

# LIST OF THE KNF'S PUBLIC WARNINGS AS THE FINANCIAL MARKET PROTECTION INSTRUMENT

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## 1. INTRODUCTION

The multi-plane implications of the financial market<sup>1</sup> constitute the reason for differentiated approach towards its protection.<sup>2</sup> The presence of the “contagion effect” causes that the violation of the rules of functioning of one of the sectors of this market may result in other segments’ contagion and, finally, pose a risk to the functioning of national or even global economy.<sup>3</sup> Economically, the financial market can be defined as a platform of capital allocation of different maturity time limits.<sup>4</sup> Although the term is used in the legal literature,<sup>5</sup> it does not have a legal definition. It is rightly indicated that the lability of this market scope and the dynamics of its

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<sup>1</sup> See, H. Davies, D. Green, *Globalny nadzór i regulacja sektora finansowego* [Global supervision and regulation of the financial sector], Warsaw 2010, pp. 47–51; P. Wajda, *Rola decyzji administracyjnej w nadzorze nad polskim systemem finansowym* [Role of the administrative decision in the supervision of the Polish financial system], Warsaw 2009, pp. 31–32.

<sup>2</sup> See, M. Dyl, *Środki nadzoru nad rynkiem kapitałowym* [Supervisory measures in the capital market], Warsaw 2012, pp. 200–203.

<sup>3</sup> A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej* [Security of the financial market in the light of the European Union law], Warsaw 2008, pp. 179–180; P. Wajda, *Charakter prawny wpisu na listę ostrzeżeń publicznych KNF* [Legal consequences of entry in the KNF public warnings list], *Monitor Prawa Bankowego* No. 6, 2013, p. 78.

<sup>4</sup> See, I. Pyka, *Funkcjonowanie i organizacja rynku finansowego* [Operation and organization of the financial market], [in:] I. Pyka (ed.), *Rynek finansowy* [Financial market], Katowice 2010, p. 9; A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego...* [Security of the financial market...], pp. 25–26; M. Lemmonier, *Europejskie modele instrumentów finansowych. Wybrane zagadnienia* [European models of financial instruments. Selected issues], Warsaw 2011, p. 219; P. Zawadzka, *Pojęcie i zakres rynku finansowego* [Concept and scope of the financial market], [in:] R. Mastalski, E. Fojcik-Mastalska (eds.), *Prawo finansowe* [Financial law], Warsaw 2011, pp. 476–477.

<sup>5</sup> See, the review of the financial market definitions [in:] P. Wajda, *Rola decyzji administracyjnej...* [Role of the administrative decision...], pp. 11–19.

development are obstacles to determining a statutory binding definition.<sup>6</sup> From the perspective of the financial market supervision,<sup>7</sup> in order to determine the concept of the financial market, it may be useful to consider the provision of Article 1(2) Act of 21 July 2006 on financial market supervision (hereinafter: AFMS),<sup>8</sup> which stipulates that financial supervision applies to the entities of the banking sector, pension market, insurance market, capital market, payment institutions, payment service bureaus, electronic money institutions, branches of foreign electronic money institutions, rating agencies, as well as cooperative savings and credit unions, and Krajowa Spółdzielcza Kasa Oszczędnościowo-Kredytowa.

The present model of the financial market protection is based on many pillars, which include civil, institutional (administrative) and penal legal measures.<sup>9</sup> Due to the fact that penal instruments of the financial market protection belong to those that most strongly interfere into the sphere of citizens' rights and freedoms, in accordance with the principle of subsidiarity of penal business law, the protection of legal interests with the use of its instruments cannot be absolute and unlimited.<sup>10</sup> Although, in relation to legal interests that are of special social significance, the legislator is obliged to criminalise the behaviour that infringes them or exposes them to risk,<sup>11</sup> it is indicated that, especially in the sphere of economic transactions,

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<sup>6</sup> P. Wajda, *Rola decyzji administracyjnej...* [Role of the administrative decision...], p. 19; B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego. Komentarz* [Capital market law. Commentary], Warsaw 2014, p. 1369. The rules of developing legal definitions are laid down in §146(1) *Zasady Techniki Prawodawczej* (annex to the Regulation of the President of the Council of Ministers *Zasady Techniki Prawodawczej* of 20 June 2002, Journal of Laws [Dz.U.] of 2016, item 283). What may constitute the reason for introducing a statutory definition is the ambiguity, lack of clarity, lack of common understanding, or the need to reinterpret a given term. It must be emphasised that the requirement determining the reason for forming a definition of a term lacking clarity is the desire to limit this ambiguity (§146(1)2 *Zasady Techniki Prawodawczej*).

<sup>7</sup> B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Capital market law...], pp. 1369–1370.

<sup>8</sup> Journal of Laws [Dz.U.] of 2017, item 196, as amended.

<sup>9</sup> M. Dyl, *Środki nadzoru...* [Supervisory measures...], pp. 122–203. Also see, R. Kuciński, *Przestępstwa giełdowe* [Stock exchange offences], Warsaw 2010, p. 47. Compare, S. Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności* [Penal business law in terms of subsidiarity principle], Warsaw 2009, p. 229; P. Ochman, *Ochrona działalności bankowej w prawie karnym gospodarczym. Przepisy karne ustaw bankowych* [Protection of banking activity in the penal business law. Penal provisions in the acts on banking], Warsaw 2011, pp. 115–128; by the same author, *Rola Komisji Nadzoru Finansowego w karnej ochronie rynku finansowego* [Role of the KNF in the penal protection of the financial market], *Ius Novum* No. 4, 2016, pp. 325–327.

<sup>10</sup> R. Zawłocki, *Prawo karne gospodarcze* [Penal business law], Warszawa 2007, pp. 8–9; by the same author, *Istota prawa karnego gospodarczego* [The essence of penal business law], [in:] R. Zawłocki (ed.), *Prawo karne gospodarcze* [Penal business law], Warsaw 2012, p. 36; S. Żółtek, *Prawo karne gospodarcze...* [Penal business law...], pp. 94–135; O. Górniok, *Istota karnego prawa gospodarczego* [The essence of penal business law], [in:] O. Górniok (ed.), *Prawo karne gospodarcze* [Penal business law], Warsaw 2003, pp. 6–12; by the same author, *Rola karania w przeciwdziałaniu patologicznym zachowaniom gospodarczym* [Role of punishment in prevention of pathological business behaviour], *Przegląd Ustawodawstwa Gospodarczego* No. 5, 1999, pp. 12–15.

<sup>11</sup> See, L. Gardocki, *Zagadnienia teorii kryminalizacji* [Issues in penalisation theory], Warsaw 1990, p. 98.

it is necessary to use non-penal instruments of combating economic pathologies.<sup>12</sup> They may include: specific capital requirements for business activity or other requirements for setting up a business, establishment of supervision over those entities as well as promotion of non-legal measures strengthening ethical awareness of business operations participants.

The Polish Financial Supervision Authority (KNF) undoubtedly is an expression of the financial market protection.<sup>13</sup> It is indicated in the literature that the entity is a body of integrated supervision over the financial market,<sup>14</sup> which constitutes one of the elements of the financial safety net, i.e. a group of institutions and legal regulations that aim to protect the financial system against its destabilisation.<sup>15</sup> In accordance with Article 3(2) AFMS, the Polish Financial Market Authority is a body competent to supervise the financial market. The supervision aims to ensure the proper functioning of the financial market (i.e. stability, safety, transparency, trust in it and the protection of its participants' interests via reliable information concerning the functioning of the market) as well as to implement detailed supervision tasks laid down in special legal acts concerning particular sectors.<sup>16</sup>

The article aims to analyse one of the KNF's competences, i.e. the development of a list of public warnings (Article 6b(1) first sentence AFMS). The introduction of clear statutory grounds for this entitlement took place quite recently,<sup>17</sup> namely on 17 January 2014. This does not mean, however, that the list had not been developed before,<sup>18</sup> but the scope of information provided by the KNF had been regulated by special acts. For example, in accordance with Article 25(1)2 of the Act of 29 July 2005 on capital market supervision (hereinafter: ACMS),<sup>19</sup> the KNF was entitled

<sup>12</sup> Council of Europe Committee of Ministers, Recommendation No. R (81) 12 of 25 June 1981. On the same topic, see O. Górniok, *Problemy przestępczości gospodarczej w zaleceniach Rady Europy* [Problems of business crime in the recommendations of the Council of Europe], *Państwo i Prawo* No. 9, 1991, pp. 45–54; by the author, *Środki zapobiegania przestępczości gospodarczej w zaleceniach Rady Europy* [Measures preventing business crime in the recommendations of the Council of Europe], *Państwo i Prawo* No. 10, 1992, pp. 24–31; *Przestępczość gospodarcza i jej zwalczanie* [Business crime and its combating], Warsaw 1994, pp. 163–167; *Pojęcie karnego prawa gospodarczego i jego szczególne problemy* [The concept of penal business law and its specific issues], [in:] O. Górniok (ed.), *Prawo karne gospodarcze...* [Penal business law...], pp. 27–30.

<sup>13</sup> For more on the status of the KNF, see M. Dyl, *Środki nadzoru...* [Supervisory measures...], pp. 95–101; A. Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego* [Financial Supervision Authority in the new institutional structure of the European system of financial supervision], Warsaw 2014, pp. 245–260.

<sup>14</sup> B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Capital market law...], pp. 1372–1373; M. Dyl, *Środki nadzoru...* [Supervisory measures...], p. 71.

<sup>15</sup> For more, see A. Nadolska, *Komisja Nadzoru Finansowego...* [Financial Supervision Authority...], pp. 335–394.

<sup>16</sup> For more, see B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Capital market law...], p. 1376.

<sup>17</sup> The provision of Article 6b AFMS was added based on the provision of Article 1(3) of the Act of 23 October 2013 amending the Act on financial market supervision and some other acts (Journal of Laws [Dz.U.] of 2013, item 1567).

<sup>18</sup> See, P. Wajda, *Charakter prawny wpisu...* [Legal consequences...], p. 82; B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Capital market law...], p. 1405.

<sup>19</sup> Journal of Laws [Dz.U.] of 2016, item 1289 as amended.

to promulgate information concerning notices on crime under the Act on trading in financial instruments, the Act on investment funds or the Act on commodity exchanges. However, the provision of Article 6b AFMS, unlike other legal grounds for disseminating information by the KNF, constitutes an instrument consisting in an obligation to inform public opinion about financial crime of violation of the statutory exclusive right of entities operating on this market. The importance of this particular issue is demonstrated in preventive activities aimed at informing the public about entities that do not guarantee appropriate operations on the financial market<sup>20</sup> (ensuring information effectiveness<sup>21</sup>), which are suspected of committing economic offences consisting in the violation of the statutory exclusive right to perform regulated business activity on the financial market or its designations<sup>22</sup>. As a result, in relation to information about economic crime committed on the financial market, the development of the list of public warnings constitutes one of the instruments that let the KNF fulfil tasks concerning penal protection of the financial market.<sup>23</sup> It makes it possible to publish information concerning a probability of specific financial crime commission and the course of action undertaken. Due to the fact that the information is provided by a competent entity (a supervision authority), having specialist knowledge and data concerning a supervised entity's compliance with the regulatory requirements, it constitutes an extremely important preventive instrument (transparency of violations of criminal legislation concerning the financial market), a cautionary one (possibility of preventing the infliction of harm upon unaware investors) as well as one supporting law enforcement bodies and the institution of justice.

## 2. DETAILED DESCRIPTION

Information asymmetry of particular participants of the financial market and, as a result, the lack of overall knowledge of details concerning its functioning, as well as a desire to obtain extraordinary profit are just some of the factors generating a high risk on this market. That is why, the development of the list of public warnings by the KFN constitutes a very important instrument, especially because of its informative, educational and cautionary value for the members of the financial market. The entry into force of the Act of 23 October 2013 amending the Act on financial market supervision and some other acts<sup>24</sup> meant the creation of an explicit statutory regula-

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<sup>20</sup> P. Wajda, *Charakter prawny wpisu...* [Legal consequences...], pp. 81–82.

<sup>21</sup> Compare, P. Wajda, *Efektywność informacyjna rynku giełdowego* [Information effectiveness of the stock exchange market], Warsaw 2011, p. 311; M. Dyl, *Środki nadzoru...* [Supervisory measures...], p. 281.

<sup>22</sup> The list of public warnings may also contain information concerning pecuniary penalties imposed for the violation of some obligations laid down in APS (Article 6b(1) second sentence AFMS). The legal grounds were introduced in Article 8 of the Act of 30 November 2016 amending the Act on payment services and some other acts (Journal of Laws [Dz.U.] of 2016, item 1997), which entered into force on 8 February 2017.

<sup>23</sup> See, P. Ochman, *Rola Komisji Nadzoru Finansowego...* [Role of the KNF...], pp. 331–332.

<sup>24</sup> Journal of Laws [Dz.U.] of 2013, item 1567.

tion applicable to the financial market and determining the subjective and temporal scope of information revealed to the public. It is necessary to draw attention to the fact that continuous development of the list of public warnings reflects the KNF's activities in the informative and educational sphere (Article 4(1)4 AFMS), but *de lege lata* it constitutes the body's responsibility laid down in the provision of Article 6b AFMS. Before the above-mentioned amendment entered into force, particular acts regulating the capital market determined specific rules of promulgating information (e.g. the Act of 29 July 2005 on capital market supervision<sup>25</sup> and the Act of 29 July 2005 on public offerings and conditions for introduction of financial instruments to the organised system of transactions and public companies<sup>26</sup>).<sup>27</sup> However, they are limited to particular segments of the financial market and, moreover, promulgation of particular information based on them is optional.<sup>28</sup> In addition, at present, the name: List of the KNF's public warnings can be used only for information provided under Article 6b AFMS.<sup>29</sup>

In essence, the list of KNF's public warnings is to reveal information about the fact that a crime was reported (Article 6b(1) first sentence AFMS) or the criminal proceedings are in progress, provided that the KNF Chairman exercises his rights of the aggrieved party (Article 6b second sentence in conjunction with Article 6(2) AFMS).<sup>30</sup> The information that the list of public warnings should include does not

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<sup>25</sup> Journal of Laws [Dz.U.] of 2017, item 724, as amended, hereinafter: ACMS. The provision of Article 25(1) of the Act stipulates, inter alia, the grounds for promulgating by the KNF of the information about: (1) cases of infringement of the provisions of the Act on trading in financial instruments, the Act on public offerings, the Act on investment funds and the Act on commodity exchanges; (2) legal measures undertaken in order to counteract the violation of regulations of the Acts referred to in (1), including sanctions imposed and reporting the suspicion of crime commission as well as initiation of result of an administrative or civil proceedings; (3) circumstances indicating the manipulation referred to in the Act on trading in financial instruments or the commission of a crime or a misdemeanour referred to in the Acts listed in (1). There is a negative result of promulgating the information: the possibility of endangering capital market or causing disproportionate loss for the persons involved.

<sup>26</sup> Journal of Laws [Dz.U.] of 2016, item 1639 as amended, hereinafter: APO. The provisions of Article 16(1)3 and Article 17(1)3 of the Act constitute, inter alia, grounds for publishing by the KNF, at the issuer's expense, information on illegal operations concerning public offerings, subscription or sale or illegal operations connected with the application for admission to or introduction of trade in securities on the regulated market.

<sup>27</sup> It must be emphasised that the subjective grounds for promulgation of some information are still in force.

<sup>28</sup> For more, see P. Wajda, *Efektywność informacyjna...* [Information effectiveness...], pp. 310–314; M. Dyl, *Środki nadzoru...* [Supervisory measures...], pp. 281–284; T. Nieborak, [in:] T. Nieborak, T. Sójka (ed.), *Ustawa o nadzorze nad rynkiem kapitałowym. Komentarz* [Act on capital market supervision. Commentary], Warsaw 2011, pp. 153–154; M. Wędrychowski, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Capital market law...], p. 1510.

<sup>29</sup> See, Article 6b(4) AFMS.

<sup>30</sup> As a result of the amendment to AFMS, the scope of the list of the KNF's public warnings has been broadened by the addition of a possibility to promulgate information about imposing a pecuniary penalty on the provider of payment services in connection with failure to fulfil some obligations laid down in APS. It must be indicated, however, that the provision of information about a pecuniary penalty is optional. Moreover, there is a negative consequence (revealing the information may endanger the financial market or cause disproportionate loss). The

apply to all offences but only those laid down in the provision of Article 6b(1) AFMS. In general, they consist in illegal performance of regulated business on the financial market or illegal use of designations dedicated to institutional participants of that market (the infringement of statutory exclusive rights of the entities of this market). The catalogue of those offences includes:

- illegal use of the term “pension scheme”, “public pension association” or “workers’ pension association” (Article 215 Act of 28 August 1997 on the organisation and operation of pension schemes<sup>31</sup>);
- illegal involvement in a pension scheme or a pension association activities (Article 216 AOOPS);
- illegal banking activities (Article 171(1) and (3) Act of 29 August 1997: Banking law<sup>32</sup>);
- illegal use of terms: “bank” or “savings bank” (Article 171(2) and (3) BL);
- illegal purchase or proposal to buy stock exchange products (Article 56a Act of 26 October 2000 on commodity exchanges<sup>33</sup>);
- illegal involvement in commodity exchange institutions’ activities (Article 57 ACE);
- illegal involvement in insurance and reinsurance activity (Article 430 Act of 11 September 2015 on insurance and reinsurance activities<sup>34</sup>);
- illegal involvement in insurance intermediation (Article 47 Act of 22 May 2003 on insurance intermediation<sup>35</sup>);
- illegal use of terms indicating performance of agency-related or brokers’ activities in the field of insurance and reinsurance (Article 48 AII);
- illegal use of the term “pension scheme” (Article 50(1) and (2) Act of 20 April 2004 on workers’ pension schemes<sup>36</sup>);
- illegal use of the terms “personal pension account” or “personal pension protection account”, and their respective abbreviations “IKE” or “IKZE” (Article 40 Act of 20 April 2004 on personal pension accounts and personal pension protection accounts<sup>37</sup>);
- illegal involvement in investment activities (Article 287 Act of 27 May 2004 on investment funds and alternative investment funds management<sup>38</sup>);
- illegal sale of shares in investment funds (Articles 290 to 291 AIF);

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above-mentioned optional mode and negative consequence make the mechanism of providing information about pecuniary penalties imposed similar to the regulations for the capital market (e.g. Article 25 (1) AFMS). Thus, a question arises whether it would not be more purposeful to include the provision in the Act on payment services, especially as the provision of Article 6b AFMS does not contain any regulations concerning further proceedings in connection with once communicated information (its verification or updating), in particular the period of making it available.

<sup>31</sup> Journal of Laws [Dz.U.] of 2017, item 870, as amended, hereinafter: AOOPS.

<sup>32</sup> Journal of Laws [Dz.U.] of 2016, item 1988, as amended, hereinafter: BL.

<sup>33</sup> Journal of Laws [Dz.U.] of 2017, item 1127, as amended, hereinafter: ACE.

<sup>34</sup> Journal of Laws [Dz.U.] of 2017, item 1170, as amended, hereinafter: AIRA.

<sup>35</sup> Journal of Laws [Dz.U.] of 2016, item 2077, as amended, hereinafter: AII.

<sup>36</sup> Journal of Laws [Dz.U.] of 2016, item 1449, as amended.

<sup>37</sup> Journal of Laws [Dz.U.] of 2016, item 1776, as amended.

<sup>38</sup> Journal of Laws [Dz.U.] of 2016, item 1896, as amended, hereinafter: AIF.

- illegal establishment of investment management companies' branches (Article 292 AIF);
- illegal involvement in activities of investment management companies (Article 293 AIF);
- illegal introduction of an investment fund or an alternative investment fund to the EU system (Article 294a AIF);
- illegal involvement in activities of an EU investment management company into the territory of the Republic of Poland (Article 294b AIF);
- illegal involvement in investment fund associations' activities (Article 295 AIF);
- illegal use of the terms: "alternative investment company", "investment fund", "investment fund association" and their abbreviations "EuVECA" or "EuSEF" (Article 296 AIF);
- illegal involvement in financial instruments trade activities (Article 99 APO);
- illegal public offering (Article 99a APO);
- illegal involvement in payment services or electronic currency supply (Article 150(1) Act of 19 August 2011 on payment services<sup>39</sup>);
- illegal use of the terms: "payment services", "electronic currency supply", "payment institution", "payment services office", "electronic currency institution" or "branch of foreign payment institution" (Article 150(2) APS),
- illegal conclusion of contracts to provide payment services (Article 151 APS).

What draws attention in the presented catalogue is the lack of an offence classified in Article 437 AIRA, consisting in the illegal use of terms indicating involvement in insurance and reinsurance activities. In the light of the relatively coherent subjective scope of the list of public warnings, its lack is entirely incomprehensible. Moreover, the subjective scope of the list of public warnings is imperfect because there is no obligation to include in it information about proceedings concerning collective entities' liability for prohibited acts carrying a penalty. Most economic crimes that are grounds for entry onto the list, in case the fact of committing a prohibited act is confirmed by a valid conviction, a judgement conditionally discontinuing the criminal proceedings or a court ruling of the proceeding discontinuation because of circumstances excluding the punishment of a perpetrator, constitute grounds for a collective entity's liability in accordance with the Act of 28 October 2002 on collective entities' liability for prohibited acts carrying a penalty<sup>40</sup>.

From the technical point of view, the implementation of the subjective obligation consists in promulgation of the above-mentioned information by the KNF on a dedicated website called *List of the KNF's public warnings*<sup>41</sup>. A company name

<sup>39</sup> Journal of Laws [Dz.U.] of 2016, item 1572, as amended, hereinafter: APS.

<sup>40</sup> Journal of Laws [Dz.U.] of 2016, item 1541, as amended, hereinafter: ACEL. The catalogue of prohibited acts that are grounds for a collective entities' liability (Article 16 ACEL), because of unknown reasons, does not contain crimes classified in ATFI (see, P. Ochman, *Karnoprawna ochrona rynku kapitałowego. Przepisy karne ustaw polskiego rynku kapitałowego* [Penal and legal protection of the capital market. Penal provisions of the Polish acts on the capital market], London 2014, p. 346).

<sup>41</sup> Available at: [https://www.knf.gov.pl/dla\\_konsumenta/ostrzezenia\\_publiczne](https://www.knf.gov.pl/dla_konsumenta/ostrzezenia_publiczne).

is also published in the list in the event it has been reported that it might have committed a crime or in case preparatory proceedings are conducted against that company. If a company operates under a different designation, the other designation is also revealed. The information provided by the KNF cannot contain any personal data, however, publication of the name of a natural person's company does not infringe this ban. In the literature, still before Article 6b AFMS entered into force, the entry on the list of public warnings was classified as the substantial-technical action,<sup>42</sup> and the standpoint has remained the same up to now.<sup>43</sup>

The information in the list of public warnings is verified and updated. The verification may result from the findings in the course of criminal proceedings or due to the time that has passed from the moment of the last entry. Updating may concern submitting adequate remarks or deleting the information. Information that the KNF reported suspicion of crime commission under Article 6b(1) AFMS must be each time supplemented with information about a valid ruling on refusal to initiate preparatory proceedings or a valid ruling to discontinue preparatory proceedings, and in case of indictment filed – about a valid court judgement. Due to the fact that preparatory proceedings concerning the above-mentioned offences may be initiated as a result of suspicion reported by other entities or *ex officio*, the provision of Article 6b(6) AFMS obliges a prosecutor to inform the KNF about the event. In such a case, information about the criminal proceedings and additional remarks are published only if the KNF Chairman exercises his right of the aggrieved party. Updating and verification of the information provided in the list of public warnings play an important role, especially because of the necessity and need to promulgate data reflecting the actual state (for example, about the negative verification of the KNF's suspicions concerning the commission of crime and the ruling to discontinue criminal proceedings). In this context, it is necessary to draw attention to the lack of any deadlines to be met by a prosecutor concerning information about events laid down in Article 6b(6) AFMS to be passed to the KNF or concerning information available to the KNF *ex officio*.

AFMS also determines the rules of deleting information from the list of public warnings.<sup>44</sup> It may take place *ex officio* or on a motion. However, regardless of the mode, the requirement of deleting information and any additional remarks from the list is the conclusion of all criminal proceedings initiated as a result of the KNF's reports or conducted *ex officio*, or resulting from other entities' reports provided that the KNF Chairman exercises his right to act as a subsidiary prosecutor. This means that in case more than single proceedings were initiated and when single criminal proceedings were initiated, while other motions to initiate preparatory

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<sup>42</sup> P. Wajda, *Charakter prawny wpisu...* [Legal consequences...], p. 85.

<sup>43</sup> B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Financial market law...], p. 1404.

<sup>44</sup> It is indicated in the specialist literature that an entity entered in the list of public warnings does not have a possibility of challenging the grounds for the decision and taking action before court (B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Capital market law...], p. 1404; also compare, M. Wędrychowski, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego...* [Capital market law...], p. 1510).



proceedings in one or more cases were rejected, only the conclusion of the “last” criminal proceedings makes it possible to delete the information and all the remarks concerning the given entity. However, it is important to draw attention to the legislator’s use of a phrase “after the conclusion of all the proceedings” without the statement that it applies to “valid conclusion of all initiated proceedings”.<sup>45</sup> In case of the “motion-based” mode, the requirement of deleting information from the list of public warnings is the submission of a written motion by the entity that was reported or against which the KNF Chairman acted as a subsidiary prosecutor. The right to file a motion to delete the information is only limited to cases in which, after publishing information by the KNF, there was a valid ruling issued concerning the refusal to initiate preparatory proceedings, discontinuation of preparatory proceedings or a court judgement concluding the criminal proceedings other than conviction or conditional discontinuation of criminal proceedings. The *sine qua non* requirement of accepting the motion by the KNF is the notification of the KNF by a prosecutor about the further course of the proceedings. Otherwise, the motion cannot be dealt with and the petitioner is informed about that. Attention may also be drawn to some doubts that can be an obstacle to accept an entity’s legitimate motion in the event the procedure of entering the entity in the list of public warnings was groundless. Due to the lack of any deadlines laid down that would bind a prosecutor to update and pass information to the KNF, his inaction will actually make it impossible for the KNF to accept the motion.

Deleting the information and all the remarks from the list of public warnings, concerning a given entity, as a rule, should take place not later than 10 years after a crime commission was reported or the KNF Chairman filed a motion to exercise his right to act as a subsidiary prosecutor. In the event the criminal proceedings have not been concluded within the 10-year period, and after a year from the day of valid conclusion of the criminal proceedings, the information and all the remarks must be deleted from the list *ex officio*.

As it was indicated above, the development of the list of public warnings undoubtedly increases availability of information concerning entities involved in illegal operations on the financial market. On 12 July 2017, the list contained 171 entries of which 68 concern crimes under Article 171(1) to (3) BL, 66 – crimes under Article 178 ATFI, 2 – crimes under Article 178 in conjunction with Article 79 ATFI, 7 – crimes under Articles 287 and 290 to 296 AIF, 13 – crimes under Articles 99 and 99a APO, 1 – crime under Articles 56a and 57 ACE, 4 – crimes under Article 430 AIRA (ex Article 225 Act on insurance activities), 3 – crimes under Articles 47 and 48 AII, and 7 – crimes under Articles 150 and 151 APS. As it can be observed, the list contains a relatively big number of entities, of which only four were subject to additional information about conditional discontinuation of criminal proceedings, one ended in a valid acquittal, one ended in a penal judgement in the form of an order, and eight ended in a valid conviction.

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<sup>45</sup> There is also a lack of a mode for deleting information about the imposition of pecuniary penalties on payment services providers.

### 3. CONCLUSIONS

Although the amount of information published does not correspond to the number of convictions and conditionally discontinued criminal proceedings,<sup>46</sup> this cannot constitute an argument for the statement that the list of public warnings is ineffective. Their role is undoubtedly appropriate to the aim they serve. The KNF, as a specialist body supervising the financial market, has first-hand information enabling it to verify whether the financial market entities' activity complies with legal regulations. This lets this body outrun law enforcement agencies and justice institution bodies, which are more active in the field of penalising economic pathologies. In this context, the KNF activity makes it possible to prevent harming investors by entities that do not guarantee appropriate operations on the financial market. The list of public warnings is one of such instruments. However, it is very important for the instrument to be used by investors as well as law enforcement or justice institution bodies. Moreover, the clear regulation concerning the list is the indication of significance of the instrument stipulated by the legislator. However, this does not mean that the present regulation does not have any drawbacks. One can point out the following diagnosed issues:

- omission of the crime of illegal use of names indicating insurance and reinsurance activities in the catalogue of crimes revealed on the list of public warnings (Article 437 DUU);
- imprecise use of the term “conclusion of criminal proceedings” instead of a more appropriate term “valid conclusion of criminal proceedings”;
- lack of a set deadline in the provision of Article 6b that the KNF as well as a prosecutor should meet when performing their duties;
- lack of explicit obligation imposed on a prosecutor to inform the KNF about the issue of a valid ruling of refusal to initiate preparatory proceedings or discontinuation of preparatory proceedings, and in case of an indictment filed to court, about a valid judgement;
- lack of the KNF's obligation to publish information concerning collective entities' liability for prohibited acts carrying a penalty.

Consideration of changes in the proposed scope would undoubtedly increase safety, stability and trust in the financial market as well as the protection of investors. It should be hoped that information published in the list of the KNF's public warnings will be used by their addressees and other state bodies and will constitute a real instrument eliminating entities that do not comply with law when operating on the financial market.

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<sup>46</sup> See, P. Ochman, *Karnoprawna ochrona rynku...* [Penal and legal protection...], pp. 298–299; A. Kawulski, *Prawo bankowe. Komentarz* [Banking law. Commentary], Warsaw 2013, thesis 4 to Article 171.

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## LIST OF THE KNF'S PUBLIC WARNINGS AS THE FINANCIAL MARKET PROTECTION INSTRUMENT

### Summary

The article is an attempt to present the role of the List of the Financial Market Supervision Authority's public warnings in the system of the financial market protection. The introduction of explicit statutory grounds for the entitlement to perform it took place relatively not long ago, which does not mean, though, that the body did not develop such a list before. The regulation of the provision of Article 6b AFMS, as this is the act discussed, constitutes an instrument consisting in the obligation to inform public opinion about crimes on the financial market which violate the exclusive rights of entities operating on this market. Due to the fact that the information is provided by a specialist and professional body, the list of public warnings constitutes an extremely important preventive and cautionary instrument as well as one supporting the activities of law enforcement agencies and justice institution bodies. The Financial Market Supervision Authority's competences presented in the article constitute a significant element of the system of ensuring security, stability and trust in the financial market, as well as the protection of its participants.

Keywords: KNF, list of public warnings, business crimes, penal business law, financial market

## LISTA OSTRZEŻEŃ PUBLICZNYCH KNF JAKO INSTRUMENT OCHRONY RYNKU FINANSOWEGO

### Streszczenie

Celem niniejszego artykułu jest próba przedstawienia roli, jaką spełnia Lista ostrzeżeń publicznych Komisji Nadzoru Finansowego w systemie ochrony rynku finansowego. Wprowadzenie wyraźnej ustawowej podstawy uprawnienia do jej prowadzenia nastąpiło stosunkowo niedawno, co jednak nie oznacza, że taka lista nie była wcześniej prowadzona przez ten organ. Regulacja przepisu art. 6b NRFU – bo o niej będzie mowa – stanowi jednak instrument polegający na obligatoryjnym poinformowaniu opinii publicznej w sprawach przestępstw rynku finansowego, polegających na naruszeniu ustawowego prawa wyłączności podmiotów działających na tym rynku. Ze względu na fakt, że informacja taka podawana jest przez podmiot profesjonalny i specjalistyczny, lista ostrzeżeń publicznych stanowi niezwykle istotny instrument prewencyjny, ostrzegawczy, a także nawet wspomagający działania organów ścigania oraz organów wymiaru sprawiedliwości. Zaprezentowana w artykule kompetencja Komisji Nadzoru Finansowego stanowi istotny element systemu ochrony bezpieczeństwa, stabilności i zaufania do tego rynku finansowego, a także ochrony jego uczestników.

Słowa kluczowe: KNF, lista ostrzeżeń publicznych, przestępstwa gospodarcze, prawo karne gospodarcze, rynek finansowy