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REMARKS REGARDING THE INFLUENCE OF EUROPEAN LEGISLATION UPON CODIFICATION OF CIVIL LAW

To say that the Polish legal system remains subjected to a significant amount of influence coming from European legislation is, by all means, a cliché, repeated almost *ad nauseam* by practicing lawyers, scholars and members of the public alike. Such a high status of this proposition implicates, evidently, its prevalence within society as well as, presumably, its pervasiveness among all people who use laws professionally. However, this does not mean that the subject is not worth further studying and analysing. Conversely, a phenomenon of such importance and magnitude should never avoid scrutiny and interest of scholars. More than that – even if the subject were to become, at some point, mundanely tiring, it is practically impossible to escape therefrom. For Europeanisation is present in almost any topic worthy of consideration within jurisprudence. Decodification of civil law is no exception.

The notion of decodification, introduced to scholarly discourse by Italian academic Natalino Irti almost 40 years ago¹, triggers some emotional reactions to this day. This should not surprise because the idea disguises a theory in line with which the role of codes as the principal source of civil law shall be diminished or, as the title of Irti's book itself suggested, the sheer concept of codification should be abandoned and the era of the codex in the history of law shall come to an end. Meanwhile, the civil code, an expression of the grand, Enlightenment idea of European legislation, remains to this day a kind of, as it were, a myth of legal positivism², still being the central point of reference for the traditional way of perceiving continental private law. For the purposes of this paper it shall be accepted, however, that the theory first put forward by Irti is correct, and the process of decodification – understood as a reduction in influence of the civil code as the principal source of private law – has been an observable fact for decades. As a result of this process, codification of the civil law loses its two main

¹ N. Irti, *L'età della decodificazione*, Milano 1979.

² T. Giaro, *Prawo i historia prawa w dobie globalizacji. Nowe rozdanie kart*, (in:) T. Giaro (ed.), *Prawo w dobie globalizacji*, Warszawa 2011, p. 75.

characteristics, namely wholeness and axiological coherence³. That the theory is right is not accepted by the author, as it were, *a priori*, but is a result of studies of the problems of codification and decodification⁴, and such a conclusion relies primarily upon the views of a number of legal scholars from Poland, other European countries and the world⁵. In addition, one example discussed in this piece may, without a doubt, serve as evidence that decodification of civil law is an active process at least in contemporary Poland, as well as, to some extent, in other countries that represent the tradition of civil law and are members of the European Union⁶.

1. REGULATIONS AND DIRECTIVES IN THE CONTEXT OF DECODIFICATION

There is a plethora of factors which bolster decodification and it would be pointless to discuss or even single them all out especially because one may well

³ In line with a commonly accepted view, a code, within the meaning accorded thereto by the European Enlightenment, shall be an act that has, within its scope, an entire branch of the law, and is characterized by its wholeness, coherence, consistency and terminological uniformity. See e.g. R. Zimmermann, *Codification: history and present significance of an idea. A propos the recodification of private law in the Czech Republic*, “European Review of Private Law” 1995, issue 3, pp. 96–97, 103–104; T. Giaro, (in:) W. Dajczak, T. Giaro, F. Longchamps de Bérrier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2014, p. 87; R. Longchamps de Bérrier, *Wstęp do nauki prawa cywilnego*, Lublin 1922, p. 15; L. Górnicki, *Kodyfikacja prawa prywatnego*, (in:) M. Safjan (ed.), *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, Warszawa 2012, p. 78.

⁴ Effects of those studies hitherto include, in particular, the following publications: J. Rudnicki, *Gdzie szukać rzeczy niczyich, czyli do czego służy kodeks cywilny*, “Forum Prawnicze” 2014, Vol. 5, issue 25, pp. 16–27; J. Rudnicki, *Dekodyfikacja prawa cywilnego doby PRL – między ideologią a wymogami obrotu*, (in:) T. Giaro (ed.), *Źródła prawa. Teoria i praktyka*, Warszawa 2016, pp. 75–89; J. Rudnicki, *Posiadacz i posiadanie w dobie dekodyfikacji*, (in:) F. Longchamps de Bérrier (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa 2017, pp. 163–179.

⁵ See especially: J. H. Merryman, D. S. Clark, J. O. Haley, *The Civil Law Tradition: Europe, Latin America and East Asia*, Charlottesville 1994, pp. 1241–1242; M. L. Murillo, *The evolution of codification in the civil law legal system: towards decodification and recodification*, “Journal of Transnational Law and Policy” 2001, Vol. 11, issue 1; S. Genner, *Dekodifikation. Zur Auflösung der kodifikatorischen Einheit im schweizerischen Zivilrecht*, Basel–Genf–München 2006; F. Zoll, *Problem struktury przyszłego polskiego Kodeksu cywilnego*, (in:) M. Kosek, J. Słyk, *W trosce o rodzinę. Księga pamiątkowa ku czci profesora Wandy Stojanowskiej*, Warszawa 2008, p. 648; F. Longchamps de Bérrier (ed.), *Dekodyfikacja...*, Warszawa 2017.

⁶ It shall be emphasized that alongside the civil law tradition the Anglo-Saxon legal tradition functions parallelly within the European Union. The notion of codification (particularly in the sphere referred to as private law on the continent) is completely foreign to the latter. Examples thereof include, needless to say, the United Kingdom (however, Scotland is typically termed a so-called mixed jurisdiction) and Ireland, as well as former British territories: Malta and Cyprus. Recent events give rise to an interesting question, that is how the position of *common law* within the European Union will be affected by Brexit.

have recourse to a significant, established body of literature on the subject. One example is Europeanization, albeit the spectrum of its consequences is far greater. Our discussion of private law should be started by stating the obvious, namely that European legislation affects it substantially, mainly within the spheres that are crucial for the functioning of the internal market. One such sphere is consumer protection which is, one could say, one of the most favourite areas of activity of the Brussels legislator. Both legislative methods employed in the EU are observable here, namely regulations and directives. Effects of decodification in the context of regulations are clear at first sight. For by enacting a regulation – so long as it concerns a private law problem – provisions are created which are by their nature outside of the code. In addition, due to their transnational provenience and character, they are not coherent with any codification functioning in any of the EU Member States.

A fitting example in this connection is Regulation 261/2004⁷ which introduced principles of protection of a special type of consumer, namely an air passenger. The Regulation governs several cases a private lawyer would file under improper performance of a contract of carriage by an air carrier. Therefore, it is a civil matter, yet the Regulation casts it in terms that are utterly foreign to European codifications by introducing, in principle, objective compensatory liability of air carriers that is also detached from the presence of any harm on the part of a passenger and is strictly expressed in numbers. Admittedly, such a legislative device is a throwback to archaic legal principles that extricates itself from the entire legacy of civil in the field of contractual liability, on which provisions of all, it is submitted, civil codes are based. However, the ease of pursuing claims under the Regulation and the attractiveness of compensatory measures stipulated therein makes it so that both national and international laws governing contracts of carriage lose much of their practical significance. The Polish Civil Code, which, in theory, regulates carriage in Articles 774–793, has been pushed to the end of the queue of legal sources to be called upon where, for example, a person is denied boarding or a flight is delayed.

The foregoing remarks do not apply in the same way to directives as it is exclusively up to a Member State and its legislative authorities how a directive's provisions are implemented and ultimately where, within a national legal order, the resultant domestic laws are placed. Consequently, if a given directive aims at harmonizing laws of a civil character, there is no obstacle to its implementation consisting in amending the provisions of a relevant code. This assumption

⁷ Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91.

was accepted by the erstwhile Civil Law Codification Committee⁸, however it is not being realized well in the field of consumer protection. In 2004 J. Pisuliński wrote that “the evolution of Polish consumer law so far discloses the legislator’s preference towards issuing separate acts where discrete consumer issues are addressed”⁹. This view – despite intensified recodification in respect of consumer sale – is also accurate today, and proof is yielded by an analysis of the evolution of the Polish regulation of the right known in Polish legal jargon under the English term timeshare or timesharing.

2. IMPLEMENTATION OF DIRECTIVES PERTAINING TO *TIMESHARE* IN POLAND

Timeshare is a relatively novel institution of civil law that formed in the commercial practice of Western European states in the second half of the twentieth century. It appeared in Polish law at the pre-accession stage when domestic laws were being adjusted to European standards. The 1994 Directive¹⁰ on the protection of purchasers in respect of timeshare contracts was implemented in Poland by means of the Act of 13 July 2000¹¹. The Act did not avail itself of the English expression “timeshare”, however, instead of coining a succinct Polish term of art, it merely referred to “a right to use a building or a room at a designated time every year”.

The Act merely regulated the issue of protection of rights of one party to a special contract whose object was an immovable property, therefore there is no doubt that the entire scope of the Act belonged to civil law. Nevertheless, the only mark the new institution left on the Civil Code was by means of introducing a new Article 270¹, which was no more than a blanket provision. It linked the rights accrued through a timesharing contract with usufruct (governed by the Code) and contained a reference to the 2000 Act. Only § 2 of the Article represented some

⁸ Z. Radwański (ed.), *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, Warszawa 2006, pp. 111–112.

⁹ J. Pisuliński, *Prawo konsumenckie w systemie prawa cywilnego*, (in:) M. Sawczuk (ed.), *Czterdzieści lat kodeksu cywilnego. Materiały z ogólnopolskiego zjazdu cywilistów w Rzeszowie (8–10 października 2004 r.)*, Kraków 2006, p. 179.

¹⁰ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

¹¹ Act of 13 July 2000 on the Protection of Acquirers of the Right to Use a Building or a Room at a Designated Time Every Year and on Amending the Civil Code, the Petty Offences Code and the Act on Land and Mortgage Registers and Mortgages (Polish Official Journal of Laws of 2000, No. 74, item 855).

normative value in that it introduced a time limit for the existence of the right of usufruct given rise to by a timesharing contract. It meant that almost all laws pertaining to timesharing fell outside of the civil code, which referred to a specific act merely pro forma, as is the case in many instances already discussed and many more to come. Since the very beginning, therefore, a new civil law instrument was completely decodified, whilst Article 2701 itself may be considered a mere fig leaf, as it were, which ostensibly obscured the sad (from the perspective of the idea of codification) truth that the legislator neglected, in this case, the idea of wholeness of a civil code.

As early as at the stage of drawing up the Act, J. Preussner-Zamorska and E. Traple wrote that “doubtless, one cannot regulate timesharing by means of amending the Civil Code for obvious reasons, more on which below. Therefore, taking into account the necessity of properly protecting the interests of a consumer – which the directive emphasizes – it does not appear that leaving the regulation of this issue exclusively to the provisions of the Civil Code would be appropriate, even if this were to be a temporary measure. Such provisions could – admittedly – constitute, to a large extent, a normative basis for solving problems to arise in connection with timesharing, what is more, they will have to be properly applied. Nonetheless, to base the entire legal regulation upon a code would require a considerable degree of maturity and knowledge, both from agents involved in such transactions and law enforcement”¹². Almost a decade later this sentiment was echoed by B. Fuchs: “it appears that – *de lege lata* – the current state of affairs shall be sustained, i.e. timesharing should be regulated outside of the civil code. First, this is apparent when one looks at the progress of the works on a horizontal instrument. (...) When a horizontal instrument is enacted and its shape and legal form are known, inserting timesharing into the civil code could be discussed (...) it will be testimony to the correct tendency of not placing contracts outside of the civil code. Second, considerations of systemic nature point towards locating the regulation of timesharing outside of the civil code. A closer analysis of the new directive must lead to the conclusion that it contains provisions hard to reconcile with the existing solutions envisaged by the civil code”¹³.

The European legislator has not completed his work on a so-called horizontal instrument, whilst regulations governing timeshare are far from ideal. The new 2009 directive¹⁴ exacted such sweeping changes within the principles governing the contract in question that the Polish system had to conceive of an entirely new

¹² J. Preussner-Zamorska, E. Traple, *Timesharing – nowa instytucja prawa polskiego. Uwagi na marginesie projektu ustawy*, “Kwartalnik Prawa Prywatnego” 1998, Vol. 3, issue VII, p. 535.

¹³ B. Fuchs, *Timesharing w prawie wspólnotowym – wnioski dla polskiego ustawodawcy*, “Rejent” 2009, Vol. 2, issue 214, p. 30.

¹⁴ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

legislative regulation. At the stage of drafting, B. Fuchs remarked again that locating timeshare inside the Polish Civil Code would be reflective of the correct tendency of not placing contracts outside of the civil code¹⁵, however ultimately she opted in favour of the opposite solution. She noted that placing references inside the Code would adversely affect its internal coherence¹⁶. The legislator followed suit and the new Act on timeshare¹⁷ completely decodifies the institution. Article 270¹ of the Civil Code was repealed and therefore the Code is now void of any provision, even a reference to specific legislation, pertaining to timeshare. Therefore, the fig leaf mentioned above was flagrantly abandoned, resulting in a strictly civil institution being regulated exclusively in a specific piece of legislation dedicated thereto. Article 8 of the Act on Timeshare stipulates that “in matters not governed by the immediate act, provisions of the Civil Code are to be applied respectively”.

3. LINGUISTIC SLOPPINESS?

The linguistic aspect of the problem at hand cannot be left without a comment¹⁸. As stated above, whilst the term proposed by the legislator to refer to timesharing in the 2000 Act was a failure, the device employed in the 2011 Act deserves utmost criticism. For the legislator did not bother to look for an ingenious codification, but instead it availed itself of the English term, copied straight from the title of the directive. The word was not (as opposed to code-regulated leasing which is at least used in all cases) in the least bit adapted to the Polish language, but it functions in its English, single-case version. The laziness of the Polish legislator evidenced here may be compared with the linguistic concern (often bordering on pedantism) displayed by its German counterpart¹⁹. It is surprising also to consider the lack of concern for the lexis of the law showed by academic writers²⁰. Regardless, however, of how one were to subjectively – after all – assess the legislator approach to its native language, the important linguistic problem in question may be analysed through the prism of decodification. The current condition of Polish legislation tends to suggest that decodification of Polish civil

¹⁵ B. Fuchs, *Regulacja timesharingu a Kodeks cywilny*, (in:) M. Jagielska, E. Rott-Pietrzyk, A. Wiewiórkowska-Domagalska (eds.), *Kierunki rozwoju europejskiego prawa prywatnego. Wpływ europejskiego prawa konsumenckiego na prawo krajowe*, Warszawa 2012, p. 160.

¹⁶ *Ibidem*, pp. 161–162.

¹⁷ Act of 16 September 2011 on Timeshare (Journal of Laws of 2011, No. 230, item 1370).

¹⁸ For more on this, see also: J. Rudnicki, *Szekspir i leasing – o anglicyzmach w polskim prawie cywilnym*, “Palestra” 2017, Vol. 62, issue 1–2, pp. 126–132.

¹⁹ In BGB, the institution referred to here is regulated in §§ 481–487 and is called *Teilzeit-Wohnrecht*.

²⁰ B. Fuchs, *Regulacja timesharingu...*, p. 158.

law has progressed very far, and both the legislator and the doctrine appears to have got used to that state of affairs. The presence in Polish law of such a foreign term as “timeshare” seems to attest to this fact. For the terminology of Polish civil law, formerly shielded from almost any terms of foreign origin, used to represent, decades ago, an ideal of linguistic consistency and order. A sudden permission for “leasing agreements” and “timeshare” to enter the Polish civil law system has disturbed this equilibrium, attacking one of the constitutive elements of internal coherence of private law and, as a result, contributing to its decodification. It is difficult to blame the EU legislator for this effect of the implementation of the timesharing directive as, without a doubt, it does not object to national legislators caring about the purity of their respective languages. The latter, however – as evidenced by the Polish law in question – do not always perform this task appropriately.

4. WHY NOT IN A CODE?

The aforementioned views of eminent scholars, concerning the issue of time-sharing’s presence in a code or outside of it, deserve further comment. The quotes laid out above speak strongly in terms of the need to implement directives. First, subjecting the Polish legislator to the influence of the European one means that the decision as to whether a given measure pertaining to consumer protection is targeted or transitional belongs *de facto* “to Brussels”. Therefore, because of, as it were, the necessity of adding excessively frequent amendments to a code – which by its nature shall be a very stable piece of legislation – it is difficult to amend it as new directives keep coming in. Second, scholars often emphasize that provisions of directives and their axiology are at times problematic to reconcile with a code’s internal structures and principles.

It should also be noted that since the Enlightenment the optics of looking at the demand that the law be clear and understandable has changed. It is indisputable that the idea of a code – a condensed, “straight to the point” piece of legislation that enables even a layman to find his way not only to the matters of interest thereto but also navigate around the entire system – was originally a fundamental expression of this very postulate. After two centuries this vision must be considered implausible, and the insistence upon clarity of the law is almost non-existent. One could venture to posit that the core assumptions behind legal clarity were barely alive as far back as 120 years ago when BGB was a highly scientific piece of legislation whose authors did not pretend they endeavoured to create a law understandable to a layman. The Polish Civil Code is based upon the German model and it copies its academic style to a large extent. This is why many claim that inserting a provision into the Code makes it indeed harder for a layman, and

sometimes even for a practising lawyer, to apply. Specific legislation, which mars the idea of a code, aims to, paradoxically, facilitate understanding and applying the law. A consumer, confronted with a problem, should be able to, at least preliminarily, deal with it “on his own”, and this is said to be enabled by a law that comprehensively regulates his area of interest – for example, timesharing and special rights stemming therefrom.

J. Pisuliński in his paper on consumer protection within the civil law system cited above, attempted a summary of all “pros” and “cons” of regulating consumer relations in specific legislation²¹. He noted that creating specific legislation is easier and more expeditious, and that it facilitates comprehensive regulation of a given issue (i.e. amalgamating, within one act, its civil, criminal and administrative aspects). Adding new provisions to the Civil Code would be, on the other hand, troublesome because of its systematics, would detrimentally affect its stability, and the casuistry of directives would not fit well the abstract nature of code provisions. Above all, J. Pisuliński stressed that enacting specific legislation reduces the significance of the civil code as the most important legal pronouncement regulating civil relations, undermines transparency and coherence of the system, and it makes the application of the code challenging by incorporating legal constructs which differ markedly from those to be found in the code.

5. UNAVOIDABLE DECODIFICATION

It appears that in the face of the necessity of implementing directives such as those governing, *inter alia*, timeshare, the civil code finds itself between a rock and a hard place. For implementation of a directive via specific legislation reduces the scope of application of code provisions and constitutes an attack on its wholeness. At the same time, subsequent amendments undermine the structure of the code, bringing about internal decomposition. In both cases a crucial feature of the code, recognized since the 18th century, is undercut. One may say, therefore, in slightly fatalistic terms, that the domestic legislator is, as it were, doomed to undermine the position of the code as the fundamental, central and consistent source of private law norms when implementing directives.

When one looks at the mosaic of traditions and solutions that constitutes the world of continental law, one comes to the conclusion that any supranational harmonization of private law must undermine the idea of codification. For it is civil codes that give grounds to and petrify some basic differences between national legal systems due to their dominating position in the process of “national fragmentarization” of private law that, according to some scholars, diminished the

²¹ J. Pisuliński, *Prawo konsumenckie...*, pp. 180–183.

pre-Enlightenment uniformity thereof²². Implementation of mutual supranational measures must, doubtless, lead us to the opposite trend, namely decodification. This, among many aspects surrounding the Europeanization of the law, deserves attention especially where academics or politicians demand that civil law be thoroughly amended or even recodified. For one may varyingly assess the influence of European legislation upon civil law depending on how much one is accustomed to the notion of a civil code and to what degree one values the rationales behind it as well as the values it should be guided by. However, regardless of what assessment one renders, one cannot detract from the fact that the notion of a civil code has lost its significance also because of expanding Europeanization.

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Summary

This paper emphasises that Europeanisation of law contributes greatly to the phenomenon of decodification. The impact of European legislation on the position of the civil code as the main source of private law is clearly visible in the case of directly effective regulations. Also, implementation of directives can (and often does) lead to the creation of legislation regulating civil law matters, yet separate from the civil code. The Polish experience with implementation of directives concerning consumers protection makes for a good example. Regulation of timeshare contracts completely outside the civil code is – according to the Polish doctrine – a result of difficulties with integrating this particular provision into the codification of private law. If such difficulties are inevitable, so is also progressing decodification of civil law due to its advancing harmonization on the European level.

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²² To that effect especially R. Zimmermann, *The New German Law of Obligations. Historical and Comparative Perspectives*, Oxford 2005, pp. 4–5; *Dziedzictwo Savigny'ego. Historia prawa, prawoznawstwo porównawcze i kształtowanie się europejskiej nauki prawa*, “Kwartalnik Prawa Prywatnego” 2005, Vol. 14, issue 1, pp. 13–14 (translated by R. Mańko).

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KEYWORDS

decodification, civil law, Europeanisation, harmonization, directives, timeshare

SŁOWA KLUCZOWE

dekodyfikacja, prawo cywilne, europeanizacja, harmonizacja, dyrektywy, timeshare