

EUROPEANIZATION OF THE POLISH LAW - CONSIDERATIONS ASSOCIATED WITH THE ADOPTION OF THE DIRECTIVE ON ADR IN CONSUMER DISPUTES

Dr Ewelina Cala-Wacinkiewicz and Dr Daniel Wacinkiewicz***

ABSTRACT

The adapted aim of this study is general characteristics and formal possibilities of the impact of the European Union law on the Polish law, which can be defined by way of great simplification as "Europeanization" of the latter. This, among its many dimensions (Europeanization of: administration, research, education, politics, language), also has a legal dimension, particularly interesting to us. This paper will therefore focus only on the EU law and its impact on the Polish law, as well as on the legal basis for the implementation of EU legislation onto the ground of the domestic legal order.

To illustrate the Europeanization processes running in this way we shall use the description of the status of a consumer and legal solutions aimed at strengthening his position in relation to entrepreneurs. Justification for so defined choice is twofold. Firstly, it is a representative example (in terms of adaptation of national legal systems to the standards of the European Union), and secondly, one relating to issues of particularly major importance for the functioning of the single European market. Said assumptions correspond to Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR). Its analysis will form an essential objective of considerations for which analyses outlined earlier are of introductory and subsidiary importance.

INTRODUCTION

It is a truism to say that the impact of international organizations on the states forming them is multi-faceted. However, it is necessary to be able to

* Assistant Professor, Department of International Law, Faculty of Law & Administration, University of Szczecin, Poland.

** Assistant Professor, Department of Public Economic Law, Faculty of Law & Administration University of Szczecin, Poland.

demonstrate that one of its manifestations is the impact of the law of these international law actors on national law. This effect is often of a far-reaching nature, causing the need for a change aiming at adjusting the national law to the standards created by international organizations. Depending on the legal status of the organization, the object of their activity, as well as the nature of the adopted resolutions,¹ said impact can be limited e.g. to a certain range of cases (as is the case of NATO). It may also extend to almost all state legislation, a perfect illustration of which is legislative activities of the European Union.² It is an organization in which the integration of states is so advanced that some want to prove its federal character.³ Such a far-reaching degree of integration - which is a result of over 60 years of strengthening of the cooperation - (initially only) economic, and later also political – had to be based on a common mechanism of standardisation. As a result, at the basis of creation of today's European Union lay the need to harmonize national legal orders. The law thus became a fundamental instrument for adaptation and standardization of national legal orders often significantly different from one another. This need has extended to both: the relations between an international organization and its member states (horizontal approach), but partly also to the relations between states (vertical approach) forming it.

Taking this into account, the adapted aim of this study is general characteristics and formal possibilities of the impact of the European

1 For this on the ground of a national doctrine of the subject, *See for example*: JERZY MENKES, ANDRZEJ WASILKOWSKI, ORGANIZACJEMIĘDZYNARODOWE. PRAWOINSTYTUCJONALNE (WARSZAWA 2006); Natalia Buchowska, *Uchwałyorganizacjimiędzynarodowych w polskimporządkuprawnych – zarysproblematyki*, in ²PRAWOWOBECYWYŻWAŃWSPÓLCHESNOŚCI, (Paweł Wiliński ed., Poznań 2005); KRZYSZT OF SKUBISZEWSKI, UCHWAŁYPRAWOTWÓRCZEORGANIZACJIMIĘDZYNARODOWYCH (POZNAŃ 1965).

2 For its legal nature, *see*: EWELINA CAŁA-WACINKIEWICZ, CHARAKTERPRAWNY UNII EUROPEJSKIEJ W ŚWIETLEPRAWAMIĘDZYNARODOWEGO (WARSZAWA 2007).

3 And so, as an example, as believed by A. Pliakos, the structure of the Union corresponds most to the concept of a federal state. *See more*: Asteris Pliakos, *La nature juridique de L'Union Européenne*, 29(2) REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 187, 189 (1993). It may, as highlighted by A. von Bogdandy, be defined by the conceptual network of *Supra*-governmental federalism. *See*: AMIN VON BOGDANDY, SUPRANATIONALER FÖRDERALISMUS ALS IDEE UND WIRKLICHKEIT EINER NEUEN HERRSCHAFTSFORM. ZUR GESTALT DER EUROPÄISCHEN UNION NACH AMSTERDAM, 61 (BADEN – BADEN 1999).

Union law on the Polish law, which can be defined by way of great simplification as "Europeanization" of the latter. This, among its many dimensions (Europeanization of: administration, research, education, politics, language), also has a legal dimension, particularly interesting to us.⁴ The legal dimension of Europeanization, as stressed by K. Wach, means the convergence of the national law with the union law. Its result is, on the one hand, the transposing of the union law into the national legal order, and on the other hand, direct applicability of the EU law in Member States.⁵

This observation is additionally accompanied by an assumption according to which the process of Europeanization - for the purposes of these analyses - will be limited only to the law of the European Union (Europeanization in the narrow sense). Thus we leave outside the scope of analysis the law-making activity of regional organizations other than the European Union – e.g. the Council of Europe. However, this does not detract from its important role in the process of Europeanization. The impact of this organization on its member states - as in the case of the European Union - is significant, and this is so even due to the establishment of the European Court of Human Rights based in Strasbourg as the authority controlling the observance of rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 4 November 1950.⁶ Only to flag up now, non-compliance with the provisions of this international agreement may result in Member States being held accountable both by other countries, as well as by natural and legal persons. If the Court recognises infringement thereof, it may award financial compensation, which is certainly a far-reaching sanction for failure to comply with international obligations that have become part of national legal orders.

4 More broadly on the subject of said dimensions: Krzysztof Wach, *Wymiary europeizacji i jej kontekst*, 852 ZESZYTY NAUKOWE UNIWERSYTETU EKONOMICZNEGO W KRAKOWIE 29, 33 (2011).

5 Krzysztof Wach, *Supra note 5*, at 36.

6 Journal of Laws of 1993, No. 61, item 284 as amended (Pl).

This paper will therefore focus only on the EU law and its impact on the Polish law, as well as on the legal basis for the implementation of EU legislation onto the ground of the domestic legal order.

To illustrate the Europeanization processes running in this way we shall use the description of the status of a consumer and legal solutions aimed at strengthening his position in relation to entrepreneurs. Justification for so defined choice is twofold. Firstly, it is a representative example (in terms of adaptation of national legal systems to the standards of the European Union), and secondly, one relating to issues of particularly major importance for the functioning of the single European market. Said assumptions correspond to Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR).⁷ Its analysis will form an essential objective of considerations for which analyses outlined earlier are of introductory and subsidiary importance.

The description of the formal aspect of the Europeanization⁸ of the Polish law can be preceded by an ascertainment that the so-called "adjustment"⁹ of legal systems, falling within the scope of meaning of this concept, in broad terms will mean transferring legal institutions that have developed on the

7 2013 O.J. (165), 63.

8 The concept of "Europeanization" is a concept fairly well developed on the doctrinal ground both in Poland and in the world. *See, for example:* Europeizacja praw krajowego: wpływ integracji europejskiej na klasyczny dziedzinę prawa krajowego, (Cezary Mik ed., Toruń 2000); Europeizacja praw polskiego - wybrane aspekty, (Beata Bieńkowska & Dariusz Szafranski eds., Warszawa 2007); Johan P. Olsen, *The Many Faces of Europeanization*, 40(5) *Journal of Common Market Studies* 921 (2002); The Politics of Europeanization, (Kevin Featherstone & Claudio M. Radaelli eds., Oxford 2003); Hellen Wallace, *Europeanization and Globalization: Complementary or Contradictory Trends*, 5(3) *New Political Economy* 369 (2000); Claudio M. Radaelli, *Europeanisation: Solution or problem?*, 8(16) *European Integration online Papers* 1 (2004); Frank Schimmelfennig, *Europeanization beyond Europe*, 4(3) *Living Reviews in European Governance* 4 (2009); Trine Flockhart, *Europeanization or EU-ization? The Transfer of European Norms across Time and Space*, 48(4) *Journal of Common Market Studies* 787 (2010).

9 The term adopted after: Anna Gąsior-Niemiec, *Pojęcie europeizacji. Wybrane problemy teoretyczne i metodologiczne (część 1)*, 2 *POLITYKA I SPOŁECZEŃSTWO* 73, 74 (2005).

western European continent onto the ground of the Polish law.¹⁰ In turn, in narrow terms – transferring legal institutions developed by the European Union as the "Europeanization is linked foremost to the organizational and administrative power of the European Union".¹¹

One needs to bear in mind though that the legal dimension of Europeanization, being the subject of these analysis, will also be subject to further processes of "adjusting", going over to the grounds of various fields of law such as criminal, civil, administrative, and economic, and finally the law of the protection of competition and consumers.

The impact of the legislation of international organizations on the Polish law would not be possible were it not for the provisions of the Constitution of the Republic of Poland of 2 April 1997¹² - the most important act in the Polish legal order. Formally, they allow the validity and application of EU law. The provisions, which will be described later in the paper, are of a general nature and deal with international organizations in general - thus referring to the European Union indirectly.

As already noted, as an international organization, the European Union affects the whole state legislation due to the advancement of integration processes taking place within it. Their consequence is, inter alia, the dual legal system of this organization, which is formed by the so-called primary and secondary legislation.

EU primary law means classic international agreements. It is to them that the provisions of Art. 87 of the Constitution apply, placing ratified international agreements among universally binding sources of the Polish law. Furthermore, such agreements will be directly¹³ applicable, having - it

10 Cf.: Zbigniew Leoński, *Wprowadzenie*, in *EUROPEIZACJA PRAWA ADMINISTRACYJNEGO*, 13 (WROCLAW 2005).

11 John Borneman and Nick Fowler, *Europeanization*, 26 *ANNUAL REVIEW OF ANTHROPOLOGY* 487, 488 (1997).

12 *Journal of Laws of 1997*, No. 78, item 483 (Pl).

13 An interesting approach in the context of the European Union law to direct application of this law was introduced by the European Court of Justice in *Administration of State Finance v. Simmenthal SpA*. In its view this means that the provisions of this law

should be stressed - precedence over an act in the event of a collision with it (Art. 91 para. 1 and 2 of the Constitution). The result is that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community adopted on 13 December 2007,¹⁴ constituting the foundation of today's European Union, will enjoy on the ground of Polish law the so-called precedence over an act, referred to as "the principle of the primacy of international agreements." It gives it a special position and rank in the legal system.

Things are slightly different when it comes to secondary legislation. Here (being aware of a certain simplification) one should mention - as its forms of a binding nature - directives, regulations and decisions. A catalogue of these acts does not bear too much significance from the point of view of the Polish Constitution. It has already been stated that the applicability of the law of international organizations stems from its provisions. According to Art.91 para. 3 of the Constitution, if it results from an act constituting an international organisation, the law applied by it is applied directly, also having precedence in the event of a collision with laws. The provisions in question thus give the possibility of applying secondary legislation of the European Union - in constitutional terms understood as the law of an international organization.

The discussed provisions of the Polish Constitution fully correspond to the previously cited way of understanding the processes of Europeanization. They provide for the possibility of direct application of, for example, directives as acts of EU secondary legislation, opening in a sense the national legal order to its Europeanization. Hence rather obvious seems a view that the above outlined formal aspect of this phenomenon has its own normative dimension, expressed by the provisions of the Constitution as the basic law.

have full power uniformly in all Member States. The directly applicable laws are the source of rights and obligations for all those that are concerned. See: Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA.*, 1978 E.C.R.00629.

14 Journal of Laws of 2009, No. 203, item 1569 (Pl).

DIRECTIVE ON CONSUMER ADR

The European Union law affects many aspects of public life. As emphasized above, from the point of view of citizens most noticeable are changes in those areas of law that affect them directly.¹⁵

Such an area of life is certainly consumer law as not only are we all consumers, but above all, provisions covered by the scope of this field form an important part of EU law. Through its regulations, and secondary legislation in particular,¹⁶ the Polish law has changed (and is still changing).¹⁷ Therefore, at the outset already it is worth highlighting that major changes in the law of competition and consumer protection occurred in Poland under the influence of EU legal achievements, referred to as *acquis communautaire*. Already during its membership in the European Communities (since 1992), and then in the European Union, Poland began the process of harmonizing its legislation with EU regulations.

15 BeataBieńkowska&DariuszSzafrąński, *Wprowadzenie*, in *EUROPEIZACJAPRAWAPOLSKIEGO – WYBRANEASPEKTY*, VII (BeataBieńkowska&DariuszSzafrąński eds., Warszawa 2007).

16 Only as a way of signalling, See: Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002 O.J. (L 271), 0016.; Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts, 2009 O.J. (L 33), 10.; Commission Delegated Regulation (EU) No 1155/2013 of 21 August 2013 Amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the Provision of Food Information to Consumers as Regards Information on the Absence or Reduced Presence of Gluten in Food, 2013 O.J. (L 306) 7.; Commission Implementing Regulation (EU) No 828/2014 of 30 July 2014 on the Requirements for the Provision of Information to Consumers on the Absence or Reduced Presence of Gluten in Food, 2014 O.J. (L 228), 5.; Commission Decision of 14 September 2009 Setting up a European Consumer Consultative Group, 2009 O.J. (L 244), 21.; Commission Implementing Decision of 24 January 2013 Adopting Guidelines for the Implementation of Specific Conditions for Health Claims Laid Down in Article 10 of Regulation (EC) No 1924/2006 of the European Parliament and of the Council, 2013 O.J. (L 22), 25.

17 The issues of consumer rights gained particular importance with the moment of introduction in Poland in 1989 of political changes introducing principles of the market economy in place of the former so-called centrally planned economy, characteristic of socialist countries of this part of Europe. The first law relating directly to these issues was passed already after regime transformations in Poland, dated 24 February 1990 and was devoted to counteracting monopolistic practices, *Journal of Laws* of 1997, No. 49, item 318 as amended (Pl).

The main impact on these regulations has been and is to this day held by secondary legislation, particularly directives. It is them that should be assigned the status of legislation by which Europeanization of the Polish law is carried out most fully, not only in the area of consumer and competition protection, but also, evaluating the overall process, from the perspective of other branches of the law. This is due to their nature, since by binding Member States of the European Union as regards the aim they grant them the freedom to choose methods and forms of its implementation.¹⁸ What is particularly important is the fact that states have an obligation to adapt their legislation to the provisions of the Directive within the deadlines specified in directives.

The above assumptions concerning directives in general are apparent in the Directive on consumer ADR which is the subject of this study. Its transposition into a domestic legal order has been determined by the provisions of Art. 25, which imposed on Member States an obligation to bring into force statutory, executive and administrative provisions necessary to implement said Directive – no later than 9 July 2015.

At the core of the adoption of this act (and designation of the relatively short implementation period) lay the recognition of the need for action in EU countries, aiming to ensure effective functioning of the system of alternative - in relation to common courts of law - methods of resolving disputes concerning consumers. The need for this type of action arose from a critical assessment of both the existing legal solutions and the practice of their application.

The search for an alternative to the common judiciary - not only costly from the point of view of states, but also not always fully available (if only

18 Their status is defined by the provisions of Art. 288 of the Treaty on the Functioning of the European Union in the version established by the previously cited Treaty of Lisbon. In addition, the European Court of Justice in its case law has determined the character of directives numerous times. *For example, see:* Case 148/78, Criminal proceedings against Tullio Ratti, 1979 E.C.R. 01629; Case 8/81, Ursula Becker v Finanzamt Münster-Innenstadt, 1982 E.C.R. 00053; Case C-271/91, M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority, 1993 E.C.R. I-04367.

because of the numerous court fees and costs imposed on natural and legal persons) - prompted the European Union to put pressure on extra-judicial (out-of-court) consumer dispute resolution. The process of changes of Polish legislation put into motion by the ADR Directive seeks to achieve objectives expressed in it. An important role in terms of developing the concept of implementation of the provisions of the ADR Directive fell on a key - in the Polish political system - body: the President of the Office of Competition and Consumer Protection.

This is reflected in Information containing a description of the implementation variants of Art. 5 of the Directive in question,¹⁹ annexed to his letter of 9 April 2014. In accordance with its content, "activities of various bodies settling disputes in a way alternative to court litigation is an important complement and relief for the common judiciary and should be developed as it provides consumers with more complete access to a broadly understood administration of justice. Such a tool gives them an opportunity for a quick and inexpensive resolution of disputes arising from transactions commonly concluded in everyday life".

Given that the ADR system in Poland is based on two basic forms (arbitration mainly in consumer cases and mediation) and is not greatly developed, provisions of the Directive in question definitely have a significant character. Its goal is not only an extension, but also strengthening and giving greater effectiveness to the ADR system applicable to domestic and cross-border transactions. This is to serve - in accordance with Art. 1 of the Directive – the achievement of a high level of consumer protection and thereby contributing to the proper functioning of the internal market by providing consumers with the possibility of voluntary filing of complaints against traders to entities offering independent, impartial, transparent, effective, quick and fair methods of alternative dispute resolution.

19 The Office of Competition and Consumer Protection, www.uokik.gov.pl/download.php?id=1138, (last visited August 30, 2014).

The Directive - making a preliminary assessment of its provisions - quite generally defines the responsibilities assigned to Member States, leaving them freedom in the shaping of the ADR system. The most important duties are those concerning:

1. facilitating consumer access to ADR proceedings and providing opportunities to bring disputes before this method of dealing with them (Art. 5 of the Directive),
2. ensuring that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial (Art. 6 of the Directive),
3. ensuring transparency of functioning of ADR (Art. 7 of the Directive),
4. ensuring effectiveness of ADR (Art. 8 of the Directive),
5. ensuring fair treatment of parties (Art. 9 of the Directive),
6. ensuring voluntariness of proceedings (Art. 10 of the Directive),
7. ensuring legality of proceedings (Art. 11 of the Directive),

In the context of provisions of the ADR Directive it should be noted that in Poland the process of implementing its provisions has not yet been completed. And although appropriate legislation has not adopted, one can safely assume that Poland, conducting the implementation of the provisions of the Directive into a domestic legal order, has chosen the so-called mixed variant. This means that the ADR system will be based on both "business and public entities". The adoption of this model seems to be the golden mean which gives wide possibilities to consumers pursuing claims arising from violations of their rights. The ADR system - which is the intention of the Directive – being a viable alternative to the common judiciary, based on the cooperation of business and public entities, will form a coherent and functional structure. Given that the corresponding target must be achieved in other European Union countries, it can be assumed that the actual protection of consumer rights will gain a level of security higher than before.

This level becomes particularly important in the face of noticeable internationalization of social life, expressed even in the increase in the number of cross-border transactions. Standardization of legal provisions in Member States will therefore result in an increase in consumers' sense of security in the conducted trade transactions. This in turn will translate into the implementation of free movement of goods and capital, and thus the implementation of fundamental freedoms of the single internal market in the European Union.

SUMMARY

The analysis conducted in this paper showed beyond any doubt that the increase in real consumer protection results mainly thanks to the implementation of the EU legal acquis on the ground of domestic legal orders. The Europeanization of the Polish law thus taking place through legislative activities of this international organization is of fundamental importance. It is reflected in a number of dimensions. And therefore:

1. In the context of the genesis of legal regulations serving the protection of consumers' rights in Poland, one can clearly state that the laws dedicated to this social group would not be as prevalent had it not been for the fact of "forcing" by the European Union of certain legal regulations on their Member States. It is to this international organization that Poland owes its present shape and normative scope of regulations making up the consumer protection law.
2. As already signalled, the process of Europeanization through the provisions of the ADR Directive has been launched in Poland and the search for an appropriate and optimal model of implementation of the provisions of the ADR Directive shows that Poland is not indifferent to its course of development. The directory of changes imposed by the scope of provisions of the Directive in question, of fairly fundamental importance, will certainly result in the strengthening of the role and importance of methods of alternative resolution of consumer disputes.

Because the process of Europeanization in this area is not complete yet, we cannot make a univocal assessment of its progress. But certainly, not only will the ADR Directive bring about change on the line of the European Union and its Member States, but it will also affect Member States in their mutual relations. This in turn will result in the fact that when concluding trade transactions in other EU countries we will feel safe as consumers.