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REGULATORY ACTIVITY OF THE EUROPEAN UNION AND THE PRINCIPLE OF ECONOMIC FREEDOM

Robert Grzeszczak
(Prof., University of Warsaw)
Michalina Szpyrka
(MA, University of Warsaw)
Tomasz Klemt
(MA, University of Warsaw)

Abstract. *Development of regulatory activities at EU and Member States level requires defining the limit of the acceptable influence of the market regulators on shaping the content of the civil and legal relations on the basis of the applicable domestic and EU regulations. It will determine the mutual relations of the regulators in this respect and it will contribute to answering the question about whether there is a possibility of establishing uniform standards of the influence of the regulators on shaping the content of the civil and legal relations on regulated markets, which standards would ensure the appropriate respect for the principle of economic freedom and which would contribute to increasing the certainty of the law and the trust in the public institutions on the part of the citizens, or, due to the diversified scope of the competences assigned to the regulators and the inconsistent instruments, whether each sector should be treated separately.*

Keywords: *Economic freedom, Regulation, European Union, Regulatory institutions, Europeanisation of law*

Given the limited scope of this article, only selected issues and opinions concerning the development of regulatory activities at EU and Member States (domestic) level will be

presented. The scientific objective of this article is to define the framework the influence of the UE and domestic market regulators on shaping the content of the civil and legal relations. The center of the research is the analysis of the consequences of that phenomenon for the entrepreneurs, as well as the analysis of the measures and methods with which the regulatory bodies influence the economic freedom on the internal market and the examining of the legitimacy of interfering in the aforementioned relations.

A research hypothesis is put forward, stating that there is currently no uniform standard of the influence of the regulators on shaping the content of the civil and legal relations on regulated markets, which standards would ensure the appropriate respect for the principle of the economic freedom and which would contribute to the increasing of the certainty of the law and the trust in public institutions on the part of the citizens.

In view of the basic significance of the principle of economic freedom for the free market system, all the actions of the public institutions which limit that sphere of legally protected independence should be exceptional and preceded by the careful weighing of the colliding values. In the case of Poland, according to the provision of art. 22 of the Constitution of the Republic of Poland, in the act clearly provided for the possibility of the interference of the regulators in the area of the freedom of shaping the civil and legal relations by private entities. However up till now in the Polish literature there have not been any publications comprehensively analyzing the legitimacy and the effectiveness of such solutions.

In the face of the growing legislative activeness of the European Union in shaping the legal situation of the entities acting on the determined markets and in granting the particular regulators significant ranges of competences in that area, one should look at that phenomenon also from the perspective of the economic entities and the protection of their right to the economic freedom. By defining the problem in this manner it is possible to reveal a dissonance between the need to ensure the effectiveness of the sector regulation, along with the right to consumer protection, and the economic freedom of the entrepreneurs and the principle of the freedom of contract. Therefore, it is legitimate to look for legal solutions which could alleviate those tensions and ensure the optimum enforcement of the regulations. In fact, the assumed objective of the regulations is to increase the competitiveness, which is also accompanied by the need to ensure public security.

EU law and the Europeanisation of domestic law

In the recent decades, law has been undergoing numerous changes. It has been taking new directions and becoming more and more complex, which is a global phenomenon. Nonetheless, this is particularly typical of the law of the integrated EU owing to its supranational and, to a large extent, ‘empirical’ character. There have been an extraordinarily increasing number of legal systems in the EU: national, regional, universal international, regional international, supranational and post-national (N. Walker, J. Shaw, S. Tierney (eds.) *Europe’s Constitutional Mosaic*, Oxford: Oxford University Press 2012, p. 404).

It needs to be emphasized that since 1st May 2004 the Polish legal order consists of – like in each Member State - from the perspective of the legislature – the system of European Union law and the system of domestic law. In the first case, the legislator is very specific. It is a group of diverse entities: EU institutions and state institutions or rather representatives of the governments who form the Council (EU). As a result of State’s accession to the European Union, the former classic structure based on the co-existence – in different configurations – of rules of international and national law was supplemented by a new, though built on foundations of international law, legal system of the Union. As a result, a European legal area has been created, which is understood as a set of standards of EU primary and secondary law, unwritten general principles and national standards issued in order to meet the legal commitments of the Community. The system of European Union law is of paramount importance for the citizens of the Community, and in particular for entrepreneurs, service providers, consumers and, finally, employees. It is of course important also for other social groups such as pensioners and students.

National law covers substantive law, political law and procedural law. The influence of EU's law refers mostly to substantive law and, to a lesser extent, also political and procedural law. This is related to the principle of procedural autonomy of the Member States, which retain their autonomous procedural systems. In other words, states retain the competence to shape their own civil, administrative and criminal proceedings as well as any related proceedings. However, it goes without saying that this autonomy has limits which are set in particular by the principles of efficiency and effectiveness of Union law. In the article, the sources of law are understood it the traditional sense – as sources of application of law in a formal meaning, i.e. facts regarded as law-shaping in a given system. It is all these facts that create a legal system. What should be emphasized in relation to State's Membership of the European Union is the law-making character of the case law of the Court of Justice of the European Union (CJEU) which has a far-reaching impact on all the fundamental areas of domestic law, be it employment law, agricultural law, banking law or the development of EU's regulatory activities at Member States level.

In practice, the major influence of the European Union on the Member States results from the implementation of EU policies and law. In the literature, this process is called Europeanisation (R. Grzeszczak, *The European transformation of the legislative, executive and judicial power in Poland* (in:) I. P. Karolewski, M. Sus (eds.), *The Transformative Power of Europe*, Nomos, Baden-Baden 2015, pp. 19-36). It is a short and relatively universal definition of a phenomenon which, in practice, is much more complex. Functioning of a state within the European Union entails certain obligations which, as a rule, are the same for all the Member States. They consist mostly in a commitment to implement Community standards (i.e. directives which need to be implemented into national law) as well as to apply and enforce standards which are directly applicable, i.e. primary law and in particular the Treaties on which the European Union is founded, as well as regulations and decisions that can have direct effect as against individuals. The European legal order has become part of domestic law, and (national) courts have a particular role to play here. What is more, the obligation to implement specific legal standards by the Member States arises not only from the Treaties but also from national constitutions.

The Europeanisation of Polish law, politics, economy, culture and society has been in progress since the 1990s. In the course of time, this process, on the whole, has been undergoing numerous changes but it has never reduced in importance. The scope of the processes driving the impact of Union law on the legal and political system of a given state is influenced not only by historical, but also economic and social developments. The more elaborate the organization of the state and society, the more complex the process of reception of legal solutions. The process of Europeanisation relies mostly on direct application of the standards of EU law in the national legal system, implementation of directives into national law and harmonization or standardization of national legal solutions so that they comply with the EU framework. It is also the reception of a common, European (Union) axiology. In Poland, the process of Europeanisation started from the creation of new law and amendments to the existing one to make it compatible with the rules and standards of Union law. This process is still ongoing and encompasses law-making as well as application and implementation of law.

EU law is created as a result of the interaction between private and public entities, EU institutions and member states as well as specialist (expert) groups, leading to what is known as European governance. A distinguishing feature of EU legislation is the tendency for the continuous increase in the law-making activity of the administration, which creates peculiar legal subsystems while arranging the fulfilment of collective needs on a mass scale. These subsystems often modify the most fundamental legal standards and influence the legal and factual situation of the citizens, which entails a weaker legitimization of the law. Thus, the 'unique' legal determinants of governance in the EU are manifested in the fact that the basic source of European law are decisions taken by the executives of the member states at meetings of the Council, complemented by the extensive participation of the EU administration (European Commission).

Economic freedom as a principle of the EU and domestic law

The economic freedom is one of the fundamental principles of the EU law and of the domestic law. The entrepreneurs are entitled to undertake and to execute economic activity within the limits of the applicable provisions of the law. On the grounds of the EU law, the economic freedom is a basic right, proclaimed in the judicature of the Court of Justice of the European Union (CJEU) (i.a. verdicts in the case of Sky Österreich, C-283/11, EU:C:2013:28, section 42; in the case of Schaible C-101/12, EU:C:2013:661, section 25; in the case of Pillbox 38 C– 477/14, EU:C:2016:324, section 155) and in art. 16 of the Charter of the Fundamental Rights of the EU.

On the other hand, in the domestic law the economic freedom is one of the constitutional principles and in Poland it is described in art. 20 of the Constitution of the Republic of Poland. The economic freedom, however, is not an absolute and unlimited value. It should be correlated with the remaining elements of the economic system. Both on the grounds of the EU law and of the domestic law, which is directly connected with the EU law, the economic freedom may be restricted only due to an important public interest (i.a. the verdicts of the CJEU in the case of Sky Österreich, C-283/11, EU:C:2013:28, section 45; in the combined cases of Spain and Finland vs the Parliament and the Council C-184/02 and C-223/02, EU:C:2004:497, section 51 and 52;. in the case of Deutsches Weintor C-544/10, EU:C:2012:526 section 54 and the related judicature; W. J. Katner, *Prawo działalności gospodarczej. Komentarz. Orzecznictwo. Piśmiennictwo*, Warsaw 2003, p. 54).

The basis for the restricting of the economic freedom in the EU law is art. 52 section 1 of the Charter of the Fundamental Rights of the EU (verdicts of the CJEU in the combined cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert, EU:C:2010:662, section 65 and in the case of Sky Österreich, EU:C:2013:28, section 48). In the Polish law that basis is described in art. 22 of the Constitution of the Republic of Poland. Any restriction of the principle of economic freedom must be treated as an exception and interpreted narrowly. Therefore, in the case of the lack of specific regulations a presumption is adopted in favour of the principle of economic freedom (C. Kosikowski, *Prawo działalności gospodarczej. Komentarz,* Warsaw 2002, p. 34). The main criterion of establishing the restrictions of the basic rights defined in the Charter of Fundamental Rights, as well as the restrictions of the constitutional freedoms, is whether such restrictions are defined in the acts having legislative force. They should also come from rational premises and they should serve the protection of an important public interest, as well as they may not infringe the essence of the given right or freedom. Subject to the principle of proportionality, they have to be necessary and they have to truthfully meet the objectives of the general interest or they should result from the need to protect the rights and freedoms of other persons (the verdict of CJEU in the case Sky Österreich, C-283/11, EU:C:2013:28, section 48).

Regulation as a permissible restriction of economic freedom

A reliable example of such an acceptable restriction of the economic freedom is the regulation which is a form of a specific interference of the state in the market economy (M. Rogalski, *Prawo telekomunikacyjne*, Warsaw 2011, p. 31). It needs to be noticed that already John Maynard Keynes pointed out that it is necessary to adjust and to support market mechanisms in the case of the occurrence of the imbalance or the disruption of the market, especially at the time of crisis (J.M. Keynes, *The General Theory of Employment, Interest and Money*, Australia 2003, p. 232.). Thus, this subject gains validity and significance.

The regulation, which in fact is a particular form of applying restrictions on the access to the economic freedom and, at the same time, acts as the administrative police in the strategic market sectors, aims at ensuring the stable functioning of those sectors and the uninterrupted access to the services provided within them (in detail, see: M. Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki*, Warsaw 2005). Due to the inefficiency of the market, often resulting from monopolies and from the occurrence on the market of the goods described as „public goods" (R. Cooter, T. Ulen, *Ekonomiczna analiza prawa,* Warsaw 2009, p. 40-43), the regulatory bodies have been equipped with the instruments

which aim at eliminating the disquieting anomalies of the market and at ensuring the appropriate level of the competitiveness and security, in particular, in the sectors considered crucial for the state economy.

One of the forms of the regulation, which form belongs to the competences of the regulatory bodies, is the possibility of influencing the shaping of the content of the civil and legal relations. It may be realized in various manners, depending on the particular regulator and on the statutory regulation. It may be noticed that the actions taken by the regulators in this respect may have the nature of non-regulatory interference or they may assume the form of decisions of a regulatory nature. One of the examples of the influence of the regulators on the shaping of the content of the civil and legal relations is a situation in which the entrepreneurs cannot reach an agreement on the issue of the appropriate shaping of their civil and legal relation. In this case they may submit their dispute to the settlement by the appropriate regulatory body. In the case of settling the dispute by a regulatory body, the agreement is replaced by the decision. It is the most far-reaching form of state interference, because it assumes the possibility of a regulatory interference of the body in the shape of the agreement binding the entrepreneurs.

As part of the article an analysis will be conducted as to the regulations regarding the competition and consumer protection law, the telecommunications law, the energy law and the financial law. The analysis of the diversified markets is necessary in order to demonstrate whether there exist mutual competences assigned to all the regulators or any uniform regulatory instruments or whether each sector has to be treated separately, which will allow to confirm or to contradict the proposed hypothesis. The analysis is to constitute a contribution to creating uniform standards of the interference in the civil and legal relations, applicable for all the regulators.

Sector analysis

The shaping of the content of the civil and legal relations by the market regulators constitutes the process of making more precise the obligations and prohibitions contained in the sector regulation and in the competition protection law. Such shaping of relations, according to the assumptions, should serve the realization of those norms, thus contributing to the economic effectiveness, the public security and to the development of the internal market. Therefore, the sector regulations and the law on the protection of the competition may be perceived as a certain instrument of the legal interference in the autonomy of the participants in this process and in the civil and legal relations binding them. That constitutes a form of the state interference in the economy in order to ensure its effectiveness and to adjust the imperfections of the market mechanisms. At the same time, it is one of the basic examples of limiting the economic freedom, which freedom is considered to be the basic right both at the level of the European Union and at the domestic level.

The existing decision-making practice of the independent regulatory offices (Office of the Competition and Consumer Protection - UOKiK, Energy Regulatory Office - URE, Office of Electronic Communications - UKE, Polish Financial Supervision Authority - KNF), created in Poland as a result of the economic transformation, constitutes an extensive material for scientific research. The activity of the aforementioned offices over many years allows formulating conclusions on the basis of the judicature of both the regulators and the courts supervising the regulators' decisions. The need for such an analysis results primarily from the fact that Poland, where the free market economy has been introduced fairly recently, continues to remain in the process of building effective institutional and legal solutions.

The choice of the competition and consumer protection law and of the sector regulations presented above is justified. The analysis of the activity of the antitrust bodies is important in view of the fact that they have competences of general nature compared with other regulatory bodies, which competences do not regard the particular markets (for example, the telecommunications or energy markets), therefore, it influence on the scope and the manner of executing such authorizations, as well as the mutual links and dependencies between the particular regulators.

The regulations adopted within the competition law and the sector law, made precise by the market regulators, also through shaping the content of the civil and legal relations, often regard the same market problem. It happens that, due to the diversification of the content of the obligations and prohibitions formulated for the entrepreneurs, which obligations and prohibitions result from the competition law and from sector regulations, and due to the differently formulated competences of the regulators, the same market problems are solved in different manners. That may cause numerous problems of practical nature and raise doubts as to the mutual relations of the regulators. Besides, the aforementioned diversification regarding the competences of the particular regulators raises further doubts concerning the acceptable scope of the interference of those bodies in the shaping of the content of the civil and legal relations.

With respect to the competition law particularly important is the influence of the antitrust bodies, both in Poland and in the EU (the President of the Office of the Competition and Consumer Protection (UOKiK), the European Commission), on the shaping of the appropriate behavior pattern of the entrepreneurs acting in the sector of the new economy. In the era of the increasing revolution of the information technology there appears a question: to what degree the system of the legal protection of the competition, created in the reality and in order to meet the needs of the industrial economy, is capable of ensuring the effective competition also in the conditions of the increasing IT revolution. The inappropriate application of those provisions may, as a consequence, limit the economic freedom of the entrepreneurs and hamper the development of new technologies. The antitrust policy, developed in the EU on the grounds of the schools of Fribourg and Harvard, does not fully reflect the essence of the competition on digital markets. It is because that competition has a dynamic and not static nature. Consequently, there may occur an "antitrust paradox", because the approach which is too much oriented on intervening may not only fail to protect the competition, but it may even limit and weaken it.

With regard to the telecommunications law an interesting area is that of both the direct shaping of the content of the civil and legal relations in the decision of the President of the Office of Electronic Communications (the President of UKE), which decision replaces the agreement, and the indirect influence of the regulator, resulting from the imposing by the President of UKE of the determined regulatory obligations in separate decisions. Those separate decisions are then incorporated in agreements or in the decisions replacing them. Another form of an indirect influence of the President of UKE is the fact that in the decisions replacing agreements the President of UKE refers to the content of the non-binding statements issued by that institution or by the European Commission. The aforementioned activity of the regulator, falling within the scope if its competences, provokes numerous problems of practical nature, which result form the relations between the particular decisions or from incorporating in the regulatory decisions the provisions included in the acts of the *soft law* nature, which acts, in principle, cannot be appealed against neither in the administrative nor in the civil procedure.

In the case of the energy law, the analysis of the competences of the President of the Energy Regulatory Office (President of URE) to interfere in the civil and legal relations will lead to formulating the conditions allowing the company of the energy industry to refuse to conclude an agreement. The research into the existing decision-making practice of the regulator and into the judicature of the common courts allows let us say that the scope of the freedom in concluding agreements (including the freedom to choose the contractor), on the grounds of the energy industry is subject to far greater limitations than in other areas of the economic life. A separate question remains whether that measure constitutes the appropriate instrument of the realization of the values of the energy law, such as competition, energy security, effectiveness, energy saving and the protection of the environment. This is all the more important in Poland, because energy market, which market, having been only recently liberated from state monopolies, continues to remain in the period of changes.

It should be stated that the supervisory actions constitute very strong interference in the nature and in the system of capital companies, as in fact they are *quasi* provisions of the law and not instruments of the *soft law*. As a consequence of such supervisory actions the norms of the

civil law are adjusted and corrected. The key instrument of acting on third parties are the indications and recommendations used by the financial supervision institutions. Those recommendations are addressed to the supervised entities, but many of them refer to the rights and obligations of other entities (by regulating, i.a. the process of establishing and paying the compensation for damages by insurers or the principles of remunerating employees). A question arises as to whether the regulations discussed here do not constitute an infringement of the principle of the freedom of contract with regard to shaping the civil and legal relations.

Conclusions

This article is an outline of the problems of very major importance, requiring further research - including comparative law. The knowledge of the solutions present in other countries of the continent seems to be all the more useful, as in the EU at present a tendency is observed to intensify the actions aiming at completing the building of a uniform internal market (especially with regard to the energy market and the digital market). The legislative processes presented by the European Commission (e.g. the "winter package") assume, among others, the equipping of the EU agencies with the competences far broader than before, the strengthening of the cooperation between the domestic regulators and the introducing of the solutions encouraging and facilitating the cross-border activity. Such proposals, which have been published relatively recently, have not become so far the object of comprehensive scientific research.

Therefore, the detailed analysis of the aforementioned projects of the European Commission is needed, which will make it possible to involve the scientific environment in the discussions, which are conducted, at the moment, mostly by politicians and columnists. The research being conducted will aim at evaluating the proposed solutions regarding, for instance, a uniform energy market or a uniform digital market from the perspective of such values as security, consumer protection or the solidarity between the member states. Although the final decisions on the form of the EU regulations will belong to the politicians, it is important that in taking them they could rely on thorough analyses.

Simultaneously, as indicated above, the knowledge about the functioning of the regulatory systems in the remaining member states may prove very useful in shaping the supranational markets. On the one hand, it will allow the conscious participation in the reform of the principles of the functioning of the EU agencies, which, by gaining the position of the all-European regulators, to a great extent will rely on the practices elaborated by the domestic institutions. On the other hand, that knowledge will help the domestic regulators to prepare themselves for the cooperation with their foreign counterparts.

The convergence of the legal systems, resulting from the globalization of the economic processes and the growing international links, today is an obvious process. The countries capable of working according to the principles of good governance (more see: R. Grzeszczak (ed.), *Challenges of good governance in the European Union*, Baden-Baden, Nomos Verlag 2016), taking advantage of the best foreign practices – while at the same time retaining certain independence of the political, social, cultural or geographical nature – may benefit a lot from that.

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УДК 342

ОСОБЛИВОСТІ СОЦІАЛЬНО-ПРАВОВОГО СТАТУСУ СУБ'ЄКТІВ ЗАХИСТУ ПЕРСОНАЛЬНИХ ДАНИХ

Дяковський О.С.
(аспірант другого року навчання Університету державної фіскальної служби України)

Анотація. *У даній статті розглядається питання правового статусу суб'єктів захисту персональних даних. Акцентується увага на класифікації суб'єктів захисту у даній сфері, пропонується внесення відповідних змін до Закону України «Про захист персональних даних».*

Ключові слова: *персональні дані, суб'єкти захисту, правовий статус, класифікація суб'єктів захисту персональних даних, правове положення, захист порушених прав.*

Abstract. *This article examines the legal status of subjects of personal data protection. Attention is focused on the classification of subjects in the field of protection proposed relevant amendments to the Law of Ukraine "On Personal Data Protection".*

Keywords: *personal data protection actors, legal status, classification of subjects of personal data protection, legal status, protection of rights.*

Актуальність дослідження: З розвитком інформаційних відносин, активним використанням сучасних інформаційних технологій, методів автоматичної обробки даних в суспільстві та державі в цілому носій персональних даних піддається використанню, поширенню та обробленню його даних про особу котре порушує законні права носія персональних даних. Дане порушення серед іншого інформаційних прав людини та громадянина та протиправне використання персональних даних породжує застосування способу захисту порушених прав.

Реалізація способів захисту прав здійснюється шляхом звернення до компетентних органів із заявами та скаргами з метою їх відновлення або припинення їх порушення та породжує велику увагу до суб'єктів захисту персональних даних, зокрема до їх повноважень, місця серед інших органів державної влади, підпорядкування, що свідчить про актуальність даної теми дослідження та про інтерес науковців та юристів практиків до вивчення інституту персональних даних.

Постановка проблеми: Проаналізувавши нормативно – правові акти, що регулюють коло суспільних відносин у сфері інформації та захисту персональних даних, наукові погляди дослідників та юристів практиків було встановлено відсутність в Законі України «Про захист персональних даних» класифікації суб'єктів захисту персональних даних, та самого поняття суб'єктів захисту персональних даних, що зумовлює необхідність дослідження даних проблем.