sue in electronic writ of payment (when the premises of Art. 485 of the CCP are met), cf. J Lapierre (updated by K Weitz) in J Jodłowski, Z Resich, J Lapierre, M Misiuk-Jodłowska, K Weitz, *Postępowanie cywilne* (LexisNexis 2007) 372.

23 Cf. A Zieliński, 'Uprzywilejowanie niektórych rodzajów roszczeń w postępowaniu cywilnym' in M Jędrzejewska, T Ereciński (eds), *Studia z prawa postępowania cywilnego. Księga pamiątkowa ku czci Zbigniewa Resicha* (PWN 1985) 310 oraz 312 and subs.; Ereciński (n 5) 8 and subs.

of substantive law character and a particular public interest in cognizing them.<sup>24</sup> The introduction of proceedings in matrimonial cases or proceedings in cases of parents-and-children relations resulted therefore from the nature of the right or legal relationship under protection. The legislator was also guided by this criterion when creating subsequent separate proceedings, such as for cases related to labour law and social insurance or for specific cases, in terms of their object, the so-called regulatory proceedings. It is also noteworthy that some of these proceedings concern civil cases in substantial meaning (such as, proceedings in matrimonial cases or in cases involving parent-child relationship, proceedings in labour law cases), and some cover civil cases in a formal meaning (proceedings in social insurance cases, and the so-called regulatory proceedings).

As aptly noted by T. Ereciński, separate proceedings are not homogenous in consequence of the fact that some of them constitute only an initial phase of procedural proceedings, while others are a separate manner of proceedings, similar to the general process.<sup>25</sup>

#### **4. EUROPEAN SMALL CLAIMS PROCEDURE AS SEPARATE PROCEEDINGS – GENERAL ISSUES**

The European small claims procedure was introduced to the Polish Code of Civil Proceedings by the amendment which entered into force on 12<sup>th</sup> December 2008.<sup>26</sup> The provisions dealing with these proceedings (Art. 505<sup>21</sup>–505<sup>27</sup> of the CCP) make up the domestic supplement to the provisions contained in the Regulation of the European Parliament and of the Council (EC) No. 861/2007 of 11 July 2007 which established the European Small Claims Procedure,<sup>27</sup> which were amended later by the Regulation of the European Parliament and of the Council (EU) 2015/2421<sup>28</sup> of 16 December 2015. The provisions contained in the Regulation No. 861/2007 make up the legal basis for the Polish Court to act in the small claims procedure, whereby pursuant to the provisions of Art. 19 of this Regulation, the European Small Claims Procedure is subject to the procedural provisions of the Member States in which the proceedings take place. In consequence, the provisions of the Polish Code of Civil Proceedings in the small claims procedure deal exclusively with such issues which are not dealt with in Regulation No. 861/2007, nor do they modify or copy the European Union's provisions. They constitute supplementing provisions to the Regulation No. 861/2007, based on domestic law.<sup>29</sup> In the European Small Claims Procedure before Polish courts, we deal with parallel applications of the provisions of the Regulation No. 861/2007

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24 Ereciński (n 5) 9.

25 Ereciński (n 5) 11.

26 Act on amendment - to the Code of Civil Proceedings and some other laws of 5 December 2008, Journal of Laws No. 234, item 1571.

27 Official Journal of the European Union L 199 of 31 July 2007, p. 1, hereinafter referred to as the Regulation No. 861/2007.

28 Official Journal of the European Union L 341 of 24 December 2015, p. 1, hereinafter referred to as the Regulation No. 2015/2421. This Regulation also amended the Regulation (EC) No. 1896/2006, which established proceedings with regard to the European order for payment.

29 A Harast-Sidorowska, 'Commentary to Art. 505<sup>21</sup> the CCP' in A Góra-Błaszczkowska (ed), *Code of Civil Proceedings, Vol. I, Commentary to Art. 1-729* (C.H. Beck 2016) 1528-1529.

and the provisions of the Code of Civil Proceedings, which supplement the provisions of the above-mentioned regulation.

Pursuant to point 8, first sentence, of the recitals of the Regulation No. 861/2007, the purpose of these proceedings is to simplify and speed up the course of disputed proceedings related to small claims in cross-border cases, and also to reduce the costs by making available an optional tool, supplementing the procedures existing in the individual Member States law, which remains intact.

The European Small Claims Procedure is an optional, separate procedure, which is autonomous with regard to the other separate Polish proceedings, as pursuant to Art. 505<sup>21</sup> §2 of the CCP, the CCP provisions on other separate proceedings are not applied in cases examined according to the provisions of the European Small Claims Procedure.

The Regulation No. 861/2007 is eligible in cross-border cases of a civil and commercial nature, notwithstanding the type of court and tribunal, in the case, when the value of the disputed claim, with the exclusion of all the interest, expenses and disbursements does not exceed EUR 5,000 at the moment when the application form is submitted to the competent court or tribunal. The Regulation is not applied in particular to revenue, customs or administrative cases, nor to those related to the State's liability for acts or omissions in the exercise of State authority (*'acta iure imperii'*), those related to civil status, legal capacity and capacity for legal deeds of natural persons, property relationships, arising from matrimony or a union recognised based on the provisions which are to be applied to such a union as having comparable effects to the consequences of marriage, maintenance duties, arising from a family relationship, relationship of marriage, kinship or affinity, last wills and succession, including maintenance duties, occurring as a result of death, bankruptcy, arrangement or any other similar proceedings, social security, conciliatory tribunals, labour law, lease or tenancy of real estate, with the exclusion of claims related to pecuniary claims or breach of privacy and personal goods, including defamation (Art. 2).

For the purposes of this Regulation, a cross-border case is understood as one in which at least one Party has the place of residence or habitual stay in a Member State other than the Member State of the court or tribunal which examines the case and the moment proper to decide whether a given case is of a cross-border nature is the day when the application was submitted to the competent court or tribunal (Art. 3 subpara. 1 and 3).

The issue of European Small Claims Procedure's relation to the other separate proceedings is dealt with in Polish procedural law.

## **5. RELATION BETWEEN THE EUROPEAN SMALL CLAIMS PROCEDURE AND OTHER SEPARATE PROCEEDINGS**

### **5.1. ORDER FOR PAYMENT PROCEEDINGS**

It is necessary to determine the type of cases that can theoretically be examined in both separate proceedings, with reference to Art. 485 of the CCP and to Art. 2 and 3 of the Regulation No. 861/2007 in conjunction with Art. 505<sup>21</sup> § 1 of the CCP. These are civil and commercial cases of a cross-border nature, if the circumstances to justify the

request are proved by documents indicated in Art. 485 of the CCP,<sup>30</sup> and the value of the cause of action, with the exclusion of interest, expenses and disbursements, does not exceed the equivalent of Euro 5,000 at the moment the action comes to the court, and in addition, these cases are not listed in Art. 2 subpara. 1 sentence 2 and subpara. 2 of the Regulation cited.

The relationship between these separate proceedings shall be examined, their optional nature taken into account, which means that it is the claimant who decides in which of these proceedings they will assert their claim (the claimant has the choice: either the order for payment or the European Small Claims Procedure). The claimant's choice of one of the above-mentioned separate proceedings has it that during the proceedings initiated, the simultaneous or supplementary application of the rules of the other proceedings is not allowed. This issue is dealt with in Art. 505<sup>21</sup> §2 of the CCP, according to which in the case examined under the rules of the European Small Claims Procedure, no provisions of any other separate proceedings can be applied.<sup>31</sup>

Pursuant to Article 505<sup>27</sup> §2 of the CCP, by reversing the judgment appealed against, the second instance court transfers the case to be re-examined, the rules of separate proceedings being excluded. The above rule leads to the conclusion that after the case is resolved by the court of first instance in the European Small Claims Procedure and the judgment is reversed by the second instance court, the subsequent application of the rules of order for payment proceedings is unacceptable.

30 Art. 485 § 1 of the CCP. The Court issues an order for payment if the claimant pursues a claim for money or for the performance of other replaceable things and the circumstances which justify the claim being pursued are proved by the following documents attached to the statement of claim:

- 1) an official document;
- 2) a bill approved by the debtor;
- 3) summons for the debtor to pay and a written declaration by the debtor on acknowledgement of the debt;
- 4) a demand for payment accepted by the debtor, returned by the bank and unpaid because of lack of resources on the bank account.

§ 2. The Court also issues an order for payment against a person obligated from a promissory note, a cheque, a warrant or a bill of debt, properly filled in, whose correctness and content raise no doubt. In the case the rights from the promissory note, cheque, warrant or bill of debt have passed to the claimant, so as to issue the order, it is necessary to present documents to justify the claim, and if the passage of these rights onto the claimant does not result directly from the promissory note, cheque, warrant or bill of debt.

§ 2a. The Court issues an order for payment based on the contract, the proof of having fulfilled the mutual non-pecuniary performance, the proof of having served the invoice or bill on the debtor if the claimant pursues claims related to payment of pecuniary performance, interest in commercial transactions set out in the 8 March 2013 Law on Deadlines for Payments in Commercial Transactions (Journal of Laws of 2016, item 684 and of 2018, item 650), or an amount set out in Art. 10 subpara. 1 of this Law and pursuant to documents which confirm having borne the costs of the receivables collected if the claimant also pursues the costs set out in Art. 10 subpara. 2 of this Law.

§ 3. The Court may issue an order for payment if the bank pursues the claim based on an extract from a bank account books, signed by the persons authorised to make declarations in the scope of material rights and obligations of the bank, and stamped with the bank's seal, as well as a proof that the debtor has been served the demand for payment.

§ 4. If the original of the promissory note, cheque, warrant or bill of debt or of the document set out in § 3 has not been attached, the presiding judge summons the claimant to submit them under pain of the return of claims, based on Art. 130.

31 Compare, more on this subject: S Cieślak, 'System postępowań przyspieszonych w procesie cywilnym po zmianach Kodeksu postępowania cywilnego wprowadzanych w życie w latach 2008-2010' in J Gudowski, K Weitz (eds), *Aurea praxis, aurea theoria: księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, (Vol 1, Lexis Nexis 2011) 87-107.

## 5.2. WRIT OF PAYMENT PROCEEDINGS

Undoubtedly, there are cases that can be hypothetically examined both in the European Small Claims Procedure and in the writ of payment proceedings. These are civil and commercial cases of a cross-border nature in which only pecuniary claims are pursued (Article 498 §1 of the CCP<sup>32</sup>), provided that the value of the cause of action, interest, expenses and disbursements excluded, does not exceed the equivalent of EUR 5,000 at the moment the claim form comes to the court, and in addition, these cases are not listed in Art. 2 subpara. 1 sentence 2 and subpara. 2 of the Regulation No. 861/2007.

If the claimant chooses for their claim the optional European Small Claims Procedure, then, pursuant to Art. 505<sup>21</sup> §2 of the CCP, the simultaneous and supplementary application of the rules of writ of payment proceedings is unacceptable in this procedure. It shall be also assumed that the subsequent referral of such a case to the writ of payment proceedings, being a separate, mandatory procedure, was excluded by the Polish legislator, because by reversing the judgment appealed against, the court of second instance transfers the case to be re-examined, the rules on separate proceedings excluded (Article 505<sup>27</sup> §2 of the CCP).

In the case, the claim is pursued in the writ of payment proceedings, when no grounds for issuing the order are found out (Article 498 §2 of the CCP<sup>33</sup>), or after effective opposition being raised against the order for payment (Article 505 of the CCP<sup>34</sup>), or after the order has been annulled *ex officio* (Article 502<sup>1</sup> of the CCP<sup>35</sup>), it is not allowed to continue the process, using the rules of the European Small Claims Procedure. This possibility is precluded by the optional nature of this procedure and the absolute requirement to file the statement of claims on the appropriate official form. As a consequence, it is also not possible to proceed with the case in the European Small Claims Procedure.

A special regulation in this area is also included in Art. 4 subpara. 3 of the Regulation No. 861/2007, according to which, if the action brought does not cover cases in the scope of this Regulation, the court or tribunal informs the claimant thereof. If the claimant does not withdraw their claim, the court or tribunal shall proceed in accordance with the relevant procedural rules of the Member State in which the proceedings are

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32 Order for payment is issued if the claimant pursues a pecuniary claim and in other cases, if the provisions stipulate so.

33 In the case, there are no reasons to issue an order for payment, the Presiding Judge schedules the hearing, unless the case may be examined *in camera*.

34 If the opposition against the order has been lodged correctly, the order for payment loses its force and the Presiding Judge assigns a deadline for the hearing and has the opposition together with the summons to the hearing served on the claimant. The order for payment loses its force in the part opposed against by the opposition. The opposition by only one of co-defendants for the same claim and as to only one or only some of claims taken into account, causes the loss of force of the order only as to them. At the defendant's request, the Court or the court assistant issues a decision at an *in camera* sitting, in which it ascertains that the order for payment has lost its force entirely or in part.

35 If the order for payment cannot be served for reasons indicated in Art. 499 point 4 of the CCP, the Court annuls the order for payment *ex officio* and the Presiding Judge undertakes relevant procedures. If after the issuance of the order for payment, it turns out that at the moment the statement of claims was brought into court, the defendant had no capacity to be a party to a court case, the process capacity or the body appointed to represent it and these failures have not been made good in the assigned deadline in accordance with the provisions of the Code, the Court annuls *ex officio* the order for payment and issues a relevant decision. The reasons for impossibility to serve the order for payment indicated in Art. 499 point 4 of the CCP are the lack of knowledge of the defendant's place of stay, or a case in which the service of the order cannot take place in Poland.

conducted. This means that in such a case, the provisions dealing with the writ of payment proceedings may apply, of course, on condition that the case is eligible for examination in this mandatory procedure.

### 5.3. ELECTRONIC WRIT OF PAYMENT PROCEEDINGS

To determine cases that can be abstractly examined in both the European Small Claims Procedure and in electronic writ of payment proceedings, one shall be referred to Art. 2 and 3 of Regulation No. 861/2007 and Art. 505<sup>28</sup> in conjunction with Art. 498 § 1 of the CCP. These are civil and commercial cases of a cross-border nature, in which only pecuniary claims are pursued, provided that the value of the cause of action, interest, expenses and disbursements excluded, does not exceed the equivalent of EUR 5,000 at the moment the claim is brought to court, and in addition, these cases are not listed in Art. 2 subpara. 1 sentence 2 and subpara. 2 of the Regulation No. 861/2007.

In order to show the relationship between the separate proceedings cited, it is of fundamental importance that both the European Small Claims Procedure and the electronic writ of payment proceedings are optional. On the grounds of the Polish Code of Civil Proceedings, if the claimant chooses the European Small Claims Procedure, then, these proceedings will be solely appropriate (compare Art. 505<sup>21</sup> § 2<sup>36</sup>, Article 505<sup>27</sup> § 2<sup>37</sup> and Article 505<sup>29</sup> <sup>38</sup> of the CCP).

The Polish legislator did not directly regulate the situation in which the claimant has chosen the electronic writ of payment proceedings, and while proceeding no grounds for issuing a payment order were found out (Article 505<sup>33</sup> § 1 of the CCP<sup>39</sup>), or the court has *ex officio* annulled the order for payment (Article 505<sup>34</sup> § 1 of the CCP<sup>40</sup>), or else an opposition against the order for payment has been successfully filed (Art. 505<sup>36</sup> of the CCP<sup>41</sup>). It seems, however, that in the above situations, it is not allowed to apply subsequently the European Small Claims Procedure if only because of the optional nature of the proceedings and the absolute requirement to file the suit on the appropriate official form.<sup>42</sup>

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36 Pursuant to Art. 50521 § 2 of the CCP in the case examined pursuant to the rules of the European Small Claims Procedure, no rules of other separate procedures are applied.

37 Reversing the judgement appealed against, issued in the European Small Claims Procedure, the second instance court transfers the case to be re-examined, the rules of separate procedures excluded.

38 In electronic writ of payment proceedings no rules of separate proceedings other than the writ of payment proceedings and the provisions of Art. 139 of the CCP are applied.

39 In the case, there are no bases to issue an order for payment, the court transfers the case to the court of the proper general competence.

40 In the case, the place of stay of the defendant is not known or the service of the order on them could not take place in Poland, the court annuls the order for payment *ex officio* and transfers the case to the court according to the general competence unless the claimant removes the obstacle in serving the order for payment on them in the deadline assigned.

41 In the case, when the opposition is lodged, the order for payment loses its force for its entirety and the court transfers the case to the court, according to the general competence.

42 Cieślak (n 31) 87-107.



## 5.4. SIMPLIFIED PROCEDURE

Civil cases that can potentially be examined in both the proceedings indicated, are set out in Art. 505<sup>1</sup> of the CCP<sup>43</sup> and Art. 2 and 3 of the Regulation No. 861/2007. They are civil and commercial cases for claims, resulting from cross-border agreements, if the value of the object of the dispute or contract, interest, expenses and disbursements excluded, does not exceed the equivalent of EURO 5,000 and zloty 20,000 (or zloty 75,000 for claims from Art. 505<sup>1</sup> point 2 of the CCP<sup>44</sup>) at the moment the claim is brought to court, and in addition these cases are not listed in Art. 2 subpara. 1 sentence 2 and subpara. 2 of the Regulation No. 861/2007.

If the claimant chooses the optional European Small Claims Procedure, it becomes exclusively competent to examine the given case, thus, in accordance with Art. 505<sup>21</sup> §2 of the CCP, in the light of which, in the case examined under the provisions of the European Small Claims Procedure, the rules of other separate proceedings do not apply. The rule contained in Art. 505<sup>27</sup> § 1 of the CCP is not contradictory to the above. It stipulates that in the European Small Claims Procedure, in the proceedings before the second instance court, several provisions of the simplified procedure indicated by the legislator apply, i.e. Art. 505<sup>9</sup>–505<sup>11</sup>, Art. 505<sup>12</sup> § 1 and 3 and Art. 505<sup>13</sup> of the CCP. Bearing in mind sped up and simplified nature of the European Small Claims Procedure, the legislator considered it rational to simplify also the appellate proceedings, whereby these proceedings were constructed in a way similar to the appellate procedure in simplified proceedings, and in consequence, it became sufficient to refer to the provisions which regulate simplified proceedings and are listed by the legislator.

As argued earlier, in the European small claims procedure, at the stage of appellate proceedings, the following rules of simplified procedure are applied:

- 1) Art. 5059 of the CCP – setting out types of arguments, on which the appeal can be based and excluding further pleas that must not be raised after the deadline to submit the appeal;
- 2) Art. 50510 of the CCP – one-person panel of the Court, judging the appeal, the right to examine the appeal in camera, if in the appeal or the reply to the appeal, the oral trial hearing was not requested;
- 3) Art. 50511 of the CCP – restriction of the evidence taking to documents with the exception of the case, when the appeal was based on later revealed factual circumstances or evidence which the party was not able to take advantage of in the first instance court;

43 The rules of simplified proceedings are applied in the following cases, belonging to the competence of the district courts:

- 1) claims, arising from the contracts, if the value of cause of action does not exceed twenty thousand zloty and in cases for a claim, arising from quality guarantee, warranty or from the incompliance of the thing sold to the consumer with the contract, if the value of the object of the contract does not exceed this amount of money;
  - 2) for the payment of rents for tenancy of flats/houses and fees charging the tenants and fees, arising from the use of a flat in a housing cooperative notwithstanding the value of the object of dispute.
- 44 Cases for property rights in which the value of the object of dispute goes beyond an amount of seventy five thousand zloty apart from cases for maintenance, infringement of possession, for establishing matrimonial separated properties between the spouses, for reconciliation of the land and mortgage register content with the actual legal status and cases examined in the electronic writ of payment proceedings which belong to the *competence in materia* of the general court as the court of the first instance (Art. 17 point. 4 of the CCP).

- 4) Art. 50512 § 1 of the CCP – reversing of the judgment under appeal, if a breach of substantive law is found out, if the evidence gathered does not provide sufficient grounds for a change of the judgment;
- 5) Art. 50512 § 3 of the CCP – dismissal of the appeal if, despite a breach of substantive law or procedural provisions or else incorrect justification, the judgment appealed against complies with the law;
- 6) Art. 50513 of the CCP – limiting the justification of the judgment to the clarification of the legal basis with legal provisions cited in a situation when the court of the second instance did not conduct evidential proceedings.

After the reversal of the judgment by the court of the second instance, if any, the exclusivity of the European Small Claims Procedure is replaced by the exclusivity of ordinary procedure within the hearing mode in accordance with the disposition of Art. 505<sup>27</sup> §2 of the CCP.<sup>45</sup> Further proceedings will, therefore, be under way, overriding the provisions of all separate proceedings, those of the European Small Claims Procedure included. It shall be emphasized that the exclusion of the admissibility of the European Small Claims Procedure in this situation is justified, since it was in this procedure that a ruling was issued which was effectively overruled in proceedings by the second instance court and thus, the case must not be re-examined in the manner provided for in the Regulation No. 861/2007.

Of course, the special regulation contained in Art. 4 subpara. 3 of the Regulation No. 861/2007 shall be borne in mind, pursuant to which the court or tribunal informs the claimant if the action does not concern matters falling within the scope of this regulation. If the claimant does not withdraw his claims, the court or tribunal shall proceed in accordance with the relevant procedural rules of the Member State in which the proceedings are conducted. This means that in such a case the provisions, regulating the simplified proceedings may be applicable, provided, of course, that the case is eligible to be examined in this mandatory procedure.

## 5.5. EUROPEAN ORDER FOR PAYMENT PROCEDURE

Matters that are theoretically common for both listed proceedings shall be set out on the basis of Art. 505<sup>15</sup> § 1 of the CCP in conjunction with Art. 2, 3 and 4 of the Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006<sup>46</sup> (as amended by the Regulation 2015/2421 previously cited) which established

<sup>45</sup> Reversing the judgement appealed against, the second instance court will transfer the case to be re-examined with the exclusion of the provisions on separate proceedings.

<sup>46</sup> The Official Journal of the European Union L 399 of 30 December 2006, p.1, hereinafter referred to as the Regulation No. 1896/2006. Pursuant to Art. 2 to this Regulation, it is applied to cross-border civil and commercial matters notwithstanding the type of court or tribunal. It is not applicable in particular to revenue customs and administrative matters or the liability of the State for acts and omissions in the exercise of the State authority (*acta iure imperii*), rights in property, arising from matrimonial relationships, wills and succession, bankruptcy, proceedings related to winding up insolvent companies or other legal persons, judicial arrangements, compositions and other analogous proceedings, social insurance, claims arising from non-contractual obligations unless they are the subject of an agreement between the parties and the debt has been acknowledged or they refer to debts denominated and arising from the co-ownership of the property. Art. 3 of the Regulation No. 1896/2006 stipulates that the cross-border case shall be understood as that in which at least one of the parties is domicile or habitually resident in a Member State other than the Member State of the court which examines the case and the cross-border case shall be evaluated, according to the status of the day when the claim for the issuance

the European order for payment and Article 505<sup>21</sup> §1 of the CCP in conjunction with Art. 2 and 3 of the Regulation No. 861/2007. Thus, this relates to cross-border civil and commercial cases which refer to pecuniary claims that are due at the time the action is brought, on condition that the value of the cause of action, interest, expenses and disbursements excluded, does not exceed the equivalent of EUR 5,000 at the time the court is seized, and furthermore, no exemptions included in the cited provisions are to be taken into account.

The relationship between these proceedings was determined by the Polish legislator very precisely. In the case, when the claimant chooses the European Small Claims Procedure, the exclusivity of these proceedings results directly from Art. 505<sup>21</sup> § 2 and Art. 505<sup>27</sup> § 2 of the CCP. However, if the claimant chooses the European order for payment procedure, then, this procedure is the only appropriate, as in accordance with Art. 505<sup>15</sup> § 2 of the CCP in the case examined under the provisions of the European order for payment procedure, the provisions of other separate proceedings are not applied.

And yet, two special situations shall be underlined for their unique regulation.

In the case, when the claimant agrees for a European order for payment to be issued only for a part of the claim (Article 505<sup>18</sup> § 1 of the Code of Civil Proceedings), the court will hear the case which regards the rest of the claim in the appropriate mode, and in the cases specified in the Act, according to the rules on separate proceedings. However, the order for payment and the writ of payment proceedings are excluded for a part of the claims for which the European order for payment could not have been issued. It raises no doubts that the use of the term 'mode' by the Polish legislator may suggest that in such a case the court may also refer the case to non-litigious proceedings. However, bearing in mind the fact that the Regulation No. 1896/2006 does not apply to revenue, customs or administrative matters, nor to those which regard State liability for acting and omission to act in the exercise of State authority (*acta iure imperii*), property rights, arising from marital relations, wills and inheritance, bankruptcy, proceedings related to the liquidation of insolvent companies or other legal persons, conciliation proceedings, arrangements and other analogous proceedings, social security, claims arising from non-contractual obligations, unless they are the subject of an agreement between the parties or the debt has been recognized, or concern denominated debts arising from joint ownership of property (Article 2 subpara. 2 and 3), this needs to assume that such a procedural situation must not be considered as possible in practice.<sup>47</sup> As to the examination of the case with the application of the provisions on mandatory simplified proceedings, if any, a major obstacle to such a solution is the requirement to submit the claim in simplified proceedings on the appropriate official form. In turn, the source of exclusion of the admissibility of the order of payment and the writ of payment proceedings is the fact that as the European order of payment procedure is an alternative to the domestic order of payment and writ of payment proceedings then, in

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of the European order of payment was submitted in accordance with this Regulation. In accordance with Art. 4 of the above cited Regulation, the European order for payment procedure will be established to collect pecuniary claims for a specific amount of money which has fallen due on the day when the application for a European order for payment is submitted.

47 It seems that in the present legal environment, the application of the word 'mode' used in. 505<sup>19</sup> § 1 CCP shall be replaced at least by the notion of 'civil proceedings', compare Art. 17 of the Regulation No. 1896/2006.

the situation in which the court may not issue a European order for payment, the same needs to apply to the issuance of an order in the writ of payment proceedings, and not to allow the reuse of another sped up separate proceedings.<sup>48</sup> It also needs emphasizing that it results from the essence and the nature of the analyzed proceedings in which the legislator excluded the right to examine the case in the writ of payment proceedings, that the claimant's claim must not be pursued either in the ordinary writ of payment proceedings nor in the electronic writ of payment proceedings. As an additional comment, it can be argued that this seems to be obvious in view of the optional nature of this procedure, in consequence of which its pursuance depends on the will of the claimant, not of the court.

In the light of the above, there is no doubt that the case may be examined in ordinary procedural proceedings.

On the other hand, when an opposition is effectively raised against the European order for payment, the order loses its force (Article 505<sup>19</sup> § 1 of the CCP) and further proceedings will take place before the competent courts in the Member State of origin, unless the claimant has explicitly requested the proceedings be terminated (Art. 17 subpara. 1 sentence 1 of the Regulation No. 1896/2006).<sup>49</sup>

Further proceedings, if any, will be carried out in accordance with the rules:

(a) of the European Small Claims Procedure in accordance with the Regulation No. 861/2007, if applicable;

or

(b) the applicable national civil procedural law (Art. 17 subpara. 1 sentence 2 of the Regulation 1896/2006).

However, if the claimant does not indicate which of the abovementioned proceedings are to be applied to examine their claim in the proceedings to be taken as a result of the opposition or when the claimant requested the European Small Claims Procedure be applied under the Regulation No. 861/2007 and their claim is not included in the scope of the Regulation, the case will be referred to the relevant national civil procedure, unless the claimant has explicitly requested that no such a transfer be made (Article 17 subpara. 2 of the Regulation 1896/2006).

The referral of the case to the European Small Claims Procedure or to any other civil proceedings appropriate under national law is subject to the law of the issuing Member State, that is the national law of that Member State (Article 17 subpara. 4 of the

<sup>48</sup> K Weitz, in T Ereciński (ed), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze. (Commentary. Fact-finding procedure), V. II* (LexisNexis 2012) 982, compare also the justification of the bill related to the change of the law, the Code of Civil Proceedings and some other laws, The Sejm print no 949 office VI, 41–42.

<sup>49</sup> Pursuant to the judgement of CJEU of 13 June 2013 in case C-144/12 *Goldbet Sportwetten GmbH v Massimo Sperindeo* <<http://curia.europa.eu/>> accessed 2 May 2019 it cannot be claimed that the proceedings of the European order for payment and the national civil proceedings pending upon its completion are in reality one and the same procedure. Such an interpretation would be difficult to agree with the circumstance that the first of these proceedings is conducted pursuant to the rules of the Regulation No. 1896/2006, while the other, which results from Art. 17 subpara. 1 of the Regulation is conducted pursuant to the provisions of the national civil proceedings. In consequence, submitting an opposition against a European order ends formally the procedure for the issuance of the European order for payment, and therefore, this procedure and that following it, the national civil procedure make up formally separate proceedings.

Regulation 1896/2006). At the same time, it shall be emphasized that in consequence of the amendment to the Regulation No. 1896/2006 already cited, the provision of Art. 17 of the Regulation does not currently use the term 'ordinary civil proceedings', because it was replaced by 'national civil procedure'.

By regulating the transition to the national law in the event of an effective opposition against a European order for payment, the Polish Code of Civil Proceedings also stipulates that in such a case, the court examines the case in the appropriate mode, and in the cases indicated in the Act, in accordance with the provisions on separate proceedings, however, the order for payment and the writ of payment proceedings excluded (Article 505<sup>19</sup> § 1 of the CCP), whereby the earlier comments with regard to the case referral by the court to non-litigious proceedings, optional electronic writ of payment proceedings along with simplified proceedings also apply to this case.

And yet, in the indicated situation, the case may be without doubt examined in a new, formally separate procedure<sup>50</sup> that will be conducted by the court in ordinary civil trial proceedings.

## 6. CONCLUDING REMARKS

To sum up all the considerations, it is worth recalling the basic theses of the findings arrived at:

- 1) the European Small Claims Procedure is an alternative to the existing procedures under the laws of the Member States;
- 2) this procedure is optional, because the claimant decides whether they will use the procedure, by expressing their will when they file the lawsuit on a special form;
- 3) the European Small Claims Procedure can be included into simplified and sped up proceedings, since the course of this procedure, and in particular the possibility of examining the case in camera, indicates features common with this group of separate proceedings;
- 4) the feature of the European Small Claims Procedure, distinguishing it from other separate proceedings (with the exception of the European order for payment procedure) is the cross-border nature of the case;
- 5) if the claimant chooses the European small claims procedure, then, these proceedings will be the only appropriate ones;
- 6) there is a prohibition in the Code of Civil Proceedings to combine the European Small Claims Procedure with the order for payment proceedings, which refers to proceedings before the courts of both instances;
- 7) if the claimant chooses the European Small Claims Procedure for their claims, the referral of the case to the ordinary writ of payment proceedings is excluded;
- 8) in the case, the claim is pursued in the writ of payment proceedings, when no grounds for issuing the order for payment are established, or after an effective opposition against the order for payment is filed or after the order for payment is annulled ex officio, it is not allowed to continue the process based on the provisions of the European Small Claims Procedure;
- 9) if the claimant chooses the electronic writ of payment proceedings, and in their course no grounds for issuing the order for payment are established, or the order for

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<sup>50</sup> Compare (n 47).

payment is annulled ex officio or an effective opposition against the order for payment is filed, the use of the European Small Claims Procedure is not allowed;

10) if the claimant has chosen the European order for payment, then, this procedure is the only appropriate;

11) pursuant to Art. 4 subpara. 3 of the Regulation No. 861/2007, if the action brought does not refer to matters covered by the scope of this Regulation, the court or tribunal informs the claimant thereof. If the claimant does not withdraw their claim, the court or tribunal shall proceed in accordance with the relevant procedural rules of the Member State in which the proceedings are conducted. This means that in such a case, the provisions, which deal with the mandatory writ of payment or simplified proceedings may be applied, provided, of course, the case is eligible for the examination in such proceedings;

12) the rules of the European Small Claims Procedure clearly indicate that the proceedings are autonomous when compared to other separate proceedings.



# ABUSE OF PROCEDURAL RIGHTS IN POLISH AND EUROPEAN CIVIL PROCEDURE LAW AND THE NOTION OF PRIVATE AND PUBLIC INTEREST

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Summary: 1. Introduction. – 2. Legal Interest and Abuse of Civil Procedural Rights. – 3. Abuse of Right in the Polish Civil Procedure. – 4. Abuse of Right in the European Civil Procedure. – 4.1. Abuse of the Right to File an Action and the Right of Defense in European Procedural Right. – 4.2. Abuse of Right under Regulation of Council (EC) 1346/2000 of 29 May 2000 on insolvency proceedings and regulation No. 2015/848 of 20 May 2015. – 4.3. Abuse of Procedural Rights under Regulation of Council (EC) 44/2001 of 22 December 2000 on Jurisdiction and Recognition of Court Decisions and Enforcement in Civil and Commercial Cases and Regulation of European Parliament and Council (EU) No. 1215/2012 of 12 December 2012 on Jurisdiction and Recognition of Court Decisions and Enforcement in Civil and Commercial Cases. 5. – Concluding Remarks

*The article discusses the abuse of procedural rights in Polish and European civil procedure law and the notion of private and public interest. The issue of abuse of procedural rights is a category of applying the law. At the current stage of development there is no simple transposition of the issue of legal interest on the institution of abuse of procedural right; undeniably, the lack of current and real interest, with the assumption of fulfillment of other prerequisites, may be contemplated in categories of abuse of right by the court under ius dicere. In the Polish law it is not sufficient to analyse this phenomenon solely in the sphere of procedural locus standi and there shall be the interest in taking a specific step. There also shall be the awareness of the party taking the step as to its inadmissibility and intention to harm the other party, as e.g. in case of fictitious actions. In the European area it is additionally necessary to create methodology and general approach to abuse of right in European civil proceedings and finding compromising approach towards understanding of the notion of the interest in Roman and Germanic law systems. Because application and development of the law due to lack of procedural fairness and good faith is rather difficult to verify and to define, the advantage of adopting admissibility of a separate international institution of abuse of procedural right would lie in the possibility of applying a universal*

approach towards abuse of procedural right in all member states. This would mean that each court of the member state would apply the same standard of the test. Finally, the alternative use of exclusively national concepts of abuse of procedural right cannot be continued. It can be assumed that confirmation of the existence of the abuse of European procedural right in a given case would require existence of objective and subjective factors.

*Key words:* abuse of procedural rights, civil procedure law, the notion of private interest, the notion public interest, European civil procedural law.

## 1. INTRODUCTION

The issue of abuse of procedural rights is a category of applying the law.<sup>1</sup> In this way it is naturally connected with judicial power, as the notion, in fact, is created by it. Judicial power is authoritarian *ius dicere*, namely the power to announce what law applies in a given case in contrast to *dare*.<sup>2</sup> The notion of procedural abuse of rights undoubtedly was created as a result of court practice, which resulted in the necessity to correct the procedural steps of the parties and participants in the proceedings within the frames of public civil procedure application of the principle of the rule of law on the basis of such principles as good faith, morality, honesty, justice, security and stability. It is based on assumption that despite formally correct application of law the objective goal of the legal norm is not reached. This is why it is necessary to introduce a specific measure aiming at implementation of basic procedural standards and principles, also with respect to European civil procedural law according to the agreed standard. The said is connected with the existence of a certain conflict in the frames of law application. The application within the frames of judicial power of the correcting mechanism in the form of abuse of rights should reduce the tension between strict law observance (*lex*), and the goal and spirit of the statute (*ius*).<sup>3</sup> Such application occurs within the frames of *ius dicere*. The natural sphere to analyse the principle prohibiting the abuse of rights involves private law, however, the prohibition of abuse of rights is also discussed in the area of national civil proceedings, in particular, in the scope of Polish civil procedure as well as European civil procedure law. Lack of statutory definitions requires a detailed description of this phenomenon. Undoubtedly, what is a crucial and necessary element is the determination that the procedural 'tools' were used contrary to the purpose they were created for. In practice it refers to procedural steps of the parties and participants which are in fact permitted, at the level of procedural norms - neutral, but from the perspective of the goal of the proceedings and protection standards, they must be perceived negatively as hampering the course of the proceedings.

1 See T Ereciński, 'Nadużycie praw procesowych w postępowaniu cywilnym. Tezy i wstępne propozycje do dyskusji' in P. Grzegorzczak, M. Walasik, F. Zedler (eds), *Nadużycie prawa procesowego cywilnego* (Wolters Kluwer 2019) 11.

2 AX Fellmeth, M Horwitz, *Guide to Latin in International Law* (OUP 2011) 101 et seq.

3 Compare A Lenaerts, 'The general Principle of the Prohibition of Abuse of Rights. A Critical Position on Its Role in a Codified European Contract Law' (2010) 6 *European Review of Private Law* 1121; L Baudenbacher, 'Überlegungen zum Verbot des Rechtsmissbrauchs im Europäischen Gemeinschaftsrecht' (2008) 205 *Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht*; V Karayannis, *Labus de droits découlant de l'ordre juridique communautaire. A propos de l'arrêt C-367/96 Alexandros Kefalas e.a./Elliniko Dimosio (État hellénique)* (CDE 1999) 521-522; A Kjellgren, 'On the Border of Abuse: The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law' (2000) 179 *European Business Law Review*.

It can be said that the concept of abuse to a significant extent is based on the assumption of abuse of procedural rights claiming at the same time that there is necessity of observing the principles of fair and loyal proceedings both by the court and the parties, which constitutes in the procedural area the transposition of the substantive concept of bona fide. There are also opinions sanctioning the abuse in the categories of public service of the administration of justice fulfilling a servient role with respect to implementation of the individual rights of the Europeans.<sup>4</sup> The said is connected with two concepts appearing in the legal comparative perspective.<sup>5</sup> The first one - used mostly *inter alia* in Belgium,<sup>6</sup> Holland,<sup>7</sup> Luxembourg, France<sup>8</sup> or Italy<sup>9</sup> - is based on the existence of individual rights of citizens reflected also in certain procedural rights such as e.g. the right to initiate action, to defence, to lodge an appeal, to enforce the court decision. The implementation of such rights is not unlimited, though. Its freedom ends where the abuse starts. The abuse of procedural rights during procedural steps most often takes place where procedural rights are implemented in an incorrect and grossly defective way. The abuse of procedural rights is implied exclusively by non-standard and defective at the same time exercise of a procedural right, connected with the failure to understand its gist.<sup>10</sup> The second, broader approach - existing mainly in Germany or <sup>11</sup> Spain<sup>12</sup> - is not based on individual rights of people but on the obligation to take procedural steps honestly with the obligation to conduct the proceedings in a loyal and honest way.<sup>13</sup> Pursuant to this concept all the parties to civil proceedings active in the proceedings are obliged to take all procedural steps in accordance with the principle of loyalty and good faith as in the lack of those two elements it is not justice.<sup>14</sup> The obligation to proceed in an honest and loyal way creates a specific right to prevent serious and detrimental deviation from commonly accepted procedural norms.<sup>15</sup> The obligation of

- 4 M Storme, 'Foreword' in M. Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness*, (Haga-Londyn-Boston 1999) XI.
- 5 see J Normand, 'Final Report. The two approaches to abuse of procedural rights' in M. Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Haga-Londyn-Boston 1999) 237.
- 6 P Taelman, 'Abuse of procedural rights: Regional report for Belgium - The Netherlands' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness*, (Kluwer Law International 1999) 125 et seq.
- 7 Taelman (n 6) 125 et seq.
- 8 A Donti, 'Abuse of procedural rights: Regional report for Italy and France' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness*, (Kluwer Law International 1999) p 125 et seq; M Klöpfer, *Missbrauch im Europäischen Zivilverfahrensrecht* (Mohr Siebeck 2016) 192-194.
- 9 Donti (n 8) 125 et seq.
- 10 see Normand (n 5) 237-239.
- 11 See Klöpfer (n 8) 187-191; B Hess, 'Abuse of procedural rights in Germany i Austria' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 151 et seq.
- 12 FR Mendez, 'Abuse of procedural rights? Spain and Portugal' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 181 et seq.
- 13 This approach exists also in the USA (see GC. Hazard, 'Abuse of procedural rights: Regional Report for United States' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 43 et seq.), Japan (see J Taniguchi, 'Abuse of procedural rights: A Japanese perspective' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 215 et seq.) or South America (see ED Oteiza, 'Abuse of procedural rights in Latin America' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 191 et seq.
- 14 see Normand (n 5) 240-241.
- 15 See Hazard (n 13) 43 et seq.

fair proceedings is imposed not only on the petitioner or the defendant but clearly on the adjudicating body. All (both the parties and the court) are obliged to act in good faith, and generally to respect fair and honest proceedings. Both concepts to a smaller or greater degree are a reference point for the analysis of abuse of procedural rights in both European and national area.

In the literature it is underlined that from the legal comparative perspective we are approaching the day when the abuse of procedural rights can be discussed with the use of common language.<sup>16</sup> The broadest notion in the analyzed scope involves the abuse of civil procedural right which includes both the abuse of the right to the proceedings and the abuse by taking procedural steps during the proceedings. The abuse of right to civil proceedings means the abuse of right to be given legal protection by the court in civil proceedings. The abuse may be committed by the petitioner and then it includes the abuse of the right of action in European civil proceedings as well as by the defendant and then it includes the abuse of the right of defence in European civil procedural law.

The abuse of the right to initiate action in the civil procedural law takes place e.g. in a situation where the petitioner starts the action being aware that he lacks interest. It takes place especially when the action is started without any legal or factual grounds and the allegation of abuse is completely groundless, the action is started exclusively to obtain advice from court (without any other reason) or a fictitious action is started.<sup>17</sup> With respect to abuse of right to initiate action other situations include the initiation of the action with the breach of *res iudicata* principle, while the others - to settle the case despite the lapse of limitation period.<sup>18</sup> Those comments may to a smaller or greater degree refer to abuse of the right of defence. In particular, completely unjustified or clearly groundless defence may be deemed abuse of procedural rights. The abuse of the right of defence may consist in starting defence in an obvious way without factual or legal conditions required by the law.<sup>19</sup>

Each evaluation should depend on a specific case and should be made within the frames of judicial *ius dicere*.<sup>20</sup> From the subjective point of view this evaluation depends *ad casu* on the intention of the person taking the procedural step. This definitional element creates an obvious problem in creating general definition of the abuse of civil procedural right. The abuse should result from a fraud or such gross misconduct (error) that could be deemed equivalent to a fraud. The subjective feature of the abuse in civil procedural law should include the fact that an ordinary mistake or negligence is not enough to create an abuse.

In the individual aspect in the European procedural civil law we may distinguish adversarial abuse, i.e. made by one party to the other party and adjudicatory abuse i.e. made by the court to the parties.<sup>21</sup> The literature underlines, however, that the

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16 See Normand (n 5) 242.

17 M Taruffo, 'General Report: Abuse of Procedural Rights: Comparative Standards of Procedural Fairness' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 15.

18 Taruffo (n 17) 16.

19 Taruffo (n 17) 16.

20 Taruffo (n 17) 21-22.

21 See R Fentiman, 'Abuse of procedural rights: The position of English Law' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 43 et seq.

concept of abuse of rights by the court is of symbolic significance, as the possibility of committing an abuse by the court is scarce. In this situation the notion of abuse of powers is undoubtedly more apt.<sup>22</sup>

## 2. LEGAL INTEREST AND ABUSE OF CIVIL PROCEDURAL RIGHTS

As a consequence, one of the fundamental questions asked as a result of discussion about the abuse of right in the Polish and European civil proceedings is as follows: is the existence of the legal interest in gaining legal protection important in the abuse of procedural rights?<sup>23</sup> The answer to this question is connected with the adopted concept of the legal interest. It should be underlined that in this scope there are various opinions in various legal orders. For example, in France there is a general principle saying that having legal interest is a prerequisite for demanding legal protection in court (in accordance with the established maxim *pas d'interet, pas d'action*).<sup>24</sup> The interest as the general prerequisite for seeking court protections is indicated in s. 31 of the French CPC, whereby the provision says that it should be legitimate. Wherefore, in the light of the fact that the notion of legitimate interest in the context of legitimacy of the enforced claim raises various doubts, it is postulated that instead of using the word legitimate we should use the notion of legal interest.<sup>25</sup> The interest must be individual and valid, it is the prerequisite for admissibility and belongs to the substantive prerequisites for settling the case. Wherefore, the prerequisite for the interest does not refer to situations in which prosecutor operates, which results from the fact that the prosecutor does not act in the private interest (to which the requirement refers) but in the public interest. Similarly in Italy in S. 100 of Codice di procedura civile – Italian CPC, the interest becomes a prerequisite for admissibility of action. Analogously, the prerequisite for the interest does not refer to situations in which prosecutor operates, which results from the fact that the prosecutor does not act in the private interest (to which the requirement refers to) but in the public interest.<sup>26</sup> In Germany there is no provision which would deem legal interest as a prerequisite for admissibility of action. In Germany the view prevails that the need for legal protection is a general prerequisite for admissibility of action in a case (*Rechtsschutzbedürfnis*). This prerequisite does not refer to bodies acting in the public interest (administrative bodies or prosecutor).<sup>27</sup> Analogously in Austria there is a notion of general interest in gaining legal protection (*Rechtsschutzinteresse*), defined also according to the German model as the need for legal protection (*Rechtsschutzbedürfnis*), where legitimization (an abstract notion) is distinguished from the person having a specific right.<sup>28</sup> This analysis shows that the interest is deemed a prerequisite for granting legal protection in the aspect of initiating action or lodging an appellate measure.

22 see Normand (n 5) 242.

23 As in: Ereciński (n 1) P. Grzegorzczak, M. Walasik, F. Zedler 14.

24 P. Ryłski, K. Weitz, 'Interet, interesse ad impugnare, Beschwer, grievance' in K. Szczepanowska-Kozłowska (ed), *Oblicza prawa cywilnego. Księga jubileuszowa dedykowana Prof. Janowi Błeszyńskiemu* (Wolters Kluwer 2013) 589 and the literature quoted therein.

25 Ryłski, Weitz (n 24) 589 and the literature quoted therein.

26 Ryłski, Weitz (n 24) 597 and the literature quoted therein.

27 Ryłski, Weitz (n 24) 601 and the literature quoted therein.

28 Ryłski, Weitz (n 24) 605 and the literature quoted therein.

The Polish literature lacks deep connection of the issue of legal interest with the abuse of law. The comments appearing in the literature are of auxiliary and enigmatic nature. In the literature the initiation of an action without legitimate legal interest is deemed abuse of procedural rights.<sup>29</sup> It is indicated that this results from the fact that application of a legal procedural norm which in theory is correct but is not proper, just and fair.<sup>30</sup> Simultaneously, an opposing viewpoint is presented indicating that the view is wrong, firstly due to the fact that the civil procedure code is undeniably constructed to combat any abuses of procedural right, however the admissibility of prevention of effectiveness of procedural steps of the parties may take place only in the way defined in procedural provisions and the procedure law does not offer an obvious remedy for filing a clearly groundless petition (application) or filing it for a different purpose than obtaining legal protection.<sup>31</sup> Secondly, the construction of ignoring the petitions (applications) initiating the fictitious action contradicts clearly the primate principle of administration of justice in the form of the right of recourse to court.<sup>32</sup> This view does not deserve being taken into consideration.

The suggested concept assumes the necessity of existence of a real and valid interest in the objective and subjective aspect with respect to essential procedural steps. The judicial power is entrusted in the context of existence of the interest with the evaluation of adequacy of a specific procedural step taken with respect to its purpose, taking into account both objective and subjective criteria. If it is determined that the specific procedural step deviates from its purpose and has cumulatively a negative impact on the sphere of other entities, then it is an abuse of procedural rights. The abuse may be detrimental not only to the parties and participants (private interest, good faith, morality, honesty, justice) but also to the administration of justice (security and stability).<sup>33</sup> The criteria of abuse of procedural rights assume within the judicial power the subjective evaluation (specific degree of guilt) and objective evaluation (comparing with the model in the form of reasonable behaviour).<sup>34</sup>

### 3. ABUSE OF RIGHT IN THE POLISH CIVIL PROCEDURE

The discussion about the abuse of right has been pending since the beginning of 20th century. In the Polish civil procedure science K. Piasecki wrote in the 60s of the 20th

29 K Piasecki, 'Nadużywanie praw procesowych przez strony' (1960) 11 *Palestra* 28; T Cytowski, 'Procesowe ndużycie prawa' [2005] *Przegląd Sądowy* 83; H Dolecki, 'Nadużycie prawa do sądu' in J. Góral, R. Hausner, J. Trzciński (eds), *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980 – 2005* (Nacz. Sąd Administracyjny 2005) 137; K Knoppek, 'Wstęp do badań nad fikcyjnym procesem cywilnym' in P Grzegorzczak, K Knoppek, M Walasik (eds), *Księga Jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi* (Wolters Kluwer 2012) 189 – 205.

30 As in A Stępkowski, 'Nadużycie prawa, a rozwój prawa' in H. Izdebski, A. Stępkowski (eds), *Nadużycie prawa* (Liber 2003) 49.

31 Knoppek (n 29) 205; J Misztal – Konecka, 'Czy wniesienie pozwu w sprawie cywilnej przeciwko sędziemu może stanowić nadużycie prawa procesowego- zarys problemu' in P. Grzegorzczak, M. M Walasik, F. Zedler (eds), *Nadużycie prawa procesowego cywilnego* (Wolters Kluwer 2019) 83. As in: Stępkowski (n 31).

32 Misztal – Konecka (n 31) 84, M Plebanek, *Nadużycie prawa procesowego* (Wolters Kluwer 2012) 103 – 114 together with the quoted literature.

33 As in Ereciński (n 1) 16-17.

34 K Gajda – Roszczynialska, 'Nadużycie prawa w europejskim prawie procesowym cywilnym' in P Grzegorzczak, M. Walasik, F. Zedler (eds), *Nadużycie prawa procesowego cywilnego* (Wolters Kluwer 2019) 490 – 620.



century about the procedural steps of the parties taken contrary to the principles of social coexistence.<sup>35</sup> The first attempts of incorporating into Civil Procedure Code the point of reference for the construction of abuse of procedural rights were made in 1955. In s. 8 of the bill of Civil Procedure Code of the Republic of Poland it was provided that 'procedural steps shall be taken by the participants according to the principles of social coexistence'.<sup>36</sup> In the next bill dated 1960 the idea of linking procedural steps with the principle of social coexistence was resumed, changing slightly the wording of S. 4 as follows: 'procedural steps taken by the parties to and participants in the proceedings shall not contradict the principles of social coexistence'.<sup>37</sup> The breach of this prohibition was sanctioned by the obligation to pay the court fees. Another Bill of the Civil Procedure Code which was passed did not contain the obligation of compliance of procedural steps with the principles of social coexistence (S. 3 § 1 CPC), only the sanction of reimbursing the court fees was left if the party was guilty of unconscientious or clearly unreasonable conduct (S. 103 CPC). As a consequence, it is assumed that by 2012, namely till the change of S. 3 CPC became effective<sup>38</sup> – the prohibition of abuse of procedural rights was derived from the general principles of law.<sup>39</sup> The literature shows that this status quo led to the situation that the judges had no effective and operative tools enabling adequate reaction to such a situation, which was not changed by S. 103 of CPC.<sup>40</sup> The only conclusive inference which was derived from the said situation was that the abuse of process may take place only within the frames of the process, within the public and legal procedural relation between the petitioner - defendant and the court, so in general terms upon instituting the proceedings and ending upon its termination.<sup>41</sup> In this legal status before 2012 the courts had referred to abuse of procedural rights rather prudently. For example, in the judgment of 16 July 2009<sup>42</sup> the Supreme Court, examining the validity of rejecting the motion of the party for adjournment of a trial stated that such a motion may constitute abuse of procedural rights if it insults the opposing party. Subsequently, the Supreme Court in the order of 20 November 2009<sup>43</sup> refusing to adopt a resolution, claimed that the civil process ensures protection of the person only under specific social principles; consequently, public resources cannot be used for unnecessary purposes and abuse of rights. The interest of a person which pursuant to common view is so minor that does not justify involvement of the court shall not be protected. In the appeal the value of claim amounted to 4,71 zł. This amount is grossly small and the real costs of proceedings to be borne by the society - high. In such circumstances involving the Supreme Court in settling the said legal issue would be a misunderstanding. This decision is crucial not only from the point of view of abuse of procedural rights but also in the context of linking the institution of abuse of procedural rights to the existence

35 Piasecki (n 29) 20 – 28 .

36 Projekt kodeksu postępowania cywilnego Polskiej Rzeczypospolitej Ludowej (Warszawa 1955) 6.

37 Projekt kodeksu postępowania cywilnego Polskiej Rzeczypospolitej Ludowej (Warszawa 1960).

38 Sec. 1(1) of the Act of 16 September 2011 on amending the law Civil Procedure Code and certain other acts (Dz. U. no. 233, item 1381).

39 As in: J Gudowski, 'Nadużycie prawa procesowego w postępowaniu rozpoznawczym (in ampliore contextu). Tezy i wstępne propozycje do dyskusji' in P Grzegorzczak, M Walasik, F Zedler (eds), *Nadużycie prawa procesowego cywilnego* (Wolters Kluwer 2019,) 33 - 34.

40 As in: Gudowski (n 39) 34.

41 As in: Gudowski (n 39) 34.

42 Case file no.: I CSK 30/09.

43 Case file no. III CZP 90/09 Biul. SN 2009 no. 11, www.sn.pl, Legalis.

of the interest. It can indirectly be derived from the decision that lack of real and valid interest may mean that the undertaken procedural step abusing the procedural rights may not lead to intended legal effects.

In the context of the abuse of procedural right in the court proceedings the order of the Supreme Court - Civil Chamber of 26 July 1978 <sup>44</sup> is quoted, in which it was asserted that the request for recognition of the foreign divorce judgment by the spouse who was intentionally misrepresenting to the other spouse the purpose and legal effects of such a divorce encouraged the latter to stop defending the interests of the minor children of the parties in the divorce proceedings and to have no objections to adjudication of the divorce would contradict the principles of social coexistence in the People's Republic of Poland. The request for making the foreign judgment, awarded in such circumstances, effective in Poland should be deemed an abuse by the spouse demanding the recognition, of the right held by such a spouse (S. 5 of the CC) so on this basis the request for recognition would be rejected.

An indirect reference to the construction of the abuse of procedural rights was made also by the Supreme Court in the order of 30 July 1965 <sup>45</sup> with respect to the division of the amount obtained through enforcement claiming that if strict observance of the division system under S. 1026(1) of the CPC with respect to maintenance is to be applied, then it would lead to such a situation that the monthly amount resulting from the division would not satisfy the basic needs of some creditors, and it would cover the needs of the other ones four times - then the demand for such a type of division, being grossly in conflict with the justified interest of one or a few creditors and simultaneously inconsistent with the principles of social coexistence in People's Republic of Poland, could not be legally protected. One cannot distinguish between the current and outstanding maintenance favouring the current one.

The change in this scope took place together with the amendment to s. 3 CPC which since 3 May 2012 has had the following wording: 'The parties to and participants in the proceedings shall carry out the procedural steps in accordance with good practice, provide explanations as to the facts of the case truthfully and without concealing anything and file evidence'. The applicable construction introduces a reference point for the mechanism of abuse of procedural rights.<sup>46</sup> It can be said that since 3 May 2012 <sup>47</sup> the postulate of fair process addressed to the parties has received the normative status. Currently in S. 3 CPC the obligation of fair process was formulated as the obligation of the parties to and participants in the proceedings to take procedural steps pursuant to good practice, which includes also non-abuse of procedural rights. This obligation defined in the literature as 'the procedural burden' was not linked to any general sanction however; if the party fails to meet it, the party may expect an unfavourable result of the proceedings, as the court may take into account such a situation when taking the procedural decisions.

44 Case file no.: II CR 248/78, PiP 1981 no. 1, p. 141, Legalis

45 Case file no.: II CZ 68/65, OSNCP 1966 no. 6, item 95, Legalis.

46 See the grounds for the bill of the Act on Amendment to the Law - Civil Procedure Code and Certain Other Acts (Sejm Paper 4332). See also K. Weitz, 'System koncentracji materiału procesowego według projektu zmian Kodeksu postępowaniacywilnego'in K. Markiewicz (ed), *Reforma postępowania cywilnego w świetle projektów Komisji Kodyfikacyjnej* (CH Beck 2011) 11.

47 Namely from the moment the Act of 16 September 2011 on Amendment to the Law - Civil Procedure Code and Certain Other Acts (Dz.U. No. 233, Item 1381 came into force).

In this context we should quote the first and so far the longest opinion of the Supreme Court in the context of abuse of rights, i.e. resolution of 11 December 2013,<sup>48</sup> referring to the right of the parties to demand adjournment of a trial under S. 214 § 1 of the CPC which, in certain circumstances, may be abused by the parties. In this context the Supreme Court claimed that the absence of the party caused by long-term sickness does not justify adjournment of a trial if in the facts of the case the motion for adjournment of a trial constitutes the abuse of procedural rights. In this context the Supreme Court attempted to contemplate the nature of the abuse of procedural rights in a wider way. In the opinion of the Supreme Court the autonomic construction of the abuse of rights under procedural law pursuant to S. 3 of CPC is still valid. Although the prohibition of abusing procedural rights has not so far been given the normative status, this construction is contemporarily in the legal science commonly accepted as the applicable principle of the procedural law and it is derived from the principle of fair process, the obligation of fair actions (consistent with good practice) of the participants in the proceedings and the purpose (essence) of the proceedings which in fact involves the real protection of individual rights resulting from the substantive law. This principle may be applied in the situation in which certain right is included in the procedural norm but using it serves a different purpose than obtaining the protection of individual rights and the effect of exercising this right would contradict the procedural purpose of the provision and economy of the procedure. The prohibition of abusing procedural rights enables prevention of using the right contrary to the function of the provisions and may be significant for interpretation and application of procedural provisions by the court. The principle prohibiting the abuse of the procedural rights, formulated before the amendment to s. 3 CPC finds solid basis in it, as the clause of good practice included in the provision leads to imposing on the parties of the obligation of fair use of the rights they enjoy and refraining from abusing them. It has a significant impact also due to the reason that the Act does not provide for any general sanction applied in case of abuse of procedural rights and there are only individual special regulations which may be regarded as introducing a type of sanction (e.g. s. 103 § 1, 213 § 2, 531 first sentence of CPC). As a consequence, the prohibition of abusing procedural rights should be regarded, next to the principle of effectiveness and equality of rights of the parties, as a crucial element of the fair process. The court may and should counteract procedural steps taken by the party hampering the course of the proceedings and at the same time depriving the opponent of the possibility of obtaining effective protection. Correct application of this rule requires its consistency with procedural guarantees and respect for the right of recourse to court. Because of this the court may recognize that the exercise by a party of the procedural right constitutes an abuse of procedural rights only after scrupulous evaluation of the facts of the case, fully justifying the assertion that the action of the party is guided by unfair intention - different from the one provided for and accepted by the act - in particular the intention to hamper or prolong the proceedings. Taking into account the objective yardstick, the comparison of the purpose of the procedural right with the adequacy of using it in a specific way will be a useful criterion for the assessment. Summing up, the Supreme Court, expressing the essence of the abuse, assumed that the action contradicting good practice may consist in the fact that the steps provided for by the law and formally admissible are used contrary to the function of the provision, in a way not meeting the real purpose of the granted right and infringing the

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48 Case file No. III CZP 78/13 OSNC 2014 No. 9, item 87, p 29

right of the other party to be granted effective legal protection. It can be claimed that also in this case the Supreme Court indirectly referred to the necessity of existence of the interest in taking a procedural step, assuming that lack of this interest is perceived as abuse if the steps provided for by the law and formally admissible are used contrary to the function of the provision and in a way not meeting the real purpose of the granted right.<sup>49</sup>

In the context of abuse of procedural rights contemplations included also the situations of submitting by the parties of multiple motions for disqualifying the judge. In particular, in the order dated 16 June 2016<sup>50</sup> the Supreme Court asserted that multiple submission by the party of the motions for disqualification of the judge, based on the same general accusations, not possible to be verified and clearly destroying the dignity of the court, is classed as abuse of procedural rights. The court confirmed its previous stance that the prohibition of abusing procedural rights derived from the principle of fair and honest trial, the obligation of fair action of the participants in the proceedings compliant with good practice and the purpose (essence) of the civil proceedings enables prevention of using certain procedural right in a way which contradicts the function of the provisions and may be significant for the interpretation and application of the procedural provisions by the court and may translate into specific procedural decisions. In turn taking by the party the steps provided for in the Act and formally permissible, which however in the facts of a specific case are used contrary to the function of the provision, in the way not meeting the real purpose of the granted right and breaching the right of the other party to be granted effective legal protection contradicts good practice.<sup>51</sup>

Recently in the judgment of 27 July 2018, V CSK 384/17 the Supreme Court found that the submission of a motion for calling for an attempt to conclude a settlement in certain situations may lead to the abuse of procedural right. The situation when the creditor submits a motion for calling for the attempt to conclude a settlement not with the purpose of meeting the claim by way of settlement but only to cause an interruption in the limitation period, is not analogous with the situation in which the creditor sues the debtor for payment of the receivable in circumstances in which using this receivable constitutes the abuse of individual right (S. 5 CC). Submission of the motion for calling for an attempt to conclude a settlement only to cause an interruption in the limitation period and not with the purpose of meeting the claim by way of settlement constitutes a case of improper use of the procedural right, where the effect, though desirable, is used in an unfair way and is of substantive nature. Taking a court action for payment in the circumstances where the use of the receivable constitutes the abuse of individual right serves the purpose of enforcing the claim. The usage of individual right (demand for payment) is subject to disqualification then, and whether simultaneously the procedural right to take court action is improperly used, is not important. Improper use of the procedural right to submit a motion for calling for an attempt to conclude the settlement, involving the submission of this motion to court only to obtain interruption in the limitation period and not – at least as well – in order to meet the claim by way of settlement should be regarded as the procedural step contradicting good practice

49 See also the judgment of SC of 25 March 2015, II CSK 443/14, (LEX no. 1730599).

50 Case file no.: V CSK 649/15 (SC Journal 2016 no. 9, Legalis) <[www.sn.pl](http://www.sn.pl)> accessed 10 June 2019. See also T Zembrzski, 'Przeciwdziałanie nadużyciom w korzystaniu z instytucji wyłączenia sędziego w postępowaniu cywilnym' (2006) 2 Przegląd Sądowy 43.

51 See also the judgment of the Supreme Court - Civil Chamber of 25 November 2015 II CSK 752/14, Legalis, <[www.sn.pl](http://www.sn.pl)> accessed 10 June 2016.

(S. 3 CPC) and, in particular, a subcategory of such a step, i.e. procedural step which leads to the abuse of the right to take such a step.<sup>52</sup> A creditor who submits a motion for calling for an attempt to conclude the settlement, not to enforce his claim by way of settlement, but only to prolong the period of its appealability through causing an interruption in the limitation period contradicts good practice in the procedural meaning and acts against and abuses the procedural right. The conflict of the motion for calling for an attempt to conclude the settlement with good practice (S. 3 CPC) which takes place if the creditor abuses the right to submit it to the court, disqualifies this step and must result in inadmissibility of reconciliation procedure on this basis. Otherwise the court would not only authorize the abuse of procedural right allowing for reconciliation proceedings, but also would permit the situation where the dishonest purpose of the abuse is reached in the form of an interruption in the limitation period. In this situation there is no on the part of the creditor – abusing the procedural right to submit a motion calling for an attempt to conclude the settlement – legal interest worth protecting, as the interest in using the procedural right only for a purpose different than its intended use provided for by the legislator does not deserve protection.

To sum up, the abuse of procedural right is treated by the case law and literature as a separate institution. The evaluation in this aspect is effected within the frames of the judicial power by the court. According to the Supreme Court a useful criterion involves a comparison – taking into account an objective yardstick – of the purpose of a given procedural right with the adequacy of its use in a specific way, combined with scrupulous evaluation of the facts of the case.<sup>53</sup>

Currently the institution of the abuse of procedural right is derived from general principles of the CPC and the clause of good practice included in s. 3 of CPC. Finally it should be indicated that the changes of the Civil Procedure Code are planned. Pursuant to the bill of the amendment to the Civil Procedure Code dated 27 November 2017, a new s. 4<sup>1</sup> is scheduled to be incorporated in the CPC, worded as follows:

‘S. 4<sup>1</sup>. The right provided for in the procedural provisions held by the parties to and participants in the proceedings cannot be used contrary to the purpose for which it was established (abuse of procedural right)’. In case the bill of the amendment to the CPC in the wording of 27 November 2017 becomes effective, also the consequences of the abuse of procedural right will be formalized. A new provision worded as follows is included in the bill of the amending Act: ‘S. 226<sup>2</sup>. After the court discovers the abuse by the party of the procedural right, the court may in the decision ending the proceedings:

- 1) impose a fine on the abuser;
- 2) irrespective of the result of the case, increase the costs of the proceedings to be paid by the abuser or even impose on the abuser the obligation to reimburse all the costs, proportionately to the delay in settling the case caused by the abuse;
- 3) at the request of the opposing party:
  - a) oblige the abuser to pay the costs of the proceedings increased by a proper amount reflecting the amount of work done by the opposing party to participate in the

52 Compare the resolution of the Supreme Court of 11 December 2013, III CZP 78/13, OSNC 2014, no. 9, item 87, the order of the Supreme Court of 16 June 2016, V CSK 649/15, OSNC 2017, no. 3, item 37.

53 See. Ereciński (n 1) 14.

proceedings resulting from the abuse, however not higher than twice the amount of the costs;

b) oblige the abuser to pay the interest due on the said amount in the rate increased proportionally to the delay in settling the case caused by the abuse, however not higher than twice the amount’.

In effect, some consequences of the abuse of procedural right may burden the party as a result of submitting the motion by the opposing party and some may result from the independent action of the court.

#### 4. ABUSE OF RIGHT IN THE EUROPEAN CIVIL PROCEDURE

Searching for the construction of the abuse of right in European procedural law requires a reference to abuse of right in European law in general. It seems to have been determined that in European law the principle of prohibition of abuse is of general nature, which is a natural feature of general principles of European law.<sup>54</sup> It constitutes a general obligation to act in good faith and conduct fair process together with their limiting function.<sup>55</sup> As a consequence, it has general application and requires the national courts to requalify the measures constituting the abuse of right or its circumvention in accordance with the reality, even in lack of national provisions transposing this principle.<sup>56</sup> It constitutes authentic and autonomous source of EU law having constitutional status and being equivalent to treaties. They have significant impact on functioning and operation of the European Union as they fill the gaps and ensure flexibility of the law.<sup>57</sup> Introduction of this principle in practice means balancing the situation between the legislator and the judiciary to the benefit of the latter and expansion of the role of judicial power. Within the judicial power the courts are given a real tool as institutions acting for the purpose of real protection of rights resulting from the EU law. Determination of the abuse leads to failure to apply relevant norm of the EU law.<sup>58</sup> Refusal to grant the law or the benefit resulting from the EU law does not require special legal basis and takes place

54 As in: F de Paul Tetang, ‘La jurisprudence de la Cour de justice et du Tribunal de l’Union européenne’ (2018) 1 *Revue du droit de l’Union européenne* 245–254; RN Ionescu, ‘Arrêt “Cussens e.a.”’ (2018) 246 *Journal de droit européen* 49; S Denys, ‘Principes généraux du droit’ (2018) 1 *Mois Comm* 11–12; M Hennigfeld, ‘Rechtsmissbrauch im Bereich des Unionsrechts’ [2018] *Betrieb* 544–545; A Masuch, ‘Unmittelbare Anwendbarkeit des Grundsatzes des Rechtsmissbrauchsverbots’ [2018] *Mehrwertsteuerrecht* 225–226; H Nieskens, ‘Grundsatz vom Verbot rechtsmissbräuchlicher Gestaltungen’ [2018] *EU-Umsatz-Steuerberater* 7; BG Van Zadelhoff, ‘Beslissingen in belastingzaken’ (2018) 5 *BNB* 1055; J Buckler, ‘Ein neuer allgemeiner Rechtsgrundsatz: Das unionsrechtliche Missbrauchsverbot - Anmerkung zum Urteil des EuGH v. 22.11.2017, Rs. C-251/16 (Cussens u.a. / Brosnan)’ [2018] *Europarecht* 371–380.

55 As in Lenaerts (n 3) 1153–1154.

56 According to CJEU’s case law the application of the principle of prohibition of abuse towards the rights and benefits provided for by the EU law should take place irrespective of the fact whether the rights and benefits are justified under the treaties (with respect to basic freedoms see, in particular, judgments dated: 3 December 1974 r., van Binsbergen, p. 13; 9 March 1999, Centros, s. 24), in the regulation (judgments: dated 6 April 2006, C-456/04, *Agip Petroli SpA v. Capitaneria di porto di Siracusa et al.*, EU:C:2006:241, p. 19, 20; and also dated 13 March 2014, *SICES et al.*, p. 29, 30) or in the directive (on VAT see in particular: dated 3 March 2005, *Finis H*, point 32; dated 21 February 2006, *Halifax*, p. 68, 69; and also dated 13 March 2014, C-107/13, *FIRIN OOD v. Direktor na direkcija “Obzhatwane i danychno-osiguritelna praktika” Weliko Tyrnowo pri Centralno upravljenje na Nacjonalnata agencija za prichodite*, EU:C:2014:151, p. 40).

57 Gajda – Roszczyńska (n 34) 490 – 620.

58 See also judgment dated 28 July 2016, *Kratzer*, p 41, 42 and the case law quoted there.



only because of the determination that in case of a fraud or abuse of right in reality the objective prerequisites required for gaining a desirable benefit are not met.<sup>59</sup>

This principle means that all the abusing behaviour is prohibited so the legal entities cannot invoke the EU law norms for purposes constituting the abuse or their circumvention.<sup>60</sup> In other words, they cannot fraudulently or abusively invoke or instrumentally use the EU provisions of the law.<sup>61</sup> It is the national court which decides whether the abuse took place in accordance with the evidentiary rules provided for in the national regulations as long as it doesn't hamper the effectiveness of EU law. The national court in the main proceedings verifies whether the essential criteria are met with respect to existence of the abuse within the frames of 'abuse test'.<sup>62</sup> The national court should in accordance with the test verify both the objective and the subjective element.<sup>63</sup> If necessary, through awarding the judgment in the preliminary ruling procedure the CJEU may set guidelines helping the national court in the interpretation effected by it.<sup>64</sup>

The European civil procedure law does not contain any definition of the concept of abuse of the European civil procedure right. What is more, there are no general and overall norms which would create a general obligation of a fair and just process, binding the parties and their attorneys and preventing clearly incorrect or fraudulent actions of one party aimed at paralysing or undermining the defence of the other party.<sup>65</sup> Anticipating further solutions, on the one hand, it should be indicated that there is no decision of CJEU which could clearly introduce a general principle of abuse of European right in civil procedure,<sup>66</sup> deriving it as an autonomous principle or transferring it from the

59 See also judgments: dated 14 December 2000, *Emsland Stärke*, p 56; dated 21 February 2006, *Halifax*, p 93; dated 4 June 2009, C-158/08, *Agenzia Dogane Ufficio delle Dogane di Trieste v. Pometon SpA*, EU:C:2009:349, p 28; dated 22 November 2017, C-251/16, *Edward Cussens et al. v. T.G. Brosman*, EU:C:2017:881, p 27.

60 Gajda – Roszczyńska (n 34) 490 – 620.

61 See judgments: dated 7 February 1979, *Knoors*, p 25; dated 3 October 1990, C-61/89, criminal case against *Marc Gaston Bouchoucha*, EU:C:1990:343, p 14; dated 7 July 1992, *Singh*, p 24; dated 12 May 1998, *Kefalas et al*, p 20; dated 9 March 1999, *Centros*, p 24; dated 23 March 2000, *Diamantis*, p 33; dated 21 November 2002, C-436/00, *X i Y v. Riksskatteverket*, EU:C:2002:704, p 41, 45; dated 30 September 2003, C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, EU:C:2003:512, p 136; dated 21 February 2006, *Halifax et al*, p 68; dated 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, p 35; dated 21 February 2008, *Part Service*, p 42; dated 25 July 2008, *Metock et al*, p 75; dated 2 June 2010, C-118/09, *Robert Koller*, EU:C:2010:805, p 81.

62 See instead of many: 22 November 2017 *Cussens et al*, p 59.

63 More information in: *Klöpfer* (n 8) 176 et seq.

64 See instead of many: judgment dated 22 November 2017, *Cussens et al*, p 59; dated 21 February 2006, *Halifax*, p 76, 77; and also dated 17 December 2015, C-419/14, *WebMindLicenses kft v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, EU:C:2015:832, p 34.

65 See F Mancini, 'Short note on abuse of procedure in community law' in M Taruffo (ed), *Abuse of procedural rights: comparative standards of procedural fairness* (Kluwer Law International 1999) 233. However, there are opinions trying to derive from contextuality or purposefulness the existence of the concept of abuse of rights from Art 7 and Art 8 of the Regulation 1215/2012 or Art 10 of the Regulation 650/2012 (see more in *Klöpfer* (n 8) 315–352). It should be noted that there is a legal norm directly referring to the concept of bad faith in the context of process. Under S. 139 of the consolidated text of the regulation on procedure before the Court of Justice dated 25 September 2012: 'Unjustified costs or those resulting from bad faith The CJ may be imposed on the party even if the party won the case, the obligation to reimburse the cost incurred by the opposing party which in CJ's opinion resulted from the first party acting without justification or in bad faith'. See also judgment dated 1 June 1983, 36/81, 37/81 and 218/81, *Peter Willem Seton v. Komisja*, EU:C:1983:152; judgment dated 3 March 1993, T-44/92, *Claudia Delloye et al. v. Commission*, EU:T:1993:18.

66 *Klöpfer* (n 8) 53.

general principles,<sup>67</sup> not to mention the creation by litigators of own definition which would refer to the prohibition of abuse of the right in this context.<sup>68</sup> On the other hand, due to the principle of certainty and mutual trust or due to the necessity of avoiding parallel proceedings<sup>69</sup> and conflicting settlements and also the necessity of uniform application of European law the CJ many times spoke about the abuse of the European civil procedure right in a context.<sup>70</sup>

Discussion on the abuse of the European civil procedure right requires a new look at the principle of procedural and organizational autonomy.<sup>71</sup> The procedural law and the court law connected therewith are unquestionably attributed to the public law, so, as a principle, its application is dominated by national legislation and national interpretation. This assumption formed the basis for procedural and organizational autonomy principle<sup>72</sup> based on Rewe/Comet doctrine.<sup>73</sup> In lack of EU law, the implementation of the legal norms adopted by the European legal system is entrusted, as a principle, to the judiciary of the Member States with the application of procedures established in particular states as long as particular Member States are obliged to guarantee effective standards of protection existing in EU law.<sup>74</sup> Originally the limits of assuming the competences were set by: equivalence principle and effectiveness principle and the primacy principle and direct application of EU law principle connected therewith.<sup>75</sup> A special role is fulfilled in this aspect both by CJEU and the national courts which within the judicial power perform the function of the guarantor of full effectiveness of EU law, balancing the obligation of determination by Member States of procedural rules and organization of courts.<sup>76</sup> Even today CJEU, overcoming the rule of procedural autonomy in civil procedure created already some minimal standards with respect

67 See, however, in the context of the insolvency law the judgment of *Vinyls Italia SpA*.

68 See Taruffo (n 17) 7; Mancini (n 66) 234.

69 Discussion on the issue of parallel proceedings see B Trocha, *Zawisłość sprawy przed sądem zagranicznym w postępowaniu cywilnym* (Wolters Kluwer 2018) 17 at seq. and the literature quoted there.

70 Klöpper (n 8) 313.

71 See Gajda – Roszczyńska (n 34) 490 – 620.

72 B Hess, 'The State of the Civil Justice Union' in B Hess, M Bergström, E Storsrubb (eds), *EU Civil Justice. Current issues and future outlook* (2016) 7 Swedish Studies in European Law, Oxford-Portland p. 1.

73 Formulated under the decision dated 16 December 1976, 33/76, *Rewe-Zentralfinanz eG i Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, EU:C:1976:188.

74 See instead of many others: K Lenaerts, 'National Remedies for Private Parties in The Light of The Eu Law Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist New Series* 13–37; A Nylund, B Krans, 'The European Union and national civil procedure – a rocky road or a smooth process?' in A Nylund, B Krans (eds), *The European Union and National Civil Procedure* (Intersentia 2016) 1 et seq; G Rodriguez Iglesias, 'Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrecht' [1997] *Europäische Grundrechtzeitung* 298 et seq; CN Kakouris, 'Do the Member States Possess Judicial Procedural Autonomy?' 1997 (34) *CML Rev* 1389 et seq.; A Wróbel, 'Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej' (2005) 1 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 39; M Domagalska, 'Zasada autonomii proceduralnej państw członkowskich i jej ograniczenia wynikające z zasady efektywności' in ed. M. Szwarc-Kuczer, K. Kowalik-Bañczyk (eds), *Stosowanie prawa Unii Europejskiej przez sądy: Zasady – orzecznictwo – piśmiennictwo*, (vol II, Wolters Kluwer 2007) 326 et seq. TT Koncewicz, *Sędziowie krajowi...*, p. 123–160.

75 See M Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004) 4 et seq.

76 See K Lenaerts, 'The Role of Law and the Coherence of the Judicial System of the European Union' [2007] *CML Rev* 1659, 1645–1650.

to national procedures.<sup>77</sup> In this context the discussion on the prohibition of abuse of right in European civil procedure apparently seems to be mutually in conflict. On the one hand, there are numerous decisions which are interpreted in the literature as rejection of the concept of applying the institution of abuse of rights in European court proceedings, on the other hand, there are numerous examples where the case law in fact selectively applies the concept of prohibition of abuse of right in European civil procedure,<sup>78</sup> even though it is not clearly stated.<sup>79</sup> Based on this case law it is determined that the correction of certain norms of procedural law is advisable on the basis of the principles such as good faith, morality, honesty, justice in European civil proceedings and national procedures.<sup>80</sup> Even if we assume that the interpretation is too far-reaching then CJEU undoubtedly is not indifferent in this case, which results directly from the speech of the General Spokesman Tesauro<sup>81</sup> concerning Tatry case<sup>82</sup> or the speech of the General Spokesman Mengozzi concerning the case *Freeport plc v. Olle Arnoldsson*.<sup>83</sup> We

- 77 B Hess, 'The State of the Civil Justice Union' in B Hess, M Bergström, & E Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2016) 15-16.
- 78 A Nuyts, 'The Enforcement of Jurisdiction Agreements Further to Gasser and the Community Principle of Abuse of Rights' in] *Forum Shopping in the European Judicial Area* (Hart Publishing 2007) 55, 67.
- 79 G Cuniberti, 'The Discreet Influence of Abuse of Law in International Civil Procedure' in R de La Feria, S Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Studies of the Oxford Institute of European and Comparative Law, vol 13, Hart Publishing 2011) 279, 283.
- 80 Klöpfer (n 8) 178 et seq.
- 81 In his opinion the spokesman clearly indicated: 'In that regard, it should be noted, however, that such efforts constituting forum shopping are easiest to deploy in systems in which priority is automatically given to the connecting factor of the *lex fori*, however disguised. Where, conversely, the rules of private international law or the case-law, or both, adopt connecting factors which better correspond to the nature and characteristics of the relationship, and to the expectations of the parties who originally created it and 'devised it', the possibilities of biased or even abusive use of procedural and private international law, as a whole, are also reduced. In any event, it will be incumbent upon the court seized to ensure that any abuse is thwarted'.
- 82 Judgment dated 6 December 1994 C-406/92, *The owners of the cargo lately laden on board the ship 'Tatry' v. the owners of the ship 'Maciej Rataj'*, EU:C:1994:400. Compare H Tagaras, 'Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1994-1995 et 1995-1996' [1997] *Cahiers de droit européen* 164-171; Ch Wolf, 'Rechtshängigkeit und Verfahrenskonnexität nach EuGVÜ' [1995] *Europäische Zeitschrift für Wirtschaftsrecht* 365-367; RA. Borrás, 'Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas' [1995] *Revista Jurídica de Catalunya* 827-831; E Ullmann, 'Die Verwarnung aus Schutzrechten - mehr als eine Meinungsäußerung?' [2001] *Gewerblicher Rechtsschutz und Urheberrecht* 1027-1032; L Klesta Dosi, 'Corte di giustizia delle Comunità europee (1<sup>o</sup> ottobre 1994 - 30 aprile 1995)' (1995) II *La nuova giurisprudenza civile commentata* 391-393; E Tichadou, *Revue critique de droit international privé* (1995) 601-609; M Lenenbach, 'Gerichtsstand des Sachzusammenhangs nach Art. 21 EuGVÜ?' [1995] *Europäisches Wirtschafts- & Steuerrecht* 361-367; P Huber, 'Fragen zur Rechtshängigkeit im Rahmen des EuGVÜ - Deutliche Worte des EuGH' [1995] *Juristenzeitung* 603-611; H Schack, 'Gerechtigkeit durch weniger Verfahren' [1996] *Praxis des internationalen Privat- und Verfahrensrechts* 80-83; A Huet, 'Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes' [1995] *Journal du droit international* 469-476; R Fentiman, 'Tactical Declarations and the Brussels Convention' [1995] *The Cambridge Law Journal* 261-263; R Arroyo Montero, 'Interpretación del Convenio de Bruselas a partir de sus objetivos: Avances en materia de litispendencia y conexidad' (1995) 94 *La ley - Comunidades Europeas* 1-5; JJ Alvarez Rubio, 'La regla de especialidad en el art. 57 del Convenio de Bruselas de 1968 sobre embargo preventivo de buques' [1995] *Anuario del Derecho Marítimo* 273-312; P Mankowski, 'Spezialabkommen und EuGVÜ' [1996] *Europäisches Wirtschafts- & Steuerrecht* 301-305; A Pesce, 'Materie speciali, litispendenza e connessione di causa nella interpretazione della Corte di giustizia delle CE' (1995) I *Giurisprudenza italiana* 929-936; BJ Davenport, 'Forum Shopping in the Market' [1995] *The Law Quarterly Review* 366-371; TC Hartley, 'Admiralty Actions under the Brussels Convention' [1995] *European Law Review* 409-414; A Briggs, 'The Brussels Convention tames the Arrest Convention' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 161-166; P Volken, 'Rechtsprechung zum Lugano-Übereinkommen (1993/94)' [1995] *Schweizerische Zeitschrift für internationales und europäisches Recht* 332-334.
- 83 Points 48-63 of the opinion related to the judgment of CJ (third chamber) dated 11 November 2007, C-98/06, *Freeport plc v. Olle Arnoldsson*, EU:C:2007:595.

should also mention the last judgment in the case of *Vinyls Italia SpA v. Mediterranea di Navigazione SpA*.<sup>84</sup> Specific statements of CJEU in the context of the prohibition of abuse of procedural right in broadly defined European civil procedure refer to various matters, in particular with respect to the abuse of the right to start an action or the right of defence in European civil procedural law (e.g. filing a fictitious action, if and when the action for compensation may be deemed a procedural abuse, incorrect use of pleadings), or obtaining jurisdiction under false pretenses typical of the European procedural law, in particular *malus forum shopping* and the so-called *torpedo actions*.<sup>85</sup>

#### 4.1. ABUSE OF THE RIGHT TO FILE AN ACTION AND THE RIGHT OF DEFENCE IN EUROPEAN PROCEDURAL RIGHT

In European civil procedural law in the objective aspect we may distinguish abuse of right to file an action from abuse of particular procedural measures within the procedural steps taken during the process.<sup>86</sup>

The literature indicates that some situations of filing an action may be treated as abuse of procedural right.<sup>87</sup> In particular, authors give fictitious action as an example<sup>88</sup>. It is also indicated that the actions for compensation may be treated as inadmissible due to abuse of procedural right if inappropriately used in place of action for annulment, in particular, if the action was filed to avoid the consequences of the lapse of time provided for lodging the appeal concerning annulment.<sup>89</sup> In the judgment dated 23 November 2004, T-166/98, *Cantina sociale di Dolianova Soc. coop rl et al. v. Commission of the European Communities*,<sup>90</sup> the CJ found that the filed complaint about the compensation in fact aimed at repealing the individual decision addressed to the entities lodging the complaint, which was final and binding, as a result of which it would have the same subject matter and the same effect as the complaint about annulment - as a consequence it could be deemed a procedural abuse.<sup>91</sup> The abuse of the right to initiate action in the

84 Compare C Nourissat, 'Révocation d'un paiement intervenu avant l'ouverture de la faillite' (2017) 8-9 *Procédures* 19; L Idot, 'Actes préjudiciables à la masse Europe' (2017) 337 *Août Comm* 45-46; D Berlin, 'Limites à l'autonomie procédurale' (2017) 25 *La Semaine Juridique - édition générale* 1215; L D'Avout, 'Le contrat artificiellement internationalisé devant la Cour de justice (un naufrage juridique)' (2017) 38 *La Semaine Juridique - édition générale* 1655; Ch Dumont, 'Arrêt de la CJUE du 8 juin 2017 (affaire C-54/16) - Vinyls Italia SpA, en faillite, c/ Mediterranea di Navigazione SpA' [2017] *JurisNews* 81-83.

85 Gajda - Roszczyńska (n 34) 490 - 620.

86 Gajda - Roszczyńska (n 34) 490 - 620.

87 Gajda - Roszczyńska (n 34) 490 - 620.

88 See Mancini (n 66) 234. See also K Lenaerts, I Maselis, K Gutman, *EU Procedural Law* (OUP 2014) 93-94 and the case law quoted there.

89 See Lenaerts, Maselis, Gutman (n 89) 490-492 and the case law quoted there.

90 EU:T:2004:337. As in judgment dated 24 May 2011, T-489/08, *Power-One Italy SpA v. European Commission*, EU:T:2011:238.

91 Comments on the decision see: AL Mosbrucker, 'Recevabilité du recours en indemnité' (2008) 10 (297) *Europe* 13-14; J Prostor, 'Zahtevak podizvajalca do naročnika posla' (2011) 5 *Podjetje in delo* 823-835. Similarly: the order of 1st Instance Court dated 4 May 2005, T-86/03, *Holcim (France) SA, former Groupe Origny SA, based in Paris (France), v. Commission of European Communities*, EU:T:2006:90. E Barbier de La Serre, 'Autonomie des voies de droit et paiement d'intérêts après l'annulation d'une amende' (2005) 4 *Revue Lamy de la Concurrence: droit, économie, régulation* 70-71. Compare also the last judgment of CJEU dated 28 February 2018, T 292/15, *Vakakis kai Synergates - Symvouloi gia Agrotiki Anaptixi AE Meleton, dawniej Vakakis International - Symvouloi gia Agrotiki Anaptixi AE, based in Athens (Greece), v. European Commission*, EU:T:2018:103. See also F Gazin, 'Responsabilité extracontractuelle' (2018) 04 (4) *Europe* 21-22.

European civil procedural law takes place e.g. in a situation where the petitioner starts the action being aware that he lacks legal interest. With respect to abuse of right to initiate action other situations include the initiation of the action with the breach of *res iudicata* principle, while the other – to settle the case despite the lapse of limitation period.<sup>92</sup> The action filed only with the purpose of bullying, threatening or insulting the opposing party is also considered to be abuse. In this case usually *repetitive litigation*<sup>93</sup> is mentioned as an example. The petitioner filing subsequent actions against the same defendant in the same case assumes that at least one of them is likely to end in a favourable decision for him. Within the defence undertaken, the abuse of right may consist also in instigation of the action by the entity which in the parallel action instigated earlier functions as the defendant (so-called *reactive litigation*).<sup>94</sup> In particular, it can happen in the situation where the petitioner knows that the claim lodged against him is well-founded and despite this files an action aiming at determination of lack of grounds for holding him liable, relying on the fact that multiplicity of actions may contribute to making a mistake by the opponent and reducing his chances to lose in the first action. This can be illustrated with the example when instigation of a parallel action is only of demonstrative nature and aims at putting psychological pressure meaning that the opponent will not give up without fight, which in certain situations may be a motivation for concluding a settlement.<sup>95</sup>

The doctrine assumes that there are situations in which the parties may inappropriately use documents to which they gained access during the court proceedings and such behaviour may be deemed abuse of procedural right.<sup>96</sup> Hence CJEU's case law confirms that offering access to pleadings by the party to third parties in a situation where such documents were not delivered for the purpose of defending the interests of this party may constitute procedural abuse.<sup>97</sup> So if the party uses such documents for the purpose

92 Taruffo (n 17) 16.

93 See Trocha (n 70) 43.

94 See Trocha (n 70) 43; L Palsson, 'The Institute of lis pendens in international Civil Procedure'(1970) 14 Scandinavian Studies In Law 83. Compare however K Weitz, *Jurysdykcja krajowa w postępowaniu cywilnym* (Wydawnictwo Prawo i Praktyka Gospodarcza 2005) 316.

95 See Gajda – Roszczynialska (n 34) 490– 620 and the literature quoted there.

96 See Lenaerts, Maselis, Gutman (n 89) 821–822 and the case law quoted there.

97 As in: judgment dated 14 November 2012, Nexans France SAS, point 108. Comments on the decision see: F Puel, 'Nexans: Some Limitations to Inspections Carried Out by the European Commission in the Context of Investigations' (2013) 4 Journal of European Competition Law & Practice 312–314; J Probst, F Lutz, 'La jurisprudence de la Cour de justice et du Tribunal de l'Union européenne. Chronique des arrêts. Arrêt "Nexans"' (2013) 1 Revue du droit de l'Union européenne 192–198; L Idot, 'Déroulement des inspections sur décision' (2013) 1 Europe 39–40; A Laghezza, 'From the Nexans judgment to the "next" improvements of the EU dawn raid procedure?' [2013] European Competition Law Review 214–217; F Picod, 'Annulation partielle d'une décision d'inspection' (2012) 48 La Semaine Juridique – édition générale 2154. Analogously the judgment dated 17 June 1998, Svenska Journalistförbundet, point 139. Comments on the decision see: P Pallaro, 'Nuove conquiste per il diritto di accesso ai documenti delle istituzioni comunitarie' [1999] Diritto comunitario e degli scambi internazionali 695–719; M Novak-Stief, 'Zugang der Öffentlichkeit zu Ratsdokumenten' [1998] European Law Reporter 440–441; I Österdahl, 'Case T-124/96, Interporc Im- und Export GmbH v. Commission, Judgment of 6 February 1998, [1998] ECR II-0231; Case T-83/96, Gerard van der Wal v. Commission, Judgment of 19 March 1998, [1998] ECR II-0545; Case T-174/95, Svenska Journalistförbundet v. Council of the European Union, Judgment of 17 June 1998, [1998] ECR II-2289' (1999) 36 (5) Common Market Law Review 1059–1077; M Kuijter, 'De zaak Svenska; inzage in documenten van de Raad en misbruik van recht door publicatie van processtukken op Internet' [1998] Nederlands tijdschrift voor Europees recht 270–274; Y Gautier, 'Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes' [1999] Journal du droit international 514–518; G Romano, (1999) 4 Il Foro italiano 20–22; F Berrod, D Ritleng, (1998/8-9) 271 Europe 11–12.



other than conducting his own action, e.g. to provoke certain social reactions, triggering public criticism through obtaining the documents within disclosure or exerting influence on the party through public opinion and with this intention he delivers the documents to third parties, then it may be treated as abuse of right. Such an abuse of process may be sanctioned e.g. by decision on costs.<sup>98</sup>

#### **4.2. ABUSE OF RIGHT UNDER REGULATION OF COUNCIL (EC) 1346/2000 DATED 29 MAY 2000 ON INSOLVENCY PROCEEDINGS AND REGULATION NO. 2015/848 DATED 20 MAY 2015<sup>99</sup>**

In the judgment concerning *Vinyls Italia SpA*<sup>100</sup> CJ found that Art. 13 of regulation no. 1346/2000 can be efficiently invoked in a situation where the parties to the contract who are based in the same Member Country in whose territory all the other essential elements of a given situation are located, indicated the governing law concerning the contract of another Member Country on condition that they did not choose the governing law in a fraudulent or abusive way, which is to be established by the referring court. On the basis of the same insolvency law CJ clearly referred to the concept of abuse of right and transferred the general rule prohibiting the abuse of right to the jurisdictional norm. In particular the CJ reminded in this context that according to its established case law defendants cannot invoke EU law norms in a way constituting a fraud or abuse.<sup>101</sup> It also referred to a general abuse test indicating that in this context the established case law suggests that determination of existence of the practice constituting an abuse requires meeting the objective and subjective factors. Firstly, as for the objective factor, for the determination it is necessary that the overall objective circumstances would indicate that despite formal observance of conditions provided for in EU regulations the purpose intended to be met by the regulations was not met. Secondly, such a determination requires also a subjective factor, namely that the overall objective circumstances would indicate that the main purpose of the step is to gain unlawful benefit. Prohibition of the practice constituting the abuse is groundless if certain transactions may be justified in another way than only benefit gaining.<sup>102</sup> CJ held also that for the purpose of establishing the existence of the second factor connected with the intention of the parties we may *inter alia* take into account purely artificial nature of the transactions. It is the referring court which has to examine, according to evidential rules provided for in the national regulations, on condition it does not lead to hampering the efficacy of EU law, whether in the proceedings pending before such a court the prerequisites for practice constituting an abuse have been met.<sup>103</sup> The content of the decision indicates clearly that CJ applied the abuse test on the procedural basis within the insolvency law in the context of

<sup>98</sup> As in *Lenaerts*, Maselis, Gutman (n 89) 821.

<sup>99</sup> Official Journal EU L 160, p 1.

<sup>100</sup> Judgement dated 8 June 2017, *Vinyls Italia SpA*. Compare: *Nourissat* (n 85) 19; *Idot* (n 85) 45–46; *Berlin* (n 85) 1215; *D'Avout* (n 85) 1655; *Dumont* (n 85) 81–83.

<sup>101</sup> As in judgment dated 8 June 2017, *Vinyls Italia SpA*, point 51.

<sup>102</sup> As in judgment dated 28 July 2016, *Kratzer*, point 38–40 and the case law quoted there; the judgment dated 8 June 2017, *Vinyls Italia SpA*, point 52.

<sup>103</sup> As in judgment dated 28 July 2016, *Kratzer*, point 41, 42 and the case law quoted there; judgment dated 8 June 2017, *Vinyls Italia SpA*, point 53.



Art. 13 of regulation No. 1346/2000. To sum up, the decision means transferring the general principle prohibiting the abuse of right into the insolvency law area.<sup>104</sup>

#### 4.3. ABUSE OF PROCEDURAL RIGHTS UNDER REGULATION OF COUNCIL (EC) 44/2001 DATED 22 DECEMBER 2000 ON JURISDICTION AND THE RECOGNITION OF COURT DECISIONS AND ENFORCEMENT IN CIVIL AND COMMERCIAL CASES AND REGULATION OF EUROPEAN PARLIAMENT AND COUNCIL (EU) NO. 1215/2012 DATED 12 DECEMBER 2012 ON JURISDICTION AND RECOGNITION OF COURT DECISIONS AND ENFORCEMENT IN CIVIL AND COMMERCIAL CASES

Abuse of European procedural right in the scope of jurisdiction is mostly connected with the so-called trading in jurisdiction or more precisely 'obtaining jurisdiction under false pretences' and torpedo actions.<sup>105</sup> The national jurisdiction is based on an assumption of granting the courts of a given state international jurisdiction to hear and settle a given case through jurisdictional norms.<sup>106</sup> Disregarding here wide discussion about the legal nature of the jurisdictional norm (substantive or relating to conflicts of law)<sup>107</sup> it should be stated that undeniably the priority element of these norms consists in jurisdictional connecting factors, namely those facts (relating to the person or the subject matter) which link the case to the territory of a given state.<sup>108</sup> Introduction of certain jurisdictional connecting factors per se will not always lead to autonomic and exclusive definition of competence areas of particular states. In a sense competitiveness of jurisdiction is always a natural condition.<sup>109</sup> There can be positive or negative jurisdictional conflicts. What is especially significant from the analysed point of view is the positive jurisdictional conflicts. A potential positive jurisdictional conflict in the form of multitude jurisdictional grounds which can be taken into account is connected with *forum shopping*. *Forum shopping* in a simplified version means petitioner's strategy consisting in trying to move the case from its 'natural forum (where he is established)' to be settled in 'the foreign forum' which is to guarantee a bigger chance of obtaining favourable decision or other benefits.<sup>110</sup> This manipulation, with preservation of certain

104 As in: Gajda – Roszczynialska (n 34) 490 – 620.

105 Gajda – Roszczynialska (n 34) 490 – 620.

106 See Weitz (n 95) 39 et seq; T Ereciński, *Międzynarodowe postępowanie cywilne* (ed T Ereciński, J Ciszewski, PWN 2000) 70; A Torbus, *Umowa jurysdykcyjna w systemie międzynarodowego postępowania cywilnego* (TNOiK 2012) 39 et seq.

107 More information in: Torbus (n 107) 77–88.

108 Ereciński (n 107) 70.

109 See Ereciński (n 107) 56. See also MA Lupoi, 'The New Lis Pendens Provision in the Brussels I and II Regulations' (2002) 7 ZZP 153.

110 See judgment dated 13 July 2006, C-539/03, *Roche Nederland BV et al. v. Frederick Primus and Milton Goldenberg*, EU:C:2006:458, point 38. Compare also R Conti, R Foglia, 'Contraffazione di brevetti e pluralità di convenuti' [2006] Il Corriere giuridico 1453–1455; S Warner, S Middlemiss, 'Patent Litigation in Multiple Jurisdictions: An End to Cross-border Relief in Europe?' [2006] European Intellectual Property Review 580–585; S Alvarez González, M Requejo Isidro, 'Litigación internacional sobre patentes en Europa. El sistema de competencia judicial internacional interpretado por el TJCE (Reflexiones tras las sentencias del TJCE de 13 de julio de 2006 en los casos GAT y ROCHE)' [2006] Actas de derecho industrial y derecho de autor 661–677; M Wilderspin, 'La compétence juridictionnelle en matière de litiges concernant la violation des droits de propriété intellectuelle. Les arrêts de la Cour de justice dans les affaires C-4/03, GAT c. LUK et C-539/03, Roche Nederland c. Primus et Goldberg' [2006] Revue critique de droit international privé 777–809; R Knaak, 'Internationale Zuständigkeiten und Möglichkeiten des

conditions, is usually perceived negatively, in particular if it is connected with artificial creation of conditions contrary to the purpose of the regulation.<sup>111</sup> On the other hand, *forum shopping* per se does not have to be an abuse automatically. It is indicated that elimination of insecurity with respect to jurisdiction of the court of a given state is connected with the fact whether the selection of national jurisdiction allowing for the hearing of the case by court which from the parties' point of view is beneficial, is not undesired.<sup>112</sup>

In practice the abuse of *forum shopping* will have a limited scope, though. In principle, the freedom of choice of jurisdiction by the petitioner with respect to alternatively various courts having jurisdiction should not be limited only because the choice of jurisdiction is bound to have certain negative results. Such negative results should be qualified. Abuse in this context not always has to be treated as an exception.<sup>113</sup> Actions of the abuser should directly consist in acting against the legal norm or its circumvention, but also may be deemed inadmissible only if it leads to unlawful trading in grounds for national jurisdiction or in another way breaches good procedural practice. In the objective aspect we may deal with an abuse if trading in jurisdiction aims at dishonest or fraudulent obtaining of jurisdiction under false pretenses as a benefit of one of the parties, which contradicts the effect provided for by the legal norm or act<sup>114</sup>. In the subjective aspect an abuse of right takes place if as a result of trading in jurisdiction the party obtains unlawful personal benefit (taking into account the objective aspect, i.e. to the detriment of the other party and against the intended purpose of the norm)<sup>115</sup>. It means that in practice the abuse of *forum shopping* takes place each time in a given case when the freedom of choice of jurisdiction is not the real reason for taking advantage by the petitioner of the freedom of choice in the internal market and the choice of jurisdiction aims solely at harming the defendant and creating high costs to be paid by him in a way constituting a gross abuse or fraud.<sup>116</sup>

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forum shopping in Gemeinschaftsmarkensachen – Auswirkungen der EuGH-Urteile Roche Niederlande und GAT/LUK auf das Gemeinschaftsmarkenrecht' [2007] Gewerblicher Rechtsschutz und Urheberrecht, internationaler Teil 386–394; A Wittwer, 'Patentrecht im Doppelpack – zwei weitreichende Entscheidungen zur internationalen Zuständigkeit bei Patentverletzungen' [2006] European Law Reporter 391–394; P Lange, 'Der internationale Gerichtsstand der Streitgenossenschaft im Kennzeichenrecht im Lichte der "Roche/Primus" – Entscheidung des EuGH' [2007] Gewerblicher Rechtsschutz und Urheberrecht 107–114; J Adolphsen, 'Renationalisierung von Patentstreitigkeiten in Europa' [2007] Praxis des internationalen Privat- und Verfahrensrechts 15–21; A Kur, A Metzger, 'Exclusive jurisdiction and cross border IP (patent) infringement suggestions for amendment of the Brussels I regulation' [2007] Intellectuele eigendom & Reclamerecht 1–8; C Galli, 'La Corte di giustizia restringe drasticamente lo spazio per le azioni cross-border in materia di brevetti' [2006] Il Corriere giuridico 146–150.

111 See Klöpfer (n 8) 370–371; P Vareilles-Somieres, *Forum Shopping in The European Judicial Area* (Hart Publishing 2007); A Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003); F Jünger, 'Forum Shopping. Domestic and International' (1989) 63 Tulane Law Review 553–572; ChA Whylock, 'The evolving Forum Shopping System' (2011) 96 Cornell Law Review 481–534; F Ferrari, 'Forum Shopping, A Plea for a Broad and Value Neutral Definition' in W Wurmnest, P Mankowski (eds) *Festschrift für Ulrich Magnus: zum 70. Geburtstag*, (Sellier 2014) 385–401; LE Salles, *Forum Shopping in International Adjudication. The Role of Preliminary Objections* (CUP 2014); D Jasper, *Forum shopping in England und Deutschland* (Duncker & Humblot 1990).

112 As in K Siehr, 'Forum Shopping' im internationalen Rechtsverkehr' (1984) 25 ZfRV 124.

113 See Klöpfer (n 8) 371.

114 See Ch Thole, 'Missbrauchskontrolle im europäischen Zivilverfahrensrecht – zur Problematik der sog. Zuständigkeitserschleichung' (2009) 122 ZfP 423, 428; D Coester-Waltjen, 'Von der Fledermaus zum Torpedo? – Rechtsmissbrauch im internationalen Verfahrensrecht' (2011) LII Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae Sectio Iuridica 226.

115 See Klöpfer (n 8) 372.

116 Gajda – Roszczyńska (n 34) 490 – 620.

One of the classic examples includes torpedo actions.<sup>117</sup> They originate from the situation where one party blocks, claiming *lis pendens*, a court action aimed at awarding benefit through earlier filing an action for determination of non-existence of the right<sup>118</sup> and from the way the *lis pendens* is regulated in European civil procedural law and interpretation of this institution. This issue was a subject of interest on the basis of the regulation No. 44/2001 and despite the changes it is still debated under regulation No. 1215/2012. The issue of torpedo actions appeared already in Brussels Convention and then regulation No. 44/2001 and was boiled down to applying a particular defence tactics consisting in blocking the action for awarding the benefit through earlier instigation of the action for determination. The action for determination was filed in such a state where it was the most favourable for the petitioner expecting to be sued (a potential defendant). On multiple occasions the aims of such actions analysed from the perspective of fair process in good faith were debatable, in particular if the aim was to postpone the award of the judgment awarding the benefit due to the expected length of the proceedings. It is because the blockade activated as mentioned above having usually the form of suspension of the proceedings may entail additional obstacles if the administration of justice in the state where the action was instigated earlier has the reputation of protracting proceedings.<sup>120</sup> Initiation of such an action in countries such as Italy or Belgium often led to the necessity of lengthy examination of jurisdiction. Pending the action determining jurisdiction, and if this issue is settled in a positive way, then till the end of the action as for the substance, the right held by the petitioner is in fact paralysed (about a year or more).<sup>121</sup> This situation took place mainly in actions instigated in Italy as well as Belgium. That is why this practice is called *the Italian or the Belgian torpedo* and is a very topical issue in the literature.<sup>122</sup>

In the European area we may observe dual activity. On the one hand, CJEU's case law on a case-to-case basis indicates which situations create obstacles in applying a given jurisdictional connecting factor provided for in the provision, both in case of multiple meanings of notions, as well as in case of multitude of grounds - if the aim is different than the one for which the right was granted (both if the application turns out to be fraudulent and when it leads to abuse of the right to which the petitioner is entitled). On the other hand, creation by the legislator of other specific legislation mechanisms aimed at protection against abuse of the right concerning jurisdiction, especially against the so-called *malus forum shopping* and torpedo actions is very typical.<sup>123</sup>

The subject of prohibition of abusing the right in the scope of jurisdiction in civil proceedings in civil and commercial matters has been discussed by the CJ since the 90s

117 Compare Klöpfer (n 8) 303 et seq.

118 Compare K Weitz, 'Procesowe znaczenie zawisłości sprawy przed sądem zagranicznym (uwagi de lege ferenda na tle prawnoporównawczym)' (2003) 1 Kwartalnik Prawa Prywatnego.

119 Compare P Grzegorzczak, 'Zawisłość sprawy przed sądem zagranicznym w sprawach o naruszenie praw własności przemysłowej' (2006) 6 Europejski Przegląd Sądowy 23–24.

120 Trocha (n 70) 44.

121 Comments on this issue see K Schmehl, *Parallelverfahren und Justizgewährung: zur Verfahrenskoordination* (Tübingen 2011).

122 Compare Klöpfer (n 8) 303 et seq; P. Grzegorzczak, *Zawisłość sprawy...*, p. 24 et seq. and the literature quoted there and Gajda – Roszczynalska (n 34) 490 – 620.

123 Gajda – Roszczynalska (n 34) 490 – 620.

of the previous century. We can assume that *in concreto* the possibility of applying the jurisdictional norms defined in the decision is fortified with the limitation in the form of 'abuse of the grounds for court jurisdiction' which takes place if the application of such norms results from petitioner's manipulation with respect to vagueness of notions, multitude of grounds, contractual provisions, resulting in excluding the relation forming the subject matter of the proceedings from the jurisdiction of courts of a given state or triggering the instigation of the said proceedings in the courts of another member state which in lack of such manipulation would not be a competent body. Additionally, the action of the petitioner does not constitute taking advantage by him of the freedom in the internal market but is aimed exclusively at obtaining a private benefit connected with harming the defendant and generating high costs. The analysis of the case law includes all the cases in which CJ directly or indirectly in European civil procedural law referred to the so-called abuse of right. The CJ dealt with various abuses directly or indirectly taking the form of a widely defined abuse of right and they referred to both 'obtaining the jurisdictional grounds under false pretenses' as well as 'torpedo actions'. In this regard, the following cases should be mentioned: *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*.<sup>124</sup>

124 Judgement of CJEU dated 20 February 1997, C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, EU:C:1997:70. Comments on the decision see: K Weitz, 'Autonomiczna wykładnia europejskiego prawa procesowego cywilnego – wprowadzenie i wyrok ETS z 20.02.1997 r. w sprawie C-106/95 Mainschiffahrts-Genossenschaft eG (MSG) przeciwko Les Gravières Rhénanes SARL' (2008) 8 Europejski Przegląd Sądowy 54–57; N Watté, 'La désignation du lieu du for et du lieu d'exécution de l'obligation' [1998] *Revue de droit commercial belge* 380–382; J Van Haersolte, J Van Hof, 'Forumkeuze of plaats van uitvoering?' [1997] *Nederlands tijdschrift voor Europees recht* 79–80; A Rodríguez Benot, *Revista española de Derecho Internacional* (1997) 211–215; P Wautelet, *The Columbia Journal of European Law* (1997) 465–473; ME Koppenol-Laforce, 'Forumkeuze; internationale handel, gebruik, het niet-bestaan van de overeenkomst' [1998] *Nederlands tijdschrift voor burgerlijk recht* 50–51; P Huber, *Zeitschrift für Zivilprozess International* (1997) 168–181; I Queirolo, 'La forma degli accordi sul foro nella Convenzione di Bruxelles del 1968: una recente pronuncia della Corte di giustizia' [1997] *Rivista di diritto internazionale privato e processuale* 601–614; P Volken, *Schweizerische Zeitschrift für internationales und europäisches Recht* (1998) 128–129; R Foglia, A Saggio, 'Forma delle clausole attributive della competenza' [1997] *Il Corriere giuridico* 463–465; C Mereu, *Journal des tribunaux* (1997) 408–409; P Vlas, 'The EEC Convention on jurisdiction and judgments. Article 17: Jurisdiction clauses' (1999) *Netherlands International Law Review* 100–102; P Vlas, 'Art. 17 EEX – 'abstracte' aanwijzing van de plaats van uitvoering – mondeling overeengekomen forumkeuze – gebruik in de internationale handel' [1997] *TVVS ondernemingsrecht en rechtspersonen* 223–224; TC Hartley, 'Article 17 of the Brussels Convention: Jurisdiction Agreements' [1997] *European Law Review* 360–363; S Kubis, 'Gerichtspflicht durch Schweigen? – Prorogation, Erfüllungsortsvereinbarung und internationale Handelsbräuche' [1999] *Praxis des internationalen Privat- und Verfahrensrechts* 10–14; O Schlosser, *Entscheidungen zum Wirtschaftsrecht* (1997) 359–360; H Holl, *Volker Recht der internationalen Wirtschaft* (1997) 418–419; S Klauer, *St. Galler Europarechtsbriefe* (1997) 260–262; A Huet, *Journal du droit international* (1997) 625–634; J Maseda Rodríguez, 'Algunas consideraciones respecto de los artículos 5.1 y 17 del Convenio de Bruselas de 27 de septiembre de 1968. Comentario a la sentencia del TJCE de 20 de febrero de 1997' (1997) 4296 *La ley – Unión Europea* 12–14; S Phillips, 'Abstract jurisdiction agreements and the Brussels Convention' (1998) *International Trade Law Quarterly* 57–60; H Tagaras, *Cahiers de droit européen* (1999) 190–201; ME Koppenol-Laforce, 'Plaats van uitvoering en rechterlijke bevoegdheid' [1998] *Nederlands tijdschrift voor burgerlijk recht* 45–48; P Schlosser, 'Rechtszersplitterung durch internationales Einheitsrecht?' in *Festschrift für Ulrich Magnus: zum 70. Geburtstag* (SELP 1999) 543–554; H Gaudemet-Tallon, *Revue critique de droit international privé* (1997) 572–577; P Vlas, *Nederlandse jurisprudentie; Uitspraken in burgerlijke en strafzaken* (1998) 565.

*Réunion européenne SA and Others v. Spliethoff's Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002*,<sup>125</sup> as well as *AS-Autoteile Service GmbH v. Pierre Malhé*.<sup>126</sup>

Another issue of limits of unfair application or abuse of grounds for jurisdiction was indirectly touched upon in the decision of *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*<sup>127</sup>, *Freeport plc v. Olle Arnoldsson*<sup>128</sup>, *Reisch*

- 125 Judgment of CJEU dated 27 October 1998, C-51/97, *Réunion européenne SA and Others v. Spliethoff's Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002*, EU:C:1998:509. Compare: RA Borrás, 'Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas' [1999] *Revista Jurídica de Catalunya* 907–910; M Eslava Rodríguez, 'Interpretación por el TJCE de los arts. 5, aps. 1 y 3 y 6, ap. 1 del CB' [2000] *Anuario español de derecho internacional privado* 810–812; A Font I Segura, 'La responsabilidad del porteador efectivo en el Convenio de Bruselas de 1968 (STJCE de 27 de octubre de 1998, as. C-51/97, *Réunion Européenne SA y otros C. Spliethoff's Bevrachtungskantoor BV, Capitaine Commandant el navire "Alblasgracht V002"*)' [1999] *Revista de Derecho Comunitario Europeo* 187–207; P Delebecque, 'Condamnation de la théorie des groupes de contrats par la Cour de Justice des Communautés Européennes' [1999] *Le droit maritime français* 33–34; S Klauer, 'Gerichtsstand für Klage aus Delikt und Vertrag bei mehreren Beklagten' [1999] *European Law Reporter* 142–144; P Volken, 'Schweizerische Zeitschrift für internationale und europäisches Recht' 1999, pp. 450–451; A Briggs, 'Claims Against Sea Carriers and the Brussels Convention' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 333–337; J Bauerreis, 'Le rôle de l'action directe contractuelle dans les chaînes internationales de contrats. Le rétablissement de l'équilibre pécuniaire entre les maillons extrêmes d'une chaîne de contrats: l'action directe contractuelle exercée par le sous-acquéreur à l'encontre du vendeur initial de la chose non-conforme. La Convention de Bruxelles de 27 septembre 1968 et la désignation du tribunal internationalement compétent' [2000] *Revue critique de droit international privé* 341–348; H Koch, 'Europäische Vertrags- und Deliktsgerichtsstände für Seetransportschäden ("Weiche Birnen")' [2000] *Praxis des internationalen Privat- und Verfahrensrechts* 186–188; H Gaudemet-Tallon, 'Revue critique de droit international privé' 1999, pp. 333–340; TC Hartley, 'Carriage of goods and the Brussels Jurisdiction and Judgments Convention' [2000] *European Law Review* 89–93; F Leclerc, 'Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes' [1999] *Journal du droit international* 625–635; P Lombardi, 'Brevi note sulla più recente giurisprudenza comunitaria relativa alla Convenzione di Bruxelles del 1968: il caso Réunion européenne e il caso Van Uden' [1999] *Contratto e impresa/Europa* 455–468; A Crespo Hernández, 'Delimitación entre materia contractual y extracontractual en el Convenio de Bruselas: Implicaciones en orden a la determinación de la competencia judicial internacional. Comentario a la sentencia del TJCE de 27 de octubre de 1998' (1998) 4681 *La ley – Unión Europea* 1–3.
- 126 Judgment dated July 1985, C-220/84, *AS-Autoteile Service GmbH v. Pierre Malhé*, EU:C:1985:302. More information in: R Geimer, 'EuGVÜ und Aufrechnung: keine Erweiterung der internationalen Entscheidungszuständigkeit – Aufrechnungsverbot bei Abweisung der Klage wegen internationaler Unzuständigkeit' [1986] *Praxis des internationalen Privat- und Verfahrensrechts* 208–216; E. Mezger, 'Revue critique de droit international privé' 1986, pp. 147–153; TC Hartley, 'Costs and Counterclaims' [1986] *European Law Review* 98–99.
- 127 CJEU's judgment dated 27 September 1988, C-189/87, *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, EU:C:1988:45. See: R Geimer, 'Streitgenossenzuständigkeit und forum delicti commissi' [1988] *Neue juristische Wochenschrift* 3089–3090; FJ Jiménez Fortea, 'Comentario a la sentencia del Tribunal de Justicia de las Comunidades Europeas de 27 de septiembre de 1988 (artículos 5 y 6 del Convenio de Bruselas)' [1989] *Revista General de Derecho* 3939–3955; P Gottwald, 'Europäische Gerichtspflichtigkeit kraft Sachzusammenhangs' [1989] *Praxis des internationalen Privat- und Verfahrensrechts* 272–274; RA Borrás, 'Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas' [1989] *Revista Jurídica de Catalunya* 538–540; TC Hartley, 'Jurisdictional Issues under Articles 5(1), 5(3) and 6(1)' [1989] *European Law Review* 172–175; R Ebbink, 'A Fire-Side Chat On Cross-Border Issues (before the ECJ in GAT v. LuK)' in D Beier, L Petit, C Heath (eds), *Festschrift für Jochen Pagenberg* (Heymann 2006) 255–262; E Ullmann, 'Die Verwarnung aus Schutzrechten – mehr als eine Meinungsäußerung?' [2001] *GRUR* 1027–1032; AV Gill, 'Multiple Defendants, Jurisdiction in Tort and the Brussels Convention' [1989] *Irish Law Times and Solicitors' Journal* 2–4; P Schlosser, 'EuGÜbk: Zuständigkeit bei mehreren Beklagten an verschiedenen Wohnsitzen – Begriff der unerlaubten Handlung' [1998] *Recht der internationalen Wirtschaft* 987–989; Huet (n 83) 457–461; H. Gaudemet-Tallon, 'Communautés européennes' [1989] *Revue critique de droit international privé* 117–123; B Audit, 'Droit international privé' [1989] *Recueil Dalloz Sirey* 254–255.
- 128 As in the judgment dated 11 October 2007, *Freeport plc*.



*Montage AG v. Kiesel Baumaschinen Handels GmbH*.<sup>129</sup> The same approach was continued in the subsequent decisions of CJ, in particular in the case of *Eva-Maria Painer v. Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG*<sup>130</sup> or *az Solvay SA v. Honeywell Fluorine Products Europe BV et al.*<sup>131</sup>

129 CJ's judgment (second chamber) dated 13 July 2006, C-103/05, *Reisch Montage AG v. Kiesel Baumaschinen Handels GmbH*, EU:C:2006:471. More information in: M Barba, 'Leçon 1: De la connexité et de son instrumentalisation' (2016) 111 *Revue Lamy droit des affaires* 28–32; E Pataut, 'Revue critique de droit international privé' 2007, pp. 181–186; L Idot, 'Règlement n° 44/2001, "Bruxelles I"' (2006) 11 *No 345 Europe* 36; M Jánošíková, 'Osobitná právomoc a neprípustnosť žaloby' [2009] *Výber z rozhodnutí Súdneho dvora Európskych spoločností* 41–43; Ch Althammer, 'Die Anforderungen an die "Ankerklage" am forum connexitatis (Art. 6 Nr. 1 EuGVVO)' [2006] *Praxis des internationalen Privat- und Verfahrensrechts* 558–563; A Wittwer, 'Das EuGV-Debüt des EuGH – Strittiges zur Streitgenossenschaft von insolventem Hauptschuldner und seinem Bürgen' [2006] *European Law Reporter* 424–425; M Würdinger, 'Zeitschrift für Zivilprozeß International' 2006/11, pp. 180–190.

130 CJEU's judgement dated 1 December 2011, C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG*, EU:C:2011:798. Compare: HP Roth, 'Urheberrecht: Schutz von Portraitfotos' [2012] *Europäische Zeitschrift für Wirtschaftsrecht* 189–190; Ch Handig, 'EuGH zum Werkbegriff und zu den freien Werknutzungen' [2012] *Ecolex* 58–60; N Lund, 'Verschwommene Konturen: Das Luxemburger Porträt der Konnexität des Art. 6 Nr. 1 EuGVVO' [2012] *Recht der internationalen Wirtschaft* 377–380; M Walter, 'Porträtfotos – Phantombild' [2012] *Medien und Recht* 81–84; S Büttler, 'Urheberrechtsschutz von Porträtfotos, insbesondere bei der Verwendung als Fahndungsbild' [2012] *European Law Reporter* 84–86; V Dahan, Ch Bouffier, 'Arrêt Painer du 1er décembre 2011: la CJUE poursuit son oeuvre d'harmonisation du droit d'auteur' (2012) 80 *Droit de l'immatériel: informatique, médias, communication* 14–18; A Lucas, 'Droit d'auteur et droits voisins – Exceptions – Citation – Utilisation à des fins de sécurité publique' (2012) 42 *Propriétés intellectuelles* 30–31; P Sirinelli, 'Jurisprudence de la Cour de justice de l'Union Européenne. Accès à la protection' (2012) 232 *Revue internationale du droit d'auteur* 325–476; J Daleau, 'Enquête criminelle: reproduction de la photographie d'un portrait' (2011) *Recueil Le Dalloz* 2930; N Martial-Braz, 'Cliché d'une harmonisation du droit d'auteur par la CJUE: du grand art!' [2012] *Recueil Le Dalloz* 471–474; L Costes, 'Utilisation d'une photographie de portrait comme modèle pour établir un portrait-robot: l'analyse de la CJUE' (2012) 78 *Droit de l'immatériel: informatique, médias, communication* 14–15; B Michaux, 'La notion d'originalité en droit d'auteur: une harmonisation communautaire en marche accélérée' (2012) *Revue de droit commercial belge* 599–601; VL Benabou, 'Arrêt "Painer": la protection par le droit d'auteur d'une photographie de portrait utilisée à des fins de recherche d'une personne disparue' (2012) 189 *Journal des tribunaux/droit européen* 146–148; L Idot, 'Compétence en cas de pluralité de défendeurs' (2012) 02 *Europe* 45–46; L Idot, 'Droit d'auteur et photographies' (2012) 02 *Europe* 37–38; M.M Van Echoud, 'AMI: Tijdschrift voor auteurs-, media & informatierecht' 2012, pp. 73–75; MR De Zwaan, 'Ruimte in het citaatrecht in Europa? Zoekmachine vindt niets bij "search naar flexibility"' [2012] *AMI: Tijdschrift voor auteurs-, media & informatierecht* 141–148; ThM De Boer, 'Nederlandse jurisprudentie; Uitspraken in burgerlijke en strafzaken' 2013/66; S.J. Schaafsma, 'Intellectuele eigendom & Reclamerecht' 2012, pp. 155–158; P.B. Hugenholtz, 'Nederlandse jurisprudentie; Uitspraken in burgerlijke en strafzaken' 2013/66; V. Rörsch, 'Mediaforum: Tijdschrift voor Media- en Communicatierecht' 2012, pp. 106–107; P.G.F.A. Geerts, 'Intellectuele eigendom & Reclamerecht' 2012, pp. 158–162; C Oro Martinez, 'Tribunal de Justicia: Espacio de libertad, seguridad y justicia – Competencia judicial internacional – Sentencia del Tribunal de Justicia de la Unión Europea (Sala Tercera), de 1 de diciembre de 2011, asunto C-145/10, *Eva-Maria Painer c. Standard VerlagsGmbH y otros*, (2012) 2 *Revista española de Derecho Internacional* 218–220; Z Skubic, 'Ali se portretna fotografija ugrabljeni deklace šteje za umetniško delo?' (2011) 48 *Pravna praksa* 23; CE. Mezzetti, 'Il caso Painer: una rivoluzione copernicana per la tutela della fotografia in Italia?' [2012] *Giurisprudenza italiana* 2563–2569; M Dimattia, 'Cronaca giudiziaria e diritti d'autore sull'opera fotografica di fronte alla Corte di giustizia' [2012] *Il diritto dell'informazione e dell'informatica* 212–219.

131 CJEU'S judgement (third chamber) dated 12 July 2012, C-616/10, *Solvay SA v. Honeywell Fluorine Products Europe BV et al.*, EU:C:2012:445. See: Th.M. De Boer, 'Nederlandse jurisprudentie; Uitspraken in burgerlijke en strafzaken' 2013/67; S.J. Schaafsma, 'Intellectuele eigendom & Reclamerecht' 2012, pp. 530–532; PLC. Torremans, 'Artikel 6, 1. Brussel I: onveranderde tekst maar geen duidelijke weg voorwaarts' [2013] *Revue de droit commercial belge* 431–440; CJ/C Van Nispen, 'Het doek weer opgetrokken voor de "dutch cross border injunction"' [2012] *Berichten industriële eigendom* 263–265; Ch Gielen, 'Nederlandse jurisprudentie; Uitspraken in burgerlijke en strafzaken'



Here we cannot ignore the influence of protraction of the proceedings in the action which was initiated as the first one on the obligation to respect the general *lis pendens* in the context of regulation no. 44/2001. In the decision concerning the case of *Erich Gasser GmbH v. MISAT Srl*,<sup>132</sup> the CJ expressed the opinion that it is not permissible to refrain from applying Art. 21 of the Brussels convention, which analogously must be applied to Art. 27 of the regulation No. 44/2001. When issuing the decision the CJ took a stance that the time priority principle shall apply even if the first action was initiated with a breach of the contract granting exclusive jurisdiction in a given case to courts of a different member state. The literature contains conflicting views though: in accordance with the first one this issue is presented as the clear rejection of the concept of abuse of procedural right. According to the second view, CJ in fact showed that two independent issues were touched upon in this case: interpretation of Art. 21 of the Regulation No. 44/2001 and abuse of procedural right. The CJ interpreted Art. 21 of Regulation No. 44/2001 and refrained from commenting on the second issue. It can be assumed that CJ did not reject the concept of civil procedural law but only refused to solve this problem.<sup>133</sup> What is more, it is suggested that CJ unintentionally led to the development of the tactic of *malus forum shopping*.<sup>134</sup>

Taking into account Regulation No. 1215/2012 the discussion about abuse of procedural right is at an early stage.<sup>135</sup> One of the purposes of European legislator, while revising the regulation no. 44/2001, is to solve this problem and eliminate abuses.<sup>136</sup>

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2013/67; B Sujecki, 'Die Solvay-Entscheidung des EuGH und ihre Auswirkungen auf Verfahren über Immaterialgüterrechte' [2013] Gewerblicher Rechtsschutz und Urheberrecht INT 201–214; H Schacht, 'Neues zum internationalen Gerichtsstand der Streitgenossen bei Patentverletzungen' [2012] Gewerblicher Rechtsschutz und Urheberrecht INT 1110–1113; S Dack, 'Solvay/Honeywell – a sleeping beauty' [2013] Willem Hoyng Litigator 357–382; S Dack, 'Solvay/Honeywell – a sleeping beauty' [2013] Berichten industriele eigendom 364–371; L Idot, 'Pluralité de défendeurs, demandes de mesures provisoires et compétences spéciales en matière de brevets' (2012) 10 Europe 50–51; E Treppoz, 'Compétence internationale en matière de contrefaçon de brevet européen' [2013] Revue critique de droit international privé 479–487; J Dolžan, 'Pristojnost nacionalnega sodišča v čezmejnem sporu zaradi kršitve evropskega patenta' (2012) 33 Pravna praksa 28; PA De Miguel Asensio, 'Jurisprudencia española y comunitaria de Derecho internacional privado – Tribunal de Justicia: Espacio de libertad, seguridad y justicia – Competencia judicial internacional – Competencia judicial en materia de violación de un derecho de patente europea [...] Sentencia del Tribunal de Justicia de la Unión Europea de 12 de julio de 2012, asunto C-616/10, Solvay SA y Honeywell Fluorine Products Europe BV et al' [2013] 65 Revista española de Derecho Internacional 200–203; PA De Miguel Asensio, '[Competencia judicial internacional] – Posibilidad de ejercitar acciones relativas a la infracción de derechos de propiedad industrial de varios estados ante un mismo tribunal – Tribunal de Justicia, Sala Tercera, Sentencia de 12 de julio de 2012, asunto C-616/10 [Solvay SA/Honeywell Fluorine Products Europe BV e.a.]' (2012) XII Anuario español de derecho internacional privado 835–840; F Ferrari, 'La Corte di giustizia e il foro dei provvedimenti cautelari inibitori in materia di proprietà industriale' [2012] Int'l Lis 117–126.

132 Judgment dated 9 December 2003, C-116/02, *Erich Gasser GmbH v. MISAT Srl*, EU:C:2003:657. In the literature this judgment is described by P Grzegorzczuk, P Rylski, K Weitz, 'Przegląd orzecznictwa Europejskiego Trybunału Sprawiedliwości z zakresu europejskiego prawa procesowego cywilnego (2003–2008)' (2009) 3 Kwartalnik Prawa Prywatnego 811–814. See also R Fentiman, 'Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*' (2005) 42 (No1) Common Market Law Review 241–259.

133 Compare Klöpfer (n 8) 183 and the literature quoted there.

134 R Fentiman, Art 31 in U. Magnus, P. Mankowski (eds), *European Commentaries on Private International Law. Commentary, Brussels I bis Regulation* (Köln 2016) 750; R Fentiman, 'Jurisdiction Agreements and Forum Shopping in Europe' [2006] Butterworth's Journal of International Banking and Financial Law 304; J Mance, 'Exclusive Jurisdiction Agreements and European Ideals' (2004) 120 LQR 2004/120 357 et seq.

135 See compare Klöpfer (n 8).

136 B Hess, T Pfeiffer, P Schlosser, *Report on the application of regulation Brussels I in the member states*, Heidelberg 2007; A Dickinson, 'Surveying the proposed Brussels I bis regulation: solid foundations but renovation needed' in A Bonomi, GP Romano (eds), *Yearbook of private international law* (vol XII, München 2010) 247–310; U Magnus, 'Choice of court agreements in the review proposal for the

There is a question whether the current regulation of the Regulation 1215/2012 eliminates the problem of abuse of European civil procedural right?<sup>137</sup> Undoubtedly the system of respecting *litis alibi pendentis* was upheld in regulation No. 1215/2012,<sup>138</sup> however in a slightly changed form. In the light of Art. 29(1) of Regulation No. 1215/2012, not breaching Art. 31(2) if before the courts of different member states actions are instigated for the same claim between the same courts, the court in which the action was instigated later shall ex officio suspend the proceedings till the jurisdiction is established of the court where the first action was instigated. In cases defined in Subs. 1, at the request of the court before which the dispute is pending, every other court in which the action was instigated, shall forthwith inform the first court when the action was instigated in it pursuant to Art. 32 (Art. 29(2) of the Regulation No. 1215/2012). If the jurisdiction of the court in which the action was instigated as the first one was established, the court in which the action was instigated later shall find lack of jurisdiction, as the first court has it (Art. 29(3) Regulation No. 1215/2012). If before courts of different member states actions are initiated which are related to each other, each court in which the action was initiated later may suspend the proceedings (Art. 30(1) of Regulation No. 1215/2012). If such actions are instituted in the first instance court, each court in which the action was instituted later may at the request of the party find that it has no jurisdiction if the court in which the action was instigated as the first one has jurisdiction over the cases and combination of cases is compliant with its law (Art. 30(2) of Regulation no. 1215/2012). As interpreted in this article, it is believed that such cases are related to each other if the bond between them is so close that it is advisable to hear them and settle them jointly in order to avoid the issuance of conflicting decisions in separate proceedings (Art. 30(3) of Regulation No. 1215/2012). Provision of Art. 31 of Regulation No. 1215/2012 introduces a new measure aimed at protecting jurisdictional clauses through<sup>139</sup> the obligation to deviate from the principle of time priority if the issue concerns respecting the jurisdictional contract containing the establishment of exclusive jurisdiction.<sup>140</sup> This regulation exists in order to

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Brussels I regulation' in E Lein (ed), *The Brussels I review proposal uncovered* (London 2012) 83–102; A Nuyts, Study on Residual jurisdiction – General report, September 2007.

137 Gajda – Roszczyńska (n 34)490 – 620.

138 More information in: R Fentiman, 'Art. 29, Art. 30' in U Magnus, P Mankowski (eds), *European Commentaries on Private International Law. Commentary, Brussels I bis Regulation* (Köln 2016) 713–748; S Leibe, 'Art. 29, Art. 30' in T Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Brussel Ia – VO* (Köln 2016) 866–895; K Weitz, 'Projektowane zmiany rozporządzenia nr 44/2001' in P Grzegorzczak, K Weitz (eds), *Europejskie prawo procesowe cywilne i kolizyjne* (Warszawa 2012) 62 et seq.; P Rodziewicz, 'Art. 29, Art. 30' in J Gołaczyński (ed), *Jurysdykcja, uznawanie orzeczeń sądowych oraz ich wykonywanie w sprawach cywilnych i handlowych. Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1215/2012. Komentarz* (Warszawa 2015) 147–151.

139 See point 22 of the preamble where it was found that: 'however, in order to enhance the effectiveness of contracts establishing exclusive jurisdiction and avoiding dishonest tactics in court proceedings, the exception from a general regulation concerning the instigation of actions shall be provided for in order to satisfactorily solve a particular case in which parallel actions may be instigated. It is a situation in which the action was instigated in the court not indicated in the exclusive jurisdiction contract and then in the dispute concerning the same claim and between the same parties an action was instigated in the court indicated in such a contract. In such a case the court in which the action was instigated as the first one shall suspend the proceedings when the action is instigated in the court indicated in the contract and till the said court finds that it has no jurisdiction pursuant to the exclusive jurisdiction contract. It is to guarantee that in this situation the court indicated in the contract has priority of deciding on the validity of the contract and the scope in which this contract applies to the dispute it is to hear. The court indicated in the contract shall be able to conduct the proceedings irrespective of the fact whether the court not indicated in the contract already decided to suspend the proceedings'.

140 See I Bergson, 'The death of the torpedo action? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union' (2015) 11 JPIL 6 et seq.

introduce an exception from *lis pendens*, doctrine if the actions pending are parallel in the court assigned in the jurisdictional contract and the court of another country than the country indicated in the jurisdictional clause. In this situation the priority is held by the court indicated in jurisdictional contract as pursuant to Art. 31(2) of Regulation No. 1215/2012, without breaching the provisions of Art. 26, if the action is instigated in the court of the member state which in the contract defined in Art. 25 was stated as having exclusive jurisdiction, every court of another member state shall suspend the proceedings till the court indicated in the contract does not find that it has no jurisdiction under such a contract. Also pursuant to Art. 31(2) of Regulation No. 1215/2012, if the court indicated in the contract found that it has jurisdiction pursuant to the contract, every court of another member state shall find that it has no jurisdiction to the benefit of this court. The newly introduced measure without any doubts offers the required protection in the scope of jurisdictional contracts as per the choice of the competent court in many situations occurring in case of parallel proceedings.<sup>141</sup> However, it is doubtful whether definitely the problem of abuse of procedural right is eliminated under Regulation No. 1215/2012.<sup>142</sup>

- 141 See with respect to the role of jurisdiction contracts in Brussels I bis system: J Basedow, 'Exclusive choice-of-court agreements as a derogation from imperative norms' in P Lindskoug, U Manusbach, G Millqvist (eds), *Essays in honour of Michael Bogdan* (Lund 2013) 15–31; P Durand-Barthez, 'The "governing law" clause: legal and economic consequences of the choice of law in international contracts' (2012) 5 *International Business Law Journal/Revue de Droit des Affaires Internationales* 505–518; P Garcimartin, 'Prorogation of jurisdiction' in A Dickinson, E Lein (eds), *The Brussels I regulation recast* (Oxford 2015) 25–26; XE Kramer, 'Competitie in de Europese civiele rechtsruimte: een spanningsveld in de grensoverschrijdende geschillenbeslechting?' (2014/51) 4 *Tijdschrift voor Privaatrecht* 1745–1806; PA Nielsen, 'The new Brussels I regulation' (2013/50) 2 *Common Market Law Review* 503–528; M Pertegás, 'Feeling the heat of disputes and ending the shade of forum selection' [2015] *Nederlands Internationaal Privaatrecht* 374–375; SI Strong, 'Limits of procedural choice of law' (2014) 39 *Brooklyn Journal of International Law* 1027–1121.
- 142 See Gajda – Roszczynialska (n 34) 490–620; K Hilbig-Lugani, 'Der gerichtstandsvereinbarungswidrige Torpedo – wird endlich alles gut? Ein Beitrag zur EuGVVO 1215/2012' in R Geimer, A Kaissis, RC Thümmel (eds), *Ars aequi et boni in mundo: Festschrift für Rolf A. Schütze zum 80. Geburtstag* (München 2015) 195–204; Coester-Waltjen (n 115) 22; Ch Heinze, 'Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation' (2011/75) 3 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2011/75 581–618; G Cuniberti, 'Lis Pendens and Jurisdiction Clauses' in B Hess, M Bergstrom, E Storskrubb (eds), *EU Civil Justice. Current Issues and Future Outlook: Swedish Studies in European Law* (vol 7, Oxford–Portland, Oregon 2016) 25–27; Bergson (n 141) 1–30; PA Nielsen, 'The End of Torpedo Actions?' in *Cross-border Litigation in Europe: the Brussels I Recast Regulation as a Panacea?* (ed F Ferrari, F Ragno Francesca, Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale 2016) pp 153–169; PA Nielsen, 'Current Developments. The Recast Brussels I Regulation' (2014/83) 1 *Nordic Journal of International Law* 61–71; PA Nielsen, 'Current Developments. The State of Play of the Recast of the Brussels I Regulation' (2012) 81 (4) *Nordic Journal of International Law* 585–603; M Herranz Ballesteros, 'The regime party autonomy in the Brussels I recast: The solutions adopted for agreements on jurisdiction' (2014/10) 2 *Jurisdiction of private International Law* 291–308; T Ratkovic, D Zgrabljic Rotar, 'Choice-of-Court agreements under the Brussels I Regulation (Recast)' (2013) 9 *Journal of Private International Law* 245–268; D Kenny, R Hennigan, 'Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation' (2015) 64 *ICLQ* 197–210; FM Wilke, 'The impact of the Brussels I Recast on important "Brussels" case law' (2015) 11 (1) *Journal of Private International Law* 128–142; Q Forner-Delaygua, 'Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast' (2015) 11 (3) *Journal of Private International Law* 379–405; Ch Heinze, B Steinrötter, 'The Revised Lis Pendens Rules in the Brussels I bis Regulation' in V Lazic, S Stuij (eds), *Brussels I bis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (The Hague 2017) 1–26; XE Kramer, E Themeli, 'The Party Autonomy Paradigm: European and Global Developments on Choice of Forum' in: V Lazic, S Stuij (eds), *Brussels I bis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (The Hague 2017) 27–49; T Domej, 'Die Neufassung der EuGVVO – Quantensprünge im europäischen Zivilprozessrecht' (2014) 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 533–537; M Pohl, 'Die Neufassung der EuGVVO – im Spannungsfeld zwischen Vertrauen und Kontrolle' (2013) 2 109–114; M Wagner, 'Aktuelle

It seems that the solutions adopted in Art. 29 and Art. 31(2) of Regulation No. 1215/2012 do not eliminate fully the risk of the so-called Italian torpedo and *forum running*. It is because it refers only to jurisdictional contracts granting exclusive jurisdiction to hear a given case to a court selected by the parties.<sup>143</sup> Doubts and the risk of abuse arise in case of contracts indicating more than one jurisdiction. The so-called Italian torpedo is still possible in case of disputes arising from contractual relations where the parties did not agree on jurisdiction. What is more, it is still possible in case of prohibited acts and in every case in which the regulations allows for alternative possibility of selecting jurisdiction criteria.<sup>144</sup>

The risk of abuse of procedural right still exists in particular in case of concluding contracts indicating more than one jurisdiction and existence of a few conflicting jurisdictional clauses in them. In such a case the mechanism under Art. 31 of Regulation No. 1215/2012 is excluded. It is clear that the mechanism introduced by Art.31(2) and Art. 31(3) of Regulation No. 1215/2012 is designed to operate only if there is only one clause concerning the exclusive jurisdiction and does not apply in cases in which more than one clause may apply.<sup>145</sup> Doubts will arise in case of hybrid or asymmetric clauses. It is possible that in case of extended contractual relations the claims of the parties will be included in the scope of not one, but a few jurisdictional clauses which may provide for jurisdiction of different courts. In such a situation conflicting jurisdictional clauses existing in the main and special contract will lead to parallelly instigated actions in courts of different countries. Due to the fact that point 22 of the preamble of the Regulation No. 1215/2012 directly excludes the situation referring to conclusion of conflicting contracts establishing exclusive jurisdiction from the regulation including the said measure under Art. 31(2) of Regulation No. 1215/2012, the general *lis pendens* shall apply. In other words it means that the general rule concerning instigation of the action applies in the said situation if the parties concluded conflicting contracts establishing exclusive jurisdiction.<sup>146</sup> Due to this fact it is necessary to contemplate the

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Entwicklungen in der justiziellen Zusammenarbeit in Zivilsachen' [2012] NJW 1333; A Nuyts, 'La refonte du règlement Bruxelles I' (2013/102) 1 R.C.D.I.P. 42–59; P Wautelet, 'Clauses d'éllection de for et procédures concurrentes. Les innovations du Règlement 1215/2012', (2015) 1 TVIP/RDIP 152–156; V Egea, 'La solution des conflits de procédures dans le Règlement Bruxelles I bis' in E. Guinchard (ed), *Le nouveau Règlement Bruxelles I bis*, (Bruxelles 2014) 154–158; H Gaudemet-Tallon, C Kessedjian, 'La refonte du règlement Bruxelles' [2013] RTD Eur. 446–447; MA Lupoi, 'La nuova disciplina della litispendenza e della connessione tra cause nel regolamento Ue n. 1215 del 2012' (2013) 67(4) Rivista trimestrale di diritto e procedura civile 1425–1440; TC Hartley, *Civil Jurisdiction and Judgments in Europe. The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (Oxford 2017) 225 et seq.; T.C. Hartley, *Choice-of-court Agreements under the European and International Instruments. The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (Oxford 2013) 227–231. See also K Weitz, 'Między forum prorogatum, a forum non prorogatum – wzmocnienie skuteczności umowy jurysdykcyjnej w świetle rozporządzenia Bruksela I bis' (2014) 9 *Palestra* 181–198; P Grzegorzczak, 'Nowy fundament europejskiego prawa procesowego cywilnego: jurysdykcja krajowa, zawisłość sprawy oraz uznawanie i wykonywanie orzeczeń w sprawach cywilnych i handlowych według rozporządzenia Rady i Parlamentu Europejskiego nr 1215/2012 (Bruksela Ia), cz. I' (2014) 6 *Przegląd Sądowy* 13–17; B Trocha, 'Problematyka zawisłości sprawy w rozporządzeniu 1215/2012 (Bruksela I bis)' (2013) 20 *Monitor Prawniczy* 1074; J Puchała, 'Zawisłość spraw wszczętych przed sądami różnych państw członkowskich w świetle rozporządzenia nr 1215/2012' (2016) 11 *Europejski Przegląd Sądowy* 12–13; Trocha (n 70) 223 et seq.

143 Hilbig-Lugani (n 143) 195–204.

144 Gajda – Roszczyńska (n 34) 490 – 620; G Bisello, C Cognetti, F Lo Gerfo, 'Deactivating the Italian Torpedo' (2015) *International Judicial Cooperation in Civil Matters – European Civil procedure* 18–19.

145 Gajda – Roszczyńska (n 34) 490– 620; Cuniberti, (n 143) 24.

146 Gajda – Roszczyńska (n 34) 490– 620; Cuniberti, (n 143) 25–27.

need for defining the notion of conflicting jurisdictional clauses, in particular in the context of the notion of exclusive jurisdiction, as well defining the competent court for determination which of the conflicting clauses applies and thinking of a special evidence standard to determine the existence of conflicting jurisdictional clauses.

In the context of abuse of right doubts are raised by Regulation in Art. of the Regulation No. 1215/2012 whether the provisions of which jurisdictions indicated by the parties shall decide on the validity of jurisdictional contract. Firstly, the issue of the so-called *reverse torpedo* arises.<sup>147</sup> This results from the fact that regulation of Art. 31(2) of Regulation No. 1215/2012 is applicable only if the action is instigated in the court designated in the contract. The existence of jurisdictional contract per se is not enough to stop the proceedings in the competitive court, and the sense of the provision is up to date only if the action in the court designated in the contract is instigated as the second action – otherwise for such a court the general time priority rule suffices to exercise jurisdiction.<sup>148</sup> However, it means that tactically through using *forum shopping* it is possible to instigate initial proceedings before the preferred court, invoking the existence of jurisdictional contract in this court, indicating Art. 32(2) of Regulation No. 1215/2012, and to force the defendant to initiate defense. In practice, the risk of such reverse torpedo may be minimized depending on the national regulation; however, if there were cynical grounds for invoking jurisdiction under art. 25 of the Regulation, then such a step may be regarded as infringing the procedural law and penalized in the form of costs of the proceedings.<sup>149</sup> It means however non-elimination of abuse of *malus forum shopping*.<sup>150</sup>

Pursuant to the wording of Art. 25 of Regulation No. 1215/2012, the validity of jurisdictional contract shall be assessed under the legal provisions of the court of the member state selected by parties in the contract. This regulation is confirmed also in point 20 of preamble to the Regulation. It means that the issue of existence of conflicting jurisdictional clauses should be analysed in the court in which the action was instigated as the first one. The logic of *lis pendens* principle consists in full trust, namely in designation of the court into which the case was filed as first, to determine its jurisdiction.<sup>151</sup> As a consequence, it seems inevitable for the first court to assess the validity, and perform the full analysis of jurisdictional arguments of the parties as for existence of the main contract and special contracts and their provisions. It often means the necessity to hold evidence proceedings, which may make the proceedings lengthy. One of the ways to prevent such delay would be to impose a certain evidenciary standard for assessing the allegations concerning the existence of jurisdictional clause to achieve effect of *lis pendens* rule. Currently there are no such consolidated standards. The issue of compliance with national evidenciary standards with Brussels regime was decided by CJEU in its decision concerning the case of Shevill.<sup>152</sup> It means that particular member

147 Fentiman (n 135) 751.

148 Weitz (n 143) 189–190; Trocha (n 70) 224.

149 Fentiman (n 135) 751.

150 Gajda – Roszczynialska (n 34) 490 – 620.

151 M Weller, 'Mutual trust: in search of the future of European Union private international law' (2015/11) 1 Journal of Private International Law' 64–102.

152 Judgment dated 7 March 1995, C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA*, EU:C:1995:61. See also the judgment of Kratzer, points 41, 42 and the case law quoted therein; the judgment of Vinyls Italia SpA, point 53.



states will always have other standards concerning taking evidence, in particular for examining the allegations on existence of jurisdictional clause to achieve the effect of *lis pendens* rule.<sup>153</sup>

We should also consider whether the court indicated as the second one has to suspend the proceedings till decision is taken by the court in which the action was instigated as first. If only one exclusive jurisdiction exists, *lis pendens* rule under Art. 29(1) of the Regulation No. 1215/2012 orders to do so. It is debatable, however, if the suspension obligation exists also in situations in which existence of conflicting clauses is questioned. The court in which the action was initiated as the second one may in a different way perceive the existence of competing clauses granting jurisdiction than the court in which the action was started as the first one. There may be a specific situation in which the challenged clause may not exist and in reality there is only one jurisdictional clause, which makes the court in which the action was started as the second one, the only jurisdictionally selected court. From the perspective of the court in which the action was initiated as the second one, the case could be subject to mechanism of Art. 31(2) of Regulation no. 1215/2012 and then the general rule of *lis pendens* would not apply. Taking into account the interpretation as for the purpose, the second court could take a stance that there are no grounds for waiting for the decision of the court in which the action initiated as the first one, as the purpose of using the measure under Art. 31(2) of Regulation no. 1215/2012 was exactly the protection of important jurisdictional clauses in such situations. The argument of conflicting clauses should be taken into account irrespective of the existence of a lower or higher evidentiary standard. This would result in the situation where implementation of the first procedure would not delay the procedure in the selected court, but on the other hand, a risk of conflicting decisions and breaching the mutual trust principle would be higher.<sup>154</sup> Wherefore, the definitive statement that the threat of so-called Italian torpedo is eliminated is significantly exaggerated.<sup>155</sup>

In the context of the rule under Art. 29 of Regulation No. 1215/2012 a situation is possible in which there will be conflicting exclusive jurisdiction contracts with an assumption on the identity of subject matter and individuals.<sup>156</sup> This may result in the fact that although claims can be related to each other, they may not have the same facts as grounds (especially if the facts are complicated) or legal basis (even in the scope of widely defined requirement for their identity)<sup>157</sup> or even the so-called identity of purposes (the purpose of the action) suggested as peculiar remedy).<sup>158</sup> For example, the parties may conclude the framework contract together with executive contracts. Those contracts may include various jurisdictional clauses which separately ensure that each dispute arising from the current framework contract and executive contract shall be settled by specific other courts. Substantive demands of the parties should be probably analysed as breaching substantive clauses of each of the contracts. However, if the jurisdictional clauses were formulated narrowly, they would include only claims

153 Gajda – Roszczyńska (n 34) 490 – 620.

154 However, see the decision of ‘Tatry’. See also Weller (n 152) 64–102.

155 Gajda – Roszczyńska (n 34) 490– 620; Cuniberti (n 143) 31.

156 With regard to identity as per subject matter concerning *lis pendens* see Trocha (n 70) 180 et seq. Zob. również S Leibe, ‘Art. 31’ in *Europäisches Zivilprozess- und Kollisionsrecht* 896–897.

157 See the judgement of ‘Tatry’, point 39.

158 See the judgement of ‘Tatry’, point 41.



provided for in the contract to which they relate. Each of the party would have to rely on separate contacts both from the jurisdictional and substantive perspective. In this situation actions could often be based on separate contracts, and in consequence, relate to other procedural claims (of course assuming a specific concept of procedural claim).<sup>159</sup> The issue of jurisdiction would have to be assessed in two stages. At the first stage the court should find what is the subject matter of each of the parallel proceedings, based on its own law to determine the subject of the process and on the foreign law with respect to the foreign process. At the second stage *lex fori* should be decisive.<sup>160</sup> Although there is no clear decision of CJEU in this aspect, it should be supposed that there will not be identity as to the subject matter in case of claims only related to each other, and, as a consequence, they will not be subject to the general rule of *lis pendens* and the said measure may not be applicable.<sup>161</sup>

Another issue is whether application of the measure provided for by Art. 31(2) of Regulation No. 1215/201 will apply with respect to the so-called complex clauses, in particular asymmetric ones. It is possible to apply more complex clauses (contracts), and in particular asymmetric clauses (contracts) (so-called one-direction, unilateral ones).<sup>162</sup> Those contracts (clauses) are common in certain branches, such as e.g. banking law. They are characterized by the fact that in an uneven, asymmetric way they shape the jurisdiction, in particular imposing on one party the obligation to submit the petition in one specific court (e.g. by the borrower) but they give numerous options to the other party (e.g. bank) which is then entitled to instigate the proceedings in various jurisdictions.<sup>163</sup> Complex clauses, in particular such as asymmetric clauses, are connected with a number of problems in the context of *lis pendens* rule due to the doubts about the possibility of classifying asymmetric jurisdictional contracts as exclusive jurisdiction contracts. In such a case there is a question whether the measure under art. 31(2) of Regulation No. 1215/2012 is applicable to such asymmetric clauses. There are three approaches to this issue.<sup>164</sup>

According to the first view prorogation contract (or clause) including the establishment of exclusive jurisdiction assumes establishment of jurisdiction only of one specific court, and any other prorogation contract (or clause) granting jurisdiction to more than one court cannot be deemed exclusive.<sup>165</sup> Such interpretation will result in an assumption that asymmetric jurisdictional contracts in any way cannot be treated as exclusive jurisdiction contracts. So Art. 31(2) of Regulation No. 1215/2012 is not applicable to jurisdiction contracts indicating more than one jurisdiction, then each time the general rule of *lis pendens* shall apply.

The second approach assumes that the assessment whether we deal with exclusive jurisdiction contract in case of asymmetric contracts (clauses) shall be defined from the perspective of each of the parties in isolation from others. Asymmetric contract has,

159 Cuniberti (n 143) 29; A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford PILS) 285.

160 I Queirolo, 'Art. 27' in: U Magnus, P Mankowski (eds), *European Commentaries on Private International Law. Commentary, Brussels I bis Regulation* (Köln 2016) p 688–689.

161 the judgment in Gubisch case; the judgment in 'Tatry' case.

162 See Hartley (n 143) 241.

163 Fentiman (n 135) 752 and the literature quoted there,

164 The approaches are described in: Gajda – Roszczynialska (n 34) 490 – 620.

165 Cuniberti, (n 143) 30.

so as to say, double character and may include, on the one hand, exclusive jurisdiction defining one exclusive court for each party and nonexclusive one, defining for the other party e.g. two courts. From this perspective the clause having jurisdiction of the 'court where to sue' may be exclusive although the court is different depending on who instigated the proceedings, of course subject to Art. 17 of Regulation No. 1215/2012 with respect to weaker parties.<sup>166</sup>

Third interpretation assumes that the meaning of the notion of exclusivity of jurisdictional contract consists only in the fact that prorogation contract excludes jurisdiction of some courts. From this point of view the number of courts which were granted jurisdiction in prorogation contract is not important, crucial is only that their jurisdiction excludes jurisdiction of other court(s) which would have jurisdiction. Applying this definition, asymmetric clauses could be also deemed exclusive clauses, including the clauses included in banking contracts for the bank.<sup>167</sup>

To sum up, depending on the assumed concept, if the jurisdictional clause (contract) is outside the scope of application of Art. 31(2) of Regulation No. 1215/2012, the general rule of *lis pendens* shall apply. However, in case of applying a new measure, all the non-designated courts will have to suspend the proceedings till any of the designated courts in which the action was instigated dismisses the action and finds to have no jurisdiction over it. As a consequence, there may arise a problem of abuse of civil procedural right.<sup>168</sup>

Besides the said situations, grounds for establishing *malus forum shopping* still may have its source, for example in multiple meaning (vagueness) of notions used in the provisions on jurisdiction defining jurisdictional connecting factors, in multiplicity of jurisdictional grounds, which may happen e.g. in case of cumulation of general and special jurisdiction grounds (Art. 9–11, Art. 13 of Regulation No. 1215/2012), special regulation of *forum non conveniens* (Art. 12 of Regulation No. 1215/2012) or a more general exception from the norm included in Art. 8(1), namely Art. 12(3) of Regulation No. 1215/2012.<sup>169</sup>

## 5. CONCLUDING REMARKS

At the current stage of development there is no simple transposition of the issue of legal interest on the institution of abuse of procedural right; undeniably, the lack of current and real interest, with the assumption of fulfillment of other prerequisites, may be contemplated in categories of abuse of right by the court under *ius dicere*. In the Polish law it is not sufficient to analyse this phenomenon solely in the sphere of procedural locus standi and there must be the interest in taking a specific step. The lack of interest itself is not sufficient, as there must be the awareness of the party taking the step as to its inadmissibility and intention to harm the other party, as e.g. in case of fictitious actions. In the European area it is additionally necessary to create methodology and general approach to abuse of right in European civil proceedings and finding compromising

166 As in: Hartley, *Choice-of-Court Agreements...* (n 143) 141; Hartley, *Civil Jurisdiction...* (n 143) 241–242.

167 U Magnus in U Magnus, P Mankowski, *Brussel I Regulation* (Art. 23 (145–146) Munich 2011); R Geimer, R Schütze, 'Art 23 (166) Europäisches Zivilverfahrensrecht (2010).

168 Gajda – Roszczyńska (n 34) 490 – 620.

169 Gajda – Roszczyńska (n 34) 490 – 620.

approach towards understanding of the notion of the interest in Roman and Germanic law systems. And because application and development of the law due to lack of procedural fairness and good faith is rather difficult to verify and to define, the advantage of adopting admissibility of a separate international institution of abuse of procedural right would lie in the possibility of applying a universal approach towards abuse of procedural right in all member states, which would mean that each court of the member state would apply the same standard of the test. Finally, the alternative use of exclusively national concepts of abuse of procedural right cannot be continued. It can be assumed that confirmation of the existence of the abuse of European procedural right in a given case would require existence of objective and subjective factors. Firstly, in terms of the objective factor, this requires so that the overall objective circumstances could indicate that despite formal respect for regulations provided for in European civil procedure regulations, the purpose of the procedural step resulting from a given procedural norm was not achieved. Secondly, such determination requires also a subjective factor, namely that overall objective factors would imply that the main purpose of a given procedural step was to gain unlawful benefit in a blatant way contradicting good practice to the detriment of the other party.

# INADMISSIBILITY OF CIVIL PROCEEDINGS AND ACCESS TO COURT

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Summary: 1. Introduction. – 2. Historical Background. – 3. Right to Court in Polish Case-law and Jurisprudence. – 4. The Way to View Absolute Procedural Premises. – 5. The Impact of Party Autonomy on Ending Polish Civil Proceedings without a Judgement. – 6. Concluding Remarks.

*By instigating civil proceedings a plaintiff intends to obtain a final and unequivocal judgement on the merits regulating a legal situation which had been unclear prior to the lawsuit. However, reaching this goal will not always be possible. The court might be obliged to reject the lawsuit or annul the proceedings due to formal reasons (cf. Article 199 and article 355 of the Polish Code of Civil Procedure). Such situations give room to considerations whether purely formal, procedural decisions violate litigants' right to court in the aspect of 'right to judgement', i.e. a right to a verdict substantively adjudicating the merits of the case. The author analyzes this issue with reference to the so-called absolute procedural prerequisites (Germ. Prozessvoraussetzungen) and their impact on constitutional and treaty-based guarantees of access to court.*

*Keywords: Access to Court, Right to a Judgement, Inadmissibility of Proceedings, Civil Process.*

## 1. INTRODUCTION

The civil process is typically brought to completion with a judgement in which the court adjudicates the merits of the case. However, such a scenario is not always possible due to the inadmissibility of proceedings. Such a situation raises the question whether the procedural guarantees of the right to court – especially in the aspect of the 'right to a judgement' – are preserved under these circumstances. The importance of this issue is hard to ignore, as the right to court constitutes a fundamental legal concept, enshrined not only on a national (e.g. constitutional) level, but also in international treaties and conventions.

## 2. HISTORICAL BACKGROUND

The idea of the right to judicial protection has been long established in the European legal culture. It clearly manifested itself in the German legal doctrine of 19<sup>th</sup> century, when the concept of the 'right to lawsuit' (*Klagerecht*) was hotly debated.<sup>1</sup> Simultaneously, the concept of public procedural rights attributed to a party in her dealings with the State, was also steadily developed by legal scholars such as G. Jellinek and P. Laband.<sup>2</sup> In this context one should also bear in mind the consistent emergence of the concepts of 'legal state' and 'rule of law' which were accompanied by the idea of the right to court. As already mentioned, these concepts were subsequently enacted in numerous legal acts from the realm of public international law.<sup>3</sup> As a result of developments in this sphere, the right to judicial protection – currently defined as the possibility of requesting the court to examine the case and pass a judgement on the merits – was subject to the process of constitutionalization in respective national legal orders. Even if a given legal system does not proclaim the right to court directly on a constitutional level, it is common for such systems to introduce similar concepts in either procedural or constitutional acts. This observation can be exemplified by the doctrinal concept of *Justizgewährungsanspruch*, which is derived from the overall content enacted in the German constitution.<sup>4</sup>

As regards the Polish legal order, the right to court is proclaimed in Article 45 (1) of the Constitution of the Republic of Poland of 1997.<sup>5</sup> Substantial headway towards reaching this stage was made in 1989 when the principle of democratic state of law was introduced to the preceding Polish Constitution of 1952. It is worth mentioning that Polish constitutions from the pre-war period – dating back to the times when Polish civil procedural law was still at the early stages of its development – did not directly regulate the right to judicial protection, nor the

- 1 Cf. in international context e.g. N Klamaris, 'Das prozessuale Grundrecht auf Justizgewährung am Beispiel der griechischen Rechtsordnung' in P Gottwald, H Prütting, *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (Beck 1990) 269 ff; S Detterbeck, 'Streitgegenstand, Justizgewährungsanspruch und Rechtsschutzanspruch' (1992) No 1-2, AcP 325 ff; WJ Habscheid, 'Der Anspruch auf Rechtspflege' (1954) No 3-4 ZZZP, 188 ff; J Farkas, 'Bemerkungen zur Lehre vom Rechtspflegeanspruch' in W F Lindacher, W J Habscheid (eds), *Festschrift für Walter J. Habscheid zum 65. Geburtstag* (Bielefeld 1989) 83 ff; KH Schwab, 'Zur Wiederbelebung des Rechtsschutzanspruchs' (1968) No 5-6 ZZZP 412 ff; A Blomeyer 'Der Rechtsschutzanspruch im Zivilprozess' in K A Bettermann, A Zeuner (eds), *Festschrift für Eduard Böttcher zum 70. Geburtstag* (Duncker Humblot 1969) 61 ff; Cf. also in the Polish legal doctrine H Mądrzak 'Prawo do sądu jako gwarancja ochrony praw człowieka (stadium na tle polskiego prawa konstytucyjnego, prawa cywilnego materialnego i procesowego)' in L Wiśniewski (ed) *Podstawowe prawa jednostki i ich sądowa ochrona* (Wydawnictwo Sejmowe 1997) 186 ff; W Berutowicz, 'Funkcja procesu cywilnego w oświeceniu nauki o tzw. prawie skargi' in *Księga pamiątkowa ku czci Kamila Stefki* (Warszawa-Wrocław 1967) 9 ff; W Broniewicz, 'Pojęcie prawa do powództwa w nauce polskiego procesu cywilnego' in E Łętowska (ed), *Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci Jerzego Jodłowskiego* (Wrocław Warszawa Kraków Gdańsk Łódź 1989) 277 ff.
- 2 G Jellinek, *System der subjektiven öffentlichen Rechte* (Mohr Siebeck 1882); P Laband, *Das Staatsrecht des Deutschen Reiches* (vol 3, Laupp 1901).
- 3 Cf. Article 10 of Universal Declaration of Human Rights, Article 6 of European Convention of Human Rights, Article 14 of International Convention on Civil and Political Rights, Article 47 sentence 2 of Charter of Fundamental Rights of the European Union.
- 4 H J Papier, 'Justizgewährungsanspruch' in J Isensee, P Kirchhof (eds), *Handbuch des Staatsrechts. Grundrechte: Wirtschaft, Verfahren, Gleichheit* (vol 8, Heidelberg 2010), 492 ff.
- 5 Z Czeszejko-Sochacki, 'Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)' (1997) No 11-12 Państwo i Prawo 86 ff.

right to court.<sup>6</sup> Constitutional considerations were not at the center of attention when the first Polish Code of Civil Procedure was enacted in 1930, nor in the so-called March Constitution of 1921.

### 3. RIGHT TO COURT IN POLISH CASE-LAW AND JURISPRUDENCE

The Polish Constitutional Tribunal<sup>7</sup> holds that the right to court consists of three basic components: firstly, the right of access to court, i.e. the possibility of instigating civil proceedings before a competent, impartial and independent court; secondly, the right to the adequate shape of civil proceedings, which is manifested by the right to a fair trial and transparent civil process; and thirdly, the right to judgement, i.e. the right to obtain a final and binding adjudication of the case by the court.<sup>8</sup> As of today, the right to court in its triple form permeates the entirety of Polish civil proceedings.

In the light of the abovementioned aspects of the right to court, it appears that a plaintiff intends to achieve a final and unequivocal regulation of his legal situation, which had been unclear prior to the lawsuit. However, as already mentioned, reaching this goal will not always be possible. The court might be obliged to reject the lawsuit or annul the proceedings due to formal reasons (cf. Article 199 PCCP and article 355 PCCP).<sup>9</sup> Such situations give room to considerations whether purely formal, procedural decisions do not violate litigants' right to court, especially in the aspect of 'right to judgement', i.e. a verdict on the merits of the case.

The Polish jurisprudence as well as the judiciary present two stances in this regard. The first one claims that procedural provisions which establish criteria of (in)admissibility of civil proceedings constitute an inherent premise of the right to court and should not be *a priori* qualified as its infringement or limitation.<sup>10</sup> As far as the opposite view is concerned, rejecting a lawsuit which was inadmissible *ab initio* or annulling the proceedings which became inadmissible at a later stage of civil process, amounts to blocking access to court, which can be considered as justified only if it meets two criteria of legality (cf. Article 31 (3) of the Constitution of the Republic of Poland).<sup>11</sup> Firstly, it

6 Cf. Article 98 of the Constitution of 17 March 1921 and Article 68 (1 and 4) of Constitution of 23 April 1935.

7 Judgement of the Polish Constitutional Tribunal of 12 March 2002 P 9/01 (OTK ZU A 2002) No 2 item 14; judgement of the Polish Constitutional Tribunal of 4 November 2010 (OTK ZU A 2010) No 9 item 96; judgement of the Polish Constitutional Tribunal of 11 December 2002, SK 27/01, (TK ZU A 2002) No 7 item 93; judgement of the Polish Constitutional Tribunal of 8 May 2006, SK 32/05 (OTK ZU A 2006) No 5 item 54; judgement of the Polish Constitutional Tribunal of 16 November 2004, P 19/03, (OTK ZU A 2004) item 106.

8 Judgement of the Polish Constitutional Tribunal of 9 June 1998, K 28/97, (OTK 1998) No 4 item 50; judgement of the Polish Constitutional Tribunal of 10 July 2000, SK 12/99 (OTK 2000) No 5 item 143.

9 Polish Code of Civil Proceedings of 17 November 1964 (unified version: Journal of Law 2018 item 1360) (hereinafter – PCCP).

10 P Grzegorzczuk, K Weitz, 'Komentarz do art. 45 Konstytucji RP' in M Safjan, L Bosek (eds), Konstytucja RP (Legalis 2016) point 45 and point 56.

11 J Mucha, *Zawisłość sprawy w procesie cywilnym* (Wolters Kluwer Polska 2014) 136; A Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego* (Wydawnictwo Uniwersytetu Łódzkiego 2006) 271-271 and 302; B Adamiak, J Borkowski, 'Instytucje procesowe wyznaczające granice prawa do sądu' in *Państwo prawa. Administracja. Sądownictwo. Prace dedykowane Prof. dr hab. Januszowi Łętowskiemu w 60. rocznicę urodzin* (Warszawa 1998) 311; P Hofmański, A Wróbel in L Garlicki (ed), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18* (vol 1, CH Beck 2010) 295-296. Cf. A Olaś, *Umorzenie procesu cywilnego* (CH Beck 2016) 122.



must be enacted in a legal act (e.g. in the Code of Civil Procedure or in a different act of comparable status), and secondly, it cannot violate the essence of the right to court.<sup>12</sup> A similar approach has been presented in the case-law of the Polish Constitutional Tribunal. It can be illustrated by a judgement of 10 May 2000, K 21/99,<sup>13</sup> in which the Tribunal held that shaping court proceedings in accordance with specific procedural premises constitutes a significant and real limitation of the right to court, which is nonetheless necessary to respect values which are commonly cherished in a democratic state of law. The formal requirements, which are universally adopted and applied in all sorts of court proceedings, set boundaries within which the right to court can be correctly and duly implemented. According to the Tribunal, it is necessary to ascertain whether these procedural requirements and procedural premises are not overly rigorous and whether they can be assessed as proportionate with regard to the aim that they serve.<sup>14</sup> By comparison, the European Court of Human Rights holds that the procedural rights, which are enshrined in the Convention, must be guaranteed and implemented in a practical and effective way. Therefore, a state would contradict this concept, if it adopted rules excluding a significant group of civil claims from the court jurisdiction in an unlimited and unrestricted way. The Court opposed the practice consisting in granting immunities to large groups of potential defendants, as it would adversely affect plaintiffs' right to court in a disproportionate way. Hence, the Court separately assesses the circumstances of each and every case presented to him, and reaches a conclusion whether the limitations of the right to court can be appraised as justifiable.<sup>15</sup>

#### 4. THE WAY TO VIEW ABSOLUTE PROCEDURAL PREMISES

In order to evaluate the stances presented above, one can start with a reference to the right to court understood as a possibility of instigating civil proceedings. The civil process, in which access to court and all subsequent components of the right to court can be brought to fruition, is governed by a set of rules of procedural law. As a matter of fact, the lawmaker is not only supposed to provide a detailed framework in which the civil process is set, but also to establish basic prerequisites which determine effective launching of proceedings and the possibility of obtaining a verdict on the merits. These requirements constitute a foundation on which structural elements of the litigation are set. Although their existence plays a fundamental part in determining effective access to court, they are not entirely static and they can evolve over the decades and be subject to modification by the lawmaker.<sup>16</sup>

When discussing elements conditioning the right to court in the aspect of the 'right to a judgement', prominence should be given to absolute procedural prerequisites (Germ.

12 Olaś (n 11) 122. Cf. Mucha (n 11) 123-142.

13 (OTK 2000) No 4 item 109.

14 Cf. Judgement of the Polish Constitutional Tribunal of 27 May 2008, SK 57/06 (OTK-A 2008) No 4 item 63; judgement of the Polish Constitutional Tribunal of 1 July 2008, SK 40/07 (OTK-A 2008) No 6 item 101; judgement of the Polish Constitutional Tribunal of 10 May 2000, K 21/99 (OTK 2000) No 4 item 109.

15 Judgement of the European Court of Human Rights of 14 January 2014, 34356/06.

16 Cf. P van Dijk in P Van Dijk et al. (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 570 ('the right of access to the courts is not absolute [...] by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals. [...] In laying down such regulation, the Contracting States enjoy a certain margin of appreciation').

*Prozessvoraussetzungen*). The view advocating the necessity to single out circumstances which preliminarily condition not the legitimacy, but the admissibility of the plaintiff's claim, gained importance in the 19<sup>th</sup> century. As of today, absolute procedural prerequisites can be defined as fundamental concepts whose existence or non-existence determines the court's competence to examine the merits of the case. The analysis of Polish civil procedural law as well as comparative studies have shown that absolute procedural prerequisites can be regulated directly in the code of civil proceedings or their existence can be deduced from the overall structure governing the civil process.<sup>17</sup> They pertain to different aspects of procedural law, thus creating an integral set of premises determining the access to court.

These procedural prerequisites, just as any other formal requirements which condition the admissibility of adjudicating the merits of the case, should not be *a priori* perceived as a restriction or limitation of procedural rights, because they constitute an inherent part of the constitutional standard of access to court.<sup>18</sup> On one hand, absolute procedural prerequisites (Germ. *Prozessvoraussetzungen*) define the framework in which the 'right to a judgement' can be effectuated, and on the other hand, they contribute to shape the content of the right to court, by laying down necessary – although not exhaustive – conditions for its proper and legitimate implementation.<sup>19</sup> It should be emphasized that each procedural prerequisite – especially an absolute one<sup>20</sup> – has been designed to protect a specific set of values. The analysis of each of them reveals the underlying *ratio legis*. For instance, international jurisdiction can be defined as a competence of the courts' of a given state to grant legal protection, which is justified by a sufficient connection between the case in question and the legal order of that state. This competence is interlinked with an obligation to take advantage of it, meaning that a Polish court is bound to examine the merits of the case.<sup>21</sup> As regards another absolute procedural prerequisite, i.e. the competence of courts of general jurisdiction to examine the case (cf. Article 2 PCCP) – its *ratio legis* consists in assigning civil cases in accordance with the scope of competence and specialization of such courts to examine civil cases.<sup>22</sup> It is also easy to understand the reasoning behind such absolute procedural requirements as *lis pendens* and *res iudicata*.<sup>23</sup> *It is absolutely legitimate to assume that the court should refuse to substantively examine the case and pass a judgement on the merits if the same claim had already been adjudicated on the same factual grounds between the same parties. This is justified by the authority*

17 Cf. H Trammer, *Następca bezprzedmiotowość procesu cywilnego* (Kraków 1950) 20.

18 P Grzegorzczak, K Weitz, 'Komentarz do art. 45 Konstytucji RP' in M Safjan, L Bosek (eds), *Konstytucja RP* (Legalis 2016) point 45 and point 56; M Pilich, 'Wpływ orzeczeń Trybunału Konstytucyjnego na Kodeks postępowania cywilnego' in (ed) T Ereciński, K Weitz, *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego, Serock k. Warszawy, 24-26 września 2009* (Warszawa 2010).

19 Cf. T Zembrzusi, *Nieważność postępowania w procesie cywilnym* (Wolters Kluwer Polska 2017) 527-530.

20 K Weitz, *Jurysdykcja krajowa w postępowaniu cywilnym* (Wydawnictwo Prawo i Praktyka Gospodarcza 2005) 390; P Grzegorzczak, *Immunitet państwa w postępowaniu cywilnym* (Wolters Kluwer 2010) 298; Cf. Z Resich in J Lapierre, J Jodłowski, Z Resich, T Misiuk-Jodłowska, K Weitz (eds), *Postępowanie cywilne* (Wolters Kluwer 2016) 72.

21 Weitz (n 20) 113; P Grzegorzczak, 'Reżim procesowy immunitetu państwa w postępowaniu cywilnym' (2010) No 1 Przegląd Sądowy 23-24.

22 Cf. E Gapska, 'Wylączenie drogi sądowej w sprawach cywilnych w świetle Konstytucji RP' in Ł Błaszczak (ed), *Konstytucjonalizacja postępowania cywilnego* (Presscom sp z oo 2015) 69 ff.

23 Cf. Judgement of the Polish Constitutional Tribunal of 4 November 2003, SK 30/02, (OTK-A 2003) No 8 item 84.

and highest good of the whole judicial system – including parties to the proceedings – as well as stability and transparency of legal relations. It would be detrimental to the parties and to the judicial system if another judgement was passed despite the already existing res judicata or the state of *lis pendens*. Therefore, in such cases the Polish court is bound to reject the lawsuit<sup>24</sup> or annul the proceedings,<sup>25</sup> thus ending civil process without a judgement on the merits. By the same token, the role of absolute procedural prerequisites with regard to the subjects of the proceedings is also of great significance. For instance, the capacity to be a party to civil proceedings is indispensable to be a beneficiary of procedural rights and to partake in procedural burdens. If a party lacks this capacity, the civil process is flawed at its core and cannot be continued.<sup>26</sup> Although article 45 (1) of the Polish Constitution grants the right to court to ‘everybody’, it does not mean that absolutely all persons and entities enjoy the capacity to be a party to civil proceedings, nor that they can unconditionally benefit from it.

In conclusion, existence of each absolute procedural requirement (both positive ones and negative ones) serves the protection of a specific set of values, which were considered by the lawmaker as so fundamental that the implementation of the right to court (in the aspect of the ‘right to a judgement’) was conditioned upon their existence.<sup>27</sup> The protective function of these absolute procedural prerequisites is constructive in nature, as it gives space to shape the civil proceedings in accordance with these crucial values.<sup>28</sup> The significance of this issue is underlined by the Polish lawmaker himself, as he orders the court to taking into account the lack of absolute procedural requirements *ex officio* at all stages of the proceedings (cf. Article 202 sentence 3 *in fine* PCCP). It follows that procedural requirements which determine the right to court in the aspect of the right to a judgement, do not restrict it, but they co-create the content of the proper implementation of this fundamental right (cf. Article 379 point 1-3 PCCP, Article 1099 § 2 PCCP, Article 1113 sentence 3 PCCP).

## 5. THE IMPACT OF PARTY AUTONOMY ON ENDING POLISH CIVIL PROCEEDINGS WITHOUT A JUDGEMENT

The right to court in the aspect of adequate (lawful) shape of civil proceedings implies the necessity to regulate it in accordance with constitutional and treaty-based standards of fair trial. The creation of legal framework of civil proceedings and specific rules governing it, has been entrusted with the ‘ordinary’ lawmaker. It concerns a wide spectrum of issues which go far beyond the question of absolute procedural requirements.<sup>29</sup> The legislative activity in this regard should respect the constitutional guarantees of access

24 Article 199 PCCP.

25 Article 355 PCCP.

26 Cf. P Kaczmarek, ‘Prawo do sądu a zdolność sądowa’ (2005) No LXXIII PPiA, 93 ff.

27 Cf. W Brehm, ‘Einleitung’ in R Bork, H Roth (eds) *Stein/Jonas Kommentar zur Zivilprozessordnung* (vol 1, Mohr Siebeck 2014) 108-109, who mentions the „Schutzfunktion” of respective procedural prerequisites.

28 Cf. Z Resich, *Przesłanki procesowe* (Wydaw. Prawnicze 1966) 104. Cf. W Berutowicz, *Postępowanie cywilne w zarysie* (Państwowe Wydawn. Naukowe 1984), 99 and 105.

29 J Meyer-Ladewig, *Konvention zum Schutz der Menschenrechte und der Grundfreiheiten* (Nomos 2003) 98-101; F C Mayer in U Karpenstein, F C Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (Beck 2015) 176. Cf. N Półtorak in A Wróbel (ed), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* (CH Beck 2013), 1225-1227.

to court, and it should aspire to set conditions for its proper implementation.<sup>30</sup> The accuracy of these conclusions is confirmed by comparative studies.<sup>31</sup> In this context, it should be emphasized that annulment of proceedings which transpires as a result of a 'subsequent needlessness' of verdict on the merits (cf. Article 355 § 1 PCCP) does not infringe on the right to court, neither. In this case, bringing civil process to an end without a judgement results from expiry or discontinuation of the aim which urged the plaintiff to file a lawsuit.

As regards the relation between access to court and annulment of proceedings in Polish civil process (Article 355 PCCP), it is also important to consider the role of the principle of party autonomy. This principle should be analyzed in the context of the constitutional guarantees of freedom.<sup>32</sup> From the positive perspective it manifests itself by a plaintiff's liberty to instigate civil proceedings, take advantage of the procedural power to act and influence the course of the proceedings including the subject-matter of the lawsuit (*petitum*). From the negative perspective it can be exemplified by limiting the court's power to adjudicate the case in its entirety or in part for instance by withdrawing or narrowing the demand or by reaching a court settlement (Art. 203 PCCP, Art. 223 PCCP). The principle of party autonomy also comes into play when the court forgoes examination of the case following litigants' passivity – in this case the parties to the proceedings must accept responsibility for desisting from contributing a so-called 'procedural impulse' to the civil process (cf. the French institution of *péremption d'instance* and its Polish counterpart regulated in Article 182 PCCP). It is worth mentioning in this context that

30 Cf. Zembrzusi (n 19) 527-530.

31 In German law cf. H-J Papier, 'Justizgewähranspruch' in J Isensee, P Kirchhof (eds), *Handbuch des Staatsrechts, Bd. VIII. Grundrechte: Wirtschaft, Verfahren, Gleichheit* (Heidelberg 2010) 499 who states the following: 'Der Zugang zu den Gerichten sowie das anschließende gerichtliche Verfahren unterliegen mannigfaltigen Reglementierungen der einfach-gesetzlichen Prozessordnungen. Die Gesetzgebung ist in der Lage, zumutbare und sachlich begründete Zulässigkeitsvoraussetzungen für das individuelle Rechtsschutzbegehren zu normieren (Formen, Fristen, Partei- und Prozessfähigkeit, Prozessvertretung, Rechtsschutzbedürfnis, Prozesskostenregelung). Bei der Ausgestaltung der Prozessgesetze steht dem Gesetzgeber ein weiter Gestaltungsspielraum zu. Seine Grenzen findet er dort, wo der Zugang zu einem Gericht bzw. das anschließende Rechtsschutzverfahren in unzumutbarer, aus Sachgründen nicht mehr zu rechtfertigender Weise erschwert werden. Daneben sind die speziellen Rechtsschutzstandards der besonderen Justizgrundrechte (Article 101 ff GG) zu wahren'; E Benda, A Weber, 'Der Einfluss der Verfassung im Prozessrecht' (1983) No 3 ZZZ 292-293. In Greek law cf. N Klamaris, 'Die „Parteibezogenen“ bzw. „Persönlichen“ Prozessvoraussetzungen nach dem griechischen Zivilprozessrecht' in R Geimer, R Schutze, T Garber (eds) *Europäische und Internationale Dimensionen des Rechts. Festschrift für Daphne-Ariane Simotta* (Lexis Nexis 2012) 291 ff – the author claims that 'Recht auf Justizgewährung und Prozessvoraussetzungen. Ein Spannungsverhältnis oder eine funktionelle dialektische Beziehung zwischen zwei kommunizierenden Gefäßen?'; concluding that existence of absolute procedural requirements does not affect, nor limit the right to court; cf. also N Klamaris, 'Das prozessuale Grundrecht auf Justizgewährung am Beispiel der griechischen Rechtsordnung' in P Gottwald, H Prütting (eds), *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (Beck 1990) 269 ff. In English legal doctrine cf. P Van Dijk in P Van Dijk et al (eds), 'Theory and Practice of the European Convention on Human Rights' (Intersentia 2006) 570, ('the right of access to the courts is not absolute [...] by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals. [...] In laying down such regulation, the Contracting States enjoy a certain margin of appreciation'). In French law cf. J Vincent, S Guinchard, *Procédure civile* (Dalloz 2001) 139, who claim that 'La mise en œuvre du droit à un recours juridictionnel peut être subordonnée à des conditions, la valeur constitutionnelle de ce droit ne le transformant pas en droit absolu et illimité. Le législateur peut lui apporter des atteintes non substantielles. Ainsi, l'intérêt à agir est une condition de la reconnaissance du droit au recours juridictionnel : il est d'ailleurs visé par la décision du Conseil constitutionnel du 13 août 1993, décision qui ne reconnaît ce droit « qu'aux seules personnes intéressées ».

32 P Grzegorzczuk, 'O konstytucjonalizacji prawa procesowego cywilnego' (2012) No 2 Kwartalnik Prawa Prywatnego 298-299 and 306-307.

the principle of party autonomy is not perceived as absolute in the Polish constitutional and procedural law, as it is accompanied by other instruments allowing for a fair balance between it and other values which are legally protected (cf. the 'controlled' principle of party autonomy). The Polish Code of Civil Procedure also acknowledges the fact that the access to court is not only oriented towards the plaintiff, but it also honors the rights of a defendant. The Polish civil procedural law provides the defendant with mechanisms which allow him to decide about the end of proceedings on a par with a plaintiff (cf. Article 203 (1) *in principio* PCCP; Article 223 PCCP). It plays a significant role when it comes to closing civil proceedings without a judgement.<sup>33</sup>

## 6. CONCLUDING REMARKS

In the light of the above conclusions, it is controversial to assess the constitutionality of annulment of proceedings from the perspective of Article 31 (3) of the Constitution of the Republic of Poland. This regulation is based on the *a priori* assumption that provisions regulating inadmissibility of civil claims constitute a limitation of the access to court, which can be viewed as acceptable only on condition of its proportionality.<sup>34</sup>

A separate question arises on the ground of Article 77 (2) of the Constitution of the Republic of Poland, according to which it is justifiable to bar access to court by way of a legal provision directly regulated in the Constitution. It is exemplified by articles establishing formal procedural immunity of parliamentarians (cf. Article 105 and 108 of the Constitution of the Republic of Poland). The refusal of a House of Parliament to grant permission to initiate court action against a parliamentarian results in barring access to court in this regard.<sup>35</sup> In legal doctrine it is universally held that such a scenario can also ensue from jurisdictional immunities deriving from international public law (cf. Article 9 of the Constitution of the Republic of Poland).

Procedural requirements, which set the boundaries of admissibility and inadmissibility of proceedings, are subject to verification with regard to their coherence with constitutional standards as well as their compatibility with procedural guarantees enshrined in treaties and conventions.<sup>36</sup> On an international level, the issue of immunities sparked a special interest.<sup>37</sup> The controversy regards immunities stemming from public international law as well as procedural immunities with an internal reach such as abovementioned parliamentary immunity. The European Court of Human Rights holds that beneficiaries

33 Grzegorzcyk, (n 32) 298-299 and 306-307; R Stürner, 'Verfahrensgrundsätze des Zivilprozesses und Verfassung' in W Grunsky (ed), *Festschrift für Fritz Baur* (Mohr Siebeck 1981) 650 ff; P Gilles, 'Zivilprozess und Verfassung – Betrachtungen zum Thema aus deutscher Sicht' in *Studia in honorem Pelayia Yessiou-Faltsi* (Athens-Thessaloniki 2007) 218. Cf. W Głodowski, 'Cofnięcie pozwu w świetle konstytucyjnej zasady równości' in Z Niedbala (ed), *Prawo wobec dyskryminacji w życiu społecznym, gospodarczym i politycznym* (Warszawa 2011) 75 ff.

34 Cf. Ołaś (n 11) 122; Mucha (n 11) 134; Kubiak (n 11) 271-271 and 302; Adamiak, Borkowski, (n 11) 311.

35 P Grzegorzcyk, K Weitz, 'Komentarz do art. 77 Konstytucji RP' in M Safjan, L Bosek (eds), *Konstytucja RP* (Legalis 2016) point 137.

36 Pilich (n 18) 371-372; J Człowiekowska, 'Prawo do sądu jako publiczne prawo podmiotowe' (2006) No 5, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* 180; P Grzegorzcyk, K Weitz, 'Komentarz do art. 45 Konstytucji RP' in M Safjan, L Bosek (eds), *Konstytucja RP* (Legalis 2016) points 56, 88 and 117.

37 Cf. D Leipold, 'Immunität versus Rechtsschutzgarantie' in *Festschrift für Gerhard Lüke zum 70. Geburtstag* (Beck 1997) 353 ff; E J Habscheid, 'Die durch art. 6 I EMRK beschränkte Immunität internationaler Organisationen im Erkenntnisverfahren' (2001) No 5 IPRax 396 ff.

of those privileges should be narrowly defined. The Court stated in *Al-Adsani* case that granting immunity to numerous groups or categories of beneficiaries, without any control, reflection and constraint is likely to infringe on the principle of access to court as laid down in article 6 (1) ECHR.<sup>38</sup> Claims which are encompassed by the immunity should be directly interconnected with the reasons for which the immunity had been granted.<sup>39</sup> It is also important to consider whether a fair balance has been achieved between the public interest in granting immunity and the line of reasoning in favor of the unhindered access to court.<sup>40</sup> Nonetheless, the European Court of Human Rights has held in a judgement of 14 January 2014 that immunity of a state guaranteed by public international law generally cannot be perceived as a disproportionate restriction of access to court in the meaning of article 6 (1) ECHR.<sup>41</sup> Considering that access to court constitutes an inherent part of guarantees of a fair trial, certain limitations in this sphere should be viewed as inseparably and naturally connected with it. This statement can be exemplified by restrictions, which are universally accepted by the community of nations as an element of the doctrine of State immunity. This remark carries weight given the relations between constitutional and convention-based guarantees of access to court when it comes to the structure of regulation, as well as its content and overall significance.

In conclusion, whenever litigants turn to court with a request to examine a case and grant legal protection, there is an underlying supposition that – in the ordinary course of action – proceedings should end with a decision on the merits. A party's right to initiate civil proceedings is correlated with the court's obligation to issue a verdict in a way and form prescribed by the law.<sup>42</sup> Bearing this in mind, it must be acknowledged that the right to court in the aspect of the 'right to a judgement' does not come to fruition when the court issues a purely formal decision, such as a decision to reject a lawsuit (Art. 199 PCCP) or a decision to annul civil proceedings (Art. 355 § 1 PCCP). The right to court in this aspect would be satisfied only if a plaintiff obtained a verdict on the merits. Nonetheless, a situation in which the court rejects a lawsuit or annuls civil proceedings should not be perceived in terms of violating or limiting a party's access to court. The right to court is conditioned upon fulfilling a series of procedural requirements set up in the legislative process, which constitute a prerequisite for adjudicating the case on the merits. As long as a given procedural requirement is not challenged and negatively appraised by a constitutional tribunal, one cannot *a priori* assume any limitation or restriction in the access to court. A similar approach to this issue was presented in the decision of the Polish Supreme Court of 25 March 2010, I CSK 252/09. The Court argued that annulment of proceedings does not violate Article 45 (1) in connection with Article 2 of the Constitution of the Republic of Poland. The guarantees laid down in these provisions do not provide litigants with a right to demand a judgment on the

38 Judgement of the European Court of Human Rights of 21 November 2001, par. 47. Cf. also judgement of the European Court of Human Rights of 14 January 2014 *Jones and others v. the United Kingdom*. Cf. M Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Leiden Boston 2010) passim; Dijk (n 16) 571; Meyer-Ladewig (n 29) item 26, 101; Mayer (n 29) 177.

39 Por. judgement of the European Court of Human Rights of 17 December 2002, *A v the United Kingdom*, paras. 66-89; judgement of the European Court of Human Rights of 19 June 2001, *Kreuz*, para. 56; judgement of the European Court of Human Rights of 30 January 2003, *Cordova* (No. 1), paras. 62-63; judgement of the European Court of Human Rights of 3 June 2004, *De Jorio*, paras. 29-30.

40 Cf. Judgement of the European Court of Human Rights of 28 October 1998, *Osman*, paras. 151-153.

41 Cf. Judgement of the European Court of Human Rights of 14 January 2014, 34356/06.

42 Cf. Człowiekowska (n 36) 180.



merits, but merely with a possibility of instigating civil proceedings and having the case examined. Examination of the merits of the case must be preceded with a positive verification of obligatory procedural requirements. This verification takes place *ex officio* at all stages of civil proceedings. Its outcome determines the admissibility of passing a judgement (or any other final decision on the merits). The Supreme Court further explained that a constitutional norm does not offer a legal basis for a litigant's right to obtain a substantive ruling in every single case, because the court may be prevented from reaching a judgement due to a lack of legal grounds to appraise the merits of the case. Although a solely procedural closure of civil proceedings should be typically perceived as an exception to the rule, it is not contrary to the Polish Constitution, nor does it infringe a party's right to court. Furthermore, even if we assume that all obligatory prerequisites of admissibility of proceedings are met, the civil process can still draw to a close 'without a judgement'. The reason for such a turn of events may ensue from the procedural autonomy of the parties themselves (i.e. withdrawal of a lawsuit; prolonged discontinuation of proceedings resulting in their annulment; a court settlement).<sup>43</sup>

A different perspective can be adopted only if annulment of proceedings or a court's refusal to annul the proceedings occurred erroneously. In such situations constitutional rights of litigants should be deemed violated. As regards the first scenario, the court simultaneously infringes a judge-imposed interdiction to shy away from administering justice on the merits. The term 'refusal of justice' (Fr. *le déni de justice*), which can be traced back to the famous Article 4 of the Napoleonic Code,<sup>44</sup> was not codified in the Polish law,<sup>45</sup> but it is commonly adopted in the legal doctrine.<sup>46</sup> According to Mateusz Pilich, the court which baselessly refused to adjudicate on the merits, violates the fundamental rules of the democratic state of law and infringes upon parties right to obtain a verdict, i.e. a binding, authoritative clarification of their legal situation.<sup>47</sup> As regards the second scenario, concerning an erroneous refusal to annul the proceedings, it might manifest itself in the Polish civil procedure by disregarding the principle of procedural autonomy of the parties, which is situated in the sphere of the constitutional principle of freedom.<sup>48</sup> Both of these situations adversely affect procedural fairness which stems from the right to court in the aspect of fair and adequately shaped proceedings.

43 Cf. Article 203 PCCP, Article 182 PCCP.

44 'Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice'.

45 H Mądrzak, 'Prawo do sądu jako gwarancja ochrony praw człowieka (stadium na tle polskiego prawa konstytucyjnego, prawa cywilnego materialnego i procesowego)' in L Wiśniewski (ed), *Podstawowe prawa jednostki i ich sądowa ochrona* (Wydawnictwo Sejmowe 1997) 199; Pilich (n 18) 372.

46 Cf. R Geimer, *Internationales Zivilprozessrecht* (Köln 2015) 204; E Schumann, 'Das Rechtsverweigerungsverbot. Historische und methodologische Bemerkungen zur Pflicht, das Recht auszulegen, zu ergänzen und fortzubilden' (1968) No 102 ZZZ 79 ff.

47 Pilich (n 18) 372.

48 Grzegorzcyk (n 32) 298-299.

# COUNTERACTION TO MISCARRIAGE OF JUSTICE IN UKRAINE

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Summary: 1. Introduction. – 2. Criminal Law Measures of Counteraction to Miscarriage of Justice. – 3. Criminal Procedure Measures of Counteraction to Miscarriage of Justice. – 4. Criminalistic Measures of Counteraction to Miscarriage of Justice. – 5. Conclusion

*Investigation of crimes against justice in Ukraine is among topical problems of miscarriage of justice. Hundreds of criminal cases are recorded as a crime in the Official Register in Ukraine but only a few have been brought to the court. In this article we try to approach this problem in three ways: from the point of view of criminal law, criminal procedure and criminalistic measures of counteraction to miscarriage of justice. Such an approach helps to demonstrate problems of investigator, prosecutor and judge at different stages of criminal proceeding.*

*Special attention is paid to specific regulation of the issues of criminal proceedings against a certain category of persons, including judges. Mistakes of representatives of law enforcement bodies become visible as a result of analyzing of real criminal cases. Such an analysis is aimed to disclose the problem of counteraction to miscarriage of justice in Ukraine.*

*Key words: Counteraction, Measures, Miscarriage of Justice, Influence of Justice, Crime Against Justice, Illegal Verdict, Judge, Fair Trial, Court.*

## 1. INTRODUCTION

A deliberately unjust verdict, judgment, order or ruling of a judge (or judges) in Ukraine according to Article 375 of the Criminal Code of Ukraine is punished by custodial restraint for up to five years, or imprisonment for a term of two to five years. It could be named as ‘a medium-gravity’ crime against justice. Aggravating circumstances such as causing serious consequences, a lucrative impulse or other personal interests of a judge (judges) can turn this crime into a serious one. Judge, who committed it, is punished by imprisonment of five to eight years.

A deliberately unjust verdict, judgment, order or ruling is a crime against justice (Chapter XVIII of the Criminal Code of Ukraine). In different countries responsibility for such acts is also envisaged as they are considered 'Crimes against Justice' or 'Crimes against Administration of Justice'. Different Criminal and Penal Codes of European countries include similar articles that provide punishment of deliberately unjust verdict, judgment, order or ruling of a judge (miscarriage of justice). For example, the Criminal Code of the Republic of Albania (Art. 315), the Criminal Code of the Republic of Armenia (Art. 352), the Penal Code of Estonia (§ 311), the Criminal Code of Germany (Sect. 339), the Criminal Code of Latvia (Art. 291), the Criminal Code of the Republic of Moldova (Art. 307), the Criminal Code of the Republic of Slovenia (Art. 288), the Criminal Code of Spain (Art. 446) provide for punishment for such illegal judge activities.

Specific position of a judge and his/her possibilities in legal sphere require specific criminal procedure and criminalistic measures of counteraction to miscarriage of justice. In 2012 the new Criminal Procedure Code was adopted in Ukraine, where special criminal proceedings for different categories of person, including judges are envisaged. In Ukraine, the problem of responsibility for miscarriage of justice (Art. 375 of the Criminal Code of Ukraine) became relevant only after 'the Euromaidan' (2013-2014) and 'The Revolution of Dignity' (2014), when persons who actively participated in these events were convicted for committing various offenses.

The research (2013-2017) of the sentences for miscarriage of justice (Art. 375 of the Criminal Code of Ukraine) has demonstrated, that 11 of them were guilty verdicts, and 2 – non-guilty verdicts. At present, the number of criminal cases is starting to grow (by the statistics of Prosecutor General's Office of Ukraine<sup>1</sup>). The Register of proceedings of crimes also demonstrates this trend: in 2016 – there were 174 offences; in 2017 – 285; in 2018 – 295. But only some of them have been brought to the court: 6 criminal cases during 2016, 3 – during 2017, and 1 – during 2018.

Criminal proceedings in regards to pre-trial investigation, judicial examination of miscarriage of justice indicate the need for theoretical justification of investigators', prosecutors' and judges' activities in this context. For this purpose, we should consider sources in criminal law, procedure and criminalistics. Experts in these spheres have already pointed out to this need.<sup>2</sup>

## 2. CRIMINAL LAW MEASURES OF COUNTERACTION TO MISCARRIAGE OF JUSTICE

We should pay attention to the objective evidence of miscarriage of justice in Ukraine. In this case we are talking about such activities of a judge, which are related to: a) drawing up a legal act (verdict, judgment, decision, ruling or order); b) its signing by a judge (judges); c) pronouncing (disclosing it to the trial participants).<sup>3</sup> Therefore, the

1 See: Prosecutor General's Office of Ukraine, 'Statistical Information' < <https://www.gp.gov.ua/ua/statinfo.html> > accessed 26 May 2019.

2 V Tyutyuhin, O Kaplina, I Titko, 'A Deliberately Unjust Verdict, Judgment, Ruling or Order Passed by a Judge: Some Aspects of Applying Art. 375 of the Criminal Code of Ukraine' (2012) 2 (138) Bulletin of the Supreme Court of Ukraine 42-48.

3 V Tatsiy, V Borysov, V Tyutyuhin (eds), *Criminal Code of Ukraine. Scientific and Practical Commentary: in 2 Vols* (Pravo Publishing House 2015).

pronouncing of the act, in fact, means the end of the crime. This is important because using this approach, there is no need to cancel the decision in the court of appeal or court of cassation.

A sentence, judgment, ruling or order, that are drawn up, signed and pronounced by a judge (judges) are judicial acts. According to Articles 8 and 21 of the Criminal Procedure Code of Ukraine the right to a fair hearing and case judgment within a reasonable time by an independent and impartial court, established by law, is guaranteed to everyone. Criminal proceedings are carried out in compliance with the rule of law, according to which a person, his rights and freedoms are recognized as the highest values, and determine the content and direction of the state activity. The principle of legality in the CPC of Ukraine (Art. 9) is shown by the fact that in the course of criminal proceedings, an investigating judge, prosecutor, head of the pretrial investigation, investigator officers of other public authorities are obliged to strictly obey the Constitution of Ukraine, the Code, international treaties ratified by the Verkhovna Rada of Ukraine (Parliament), the requirements of other legal acts. These guidelines providing compliance with the rule of law and legality are set out in other procedural codes and laws.

The Convention for the Protection of Human Rights and Fundamental Freedoms also contains Article 6 (right to a fair trial) and Article 7 (no punishment without law). The content of these rules is consistent with the provisions of the procedural codes and laws of Ukraine. The practice of the European Court of Human Rights is also important to users, because courts in Ukraine apply the Convention and the case-law as a source of law (the Law of Ukraine 'On the Enforcement and Application of the Practice of the European Court of Human Rights' in 2006).

For holding judges criminally liable for a court decision it is crucial to prove that these acts have signs of 'unjust'. This means that the judge will be brought to criminal liability under Art. 375 of the Criminal Code of Ukraine if the judgment is not consistent with the principles of the rule of law and legality. Thus, an unjust (illegal) decision is not only unfair, but is also taken in violation of the law, beyond the framework of procedures provided for it.

For the criminal legal analysis of the crime, the circumstances of passing a deliberately unjust verdict, judgment, order or ruling by a judge are important. According to the Constitution of Ukraine, justice in Ukraine is carried out only by courts (Art. 124), and the court decides in the name of Ukraine (Art. 129-1). Thus, judicial bodies representing the state can make decisions on behalf of Ukraine. The analysis of the elements of the crime set out in Art. 375 of the Criminal Code of Ukraine indicate that it can be committed only by judicial acts of judges in the exercise of their powers in all forms of justice – criminal, civil, administrative, commercial and constitutional proceedings. Depending on the requirements of Procedural Codes of different forms of justice there is a correlation regarding the possibility of passing a certain judicial act.

The most controversial issue is the possibility of bringing judges of the Constitutional Court of Ukraine to criminal liability for passing a deliberately unjust judgment in the administration of constitutional justice. This issue arose in Ukraine following the adoption of a Resolution 'On Response to Oath Violations by Judges of the Constitutional Court of Ukraine' № 775-VII on 24 February 2014 by the Verkhovna Rada of Ukraine (Parliament), which suggested the Office of the Prosecutor General of Ukraine initiating criminal proceedings on the decision by the Constitutional Court of Ukraine № 20-rp of

30 September 2010 and bringing those guilty to justice. On the same day the press service of the Constitutional Court of Ukraine published the judges' address, which expressed their concern and pointed to the provisions of the Law of Ukraine 'On the Constitutional Court of Ukraine' regarding the impossibility of bringing judges to legal liability.<sup>4</sup>

The judges of the Constitutional Court of Ukraine are not legally liable for the results of voting or statements made in the Constitutional Court of Ukraine and its panels, with the exception of insult or defamation when trying cases, taking decisions and giving opinions by the Constitutional Court of Ukraine (Article 28 of the Law of Ukraine 'On the Constitutional Court of Ukraine'). This provision has exceptions and is associated with the possibility of bringing judges of the Constitutional Court of Ukraine to justice for passing a deliberately unjust judgment.

First, the judges of the Constitutional Court of Ukraine may be held criminally liable, in principle, but under a special procedure, as provided by the Constitution of Ukraine (Art. 126, p. 2, Art. 127, p. 149) and the Criminal Procedure Code of Ukraine (Chapter 37).

Second, legislative position of the Constitutional Court of Ukraine in the judiciary as a body with a special status that carries out its tasks within the justice system, is consistent with the court system (i.e. administers justice).<sup>5</sup> Therefore, the scope of constitutional justice and constitutional justice participants are protected, above all, by the rules of Section XVIII of the Criminal Code of Ukraine 'Crimes Against Justice'.

Third, the provision of the Law of Ukraine 'On the Constitutional Court of Ukraine' (Art. 28), which discharges judges from legal liability, has limited effect, which is outlined by its content. This approach is consistent with the principle of judicial immunity as part of the system of checks and balances, and provides an important guarantee of the rule of law (O. Ovcharenko).<sup>6</sup> However, some criminal law experts believe that the Constitutional Court of Ukraine does not administer justice (P. Andrushko<sup>7</sup>, R. Melnik<sup>8</sup>). However, it is not clear, as which body they qualify the Constitutional Court of Ukraine. Taking his approach, the judges of the Constitutional Court of Ukraine cannot be brought to justice for passing a deliberately unjust judgment, because judges who do not administer justice cannot commit any crime against justice, including passing a deliberately unjust judgment.

Other experts in criminal law point out that the Constitutional Court of Ukraine not only administers justice, but also is a body of judicial power. Therefore, judges of the Constitutional Court of Ukraine should be held criminally liable for passing deliberately unjust decisions, taken after considering Cases of unconstitutionality of laws and regulations of the Verkhovna Rada (Parliament), the President, the Cabinet of

4 The official Site of the Constitutional Court of Ukraine <<http://www.ccu.gov.ua/uk/publish/article/239150>> accessed 27 May 2019.

5 M Shepitko, 'Criminal Law Approach to Understanding the Concept of Justice' (2015) 3 (82) Bulletin of the National Academy of Sciences of Ukraine 126.

6 O Ovcharenko, 'On the Responsibility of the Constitutional Court of Ukraine' (2013) 26 (65), 2-1 (Part 1) Scholarly notes of V. Vernadsky Tavria National University. Series 'Legal science' 195.

7 P Andrushko, 'Some Issues of Qualifying Deliberately Unjust Decisions Taken by a Judge (Judges) in Criminal Proceedings in Terms of Criminal Law (Art. 375 CC)' (2014) 8 (168) Bulletin of the Supreme Court of Ukraine 37.

8 R Melnik, 'The Responsibility of the Constitutional Court of Ukraine Judges for Passing a Deliberately Unjust Act: the Problem in Terms of De Lege Ferenda' in *On Crimes and Punishment: the Evolution of criminal Law Doctrine* (Materials of International Scientific-Practical Conference Dedicated to 250th Anniversary of Treatise by Cesare Beccaria, Yurydychna Literatura 2014).

Ministers of Ukraine (Government), legal acts of the Crimean Parliament (N. Halevykh, L. Palyuh<sup>9</sup>). We agree that 'the constitutional jurisdiction is implemented on the principles of constitutional justice, and its goal is aimed at achieving the inviolability of the constitutional order, establishing the principle of separation of powers and the rule of law, which the society aspires to' (A. Selivanov).<sup>10</sup> This conclusion is confirmed by the decision making process of the Constitutional Court of Ukraine and the purpose of its activities.

The purpose of the judiciary is not bringing to legal responsibility, but a dispute resolution, establishment of the objective truth and justice. The Law of Ukraine 'On the Constitutional Court of Ukraine' stipulates that the powers of the Constitutional Court of Ukraine do not include the issues of legality of acts of state authorities, authorities of the Autonomous Republic of Crimea and local governments, and other matters within the jurisdiction of the courts of general jurisdiction (Art. 14). The grounds for the Constitutional Court of Ukraine's decision on the unconstitutionality of acts on the whole or in parts include: inconsistency with the Constitution of Ukraine; violation of the proceedings set out in the Constitution of Ukraine in terms of their review, adoption or their entry into force; exceeding constitutional authority in the course of passing them (Art. 15). Therefore, the Constitutional Court has not only the function of applying the law, but also enforcing it. The function of applying the law is fulfilled by the Constitutional Court of Ukraine through the direct application of the Constitution of Ukraine and the recognition of laws, other legal acts or certain provisions unconstitutional and null and void<sup>11</sup> from the day the Constitutional Court of Ukraine takes decision on their unconstitutionality (p. 2, Art. 152 of the Constitution of Ukraine). The law enforcement function of the Constitutional Court of Ukraine is fulfilled through the fact that this judicial authority using its powers, the legal status of judges, protects the rights, freedoms and legitimate interests of man and citizen through the implementation of tasks of the Constitutional Court of Ukraine – to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the state in Ukraine (Art. 2 of the Law of Ukraine 'On the Constitutional Court of Ukraine'). It is important that a person can make a constitutional appeal to the Constitutional Court of Ukraine 'to ensure the exercise or protection of constitutional rights and freedoms of man and citizen and legal entity' (p. 1 Art. 42 of the Law of Ukraine 'On the Constitutional Court of Ukraine').

The analysis of the provisions of Part 3 Art. 28 of the Law of Ukraine 'On the Constitutional Court of Ukraine' indicates that this rule has some serious limitations on discharge from legal liability: 1) judges of the Constitutional Court of Ukraine are not legally liable for the results of the vote in the Constitutional Court of Ukraine and its panels; 2) judges of the Constitutional Court of Ukraine are not legally liable for the statements in the Constitutional Court of Ukraine and its panels; 3) the exception is liability for insult or defamation trying cases, taking decisions and giving opinions by the Constitutional Court of Ukraine. Due to the limitations of the rule the formal application of Art. 375 of the Criminal Code of Ukraine for passing a deliberately unjust decision or ruling of the Constitutional Court of Ukraine is possible. Thus, Part 3. Art. 28 of the Law of Ukraine 'On the Constitutional Court of Ukraine' sets out the grounds for dismissal of judges,

9 N Halevykh, L Paliuh, 'Taking a Deliberately Unjust Court Decision – Issues of Criminal Liability' (2015) 49 (1066) Legal Bulletin of Ukraine 7.

10 A Selivanov, *Constitutional Jurisdiction and Constitutional Justice in Ukraine* (Logos 2010).

11 Actually – no longer in force as the wording remains in the legislation until cancelled by an unauthorized body.



which are only: 1) the election results, not the decision or approval; 2) statements in the Constitutional Court of Ukraine and its panels, and the decision or ruling contains no statements in principle; 3) exception regarding insult or slander when trying cases, taking decisions and giving opinions is irrelevant to the application of Art. 375 Criminal Code of Ukraine as a decision or ruling cannot contain insults or slander.

New controversial judgment of the Constitutional Court of Ukraine № 1-r/2019 of 26 February 2019<sup>12</sup> in case of recognition of Art. 368-2 of the Criminal Code of Ukraine 'Illegal Enrichment' as a unconstitutional returned us to the problems of criminal liability and proving for miscarriage of justice in the sphere of constitutional proceeding.

Thus, the analysis of the objective signs of passing a deliberately unjust verdict, judgment, order or ruling allows us to specify that the act lies in the drafting, signing and pronouncing a legal act by a judge (judges), which does not comply with the rule of law and legality in the course of exercising their powers in the name of the state in criminal, civil, administrative, commercial or constitutional proceedings.

To bring judges to criminal responsibility for taking an unjust verdict, judgment, order or ruling, criminal justice authorities must establish that the judge (the judges) who took the relevant decision, administered justice, being in this position legally, fulfilled their duties in accordance with the provisions of the procedural laws. To bring a judge (judges) to criminal liability under Art. 375 of the Criminal Code of Ukraine, criminal justice authorities also have to ascertain his (their) guilt in the form of direct intent. This is indicated by 'deliberation'. That is, a judge (judges) in the course of drawing up, signing and / or pronouncing a judgment, decision or ruling realizes (realize) that the legal act (decision) is unjust.

Passing a verdict, judgment, order or ruling by a judge (judges) in the course of exercising his (their) powers in criminal, civil, administrative, commercial or constitutional proceedings taken by mistake cannot be punished under Art. 375 of the Criminal Code of Ukraine.

### **3. CRIMINAL PROCEDURE MEASURES OF COUNTERACTION TO MISCARRIAGE OF JUSTICE**

The Criminal Procedure Code of Ukraine provides for Section 37, which regulates the issues of criminal proceedings against a certain category of persons. In this case it concerns the judges and the judges of the Constitutional Court of Ukraine. In criminal proceedings against judges, a judge or judge of the Constitutional Court of Ukraine gets a notice of suspicion issued by the Prosecutor General or his deputy (Art. 481 CPC of Ukraine). The apprehension or detention of a judge requires the consent of the High Council of Justice. Unless the High Council of Justice sanctions it, no judge can be arrested or held in custody before conviction by a court, except for detention of judges during or immediately after the commission of a grave or particularly grave crime. A judge detained on suspicion of committing acts entailing criminal liability must be immediately dismissed after establishing his identity, with the exceptions as follows: 1) if the High Council of Justice granted consent to arrest the judge in connection with the act; 2) the detention of the judge during or immediately after committing a grave

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12 The official Site of the Constitutional Court of Ukraine <<http://www.ccu.gov.ua/docs/2627>> accessed 27 May 2019.

or particularly grave crime, if such detention is necessary to prevent the commission of a crime, crime consequences or preserve the crime evidence. The judge must be dismissed immediately if the purpose of such detention (crime prevention, prevention of the crime consequences or preservation of the crime evidence) is achieved (Art. 482 CPC of Ukraine).

The presence of special procedures for giving a notice of suspicion to judges and judges of the Constitutional Court of Ukraine, their detention or the choice of preventive measure indicates the violation of the principle of equality before the law and the courts. This breach of the equality principle is the result of a special status of judges, complex procedures for appointment to this position and judicial immunity. The concept of judicial immunity is revealed in the Law of Ukraine 'On the Judiciary and Status of Judges', which states that a judge cannot be held liable for his decision, except for committing a crime or a disciplinary offence (Art. 49). A judge cannot be compulsorily brought or forcibly delivered to any institution or body, beside court, except for the above cases. Judges can be notified of the suspicion of a criminal offense only by the Prosecutor General or his deputy. The judge may be suspended from administration of justice for a period not exceeding two months in connection with a criminal prosecution on the basis of a grounded complaint of the Prosecutor General or his deputy under the current statutory procedure. The decision on a temporary suspension of judges from justice is adopted by the Supreme Council of Justice.

The analysis of legal provisions on bringing judges (judges) to criminal prosecution indicates that there are specific procedures for the investigation of crimes committed by them. These special procedures envisaged by the Criminal Procedure Code of Ukraine point out inequality of judges suspected of committing a crime and other suspects. It is important to note that this need is conditioned by judicial inviolability and immunity, determined by the status of judges and allows them to be independent in making decisions.

To clarify the specific features of investigation of an unjust verdict, judgment, order or ruling deliberately taken by a judge it is necessary to establish which investigating authority should conduct it. According to the CPC of Ukraine, it is the investigators of the State Bureau of Investigation who carry out pre-investigation of crimes committed by a judge, except for cases when pre-trial investigation of these crimes is assigned to the jurisdiction of the National Anti-Corruption Bureau of Ukraine (Art. 216). Despite the fact that the Law of Ukraine 'On the State Bureau of Investigation' is in force, the body of criminal justice itself – the State Bureau of Investigation – has not been formed yet. That is why, the general provision is applied, which indicates that the investigators of the National Police carry out pre-trial investigation of criminal offenses, provided by the law of Ukraine on criminal liability, except those assigned to the jurisdiction of other bodies of pre-trial investigation. In our opinion, this approach cannot be applied concerning the procedure of investigating a deliberately unjust verdict, judgment, order or ruling. This category of cases is quite complex because investigating actions are taken against a judge; investigators have to search and seize documents from the court document circulation, interview people who mostly have a legal background (education). At the time of substantial reform and renewal of the National Police, we can say that an investigation by the National Police against judges suspected of taking a deliberately unjust verdict, judgment, order or ruling is not correct, because the possibility of effective investigation by the investigators of the National Police in the

period of significant changes is limited. This situation is also affected by the fact that the procedure of the pre-trial investigation is controlled by the prosecutor (Art. 36 CPC of Ukraine). In this case, the investigator of the National Police is in a situation where he is deprived of any initiative during the preliminary investigation, as an appointed prosecutor manages the case. The status of an investigator during the preliminary investigation also raises doubts as the adversarial principle puts him on the side of the prosecution, which reduces his capacity to make decisions not only on the prosecution, but also as for acquittal of a person suspected at the stage of preliminary investigation.

#### 4. CRIMINALISTIC MEASURES OF COUNTERACTION TO MISCARRIAGE OF JUSTICE

A case study of 12 sentences, passed on persons accused of taking a deliberately unjust verdict, judgment, order or ruling,<sup>13</sup> allow us to specify certain problems faced by the investigators, prosecutors and judges in these cases. Thus, the acts provided for in Art. 375 of the Criminal Code of Ukraine were committed 8 times in civil proceedings, 4 times – in administrative proceedings in cases of administrative violations, 1 time – in criminal proceedings. 7 times judges took deliberately unjust verdicts, judgments, orders or rulings without aggravating features, 4 times – for financial gain, 2 times – with serious consequences. Interestingly, this type of crime is often combined with malfeasance in office: the abuse of power or position (2 cases), exceeding of power or authority (1 case), forgery (9 cases). There were also cases of combining this crime with fraud (1 case), unauthorized tempering with the computer (1 case), and theft of documents (1 case).

The only case of acquittal concerns events in the Euromaidan when traffic police officers completed a report on administrative offense against an Automaidan activist, which he had not committed. As a result of proceedings, a judge passed a deliberately unjust decision in those circumstances. On 8 April 2016, Sviatoshyn district court in Kyiv, after considering a case as for a charge under Part. 2, Art. 375 Criminal Code of Ukraine, passed an acquitting judgment on account of procedural violations in the course of notifying the judge of suspicion of committing the crime. The Court concluded that under the current legislation, the Deputy Prosecutor General of Ukraine was to notify of the suspicion. The court found the judge not guilty because the violation of the notification procedure led to incomplete preliminary investigation and breach of procedural law. Thus, we can see an example of incompetent conduct of preliminary investigation and violations of procedural rules. This made a full and thorough investigation of the criminal proceedings and proving of guilt of the judge accused of taking a deliberately unjust ruling impossible.<sup>14</sup>

13 Archive of Letychiv District Court of Khmelnytsky region, the case number 1-58/12; Archive of Court of Appeal in Sevastopol, the case number Yo / 2790/2/12; Archive of Kremenchug district court of Poltava region, the case number 1614/2538/12; Archive of Leninsky District Court in Nikolayev, the case number 1416/7548/12; Archive of Melitopol district court of Zaporozhye region, the case number 815/5626/2012; Archive of Holoseiev district court in Kyiv, the case number 752/2780/13-K; Archive of Leninsky District Court in Nikolayev, the case number 489/9376/13-K; Archive of Chigirin district court of Cherkasy region, the case number 708/752/14-K; Archive of Bolekhiv City Court of Ivano-Frankivsk region, the case number 339/417/14-K; Archive of Sviatoshyn District Court in Kyiv, the case number 759/15 166/15-K; Archive of Pechersk district court in Kyiv, the case number 757/3752/15-k.

14 Archive of Sviatoshyn District Court in Kyiv, the case number 759/15 166/15-K.

The investigation of a deliberately unjust verdict, judgment, order or ruling begins with the fact that this offense is quite difficult to detect. The statistical data of the Supreme Court of Ukraine give us an idea about it. Thus, in 2015 the local courts made 1,560,906 decisions, and in 2016 – 1,398,717 decisions. Herewith, in 2015 – 54 510 (3, 5%), and in 2016 – 45,419 (3, 2%) decisions of local courts were reversed or reviewed on appeal. In 2015 – 17 642 (1, 8%), in 2016 – 21,094 (1, 5%) decisions of local courts and courts of appeal were reversed or reviewed under procedure of cassation.<sup>15</sup> Therefore, we have to admit that judges of local and appellate courts make decisions that are reversed or reviewed. This may indicate errors made by judges or their willful acts aimed at taking deliberately unjust decisions.

Here arises the issue of possibility of revealing verdicts, judgments, orders and rulings that are unjust. We believe that a specially created body, such as the National Anti-Corruption Bureau of Ukraine should reveal such decisions, if the crime is associated with corruption or a selfish motive. However, we should keep in mind that this body is not a substitute for courts of appeal or cassation courts nor is it created to check the quality of their review. This body should respond to information from mass media or citizens regarding the facts of corruption.

Investigation of a deliberately unjust verdict, judgment, order or ruling is connected with the reconstruction of the events that occurred in the course of the trial. In addition, investigators tend to rely on the position of judges in the court of appeal and cassation authority in such cases. Investigators should undertake search and seizure of case files and documents that are relevant to the case (court hearing records, audio and video recording of the court hearing, a document confirming payment of court fees, etc.). The investigator must interrogate all the trial participants and collect evidence about the course of legal proceedings (if they took place), whether they started during working hours, whether parties and other participants in the proceedings were notified about it, how the judge behaved during the proceedings, whether he undertook an initiative during the trial or only performed a balancing function, whether he had relations with the parties to the proceedings or other interested persons.

The analysis of cases in which a judge was accused of passing a deliberately unjust verdict, judgment, order or ruling, has allowed us to conclude that the investigator was in a situation of proving the authenticity of signatures on the acts of court and had to conduct technical research of the document. This conclusion is based on the fact that almost for each of these cases an expert was involved to carry out a handwriting examination and technical study of the document. In addition, depending on the subject matter, forensic examination, judicial construction and technical examination, computer forensic analysis and phonoscopic examination were conducted. Thus, in each of these cases the investigator tried to integrate the collected evidence with the results of forensic examinations.

It is interesting that in 6 out of 11 sentences in which a judge was found guilty of passing a deliberately unjust verdict, judgment, order or ruling, it was revealed that the judges either imitated the trial or the trial did not happen at all, or it established legal facts that never happened. In two cases, instead of representatives of the parties,

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15 The official site of the Supreme Court of Ukraine <[http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/FAFD37716AD40ED9C22580E400382EF6](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/FAFD37716AD40ED9C22580E400382EF6)> accessed 27 May 2019.

other persons were called on their behalf and they reached settlements that were approved by court decisions.

Interrogation of the trial participants was conducted due to the fact that the judge, counsels, lawyers, prosecutors, and other persons participating in the case had legal education and could both help the investigation and interfere with it. This interference can take the form of reference to the right to refuse giving evidence or making statements about oneself, family members or close relatives enshrined in the Constitution of Ukraine (Art. 63).

The investigator, prosecutor, carrying out pre-trial investigation and the judge who institutes the proceedings in this case, feel a considerable psychological impact of the public, colleagues involved in the administration of justice, participants in proceedings in which a deliberately unjust verdict, judgment, order or ruling was passed. A significant complication is the fact that bringing to justice judges who passed an unjust verdict, judgment, order or ruling shall take the form of pre-trial investigation, and then a trial, that is, it means the same situation, in which an unjust judicial act was passed.

It is important to carry out investigative actions in the form of pre-trial investigation. The collected materials and the indictment must be submitted to the court. Such cases should be heard by an experienced judge, because he feels a considerable psychological impact of the defendant, who also served as a judge and is accused of passing a deliberately unjust verdict, judgment, decision, or order.

## **5. CONCLUDING REMARKS**

The research in the sphere of counteraction to miscarriage of justice in Ukraine has enabled us to identify a number of problems in terms of criminal law and criminal proceedings. A comparative analysis of Criminal and Penal Codes demonstrated similar approach of Parliaments in forming articles, including punishment for miscarriage of justice. Specifics in the wording of Art. 375 Criminal Code of Ukraine formulates stepping of adoption of decisions by judges, that influence classification of this crime against justice and its characterization.

The study of criminal procedural problems of investigating a deliberately unjust verdict, judgment, order or ruling taken by a judge (judges) indicated that as the judges are granted inviolability and immunity, a special procedure of giving a notice of suspicion, apprehension or detention a judge in custody is applied. However, the legal loophole is created by the fact that in the Criminal Procedure Code there is no indication as to which investigative body should be investigating this crime. It is not specified either that an investigator should have a considerable investigation experience, because it is most likely that in the course of investigation he will be exposed to illegal influence of his colleagues. This conclusion is based on the fact that the situation when a judge passes a deliberately unjust sentence, judgment, ruling or order, is comparable with the procedures stipulated by the Criminal Procedure Code in reference to the case investigation and court hearing. The case study allowed us to point out the challenges faced by the investigator, prosecutor and judge in the investigation of this crime.

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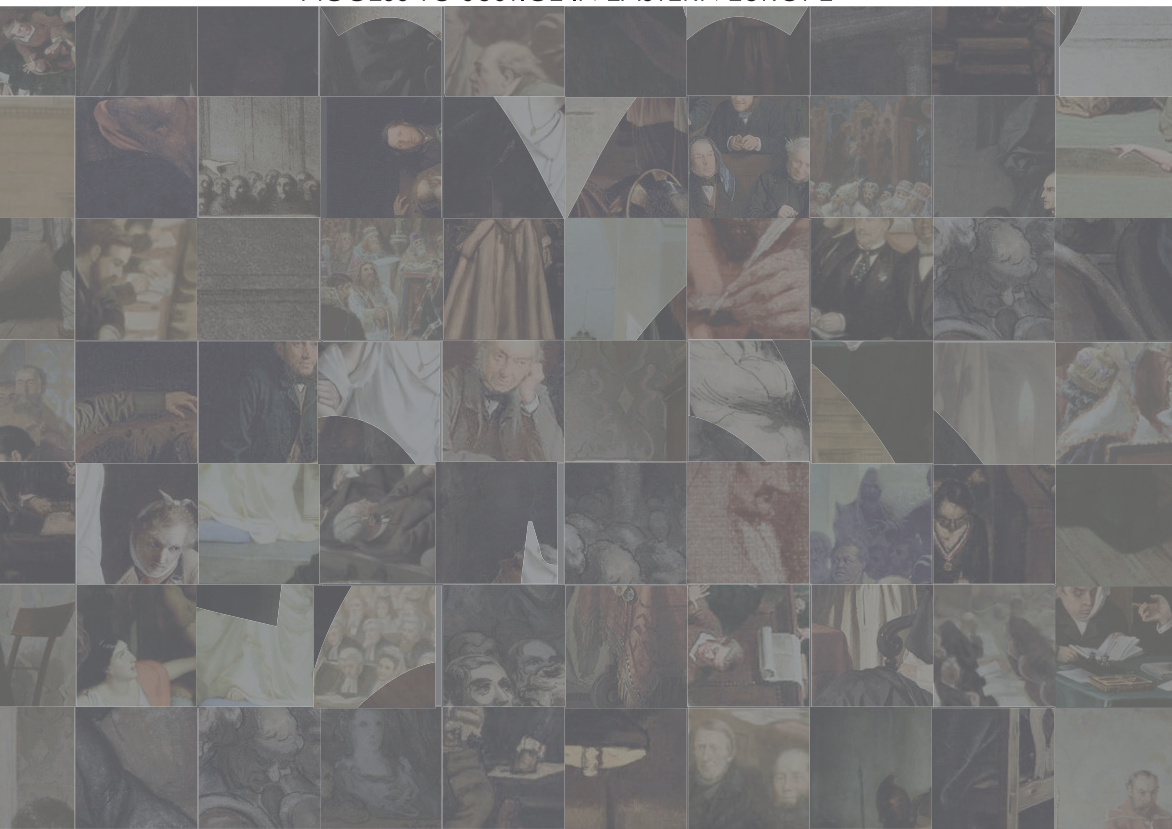
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