



Emerging Markets:

A Review of Business and Legal Issues

VOLUME 3 | No 1 | May 2011

Articles:

- ❖ **Ukrainian Agrimarket: On the Eve of Reforms**
by Olena Kibenko and Olena Parkhomenko
- ❖ **International Financing of Ukrainian Business: Legal Insight**
by Olena Kibenko and Anton Zinchuk
- ❖ **Solving the conflict of interests – of the public interest and citizens' legitimate interest – as regards administrative restrictions and administrative police, using selected norms of the Polish Code of Administrative Procedure as an example**
by Tomasz Sienkiewicz
- ❖ **Constitutional regulations on freedom of speech and the penalty itself under the Penal Code in Poland** *by Krystyna Warylewska*

Emerging Markets: A Review of Business and Legal Issues

WWW.KENTLAW.EDU/EMERGINGMARKETS

The purpose of the journal is to provide forum for international, interdisciplinary work on the business and legal issues confronting emerging markets.

The journal combines theoretical soundness and practical relevance. The articles guide policy makers while also advancing theoretical understanding.

Editorial Board

Richard Warner

Editor In Chief
Professor of Law
Faculty Director, Center for Law and Computers
Chicago-Kent College of Law
Visiting Foreign Professor, Director School of American Law, University of Gdańsk, Poland
Director, School of American Law, University of Wrocław, Poland;
Director, School of American Law Kharkiv
rwarn@kentlaw.edu

Agnieszka Cenzartowicz

Senior Associate Editor
Adjunct Professor
Chicago-Kent College of Law
cenzartowicz@emresearchers.org

Tomasz Gulla

Senior Associate Editor
Editor In Chief Printpol.pl (legal-insurance service)
Editor In Chief European Center for Combating Insurance Fraud (ECCIF)

Dr Igor Osyka

Associate Editor
Senior Lecturer, Kharkiv University of Economics and Law

Igor Solodovnik

Associate Editor
Adjunct Professor
Chicago-Kent College of Law

Lukasz Grzejdzia

Associate Editor

Publisher:

Emerging Markets Review

ISSN



2082 9191 >

Advisory Board

Edward Carter

Assistant Illinois Attorney General
Supervisor of the Financial Crimes Prosecution Unit
Adjunct Professor of Law
Chicago-Kent College of Law, Chicago

Anna Fornalczyk

Partner - Założyciel
COMPER
Fornalczyk i Wspólnicy

David Gerber

Distinguished Professor of Law
Co-Director of the Program in International and Comparative Law
Chicago-Kent College of Law

Henry Peritt, Jr.

Professor
Director of the Graduate Program in Financial Services Law
Chicago-Kent College of Law

Wojciech Rogowski

Expert, Economic Institute
National Bank of Poland
Assistant Professor
Warsaw School of Economic

Judge Dariusz Sielicki

Ministry of Justice, Warsaw
Adjunct Professor of Law
Chicago-Kent College of Law, Chicago

Jarosław Warylewski

Professor
Dean of Law and Administration Faculty, University of Gdańsk, Poland
Chair of Substantive Criminal Law and Forensic Psychiatry

Disclaimer: Statements of fact and opinion in the articles in Emerging Markets Review are those of the respective authors and contributors and not of the Emerging Markets Review. Emerging Markets Review make any representation, express or implied, in respect of the accuracy of the material in this journal and cannot accept any legal responsibility or liability for any errors or omissions that may be made. The reader should make her or his own evaluation as to the appropriateness or otherwise of any experimental technique described. They are put forward to stimulate discussion.

Cover design & Photo: Tomasz Gulla

CONTENTS

Articles:

Ukrainian Agrimarket: On the Eve of Reforms <i>by Olena Kibenko and Olena Parkhomenko</i>	4
---	---

International Financing of Ukrainian Business: Legal Insight <i>by Olena Kibenko and Anton Zinchuk</i>	10
--	----

Solving the conflict of interests – of the public interest and citizens' legitimate interest – as regards administrative restrictions and administrative police, using selected norms of the Polish Code of Administrative Procedure as an example <i>by Tomasz Sienkiewicz</i>	16
---	----

Constitutional regulations on freedom of speech and the penalty it self under the Penal Code in Poland <i>by Krystyna Warylewska</i>	39
--	----

Olena Kibenko, Olena Parkhomenko

Authors: **Olena Kibenko** is the Senior Partner with ILF (Inyurpolis Law Firm). Areas of expertise: Corporate/M&A, International Finance and Capital Markets, Agribusiness and Business Restructuring. Ms. Kibenko serves as an advisor to the Securities and Stock Market Commission of Ukraine.

Olena Parkhomenko is a Senior Attorney with ILF (Inyurpolis Law Firm). Areas of expertise: Corporate/M&A, Taxes, Antitrust & Competition. Possesses substantial experience in restructuring of business, tax planning and optimization.

Ukrainian Agrimarket: on the Eve of Reforms

Appeal of Agrimarket for Foreign Investors: Facts

From a number of Ukraine's economy industries agribusiness is obviously the most attractive one for foreign investors. In 2009, in the thick of the financial crisis, Ukrainian agrarian companies managed to attract more than 12% of the world investments. Fitch Ratings predicts that in 2010-2012 capital investments in Ukrainian agrarian sector will constitute approximately USD 1.87 billion.

Ukrainian government also considers agrarian sector to be one of the main in the economy of the state. What is more, Ukraine plans to enter the TOP-5 world leading agrarian economies. For this purpose government intends to undertake a whole number of significant reforms.

Public Agrarian Sector: Concentration and Privatization

Today about 500 state companies are subordinated to the Ministry of Agrarian Policy and Foods of Ukraine. Performance of these companies cannot be deemed satisfactory. Most of them are unprofitable; their concerns are used on different legal grounds by private companies. Sometimes the usage is conducted without a good reason or with substantial breach of economic interests of the public companies. The same applies to the land plots owned by these public companies. What is more, quite often, publicly owned assets and land plots are alienated not in compliance with the law or on unfavorable terms. The Ministry is not capable to efficiently control and manage such number of companies. As of 1 December 2010 one fifth of the companies subordinated to the Ministry undergo bankruptcy procedures.

Meanwhile, many of these companies may be very attractive for the foreign investors. Unfortunately, their privatization is blocked due to undeveloped legislation and numerous

restrictions on privatization (about 40% of the state agrarian companies are prohibited for privatization).

It is planned that three strategies will be applied in respect of the state agrarian companies. Some of them will be privatized, some kept in public ownership, and some liquidated. Currently, the draft law, which will allow privatization of many state companies of the industry, is being developed. However, it would not be enough just to abolish restriction on privatization. To make the process effective it is necessary to make amendments to a number acts of legislation, notably the Act of Ukraine “On Peculiarities of Property Privatization in Agro-Industrial Complex” dated 10 July 1996 No.290/96-BP and the Act of Ukraine “On Privatization of State Property” dated 4 March 1992 No.2163-XII.

In 2010 the Ministry of Agrarian Policy of Ukraine actively conducted concentration (consolidation of the industry companies into concerns or fusion into one state company) of the subordinated state companies, which will be continued in 2011. This concentration is aimed to improve the Ministry’s possibilities to manage the companies, as well as to prepare some of them for subsequent privatization.

As a result of such concentration the following consolidating entities have already been established:

- **State Company “UKRSPIRT”**, which consolidated 46 active companies and will additionally receive the assets of 32 bankrupt companies;
- **State Company “State Foods and Grain Corporation of Ukraine”**, which will be the owner of the liquid assets of the State Joint-Stock Company “Khlib Ukrainy”; as of today the Corporation already consolidates 36 companies and subsequently 13 more will be included.

In 2009 was established the **State Concern “National Agro-Industrial Association “Masandra”**, which consolidated 8 state companies of winemaking industry. The Concern was established as a result of reorganization of the National Agro-Industrial Association “Masandra”

in accordance with the government Resolution dated 9 September 2009 No.972 and is subordinated to the Cabinet of Ministers of Ukraine.

In addition, the following concerns are in process of establishment: “AGROLIS”; “Derzhvynprom”; «Land Fund»; «Ukrvetsanzavod»; «Horse Breeding of Ukraine». In case the concentration is successfully completed, about 10% of the state agro-companies will stay free-floating.

Land Issues

Ukraine cannot become one of the world’s leading agrarian economies until the issue of agricultural land is resolved. It covers abolition of the moratorium on alienation of agricultural land, inventory of lands and establishment of the State Land Cadastre. To do that the following acts need to be adopted: the Act of Ukraine “On the State Land Cadastre”, the Act of Ukraine “On Circulation of Agricultural Lands”, the Act of Ukraine “On the State Fund of Agricultural Lands”, and the Act of Ukraine “On Inventory of Land”. The drafts of these Acts have already been prepared by the Ministry of Agrarian Policy and Foods of Ukraine and there is a chance that a great land reform will be launched in 2011. Some preconditions for this have also been created. In particular, under the administrative reform initiated by Ukraine’s President in December 2010 the State Committee for Land Resources was transformed into the State Agency for Land Resources and subordinated to the Ministry. Following the governmental program of economic reforms, the land reform is expected to be accomplished by the end of 2012.

Tax Reform

On 1 January 2011 came into effect the Tax Code of Ukraine, which substantially changed the play rules for some businesses. Among the most significant changes are: i) decrease of corporate income tax rate from 25% to 16% and of VAT from 20% to 17%; ii) tax holiday for small businesses; iii) temporary moratorium on corporate income tax for some industry-specific businesses (e.g. agro-machinery construction companies, companies producing energy from renewable sources, etc.).

Generally, adoption of the Tax Code has not materially influenced on agro-businesses, due to the majority of them are payers of the fixed agricultural tax.

Fixed Agricultural Tax

Since 1998 agro-companies may apply privileged taxation regime, which implies payment of the fixed agricultural tax. Payers of the tax are exempt from some taxes payable by the regular taxpayers (e.g. corporate income tax, land tax, municipal tax, fee for trading patent, etc.). Another advantage of this regime is that the amount of the tax to be paid depends on the assessment of the agricultural lands owned by the taxpayer made on 1 July 1995. The tax rate maybe 0.03-0.45% of the land assessment and does not depend on the amount of a company's income.

The principal requirement for a company to become a payer of the fixed agricultural tax is that the amounts received from realization of its own agricultural produce and processed produce for the previous reporting year must exceed 75% of the company's gross income. Tax Code did not introduce any substantial amendments to the fixed agricultural tax regime. All the amendments made are of cosmetic character.

VAT

Amendments to the VAT regulations introduced by the Tax Code are of great concern for the dairy and meat industry companies. Formerly dairy and meat producers, as well as processing companies enjoyed certain privileges on VAT payment, notably:

- i) Supply by producers of milk and live weight meat to processing companies were exempt from VAT.
- ii) VAT amounts received by processing companies from milk and meat realization were subsidized to the producers. The said amounts were transferred to a special account of a producer or paid in cash. Producers had to use the subsidy in accordance with the set purpose designation.

- iii) VAT amounts received by agricultural producers from realization of milk, cattle, poultry, etc., produced in their own processing subdivisions could be forwarded for maintenance of production facilities

Tax Code introduced 2 VAT regimes (regular and special), which the agricultural companies may choose.

The companies, which choose special VAT regime, are authorized not to pay VAT amounts to the budget. They are accumulated on a special account opened under the procedure set by the Cabinet of Ministers and can be used by the company to compensate the VAT paid to the suppliers and the rest for other needs of the company.

Agricultural companies, which are regular VAT payers, are authorized to use the VAT funds received from realization of their own milk, cattle, poultry and wool, as well as from realization of dairy produce, raw milk produce and meat foods produced in their own processing subdivisions, for maintenance of the production facilities.

However, until 1 January 2015, the VAT amounts payable by the processing companies to the state budget from realization of milk, raw milk produce and dairy produce, meat and meat foods, and other products of processing of cattle, purchased on live weight, will be accumulated in a special budget fund. The procedure for calculating, payment and use of these amounts shall be determined by the Cabinet of Ministers. As of today such a procedure has not been approved.

Olena Kibenko, Anton Zinchuk

Authors: Olena Kibenko is the Senior Partner with ILF (Inyurpolis Law Firm). Areas of expertise: Corporate/M&A, International Finance and Capital Markets, Agribusiness and Business Restructuring. Ms. Kibenko serves as an advisor to the Securities and Stock Market Commission of Ukraine.

Anton Zinchuk is a Senior Attorney with ILF (Inyurpolis Law Firm). Areas of practice: Corporate/M&A, Capital Markets. Mr. Zinchuk is experienced in due diligence, business restructuring, and support of foreign investments.

International Financing of Ukrainian Business: Legal Insight

10 years ago words “Eurobonds”, “IPO”, “syndicated loans”, etc. were known in Ukraine for most only to the experts and the relevant instruments were very rarely used to finance national businesses. However, rapid development of Ukrainian companies in 2002-2007, permanent need for the funds to enter new markets and implement new projects, caused the demand for the new external sources of financing. This became especially crucial in the course of the financial crisis.

Financial Instruments: Facts and Trends

What are the instruments commonly used by international creditors to finance Ukrainian companies? Large companies usually attract funds via international loans, including syndicated loans, issue of Eurobonds and IPO. According to the analysts in 2005-2010 Ukrainian companies managed to attract about USD 3.2 billion on the foreign stock exchanges. The commonly chosen platforms for placement are AIM of the London Stock Exchange, Frankfurt Stock Exchange and Warsaw Stock Exchange (WSE). The last exchange is especially popular with Ukrainian agro-companies. To add, experts consider placements of Ukrainian companies on the WSE as the most effective.

Mid-sized companies, as a rule, attract funds via international loans, including loans through sale of shares under obligation on subsequent buyout.

In 2010 a Ukrainian mid-sized company AGROLIGA successfully completed private placement on the NewConnect, an alternative trading platform of the WSE, and attracted USD 1.3 million. This was the first Ukrainian company to enter this platform but experts believe that in a few years NewConnect will become the leading platform for small and middle Ukrainian companies.

The principal peculiarity of financing Ukrainian businesses by foreign creditors is that the funds are provided by the creditor to the borrower directly only via loans and direct purchase of stocks. Funds attracted via IPO, private placement or Eurobonds issue, are first accumulated on the account of the holding SPV (special purpose vehicle), established in EU or offshore jurisdiction. Ukrainian company receives funds from the SPV as contribution to the registered capital, or loan on favorable terms or on other legal grounds.

International Loans

Loans are among the most efficient instruments to finance business in Ukraine. Tax Code of Ukraine dated 2 December 2010 No.2755-VI, as well as formerly effective Act of Ukraine “On Corporate Income Tax” dated 28 December 1994 No. 334/94-BP, prescribes that the funds receivable by Ukrainian companies as loans or credits are not included to their taxable income and, therefore, do not cause increase in their tax obligations. Meanwhile, the amounts payable to return the loan do not fall within the company’s gross expenses, except for the interest amounts, and cannot be offset against its corporate income tax liabilities.

In addition, international loans are strictly supervised and regulated by the government. If a Ukrainian company obtains a loan, from a foreign company, the loan agreement, whatever law is chosen by the parties as applicable, will be subject to compulsory requirements of the National Bank of Ukraine (NBU). Such requirements are determined by the Resolution of the NBU Managing Board “On Approval of the Regulations for the Procedure of Obtaining by Residents of Loans in Foreign Currency from Non-Residents, and Granting Loans in foreign Currency by Residents to Non-Residents” dated 17 June 2004. In accordance with the Resolution loan agreements made with non-residents are subject to registration with NBU and become valid and binding upon the parties thereto not earlier than the registration date. Any material amendments to the agreement (e.g. loan period, interest rate, etc.) must be registered with NBU as well. Registration of the agreement is confirmed by the Registration Certificated issued by the NBU, and of the amendments to the agreement by the Addendums to the Certificate. In case a company obtains the loan without the said registration, a fine in the amount of 1% of the loan may be imposed upon the company.

What is more, NBU is authorized to establish obligatory maximum interest rates for the loan agreements with non-residents. The maximum interest rate for a specific agreement depends on the loan period. For the short-term loans (not more than 1 year) the maximum interest rate is 9.8%, for mid-term loans (1-3 years) the rate is 10%, and for the long term loans it constitutes 11%. These rates include not only the interest amounts but also any other payments to be made by the borrower in favor of the lender under the agreement (e.g. penalties, commissions and so forth), which imposes substantial limitation upon the possibilities of the lender to apply financial penalties in case of agreement violation.

IPO/Private Placement/Eurobonds

Formally, legislation of Ukraine does not prohibit national companies to place their shares and bonds directly on the foreign exchanges and trading platforms. However, as of today neither Ukrainian company has direct listing of its shares or bonds abroad. The reason for that are the requirements of the State Commission for Securities and Stock Market (SCSSM) in respect of the issuers and the terms of their placement abroad. Under the Act of Ukraine “On Securities and Stock Market” dated 23 February 2006 No.3480-IV Ukrainian companies intending to place their shares or bonds abroad are required to obtain the Permit from SCSSM. The procedure and terms for obtaining the Permit are regulated by the SCSSM Resolution dated 17 October 1997 No.36. The Resolution determines that the SCSSM Permit for circulation of the shares and bonds abroad is granted to the national issuers, registered capital of which constitute at least UAH 5 million (approximately USD 625 thousand). This requirement is out-of-date and does not create any guarantee for financial status of Ukrainian issuers. Ukrainian laws establish that if under the results of the second and any subsequent financial year value of a company’s net assets appears to be less than the registered capital amount, the company is obligated to decrease its registered capital. If the value of the net assets becomes less than the minimum registered capital, then the company is subject to liquidation. However, in practice these provisions are not complied with due to the state agency authorized to supervise the compliance is not determined and the liability for non-compliance is not prescribed by the law.

Furthermore, in accordance with the Resolution the volume of foreign placement may not exceed 25% of the issuer's registered capital and registration of rights to the securities must be conducted under the regulations of Ukrainian laws on depositary system. The last requirement is especially inconvenient for the foreign creditors/investors because as of today they have to keep their securities with Ukrainian custodians and have no possibility of distant access and management of the account.

Because of the abovementioned and some other restrictions introduced by the legislation of Ukraine shares and Eurobonds of Ukrainian companies are not placed directly. As a rule, international creditors finance Ukrainian businesses through purchase of shares and Eurobonds issued by holding companies established in the EU countries (Cyprus, Luxembourg, etc.) or off-shore jurisdictions with developed legislation.

Purchase of Corporate Rights

Often international creditors finance Ukrainian businesses through purchase of stocks in Ukrainian companies under the borrower's obligation on subsequent buyout. This method gives a creditor the possibility to influence the company's activity and, therefore, makes substantial collateral. However, in most cases the creditors prefer to have in place as an additional security shareholders agreement, which is subordinated to foreign laws.

However, there are some regulations in Ukrainian legislation and court practice, which a potential creditor should carefully consider before entering such an agreement. First, shareholders agreements are allowed only for the members of the joint-stock companies but not the limited liability companies. Second, in accordance with the Act of Ukraine "On Joint-Stock Companies" dated 17 September 2008 No.514-VI the shareholders are authorized to make only agreements that may cause additional obligations for the shareholders in respect of the company and liability for breach thereof, and provided that such possibility is prescribed by the company charter. Third, on 24 October 2008 the Supreme Court of Ukraine adopted the Resolution "On the Practice of Corporate Disputes Resolution" No.13, which prohibits the shareholders to choose foreign law as applicable for the agreements between them or to subordinate resolution of

the corporate disputes to international arbitrages. Though the Resolution has no force of law, formally it is obligatory for Ukrainian courts.

Tomasz Sienkiewicz

Author: Tomasz Sienkiewicz - Ph.D. in Laws, Assistant Professors at the Chair of Administrative Law, Off-Campus Faculty of Legal and Economic Sciences of the John Paul II Catholic University of Lublin in Tomaszów Lubelski, legal advisor. Author of books and articles on the rights of the disabled and administrative law.

Contact: sienkiewicz@kul.pl

Solving the conflict of interests – of the public interest and citizens’ legitimate interest – as regards administrative restrictions and administrative police, using selected norms of the Polish Code of Administrative Procedure as an example

The fact that a man is a social being triggers numerous social interactions and related legal problems. As pointed out by M. Zdyb: “a man not only lives in a certain natural environment, but also goes beyond natural reality and enters the world of relationships and interpersonal relations created by people, social bonds and roles, common experiences and values representing the culture of a given community, products of human actions – that is social reality. As rational beings, aware of their rationality, and at the same time their subjectivity, if aspire to strengthen their humanity, men must be open to society together with its interpersonal, prescribed relations and hierarchy of values, which they acknowledge or accept. Adoption (or fulfilment) of a given social role must assume existence of a certain system of values between this subject and other persons of a given social system.”¹ Relations with the society force an individual to adapt to a certain degree to the standards of this society.² Men participating in social life limit to a certain degree their freedom not to cross the limits of freedom of others. In the social context men’s freedom is not something granted, but it is a task to be fulfilled. It allows one to objectivise individual interests.³ Administrative restrictions and administrative police constitute areas in which such boundaries are determined authoritatively. As M. Zdyb argues “An individual may have legal interest, which refers to freedom only when the existence of freedom is related to certain legal norms, e.g. the norms which determine legal limits of

¹ M. Zdyb, *Prawny interes jednostki w sferze materialnego prawa administracyjnego. Studium teoretyczno-prawne*. Lublin 1991, p. 18.

² Vide ibidem, p. 18.

³ Cf. ibidem, p. 21.

freedom.”¹ If the legislator provides for protection of certain freedom, they must at the same time provide for protection of such a system of social relations so that freedom of one subject does not destroy freedom of other subjects.² A graded system of mutual compromise created in this way allows one to find the best solution possible. It should be pointed out that public administration, when performing acts in the scope of administrative restrictions or administrative police³, is meant to optimize as far as possible individual or public interests. It creates compromise between subjects that are, in a sense, external towards it. But it should not be both a recipient of benefit brought by compromise and arbitrator determining authoritatively necessary concessions, rights and obligations of parties to administrative and legal relations. As emphasized by J. Boć “Interests as prerequisites for administrative interference constitute values which are always external towards administration bodies, which means that such bodies have only tasks and competences, but do not have their own interests. Within the scope of such tasks and

¹ Ibidem, p. 68.

² Vide ibidem., p. 223.

³ To learn more about restrictions on economic freedom vide: J. Boć (ed.), *Prawo administracyjne*. Wrocław 2007, pp. 355-356; A. Chajbowicz, *Antyczne korzenie policji administracyjnej i działalności policyjnej*. [in:] A. Błaś, K. Nowacki (ed.) *Współczesne europejskie problemy prawa administracyjnego i administracji publicznej*. W 35. rocznicę utworzenia Instytutu Nauk Administracyjnych Uniwersytetu Wrocławskiego. Wrocław 2005, p. 107; K. Klecha, *Wolność działalności gospodarczej w Konstytucji RP*. Warszawa 2009, p. 169 et seq.; T. Kocowski, *Akty bieżącego nadzoru reglamentacyjnego* [in:] L. Kieres (ed.) *Środki prawne publicznego prawa gospodarczego*. Wrocław 2007, p. 71 et seq.; T. Kocowski, *Reglamentacja działalności gospodarczej w polskim administracyjnym prawie gospodarczym*. Wrocław 2009; C. Kosikowski, *Koncesje w prawie polskim*. Kraków 1996; C. Kosikowski, *Prawo gospodarcze publiczne*. Wydawnictwo Naukowe PWN, Warszawa 1994, pp. 121-122; C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*. Warszawa 2008, pp. 153-157; C. Kosikowski, *Wolność gospodarcza w prawie polskim*. Warszawa 1995, p. 73 et seq.; C. Kosikowski (ed.), *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji*. Warszawa 2005, p. 44 et seq.; G. Kowalski, “Ludzka twarz” swobody gospodarczej w konstytucji Rzeczypospolitej Polskiej. [in:] B. Kościak, M. Sławińska (ed.), *Człowiek a koncepcja zrównoważonego rozwoju*. Warszawa 2009, p. 24 et seq.; J. Oniszczyk, *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne*. Warszawa 2005, p. 59; Z. Szażyk, A. Szafranski, *Publiczne prawo gospodarcze*. Warszawa 2009, pp. 105-115; T. Sienkiewicz, *Nowe podejście do zamówień publicznych szansą likwidacji ukrytych form administracyjnej reglamentacji w dostępie do rynku zamówień publicznych* [in:] B. Uliasz (ed.), *Nowe podejście do zamówień publicznych*. Warszawa 2010, pp. 184-185; T. Sienkiewicz, *Administracyjna reglamentacja chronionego rynku pracy* [in:] B. Pietrulewicz, M. A. Paszkowicz, H. Ochonczenko, (ed.), *Osoby z niepełnosprawnościami na współczesnym rynku pracy. Przygotowanie zawodowe*. Zielona Góra 2008, pp. 67-68; M. Szydło, *Swoboda działalności gospodarczej*. Warszawa 2005, p. 206 et seq.; M. Waligórski, *Administracyjnoprawna reglamentacja działalności gospodarczej*. Poznań 1994, p. 27; M. Waligórski, *Nowe prawo działalności gospodarczej. Podręcznik akademicki*. Poznań 2001, p. 206 et seq., 377-396; S. Wrzosek, R. Biskup, *Wolność gospodarcza w nauczaniu Jana Pawła II*. [in:] T. Guz, M. Kuć, (ed.), *Ius et fides. Księga jubileuszowa z okazji siedemdziesiątych urodzin Profesora Jana Świtki* Lublin 2006, p. 293; M. Wierzbowski, M. Wyrzykowski (ed.) *Prawo gospodarcze. Zagadnienia administracyjnoprawne*. Warszawa 2005, pp. 66-80; M. Zdyb, *Publiczne prawo gospodarcze*. Kraków-Lublin 1997, p. 143 et seq.

competences they exercise certain interests, but they are always someone else's interests. Thus, they act as arbitrators (not creators), which points to objectivity of such interests"¹. It should also be noted that there are situations in which one public administration body has legal interest in dealing with a matter by another administration body, e.g. when it applies for construction permits as an investor.²

When beginning to discuss individual legal interest, as regards administrative restrictions and administrative police, attention should be drawn to the fact that the term "interest" itself is ambiguous.³ It is a term of the legal language. The essence of public interest and citizens' legitimate interest is juxtaposed, for example, in Article 7 of the Code of Administrative Procedure⁴: *In the course of the proceedings public administration bodies shall safeguard the rules of law and shall undertake any steps necessary to precisely determine the facts of the case and to settle the matter, taking into consideration public interest and citizens' legitimate interest.* Thus, in practice legal interpretation of the terms: "public interest" and "citizens' legitimate interest" will be decisive for the scope of administrative restrictions, as the nature of restrictions themselves often gives rise to discrepancies between these two interests.⁵ Administrative restrictions constitute an area in which the state attempts to combine two interests – community interest and individual interest, in particular when they are not identical.⁶ Due to the fact that benefit can be graded⁷, to some degree it is possible to reconcile two contradictory interests in the restrictive actions. According to M. Zdyb, when the legislator leaves the public administration body freedom of evaluation, this freedom imposes on the body "a necessity to explore the essence of a colliding phenomenon, taking into consideration all necessary circumstances and referring to those values, which cannot be expressed precisely by law,

¹ J. Boć (ed.), *Prawo...*, p. 21.

² Vide K. Chorąży, W. Taras, A. Wróbel, *Postępowanie administracyjne, egzekucyjne i sądowo administracyjne*. Zakamycze 2004, p. 54.

³ M. Zdyb, *Prawny interes jednostki...*, p. 10 et seq.

⁴ Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego (consolidated text in Dz. U. Journal of Laws of 2000, No. 98, item 101, with later amendments).

⁵ Vide M. Zdyb, *Prawny interes jednostki...*, p. 228.

⁶ Vide ibidem, p. 19.

⁷ Vide ibidem, pp. 28-29.

including suprasystem values, which enable one to present more comprehensively the essence of certain social relations as well as individual personality and subjectivity.”¹

Terms such as “legal interest,” “citizens’ legitimate interest,” “public interest” are indeterminate terms, general clauses, the use of which in practice makes law become more flexible, making it possible to adjust a decision to a certain situation in a most just way. They make it possible to use preterlegal evaluations and rules.² Thus, for the purpose of this article we should attempt to define the term “interest.” Definitions of this term include definitions which point to the conflict of interests, which is most common in the case of administrative restrictions. As E. Samborska-Boć argues: “By interest we understand a certain motivational value disclosed or disclosing itself in the case of controversial coincidence of two behaviours displayed dependently at least by two subjects or groups of subjects.”³ Actual interest is characterized by considerable subjectivity. But it does not exclude overlapping with their objectivised vision. The essence of the term “interest” is defined from the angle of needs, since, as pointed out by M. Zdyb, “the essence of individual interest cannot be separated from the needs associated with it.”⁴ “Interest constitutes legal interest, when the problem of needs is considered within the framework of the existing legal norms, so within the framework defined by this and not another living structure of a certain reference system. Such a reference system decides that some individual needs are regarded as worth protecting in a certain system of values, and to interest based on them a defining adjective, e.g. legal or administrative and legal, is added (or not).”⁵ The essence of legal interest does not manifest egoistic feelings, needs, and values, but feelings, needs, and values objectivised by the legislator. “Thus, it can be said that in a given case legal interest as objective (objectivised) may be, in relation to some situations or phenomena, non-identical with individual actual interest and that, as a result, various relations between individual

¹ Ibidem, p. 41.

² Vide ibidem, p. 253; cf. B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa 2004, pp. 71-72.

³ E. Samborska-Boć [in:] J. Boć (ed.), *Prawo administracyjne*. Wrocław 2007, p. 20.

⁴ M. Zdyb, *Prawny interes jednostki..*, p. 22.

⁵ Ibidem, p. 23.

legal interest and individual actual interest in a given actual situation are possible.”¹ Thus, there may occur various situations, when, for example, legal interest does not coincide with actual interest, but it is contradictory or legally indifferent in relation to it or when legal interest is identical with actual interest.² As pointed out by Z. Leoński “legal interest within the meaning of the Code of Administrative Procedure means the existence of a relation between individual rights and obligations of a given subject and an administrative case, in which such rights and obligations can be specified. They are most often specified in an administrative decision issued as a result of a decision taken on a case.”³ According to Z. R. Kmiecik, demonstrating legal interest when demanding that administrative proceedings be instigated means that “there is a substantive law regulation which provides for dealing with a request filed by a person to the public administration body in the form of a decision regarding the essence, directed to the person submitting a request. Thus, substantive law must provide for the possibility to grant a right requested by a given person to this person and must provide for the form of a decision to deal with such a matter (to perform such an act).”⁴

The doctrine also contains views in favour of the broad meaning of the term “citizens’ legitimate interest.” Due to the fact that in Article 7 of the Code of Administrative Procedure the legislator introduced the term “citizen,” and not “party,” the public administration body has an obligation to take into consideration during the proceedings not only individual legal interests, but also individual actual interests. As pointed out by B. Adamiak “the term <<citizen>> means that the legislator does not narrow the protection to the protection of individual legal interest. If the legislator meant to protect only the party’s legal interest, it would not introduce the term <<citizen>>, but the term <<party>> in the regulation. Adopting such a scope for the term <<citizens’ legitimate interest>> is of utmost importance. Thus, an administrative decision may be related not only to the parties, but it may also affect other persons (individuals, organizational

¹ Ibidem, p. 32;

² Vide B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego...*, p. 72; M. Zdyb, *Prawny interes jednostki...*, pp. 32-33, 242.

³ Z. Leoński, *Prawo administracyjne*. Warszawa 2004, pp. 317-318.

⁴ Z. R. Kmiecik, *Postępowanie administracyjne i sądowniczoadministracyjne*. Zakamycze 2003, p. 98.

units). It is particularly important because substantive law does not offer protection to all persons that can be affected by legal actions of public administration bodies, and does not grant their interests the status of legal interests. An obligation to take into consideration also individual actual interests, when dealing with a case, constitutes a significant possibility of their protection for this category of interest.”¹

Due to the fact that the Code of Administrative Procedure differentiates between public interest and party’s legitimate interest, we should have a closer look at the context, in which the term “public interest” occurs. J. Boć points to several basic contexts in the Polish administrative law in which public interest (or corresponding particularly defined interest) may occur.² It may occur as:

- 1) a prerequisite for the issue of a general legal act by the administration body;
- 2) a prerequisite for the issue of a decision;
- 3) a value shaping a proper content of the decision;
- 4) a prerequisite for “undertaking certain groups of composite administrative actions based on a certain concept and practical goal, undertaken in a complex way and aimed at creating such organizational, material or legal conditions which, according to substantive law, are necessary for the exercise of citizens’ certain rights or obligations, accomplished by virtue of law or through an administrative decision, and such benefits or charges, which are applied in other legal forms.”³

Disharmony between individual and public interests may have various sources⁴, e.g. conflict of values, legislative errors, or the nature of a legal relation, which is a source of limitations of any of men’s freedoms. The conflict of interests usually occurs with regard to administrative restrictions or administrative police.

¹ B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego...*, pp. 71-72.

² Vide J. Boć (ed.), *Prawo...*, p. 22.

³ Ibidem.

⁴ Vide M. Zdyb, *Prawny interes jednostki...*, pp. 223-230.

Moreover, there are administrative law norms which protect individual interests, but which do not grant an individual the right to individually claim such interest in a legal form. They constitute situations called reflective effect of administrative law norms.

Another specific legal situation is granting by law the protection of individual interest to subjects that are not interested in its exercise or that simply demonstrate a hostile attitude towards it.¹

Determination of the scope of the term “legal interest” is, in practice, particularly important in administrative proceedings in order to determine a party to proceedings. Pursuant to Article 28 of the Code of Administrative Procedure: *A party means each person to whose legal interest or obligation proceedings refer or who requests that a body undertake actions due to their legal interest or obligation.* When faced with administrative restrictions the term “legal interest” will be considered, in the first place, from the angle of substantive administrative law². As M. Zdyb suggests “individual legal interest is derived from substantive law and aims at the exercise of this right.”³ In practice, it is disputable whether interest may be based only on substantive administrative law or the norms of other branches of law. This problem was examined in judicial decisions. A. Wróbel points to administrative court decisions, which contain different views on the definition of the term “legal interest.” For example: “the concept of a party, used in Article 28 of the Code of Administrative Procedure, and then the remaining provisions of this Code, may be derived only from substantive administrative law, that is, from a specific legal norm, which may constitute basis for the formation of citizens’ interest or obligation. To have legal interest in administrative proceedings means to determine a legal rule generally applicable on the basis of which one can effectively demand actions from the body with an intent to satisfy a need or demand that actions of the body contradictory to the needs of a given person be abandoned or limited.”⁴ “Legal interest constitutes individual interest, which is

¹ Vide ibidem, p. 33-34.

² M. Zdyb, *Prawny interes jednostki...*, p. 65.

³ Ibidem, p. 43.

⁴ Wyrok NSA z dnia 22 lutego 1984 r., I SA 1748/83, quoted after: M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa 2004, p. 216.

specific, objectively verifiable, and which is confirmed by the facts of the case, which constitute prerequisites for applying a substantive law rule. Thus, legal interest constitutes interest, which may be based only on substantive administrative law due to the fact that an administrative decision is an authoritative specification of administrative law.”¹ “Determination of the existence of legal interest requires one to determine a relation of legal and material nature between the applicable legal norm and legal situation of a given subject of law, which means that the act of the norm application (administrative decision) may affect the legal situation of this subject as regards substantive law. Such interest should be direct, specific, real and should be confirmed by the facts of the case, which substantiate the application of the substantive law norm.”² “Limiting the term >>legal interest<< only to interest protected by the substantive law norms is not supported by the administrative law doctrine.”³ “(...) Legal interest should be distinguished from actual interest, that is, the situation when a citizen is directly interested in the solution of an administrative case, but cannot find support for this interest in generally applicable law, which is to constitute the basis for effective request that appropriate actions be taken by an administration body. In such a case the citizen does not have the status of a party in administrative proceedings.”⁴ “>>Legal interest<<, the existence of which depends on granting a person the status of a party in a given case, must be directly related to the legal sphere of the subject. Lack of direct influence of the case on the person’s legal sphere makes it impossible to recognize it as a party.”⁵ Taking all the above into consideration, it should be noted that the essence of the term “legal interest” will be decided on each time e.g. by a given administrative court.

¹ Wyrok NSA z dnia 17 kwietnia 2007 r., I OSK 755/06, quoted after: M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego*..., p. 216.

² Wyrok WSA w Warszawie z dnia 29 marca 2006 r., VI SA/Wa 2401/05, quoted after: M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego*..., p. 216, cf. p. 223.

³ Wyrok NSA z dnia 9 marca 1982 r., SA/Wr 48/82, quoted after: M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego*..., p. 216; B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego*..., p. 231; M. Szubiakowski, M. Wierzbowski (ed.), A. Wiktorowska, *Postępowanie administracyjne – ogólne, podatkowe i egzekucyjne*. Warszawa 1999, p. 53.

⁴ Wyrok NSA z dnia 22 lutego 1984 r., I SA 1748/83, quoted after: M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego*..., p. 227.

⁵ Postanowienie NSA z dnia 30 maja 1984 r., II SA 789/84, quoted after: M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego*..., p. 223.

A problem faced by the Lublin Municipal Council during its operation can serve as an example of the influence of judicial decisions on the scope of exercise of “legal interest.” Due to difficulties related to living in the vicinity of liquor shops, the inhabitants of one of the blocks in Lublin, located close to the retail shops possessing licence to sell alcohol, wrote a letter to the President of Lublin, pursuant to Article 18 of the Act of 26 October 1982 on education in sobriety and counteracting alcoholism¹, with a request to withdraw the licence granted to three shops located in the vicinity of their block. Due to the fact that none of the block inhabitants was a party to the restrictions proceedings regarding the granting the licence, there was a legal question whether the applicants had legal interest in the proceedings regarding the withdrawal of the licences, and, as a result, whether they could participate in the proceedings as a party. An administrative decision adverse for those inhabitants, refusing to grant them the status of a party, was passed.² The inhabitants appealed from the decision to the Self-Government Appeal Court in Lublin, which revoked it in whole and transferred the case for re-examination by the first instance body, substantiating this ruling as follows: “Pursuant to Article 28 of the Code of Administrative Procedure a party means each person to whose legal interest or obligation proceedings refer or who requests that a body undertake actions due to their legal interest or obligation. Analysis of the decisions of the Supreme Administrative Court shows that the legislator, defining the concept of the party to administrative proceedings, clearly pointed to the connection between a given subject and specific legal interest. Thus, we deal here not with actual interest, which can even be proved rationally, but legal interest, that is, interest which results from a given legal rule directly concerning the situation of a given subject. In addition, legal interest in question must constitute individual interest of the party to the proceedings, so it must be directly related to it. Thus, whether a given subject has the status of a party to given administrative proceedings, is decided on by a legal norm, which directly provides for specific rights and obligations of this subject (decision of the Supreme Administrative Court of 15 December 1998 II SA 1551/98, LEX 43215). Pursuant to Article 18 section 10 of the Act of

¹ Consolidated text in Dz. U. Journal of Laws of 2007, No. 70, item 473, with later amendments.

² Vide Decyzja Prezydenta Miasta Lublin z dnia 5 lutego 2007 r., znak: WSA/EG-III-6443/30/06, unpublished.

1982 the party to the proceedings concerning withdrawal of the licence to sell alcohol is the addressee of the decision, that is, the entrepreneur who had obtained the licence and sold liquor (judgment of the Supreme Administrative Court of 5 January 2001, II SA/Ka 564/99, “Orzecznictwo w Sprawach Samorządowych 2001”, No. 2 item 42). Whereas, the persons suffering the disorderly behaviour of persons drinking alcohol had only actual interest related to the consideration of the need to deprive them of the possibility to purchase alcohol in a given liquor shop (judgment of the Supreme Administrative Court of 10 August 1998, II SA 742/98, LEX 43180).

Nevertheless, the Voivodship Administrative Court in Lublin adopts a broad interpretation of the concept of a party, as provided for by Article 28 of the Code of Administrative Procedure, acknowledging that this Code provision provides for legal interest protected by generally applicable law, and not only by administrative law. As a result of such interpretation it should be said that the parties to the proceedings for the withdrawal of the licence to sell alcohol are the owners of the properties adjacent to the property, where alcohol is sold. Pursuant to Article 140 of the Civil Code, the owner may use a thing in accordance with the socioeconomic purpose, and against persons who infringe his ownership and he has the right to claim restitution of his lawful position and abstention from infringements of law (Article 222 § 2 of the Civil Code). Thus, the owner of the adjacent property, pursuant to Article 28 of the Code of Administrative Procedure, has legal interest if he suffers the effects of the operation of a liquor shop (judgment of the Supreme Administrative Court of 16 December 1999, II/SA/Lu 1480/98, unpublished, and judgment of the Voivodship Administrative Court in Lublin of 31 March 2004, 3 II SA/Lu 678/03, unpublished).¹ This quotation from the substantiation of the decision indicates that numerous subjects, not directly participating in the restrictions procedure may be effective in trying to make the public administration to undertake actions of the administrative police. Administrative proceedings may concern legal interest directly or indirectly when an administrative decision addressed to a given subject nevertheless affects the

¹ Decyzja Samorządowego kolegium Odwoławczego w Lublinie z dnia 12 marca 2007 r., znak: SKO.0073/667/HU/2007, unpublished.

rights and obligations of another subject “due to associating the decision’s addressee’s legal situation with this subject.”¹

As an author of this paper I am inclined towards the concept of broad understanding of the term “legal interest.”² The legal doctrine, defining an administrative act, indicates that it may bring consequences also in other branches of law. When defining a party, the Code of Administrative Procedure points to any legal interest. It may result from any branch of law other than administrative law.³ Nevertheless, it does not change in any way the basis for conducting administrative proceedings as determined in Articles 1-4 of the Code of Administrative Procedure. The first interpretation in a law-abiding state is linguistic interpretation. Adopting in this scope narrowing interpretation, indicating administrative law as the only basis for legal interest would be groundless, as legal interest would depend, inter alia, on the type of a legal relation it refers to or the type of interest protected by law, etc. For example, in the case of administrative restrictions or administrative police legal interest may result, inter alia, from the ownership regulated by the Civil Code. Owners are, for example, expropriated pursuant to administrative law norms.

Referring to substantive administrative law alone, it can be said that the norms in three ways define the essence of individual interest, which may arise from:

- 1) the Act itself;
- 2) appropriate behaviour of an individual, with which law associates legal effects;
- 3) specification of a general and abstract legal norm by way of an administrative decision.⁴

Determination of the essence of “legal interest” is part of the application of the legal norm, referred to in Article 28 of the Code of Administrative Procedure. Determination of the essence of “citizens’ legitimate interest” and “public interest” is part of the application of the

¹ Vide M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego...*, p. 224.

² Cf. ibidem, pp. 218-220.

³ Cf. ibidem, p. 224 – “Interes prawny, o którym mowa w art. 28, może wynikać nie tylko z przepisów prawa materialnego administracyjnego lecz także z prawa cywilnego (...)”.

⁴ Vide M. Zdyb, *Prawny interes jednostki...*, p. 73.

legal norm, referred to in Article 7 of the Code of Administrative Procedure.¹ Legitimate means fair. It is a very broad term, going beyond the limits of the term “legal.” As M. Zdyb claims “we should presume that it is not only about legal interests but actual interests of an individual, which are not provided for by norms, but which are not contrary to law and principles of social co-existence, which means that they are <<fair>>.”² Public interest is considered jointly within the categories of expediency and legality.³ Common interest– The Republic of Poland – is in the individual’s legitimate interest.⁴

When the rights and obligations arise by virtue of law, legal interest is real interest from the commencement of the proceedings. Whereas, in numerous cases it is potential interest, which means that during administrative proceedings a claim that someone has legal interest will be verified and determined by a decision.⁵ Thus, as M. Zdyb points out, “we may think that when a request is filed the individual’s subjective feeling that they do have legal interest and that they need protection is sufficient.”⁶ Considering “most of all the fact that it seems unacceptable (in particular with reference to the relations: individual – administration body) to interpret regulations, raising doubts, to a citizen’s disadvantage, in particular that the genesis of this institution favours the version presented here, it should be said that arguments for the subjective version of the party’s title to bring the action before the court have a much greater significance than arguments on the objective side. After all, whether a party indeed has legal interest should be decided by administrative or court proceedings.”⁷ The provision of Article 28 of the Code of Administrative Procedure, concerning the term “party”, was a source of disputes in the law doctrine and administrative proceedings.⁸ As pointed out by M. Zimmerman “the nature of dispute concerns the question whether, in the light of the provisions of the Code of

¹ Cf. *ibidem*, p. 232.

² *Ibidem*, p. 237.

³ Vide M. Zdyb, *Prawny interes jednostki...*, p. 239, cf. p. 257.

⁴ Vide W. Łączkowski, *Konstytucyjna ochrona wartości*. [in:] A. Dębiński, K. Orzeszyna, M. Sitarz (ed.), *Ecclesia et status. Księga jubileuszowa z okazji 40-lecia pracy naukowej Profesora Józefa Krukowskiego*. Lublin 2004, p. 716.

⁵ Vide M. Zdyb, *Prawny interes jednostki...*, p. 45.

⁶ *Ibidem*, p. 55; cf. B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego...*, pp. 28-29.

⁷ M. Zdyb, *Prawny interes jednostki...*, p. 64.

⁸ Vide M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego...*, p. 214.

Administrative Procedure, in case the proceedings are instigated at the request of the interested person (or <<party>>), <<legal interest>> is determined in the course of the proceedings, or whether we deal here with <<objective>> category which, in the opinion of the supporters of such a solution, constitutes a condition precedent of the proceedings. The concept of legal interest undoubtedly belongs to substantive law, it is an objective concept, which is usually not questioned by the supporters of the <<subjective version>>.”¹ As A. Wróbel underlines “among judicial decisions the position reflecting the views of the supporters of the objective theory of the party prevails.”² Without solving this problem, it should be indicated that broad understanding of the term “legal interest” has its practical justification as it is a guarantee that the public administration body will not be too hasty to close the way for a subject wishing to exercise their subjective rights by refusing to recognize the interested subject as the party. According to M. Zdyb “a dispute regarding the nature of the party does not concern what individual interest is based on, but when its existence is determined authoritatively.”³ Indicating the rights and obligations in an administrative decision does not mean that such rights and obligations are created. They are determined in substantive law. Sometimes they are determined in the administrative procedure norms.⁴ A decision declares their existence. This is how a general and abstract norm is interpreted in an individual and specific way, subjecting a certain situation to a given legal norm.⁵ It should be noted, as M. Zdyb points out, that “at the basis of each legal interest there is actual interest, which should express the necessity of certain interest, take into consideration all phenomena associated with the functioning of the values it aims at.”⁶ In the case of administrative restrictions an administrative decision will often authorize one to run a certain type of business activity and at the same time impose an obligation, for example, to pay public levies, observe work health and safety rules as regards the business activity, etc.⁷ The

¹ M. Zimmerman, *Z rozważań nad postępowaniem jurysdykcyjnym i pojęciem strony w kodeksie postępowania administracyjnego*. [in:] *Księga pamiątkowa ku czci Kamila Stęfki*. Warszawa – Wrocław 1967, p. 440.

² M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego...*, p. 215.

³ M. Zdyb, *Prawny interes jednostki...*, p. 45.

⁴ Vide ibidem, p. 47.

⁵ Vide ibidem, p. 45.

⁶ Ibidem, p. 47.

⁷ Vide ibidem, p. 47.

term “legal interest” may cover not only rights, but also obligations.¹ The broad understanding of the term is indicated by the fact that, despite the objective concept of the title to bring the action before the court, the administrative law doctrine also contained views of the subjective version of the party’s title to bring the action before the court.² As the author of this paper I am inclined towards the objective understanding of the party’s title to bring the action before the court, and consequently, to the understanding of the term “legal interest” in terms existing objectively, provided that it may be any legal interest, not necessarily the one associated with substantive administrative law. Such a conclusion is triggered by linguistic interpretation of Article 28 of the Code of Administrative Procedure. In the case of administrative restrictions the meaning of the term “legal interest” is narrowed when a private subject applies to the administration body for the right to run a certain business activity. As M. Zdyb claims “it is usually possible to exercise a legal right only as a result of administrative proceedings when it is possible to demonstrate that the individual, invoking their legal interest, has legal basis for their claim.”³ In the case of administrative police subjects not associated with the restrictions procedure may have legal interest. There are numerous manifestations of men’s actions, which, without proper application of actions of the administrative police, may easily infringe law-protected interests of subjects that are not a party to restrictions proceedings, but to administrative police actions. For example, as regards an attempt to withdraw licences to sell alcohol by retail liquor shops legal interest in such a situation can be claimed by other subjects, deriving it even from ownership protection when, as a result of the sale of alcohol, public order is disturbed by persons abusing alcohol, which infringes the rights of other persons.

The term “public interest,” in the course of interpretation, involves a referral to a certain system of values, which are behind this term.⁴ Law protects values common for community and it must attempt to objectivise them.⁵

¹ Vide ibidem, p. 49.

² Vide ibidem, pp. 50-51.

³ Ibidem, p. 69.

⁴ Cf. ibidem, p. 14.

⁵ Vide ibidem, p. 25.

There arises a question: which interest is more important? Individual interest or common interest? As M. Zdyb points out “in each democratic state of law, individual interest and individual reasons, if not in conflict with clearly determined social reasons, constitute superior reasons.”¹ Furthermore, it should be noted that, pursuant to Article 7 of the Code of Administrative Procedure, the administration body has an *obligation to settle the matter, taking into consideration public interest and citizens’ legitimate interest*. This provision does not decide about the priority of any goal. The public administration body is obliged to balance and determine the priority of goals in the administrative restrictions procedure or police actions. This hierarchy is not a purely theoretical determination, but in the case of administrative restrictions it is a practical one. B. Adamiak and S. Fundowicz point to a decision of the Supreme Court, determining mutual relations of public interest and citizens’ legitimate interest. “In a state of law there is no room for mechanical and rigid principle of primacy of general interest over private interest. It means that in each case the acting body is obliged to indicate general (public) interest in question and prove that it is so significant and meaningful that it requires absolute limitation of citizens’ individual rights. Both such interest and its significance as well as prerequisites for the need to put public interest before individual interest in a given case must be always subject to thorough control of the body and court (...).”² Public interest is not always and unconditionally more important than individual interest. The legislator decided to harmonize these two interests rather than determine rigid priorities.³ There may be exceptions from the obligation to balance interests when the act gives priority directly to any of them, e.g. public interest. This is the case, for example, with the provision of Article 139 of the Code of Administrative Procedure⁴, which provides that *an appeal body cannot pass a decision to the disadvantage of the appealing party*,

¹ Ibidem, pp. 52-53.

² Wyrok SN z dnia 18 listopada 1993 r., III ARN 49/93, quoted after: B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego...*, pp. 72-73; S. Fundowicz, *Dobro w prawie administracyjnym*. [in:] D. Dudek, M. Gapski, W. Łączkowski, *Amicus hominis et defensor iustitiae. Przyjaciół człowieka i obrońca sprawiedliwości. Księga jubileuszowa w 70. rocznicę urodzin Sędziego Ferdynanda Rymarza*. Lublin 2010, p. 169.

³ Vide B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego...*, pp. 72-23.

⁴ Vide ibidem, p. 73.

unless the decision in question constitutes gross violation of law or infringement of public interest.

Pursuant to Article 107 §3 of the Code of Administrative Procedure *factual substantiation of the decision should indicate, in particular, the facts, which the body regarded as proved, evidence it relied on, and reasons, due to which it refused to recognize other evidence as credible and having probative force, and legal substantiation – explanation of the legal basis of the decision, indicating the legal provisions.* The priority of such goals cannot be determined, skipping the values, on which the legal order is based. The legislator, trying to reconcile different individual or group interests, must determine the common value¹, according to which limits of administrative restrictions and administrative police will be drawn. Balancing such goals must be reflected in substantiation of an administrative decision, otherwise the party displeased with the decision will seek to have it overruled by pointing, for example, to:

- 1) lack of balancing of public interest and citizens' legitimate interest;
- 2) omission in the balancing process of certain interests;
- 3) groundless acceptance of the dominance of any interest or unequal treatment of interests;
- 4) violation of the principle of justice.²

The influence of values on the actions of the administration is indicated by numerous authors, for example by J. Łukasiewicz. "Actions of the public administration aimed at the completion of tasks cannot be performed separately from the system of specific values."³ As pointed out by M. Zdyb: "Each legal norm has two sides: the essential one associated with literal wording of legal regulations and existential one, which arises in relation to: a) axiological basis of the applicable legal system, natural order of things (natural law), principles of justice, righteousness of will, sense of law, etc.; b) facts of the case, to which law refers; c) supra-system

¹ Cf. M. Zdyb, *Prawny interes jednostki...*, p. 221.

² Cf. *ibidem*, p. 240; cf. M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego...*, pp. 136-138.

³ J. Łukasiewicz, *Podstawowe pojęcia z zakresu nauki administracji*. [in:] S. Wrzosek (ed.) *Kompendium wiedzy administratywy*. Lublin 2008, p. 87.

norms, rules and principles which are a result of the civilization development (technical norms and standards, knowledge standards, praxeological principles, etc.); d) practices of law application (e.g. judicial decisions); e) doctrine views. A role of the organ of the state applying law is to identify the legal norm by referring not only to the situation and principle of conduct determined in a specific editing unit, but also by deducing a legal norm, taking into consideration whole existential side of the legal rule and all-system rules. In such a reference system each legal norm will be a system norm, and not a mechanical rule functioning separately from other rules, with the rejection of integrating values.”¹ W. Łączkowski underlines that “no state is able to avoid entering the fundamental fields of axiology and it always follows a certain point of view.”² Thus, the values popularized in the administration will have a real influence on legal manifestations of the administrative actions, including the development of the essence of “legal interest.” The values will affect decisions solving the question which interest in relation to certain facts of the case is more important – public or individual one. The values will affect the scope in which particular interests are taken into consideration in the restrictions procedure and in the course of the administrative police actions. The constitutional values, on the basis of which disputable interests – public and individual ones – will be balanced include in particular the principles of:

- 1) common interest³,
- 2) social market economy⁴,
- 3) ownership protection¹,

¹ M. Zdyb, *Państwo prawa w perspektywie zaszczości historycznych oraz dokonujących się zmian*. [in:] S. Fundowicz (ed.) *Współczesne problemy prawa publicznego. Studia z prawa publicznego*. T1, Lublin 1999, p. 21; Cf. M. Zdyb, *Prawny interes jednostki...*, pp. 75-76.

² W. Łączkowski, *Ograniczenia prawa stanowionego*. [in:] A. Dębiński, A. Pomorska, P. Smoleń (ed.) *W służbie nauki prawa finansowego. Jubileusz obecności profesora Jana Głuchowskiego w Katedrze Finansów i Prawa Finansowego Katolickiego Uniwersytetu Lubelskiego Jana Pawła II*. Lublin 2010, p. 71; cf. W. Łączkowski, *Prawo a zmiana ustroju państwa*. Poznań 1992; W. Łączkowski, *Granice prawa*. [in:] W. Depo, M. Leszczyński, T. Guz, P. Marzec (ed.), *Veritatem in Caritate. Księga Jubileuszowa z okazji 70. urodzin Księdza Biskupa Profesora Jana Śrutwy*. Lublin 2011, pp. 447-457.

³ Konstytucja RP, art. 1: *Rzeczpospolita Polska jest dobrem wspólnym wszystkich obywateli*.

⁴ Konstytucja RP, art. 20: *Spółeczna gospodarka rynkowa oparta na wolności działalności gospodarczej, własności prywatnej oraz solidarności, dialogu i współpracy partnerów społecznych stanowi podstawę ustroju gospodarczego Rzeczypospolitej Polskiej*.

4) proportionality².

We may attempt to distinguish the following prerequisites for solving conflicts between public interest and individual interest:

- 1) searching for norms determining the method of conflict solution under substantive law norms³, and if this should fail, then system norms⁴ should be referred to, always bearing in mind the values, on which a legal system is based;
- 2) referring the problem of interest balancing to all conflicting situations⁵, perceiving the conflict of interests from the angle of all interests⁶ taken into consideration in such situations, as considering only one interest and not taking a stance on claims and requests of the parties having other conflicting interests violates the principle of citizen's confidence in the state, determined in Article 8 of the Code of Administrative Procedure⁷ and may constitute basis for using remedy at law;
- 3) economic actions of the administration⁸ by, inter alia, adjusting remedies for conflict solution to the needs – if it is possible to select legal remedies, the ones which will lead to the fulfilment of the norm purpose should be chosen, with the least possible interference in the sphere of the subject's freedom, towards whom administrative actions are undertaken⁹;
- 4) rational and purposeful actions of the administration – public interest makes sense if it is used to fulfil individual interests¹⁰;

¹ Konstytucja RP, art. 21: *1. Rzeczpospolita Polska chroni własność i prawo dziedziczenia. 2. Wywłaszczenie jest dopuszczalne wówczas, gdy jest dokonywane na cele publiczne i za słusznym odszkodowaniem.*

² Konstytucja RP, art. 22: *Ograniczenie wolności działalności gospodarczej jest dopuszczalne tylko w drodze ustawy i tylko ze względu na ważny interes publiczny.*

³ Vide M. Zdyb, *Prawny interes jednostki.*, pp. 240-241.

⁴ Vide ibidem, p. 242.

⁵ Vide ibidem, p. 242.

⁶ Vide ibidem, pp. 242-243.

⁷ Vide M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego. Komentarz.* Warszawa 2009, p. 138; cf. S. Fundowicz, *Prawne determinanty relacji urzędnik - petent.* [in:] A. Dębicka, M. Dmochowski, B. Kudrycka (ed.), *Profesjonalizm w administracji publicznej.* Białystok 2004, p. 284.

⁸ Vide S. Wrzosek, *Polityka administracyjna a ekonomiczność działania administracji publicznej* [in:] J. Łukasiewicz (ed.), *Polityka administracyjna.* Rzeszów 2008, pp. 840-841.

⁹ Vide M. Zdyb, *Prawny interes jednostki.*, p. 243.

¹⁰ Vide ibidem, p. 244.

- 5) legislator's avoidance of strengthening of the authoritarianism of the public administration bodies, because excessive power hinders mediation and searching for compromise¹;
- 6) undertaking attempts to lead negotiations between the decision-taking body and the citizen², if possible, bearing in mind that, pursuant to article 11 of the Code of Administrative Procedure: *Public administration bodies should explain to the parties legitimacy of the prerequisites they follow when dealing with a case, so as to make the parties, as far as possible, execute the decision without the need to reach for coercive measures* (emphasis added by T.S.).

To sum up the discussion on solving the conflict of public and citizens' legitimate interests, we should repeat after J. Boć that, since "there are no enterprises of the state and self-governments which are not eventually addressed to men, we should agree that men's interest is the fundamental goal of the actions undertaken by the administration."³ In the case of administrative restrictions the concept of legal interest is related to subjective rights⁴, human rights, and in particular to the freedom of business activity. A. Błaś and J. Boć define substantive public law as "such a legal situation of a citizen (group individual), within the scope of which the citizen (group individual), relying on the legal norms protecting his legal interests, may effectively demand something from the state or may accomplish something in a way not questioned by the state."⁵ J. Zimmerman emphasizes that "substantive public rights are <<stronger>> than legal interests. (...) In other words, substantive public law constitutes legal interest reinforced by the category of claim, which the citizen acquires through this right towards the public administration (state)."⁶ As underlined by B. Adamiak, the essence of "legal interest" "shall be substantive public law, understood as granting by a legal rule specific benefits to an individual, which may be used in the administrative proceedings, because they are decided upon

¹ Vide ibidem, p. 241.

² Vide ibidem, pp. 244-245.

³ J. Boć (ed.), *Prawo...*, p. 22.

⁴ Vide M. Zdyb, *Prawny interes jednostki...*, pp. 36-37, 41-42.

⁵ A. Błaś, J. Boć, *Publiczne prawa podmiotowe*. [in:] J. Boć (ed.) *Prawo administracyjne*. Wrocław 2007, p. 501.

⁶ J. Zimmerman, *Prawo administracyjne*. Warszawa 2008, p. 271.

in the administrative proceedings.”¹ As a result, public interest is to favour the exercise of individual interest. As pointed out by J. Boć, “in the case of conflicting interests new obligations may be imposed on the citizens or their existing rights may be limited as far as the state or local self-government needs that to ensure the goals determined with respect of those citizens are achieved. In other words, it is about the protection of public (social) interest as a stage for the exercise of individual interest.”² Finally, it should be noted that in the case of administration and legal relation, in particular in the case of administrative restrictions or administrative police, the conflict of interests and its solution is common and natural in the actions of the public administration.³

Bibliography Sources

1. Ustawa z dnia 2 kwietnia 1997 r. Konstytucja Rzeczypospolitej Polskiej (Dz. U. Nr 78, poz. 483).
2. Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego (tekst jedn. Dz. U. z 2000 r., Nr 98, poz. 101, z późn. zm.).
3. Ustawa z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi (tekst jedn. Dz. U. z 2007 r., Nr 70, poz. 473, z późn. zm.).
4. Decyzja Prezydenta Miasta Lublin z dnia 5 lutego 2007 r., znak: WSA/EG-III-6443/30/06, niepublikowana.
5. Decyzja Samorządowego kolegium Odwoławczego w Lublinie z dnia 12 marca 2007 r., znak: SKO.0073/667/HU/2007, niepublikowana.

Subject bibliography

6. Adamiak B., Borkowski J., *Kodeks postępowania administracyjnego. Komentarz*. Warszawa 2004.
7. Błaś A., Boć J., *Publiczne prawa podmiotowe*. [In:] J. Boć (red.) *Prawo administracyjne*. Wrocław 2007.
8. Boć J. (ed.), *Prawo administracyjne*. Wrocław 2007.
9. Chajbowicz A., *Antyczne korzenie policji administracyjnej i działalności policyjnej*. [In:] Błaś A., Nowacki K. (ed.) *Współczesne europejskie problemy prawa administracyjnego i*

¹ B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego...*, p. 226.

² J. Boć (ed.), *Prawo...*, pp. 22-23.

³ Cf. M. Zdyb, *Prawny interes jednostki...*, p. 245.

- administracji publicznej. W 35. rocznicę utworzenia Instytutu Nauk Administracyjnych Uniwersytetu Wrocławskiego. Wrocław 2005.*
10. Chorąży K., Taras W., Wróbel A., *Postępowanie administracyjne, egzekucyjne i sądowoadministracyjne*. Zakamycze 2004
 11. Fundowicz S., *Dobro w prawie administracyjnym*. [In:] D. Dudek, M. Gapski, W. Łączkowski, *Amicus hominis et defensor iustitiae. Przyjaciel człowieka i obrońca sprawiedliwości. Księga jubileuszowa w 70. rocznicę urodzin Sędziego Ferdynanda Rymarza*. Lublin 2010.
 12. Fundowicz S., *Prawne determinanty relacji urzędnik - petent*. [In:] Dębicka A., Dmochowski M., Kudrycka B. (ed.), *Profesjonalizm w administracji publicznej*. Białystok 2004.
 13. Jaśkowska M., Wróbel A., *Kodeks postępowania administracyjnego. Komentarz*. Warszawa 2009.
 14. Klecha K., *Wolność działalności gospodarczej w Konstytucji RP*. Warszawa 2009.
 15. Kmiecik Z. R., *Postępowanie administracyjne i sądowoadministracyjne*. Zakamycze 2003.
 16. Kocowski T., *Akty bieżącego nadzoru reglamentacyjnego* [In:] Kieres L. (red.) *Środki prawne publicznego prawa gospodarczego*. Wrocław 2007.
 17. Kocowski T., *Reglamentacja działalności gospodarczej w polskim administracyjnym prawie gospodarczym*. Wrocław 2009.
 18. Kosikowski C., *Koncesje w prawie polskim*. Kraków 1996.
 19. Kosikowski C., *Prawo gospodarcze publiczne*. Warszawa 1994.
 20. Kosikowski C., *Ustawa o swobodzie działalności gospodarczej. Komentarz*. Warszawa 2008.
 21. Kosikowski C., *Wolność gospodarcza w prawie polskim*. Warszawa 1995.
 22. Kosikowski C. (ed.), *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji*. Warszawa 2005.
 23. Kowalski G., „Ludzka twarz” swobody gospodarczej w konstytucji Rzeczypospolitej Polskiej. [In:] Kościak B., Sławińska M. (ed.), *Człowiek a koncepcja zrównoważonego rozwoju*. Warszawa 2009.
 24. Leoński Z., *Prawo administracyjne*. Warszawa 2004.
 25. Łączkowski W., *Granice prawa*. [In:] W. Depo, M. Leszczyński, T. Guz, P. Marzec (ed.), *Veritatem in Caritate. Księga Jubileuszowa z okazji 70. urodzin Księdza Biskupa Profesora Jana Śrutwy*. Lublin 2011.
 26. Łączkowski W., *Konstytucyjna ochrona wartości*. [In:] A. Dębiński, K. Orzeszyna, M. Sitarz (ed.), *Ecclesia et status. Księga jubileuszowa z okazji 40-lecia pracy naukowej Profesora Józefa Krukowskiego*. Lublin 2004.
 27. Łączkowski W., *Ograniczenia prawa stanowionego*. [In:] A. Dębiński, A. Pomorska, P. Smoleń (ed.) *W służbie nauki prawa finansowego. Jubileusz obecności profesora Jana Głuchowskiego w Katedrze Finansów i Prawa Finansowego Katolickiego Uniwersytetu Lubelskiego Jana Pawła II*. Lublin 2010.
 28. Łączkowski W., *Prawo a zmiana ustroju państwa*. Poznań 1992
 29. Łukasiewicz J., *Podstawowe pojęcia z zakresu nauki administracji*. [In:] S. Wrzosek (ed.) *Kompendium wiedzy administratywisty*. Lublin 2008
 30. Oniszczyk J., *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne*. Warszawa 2005.

31. Snażyk Z., Szafrński A., *Publiczne prawo gospodarcze*. Warszawa 2009.
32. Sienkiewicz T., *Administracyjna reglamentacja chronionego rynku pracy* [In:] Pietrullewicz B., Paszkowicz M. A., Ochonczenko H. (ed.), *Osoby z niepełnosprawnościami na współczesnym rynku pracy. Przygotowanie zawodowe*. Zielona Góra 2008.
33. Sienkiewicz T., *Nowe podejście do zamówień publicznych szansą likwidacji ukrytych form administracyjnej reglamentacji w dostępie do rynku zamówień publicznych* [In:] Uliasz B. (ed.), *Nowe podejście do zamówień publicznych*. Warszawa 2010.
34. Szubiakowski M., M. Wierzbowski (ed.), Wiktorowska A., *Postępowanie administracyjne – ogólne, podatkowe i egzekucyjne*. Warszawa 1999.
35. Szydło M., *Swoboda działalności gospodarczej*. Warszawa 2005.
36. Waligórski M., *Administracyjnoprawna reglamentacja działalności gospodarczej*. Poznań 1994.
37. Waligórski M., *Nowe prawo działalności gospodarczej. Podręcznik akademicki*. Poznań 2001.
38. Wierzbowski M., Wyrzykowski M. (ed.) *Prawo gospodarcze. Zagadnienia administracyjnoprawne*. Warszawa 2005.
39. Wrzosek S., *Polityka administracyjna a ekonomiczność działania administracji publicznej* [In:] Łukasiewicz J. (red.), *Polityka administracyjna*. Rzeszów 2008.
40. Wrzosek S., Biskup R., *Wolność gospodarcza w nauczaniu Jana Pawła II*. [In:] T. Guz, M. Kuć, (ed.), *Ius et fides. Księga jubileuszowa z okazji siedemdziesiątych urodzin Profesora Jana Świtki* Lublin 2006
41. Zdyb M., *Państwo prawa w perspektywie zaszłości historycznych oraz dokonujących się zmian*. [In:] Fundowicz S. (ed.), *Współczesne problemy prawa publicznego. Studia z prawa publicznego*. T1, Lublin 1999.
42. Zdyb M., *Prawny interes jednostki w sferze materialnego prawa administracyjnego. Studium teoretyczno-prawne*. Lublin 1991.
43. Zdyb M., *Publiczne prawo gospodarcze*. Kraków-Lublin 1997.
44. Zimmerman J., *Prawo administracyjne*. Warszawa 2008.
45. Zimmerman M., *Z rozważań nad postępowaniem jurysdykcyjnym i pojęciem strony w kodeksie postępowania administracyjnego*. [In:] *Księga pamiątkowa ku czci Kamila Stefki*. Warszawa – Wrocław 1967.

Krystyna Warylewska

Author:

- Law student at the University of Gdańsk (Poland) writing MA on Comparative and European Law
- Erasmus student at the University of Caen in Basse-Normandie in France 2008/2009
- ELSA member 2009/2011
- ELSA International Delegate at the 25th Session of the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications 2011
- LL.M. student at the Chicago- Kent College of Law 2011/2012

Constitutional regulations on freedom of speech and the penalty itself under the Penal Code in Poland.

Polish Constitution, adopted on 2 April 1997, based on the basic freedoms, rights and obligations of every man and citizen. The article 30 of the Constitution, opens Chapter II, entitled *"Freedom, rights and duties of man and citizen"*, reads: *"The inherent and inalienable dignity of person shall constitute a source of freedoms and rights of man and citizen. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."* It's mean that Everybody has the right to freedom of speech, thought and deed, legally protected, without infringing the rules of social security or public order, environmental protection, health and public morals, or the freedoms and rights of others man. In turn, these limitations may not impose freedom and rights.

The crucial issue mentioned in title of Chapter II of Article 31 of Polish Constitution where legislature declared in paragraph 1 : "Freedom of the person is subject to legal protection." Therefore, the freedom of each man and citizen is protected in the Republic of Poland at the highest possible legal level. Normative system of guarantees and protection of this freedom are complement with the various international regulations:

1. The European Convention on Human Rights and Fundamental Freedoms-ECHR-art.10, which guarantees the right to respect for freedom of expression
2. International Covenant on Civil and Political Rights-ICCPR - Art. 18, 19, on freedom of thought and freedom of expression
3. Jurisprudence of the Constitutional Court and European Court of Human Rights, freedoms associated with non-absolute, as opposed to other values and are subject to numerous restrictions.

Freedom of expression is classified as a law of individual and political rights, and its equivalent in Poland as freedom of speech or freedom of expression. Special significance is attributed to freedom of expression in a democratic state. Because of the principles which are guided by a democratic country freedom of expression should grant protection to statements at the higher level than others ones rights and behaviors.

The democratic country governs on the basis of constitutionality and the rule of law itself, this is the reason why the protection of speech should be subject to any kind of expression in particular those who do not find acceptance in society and sometimes can even cause harm.

This legal principle mentioned above was confirmed by the European Court of Justice, which declare that freedom of speech "should not be limited only to information that are favorably received or regarded as inoffensive or indifferent, that hurt, outraged. Such are the conditions of pluralism and democracy, without which democracy can not exist".

In relation to this case, which collapsed in Strasbourg, stressed that "freedom of expression is one of the main foundations of a democratic society, one of the basic conditions for its development and individual self-realization" (*Handy side vs. UK*, 7.12.1976). Freedom of expression in the broad sense comprises four rights: freedom to hold opinions, freedom to impart information and ideas, freedom, and freedom of their seeking information and ideas. Freedom of thought has its own, that is why this is an absolute and Ina is subject to interference by the state, and it guarantees Articles *expressis verbis* 19 ICCPR and Article 10 of ECHR.

Regarding security issues, it's up to its subject matter. The strongest protection of political speech are covered, and expression of political importance. According to the Strasbourg case law, such statements stem from the core concepts of a democratic society. Moreover, in a democratic society acts and omissions of government should be subject to scrutiny by the legislature and from the press and the public. Therefore, political criticism should come under the protection at the highest of levels.

Higher limits are allowed to critics such policy rather than a private person, therefore, that in a way unavoidable and aware of tight controls on the part of journalists and the public (*Austria vs. Ligenz*, 8.7.1986, *Castells vs. Spain*, 04.23.1992).

What about freedom of speech and expression of journalists and the media, who serve as "guardian of the public" and the fourth power? Although they can not exceed the limits of protection of property and goods of other people, it should inform the society and all those things which are popular among the society and public (*Oberschlik vs. Austria*, 05.23.1991).

With all respect, journalists have to act in *bona fide* and accuracy as well during their preparation or presentation of the description of facts. However, using some kind of exaggeration and even provocation at work is not forbidden (*Oberschilk vs. Austria*, 26.04.1995). The media activity is related closely to the idea of preserving pluralism. The role of the state is to eliminate and to prevent the monopoly of media and monopoly practice them self. There are some potential and special cases where it can be justified specially the television monopoly when is required by society (*Lenti Informationsverein vs. Austria*, 24.11.1993).

Subsequently, the problem of admissibility of preventive censorship regulate Article 54 of the Constitution (although the concession of radio or television stations is acceptable) and Article 13 ACHR (special preventive censorship is allowed due to public demonstrations and shows to protect the morality and adolescents of children). On the fields of European Human Rights Convention of preventive censorship is not forbidden, however should be always taken as a matter of special care and observation (*Observer & Guardian Vs. UK*, 26.11.1991).

The European Convention on Human Rights and Fundamental Freedoms, hereinafter referred to as the ECHR in a nutshell, done at Rome on 4 November 1950, as amended by Protocol 11, which entered into force on 1 November 1998, at the same time, the protocol expired on 9th Freedom of speech, is protected at the national level after the acts of the rank of constitutional and international treaties mainly after the general protection of human rights: art. 19 PUDHR, art. 19 and 20 of the ICCPR, art. 10 of the ECHR

The State governs our rights and freedoms by introducing numerous restrictions and prohibitions in order to protect the legal and social order. It seems from similar to the times of

People's Republic of Poland, where the state effectively restricted and controlled the flow of information to the press, scientific and cultural publications, television, radio and even interfered in artistic activities are over.

Moreover, more often people speaks about false or misleading information given to the public; skirmishes and scandals in public life of journalists, actors, singers, politicians; systematically, we can observe the fate of the representatives of the arts and sciences accused of insulting the state or religion, the very well-known arrested participate in subsequent court hearings called to criminal liability for defamation, insult or slander. Observation, I have made during last several years specially on events taking place not only on the political scene, but taking place in every area of public life, as well as social, makes bad reflection and proposals but the most prevailing mental state of Polish society and Polish Government. Further prohibitions, limitations of rights and freedoms of man and citizen evaluate over the centuries. However, citizens of the Polish Republic, declare they are tolerant and liberal, persevering participants galloping globalization, they may impose some kind of preventive and repressive censorship, but in new different evaluated form, adequate to the XXI century.

The period of People's Republic of Poland dates to the years 1952 to 1989. Constitution of the People's Republic of Poland was elaborated analogical to the model of Soviet Union constitution form 1936 and then passed on July 22, 1952 what set the socialist system in Poland. For over 45 years Polish nation lived in slavery under the Soviet influence. The 1989 was a special and significant year for the Polish nation, it opens a new chapter in Polish history and ends the difficult and hard communist regime. The citizens of the country have been waiting such a long time, full of impatient for a better tomorrow, for the constitutional changes and finally for the "explosion of freedom".

It was only in 1990 repealed the Act of 1981 concerning control of publications and performances, have also been invalidated prohibitions on promoting content morally and politically incorrect, was not required for more consensus on publishing books, newspapers, films, exhibitions and other transfers of information.

All aspects of freedom are strictly related with constitutional principles and the sanctions which ones are regulated by the Polish Penal Code. In chapters XXIV, XXV, XXVI and XXVII, we can find articles that clearly define the conditions for criminal liability for a criminal offense against the freedom of conscience and religion, sexual freedom and customs, against honor and personal integrity.

Nevertheless, to talk about any limitations, you need to investigate whether it formally meet the required conditions:

1. Must be provided in Normative Act,
2. Perform only when is needed and justify to ensure security in a democratic state and public order, or to protect the environment, health and public morals, or the freedoms and rights of other people,
3. Judicial regulations and restrictions can not infringe the essence of freedoms and rights (Article 31, paragraph 3 of the Constitution).

Criminal legal limitations are not the only ones restrictions of those freedoms and rights, but only their rationale understanding, application and possible relating to their proposals *de lege ferenda* will narrow area of research and deliberation about the rights and freedoms of man and citizen, focus on freedom of expression, freedom of speech.

I would like to light out the article 212 of the Penal Code which carries a lot of controversy related with worship and personal integrity:

§ 1 Who imputes to another person, group of persons, institution, legal person or entity without legal personality of such behavior or characteristics that may humiliate them in public or expose to loss of trust necessary for a given position, occupation or activity, punishable by fine or restriction of liberty.

§ 2 If the perpetrator commits the act specified in § 1 by means of mass communication, the penalty of restriction of liberty or imprisonment up to one year. Journalists, reporters who are most vulnerable to accusations and complaints arising from the aforementioned article.

Journalists and reporters are in greater danger to be accused and complaints coming from this article than others people. They are trying to carry out their duties by working in the way of honestly describing reality, very often in a critical way. Sometimes, due to their work on the use of The fourth Estate, can happens that they are convicted for use judgments conviction to a fine and even happens to also be the punishment of detention. The number of criminal trials involving journalists accused of infringing parts, or assault, libel or defamation is growing every year since 2002, steadily weakening the Polish position in the ranking prepared each year by "Reporters Without Borders". Currently, Poland is 47 *egzequo* together with Romania and South Korea.

Andrzej Marek case has brought to light the problem of freedom of speech, religion and journalists. Publisher of a local newspaper "*News of Police*" was charged with Article. 212 § 2 . Courts in all instances considered Andrzej Marek is guilty.

Court find him convicted for the art. 212 § 2 of Penal Code and for three months imprisonment. This decision met with opposite opinion from environmental disasters journalism, which was reflected in a spectacular closing of the well-known figures in the symbolic frame before the Parliament.

Although the Penal Code provides kontratyp "criticism" does not solve all the problems arising from work as a journalist but every man and citizen to express publicly their views on current critical issues and problems as well. Article 213:

§ 1 There is no offense under article. 212 § 1, if the complaint is made non-public real.

§ 2 Does not commit an offense under article. 212 § 1 or 2, who publicly raises or makes public the real objection:

1) for dealing person holding public office or

2) used the defense of a socially legitimate interest.

If the complaint is related to private or family life, the proof of the truth can be performed just in case when it is about to prevent risk of life or human health or the demoralization of a minor.

Code Penal has an institution called “kontratyp” – which one can justify criminal act as unlawful fact. Kontratyp is an exception to the prohibition of committing certain offenses. Moreover, kontratyp can be a defense in a prosecution for a criminal offense. When an act is justified, a person is not criminally liable even though his act would otherwise constitute an offense. That means, when conduct is normally unlawful, it becomes legitimate because of the existence of certain conditions as legal prerequisite. Nevertheless application of libel or slander kontratyp in penal proceedings may still indicate the criminal responsibility of the person who is broadcasting “false” allegations even in good faith. Journalists and reporters working honest with duty of care complain that this is not enough to avoid criminal liability.

According to the crime statistics the number of recorded crimes in article 212 of the Penal Code has increased from 93 to 148 in last 5 years. Cases such as the aforementioned Andrzej M. or any other controversial cases in area of interest among the society represent only a small percentage of the total number of crimes against freedom growing each year.

There is another case that made an impact in Polish society, case of Marian M. Journalist Marian M. filed a complaint about charging him guilty to the Constitutional Court.. On his view accusation made in his direction was unfounded. He claimed its violation on freedom of speech and criminal defamation and its kontratyp.

The applicant was the editor of a newspaper. He was considered guilty of libel made by a newspaper article where he presented the relation of district court employees and the district itself. Libel could humiliate them in public and expose the risk of losing trust in society, which is the necessary element of the job of the judge and for taking action in the administration of justice. He was also convicted for libel in the same article by the regional prosecutor's office for improper conduct investigations. He appealed to the district court against the decision. A social representative of Helsinki Foundation for Human Rights took the legal action to the proceedings. He presented an opinion that the challenged provisions in libel action definitely violate the Constitution. The district court upheld a local court decision and however, the complainant has no rights either qualification to appeal for cassation. According to the complainant has been violated his right to freedom of expression questionable article 213 § 2 of the Penal Code by the

applicant specifies the circumstances excluding liability for libel made in public, so this is about how is constructed *kontratyp*.

Decisions in libel law proceedings brought the problem into light whether the Constitution is consistent with the exclusion of criminal responsibility for an act raise to the public or defamatory allegations proclaim only when two conditions are met: allegations are true and will defend the allegations of socially legitimate interest at the same time.

Constitutional Court present the opinion that legislator has on his mind particular, valuable and required protection (guaranteed to the highest constitutional level) considered that information corresponding to the reality and to the individual's makes a right to eliminate from the public market (or to avoid hitting the market) any false information made in their direction. The Court found that when the offender meets the standard of care defamation and fairness in collecting information and determining their authenticity it does not bear criminal responsibility, even when he raised or broadcast allegations proved to be incorrect. In consequence, the Constitutional Court found that such interpretation of article 212 of Penal Code, restricts the criminalization of certain acts itself to cases where the statement relates to facts, not to the evaluations and allows to consider the constitutionality of Article 213 § 2 of Penal Code, extent that the "truth of the plea" does circumstance exempting from criminal liability.

The Constitutional Court held that there is no justifiable sufficient reasons, however, in a democratic country which respects freedom of expression, can not be excluded from the *kontratyp*– justification. The analyzed criteria of "defending the socially legitimate interest" in relation to statements of persons performing public functions. These people - because of his position and interaction, decisions, attitudes, views on the situation of wider social groups –have to accept the risk of exposure to the more stringent assessment of public opinion. The unconstitutionality no prejudged the concept of "socially legitimate defense interests".

The main reason for the decision made by Court it was the fact that in a democratic state - which is necessary to conduct a public debate (Article 2 of the Constitution), freedom of the press (Article 14 of the Constitution), freedom of expression (Article 54 of the Constitution), and

the constitutionally guaranteed right to information about the activities of persons holding public office - the dissemination of truthful information on the behavior of actors in this category meet the required additional evaluative criteria.

Notwithstanding, the Court's approval of rules for the distribution of proof in defamation cases, the requirement of proof by the defendant that raised and broadcast through the mass media, the real objection, concerning the proceedings a person performing public functions, is there to protect the socially legitimate interest, was considered excessive. Constitutional Court's penal jurisdiction issued on *12 May 2008, ref. Reference SK 43/05*, in the form of so-called. The scoop above publicity in the Official Journal changed the wording of article 213 § 2 of the Penal Code, by repealing unconstitutional under the applicable standards contained therein.

The European Court of Human Rights took the position which one was presented very often in rulings that the situation where the journalists present their critical position, unless they have demonstrated their accuracy (*Dalbanvs Romania, 28.9.1999*), and the limits of acceptability criticism are wider than in relation to private individuals, just because of the need for public debate in a democratic country (*Ligens vs. Austria, 8.6.1986*).

Both cases Andrzej M. and Marian M. led to reflection all those people which are sensitive to restrictions on freedom of expression in a democratic state and for all those who have been observing the whole process from the beginning to the end. Arguments, which have been found in the justifications for the provision of places of deprivation of liberty are rational, but from the other hand, whether a fine or prison up to the obvious abuses of freedom of expression are the precaution of reaction? Remain the hope of the Polish fruit will maintain a reasonable number of prohibit types of crime to the minimum necessary level. Maybe one day, some things will change in future. Maybe the society will find every man and citizen of the Polish Republic free and able to present their opinions, even the critical ones on political events, actual public problems without incurring criminal liability, as is regulate in United States or France, where the sanctions are much more milder.

Bibliography:

1. Balcerzak M., Sykuna S., *Leksykon ochrony praw człowieka*, Warszawa 2010;
2. Szmyt A., *Leksykon Prawa konstytucyjnego*, Warszawa 2010;
3. Mozgawa M., *Prawnokarne aspekty wolności*, Kraków 2006;
4. Izdebski H., *Fundamenty Współczesnych Państw*, Warszawa 2007;
5. Maciejewski T., *Historia Ustroju i prawa sądowego*, Warszawa 2003;
6. Newspaper „*Rzeczpospolita*”, 16.01.2005;
7. *Polish Penal Code*.



Emerging Markets:

A Review of Business and Legal Issues

