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BASIC ANALYSIS OF THE CURRENT SITUATION IN POLAND REGARDING ACCESS TO REMEDY IN CASES OF BUSINESS-RELATED ABUSE

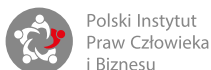
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LIST OF ABBREVIATIONS

ACR	Act on consumer rights
ALCE	Act on liability of collective entities for acts prohibited under penalty
ALCE	Act on liability of collective entities for acts prohibited under penalty
ASPD	Act on Spatial Planning and Development
CAP	Code of Administrative Procedure
CBA	Central Anti-Corruption Bureau
CC	Civil Code
CCP	Code of Civil Procedure
CCrP	Code of Criminal Procedure
CrC	Criminal Code
CSR	Corporate Social Responsibility
ELD	Directive on environmental liability with regard to the prevention and remedying of environmental damage
Environmental Protection Act	Act on the Disclosure of Information on the Environment and Its Protection, Participation of the Public in Environmental Protection, and Environmental Impact Assessments
Equality Act	Act on the implementation of certain European Union regulations in the scope of equal treatment
GDOŚ	General Directorate for Environmental Protection
Guidelines	OECD Guidelines for Multinational Enterprises
LC	Labour Code
LSDP	Local Spatial Development Plan
NLI	National Labour Inspectorate
NSA	Supreme Administrative Court
ODR	Online Dispute Resolution
OECD NCP	OECD National Contact Point
PAIiIZ	Polish Information and Foreign Investment Agency
PBAC	Polish Act on Proceedings Before Administrative Courts
RDOŚ	Regional Directorates for Environmental Protection
UOKiK	Office of Competition and Consumer Protection
WIOŚ	Voivodship Inspectorate of Environmental Protection

1. INTRODUCTION

The objective of this analysis is to present areas within which severe risks of human rights abuses exist in Poland in connection with the activities of business enterprises in order to determine the barriers of effective remedies within the meaning of the third pillar of the “United Nations Guiding Principles on Business and Human Rights”,¹ and to propose recommendations aimed at resolving identified legal problems.

This analysis focuses on areas where the risk of detrimental activity from business enterprises is most evident. This includes regulations concerning employment relationships, consumer protection, environmental protection, as well as broadly understood economic crime and corruption. Specific areas are briefly described in *Chapter 2 – Review of the most important business-related abuses*.

The following chapters define the most significant problems limiting the possibilities of redress in the case of law infringement. Problems and recommendations are divided according to law fields referred to as: civil law, criminal law and administrative law. Each of these fields regulates different areas of social relations – the civil law is the area of private law, whereas the administrative and criminal law represents public law.

Civil law comprises legal norms regulating parties’ mutual rights and obligations related to everyday situations. It provides practical protection of fundamental human rights, including the protection of life, health and property. If required, everyone may claim respect for such rights against another person in civil proceedings under the rules defined mainly in the Civil Code (CC). Thus, it is possible to seek redress for any harm suffered, claim compensation for material losses sustained, or demand discontinuation of further infringement of rights.

The basic function of administrative law is the regulation of social relations that appear in public administration activities with a focus on protecting public interest. If social relations are not compliant with administrative law norms, it is possible to appeal against a given decision under administrative proceedings, regulated mainly by the Code of Administrative Procedure (CAP), and subsequently challenge it, pursuant to the law on proceedings before administrative courts, to the administrative court, itself. As such, it is possible, *inter alia*, to claim the elimination of administrative decisions that infringe on legal norms.

Broadly understood criminal law determines a catalogue of prohibited acts (whenever civil or administrative law regulations are insufficient) and rules concerning holding the perpetrators of such crimes accountable along with a catalogue of possible penalties or other measures which should, on the one hand, punish the offender for the wrong done and on the other, redress the damage and harm suffered by the victim, as well as protect society against similar behaviours of that or other potential perpetrators in the future. The rules governing criminal law and procedure are mainly regulated in the Criminal Code (CrC) and the Code of Criminal Procedure (CCrP). Importantly, criminal procedure is usually carried out, contrary to civil procedure, based on the *ex officio* principle, which means that the prosecutor and the court play the most significant role therein, whereas the importance of a victim is marginalised in relation to issues associated with initiation and closing of criminal proceedings. Besides criminal liability, regulations concerning quasi-criminal liability of collective entities for prohibited acts under the threat of penalty exist in Poland.

Additionally, the scope of the analysis also comprises issues and recommendations associated with the operation of the OECD National Contact Point in Poland, currently acting – as of 1 July 2016 – within the structure of the Ministry of Economic Development.

¹ In accordance with the guidelines, access to remedy includes appropriate judicial, administrative, legislative or other appropriate means (e.g. non-judicial measures, such as mediation or arbitration) aimed at counteracting or redressing the damages arising from infringement of human rights by corporations. Cf. Wytyczne ONZ dotyczące biznesu i praw człowieka. Wdrażania dokumentu ramowego “Chronić, Szanować i Naprawiać” (*Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy”*), Polish Institute for Human Rights and Business, Częstochowa 2014.

2. REVIEW OF THE MOST IMPORTANT BUSINESS-RELATED ABUSES.

2.1. INFRINGEMENT OF LABOUR LAW, DISCRIMINATION, SITUATION OF MIGRANTS ON THE LABOUR MARKET

The situation of employees in the Polish labour market is determined by the type of contract under which they carry out their work. The problem often raised in recent years has been the issue of employment under so-called 'junk contracts' (i.e. under the contract of mandate or contract for specific work, or even undeclared,² as well as exerting pressure on employees to make them commence self-employment³). Another issue requiring implementation of relevant solutions, despite rich regulations dealing with employee rights, is the continuous lack of specific regulations concerning the protection of whistleblowers.⁴ In view of the increasing inflow of employees across the eastern border, in particular, those of Ukrainian nationality, the significance of the problem related to the method and form of employment of this group of foreigners is growing.

2.2. ENVIRONMENTAL DAMAGES – CONTAMINATION, INFRINGEMENT OF THE ENVIRONMENTAL PROTECTION LAW

Environmental damages occur as a result of adverse impacts on its individual elements: air, water, soil and ground, climate, as well as living organisms and their natural habitats. In Poland, air pollution caused by the emission of hazardous substances generated from burning processes is a particular problem. The municipal sector remains its major source – the combustion of solid fuel within individual heating installations.⁵ Corporate responsibility manifests itself in the production and sales of low quality fuel and obsolete, high-emission boilers. The adverse impact on water is also a significant problem, in particular, due to the emission of pollutants (including so-called 'thermal pollution') and water intake. In this regard, the role of the coal industry, which accounts for 70% of water consumption in Poland, is of grave concern.⁶

² Cf. P. Szumlewicz, *Śmieciowy rynek pracy (Junk labour market)*, 26.05.2015, available online on the website of the All-Poland Alliance of Trade Unions: http://www.opzz.org.pl/-/smieciowy-rynek-pra-1?redirect=http%3A%2F%2Fwww.opzz.org.pl%2Fo-czym-mysla%3Fp_p_id%3D101_INSTANCE_iSC6zHmAgFz%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1.

³ Cf. P. Szymaniak, M. Guza, *Przedsiębiorcy tylko z nazwy. Zmuszeni do samozatrudnienia przez pracodawców, uciekający przed bezrobociem (Entrepreneurs by name only. Forced to self-employment by employers, running away from unemployment)*, *Gazeta Prawna*.PL, 20.02.2015, available online at: <http://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/854604,samozatrudnieni-zmuszeni-do-zatrudnienia-przez-pracodawcow-uciekajacy-przed-bezrobociem.html>.

⁴ Cf. *Ochrona sygnalistów to nie zadanie dla resortu pracy – wyjaśnia Ministerstwo (Protection of whistle-blowers is not the task for the Ministry of Labour – explains the Ministry)*, 1.07.2016, available online at <https://www.rpo.gov.pl/pl/content/ochrona-sygnalistow-nie-zadanie-dla-resortu-pracy-wyjasnia-MRPIPS>.

⁵ National Air Protection Programme (Krajowy Program Ochrony Powietrza): https://www.mos.gov.pl/fileadmin/user_upload/mos/srodowisko/lesnictwo/KPOP_do_roku_2020.pdf.

⁶ <http://www.greenpeace.org/poland/WielkiSkokNaWode/>

The adverse environmental impact may be compliant with the law as a result of so-called 'common' or 'normal' uses of the environment, regulated use after the acquisition of relevant permits,⁷ and even if norms exceed defined legal regulations or administrative decisions issued hereunder.

A separate problem is activity within the limits of obtained administrative decisions which were issued in breach of the law. This is often the effect of conscious policy decisions by public authorities who perceive economic development as having prevailing value over environmental protection.

2.3. PRACTICES VIOLATING CONSUMER RIGHTS

Regulations protecting consumer rights are broken down by many independent legal acts, which adversely impact their transparency. Despite consumer rights being more and more comprehensively protected by Polish legislation, areas still exist that require amendments. Through this lens, particular attention was paid to the lack of extended effectiveness of the register of prohibited clauses to those which are used by entrepreneurs and not covered by the procedure concerning the recognising of a contractual template clause as prohibited. Independently, the problem of introducing new regulations concerning non-judicial methods of consumer dispute resolution into the Polish legal order has been also considered.⁸

2.4. HEALTH AND MEDICAL INDUSTRY

The role of the private sector in Poland's health care system is prominent in all areas other than hospital treatment.⁹ To large extent the services of private medical establishments are financed from public funds.

The provision of medical devices is associated with the risk of being detrimental to patients' health and leading to irreversible failures, such as patient death. In order to assign liability for such an event, it is necessary to determine whether it has occurred as a result of culpable irregularities in treatment. In criminal proceedings, it is necessary to indicate the fault of specific individuals; under civil law regulations, the concept of so-called 'organisational fault' also occurs, when damage results from poor work organisation in the medical establishment.¹⁰ Proving a causal link between a medical error and its effect in the form of a health detriment is a significant impediment, in that it usually requires the appointment of medical experts, which significantly raises trial costs. Moreover, due to strong professional solidarity within the medical community, opinions prepared by experts are sometimes biased.

⁷ Article 4 of the Act of 27 April 2001. Environmental Protection Law (*Prawo ochrony środowiska*) hereinafter referred to as the Environmental Protection Law.

⁸ Cf. *Polubowne rozstrzygnięcie sporów konsumenckich w Polsce (Amicable settlement of consumer disputes in Poland)*, UOKiK, 2014.

⁹ *Private sector participation and the impact on the healthcare system*, available online at: <http://www.pwc.pl/en/artykuly/2016/10-trends-in-polish-healthcare-2016.html>.

¹⁰ Thus, the organisational fault of a medical establishment may be reflected in negligence in the scope of organisation, safety, hygiene and patient care. At the same time, it is unimportant which of hospital employees is responsible for the negligence since, in such a case, the rule of anonymous fault is adopted. – see the verdict of the Court of Appeals in Szczecin of 29 December 2009, I ACa 393/14.

In 2012, regulations entered into force which established new institutions examining claims in connection with medical incidents, including regional commissions for their adjudication.¹¹ However, the adopted legal solutions are faulty and the vast majority of disputes resolved in this area remain under examination in courts.¹²

Civil liability also comprises cases of infringement on patients' rights, such as the right to information, right of access to medical documentation, as well as the patient's right to privacy and dignity.¹³ These cases exclude medical errors.

Current practices used by the pharmaceutical sector create a separate problem. Over-the-counter drugs and diet supplements are advertised on a wide scale. While warnings on the content of these products (as required by regulations) is included in each advertisement,¹⁴ it is usually unclear for the consumer. The result is the highest consumption of available over-the-counter drugs in the European Union.¹⁵

The popularity of private health insurance is growing dynamically¹⁶ and increases the frequency of conflicts between policyholders and insurer may be expected, associated with the application of unfair practices typical for the insurance sector (avoiding liability, unclear and misleading contractual provisions).

2.5. SPATIAL PLANNING

In Poland, there remain serious challenges with spatial development planning. Municipalities, as basic local government units pursuant to Article 9 of the Act on Spatial Planning and Development¹⁷ (ASPD), are obliged to adopt the study on conditions and directions of spatial development (the Study). Since the study is not the act of local law, its findings, which provide a basis for drawing up the local spatial development plan (LSDP), are not binding. In principle, the adoption of the LSDP, whose findings are binding, is not obligatory.¹⁸ As a result, 2013 data indicates that only 28.6% of the country's area was covered by the LSDP.¹⁹ The lack of the LSDP in a given area results, in accordance with Article 4(2) of the ASPD, in a new development being located pursuant to decisions on area development and management conditions, which are issued independently for individual investment projects. Such decisions are often contrary to the findings of the study. Consequently, ignoring the problem of chaotic development and landscape devastation (resulting from decisions on development conditions) allows industrial plants to be built whose location is in the vicinity of residential development, and when combined with their invasive activity, this creates many sources of nuisance for the local community. Moreover, binding LSDPs are often adopted on an *ad hoc* basis for smaller areas, and changed under investors' dictatorship.²⁰

¹¹ Articles 67a – 67o of the Act on Patient's rights and Patients Ombudsman (*Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta*).

¹² The greatest disadvantage of the adopted solution is that the level of the allowance due is proposed by the insurer instead of its determining by the commission. This problem was broadly described in the media: <http://www.rynekzdrowia.pl/Prawo/Smierc-warta-zlotowke-czyli-dlaczego-komisje-ds-zdarzen-medycznych-nie-odciazyly-sadow,136945,2.html>.

¹³ Article 4 of the Act on Patient's rights and Patients Ombudsman (*Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta*). Further information about patient's rights is available online at: <https://www.bpp.gov.pl/dla-pacjenta/prawa-pacjenta/>.

¹⁴ Regulation of the Minister of Health of 21 November 2008 concerning advertising the medicinal products (*Rozporządzenie Ministra Zdrowia z 21 listopada 2008 roku w sprawie reklamy produktów leczniczych*); more about this issue: http://www.ptfarm.pl/pub/File/FP/7_2009/13%20%20reklama%20produktow%20leczniczych.pdf.

¹⁵ *Medicine use statistics by Eurostat*, http://ec.europa.eu/eurostat/statistics-explained/index.php/Medicine_use_statistics.

¹⁶ According to the data of the Polish Insurance Association, in 2014 the number of policyholders increased by 42% in relation to the previous year. Data available online at <https://www.piu.org.pl/analizy/project/1878/paginacja/1>.

¹⁷ Cf. i.e. Journal of Laws 2016, item 778.

¹⁸ Article 14 item 6 of the ASPD.

¹⁹ Cf. P. Śleszyński, T. Komornicki, A. Deręgowska, B. Zielińska, *Analiza stanu i uwarunkowań plac planistycznych w gminach w 2013 roku (Analysis of the status and conditions of planning works in municipalities in 2013)*, https://www.mr.gov.pl/media/5139/analiza_2013.pdf, p. 13, Warsaw 2015.

²⁰ <http://serwisy.gazetaprawna.pl/samorzad/artykuly/609488,gminy-sporzadzaja-plany-miejscowe-pod-dyktando-inwestorow.html>

2.6. ECONOMIC CRIME

Economic crimes,²¹ described primarily in Chapter XXXVI of the Criminal Code²² entitled “Crimes against business transactions,” are committed both in the private and public sector. Economic crime has a considerable influence on the performance of the state economy, stability of financial and credit institutions as well as on trust to the overall financial system. It may also be associated with the financing of terrorism.²³

Economic crime also includes offences against money and securities transactions (Chapter XXXVII of the Criminal Code) as well as any other crimes associated with economic activity and trade. The Polish legislature has already created over 300 prohibited acts of this type, in over 50 statutes.²⁴ Broadly speaking, economic crime also comprises crimes against the environment (classified according to types in Chapter XXII of the Criminal Code) as well as crimes against employees’ rights (defined in Chapter XXVIII of the Criminal Code).²⁵

In 2015, over 169,000 economic crimes were committed in Poland, which is another consecutive growth in the revealing of this type of criminal activity in recent years.²⁶ In the same year, over 13,000 peoples were convicted of economic offences.²⁷

2.7. CORRUPTION

According to 87% of surveyed Poles, corruption is still a big problem in Poland. According to 39% of respondents, it is a ‘very big problem,’ whereas only 8% of respondents evaluate corruption as an ‘insignificant problem.’ At the same time, respondents note the problem of favouritism and nepotism among state officials – 77% of respondents recognised frequent dealing of work orders and governmental contracts by state officials and politicians in favour of their families, friends and acquaintances running private companies.²⁸

²¹ Traditionally, the economic crime was identified as acts committed by so-called white collar workers (*white collar crimes*), czyli osoby o wyższym statusie społecznym i zawodowym, charakteryzujące się co do zasady brakiem przemocy, pozorami legalności i znacznym stopniem skomplikowania (np. czyny związane z czynnościami pralniczymi) oraz nadużywaniem instytucji życia gospodarczego. According to the subjective approach to the economic crime, it will also include activities of blue collar workers (*blue collar crimes*), i.e. perpetrators with a lower status whose acts mainly accomplish the criteria of prohibited acts against property. At present, subjective definitions are abandoned in favour of the objective definition identifying the economic crime as offences committed in the framework of or in connection with conducted economic activities.

²² Act of 6 June 1997 – Criminal Code (*Ustawa z dnia 6 czerwca 1997 r. Kodeks karny*), (i.e. Journal of Laws 2016, item 1137), hereinafter referred to as the CrC.

²³ It refers, in particular, to money laundering. Cf. e.g. Directive of the European Parliament and of the Council (EU) no. 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance).

²⁴ Cf. *Prawo karne gospodarcze. Tom 10. System prawa handlowego (Economic Criminal Law, vol. 10 Commercial Law System)*, ed. R. Zawłocki, Warsaw 2012.

²⁵ Cf. S. Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności (Economic criminal law in the context of the subsidiarity principle)*, Warsaw 2009.

²⁶ Cf. <http://www.policja.pl/pol/aktualnosci/121461,Rok-2015-bardziej-bezpieczny.html>

²⁷ Cf. *Skazania prawomocne – dorośli wg – rodzajów przestępstw i wymiaru kary w l. 2008–201 (Conviction by a final court ruling – adults – according to types of crimes and maximum penalty in 2008–2015)*, Ministry of Justice.

²⁸ Public Opinion Research Centre, *Opinie o korupcji oraz standardach życia publicznego w Polsce. Komunikat z badań nr 14/2014 (Opinions on corruption and public life standards in Poland. Research Report no. 14/2014)*, Warsaw, February 2014. The survey *Aktualne problemy i wydarzenia (Current problems and events)* (282) was conducted using the face-to-face computer-assisted personal interviewing (CAPI) on 7–14 November 2013 on a representative randomly selected sample of 990 adult inhabitants of Poland.

The government also recognises corruption as a significant problem, which was reflected in the 2014-published “Government Anti-Corruption Programme for 2014–2019.” The main aim of the Programme is to “reduce the level of corruption in Poland, through strengthening of prevention and education, both in society and in public administration, as well as more effective combating of corruption crime.”²⁹

Despite such a negative image and national perception of corruption, Poland has moved up the list in various international studies regarding corruption levels over the recent years. In Transparency International’s 2015 Corruption Perceptions Index, Poland was ranked #30 in the world.³⁰

Due to the complexity of the corruption problem, official statistics do not fully reflect its extent,³¹ and it is worth looking at trends in the number of convictions for corruption crimes over recent years,³² as well as the number of proceedings initiated and offences found on this matter. Between 2010 and 2015, the number of convictions for corruption crimes decreased from over 2600 to less than 1750.³³ In 2014, the police initiated proceedings in over 1350 corruption cases and, at the same time, confirmed the committing of over 6000 such offences. The Central Anti-Corruption Bureau (CBA), which was established mainly for the prosecution of corruption crimes, dealt with 485 operational cases in 2015, including 225 initiated since 2010. Simultaneously, the CBA conducted 435 preparatory proceedings in which over PLN 17 million (\$4.2 million USD) was seized and a total of 1,528 allegations were raised against 485 individuals. 16% of cases conducted by the CBA were linked to the economic sector.³⁴

2.8. LIABILITY OF COLLECTIVE BODIES

Besides the criminal liability of individual persons committing crimes or, more broadly, prohibited acts, as of 2002, there exists a quasi-criminal liability³⁵ of collective bodies (which is based in the Act on liability of collective entities for acts prohibited under penalty³⁶) and is independent and separate from the civil or administrative liability³⁷ a collective body may be subject to.³⁸

²⁹ Cf. *Rządowy Program Przeciwdziałania Korupcji na lata 2014–2019 (Government Anti-Corruption Programme for 2014–2019)*, p. 5, <http://monitorpolski.gov.pl/mp/2014/299/1>.

³⁰ As a year before, Denmark which gained 01 scores was ranked first. All results are available on the website of *Corruption Perceptions Index 2015*: <https://www.transparency.org/cpi2015>.

³¹ Cf. M. Dudkiewicz, G. Makowski, *Możliwości oszacowania i prezentacji skali zagrożenia korupcją na podstawie statystyk przestępczości (Possibilities of estimation and presentation of corruption risk scale based on crime statistics)*, 2011.

³² Only types of prohibited acts described in Articles 228–230a of the Criminal Code are referred to, i.e. acts criminalising venality, bribery and influence peddling (passive and active).

³³ Cf. *Skazania prawomocne – dorośli wg – rodzajów przestępstw i wymiaru kary w l. 2008–2015 (Conviction by a final court ruling – adults – according to types of crimes and maximum penalty in 2008–2015)*, Ministry of Justice.

³⁴ Cf. *Informacja o wynikach działalności Centralnego Biura Antykorupcyjnego w 2015 r. (Information on results of activity of the Central Anti-Corruption Bureau in 2015)*, Warsaw 2016.

³⁵ Cf. Ruling of the Constitutional Court of 3 November 2004, file reference no. K 18/03, in which the Court held that the liability of collective bodies (which results, inter alia, from the change of the Act title during legislative works and deleting the term “criminal liability” therefrom) is not the *sensu stricto* criminal liability which, however, does not mean that it is not the repressive type of liability, with features of criminal liability, to which regulations of the Code of Criminal Procedure shall apply, in particular, the guarantees contained in Article 42 of the Constitution of the Republic of Poland.

³⁶ Act of 28 October 2002 on liability of collective entities for acts prohibited under penalty (*Ustawa z dnia 28 października 2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*), i.e. Journal of Laws 2016, item 1541, hereinafter referred to as the ALCE.

³⁷ Cf. Article 6 of the ALCE.

³⁸ Pursuant to the ALCE, a collective body shall be understood as a legal person and an entity without legal personality which is granted legal capacity under separate provisions, excluding the State Treasury, local government entities and their associations, as well as a commercial law company with the shareholding of the State Treasury, local government entity or association of such entities, a capital company under organisation, an entity in liquidation and an entrepreneur other than a natural person as well as a foreign organisational unit (cf. Article 2 of the ALCE).

Importantly, the nature of such liability is not primary and intrinsic, but secondary and a derivative of the criminal liability of the specific group of natural persons. To consider assigning any liability to a collective body whatsoever, three premises must be established:

The existence of a relationship between the perpetrator of a prohibited act and a collective body,³⁹

Issuance of a final ruling challenging the presumption of innocence of the perpetrator of a prohibited act,⁴⁰ and

Assigning specific fault to the collective body.⁴¹

Moreover, a collective body may be held accountable only under the circumstances of committing, by a natural person, one of the prohibited acts contained in the catalogue provided in Article 16 of the ALCE. These include, inter alia, selected offences against business transactions, money and securities transactions, corruption crimes, crimes against humanity, crimes against liberty and public order, offences against the protection of information, the credibility of documents, property, sexual freedom and decency, environment, intellectual property or selected fiscal crimes.

In the ALCE sanctions, which may be imposed on collective bodies, were also differently regulated (in relation to the “classic” criminal liability) by the legislator.⁴²

³⁹ The collective body may be held accountable only for prohibited acts (if such behaviour generated or could have generated a benefit to the collective body, even non-material) of natural persons who:

1. acted on behalf or in interest of a collective body under the powers or obligation to represent it, undertake decisions on its behalf or execute internal control, or when such powers are exceeded or such obligation is not fulfilled;
2. were admitted to act as a result of exceeding the powers or failure to fulfil the obligations by a person referred to in item 1;
3. acted on behalf or in interest of a collective body, under the approval or knowledge of a person referred to in item 1;
4. were entrepreneurs who had directly cooperated with a collective body in achieving of an objective legally permitted (cf. Article 3 of the ALCE).

⁴⁰ This refers not only to the final conviction but also to the verdict conditionally discontinuing criminal proceedings against such a person or proceedings concerning the fiscal offence, decision on granting the permit to such a person to surrender to accountability on a voluntary basis, or a court’s ruling on discontinuing proceedings against such a person due to circumstances excluding punishing of the perpetrator (cf. Article 4 of the ALCE).

⁴¹ Such a fault may involve:

- lack of due diligence while selecting the natural person,
- lack of due supervision of the natural person by the body or a representative of the collective body,
- organisation of activity of the collective body which did not ensure the avoidance of committing the prohibited act by a natural person, whereas it could have been provided by maintaining due diligence required under the specific circumstances by the body or the representative of the collective body (cf. Article 5 of the ALCE).

It means that such fault may take the form of a fault in selection (*culpa in eligendo*), a fault in supervision (*culpa in custodiendo*) or the organisational fault. It is worth stressing that pursuant to the ALCE the Polish legislator abandoned the fault model known in the criminal law and in Article 5 of the ALCE referred to civil law constructions which, on the one hand, is a protective move and, on the other hand, hinders adoption of the criminal nature of this regulation (cf. D. Habrat, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary. Komentarz (Liability of collective bodies for acts prohibited under the threat of penalty. Commentary)*, LexisNexis, Warszawa 2014).

⁴² The potential sanctions to be adjudicated in cases related to liability of collective bodies include, inter alia:

1. 1. A fine ranging from PLN 1000 to PLN 5,000,000 which, however, must not exceed 3% of the revenue gained in the financial year in which the prohibited act providing grounds for liability of the collective body was committed.
2. 2. Confiscation of assets which may cover objects originating, for instance, indirectly from the prohibited act, or which served or were intended for committing of a prohibited act, financial gain originating even indirectly from the prohibited act, or the equivalent of the aforementioned objects or financial gain.
3. 3. Ban on promotion or advertising of conducted activity, products manufactured or sold, provided services or granted benefits; use of subsidies, grants or other forms of financial support by public funds; access to resources from some European funds; use of aid of international organisations Poland is a member of; applying for public contracts. Such bans may be adjudicated for the period from one year to five years; in addition, the ruling against a collective body may be disclosed in the public domain, which may particularly severely affect a company operating on the consumer market. Cf. Articles 7–9 of the ALCE.

The discussed liability is assigned to collective bodies very rarely, which is discussed more broadly in Section 3.2.5. The reasons for such a state of affairs may be attributed to, inter alia, the nature of collective bodies' liability, which, as indicated by the ALCE itself as well as by case law of the Constitutional Court,⁴³ is secondary and a derivative in relation to criminal liability of natural persons.

2.9. VIOLATION OF HUMAN RIGHTS IN THE SUPPLY CHAIN

More and more frequently, corporations transfer production or other elements of the supply chain⁴⁴ to countries where they can minimise costs and expenses. However, in such countries, there is a higher risk of human rights violations, both by local public institutions and by the private sector. Violations may include forced labour, the employment of children, lack of occupational health and safety, low wages, degradation of the natural environment, as well as the use of violence against citizens and the committing of war crimes.

A particular high risk of human rights violations can be observed in the realms of agro-food, the extractive industry (especially in relation to minerals sourced in areas of conflict), as well as the textile, clothing, financial⁴⁵ and electronics sectors.

Those problems are even more significant in view of the fact that corporations pass their liabilities to subcontractors, who are not directly associated with them, while simultaneously trying to 'wash their hands'⁴⁶

The supply chain becomes increasingly important in the context of public procurement carried out by state and local government institutions, where respect for human rights should be a priority, but are often secondary to low prices and other criteria of a technical or qualitative nature.⁴⁷ The supply chain, throughout its entire process, should be the subject of corporate policy and, as a consequence, should be included in corporate reporting of non-financial information.

⁴³ Cf. Ruling of the Constitutional Court of 3 November 2004, file reference no. K 18/03.

⁴⁴ The problems comprise all customers supplying products and services required by the company for the purpose of manufacturing of the final product. "The supply chain comprises the entire product life cycle, including sales, after-sales services and utilisation; thus, it comprises a number of key business processes, constituting a certain type of enterprise backbone. How the company acquires underlying commodities, products and services determines the method of creating the value for stakeholders" [...]. Within the supply chain, its upstream and downstream can be distinguished. The manufacturer and the first and second stage supplier is the upstream. Distribution and sales, up to the end client, is the downstream of the supply chain. (N. Ćwik-Obrębowska, P. Oczyp, *Analiza: Zrównoważone zamówienia publiczne w kontekście łańcucha dostaw (Analysis: Sustainable public procurement in the context of supply chain)*, Kraków – Warsaw 2015).

⁴⁵ Information about the supply chain on the website of the Ministry of Economic Development is available at: <https://www.mr.gov.pl/strony/zadania/wsparcie-przedsiębiorczosci/spoleczna-odpowiedzialnosc-przedsiębiorstw-csr/lancuch-dostaw/>.

⁴⁶ Such situation occurred, inter alia, in case of the disaster of the Rana Plaza building where clothing, among others, for the Polish LPP company was produced, with over 1100 casualties. Carried out Cf. *Ubrania marki Cropp były produkowane w zawałonym budynku w Bangladeszu? (Clothing of Cropp brand was manufactured in the collapsed building in Bangladesh?)*, "Gazeta Prawna", 27 May 2013, available online at: <http://www.gazetaprawna.pl/artykuly/707144,ubrania-marki-cropp-byly-produkowane-w-zawalonym-budynku-w-bangladeszu.html>.

⁴⁷ Although after the recent amendment to the Public Procurement Law (cf. The Act of 22 June 2016 on the amendment to the Act on Public Procurement Law and certain other acts (*Ustawa z dnia 22 czerwca 2016 r. o zmianie ustawy – Prawo zamówień publicznych oraz niektórych innych ustaw*), Journal of Laws 2016 item 1020) the price criterion lost its importance, it still remains the dominating criterion. At the same time, no obligation exists requiring contracting authorities to apply social and environmental clauses. Cf. Article 91 of the Public Procurement Law.

3. REMEDIES

3.1. CIVIL LAW

3.1.1. GENERAL BARRIERS AND DIFFICULTIES

3.1.1.1. HIGH COSTS OF PROCEEDINGS

Under the application of civil law in corporate relations, the most significant problem restricting access to case examination by the court is the incurrence of relatively high litigation costs defined in Article 98 § 2 of the Code of Civil Procedure.⁴⁸ This includes the court fee, costs of bringing legal actions and lodging an appeal (usually 5% of the value of a claim), the costs pertaining to legal representation (in case of losing the case, the rates are diversified and depend on the type of claim), as well as other expenditures, including, in particular, the remuneration of experts if the adjudication of the case requires special information. The requirement to make a partly advance payment for an expert, as well as the risk of incurring other costs of expert remunerations in the case of losing the litigation, may effectively discourage victims of medical errors,⁴⁹ or persons experiencing significant nuisance, to bring forth legal action as a means to protect their rights.

In the case that a given person substantiates that he/she is not able to incur court costs without affecting the maintenance necessary for himself/herself and his/her family, he/she may use an exemption from their (full or partial) incurment. In the case of a full exemption from court costs, a party is not obliged to pay court fees and incur expenditures (they are temporarily charged to the State Treasury). On the other hand, a partial exemption from costs may relate to their fractional or percentage parts, a specific amount, certain fees or expenditures, as well as granting exemption up to a certain part of the claim, or certain claims asserted jointly. In such situation, a party that is partially exempted from court costs shall be obliged to pay a fee and cover expenditures at a level which is not covered by the exemption granted by the court.

In accordance with art. 108 of the Act of 28 July 2005 on court costs in civil cases (i.e. Journal of Laws 2016, item 623), in civil cases, an exemption from court costs shall not release the party from its obligation to reimburse costs of litigation to the opponent. Thus, in case of losing litigation, even an exemption from court costs shall not protect the party from its obligation to incur such costs in favour of the opponent. In accordance with Article 102 of the CCP in particularly justified cases, the court may adjudicate only a portion of costs against the losing party or fully waive such costs in relation to such a party. This regulation establishes a so-called 'principle of equity' which, due to the absolute wording of the aforementioned provision, is a solution rarely used in practice.

RECOMMENDATIONS:

1. Reducing the level of court fees in cases where they constitute a significant barrier in accessing the court.⁵⁰
2. Introducing a regulation which would extend, at least partially, an exemption from court costs to lost cases in the litigation, subject to the condition that the action would not turn out obviously unjustified.

⁴⁸ The Act of 17 November 1964 – Code of Civil Procedure (*Ustawa z dnia z dnia 17 listopada 1964 r. – kodeks postępowania cywilnego*), i.e. Journal of Laws 2014, item 101, hereinafter referred to as the CCP.

⁴⁹ Cf. <http://kielce.wyborcza.pl/kielce/1,47262,20811971,walczyla-ze-szpitałem-o-odszkodowanie-teraz-sama-słono-zapłaci.html>.

⁵⁰ In accordance with Article 45(1) of the Constitution of the Republic of Poland, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. The right of access to the court is the principle of the rule of law.

3.1.1.2. THE BURDEN OF PROOF AND ACCESS TO EVIDENCE HELD BY THE OPPONENT

Access to evidence held by the opponent may become another problem to be faced by a party bringing forth an action. This is strictly associated with the issue of distribution of the burden of proof that is regulated in Article 6 of the Civil Code.⁵¹ In accordance with this provision, the burden of proof shall lie with the person who derives legal effects therefrom. This rule consistently indicates that e.g. a victim acting as a plaintiff must substantiate that the defendant caused damage and prove the level of this damage.⁵²

Derogations from the rule determining the distribution of the burden of proof exist, such as the institution of presumption or shifting the burden of proof to the defendant. Presumptions are divided into two types: factual and legal. In accordance with Article 231 of the CCP, a factual presumption is based on the possibility of the court determining the facts of significant importance for resolving the case, which is updated if such a conclusion may be drawn from other facts found. The construction of the *prima facie evidence* used, in particular, in case law related to liability for medical treatment, relies on the institution of factual presumption. The construction of this proof is based on releasing the plaintiff from the obligation to substantiate all stages of the causal link between the generating fact and the damage.⁵³ On the other hand, a legal presumption is based on the court's obligation arising from the legal norm to accept a certain fact as a finding. According to civil procedure, this obligation is confirmed by Article 234 of the CCP. Alternatively, we face shifting of the burden of proof, for instance, in cases concerning employee discrimination. The source of this derogation originates from Article 183b § 1 of the Labour Code.⁵⁴ In accordance with this provision, the principle of equal treatment in employment shall be deemed violated, as a rule, in the case of diversification of an employee's situation by the employer for one or several reasons defined in Article 183a § 1 of the Labour Code,⁵⁵ resulting in: a refusal to establish or terminate the employment relationship, an unfavourable amount of salary or omission of an employee in promotions or awarding other benefits associated with work, or omission while appointing employees to participate in training upgrading professional qualifications, unless the employer proves that its decisions were driven by objective reasons.

As mentioned at the beginning, a plaintiff trying to prove facts significant for resolving the action brought by him/her will often need get access to the documents held by the opponent. Under such circumstances, it is possible to file a motion under Article 248 of the CCP. In accordance with § 1 of this provision, under the court's order, on a determined time and at a determined place, everyone shall be bound to present a document held by him/her that constitutes the proof of the fact significant for resolution of the case, unless the document contains classified information. This obligation refers to any documents, both official and private. In accordance with § 2, the opponent may not refuse presentation of such a document, even if this would expose the opponent to losing the case.

The court will order presentation of the document only if it recognises that the document constitutes the proof of the fact significant for resolution of the case. This provision must not provide basis for binding the opponent to generate a document, prepare the specific information or search for documents not precisely defined.⁵⁶ The foregoing facts indicate that the document whose presentation can be ordered by the court under this provision must in itself constitute the proof of the fact significant for resolution of the case. Therefore, it is indicated that, e.g. Information containing address data of witnesses shall not constitute a document within the meaning of Ar-

⁵¹ The Act of 23 April 1964, Civil Code (*Ustawa z dnia 23 kwietnia 1964 r. – kodeks cywilny*), i.e. Journal of Laws 2016, item 380, hereinafter referred to as the CC.

⁵² Cf. the verdict of the Supreme Court of 9 May 2013 in the case with file reference no. II CSK 599/12.

⁵³ Cf. justification of the verdict of the Supreme Court of 5 February 2014 (file reference no. V CSK 140/2013)

⁵⁴ The Act of 26 June 1974, Labour Code (*Ustawa z dnia 26 czerwca 1974 r. – kodeks pracy*), i.e. Journal of Laws 2016, item 1666, hereinafter referred to as the LC.

⁵⁵ In accordance with this provision, employees should be equally treated in the scope of establishment and termination of the employment relationship, terms and conditions of employment, promotion and access to training in order to upgrade professional qualifications, in particular, irrespective of gender, age, disability, race, religion, nationality, political option, trade union membership, ethnic origin, faith, sexual orientation, as well as due to employment for definite or indefinite period of time, or under full time or part time contract.

⁵⁶ Cf. *Kodeks postępowania cywilnego. Komentarz (Code of Civil Procedure. A commentary)*, ed. M. Manowska, vol. I, Articles 1–505 (38), issue III, WK 2015, commentary to Article 248.

Article 244 of the CCP (official document) or 245 of the CCP (private document).⁵⁷ Thus, apparently, Article 248 of the CCP is interpreted in an extremely stringent way, which may generate serious problems for a party seeking protection of its rights under a civil action.

The failure to fulfill the obligation to present the document is subject to a fine. However, it should be noted that under circumstances when a given entity is not bound to store the document, substantiating that it really holds the document may turn out to be difficult, or even impossible.

RECOMMENDATION:

- An amendment to Article 248 of the CCP so that the application of this provision to determine witnesses' address data is possible.

3.1.1.3. ACCESS TO CLASS ACTION

The regulation related to so-called 'class action' was introduced into the Polish legal order under the Act of 17 December 2009 on asserting claims in a class action.⁵⁸ In accordance with Article 1 of this Act, it regulates civil proceedings in cases where claims of a single type are asserted by at least ten persons, based on the same factual grounds. The Act is applicable in cases concerning claims for consumer protection due to liability for damage caused by a hazardous product and due to prohibited acts, excluding claims for the protection of personal rights.

The class action is undoubtedly attractive in terms of a reduced court fee at a level of 2% (instead of 5%) of the value of the subject of the dispute. However, experience shows that it is not the institution often used in practice. From the beginning of 2010 to the end of the first half of 2016, a total of only 203 class actions were brought forward.⁵⁹ The long duration of such proceedings is a primary reason for this, particularly the first stage of the proceedings. During the first stage of the proceedings, where the court is obliged to examine the admissibility of the proceedings as well as the functioning of the institution of a deposit to secure costs of proceedings, which is very rarely adjudicated, examination of the application is time-consuming.⁶⁰ Moreover, other problems include the lack of possibility to assert claims for the protection of personal rights, the workload of the attorney at litem (incomparably higher than in individual proceedings) and the necessity of precise accordance to the rules of cooperation among a group of plaintiffs.⁶¹ Other commentators also indicate the need to introduce a possibility to assert employee claims under a class action as well as contractual claims among entrepreneurs, as well as inflexible regulations concerning the announcement of a pending class action in the press, or lack of an effective mechanism for amicable resolution of class actions.⁶²

⁵⁷ Cf. the thesis of the verdict of the Court of Appeals of 24 June 2015 (file reference no. I Aca 15/15), LEX 2014.

⁵⁸ Act of 17 December 2009 on asserting claims in a class action (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*), Journal of Laws of 2010 No. 7, item 44.

⁵⁹ Cf. *Pozwy zbiorowe w latach 20110 – I p. 2016 (Class actions in the years 2010 – 1st half of 2016)*, Statistical Guidebook of Judicial Authorities – Multiannual reports, available online at <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie>

⁶⁰ Cf. M. Dębiak, *Postępowanie grupowe – analiza regulacji w wymiarze teoretycznym i praktycznym po czterech latach jej funkcjonowania (Class action – the analysis of regulations in theoretical and practical terms after four years of its functioning)*, Forum Prawnicze, 2014, p. 36, available online at: <http://forumprawnicze.eu/attachments/article/12/Debiak.pdf>.

⁶¹ Cf. M. Niedużak, M. Szwał, *Pozwy grupowe – doświadczenia po czterech latach (Class action – experience after four years)*, Helsinki Foundation for Human Rights, Warsaw 2014, p. 2, available online at: https://konsument.um.warszawa.pl/sites/konsument.um.warszawa.pl/files/pozwy_grupowe.pdf.

⁶² Cf. M. Dębiak, *Postępowanie grupowe... (Class action...)* p. 36.

RECOMMENDATIONS:

1. Extension of the scope of application of the Act to cases on the protection of personal rights, employee claims and contractual claims among entrepreneurs.
2. Improvement of the process of proceedings through shortening of the first stage of the proceedings and abandoning the institution of a deposit to secure costs of proceedings.
3. Introduction of a possibility to publish announcements on pending class actions via Internet.
4. Introduction of a mechanism relevant for an amicable solution of class action.

3.1.2. ADDITIONAL INFORMATION CONCERNING LABOUR LAW AND ANTI-DISCRIMINATION LAW

3.1.2.1. LABOUR LAW INFRINGEMENTS IN TERMS OF EMPLOYMENT FORMS

As already mentioned in Section 2.1, a significant problem of the Polish labour market is the employment of employees under civil law contracts (contract of mandate, agreement for provision of services, contract for specific work), commonly known as ‘junk contracts’, under circumstances when the character of the relationship between the person performing the work and the person commissioning the work demonstrates features of an employment relationship. It is a phenomenon which is difficult to combat when orders or prohibitions are applied, which can only further contribute to the development of the so-called ‘shadow economy’, and it would require creating legal instruments which would serve as incentives for employers and balance the profitability of employing persons under an employment contract versus other employment forms.⁶³ The necessity to reduce costs associated with employment is also called for independently. It is worth noting that the net remuneration of an employee constitutes only 60% of all costs which must be incurred by the employer to hire the employee.⁶⁴

A drastic manifestation of labour law violations in terms of employment is hiring employees undeclared, i.e. without any contract and the resulting rights, which is still a common phenomenon, particularly in certain sectors of the economy (e.g. in construction⁶⁵ where it is dangerous due to frequent accidents at work). It seems that in this scope, intensified inspections of the National Labour Inspectorate (NLI) are required, as well as education of black collar workers regarding their rights.

Another problem is hiring employees under contracts for a defined period of time, which results in a lower level of employee protection against the loss of work. However, the latter phenomenon has been combated by the Polish legislature, which is demonstrated in the recent amendment⁶⁶ to Article 251 § 1 of the Labour Code, pursuant to which an employment contract for a defined period of time, after exceeding 33 months, shall be transformed into a contract for an indefinite time.

⁶³ Cf. A. Rozwadowska, „*Nie ma sędziego bez oskarżyciela*” – jak Niemcy walczą ze śmieciówkami, (“*There is no judge without the prosecutor*” – how do Germans fight with junk contracts), 5.08.2015, “wyborcza.biz”, available online at: <http://wyborcza.biz/biznes/1,147141,18487260,nie-ma-sedziego-bez-oskarzyciela-jak-niemcy-walczą-ze-smieciówkami.html?disableRedirects=true>.

⁶⁴ Cf. A. Brzostek, *Koszt zatrudnienia pracownika, czyli ile pracodawca wydaje na składki*, (*Cost of employee hiring, i.e. how much does the employer spent on contributions*), 21.02.2015, “Gazeta Prawna.PL”, article available on the website: <http://praca.gazetaprawna.pl/artykuly/854263,koszt-zatrudnienia-pracownika-ile-pracodawca-wydaje-na-skladki.html>

⁶⁵ Cf. *Praca na czarno kwitnie w budownictwie* (*Undeclared work blooms in construction*), 10.10.2009, “Polska Dziennik Łódzki”, available online at: http://budownictwo.wnp.pl/praca-na-czarno-kwitnie-w-budownictwie,91148_1_0_0.html.

⁶⁶ Cf. Article 1(1) of the Act of 25 June 2015 on the amendment to the Act – Labour Code and certain other acts (Journal of Laws 2015, item 1220).

RECOMMENDATIONS:

1. Equalising employment costs, irrespective of selection of its form.
2. Expanding the competence of NLI in the scope of supervision and control of entities employing workers under civil law contracts.
3. Reducing public costs of employment.
4. Intensifying investigations carried out by the National Labour Inspectorate.
5. Introducing education regarding significant labour law regulations to the curricula in the national education system.

3.1.2.2. A SUIT FILED WITH THE LABOUR COURT

A suit filed with the labour court is a significant instrument of protection of employee rights under labour law. The possibility of its filing is mainly granted in case of groundless cancellation of an employment contract, its termination or termination of working conditions or wage conditions, as well as under the circumstances of employment refusal.

The waiver of the obligation to pay a court fee in cases pertaining to labour law should be assessed positively. In accordance with Article 35 of the Act on court costs in civil cases, the obligation of fee payment refers only to the appeal, complaint, cassation appeal and complaint regarding determining of non-compliance of the final judgement with the law. In this case, the fee, as a rule, is of fixed character and amounts to only PLN 30. Thus, it has a symbolic dimension.

On the other hand, the issue of very short terms to file an appeal against an employment contract (7 days) and a claim for reinstatement and request for concluding an employment contract (14 days) should be criticised. However, this problem will soon lose its significance in connection with the Act of 2 December 2016, signed by the President of the Republic of Poland on 28 December 2016, concerning the amendment of certain acts in order to improve the legal environment of entrepreneurs,⁶⁷ extending the terms defined in Article 246 of the Labour Code to 21 days.

3.1.2.4. PROTECTION OF WHISTLEBLOWERS

A whistleblower “is a person who, acting in good faith, reports or discloses information on irregularities undermining public interest or employer’s interest, occurring at a workplace.”⁶⁸ The protection of whistleblowers under Polish law is currently minimal, and limited to general regulations of the labour law, criminal law, civil law or related to personal data protection⁶⁹; the first regulations contain the broadest catalogue of provisions which could be potentially used by whistleblowers.

⁶⁷ [http://orka.sejm.gov.pl/opinie8.nsf/nazwa/994_u/\\$file/994_u.pdf](http://orka.sejm.gov.pl/opinie8.nsf/nazwa/994_u/$file/994_u.pdf)

⁶⁸ Definition derived from the website: <http://www.sygnaalista.pl/>.

⁶⁹ According to some experts the Act on personal data protection, in particular, its Article 25(1)(3), may pose threat to disclosure of a whistleblower’s identity, which also relates – in the scope of disclosure of personal data of the applicant – to the Act on access to public information (cf. e.g. A. Wojciechowska-Nowak, *Skuteczna ochrona prawna sygnalistów. Perspektywa pracodawców, związków zawodowych oraz przedstawicieli środowisk prawniczych (Effective legal protection of whistle-blowers. Perspective of employers, trade unions and representatives of legal communities)*, “Przegląd Antykorupcyjny” 2016, no. 2(7): *Whistleblowers*, p.24, http://cba.gov.pl/ftp/zdjecia/Przegląd_Antykorupcyjny_7.pdf). While introducing regulations protecting whistleblowers, such defining of obligations referred to, e.g. in Article 25 (1)(3) of the Act on personal data protection (*Ustawa o ochronie danych osobowych*) should be deemed desirable which would allow for avoiding similar doubts in the future.

Under the labour law, legal instruments contained in the Labour Code which may serve for the protection of whistleblowers include: protection against mobbing as a revenge for reporting irregularities, a possibility to appeal against the termination of an employment contract providing an apparent reason under the circumstances when the real reason of employee firing is the intention to “silence” him/her, or a possibility to claim compensation based on the rules of equal treatment in employment under the circumstances of harassment. However, these are ineffective in practice. It is also worth mentioning a possibility to apply the protection towards the whistleblower, foreseen in Article 23(2) of the Act on the National Labour Inspectorate⁷⁰, i.e. imposing confidentiality rules on circumstances enabling the disclosure of identity of the employee who submitted information to the labour inspection controller. At the same time, however, it is legitimate to say that those regulations of the labour law are “ineffective and only partly enable employees to avoid consequences when they decide to report irregularities at their workplace.”⁷¹ In addition, those regulations, in connection with the fact that they have been introduced for protection of an employee understood in narrow terms, often are not applicable at all in the case of persons employed under civil law. Moreover, the existing instruments of labour law which may serve for the protection of whistle-blowers are of secondary nature whereas preventive tools are missing altogether.⁷²

Contrary to recommendations from international organisations,⁷³ the Act on the protection of whistleblowers in Poland remains unadopted, which would comprehensively regulate the issue under discussion as well as introduce the definition of a whistleblower, currently undefined in the Polish legal order. The overall regulation of whistleblowers’ situations in a single legal act is encouraged, *inter alia*, by Resolution no. 1729 of the Parliamentary Assembly of the Council of Europe of 2010,⁷⁴ where the need to cover regulations of the labour law, criminal code, press law, as well as broadly understood anti-corruption regulations under the Act on whistleblowers is outlined. The Resolution also indicates that “it is necessary to guarantee, among others, prior to termination of the employment relationship, establishing legal criteria for the assessment of »good will« behind whistleblowers’ actions, shifting the burden of proof in cases where whistleblowers are the party, to the employer, if the latter uses retaliation against a person reporting abuse, guarantee the right to compensation whenever whistle-blowers are victims of retaliatory measures and recognise such measures as a manifestation of discrimination, a possibility of temporary reinstatement of a worker.”⁷⁵

RECOMMENDATIONS:

1. Adoption of a comprehensive legal act covering the protection of whistleblowers in a manner that takes into account their specific situation, which would, *inter alia*:
2. comprise all currently existing legal regulations which may serve for the protection of whistleblowers, i.e. labour law, criminal law, civil law and administrative law;
3. introduce the definition of a whistleblower;
4. indicate hallmarks of whistleblowing, as well as define cases when a whistleblower is subject to protection⁷⁶;

⁷⁰ The Act of 13 April 2007 on National Labour Inspectorate (*Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*), i.e. Journal of Laws 2015, item 640.

⁷¹ G. Makowski, M. Waszczak (ed.), *Sygnaliści w Polsce okiem pracodawców i związków zawodowych (Whistleblowers in Poland watched by employers and trade unions)*, Stefan Batory Foundation, Warsaw 2016, p. 21.

⁷² cf. A. Wojciechowska-Nowak, *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy (Legal protection of whistleblowers in the experience of labour law judges. Study Report)*, Warsaw 2011.

⁷³ Cf. Article 33 of the *United Nations Convention against Corruption* (Journal of Laws 2007 No. 84, item 563) and Article 9 of the *Council of Europe Civil Law Convention on Corruption* (Journal of Laws of 2004 No. 244, item 2443).

⁷⁴ Resolution 1729 (2010) Final version, *Protection of “whistle-blowers”*, <http://assembly.coe.int/nw/xml/XRef/Xref-XML-2HTML-EN.asp?fileid=17851&lang=en>.

⁷⁵ G. Makowski, M. Waszczak (ed.), *Sygnaliści w Polsce okiem pracodawców i związków zawodowych (Whistle-blowes in Poland watched by employers and trade unions)*, Stefan Batory Foundation, Warsaw 2016, p. 22.

⁷⁶ In case of recommendations a – c, use was made of the publication of G. Makowski, M. Waszczak, *Ustawa o ochronie sygnalistów w Polsce – o potrzebie i perspektywach jej wprowadzania (Act on protection of whistleblowers in Poland – the needs and outlook of its introduction)*, Stefan Batory Foundation, Warsaw 2016.

5. fulfill a preventive function by encouraging employers to create relevant procedures or policies protecting whistleblowers;
6. establish the framework for whistleblowers' protection allowing for anonymising their data, which would require synchronising, mainly with the provisions on personal data protection and regulations on access to public information;
7. outline minimum standards of whistleblowing systems which should be implemented in organisations;
8. specify main whistleblowers' rights at a workplace (for example, protection against sudden dismissal, conditions of reinstatement), under the conditions of a court dispute (for example, shifting the burden of proof to the employer whenever it dismisses a whistleblower in revenge) or compensation in case they were subject to retaliation;
9. cover the widest possible group of employees, including those working under employment contracts for a definite period, civil law agreements and self-employed⁷⁷.

3.1.2.5. DIFFICULT SITUATION OF EMPLOYEES FROM UKRAINE

The number of employees from Ukraine who undertake work in Poland has been growing.⁷⁸ It is estimated that they constitute 95% of all foreign employees in Poland.⁷⁹ The reason for such a state of affairs is the dynamic economic development which has taken place in Poland over recent years, the military conflict in Ukraine as well as Ukrainians' willingness to work for a lower wage. Despite the application of simplified procedures in relation to economic migrants from Ukraine, it seems that they do not respond to the need created by the recent inflow of employees from this country, especially that they allow employment without a worker permit for only 6 months. As a result, many of them work illegally, consequently being deprived of employee benefits. It is estimated that this phenomenon refers to 20% of employees of Ukrainian nationality.⁸⁰ Moreover, although it is not an original concept of the Polish legislator, arising from the obligation to implement the Directive⁸¹ in relation to the entry and stay of citizens of third countries in order to be employed as a temporary worker, as of 1 January 2017 even seasonal work of foreigners will be subject to the requirement of acquiring a permit. The regulation was criticised by the Ukrainian community.⁸²

⁷⁷ Recommendations d-h were developed based on the following publications: G. Makowski, M. Waszczak (ed.), *Sygnaliści w Polsce okiem pracodawców i związków zawodowych (Whistle-blowers in Poland watched by employers and trade unions)*, Stefan Batory Foundation, Warsaw 2016 and cf. A. Wojciechowska-Nowak, *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań (Legal protection of whistleblowers in the experience of labour law judges. Study Report)*, Warsaw 2011.

⁷⁸ Cf. *Coraz więcej pracowników z Ukrainy w Polsce (More and more employees from Ukraine in Poland)*, 6.09.2014, available online at: <http://www.bankier.pl/wiadomosc/Coraz-wiecej-pracownikow-z-Ukrainy-w-Polsce-3195772.html>.

⁷⁹ Cf. W. Priadko, *Czy w Polsce zmieni się sytuacja ukraińskich pracowników? (Will the situation of Ukrainian employees change in Poland?)*, „Wschodnik.pl”. 27.04.2016, article available on the website: <http://wschodnik.pl/polska/item/5695-czy-w-polsce-zmieni-sie-sytuacja-ukrainskich-pracownikow.html>.

⁸⁰ Cf. *Jak Polacy wykorzystują Ukraińców na rynku pracy (How Poles exploit Ukrainians on the labour market)*, „Gazeta Prawna.PL”, 16.04.2016, article available on the website: <http://serwis.gazetaprawna.pl/praca-i-kariera/artykuly/936759,polacy-wykorzystuja-ukraincow-na-ryнку-pracy.html>.

⁸¹ Directive of the European Parliament and the Council 2014/36/EC of 26 February 2014

⁸² Cf. *Zaproszenie do pracy w Polsce nie będzie już obowiązywać: nowe zasady wydawania wiz (Invitation to work in Poland will not be obligatory in Poland anymore: new rules of visa issuing)*, Wschodnik.pl, 23.08.2016, available online at: <http://wschodnik.pl/publicystyka/item/7403-zaproszenie-do-pracy-w-polsce-nie-bedzie-juz-obowiazywac-nowe-zasady-wydawania-wiz.html>.

Another problem affecting this group of economic migrants is employment agencies charging illegal fees for their services.⁸³ In accordance with Article 19d(1)(1) of the Act on promotion of employment and labour market institutions,⁸⁴ such agencies may charge fees only due to costs actually incurred, associated with secondment to work abroad, travel to the destination and return of the seconded person, visa issuing, medical tests and translation of documents.

Recommendations⁸⁵:

Conducting widespread information and education efforts concerning Polish labour law in the context of foreigners' employment (also conducted in Ukrainian, Belarusian, Russian and English); organising training for employers, employment agency staff and foreign nationals.

Making information brochures concerning employee rights available at border checkpoints in many languages (in particular, in Ukrainian, Belarusian, Russian and English).

Launching a hotline (at National Labour Inspectorate or maintained by non-governmental organisations with-in commissioned tasks) for foreigners employed in Poland, and operated in several languages (in particular, in Ukrainian, Belarusian, Russian and English).

Tightening National Labour Inspectorate inspections, in particular, increasing the frequency of ad hoc inspections in employment agencies and on the premises of employers hiring foreigners.

Enforcing penalties against entrepreneurs running employment agencies that charge illegal fees.

3.1.3. ADDITIONAL INFORMATION CONCERNING ENVIRONMENTAL LAWS

3.1.3.1. NUISANCE

As already mentioned in Chapter 2.5., production plants located within close vicinity of residential development are the source of serious problems for nearby inhabitants, including in particular, odour offenses. The reason is that so-called 'odour regulations' are not binding in Poland. This is particularly problematic in the case of large-scale industrial animal farms.⁸⁶ The lack of odour norms could be mitigated by detailed regulations in which distance of those plants from residential buildings would depend on planned number of livestock, however, such regulations are also not binding. As a consequence, even a plant operating in accordance with binding norms may be noxious for the environment. Under such circumstances, the claim for protection of property under Article 222 § 2 of CC may serve as a legal instrument for the protection of nearby inhabitants – the claim for recovery of status compliant with the law and termination of infringements. Such claims shall be valid if nuisance from a neighbouring real property is not compliant with Article 144 of the CC, providing that while exercising its rights, a real property owner should refrain from measures which would interfere with the use of neighbouring real properties above the average standard arising from the social and economic designation of the real property and local relationships. However, those premises happen to be interpreted differently by individual courts adjudicating in the case of action concerning nuisance and the method of calculating the value of the subject of the dispute is an issue raising doubts in the doctrine and in the case law.⁸⁷ Moreover, the necessity to appoint an expert may emerge relatively frequently, significantly raising litigation costs incurred by the plaintiff if the case is lost.

⁸³ Cf. R. Lidke, *Jak nieuczciwi pośrednicy zarabiają na Ukraińcach szukających pracy w Polsce?* (How do unfair intermediaries earn on Ukrainians searching for a job in Poland?), Information Service of the Polish Radio, 15.04.2016, available online at: <http://www.polskieradio.pl/42/5107/Artykul/1607821,Jak-nieuczciwi-posrednicy-zarabiaja-na-Ukraincach-szukajacych-pracy-w-Polsce>.

⁸⁴ Act of 20 April 2004 on promotion of employment and labour market institutions (*Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy*), Journal of Laws 2016, item 645.

⁸⁵ Recommendations: Z. Lasocik, E. Rekosz-Cebula, Ł. Wieczorek, *Handel ludźmi do pracy przymusowej: mechanizmy powstawania i efektywne zapobieganie* (Human trafficking for forced labour: mechanisms of development and effective prevention), available online at <http://www.cbss.org/wp-content/uploads/2012/11/ADSTRINGO-REPORT-POLISH.pdf>.

⁸⁶ Cf. <http://olsztyn.wyborcza.pl/olsztyn/1,150375,20929872,to-mial-byc-sen-o-pieknym-palacu-podniesionym-z-ruin.html#TRwknd>.

⁸⁷ Cf. <http://radcazamolska.pl/procedura-cywilna/wartosc-przedmiotu-sporu-w-procesie-negatoryjnym>.

RECOMMENDATIONS:

1. Introduction of the obligation to create comprehensive LSDPs.
2. Introduction of provisions diversifying minimum required distances between production plants and residential development.
3. Introduction of so-called 'odour regulations', e.g. based on the dynamic olfactometry method.⁸⁸

3.1.4. ADDITIONAL INFORMATION CONCERNING CONSUMER LAW

In the Polish legal order, provisions concerning consumer protection in relations with entrepreneurs are included in several acts of law, although efforts aimed at their codification have been noticeable for several years. When discussing regulations devoted to the issue of consumer protection, they may be distinguished depending on the stage of relation of a given consumer with an entrepreneur.

First of all, they include regulations related to pre-contractual relationships, thus, associated, e.g. with prohibitions regarding labelling of products or certain methods of their advertising which are contained in the Act on prevention of unfair market practice.⁸⁹

Another group of regulations refers to the stage of concluding an agreement. In this scope, provisions prohibiting the use of abusive (prohibited) clauses should be mainly distinguished, in particular, Article 3851 of the CC, which defines the term of abusiveness and determines consequences of using a clause fulfilling this premise in the agreement with the consumer. In accordance with § 1 of this regulation, the provisions of a contract executed with a consumer which have not been agreed to individually are not binding on the consumer if his/her rights and obligations are set forth in a way that is contrary to good practice, grossly violating his/her interests.⁹⁰ At this stage, provisions of the Act on consumer rights (ACR) also play a crucial role.⁹¹ They define, inter alia, information obligations of an entrepreneur towards a consumer which must be fulfilled, at the latest, upon its expressing consent to be bound by the agreement. A novelty under the existing legislation in the scope of consumer protection is the informative obligation regarding a possibility to use extra-judicial dispute resolution.⁹²

Subsequently, regulations that become valid at the moment a contract between an entrepreneur and consumer has been concluded comes in place. They are created by the provisions of the aforementioned ACR as well as CC. First, attention should be paid to Article 27 of the ACR, which contains the so-called 'right of reflection' often used in Internet shopping.⁹³ It is based on the possibility to use the right to rescind the contract if it was concluded outside the premises of the enterprise. The provisions establishing a warranty for defects of an item at the time of sale contained in Title XI section II of the CC also play a significant role, with special attention to consumers' rights which are broader than in relations among entrepreneurs.

⁸⁸ This method consists in determining of odour concentration by a group of persons meeting the relevant criteria of sensory efficiency.

⁸⁹ The Act of 23 August 2007 on prevention of unfair market practice (*Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym*), i.e. Journal of Laws 2016, item 3.

⁹⁰ This shall not refer to provisions defining the main benefits of parties, including the price or the remuneration, if they have been formulated explicitly.

⁹¹ The Act of 30 May 2014 on consumer rights (*Ustawa z dnia 30 maja 2014 r. o prawach konsumenta*), i.e. Journal of Laws 2014, item 827, hereinafter referred to as the ACR

⁹² Cf. *Polubowne rozstrzygnięcie sporów konsumenckich (Amicable settlement of consumer disputes in Poland)*, UOKiK 2014, pp. 77–82.

⁹³ Cf. <http://prawoecommerce.pl/odstapienie-od-umowy-zawartej-w-sklepie-internetowym/>.

Finally, regulations which may be applicable after concluding a contract by a consumer with an entrepreneur may be found in the Act on competition and consumers protection.⁹⁴ After the recent amendment, it is worth noting the new powers of the President of the Office for Competition and Consumer Protection contained in its Article 23b,⁹⁵ regarding issuing decisions on recognising a template of a contract as unlawful and prohibiting its application.⁹⁶ An equally important power of the President of the Office of Competition and Consumer Protection should also be mentioned consisting of the right to issue decisions recognising a practice as violating collective consumer interests and imposing the termination of its application. This power enables, inter alia, combatting offerors of so-called 'savings insurance policies', which have become a plague on the Polish financial services market.⁹⁷

Although Polish legislation regulating broadly understood consumer protection has been subject to dynamic development over recent years, creating more effective solutions for the purpose of consumer protection, as well as the issue of the lack of comprehensive codification of those legal instruments, remains a problem. This results in a lack of transparency of consumer regulations. The fact that, despite the recent amendment on the method of creating and functioning of the register of abusive clauses, the entry of a clause in the register will still be binding only in relations between an entrepreneur using it and its clients, should be also criticised. This means that it will not be applicable to clauses used by other entrepreneurs containing the same legal norms as clauses recognised as unlawful. Notwithstanding the foregoing, defining the information obligation also seems unclear in the scope of the possibility of consumer's use of extra-judicial methods of dispute settlement. The reason is that in the doctrine, opinions are raised that informing a consumer of the lack of such a possibility shall also fulfill this obligation.⁹⁸ Finally, associated with the last issue, despite the lapse of a deadline of 9 July 2015 for the implementation of the directive⁹⁹ concerning alternative dispute resolution for consumer disputes, the ODR (online dispute resolution) platform launched by the European Commission on 15 February 2016 was not still introduced. Although it is an Internet tool for extrajudicial resolution of disputes related to Internet purchases, it still does not operate in Poland.¹⁰⁰

RECOMMENDATIONS:

1. Comprehensive codification of regulations aimed at consumer protection in order to improve its transparency.
2. Extension of effectiveness of the entry to the register of prohibited clauses to other entrepreneurs using them.
3. Considering an amendment to the provisions of the ACR, which introduce the obligation to inform the consumer of a possibility to use extra-judicial methods of dispute resolution in order to eliminate interpretation doubts.
4. Immediate adoption of legal solutions enabling functioning of the ODR platform in Poland.

⁹⁴ The Act of 16 February 2007 on competition and consumers protection (*Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów*), i.e. Journal of Laws 2015, item 184.

⁹⁵ Cf. *Nowe uprawnienia UOKiK w obszarze ochrony konkurencji i konsumentów po 17 kwietnia 2016 r. pytania i odpowiedzi* (*New powers of UOKiK in the area of competition and consumer protection after 17 April 2016 – questions and answers*), UOKiK, Warsaw 2016, available online at: https://www.uokik.gov.pl/aktualnosci.php?news_id=12322.

⁹⁶ The solution based on recognising a contractual template as prohibited is not new, however, so far it was applied pursuant to the ruling of the Court for Competition and Consumers Protection.

⁹⁷ Cf. D. Olędzki, *UOKiK uwalnia tysiące klientów ubezpieczycieli z pajęczyny polisolokat* (*UOKiK releases thousands of insurers from the web of savings insurance policies*), Information Service of the Polish Radio, <http://www.polskieradio.pl/42/276/Artykul/1513530,UOKiK-uwalnia-tysiacze-klientow-ubezpieczycieli-z-pajeczyny-polisolokat>.

⁹⁸ Cf. Ł. Grzelak, *Obowiązek poinformowania konsumenta o pozasądowych metodach rozstrzygnięcia sporu* (*Obligation to inform consumer about out-of-dispute settlement methods*), available online at: <http://www.grzelak-kancelaria.pl/index.php/15-obowiazek-poinformowania-konsumenta-o-pozasadowych-metodach-rozstrzygnięcia-sporu>.

⁹⁹ Directive of the European Parliament and of the Council 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

¹⁰⁰ Cf. M. Jedrzejak, *Ruszyła platforma ODR służąca rozwiązywaniu sporów przez internet!*, (*ODR platform designed for dispute settlement via Internet has been launched!*), 21.02.2016, available online at: <http://www.trustedshops.pl/wiadomosci/12652-ruszy-la-platforma-odr-sluzaca-rozwiazywaniu-sporow-przez-internet.html>.

3.1.5. INEFFECTIVE ANTI-DISCRIMINATION PROVISIONS

A legal act of comprehensive character whose aim is counteracting discrimination at various levels and in many other areas, is the so-called 'Equality Act'.¹⁰¹ This act has been criticised for many years as apparent, ineffective and failing to provide real protection to discriminated persons. One of the basic problems is the fact that of granting a claim for compensation to discriminated persons (comprising material damage), instead of a claim for adequate non-pecuniary damages for the detriment suffered.¹⁰² The lack of grounds to adjudicate non-pecuniary damages for detriment suffered under the Equality Act was ruled by the Regional Court in Warsaw in the first final verdict issued pursuant to Article 13 of the Equality Act.¹⁰³

Another significant problem is the diversification of legal situations of victims of unequal treatment. Persons discriminated against due to religion, faith, political interests, age, disability and sexual orientation receive the weakest protection. Moreover, according to the data received by Poland's Ombudsman, the prevailing majority of unequal treatment cases (85% in 2015) are not reported to any public institution.¹⁰⁴

Furthermore, as early as 2012, the Polish Society of Anti-Discriminatory Law emphasised the problem of insufficient preparation of judges to adjudicate in cases related to discrimination, and the aversion of the community of judges to use the knowledge and experience of non-governmental organisations, simultaneously indicating low activity of the third sector in this area.¹⁰⁵

RECOMMENDATIONS:

1. In-depth analysis of the Equality Act and development of its draft amendment with the participation of social organisations representing interests of discriminated persons.
2. Making a legal situation of discriminated persons equal irrespective of the premises of discrimination.
3. Extending Article 13(1) of the Equality Act by the possibility to claim non-pecuniary damages for the detriment suffered.
4. Conducting training for judges in the scope of discrimination phenomenon and anti-discrimination regulations.
5. Implementing a system for recording proceedings conducted with the application of the Equality Act.¹⁰⁶

¹⁰¹ The Act of 3 December 2010 on the implementation of certain European Union regulations in the scope of equal treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), i.e. Journal of Laws 2016, item 1219.

¹⁰² Cf. Ewa Łętowska, *Ewa Łętowska: nie będzie pożytku z ustawy równościowej (The equality act will not be beneficial)*, available online at <http://www.lex.pl/czytaj/-/artykul/ewa-letowska-nie-bedzie-pozytku-z-ustawy-rownosciowej>.

¹⁰³ Verdict of the Supreme Court of 18 November 2015 in the case with the file reference no. V Ca 3611/14.

¹⁰⁴ This and many other problems associated with the equality act were signalled by the Ombudsman in his address to the Plenipotentiary of the Government for Civil Society and Equal Treatment of 29 April 2016, <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/4/XI.816.17.2016/724593.pdf>.

¹⁰⁵ M. Wieczorek, K. Bogatko (eds), *Prawo antydystryminacyjne w praktyce polskich sądów powszechnych (Anti-discriminatory law in the practice of Polish common courts)*, Warsaw 2012.

¹⁰⁶ Cf. G. Kukowka, A. Siekierka, *Monitoring skuteczności funkcjonowania Ustawy z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Dz.U.2010.254.1700) tzw. ustawy równościowej w czwartym roku od jej wejścia w życie (Monitoring of effectiveness of functioning of the Act of 3 December 2010 on the implementation of certain European Union regulations in the scope of equal treatment (Journal of Laws 2010.254.1700), so-called equality act in the fourth year after its entry into force)*, Warsaw 2014.

3.2. CRIMINAL LAW

As mentioned at the beginning of this paper, due to that fact that criminal law has the strongest influence on citizens' freedoms and rights, it fulfills a subsidiary role against other branches of law¹⁰⁷ and should not be used as the basic remedy in situations of corporate abuse. However, criminal law instruments¹⁰⁸ should be utilized under circumstances when institutions of civil law and administrative law are insufficient to ensure respect for citizens' rights. Unfortunately, under existing criminal law and procedure, a number of problems arise that significantly hamper the use of such remedies.

3.2.1. BARRIERS IN ACCESS TO THE COURT¹⁰⁹

The common problem related to the lack of adequate legal education in Poland¹¹⁰ also includes criminal law. Poles are not fully aware of the basic institutions of criminal law, are not informed of their rights and obligations within the criminal process and finally, do not know how to exercise their rights effectively. Although current curricula contain elements of legal education, such courses are not conducted in an adequate manner. Focusing on theoretical issues, often provided by unprepared teachers, as well as irrelevant areas of law, together with the use of materials whose understanding is difficult, may be problematic for pupils.¹¹¹ This leads to a situation in which the average citizen is disadvantaged as a participant in the preparatory or court proceedings and is unable to respond adequately to measures undertaken by the prosecutor, the court or finally, by the opponent in litigation.

The situation is not improved by instructions handed over to participants of the proceedings which, assumingly, should be helpful to them. In practice however, a list of complicated provisions often leads to even greater misunderstanding of one's own situation.¹¹² Communication difficulties with ordinary citizens are also often experienced by judges and prosecutors who are used to legal discussions with lawyers, and thus are unable to deliver their knowledge of complicated legal issues in a clear and understandable way.

Studies indicate¹¹³ constraint in access to the court is also frequently associated with low quality legal aid. This phenomenon may be primarily associated with very low remuneration offered to court-assigned attorneys, which does not adequately compensate such representatives for the work required, and deviates significantly from free

¹⁰⁷ Cf. W. Wróbel, A. Zoll, *Polskie prawo karne: część ogólna (Polish criminal law: General part)*, Kraków 2014.

¹⁰⁸ In this chapter, problems associated with accountability of collective bodies, which, however, is not the criminal liability *sensu stricto*, will be also described. See: Chapter 2.8.

¹⁰⁹ Access to the court should be understood not only as the formal authorisation to submit the case to court proceedings but mainly as a possibility of effective exercising of own powers as a participant of such proceedings.

¹¹⁰ "Legal education should be understood as any kinds of initiatives addressed to various social groups, aiming at raising legal knowledge and awareness". Cf. *Edukacja prawna obywateli – możliwości, szanse, bariery (Legal education of citizens – possibilities, opportunities, barriers)*, INPRIS, 2012.

¹¹¹ Cf. Legal guide of the Ministry of Justice for the young people *Przychodzi uczeń do prawnika...część dla młodzieży gimnazjalnej (A pupil comes to the lawyer... A part for junior secondary school students*, in which many complicated legal terms are explained by paraphrasing statutory definitions (sometimes containing a *idem per idem* error) or reference to consecutive unexplained legal terms. Cf. e.g. the definition of legal capacity: "It is the ability to perform legal activities in one's own name. It is a possibility to acquire rights, incur liabilities as well as dispose of own rights through own actions".

¹¹² It is worth noting that, contrary to the myth common also among lawyers that acts of law are written using a common language, they are actually built based on the general language in an official register which additionally contains a great number of specialist terms, including terms defined individually in a given act of law. Such a language construction of the regulations does not positively affect their understanding in a group of people who do not have any contact with the legal language on a daily basis. Cf. M. Zieliński, *Osiemnaście mitów w myśleniu o wykładni prawa (Eighteen myths in thinking about law interpretation)*, "Palestra" 2011, pp. 3–4.

¹¹³ Cf. e.g. B. Kwiatkowski, *Pranie wartości majątkowych (art. 299 § 1 k.k.) – analiza praktyki wymiaru sprawiedliwości (Laundering of assets (Article 299 § 1 of the CrC) – analysis of judicial practice. Selected issues)*, 2010.

market rates. It leads to a situation of inequality in the ‘weapons’ available in the battle between citizens and large economic entities which additionally overlaps with a common passive attitude of prosecutors during court proceedings. This is associated with the current construction of the criminal trial where prosecutors, as a rule, take part in court proceedings in which they were not conducting the preparatory proceedings.

Technical issues are another problem associated with the access to case files, which are usually collected in hard copy and made available in the same form. The problem is mainly visible in complicated economic cases, where up to several thousand file volumes (usually 200 A4 sheets each) are collected, and almost always excludes the possibility of effective evidence review.¹¹⁴

RECOMMENDATIONS:

1. Introduction of legal education at each level of education (from the kindergarten to university), which would be mainly oriented to practical use of legal institutions. Accordingly, such education should be carried out mainly based on workshops, with a minimum number of lectures (the subject of which is usually not interesting for young people). Classes within the framework of such education should be conducted by specially prepared teachers in cooperation with representatives of legal professions.
2. Preparing instructions for those undergoing court proceedings, not limited to a list of regulations copied from relevant acts of law, and presented using clear language regarding the rights and obligations of a given person during the proceedings as well as examples of taking advantage of certain rights.¹¹⁵
3. Conducting training courses for employees of the judiciary who have contact with citizens, in particular, for employees of offices/citizen service points about how to talk in a comprehensible manner with persons with insufficient legal knowledge. The objective of the training course should be to teach them how to explain complicated legal issues in simple, easy to comprehend language.
4. Strengthening legal aid institutions via incentives for professional lawyers, including adequate remuneration, corresponding to their competence and workload.
5. Introducing a rule, pursuant to which a prosecutor conducting preparatory proceedings shall appear at the court in a case he conducted; that will enable an increase of activity of prosecutors throughout court proceedings, relieve the court (whose role should focus on adjudication) instead of replacing the prosecutor, and mitigate, to a certain extent, the inequality of arms in cases where a group of well-paid defence counsels represent a perpetrator.
6. Introducing an electronic system for file collection, particularly in extensive cases, to facilitate the parties’ access to collected evidence material.

3.2.2. LIMITED RIGHTS OF VICTIMS AND ENTITIES REPORTING CRIME

Prohibited acts committed with the participation of business entities are called ‘crimes without victims,’ i.e. offences with no entities whose “legal interest has been directly violated or threatened by a criminal offence.”¹¹⁶ Such features are demonstrated by corruption crimes or economic crimes, including offences against the environment. Cases related to such crimes are very often initiated after notification from ordinary citizens who have learned about a crime, non-governmental organisations (often in relation to offences against the environment), or other entrepreneurs (sometimes in reference to corruption crimes associated with the public procurement process).

¹¹⁴ Ibid.

¹¹⁵ A good example of presentation of court proceedings participant’s rights and obligations is the website: pokrzywdzeni.gov.pl and the Guide for victims posted thereon *Jestem pokrzywdzony przestępstwem i co dalej? (I am a victim of a crime and what to do next?)* (http://pokrzywdzeni.gov.pl/Data/Files/_public/informator/informatorpokrzywdzonego.pdf).

¹¹⁶ See Article 49 of the CCrP.

Due to the fact that the code of criminal procedure does not recognise such entities as victims, it simultaneously rejects their status as a party, both in the preparatory stage and in the court proceedings. It means that such entities have no possibility to appeal against procedural decisions made by judiciary bodies, including, in particular, decisions on the refusal to institute preparatory proceedings and on discontinuation of such proceedings.¹¹⁷ The lack of recourse for lodging a complaint by a social organisation against a decision on discontinuing preparatory proceedings instituted after notification should be recognised as the most significant defect.

It should be further noted that, whereas a victim in proceedings related to acts which infringed or posed a direct threat to legal interest is a party to the preparatory proceedings and when the criminal case is submitted to the court, they become ordinary witnesses who must not challenge individual procedural activities and, above all, have no possibility to lodge an appeal against a verdict unfavourable to him/her. Although at this stage of the proceedings, a victim may act as a subsidiary prosecutor (who is a fully empowered party) – in order to play such a role, he/she must submit the appropriate declaration until the moment of opening the trial at the main hearing, i.e. until the moment when the prosecutor presents charges.¹¹⁸ The victim shall be instructed on this right, *inter alia*, in the notification concerning sending the indictment to the court. However, the form of this instruction shall be based only on quoting relevant provisions. This leads to a situation in which the victim does not understand the difference between the role of a victim and a subsidiary prosecutor, or is unaware of the deadline to submit the relevant declaration, which may mean that the victim will be unable to use his/her rights.

RECOMMENDATIONS:

1. Introduction of the right to complain against discontinuation of preparatory proceedings or refusal to initiate the proceedings for entities notifying of a crime commitment. Such a right is particularly important for non-governmental organisations monitoring compliance with anti-corruption standards in local governments or compliance with environmental protection law.
2. Extension of a victim's rights at the stage of court proceedings by a possibility to lodge an appeal against a verdict unfavourable for the victim, as well as under circumstances when he/she does not act as a subsidiary prosecutor. Such a right, at least due to the principle of swiftness of proceedings, may be limited to cases where a negligence against which the subsidiary prosecutor could lodge a complaint in the course of proceedings would not be the basis for the appeal.

3.2.3. CONFLICT OF INTEREST IN CORRUPTION AND PENAL – ECONOMIC CASES

In small communities, in cases involving local government officials and cases associated with large corporations, a potential conflict of interest is apparent in the activities of prosecutors and judges who often undertake measures against persons very well known to them, that fulfill public functions or that represent significant economic entities. The current regulations of the Code of Criminal procedure, which allow, as a principle, for excluding only individual prosecutors and judges from participation in a case, for example, due to “the existence of such circumstances that it could raise justified doubts related to their impartiality in a given case,”¹¹⁹ seem insufficient. First, requests for inclusion in such situations are not always considered. Second, very often a person involved in

¹¹⁷ There are exceptions against this rule such as, under the circumstances of refusal to institute proceedings, where a notifying institution (including a social organisation) and a notifying natural person, provided that its rights have been violated, may lodge a complaint, or in relation to discontinuation of the proceedings, where a narrow catalogue of crimes, besides the condition of infringement of rights, in relation to which a complaint is permissible. Cf. Article 306 of the CCrP.

¹¹⁸ Cf. Article 53 and 385 of the CCrP.

¹¹⁹ See Article 41 of the CCrP.

a corruption or penal-economic case knows and maintains contact with many prosecutors and judges. Therefore, under such circumstances, a biased attitude of the entire local judiciary cannot not be excluded.

A conflict of interest in activities of the prosecutor's office also emerges under circumstances when a given case involves state-owned enterprises or other entities affiliated (also politically) with the government whose ministers supervise both the prosecutor's office and the indicated entities.

RECOMMENDATIONS:

1. In specific situations of potential conflict of interest, introduction of a possibility to exclude entire units of the prosecutor's office or courts shall be analysed; or introduction of a rule that cases of a certain subject, or referring to certain entities (e.g. public officials), shall be conducted by the prosecutors and judges from the other region.
2. Recovery of separation of the prosecutor's office from governmental structures, which will significantly reduce the political risk of controlling preparatory proceedings.

3.2.4. PROBLEMS IN PROCEEDINGS RELATED TO MONEY LAUNDERING

Laundering of assets may be generally characterised as “the practice by means of which the existence or illegal source of origin, or illegal use of income is hidden, making it appear legal,”¹²⁰ which is “even more dangerous since it enables penetration of organised crime and effects of its activity into the sphere of legal state economy.”¹²¹ Money laundering, due to the construction of this prohibited act,¹²² may occur in association with any crime generating material benefits for the perpetrator. It affects not only business transactions, but also legal interests infringed upon by crimes from which dirty income originates,¹²³ simultaneously shielding their perpetrators. It is for this reason that combating this criminal action, in which corporations also participate, is so important¹²⁴.

Although money laundering occurs in almost each criminal case,¹²⁵ the number of charges presented that are associated with this crime are still limited, and the number of convictions for all types of this crime range from 100 to 250.¹²⁶ At the same time, the most common cases involving this crime are associated with careless behaviour of perpetrators

¹²⁰ Definition elaborated by the United States President's Crime Commission established in 1984 Quoted from: Górniok, *The Act of 12 October 1994 on the protection of trade and the amendment of certain provisions of criminal law (Journal of Laws 1994 no. 126 item 615)* Warsaw, 1995 p. 22

¹²¹ J. W. Wójcik, *Przeciwdziałanie praniu pieniędzy (Counteracting money laundering)*, Zakamycze, 2004, p. 30 and literature quoted therein.

¹²² Cf. Article 299 § 1 of the CrC.: “Anyone who receives, holds, uses, transmits or transfers or transports abroad, hides, transfers or converts, assists in the transfer of title or possession of [assets] obtained from the profits of offences committed or takes any other action that may prevent or significantly hinder the determination of their criminal origin or place of location, their detection or forfeiture, is liable to imprisonment for between six months and eight years.”

¹²³ Such income may originate from such crimes generating income for companies as, inter alia, use of forced labour and child labour, human trafficking, sexual crimes.

¹²⁴ “It is worth [...] quoting the opinion of one of audit department directors of a small bank who expressed his opinion in 1997, i.e. 3 years after introducing penalising of [money laundering] [...]: »our bank benefits from money laundering. Western banks had and still have such benefits, therefore we laundered money, launder money and will launder money«. This is not a new opinion. Swiss, Austrian, German and many other countries' bankers excellently raised profits, frequently owing to tolerating money laundering by their clients, particularly under anonymous transactions and secret bank accounts. On the other hand, the lobby of German bankers effectively prevented money laundering penalising”. Cf. J. W. Wójcik, *Przeciwdziałanie praniu pieniędzy (Counteracting money laundering)*, Zakamycze, 2004, p. 72.

¹²⁵ Another issue is whether this type is correctly constructed and whether the scope of its penalising is not too broad.

¹²⁶ Cf. *Skazania prawomocne – dorośli wg – rodzajów przestępstw i wymiaru kary w l. 2008–2015 (Conviction by a final court ruling – adults – according to types of crimes and maximum penalty in 2008–2015)*, Ministry of Justice.

(who play minor roles in the whole procedure) and the use of banking systems for transferring dirty money.¹²⁷ There are no effective mechanisms for combating more refined money laundering methods and indicting its organisers.

RECOMMENDATIONS:

1. Increasing the proactive control of financial flows, mainly in the non-bank area which is already covered by restrictive norms.
2. Concentrating on persons who organize and oversee money laundering operations instead of going after smaller perpetrators, which diverts attention and effort away from capturing the leaders of criminal groups and organizations.¹²⁸

3.2.5. LIABILITY OF COLLECTIVE BODIES

As indicated in Section 2.8, the quasi-criminal liability of collective entities in Poland, even in view of public announcements by authorities of their intention to change the regulation,¹²⁹ is in fact fictitious and refers to an extremely narrow group of entities. The reasons for such a state of affairs are attributed to the nature of this liability (its subsidiary character in relation to criminal liability of natural persons, which must be additionally confirmed by a prior final verdict), limiting liability only to selected types of prohibited acts (crimes against employee rights remain outside the catalogue), as well as the lack of possibility to hold a collective body accountable for prohibited acts committed by members of the management staff.¹³⁰

From 2006–2010, only 45 final verdicts were issued, where the highest fine amounted to only PLN 12,000. In four cases, forfeiture was applied, whereas in seven cases a penalty measure of a public announcement of a verdict was used.¹³¹ A majority of cases include issues related to fiscal crime and acts against creditors' interests.¹³² In 2014, 31 such cases were submitted to the court and 14 in 2015, which demonstrates that law enforcement agencies rarely enforce the ALCE.¹³³

In presented statistics, the weakness of imposed fines is striking. At the same time, the lack of a possibility to adjudicate, contrary to criminal cases against natural persons, a ban on conducting economic activity should be deemed problematic – such a ban issued in certain cases might be much more painful than the highest fine.

¹²⁷ Cf. B. Kwiatkowski, *Pranie wartości majątkowych (art. 299 § 1 k.k.) – analiza praktyki wymiaru sprawiedliwości. Wybrane zagadnienia (Laundering of assets (Article 299 § 1 of the CrC) – analysis of judicial practice. Selected issues)*, 2010.

¹²⁸ Cf. B. Kwiatkowski, J. Uchańska, *Konsekwencje stosowania środka zamrażania dla realizacji znamion występku prania wartości majątkowych opisanego w art. 299 § 1 k.k. (Consequences of application of the freezing measure for the implementation of the misdemeanour of laundering of assets described in Article 299 § 1 of the CrC)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2014, no. 3.

¹²⁹ Cf. Statement of the former Head of the Central Anti-Corruption Bureau, Paweł Wojtunik: <http://www.gazetaprawna.pl/artykuly/789986,cba-za-korupcje-odpowie-nie-tylko-menedzer-ale-tez-jego-firma.html>.

¹³⁰ Cf. Judgement of the Supreme Court of 5 May 2009 in the case with file reference no. IV KK 427/08: "The provision of Article 5 of the ALCE establishes in a completely explicit manner the premises of »fault« of a collective body only in relation to persons specified in Article 3 (2) and (3) of that Act, through indicating the »guilt« in selection or supervision. Omission of the premise of own liability of a collective body for acts of persons indicated in Article 3(1) in this provision, with the failure to introduce any other principles of entity's liability for acts of persons managing it resulted in the lack of possibility to hold a collective body accountable for prohibited acts of this category of persons".

¹³¹ Cf. *Analiza statystyczna działalności wymiaru sprawiedliwości w latach 2002 – 2011 (Statistical analysis of judicial activity in the years 2002–2011)*, Department of Statistics at the Organisational Department of the Ministry of Justice, Warsaw 2012.

¹³² B. Nita, *Postępowanie karne przeciwko podmiotom zbiorowym (Criminal proceedings against collective bodies)*, Arche 2008

¹³³ Cf. *Ewidencja spraw w sądach powszechnych według działów prawa i instancyjności za rok 2015 (Register of cases in common courts according to law departments and instance for 2015)*, Ministry of Justice.

RECOMMENDATIONS:

1. Placing more focus on conducting proceedings under the procedure defined in the ALCE in all eligible cases.
2. Extending the catalogue of situations, both in subjective and in objective terms, in which liability of a collective body may be adjudicated for prohibited acts under the threat of penalty.
3. Introduction of an additional sanction, similar to the criminal measure consisting of a ban on conducting economic activity,¹³⁴ based on prohibiting a given entity to carry out activity in the area where the infringement of the law occurred. This sanction would eliminate enterprises acting unfairly for a defined period of time and it would constitute a tangible consequence for illegal activities.

3.2.6. LIMITED PROTECTION OF EMPLOYEES

In Chapter XXVIII of the criminal code entitled “Crimes against the rights of employees,” various types of prohibited acts are stated which protect the legal interests of employees. They refer directly to the labour law and the notion of an employee, interpretation of the definition of which in the doctrine of the criminal code is controversial. The reason is that they may be understood exclusively as persons employed under an employment contract and other forms of employment specified in the Labour Code,¹³⁵ or persons having an “employment relationship,”¹³⁶ irrespective of whether such a relationship was created under the employment contract, or under civil law contracts,¹³⁷ or any persons performing paid work, not necessarily based on Labour Code regulations.¹³⁸ In connection with the common phenomenon described in Section 3.1.2.1 involving employing persons only under civil law contracts or “illegal” employment of foreigners, a number of employees performing their tasks without guarantees described in the Labour Code may theoretically also remain outside the additional protection of the criminal code.¹³⁹

RECOMMENDATION:

- Introduction of a broad definition of an employee to the Criminal Code,¹⁴⁰ which would explicitly resolve that persons working under forms of employment other than those defined in the Labour Code use additional protection, defined in Chapter XXVIII of the Criminal Code.¹⁴¹

¹³⁴ Cf. Article 39 § 2 of the CrC.

¹³⁵ Cf. *Kodeks karny. Komentarz, wyd. II (Criminal Code. A commentary)*, ed. O. Górniok, issue II, LexisNexis 2006.

¹³⁶ Cf. Article 22 § 1 of the Labour Code.

¹³⁷ Cf. P. Daniluk, W. Witoszko, Commentary to the resolution of the Supreme Court of 15 December 2005, file reference no. I KZP 34/05, OSP 2006, pp. 7–8, item 93.

¹³⁸ Cf. W. Wróbel (in:) *Kodeks karny. Część szczególna. Komentarz (Criminal Code. Specific part. A Commentary)*, vol. 2, ed. A. Zoll, 2008.

¹³⁹ This does not mean the lack of any protection, but only the lack of a possibility to apply the provisions of chapter XXVIII of the Criminal Code.

¹⁴⁰ Replacement of the word “employee” by a term with a broader meaning may be also considered which would comprise any employment forms, e.g. the “employed person”.

¹⁴¹ In its verdict of 2 June 2015, file reference no. K 1/13, the Constitutional Court observed a similar problem of narrowing the notion of an employee under the Act of 23 May 1991 on trade unions (Journal of Laws of 2014, item 167) only to persons working under the rules defined in the Labour Code, which consequently led to ruling of non-compliance of this regulation with the Constitution.

3.3. ADMINISTRATIVE LAW

3.3.1. COSTS OF PROCEEDINGS

As opposed to civil proceedings, costs do not usually prevent participation in administrative or administrative court proceedings. Lodging an appeal or a complaint in administrative proceedings in the second instance authority is free of charge. Lodging a complaint to the administrative court is usually associated with the necessity to incur a relatively low fixed fee (from PLN 100 to PLN 300). An entry fee (which depends on the value of the subject of appeal) is charged only in the case of a complaint against a decision imposing the obligation to pay a monetary receivable.¹⁴²

In case of recognising the complaint by the 1st instance court, the complainant shall be authorised to receive cost reimbursement by the authority (including the remuneration of a professional representative). Importantly, in the case of a complaint dismissal, the authority shall not be entitled to receive any reimbursement of costs from the complainant.¹⁴³ Such a solution should be evaluated positively.

The costs of cassation proceedings before the Supreme Administrative Court are different. In such proceedings, the obligation of engaging an attorney/counsel applies (the cassation appeal should be drawn up by a professional representative). This is associated with additional costs for the complaining party.

In cassation proceedings before the Supreme Administrative Court, both the authority and the complainant shall be bound to reimburse costs of proceedings if the case is lost. Taking into account the purpose and process of proceedings before the administrative court, charging the complainant with costs of the authority, also in the cassation proceedings, should be fully waived. The risk of abusive litigation is sufficiently limited by the obligation of engaging the attorney or the counsel.

RECOMMENDATIONS:

- Waiving the complainant's costs and charges of the authority in the cassation proceedings.

3.3.2. LOCUS STANDI (STANDING)

3.3.2.1. LOCUS STANDI (STANDING) IN ADMINISTRATIVE PROCEEDINGS – GENERAL RULES, LEGAL INTEREST

The basic barrier hampering participation in administrative proceedings and court administrative proceedings is the limitation of *locus standi*. In principle, parties are authorised to initiate proceedings or participate in it. In the administrative proceedings, the general norm expressed in Article 28 of the CAP applies: “everyone whose legal interest the proceedings refer to or who requires action of the authority due to its legal interest or obligation, shall be the party”. In accordance with the established case law line, legal interest is derived from the specific legal norm – it must be personal, individual and valid. Legal interest often results from the property right of a real estate, however, it shall not be assigned to entities using a real estate under the agreement, e.g. tenants (in such a case, only factual interest occurs¹⁴⁴).

¹⁴² Regulation of the Council of Ministers of 16 December 2003 concerning detailed rules of charging the registration fee in proceedings before administrative courts (*Rozporządzenie Rady Ministrów z dnia 16 grudnia 2003 r. w sprawie wysokości oraz szczegółowych zasad pobierania wpisu w postępowaniu przed sądami administracyjnymi*) <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20032212193>.

¹⁴³ Article 199 and Article 200 of the PBAC.: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20021531270>.

¹⁴⁴ “It is impossible to derive legal interest effectively from the fact of existence of the obligatory civil law relationship”. NSA verdict of 04.03.2015, file reference no. I OSK 2055/13.

RECOMMENDATIONS:

- Introduction of a statutory definition of legal interest.

3.3.2.2. LIMITATION OF LOCUS STANDI IN SPECIFIC PROVISIONS

Unfortunately, in many cases a catalogue of parties to the proceedings is limited under specific provisions. Such provisions are included in Article 28(2) of the Construction law (limitation of the scope of parties to the proceedings in case of a building permit) and Article 127(7) of the Water Law Act (limitation of the scope of parties to the proceedings in case of a water law permit). Article 41(2) of the Act on geological and mining law deprives owners of real properties located outside a mining area of party status¹⁴⁵. Article 185 of the Environmental Protection Law contains the most far-reaching limitations. Pursuant to its provisions, parties to the proceedings concerning issuance of a permit (e.g. a permit for emission of gases and dust into the ambient air) include (only) an installation operator and controlling the earth surface on the area of limited use.

An alarming tendency is the gradual limiting of the catalogue of parties and depriving groups of persons and entities of *locus standi*. For example, a draft of the new Water Law Act published by the Government Legislation Centre stipulates (despite the lack of relation with the water law reform) the updating of the Act on the Disclosure of Information on the Environment and Its Protection, Participation of the Public in Environmental Protection, and Environmental Impact Assessments (hereinafter referred to as the Environmental Protection Act) significantly limits the catalogue of parties to the proceedings concerning the decision on environmental conditions¹⁴⁶.

RECOMMENDATIONS:

1. Abandoning the introduction of regulations that limit *locus standi* in administrative proceedings.
2. Harmonisation of provisions related to *locus standi* in administrative proceedings, waiving of specific provisions regulating *locus standi* in the manner other than the CAP.

3.3.2.3. ACTIO POPULARIS, ENTITLEMENT IN DAMAGES PROCEEDINGS, COMPLAINTS AND REQUESTS

In principle, the institution of *actio popularis* is unknown in Polish administrative law. In a few cases, the possibility to claim an undertaking of specific measures by an administrative body was granted to a very wide, even unlimited range of entities. An example of a solution is Article 24 of the Act of 13 April 2007, on the prevention of environmental damage and its remediation. In accordance with this provision, anyone has the right to submit a request for action concerning the occurrence of a direct threat of damage in the environment or damage to the environment itself. The refusal to initiate proceedings shall take place under the decision against which the reporting entity has the right to appeal (and subsequently, to lodge a complaint to the administrative court). Such solutions should be assessed very positively, but unfortunately, they are very rare. Their introduction arises

¹⁴⁵ In accordance with Article 6(1)(5) of the geological and mining law, a mining area is the “space within which an entrepreneur is authorised to extract the fossil, store substances underground without tanks, store carbon dioxide underground and conduct mining works required to exercise the concession”. In case of open pit mining, the mining area, in fact, overlaps with the boundaries of the open pit. Thus, parties to the concession proceedings will not include owners of real properties located outside this area, although fossil extraction may affect them severely, e.g. through triggering mining damages, effects of the depression crater.

¹⁴⁶ <http://blog.frankbold.pl/nowe-prawo-wodne/>

from the transposition of the European Union Directive on environmental liability.¹⁴⁷ The effect of appropriate implementation of the Directive is a very high number of proceedings concerning environmental damages (when compared to other EU member states).¹⁴⁸

The CAP grants citizens the right to file complaints and requests,¹⁴⁹ which shall be considered within time limits determined by the Act. However, dealing with a complaint or request in a manner unfavourable for the party, as well as inactivity in the scope of their considering, are not subject to challenging to the administrative court.¹⁵⁰ Those institutions are of limited applicability.

RECOMMENDATIONS:

1. Extending proceeding catalogues that may be initiated by every citizen;
2. Allowing challenging of authority's inactivity in the scope of considering a complaint or a request to the administrative court; enabling initiation of court control over the method of dealing with a complaint or a request (*actio popularis*).

3.3.2.4. LOCUS STANDI VS. THE RIGHT TO SUBMIT COMMENTS AND REQUESTS

The right to submit comments and requests granted to everyone in proceedings conducted with participation of society,¹⁵¹ particularly, to processes of an environmental impact assessment (prior to issuing the decision on environmental conditions) and strategic environmental impact assessment¹⁵² projects, should be distinguished from the right to participate in administrative proceedings as a party or a participant. The authority shall be bound to consider submitted comments and refer to each of them separately, and in the case of its failure to consider them, to justify such decisions. However, the failure to consider a comment or a request shall not be subject to complaint.¹⁵³ Accordingly, social consultations are often a formality and without real impact on the shape of the decision issued.

RECOMMENDATIONS:

1. Enabling initiation of instance and court control in cases of omission or unjustified refusal to consider comments and requests in proceedings carried out with the participation of society.
2. Extension of the catalogue of proceedings with social participation.

¹⁴⁷ Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, commonly known as the ELD <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004L0035-20130718>.

¹⁴⁸ Report on the implementation status of the ELD, p. 87, available online at http://ec.europa.eu/environment/archives/liability/eld/eldimplement/pdf/ELD%20implementation_Final%20report.pdf.

¹⁴⁹ CAP Section VIII – *Complaints and Applications* (Articles 221–260).

¹⁵⁰ “Assessment of accuracy of conducting the complaint proceedings under the provisions of Section VIII of the CAP Is not subject to the cognition of administrative courts” – NSA ruling of 31 August 2010, II OSK 1578/10. “In case of failure to examine a complaint filed under Article 227 of the CAP. The Party shall not be authorised to file a complaint against the authority for failure to act” – NSA ruling of 14 October 2010, II OSK 2019/10.

¹⁵¹ Article 29 and subsequent of the Environmental Protection Act.

¹⁵² Prior to issuance of acts indicated in Article 46 of the Environmental Protection Act, inter alia, LSDP and the Study.

¹⁵³ <http://www.samorzad.lex.pl/czytaj/-/artykul/nieuwzgodnienie-uwag-do-projektow-aktow-planistycznych-bez-zaskarzenia>

3.3.2.5. ENTITLEMENT OF SOCIAL AND ECOLOGICAL ORGANISATIONS

The essence of the so-called 'formal entitlement' is the initiation of, or participation in, administrative proceedings in the interest of others or in the 'general' interest, which should be distinguished from *locus standi*. As a rule, such entitlement is granted to social organisations (associations, foundations) if it is compliant with their statutory objectives and supported by social interest (Article 31 of the CAP). The authority decides on the initiation of proceedings on request by an organisation, or on its admission to participate in pending proceedings by issuing a decision against which the right to appeal is granted, followed by a complaint to the administrative court. Unfortunately, the unclear scope of the "social interest" enable limitations of entitlement of social organisations.¹⁵⁴ Moreover, an organisation may not lodge an appeal against a decision if it did not participate in the proceedings before first instance authorities,¹⁵⁵ which constitutes an unjustified limitation of its rights.

Powers of ecological organisations in proceedings requiring social participation are broader.¹⁵⁶ In accordance with Article 44 of the Environmental Protection Act, an ecological organisation shall participate in the proceedings if it reports its intention to do so, referring to its statutory aims. The organisation may also appeal against a decision and lodge a complaint to the administrative court, even if it did not participate in the proceedings at an earlier stage. Furthermore, the unfavourable tendency of limiting *locus standi* is apparent – the amendment to Article 44 of the Environmental Protection Act which entered into force on 1 January 2015, introduced the requirement that an ecological organisation should operate for a minimum of 12 months prior to the day of initiating particular proceedings. This amendment should be assessed as definitely negative; in practice, it prevents the ad hoc creation of organisations aiming to protect the rights of inhabitants living in areas close to planned development.

The powers of social organisations are excluded in many proceedings under specific provisions, inter alia, in proceedings concerning a building permit, a water law permit,¹⁵⁷ and a permit issued under the provisions of the Environmental Protection Law (subject to proceedings concerning an integrated permit for a new or significantly modernised installation).

A social organisation shall participate in the proceedings with the rights of a party, however, its position is not always equal to the position of that party. For example, depriving the organisation of its right of participation in

¹⁵⁴ "Nevertheless, a social organisation applying for its admission to the proceedings must not rely on presentation of its statutory objectives. The organisation should make it probable that it will actively contribute to better fulfilment of its objectives through the administrative proceedings – under such conditions it may be stated that social interest supports the admission. It must be at least probable that the participation of the organisation will be favourable for the proceedings." (Verdict of the WSA in Olsztyn of 1 September 2016, II SA/OI 606/16).

¹⁵⁵ "A social organisation, if admitted to participation in the first instance proceedings on its own request, shall have a right to appeal against the decision. Otherwise, there shall be no entitlement to lodge an appeal. The appeal proceedings shall be based on the complaint principle and the right to lodge an appeal in accordance with Article 127 § 1 of the CAP shall serve to the benefit of the party. [...] On the date of lodging the »appeal« by the complainant, the administrative proceedings were already terminated. On the other hand, from the wording of Article 31 of the CAP it is impossible to draw a conclusion on the authorisation of a social organisation to claim reconsideration and resolution of the case in the course of the instance, while such organisation did not apply before for initiation of the proceedings or its admission to participation in the proceedings." NSA verdict of 4 June 1998, IV SA 1180/96.

¹⁵⁶ It is a narrow group of proceedings, in particular, the proceedings concerning issuance of the decision on environmental conditions, within which the environmental impact assessment of the project is performed (EIA). Article 44 of the Environmental Protection Act. shall also apply to proceedings concerning the issuance of an integrated permit for a newly constructed installation (pursuant to Article 185 (2a) of the Environmental Protection Law).

¹⁵⁷ It was critically assessed by the Ombudsman <http://www.sprawcy-generalne.brpo.gov.pl/pdf/2007/09/568853/1712551.pdf>

proceedings without its fault, shall not constitute a precondition justifying the resumption of the proceedings within a final decision (Article 145 (1)(4) of CAP).¹⁵⁸

RECOMMENDATIONS:

1. Waiving the specific provisions excluding the application of Article 31 of the CAP, especially in cases concerning building and water law permits.
2. Amendment to Article 31 of the CAP that enables a social organisation to appeal against a decision or lodge a complaint to the administrative court, including situations when it did not participate in the proceedings, and removal of the social interest premise.
3. Resumption of the wording of Article 44 of the Environmental Protection Act applicable before 1 January 2015 – removal of the requirement that an organisation should carry out its statutory operations over a minimum period of 12 months prior to the day of initiation of proceedings.

3.3.2.6. ENTITLEMENT TO LODGE A COMPLAINT IN PROCEEDINGS BEFORE THE ADMINISTRATIVE COURT

In accordance with Article 50 of the Polish Act on Proceedings Before Administrative Courts (PBAC) , everyone who has a legal interest to do so shall be authorised to lodge a complaint to the administrative court, including the prosecutor, the Ombudsman, the Ombudsman for Children and a social organisation, within the scope of its statutory activity, in relation to cases concerning legal interests of other persons, if it participated in the administrative proceedings. There are exceptions against this rule, as indicated above. In the proceedings requiring social participation, an ecological organisation has the right to lodge a complaint to the administrative court even if it did not participate in the proceedings.

The right to challenge acts of local law and other resolutions and orders issued by governing bodies of local government units is considerably limited. In such a case, the entitlement to lodge a complaint depends on the infringement of a complainant's legal interest. In practice, it hinders the court control of, inter alia, acts issued in the scope of spatial planning.¹⁵⁹ The entitlement to lodge a complaint against the inactivity of a local government entity is regulated analogically.

RECOMMENDATIONS:

1. Extension of the range of entities authorised to challenge resolutions and orders of local government bodies, in particular, acts of local law and planning acts, through making entitlement to lodge a complaint dependent on the factual interests of an inhabitant of a given unit;
2. Granting the entitlement to challenge resolutions and orders of local government bodies (in particular, acts of local law and planning acts) and their inactivity to social organisations whose statutory objectives refer to issues covered by a given resolution.

¹⁵⁸ The term "entity with the rights of a party" is not equal to the term of a "party" within the meaning of Article 28 of the CAP, whereas powers of the entity with the rights of a party are not equal to powers of an entity with the quality of a party. It should also be indicated that the entity with the rights of a party shall be authorised to undertake procedural steps, however, it may not dispose of the rights of material nature which are subject to the proceedings related to other person. Furthermore, the disposal of the rights of a party may also not be caused by referring the provisions of Article 145 § 1(4) of the CAP to the social organisation acting with the rights of a party, or applying for such status, without infringing of the principle of availability. – NSA verdict of 11 July 2014, II OSK 272/13

¹⁵⁹ W. Kisiel, *Legitymacja jednostki do zaskarżenia uchwał samorządowych (w orzecznictwie sądów administracyjnych)*, *Capacity of an individual to challenge local government resolutions (in the case law of administrative courts)*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2009, no. 3, pp. 33–54.

3.3.3. DEADLINES FOR LODGING APPEALS

3.3.3.1. DEADLINES IN THE ADMINISTRATIVE PROCEEDINGS

The deadline for lodging an appeal against an administrative decision is two weeks from its delivery date to the party or the day of its oral announcement.¹⁶⁰ The deadline for lodging a complaint against a judgement is seven days.¹⁶¹ If the parties are notified of a decision or a judgement through announcement,¹⁶² the notification or delivery shall be deemed effective after the lapse of 14 days from the day of public announcement.¹⁶³ Only after the lapse of this period shall the time limit for lodging an appeal shall be accrued.

3.3.3.2. DEADLINES IN PROCEEDINGS BEFORE ADMINISTRATIVE COURTS

A complaint to the administrative court shall be lodged within 30 days following the day of delivery of the settlement in a given case to the complainant.¹⁶⁴

A cassation appeal to the Supreme Administrative Court (NSA) shall be lodged within 30 days following the day of delivery of a copy of the judgement with justification to the party.¹⁶⁵ This time limit should be deemed too short and extended to two months, making it equal with the deadline for lodging the cassation appeal in the civil proceedings. An additional hindrance is the aforementioned obligation of engaging the advocate/the attorney, and the requirement of prior submission of a request for drawing up the justification of the verdict.

RECOMMENDATIONS:

- Extending the deadline for lodging a cassation appeal to the NSA to two months.

3.3.3.3. THE REQUEST FOR DRAWING UP THE JUSTIFICATION OF THE VERDICT

The requirement to submit a request for drawing up the justification of the verdict is a hindrance for parties of the proceedings. If a complaint to the regional administrative court has been dismissed, the justification shall be drawn up on request of the party and submitted within seven days of the verdict's announcement or delivery of the operative part of the judgement. The announcement of the verdict takes place in open court and the absence of the parties shall not withhold it. Instructions sent to the parties, including notifications of the hearing, are often unclear since they usually constitute extracts from statutory provisions. The parties are often convinced that despite their absence at court, the justification, or at least the operative part of the judgement, will be delivered to them with instructions. Following the lapse of a seven day period, they lose the right to file the relevant request and, as a consequence, to lodge the cassation appeal. Thus, in the court's opinion, the lack of knowledge of the law shall not justify reinstatement of the deadline for submission of the request for drawing up the justification of the verdict.¹⁶⁶

¹⁶⁰ Article 129 § 2 of the CAP.

¹⁶¹ Article 141 § 2 of the CAP.

¹⁶² It is permissible if the specific provision states so, e.g. in accordance with Article 74(3) of the Environmental Protection Act, if the number of parties to the proceedings concerning issuance of the decision on environmental conditions exceeds 20. Such a solution raises justified doubts.

¹⁶³ Article 49 of the CAP.

¹⁶⁴ Article 53 § 1 of the PBAC.

¹⁶⁵ Article 177 § 1 of the PBAC.

¹⁶⁶ NSA verdict of 19.02.2016, file reference no. I OZ 87/16.

RECOMMENDATIONS:

1. Delivery of the operative part of the judgement with instructions to parties absent at court during the announcement of the verdict and not represented by a professional attorney.
2. Wording of instructions for parties not represented by a professional attorney should be constructed in a clear and understandable way, avoiding legalistic terms and direct quotations of provisions.
3. Extension of the deadline for submission of a request for drawing up the justification of the verdict.
4. Admission of lodging a cassation appeal despite failure to submit the request for drawing up the justification of the verdict.

3.3.4. ACCESS TO EVIDENCE

3.3.4.1. ACCESS TO EVIDENCE IN ADMINISTRATIVE PROCEEDINGS; A PARTICULAR EVIDENTIAL VALUE OF ENVIRONMENTAL IMPACT REPORTS

In the administrative proceedings, the catalogue of evidence is practically unlimited; in accordance with Article 77 of the CAP, "anything that may contribute to explaining of the case and is not contrary to the law should be admitted as evidence". The parties also have a guaranteed right to make a statement concerning all evidences.¹⁶⁷

In principle, the authorities perform free evaluations of the evidence, however, in certain cases this rule is disrupted. The issue of "particular probative value" is significant in the case law regarding the report on environmental impact assessments of a project (i.e. the document based on which the assessment of the environmental impact of planned investment shall be conducted). The reports are drawn up by private enterprises on investor's request and expense, therefore their content is usually consistent with the investor's interests. In accordance with established case law line, in order to undermine claims contained in the report, the parties shall be bound to acquire a "counter report" – a specialised document drawn up by experts in a given area.¹⁶⁸ It is often unattainable by the parties, among others, due to financial reasons, especially when they may not expect reimbursement of costs incurred, even if the case settlement is favourable for them. At the same time, authorities conducting the proceedings rarely appoint experts to evaluate the report, usually relying on arrangements they are bound to obtain under the law.

RECOMMENDATIONS:

- Amendment of the provisions concerning the method of drawing up a report on assessing the environmental impact of a project. In order to ensure the unbiased character of this document, it should be prepared by independent experts; maintaining a list of experts with relevant qualifications should lie within the ability of RDOŚ (Regional Directorates for Environmental Protection) or GDOŚ (General Directorate for Environmental Protection).

3.3.4.2. ACCESS TO EVIDENCE IN PROCEEDINGS BEFORE ADMINISTRATIVE COURTS

In proceedings before administrative courts, different regulations apply. In accordance with Article 106 § 3 of the Polish Act on Proceedings Before Administrative Courts, the court may take only supplementary evidence from documents, if it is required to explain significant doubts, and provided that it does not result in excessive

¹⁶⁷ Article 10 § 1 in conjunction with Article 81 of the CAP.

¹⁶⁸ Verdict of the WSA in Kraków of 02.06.2015, II SA/Kr 310/15.

extension of the proceedings. The PBAC does not admit evidence taken from expert's opinion, whereas private expertise acquired by a party shall not be treated as the evidence from the document.¹⁶⁹ This is a result of the assumption that the administrative court should be a court of law instead of a court of fact. This creates a considerable hindrance for the parties, particularly in proceedings concerning decisions on environmental conditions, where the factual and legal spheres overlap, and professional knowledge is required for the assessment of legality of the challenged decision.

RECOMMENDATIONS:

1. Extending the catalogue of evidence in proceedings before administrative courts.
2. Granting a possibility to administrative courts to determine the factual status and evaluation of the material evidence independently in order to accelerate and simplify the proceedings.

3.3.5. OTHER PROBLEMS AND RECOMMENDATIONS

3.3.5.1. CHALLENGING OF THE ADMINISTRATIVE DECISION VS. ITS ENFORCEABILITY

In principle, challenging a decision at the administrative court shall not withhold its enforceability. After exhausting the instance process in administrative proceedings, the decision becomes final and is subject to execution.¹⁷⁰ The enforceability of the decision may be withheld by the authority or by the court on request of the complainant.¹⁷¹ Particular situations occur in cases pertaining to decisions on environmental conditions. In doctrine and in case law, the opinion prevails that its enforcement cannot be withheld.¹⁷² At the same time, however, the order of immediate enforceability of such a decision may be issued in administrative proceedings.¹⁷³

Thus, the complainants have no possibility to withhold investor's efforts to acquire successive decisions in the investment process, in particular, the building permit. It is a solution unfavourable for complainants, but it also affects the principle of procedural economics. A potential waiver of the environmental decision may be associated with the necessity to initiate the invalidation proceedings concerning further administrative decisions issued on its basis (e.g. a building permit).

RECOMMENDATIONS:

- Permitting the withholding of enforceability of the decision on environmental conditions.

¹⁶⁹ "No legal grounds exist to recognise the report prepared by three persons holding scientific degrees, entitled »Legal expertise«, as a supplementing evidence within the meaning of Article 106 § 3 of the PBAC." – verdict of the WSA in Kraków of 27.03.2014, I SA/Kr 1756/13.

¹⁷⁰ Article 16 § 1 of the CAP.

¹⁷¹ Article 61 of the PBAC.

¹⁷² NSA ruling of 16.01.2014, II OSK 3139/13; NSA ruling of 03.04.2012, II OSK 286/12.

¹⁷³ NSA ruling of 18.05.2016, II OSK 1066/15; immediate enforceability of the environmental decision is also stipulated in Article 25 item 1 in conjunction with Article 14 item 1 of so-called special transmission act (Act of 24 July 2015 on preparation and implementation of the strategic investment in the scope of transmission grids, i.e. Journal of Laws of 2016, item 1812).

3.3.5.2. INACTIVITY OF ADMINISTRATIVE BODIES

The applicable legal regulations envisage measures for combating administrative bodies' inactivity, however, as a rule, they are available only to parties to the proceedings.¹⁷⁴ Resolutions of local governments grant a possibility to complain against inactivity of local government unit bodies under the condition of substantiating infringement of the legal interest (cf. item 3.3.2.6.).

An entity which is not, and under the applicable provisions, cannot be a party to the proceedings, entitled to complain against inactivity of the body. This is particularly important when a body bound to conduct inspections or impose fines (e.g. WIOŚ (Voivodship Inspectorate of Environmental Protection) in connection with the infringement of environmental protection regulations) does not undertake activities imposed by law. Under such circumstances, citizens and non-governmental organisations shall only be entitled to submit complaints and requests in accordance with Section VIII of the CAP, however, such measures are not covered by the cognition of administrative courts (see; item 3.3.2.3. *in fine*).

3.3.5.3. SUPPLY CHAIN

Polish enterprises do not operate in a vacuum, and in numerous areas they use supply chains reaching the other end of the world. Accordingly, some companies introduce policies related to social and ecological issues, however, they usually do not monitor adherence to human rights within their supply chain.¹⁷⁵ At the same time, their obligation from the UN Guiding Principles on Business and Human Rights¹⁷⁶ is to observe human rights throughout the entire supply chain and to implement appropriate remedies in the event any infringement is found. The supply chain should be simultaneously as transparent as possible, and consumers should be duly informed of its route.

It seems that procurement procedures organised by public institutions and local governments represent the appropriate place for motivating companies to implement effective policies related to respecting human rights in the supply chain, followed by effective monitoring of their compliance. If companies seeking to win a public contract of significant value are bound to implement appropriate mechanisms, a high chance exists that such mechanisms will also be used by them in the consumer market.

An additional element fostering the implementation of effective policies is the obligation imposed by European Union Member States to implement the Directive of the European Parliament and of the Council 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU with regards to disclosure of non-financial and diversity information by certain large undertakings and groups (OJ L 330, 15.11.2014, p. 1, as amended), hereinafter referred to as "Directive 2014/95/EU", containing, inter alia, the requirement to "disclose in the report on activities – in the form of a non-financial statement – significant information relating to at least social and employee-related matters, environmental matters, respect for human rights and counteracting anti-corruption and bribery (so-called reporting in the scope of Corporate Social Responsibility – CSR reports)."¹⁷⁷ Such statements seem to be a natural place where entities bound to submit such reports should provide information on the route of their entire supply chain.¹⁷⁸ In addition, it is worth considering the introduction of regulations requiring entrepreneurs to monitor and report that no slave labour or forced labour is used in their supply chain.

¹⁷⁴ Article 37 of the CAP.

¹⁷⁵ Cf. e.g. T. Makowski, *Banany Fairtrade na polskim rynku. Analiza sytuacji obecnej i wskazówki na przyszłość (Fairtrade bananas on the Polish market. Analysis of the state-of-the-art and guidelines for the future)*, Kraków – Warszawa 2016.

¹⁷⁶ http://pihrb.org/wp-content/uploads/2014/10/Wytyczne-ONZ-UNGPs-BHR-PL_web_PiHRB.pdf.

¹⁷⁷ Justification of the draft Act on the amendment to the Accounting Act, Parliamentary document no. 1045, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/9A9AE12E5EE6DFBAC125806F004DD80E/%24File/1045.pdf>.

¹⁷⁸ Cf. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, *A renewed EU strategy 2011–14 for Corporate Social Responsibility*, COM(2011) 681, <http://ec.europa.eu/transparency/regdoc/rep/1/2011/PL/1-2011-681-PL-F1-1.Pdf>.

This proposal may be implemented, both through the requirement to present relevant reports containing policies related to social and ecological issues (including the accompanying strategy for monitoring the compliance with the principles contained in the policies), as well as through requiring companies in specific procurement contracts to hold relevant certificates confirming the use of a responsible supply chain.¹⁷⁹ Such requirements may be introduced, for example, in procurement related to food, clothing or electronic equipment.

From the perspective of the supply chain, liability of parent companies for violation of human rights by their subsidiaries, non-existing in the current legal framework, should also be recognised as extremely significant. No statutory grounds exist today to assign such liability since “in essence, a parent company is not responsible towards third parties for liabilities of its subsidiary; creditors of the subsidiary are third parties in relation to the parent company”, which is associated, inter alia, with the “fundamental rule of commercial law, pursuant to which a partner (shareholder) of a capital company (in this case – the parent company) is not liable with its assets for liabilities of the capital company in which it participates (in this case – the subsidiary).”¹⁸⁰ What is important is that liability of the parent company for liabilities of its daughter company is not uncommon in the legal order of other European countries.¹⁸¹

RECOMMENDATIONS:

1. Obligatory introduction of social and ecological clauses to the criteria of tender evaluation under public procurement, including, those related to respecting human rights within the supply chain, its monitoring, and implementation of remedies in the case that any infringements are found.
2. Obligation requiring tenderers under public procurement to hold relevant certificates (if such certificates exist in a given area) confirming their respect for human rights and the use of a responsible supply chain.
3. In connection with the implementation of Directive 2014/95/EU, introduction of an obligation to report on the route of the entire supply chain in a non-financial information statement and pursuing relevant policies in this scope, aiming to maintain due diligence during its use.
4. Introduction of the obligation to examine, under policies used in the enterprise, whether any cases of human rights violations occur in the supply chain of this enterprise, mainly in the scope of exploiting slave labour or forced labour, and to disclose such information within non-financial reporting.
5. Introduction of statutory subsidiary liability of parent companies for infringements of human rights by their subsidiaries.

¹⁷⁹ Cf. e.g. T. Makowski, *Banany Fairtrade na polskim rynku. Analiza sytuacji obecnej i wskazówki na przyszłość (Fairtrade bananas on the Polish market. Analysis of the state-of-the-art and guidelines for the future)*.

¹⁸⁰ Cf. M. Rodzyńkiewicz, *Kodeks spółek handlowych. Komentarz (Code of Commercial Companies. Commentary)*, LexisNexis, 2014.

¹⁸¹ Cf. e.g. Verdict of the Court of Justice (Ninth Chamber) of 20 June 2013 in Case C-186/12, <http://curia.europa.eu/juris/liste.jsf?num=C-186/12&language=PL>.

3.4. OECD NATIONAL CONTACT POINT

3.4.1. INTRODUCTION

OECD National Contact Point (OECD NCP) was established in Poland in 1998 in connection with the declaration of the Polish government concerning the compliance with the OECD Guidelines for Multinational Enterprises.¹⁸² Initially, it was located at the Ministry of Treasury, followed by the Polish Information and Foreign Investment Agency (PAIiIZ) in 2001, and as of June 2016 it was incorporated into the structure of the Ministry of Economic Development. Its role is to promote and ensure compliance with the Guidelines. The Polish OECD NCP is the body responsible for the submission of notifications concerning infringement of the Guidelines by multinational enterprises operating in Poland and by Polish cross-border companies operating in countries where other NCP do not act.

3.4.2. PROCEDURE BEFORE THE OECD NCP

The purpose of the procedure conducted by the OECD NCP is mainly “to find an amicable settlement of a disputable situation through arbitration proceedings or mediation”; only when such mechanisms fail, the NCP examines a case in depth.¹⁸³

The procedure before the NCP consists of three stages:

6. Receipt of the notification of preparation of a preliminary assessment¹⁸⁴;
7. The acceptance of the case to closure of the mediation and;
8. Drawing up and publishing the final statement.

The final statement does not have the features of a verdict and the only sanctions associated with its issuance, in the case that an infringement of the Guidelines is found, include publishing information on the breach of the OECD Guidelines or the lack of intention of the parties or a possibility to resolve a conflict situation.

3.4.3. PROBLEMS RELATED TO OPERATION OF THE OECD NCP

A) LACK OF OECD NCP INDEPENDENCE

The Polish OECD NCP continues to be organisationally associated, to a lesser or greater extent, with the Polish government. At the same time, no additional external advisory or expert bodies operate within its structures, as is the case in other countries.¹⁸⁵ On the one hand, this may potentially lower the professional level of the NCP's activity and, on the other, expose it to accusations of lack of sufficient independence from governmental and

¹⁸² “The *OECD Guidelines for Multinational Enterprises* (hereinafter referred to as the *Guidelines*) comprise guidance of governments addressed to multinational enterprises. The objective of the Guidelines is to ensure that operation of such enterprises is compliant with the policy of a given government, strengthen the basis of mutual trust of enterprises and the society in which they operate, improve the atmosphere for foreign investment and increase the contribution to the sustainable development of multinational enterprises. The Guidelines form a part of the OECD Declaration on International Investment and Multinational Enterprises.” Hereinafter in this Chapter referred to as: the *Guidelines*. The Polish translation of the Guidelines is available on the website of the Ministry of Development: https://www.mr.gov.pl/media/24853/Wytyczne_OECD_2011_PL.pdf.

¹⁸³ Cf. *Wytyczne OECD dla przedsiębiorstw wielonarodowych. Procedura postępowania w sprawie związanej z naruszeniem Wytycznych (OECD Guidelines for Multinational Enterprises. Procedure in the case associated with infringement of the Guidelines)*, https://www.mr.gov.pl/media/28822/KPK_OECD_Zawiadomienie_Procedura.pdf.

¹⁸⁴ The preparation of a written preliminary assessment is accompanied by taking the decision to accept or reject a complaint. The acceptance of the case does not necessarily mean that the OECD NCP has found an infringement of the *OECD Guidelines*.

¹⁸⁵ Such solutions were adopted in the Netherlands, Norway and Denmark. Cf. B. Faracik, *Krajowy Punkt Kontaktowy OECD w Polsce. Stan obecny i rekomendacje (OECD National Contact Point in Poland. State-of-the-art and recommendations)*, 2015, available online at .

political factors while, at the same time, impartiality examining complaints and taking decisions in relation thereto.¹⁸⁶ It is worth remembering that the Ministry of Economic Development, within which the OECD NCP has been functioning since June 2016, is responsible, inter alia, for issues in the scope of the economic administration section comprising, inter alia, “promotion of the economy, including supporting of exports and Polish foreign investment development as well as supporting inflow of direct foreign investment.”¹⁸⁷ In October 2016, there was a lot of publicity around the Ministry’s talks with multinational enterprises, such as Daimler¹⁸⁸ or Airbus.¹⁸⁹ If the OECD NCP dealt with a case associated with those corporations in the same period, the risk of conflict of interest arising would be considerable and the potential rejecting of the complaint, irrespective of substantive grounds of such decision, could have raised controversies.

The conflict of interest may also manifest itself under circumstances when a complaint addressed to the OECD NCP relates to a State Treasury company or other entity with the State Treasury share.

Furthermore, it should be noted that additional doubts related to the OECD NCP impartiality in similar cases and, at the same time, lack of stakeholders’ trust, may arise from the lack of information on persons examining cases submitted to the NCP and providing information related to questions concerning a possibility to submit a case, as well as persons directly responsible for supervising the NCP and decisions made by it¹⁹⁰ and the place where the NCP has been located in the Ministry’s structure.

It is worth remembering that the requirement of independence (impartiality) of the OECD NCP arises directly from the text in the Guidelines.¹⁹¹

B) LACK OF TRUST TO OECD NCP

All the aforementioned circumstances affect the currently observed lack of trust of the OECD NCP in Poland. This is due to, on the one hand, “conducting past [i.e. in the period from 2002 to 2008: author’s comment] mediations and considering complaints against international corporations in a manner assessed as unprofessional, as well as the failure of the OECD NCP in Poland to meet the criteria of effectiveness contained in the UN Guiding Principles on Business and Human Rights in the scope of effectiveness of extra-judicial dispute resolution mechanisms (Guideline 31),”¹⁹² and on the other hand, wasting the first positive effects of activities undertaken by the OECD NCP at the turn of 2013/2014 due to frequent personnel changes and failure to observe the deadlines foreseen in the procedures (i.e. updating and adjustment of the complaint procedure to the requirements of the OECD Guidelines; activities popularising the Guidelines and the OECD NCP institution, including workshops and training for social partners and non-governmental organisations), i.e. a slow growth of trust which resulted in appearance of first complaints after many years.

The lack of trust towards the OECD NCP also arises from the current absence, besides organizing an occasion-

¹⁸⁶ Cf. B. Faracik, *Krajowy Punkt Kontaktowy OECD w Polsce. Stan obecny i rekomendacje (OECD National Contact Point in Poland. State-of-the-art and recommendations)*.

¹⁸⁷ Article 9 item 2 p. 5 of the Act of 4 September 1997 on government Administration Branches (*Ustawa o o działach administracji rządowej*), (i.e. Journal of Laws 2016, item 543).

¹⁸⁸ The talks were related to the construction of the engine plant in Jawor. Cf. website of the Ministry of Economic Development: <https://www.mr.gov.pl/strony/aktualnosci/pierwsza-w-polsce-fabryka-silnikow-mercedesa/>.

¹⁸⁹ The negotiations referred to the offset agreement associated with the supply of helicopters for the Polish Army. Cf. website of the Ministry of Economic Development: <https://www.mr.gov.pl/strony/aktualnosci/oswiadczenie-w-sprawie-negocjacji-offsetowych-z-airbus-helicopters/>.

¹⁹⁰ Cf. *Procedura postępowania w sprawie związanej z naruszeniem Wytycznych OECD (Procedure in the case associated with infringement of the OECD Guidelines)*, available online at: https://www.mr.gov.pl/media/28822/KPK_OECD_Zawiadomienie_Procedura.pdf.

¹⁹¹ Cf. *OECD Guidelines for Multinational Enterprises*, p. 82, <https://www.oecd.org/daf/inv/mne/48004323.pdf> and *Wytyczne OECD dla przedsiębiorstw wielonarodowych*, p. 83, available online at https://www.mr.gov.pl/media/24853/Wytyczne_OECD_2011_PL.pdf.

¹⁹² Cf. B. Faracik, *Krajowy Punkt Kontaktowy OECD w Polsce. Stan obecny i rekomendacje (OECD National Contact Point in Poland. State-of-the-art and recommendations)*.

al conference, of active cooperation between the NCP and social partners (such as trade unions or civil society organisations) and encouraging them to use the tools offered by the proceedings before the OECD NCP, as well as changes introduced in the structure of examining the notifications (in relation to binding procedures in the period when the OECD NCP was located in PAiiZ), including the withdrawal of the Ministry of Development from covering mediation costs, which may lead to limiting the availability of this remedy.

C) LACK OF SUFFICIENT PROMOTION OF THE OECD NCP AND AWARENESS OF POTENTIAL COMPLAINANTS

The level of knowledge in Poland, both among average citizens and the group of persons associated with business or interested in problems of Corporate Social Responsibility (CSR) concerning the OECD Guidelines for Multinational Enterprises, is marginal.¹⁹³ At the same time, it means that Poles are not aware of the function of the OECD NCP, its competencies and, above all, the possibility to file a complaint in case of infringement of the Guidelines by a multinational company. This phenomenon is even more alarming in view of the fact that the OECD NCP was not established in Poland yesterday – it has been active for 18 years. The annual activity reports of the OECD NCP¹⁹⁴ indicate that the Polish Contact Point carries out a number of promotional activities (organization of and participation in conferences and seminars, maintaining a website, publishing of the text of the Guidelines, preparation of a guide of procedure), however their range, due to a limited budget and personel composition of the OECD NCP in PAiiZ, was very limited.¹⁹⁵ In relation to the OECD NCP activities carried out at the Ministry of Economic Development, no basis currently exists for evaluating its activities.

This tendency is particularly alarming among the group of social partners who should act as natural recipients of NCP promotion, and most commonly use the tools offered by the proceedings before the NCP under the circumstances of OECD Guidelines infringement.

D) OECD NCP BUDGET INSUFFICIENT FOR EFFECTIVE ACTIVITIES

The annual NCP budget (prior to its incorporation into the Ministry of Economic Development) has not exceeded EUR 5000.¹⁹⁶ It is worth noting that this budget must cover travel costs (including those associated with participation in quarterly meetings and consultations of National OECD Contact Points), costs of promotion of the Guidelines (i.e. publishing the Polish version of the Guidelines, organisation of and participation in conferences or seminars) and, above all, costs of proceedings associated, in particular, with mediation (i.e. comprising the remuneration of the mediator and transportation costs). Currently, there is no information concerning the level of funds available to the NCP as well as data on whether the OECD NCP budget has been separated from the funds allocated to the Ministry of Economic Development.

E) LACK OF INFORMATION CONCERNING THE METHOD OF COVERING COSTS OF MEDIATION CARRIED OUT BY THE OECD NCP

It is worth stressing that as long as the NCP acted within the structures of the Polish Information and Foreign Investment Agency, costs of mediation, including the mediator's remuneration, were covered by the OECD NCP budget.¹⁹⁷ However, this did not include costs incurred by the parties in connection with participation in medi-

¹⁹³ Cf. *ibid.*

¹⁹⁴ Cf. e.g. *Sprawozdanie polskiego KPK OECD za rok 2015 (Report of the Polish OECD NCP for 2015)*, http://www.paiz.gov.pl/files/?id_plik=26202.

¹⁹⁵ Cf. B. Faracik, *Krajowy Punkt Kontaktowy OECD w Polsce. Stan obecny i rekomendacje (OECD National Contact Point in Poland. State-of-the-art and recommendations)*.

¹⁹⁶ Cf. *OECD Guidelines for multinational enterprises. Poland NCP. Report to the OECD 2014 (OECD Guidelines for multinational enterprises. Poland NCP. Report to the OECD 2014)*, http://www.paiz.gov.pl/files/?id_plik=22214.

¹⁹⁷ Cf. *Procedura postępowania w sprawie związanej z naruszeniem wytycznych OECD przez przedsiębiorstwo wielonarodowe lub podmiot z nim powiązany (Procedure in the case associated with infringement of the OECD guidelines by a multination-*

ation, such as costs of transportation. In the current “Procedure in the case associated with infringement of the Guidelines,” published on the OECD NCP website, no information is available in this respect. It should be noted that abandoning the principles of mediation financing by the OECD NCPN may significantly limit access of persons reporting the infringement to this remedy, since they will be unable to cover costs required to carry out mediation.

F) INSUFFICIENT TEAM OF THE OECD NCP

Prior to the inclusion of the NCP into the structure of the Ministry of Economic Development, the OECD NCP team was limited to one person working part-time.¹⁹⁸ This significantly limits the effective activity of the OECD NCP, concentrating the overall responsibility for its functioning on a single person, which may additionally affect the independence of the NCP and technical preparation of the “team” to conduct various types of cases. Additionally, these circumstances affect the risk of non-continuity in NCP activities when a person currently working for the NCP interrupts the work for any reason (i.e. change of job, holiday leave, etc.). Such a situation requires the introduction of a new person in the functioning of the NCP, which is simultaneously reflected in the transitional decline in the quality of the NCP’s activity. Moreover, assigning working time to a single part-time employee results in limiting sufficient commitment of a given person to the fulfillment of the OECD NCP tasks and to its development. Currently, no official information concerning the personal composition of the NCP is available, whereas the analysis of measures undertaken by the Ministry of Economic Development so far suggests that only minor changes have taken place.

G) LACK OF INFORMATION ON THE NEW WEBSITE OF THE OECD NCP

In connection with moving the OECD NCP from the Polish Information and Foreign Investment Agency to the Ministry of Economic Development, the website of the OECD NCP has also changed. In its former version, it was possible to find texts of the Guidelines in English and Polish, view a short presentation of the NCP, frequently asked questions concerning the operations of the NCP, an overview of the most important cases conducted by the NCP, annual activity reports and, above all, the procedures used by the NCP. On the new ministerial website, much less information is available for those interested in filing a complaint. Materials posted thereon were limited to the text of the Guidelines (in full and abbreviated versions) and frequently asked questions. It was not until the first half of 2016, seemingly in response to a letter submitted by the CSR Coalition Watch Polska,¹⁹⁹ that the description of the procedure before the NCP was additionally posted,²⁰⁰ as well as the form for reporting infringement of the Guidelines. However, other information available on the old website, such as (in addition to the information mentioned above) a guide for persons willing to file a complaint, was missing on the website at the time of writing of this analysis. Such a change, given that citizens search for the majority of information on the Internet, should be assessed as negative.²⁰¹

nal enterprise or its affiliate), http://www.paiz.gov.pl/files/?id_plik=21283

¹⁹⁸ Cf. *Sprawozdanie polskiego KPK OECD za rok 2015 (Report of the Polish OECD NCP for 2015)*, http://www.paiz.gov.pl/files/?id_plik=26202.

¹⁹⁹ <http://pihrb.org/4-10-2016-wystapienie-koalicji-csr-watch-do-ministra-rozwoju-w-sprawie-skladu-zespołu-ds-csr/>.

²⁰⁰ Importantly, this description does not contain information on the internal method of the NCP operation, which significantly reduces its transparency and is contrary to the OECD Guidelines. In the description, it is also not indicated under what legal basis and by whom the procedure was adopted, which may raise doubts whether it will be observed in each case by persons conducting the proceedings.

²⁰¹ It is worth noting that the previous website of the Polish OECD NCP was very well developed as compared to the situation in other countries where much less information is published or websites do not operate at all. Current website of OECD NCP: <https://www.mr.gov.pl/strony/zadania/wsparcie-przedsiębiorczosci/spoleczna-odpowiedzialnosc-przedsiębiorstw-csr/krajowy-punkt-kontaktowy-oecd/>. Former website of OECD NCP: http://www.paiz.gov.pl/KPK_OECD.

RECOMMENDATIONS²⁰²:

1. Appointment of an independent expert committee operating at the OECD NCP

The appointment of an independent expert committee, following examples of solutions adopted in other countries, is required to take into account the need to raise the substantive level of the Point's activities, its effectiveness as well as ensuring its independence from political and governmental factors. The Committee should take active part in considering complaints and, under optimum circumstances, deal with creating a strategy of the OECD NCP activity. Therefore, its composition should be multidisciplinary and independent from public administration,²⁰³ which will enable it to eliminate the potential risk of conflict of interest while examining complaints.

2. Change of OECD NCP location in Poland

Prior to establishing an independent expert committee, transferring the OECD NCP in Poland to a governmental body with a higher level of independence than the Ministry of Economic Development is worth considering. Such places could include, as in other countries, the Ministry of Foreign Affairs, the Chancellery of the Prime Minister, the Chancellery of the President or the Office of the Ombudsman, where the NCP team could receive additional substantive support.

3. Increasing of the OECD NCP permanent staff

As indicated above, the permanent team of the OECD NCP should be increased to at least two persons, which would increase the effectiveness of the Point's work (both in relation to promotion activities and mediation) and guarantee the continuity of its operations in case of personal changes.

4. Increasing of the OECD NCP budget

The budget of the OECD NCP should be increased to a level that provides for much broader and more effective promotion of the Guidelines²⁰⁴ and conducting mediation proceedings. In the new budget, funds for increasing the permanent OECD NCP team and the appointment of an independent expert team should be secured.

5. Maintaining the financing of mediation from the OECD NCP funds

The former practice of using the NCP's budget to cover mediation costs, in place prior to moving the OECD NCP to the Ministry of Economic Development, should be assessed positively due to increasing the availability of the remedy under discussion. Therefore, this principle should be maintained within the Ministry of Economic Development and the relevant provisions should be included in the "Procedure in the case associated with infringement of the Guidelines."

6. Promotion of the OECD NCP among social partners

The OECD NCP may not operate effectively without adequate relations with social partners, in particular, with trade unions and civil society organisations. Therefore, active promotion of the NCP's activities should be recognised as particularly important, including the tools offered by proceedings it conducts in case of suspected infringement of the OECD Guidelines, primarily among those social partners. Such measures should simultaneously affect the growth of partners' trust to the OECD NCP in Poland.

²⁰² In this chapter, only the list of the most significant recommendations is included. A broader catalogue of recommendations can be found in the paper by B. Faracik, *Krajowy Punkt Kontaktowy OECD w Polsce. Stan obecny i rekomendacje (OECD National Contact Point in Poland. State-of-the-art and recommendations)*.

²⁰³ A potential participation of representatives of the government in the Committee is assessed in different ways (cf. e.g. B. Faracik, *Krajowy Punkt Kontaktowy OECD w Polsce. Stan obecny i rekomendacje (OECD National Contact Point in Poland. State-of-the-art and recommendations)*). However, it can be assumed that such participation should not be excluded if it had a positive impact on the contact of the NCP with individual ministries, which would facilitate the procedure before the NCP and simultaneously would not give government representatives a decisive voice at the committee meetings. Due to the subject of procedure before the NCP, participation of representatives of ministries responsible for the economy, labour and environmental protection should be considered.

²⁰⁴ The objective of promotion should be reaching the broadest possible group of citizens, presenting them the rights arising from the *OECD Guidelines* in an easy way, as well as a possibility to lodge a complaint against enterprises infringing them, including information on the process of procedure before the OECD NCP.

7. **Updating the OECD NCP website on the website of the Ministry of Development**

The current website of the OECD NCP requires updating by introducing materials which were available on the previous OECD NCP website. Among the documents which should be posted thereon include a guide for persons notifying of a possible infringement of the Guidelines and activity reports of the NCP for previous years. It should also be explicitly indicated whether a possibility of filing complaints via electronic mail exists, as it was within the PAIIZ.

4. KEY RECOMMENDATIONS

The major conclusion of this analysis is the fact that Poland still faces many gaps in legal regulations protecting human rights in business which may, however, be eliminated to a certain extent both under new legislation and, primarily, through a change in the practice of using applicable regulations.

It should be emphasised that one of the greatest problems occurring in Poland is the lack of sufficient legal knowledge and awareness among citizens, which is directly associated with the lack of adequate education in this field at any stage. Poles very often do not know their rights and are unable to use them. At the same time, the lack of adequate education (and, on the other hand, lack of the court's information activity) leads to a situation in which activities of courts remain unclear for an average citizen, which significantly affects the negative image of the judiciary system as perceived by society.

Judiciary bodies themselves (in civil, administrative and in criminal proceedings) show limited initiative in providing comprehensive information, understandable for an average citizen, concerning their activities and citizen's rights. Providing parties to proceedings with instructions in the form of a list comprised of complicated provisions is a widespread practice, when citizens need simple information on what he/she can do, when and how. This situation can be improved through preparation of adequate elaboration of the regulations (e.g. in the form of easy and very short guides handed over to participants of proceedings instead of the current unclear instructions) as well as training judges and prosecutors to communicate with participants of proceedings (other than lawyers).

Besides the lack of adequate knowledge, access to judiciary bodies is also limited by high costs of proceedings. This gains additional significance under circumstances when a citizen, who cannot afford paying for a suit or for using the assistance of a professional representative, faces a large corporation holding a huge budget for legal services during court proceedings. Thus, the equality principle in such a battle is often illusory.

Regulations concerning lawsuits in a class action also require amendments through extending the possibility of their filing also in cases involving the protection of personal property.

The law concerning planning and spatial development also requires reform. The current provisions are a source of many conflicts between investors and local communities and leads to spatial chaos, along with the adverse social, financial and environmental effects triggered by them.²⁰⁵ Therefore, ultimately the decisions on development and spatial planning should be eliminated and the obligation to adopt local spatial development plans should be introduced.

It is also worth paying attention to the separate decision on environmental conditions, the existence of which is unnecessarily complicated by administrative proceedings, which is unfavourable for all its parties and stakeholders and contrary to the procedural economics principle. The analysis of environmental aspects of project implementation and the environmental impact assessment (in cases defined in the regulations) should be conducted under the procedure related to a building permit.

In order to ensure the right of administrative and court control of administration activities to the broadest group of legal entities, it is necessary to abandon introducing regulations limiting the catalogue of parties to proceedings and rights of social organisations; waive specific provisions which narrow down the catalogue of parties defined in the Code of Administrative Procedure and limit powers of social organisations; strive to facilitate social organisations' participation in proceedings through the removal of the public interest premise; and extend citizen powers to those who are not parties to the proceedings (enabling court control of the method to consider complaints and requests).

The problem of limiting the role of social organisations is also visible in criminal proceedings, where they are currently unable to file a complaint against discontinuation of proceedings initiated after their notification, which

²⁰⁵ <http://www.administrator24.info/artykul/id6451,raport-o-ekonomicznych-stratach-i-spoecznych-kosztach-niekontrolowanej-urbanizacji-w-polsce>.

significantly undermines the social control of preparatory proceedings.

Situations of potential conflict of interest among judiciary bodies, officials and corporations also require legal changes; such conflicts of interest are visible, in particular, in small communities in corruption and penal economic cases. In such cases, the rule of sending them to prosecutor's offices and courts other than competent for the place should be considered.

The regulation reform concerning the liability of collective bodies for prohibited acts under penalty is also required, which is currently a regulation practically not applied and, consequently, almost dead.

An act on the protection of whistleblowers should be introduced to those who cannot rely on effective assistance of judiciary bodies in situations when they decide to take the risk of revealing pathologies in corporate operations they discover.

Compliance with human rights along the entire supply chain should also not be ignored, which may be strengthened through adequate requirements imposed on tenderers under conducted public procurement procedures, as well as through the introduction of relevant obligations associated with reporting of non-financial information, whose introduction into the Polish legal order is required by European Union regulations. Introduction of statutory subsidiary liability of parent companies for infringements of human rights by their subsidiaries is worthy of consideration.

This analysis is concluded with some comments concerning functioning of the OECD National Contact Point in Poland, whose current activity is completely invisible to the average citizen. Accordingly, to make it an effective tool in the battle for observance of human rights in business, several changes in the way it functions should be introduced, including, inter alia, the appointment of an independent expert committee acting at the OECD NCP, changing the location of the NCP in order to increase its independence and increasing the number of employees and the budget of the NCP.