

*Robert Grzeszczak*  
University of Warsaw

## **EUROPEANISATION OF POLISH LAW FOLLOWING POLAND'S ACCESSION TO THE EUROPEAN UNION**

The article concerns primarily the effects of the membership of the European Union on national (Polish) law and, to a limited extent, on the political system of the state. It discusses also the successes and deficits resulting from the process of broad Europeanisation of state structures and law. The aim of the article is therefore to analyse the influence of European law on the sources of law applicable in Poland. Europeanisation can be discussed both from a historical perspective and from the perspective of particular branches of law, from philosophy and axiology of law to internal organisation of the state and its institutions to public law (such as constitutional, administrative and tax law) and private law (property law, commercial law, family law, criminal law, etc.). Given the limited scope of the article, many relevant issues will be omitted or merely mentioned in passing and selected ones will be analysed in detail.

The conclusions presented in the article are of universal value. Although the article deals with Polish affairs, the principles, tendencies and consequences identified are typical of the relationship state – the EU, both before and after the accession, regardless of the state concerned. It should however, be noted that the path to membership and the membership itself are different in each case.

### **1. INTRODUCTORY REMARKS**

In the last twenty-plus years, i.e. since the political changes initiated in 1989, Poland has come a long and difficult way of political, system, legal, economic and, above all, social transformation – from democratic transformation and the adoption of the new Constitution in 1997, which set out a framework of governance, to further legal and political experiences resulting from, among others, the full implementation of constitutional principles and from Poland's accession to supranational structures (NATO and the European Union). For several years now, Poland has been in the process of Europeanisation of law, politics, economy as

well as culture and society. On the other hand, the last decades have seen a political reform of the Union itself and its deep crisis. At the same time, Poland – in various forms and styles and with a varying degree of effectiveness – has placed focus on its national interests and the areas of “expansion” of the EU. It remains open whether it is possible and appropriate to transform national interests into interests of the Union as a whole. Before the accession (since the signing of the Europe Agreement) and during the first years of membership, mutual relations between state authorities as regards EU affairs were shaped. Since that time, there have been major political changes<sup>1</sup> concerning the organisation of the state and Polish institutions, which – since the accession – are also subject to EU law, with all its consequences. Transfer of “the competence in relation to certain matters”<sup>22</sup> to the EU has, on the one hand, hindered the competence of the Polish parliament and, on the other hand – increased the importance of the executive power (government)<sup>3</sup>. A separate topic is the extent of changes for the Polish jurisdiction. Given the limited scope of the article, this topic will only be mentioned in relation to the Polish Constitutional Court and its “integration perspective”.

## 2. EUROPEANISATION OF LAW

By way of a theoretical and historical introduction to the considerations regarding the process of Europeanisation of Polish law, it should be emphasised that the history of influences of the system of Union law – particularly in the pre-accession period (i.e. between 1993 and 2004) – was a subject of intense scientific or, even more often, philosophical disputes. They were of a political and ideological, scientific and sometimes pseudo-scientific nature. Before Polish legal practitioners and courts became accustomed to the notion of Europeanisation, which was related to a certain process of maturation and getting used to new legal realities, this term had often been associated with the idea of immaturity and inferiority of Polish law to Union law. As a result, other terms were sought such as, for instance, assimilation, transmission, implementation or, most neutrally, influence. This process is still ongoing – economic and social changes are taking place. As a consequence, the more elaborate the organisation of the state and society, the more complex the process of reception of legal solutions or, in other words, the more complex and less visible process of “Europeanisation”.

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<sup>1</sup> As Stanisław Biernat, vice-president of the Polish Constitutional Court, put it in the foreword to a book edited by S. Biernat, S. Dudzik, M. Niedźwiedź (eds.), *Przystąpienie Polski do Unii Europejskiej. Traktat akcesyjny i jego skutki*, Kraków 2003, pp. 9–12, here p. 9.

<sup>2</sup> Article 90(1) of the Polish Constitution from 1997.

<sup>3</sup> More on this subject in R. Grzeszczak, *Władza wykonawcza w systemie Unii Europejskiej*, Warszawa 2011, p. 79 *et seq.*

## 2.1. EUROPEANISATION OF POLISH LAW – COPYING EU STANDARDS

Europeanisation of Polish law relied first on copying EU standards and on partial borrowings from EU law. To a certain extent, this has not changed up until today. However, as Poland's membership of the EU continued, the process of Europeanisation has become visible also in increasingly complex discussions and in the creation of own legal solutions. What is meant here is the development of legal awareness in society as a result of the process of communicating the law. Legal awareness has moved on significantly in Poland, which is demonstrated by the judgments of ordinary, administrative courts, and the Polish Constitutional Court. As a rule, legal awareness consists of four elements: knowledge about law, assessment of law, attitude towards law and demands for changes and reforms for the future (the so called *de lege ferenda*). Legal awareness covers issues such as prestige of law, legal culture, moral attitudes as well as views and opinions concerning what law should look like. It is a kind of a “legal feeling”<sup>4</sup>.

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

## 2.2. EUROPEANISATION OF POLISH LAW – THE IMPLEMENTATION OF EU POLICIES AND LAW

National law covers substantive law, political law and procedural law. Europeanisation within the meaning defined above refers mostly to substantive law and, to a lesser extent, also political and procedural law. This is related to the principle of procedural autonomy of the Member States, which retain their autonomous procedural systems. In other words, states retain the competence to shape

<sup>4</sup> R. Grzeszczak, *Charakter i rozwój procesu europeizacji prawa polskiego*, “Prawo Europejskie w Praktyce” 2016, issue 3, p. 12 *et seq.*

their own civil, administrative and criminal proceedings as well as any related proceedings. However, it goes without saying that this autonomy has limits which are set in particular by the principles of efficiency and effectiveness of Union law. In the article, the sources of law are understood in the traditional sense – as sources of application of law in a formal meaning, i.e. facts regarded as law-shaping in a given system. It is all these facts that create a legal system<sup>5</sup>. What should be emphasised in relation to Poland's membership of the European Union is the law-making character of the case law of the Court of Justice of the European Union (CJEU) which has a far-reaching impact on all the fundamental areas of Polish law, be it employment law, agricultural law or banking law.

In practice, the major influence of the European Union on the Member States results from the implementation of EU policies and law. In the literature, this process is called Europeanisation<sup>6</sup>. It is a short and relatively universal definition of a phenomenon which, in practice, is much more complex. Functioning of a state within the European Union entails certain obligations which, as a rule, are the same for all the Member States. They consist mostly in a commitment to implement Community standards (i.e. directives which need to be implemented into national law) as well as to apply and enforce standards which are directly applicable, i.e. primary law and in particular the Treaties on which the European Union is founded, as well as regulations and decisions that can have direct effect as against individuals. The European legal order has become part of domestic law, and (national) courts have a particular role to play here. What is more, the obligation to implement specific legal standards by the Member States arises not only from the Treaties but also from national constitutions.

### **2.3. EUROPEANISATION OF POLISH LAW – PRIVATE LAW**

Europeanisation of law is usually associated, and quite rightly so, with phenomena taking place in the area of private law. Yet, Europeanisation manifests itself also in an impact on the legal and political systems of the Member States, and it exerts significant influence on public law, in particular constitutional

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<sup>5</sup> M. Pichlak, *Zamknięty system źródeł prawa. Studium instytucjonalizacji dyskursu prawniczego*, Wrocław 2013, p. 19.

<sup>6</sup> The processes of Europeanisation of law have been long researched in Poland and abroad, cf. e.g. P. Graziano, M. P. Vink (eds.), *Europeanization. New Research Agendas*, New York 2007; C. Mik (ed.), *Europeizacja prawa krajowego. Wpływ integracji europejskiej na klasyczne dziedziny prawa krajowego*, Toruń 2000; I. Rzucidło (ed.), *Europeizacja polskiego prawa administracyjnego*, Lublin 2011; R. Grzeszczak, *The European transformation of the legislative, executive and judicial power in Poland*, (in:) I. Karolewski, M. Sus (eds.), *The Transformative Power of Europe*, Baden-Baden 2015, pp. 19–36.

law<sup>7</sup>. On the one hand, this process is a natural consequence of the membership of a given state of the European Union and the resulting obligation of “effective membership”. On the other hand, a question arises as to the freedom of the national legislature as to shaping the constitution<sup>8</sup>. EU law also modifies theoretical legal constructs, for instance with respect to the rights of individuals and the forms of action of state authorities<sup>9</sup>.

Europeanisation also affects the institutional system of a state, especially its administrative bodies and the judiciary. However, the scope of this article does not allow for an analysis of this issue. Since it is courts that – in addition to public administration bodies – constitute a filter through which the society directly “experiences the law”, this process has significant repercussions for individuals. Namely, the courts protect the rights and freedoms of individuals and other entities. As a consequence, the influence of EU law in this regard cannot be overstated. Just to touch upon this issue – what should be taken into account here is the impact of rights, freedoms and principles under the Charter of Fundamental Rights (for instance, the right to good administration, the EU standard of the right to a fair trial or the principle of non-discrimination) on cases handled by national administration bodies and courts, the freedoms of the internal market (shaped as rights of individuals) and, finally, ever stronger and increasingly numerous rights arising from the status of EU citizenship or the application and the intensity of application of the principle of proportionality in courts.

### 3. THE SCALE OF EUROPEANISATION

Somewhat simplified, the part of law which is EU law as well as national provisions that originate from EU law (this concerns mostly the national laws which implement directives) are based on specific principles referring to EU law and its relation to purely national (i.e. not European) law. Standards that can be applied directly (that is the standards which aim at empowering individuals, are clear and do not entail adoption of implementing acts) have direct effect and become a basis for judicial and administrative decisions. In terms of functionality, the transforming power of the EU (in other words, the scale of Europeanisation) manifests itself

<sup>7</sup> J. Galster, D. Lis-Staranowicz, *O zjawisku europeizacji polskiego prawa konstytucyjnego*, “Przegląd Sejmowy” 2010, issue 2, pp. 29–51.

<sup>8</sup> Z. Brodecki, O. Hołub-Śniadach, *Prawo państw członkowskich en block*, (in:) S. Dudzik, N. Półtorak (eds.), *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, Warszawa 2013, p. 21.

<sup>9</sup> S. Biernat, *Wpływ prawa Unii Europejskiej na źródła prawa administracyjnego i procedurę prawodawczą*, (in:) R. Hauser, A. Wróbel, Z. Niewiadomski, *System Prawa Administracyjnego. Tom 3. Europeizacja prawa administracyjnego*, Warszawa 2014, § 38.

in the process of implementation of EU law into the Polish legal system. One of the flagship examples of the power which transforms the law is the process of shaping the European perspective of the “ideology” of fundamental rights (the role of the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms is irreplaceable here) and the related constitutionalisation of legal systems<sup>10</sup>.

“Inserting” the concept of protection of fundamental rights into the axiology of public and private law has been therefore stimulated deliberately and, as a result, is part of the Europeanisation process<sup>11</sup>. In addition, if there is an irremovable conflict of laws, fundamental rights take priority and – if they are breached by state authorities – it is possible for an individual to claim damages from the state for the consequences of that breach in court. It is therefore very important to validate a legal provision, its origin and anchoring. Ideally, this should be done *ex officio* with due diligence and due discernment by courts and public administration bodies. This would fully reflect the idea of democracy and the rule of law. In practice, however, this area leaves a lot of room for improvement<sup>12</sup>.

In other words, Union law may be applied in the Member States directly or indirectly. As Stanisław Biernat indicates, direct application means that the tasks and competencies of institutions, bodies, offices or agencies of the Union and authorities of the Member States as well as the rights and obligations of individuals and entities are laid down directly under Union law. In the case of indirect implementation, the rules of EU law are introduced into the national legislation of the Member States by way of legal acts enacted by the competent national authorities with legislative powers. In the latter case, the rights and obligations arising from Union law are laid down by way of rules of national law. The influence may consist in new categories of sources of law in the Polish legal system which are not mentioned in the Constitution and in modifications of the existing sources of law. From a scholarly point of view, to be more precise, EU law may hypothetically bring about a change in the hierarchy of sources of law or in the interdependence of individual categories and forms – in the legal bases of individual categories of sources of law or, for instance, in legislative procedures.

EU law certainly influences (Europeanises) legislative activities in various ways, depending on the previous stage of development of the national law. As indicated by Stanisław Biernat, who has already been quoted above, EU law may give rise to an obligation to adopt laws regarding areas which are not covered by national law. The process of Europeanisation may become more dynamic and

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<sup>10</sup> G. de Búrca, *The ECJ and the international legal order: a re-evaluation*, (in:) G. de Búrca, J. H. H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge 2012, p. 120.

<sup>11</sup> For more, see R. Grzeszczak, *Pojęcie europeizacji prawa*, (in:) R. Grzeszczak, A. Szczerba-Zawada (eds.), *Prawo administracyjne Unii Europejskiej*, Warszawa 2016, p. 295 *et seq.*

<sup>12</sup> R. Grzeszczak, *Charakter i rozwój procesu...*, p. 15; R. Grzeszczak, *The European transformation of the legislative...*, p. 22.

extensive if a need (or an obligation) arises to introduce changes to existing laws in order to bring them into conformity with EU law. Such situations are of course much more frequent, which results from the dynamics of EU law and the development of its regulations. As a consequence, in many cases, the freedom of the national parliament as regards the fundamental legislative function, i.e. shaping the wording of laws, has been significantly reduced or even removed, which means that the act plays an executive role towards EU law<sup>13</sup>. This has significant implications for the traditional separation of powers and the system of law, which is described in the context of integration as multicentric law.

Without entering into detail – given the fact that the European Union has only the competences conferred upon it in the Treaties on which the EU is founded (the principle of conferred powers), its legislative activities are dictated by these competences. As a consequence, when the Treaties confer on the EU exclusive competence, the Member States may legislate only if so empowered by the Union or with a view to implementing Union acts. The situation is different in the case of shared competence where the EU and the Member States may compete in legislative activities. However, if Union bodies effectively adopt an act, the area it covers becomes the EU's exclusive competence.

In principle, it has to be recognised that legal acts, to the extent not covered by Union competence, are as before part of the Polish constitutional system only and are not influenced by EU law. Yet, this is a simplified conclusion. National acts, also the ones outside the remit of EU competences and, as such, pertaining to “purely internal situations”, are not completely independent. In most general terms, such acts must not run counter to the general principles of EU law and its values (Article 2 TEU). In fact, the scope of purely internal areas in the legal systems of the Member States becomes more and more narrow. This means that also in the areas which are outside EU competence parliaments of the Member States cannot make full use of law-making discretion. Certain standards of Union law are of a horizontal nature and as such they impact the entire body of law of the Member States. For instance, irrespective of the subject matter of an act, it must not contain provisions which are in breach of, in particular, the EU principles of non-discrimination, hinder the freedoms of the internal market or the rights linked to Union citizenship or make them less attractive<sup>14</sup>.

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<sup>13</sup> S. Biernat, *Wpływ prawa Unii Europejskiej...*, § 39 et seq.; cf. also S. Brouard, O. Costa, T. König (eds.), *The Europeanization of Domestic Legislatures The Empirical Implications of the Delors' Myth in Nine Countries*, Berlin 2012.

<sup>14</sup> R. Grzeszczak, *Charakter i rozwój procesu...*, p. 17.

#### **4. IS THE EUROPEANISATION PROCESS OF THE POLISH LAW UNIQUE?**

It might be asked whether the process of Europeanisation of Polish law is particular and different from the experiences of other Member States. The answer depends on the perspective taken. Taking into account the historical experience mentioned at the beginning of the article, it can be stated that in Poland the process of Europeanisation is characteristic. As a consequence, given the low level of development of certain areas of Polish law and the intensity of EU legislation in other fields, the scope of Europeanisation has mostly affected intellectual property rights, environmental protection law, agricultural law, anti-discrimination law and competition law. It can be said that regulations in these fields do not stem from the national legal system but are part of the shared European heritage and are introduced by EU institutions.

Nevertheless, the majority of changes are similar or even the same in all the EU Member States. This results from the fundamental principles of EU law which have been mentioned above – the unity of application of Union law in the national legal systems and the systemic effectiveness of EU law. However, the paths to observing these principles have been and still are different. This is underpinned and guaranteed by the principle of procedural autonomy of the Member States. It allows the states to retain autonomy of legal procedures and systemic solutions, among others, in the bureaucratic system or in the territorial structure of the states, provided that the effectiveness of Community law is ensured. The right to procedural and institutional autonomy of the Member States serves to define the distribution of legislative powers between the EU and the Member States in the area of procedural law. The principle implies that it is for the Member States to put in place the national procedural measures and to designate the national authorities competent to enforce the rights conferred on individuals by the EU legislature, on the condition that the latter has not adopted an EU procedural regulation in the area concerned<sup>15</sup>.

The procedural and institutional autonomy is the logical consequence of the structure of the EU, which, with few exceptions, does not provide for the existence of a separate structure of supranational bodies in charge of implementing and protecting EU law. It is the Member States that necessarily assume these tasks through their own authorities, using procedures laid down in national legislation. As a consequence, the EU – as has been pointed out – directly influences changes in substantive law and has indirect impact on procedural law.

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<sup>15</sup> See the judgments of the CJEU: Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, and Case 45-76 *Comet BV v Produktschap voor Si-ergewassen*.

The transforming power of the EU in the area of legislation stems from the principle of effectiveness of Union law mentioned above<sup>16</sup>. It is understood, *inter alia*, as an obligation to implement EU law into the national legal system, a prohibition on making the exercise of the rights granted by EU law excessively difficult or impossible or as an interpretative guideline as regards the system as such. It constitutes an obligation to put in place national measures providing for protection from Union law violations. In this latter sense, the principle of effectiveness may be considered equivalent to the principle of effective judicial protection<sup>17</sup>. In addition, the principle of effectiveness constitutes a requirement for national legislatures and law enforcement bodies to create and interpret law in a way that does not make it excessively difficult or impossible to exercise the rights granted by the EU legislature<sup>18</sup>.

## 5. CONCLUSION

The scope of the processes driving the impact of Union law on the legal and political system of a given state is influenced not only by historical, but also economic and social developments. The more elaborate the organisation of the state and society, the more complex the process of reception of legal solutions.

The experience of the Polish membership of the European Union, its systemic dimension and changes in the national legal system (Europeanisation) do not differ significantly than in the case of other Member States. Poland faces similar issues such as poor legitimisation of integration processes, supremacy of the government over the parliament, passivity of parliamentary committees in controlling the government and EU institutions in the decision making process, as well as dilution of responsibility for decisions taken within the EU.

The process of Europeanisation relies mostly on direct application of the standards of EU law in the national legal system, implementation of directives into national law and harmonisation or standardisation of national legal solutions so that they comply with the EU framework. It is also the reception of a common, European (Union) axiology. In Poland, the process of Europeanisation started with the creation of new law and amendments to the existing one to make it compatible with the rules and standards of Union law. This process is still ongoing and encompasses law-making as well as application and implementation of law.

<sup>16</sup> For more, see J. E. Murkens, *The Future of Staatsrecht: Dominance, Demise or Demystification?*, "Modern Law Review" 2007, Vol. 70, issue 5, pp. 731–758.

<sup>17</sup> R. Grzeszczak, *The European transformation of the legislative...*, p. 22 *et seq.*

<sup>18</sup> A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, Oxford 2009, p. 29.

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### **Summary**

The article concerns primarily the effects of the membership of the European Union on national (Polish) law and, to a limited extent, on the political system of a state. The conclusions presented in the article are of universal value. Although the article deals with Polish affairs, the principles, tendencies and consequences identified are typical of the relationship state – the EU, both before and after accession, regardless of the state concerned. It should be, however, noted that the path to membership and the membership itself are different in each case. The practice of the Polish membership of the European Union, its systemic dimension and the changes in the national legal system (Europeanisation) do not differ significantly than in the case of other Member States.

Europeanisation of Polish law, politics, economy, culture and society has been in progress since the 1990s. One can differentiate between two stages of Europeanisation: before and after Poland's EU accession, each characterised by different conditions. Over time, this process, on the whole, has been undergoing numerous changes but it has never weakened in importance. Poland faces issues such as poor legitimisation of integration processes, supremacy of the government over the parliament, passivity of parliamentary committees in controlling the government and EU institutions in the decision making process, as well as dilution of responsibility for decisions taken within the EU. The process of Europeanisation relies mostly on direct application of the standards of EU law in the national legal system, implementation of directives into national law and harmonisation or standardisation of national legal solutions so that they comply with the EU framework. It is also reception of a common, European (Union) axiology.

### **BIBLIOGRAPHY**

- Biernat S., Dudzik S., Niedzwiedź M. (eds.), *Przystąpienie Polski do Unii Europejskiej. Traktat akcesyjny i jego skutki*, Kraków 2003
- Biernat S., *Wpływ prawa Unii Europejskiej na źródła prawa administracyjnego i procedurę prawodawczą*, (in:) R. Hauser, A. Wróbel, Z. Niewiadomski, *System Prawa Administracyjnego. Tom 3. Europeizacja prawa administracyjnego*, Warszawa 2014
- Bogdandy A. von, Bast J. (eds.), *Principles of European Constitutional Law*, Oxford 2009

- Brodecki Z., Hołub-Śniadach O., *Prawo państw członkowskich en block*, (in:) S. Dudzik, N. Półtorak (eds.), *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, Warszawa 2013
- Brouard S., Costa O., König T. (eds.), *The Europeanization of Domestic Legislatures The Empirical Implications of the Delors' Myth in Nine Countries*, Berlin 2012
- Búrca G. de, *The ECJ and the international legal order: a re-evaluation*, (in:) G. de Búrca, J. H. H. Weiler (eds.), *The worlds of European constitutionalism*, Cambridge 2012
- Galster J., Lis-Staranowicz D., *O zjawisku europeizacji polskiego prawa konstytucyjnego*, "Przegląd Sejmowy" 2010, issue 2
- Graziano P., Vink M. P. (eds.), *Europeanisation. New Research Agendas*, New York 2007
- Grzeszczak R., *Charakter i rozwój procesu europeizacji prawa polskiego*, "Prawo Europejskie w Praktyce" 2016, issue 3
- Grzeszczak R., *Pojęcie europeizacji prawa*, (in:) R. Grzeszczak, A. Szczerba-Zawada (eds.), *Prawo administracyjne Unii Europejskiej*, Warszawa 2016
- Grzeszczak R., *The European transformation of the legislative, executive and judicial power in Poland*, (in:) I. Karolewski, M. Sus (eds.), *The Transformative Power of Europe*, Baden-Baden 2015
- Grzeszczak R., *Władza wykonawcza w systemie Unii Europejskiej*, Warszawa 2011
- Mik C. (ed.), *Europeizacja prawa krajowego. Wpływ integracji europejskiej na klasyczne dziedziny prawa krajowego*, Toruń 2000
- Murkens J. E., *The Future of Staatsrecht: Dominance, Demise or Demystification?*, "Modern J. E. Law Review" 2007, Vol. 70, issue 5
- Pichlak M., *Zamknięty system źródeł prawa. Studium instytucjonalizacji dyskursu prawniczego*, Wrocław 2013
- Rzucidło I. (ed.), *Europeizacja polskiego prawa administracyjnego*, Lublin 2011

## KEYWORDS

European Union, Polish law, European law, Europeanisation, multicentric law

## SŁOWA KLUCZOWE

Unia Europejska, prawo polskie, prawo europejskie, europeizacja, prawo multicentryczne