

Przemysław Litwiniuk

Warsaw University of Life Sciences

PROGRAMME-RELATED NORMS IN MODERN AGRICULTURAL LAW

1. INTRODUCTION

The discussion on the position and role of modern agricultural law in the legal system of Poland and the European Union includes a fairly widely presented view that the identification of agricultural law¹ norms is quite useful and necessary. Having observed the change of accents in the framework of doctrinally developed regulatory methods in agricultural law, which the legislator shifted from civil to administrative law,² there is a noticeable tendency to use authoritative instruments to create and control the contents of legal relations in the management of land plots, agricultural production and the functioning of rural areas.

The purpose of this paper is to analyse the nature of legal norms “regulating social relations involved in the formation of the system of agriculture, that of agricultural production and agricultural market”, or, as proposed in a definition by A. Stelmachowski,³ the norms classified as part of agricultural law. In particular, an attempt is made here to answer these questions: do programme-related norms contribute today to the creation of agricultural law? What are their characteristics and significance?

To start with, it is worth recalling the criteria defining the agricultural law in Polish and West European science, as follows:

- 1) the body of special norms relating to agriculture;
- 2) legal regulations on ownership rights and use of land;
- 3) legal regulations in respect of the situation of a farm holding;
- 4) legal regulations of production activities in agriculture;

¹ A. Oleszko, *Wyodrębnienie prawa rolnego na tle ustawodawstwa Unii Europejskiej*, (in:) A. Oleszko (ed.) *Prawo rolne*, Warsaw 2009, p. 29.

² See e.g. Act of 14 April, 2016 on the suspension of real estate sales from the Agricultural Property Stock of the State Treasury and the amendment of some acts (Polish JoL, 2016, item 585).

³ P. Czechowski, M. Korzycka-Iwanow, S. Prutis, A. Stelmachowski, *Polskie prawo rolne na tle ustawodawstwa Unii Europejskiej*, Warsaw 1999, p. 19.

5) legal regulations of the impact of agriculture on a specific category of goods used in agricultural production or generated in the course of agricultural production;

6) a set of norms defining the legal situation of the farmer.⁴

Given the period of nearly 20 years that has passed since the construction elements described above were formulated in the science of agricultural law, and given the experience related to the application of the 1997 Constitution as well as the primary and secondary law of the European Union, it needs to be considered whether the abovementioned catalogue has not been expanded by a set of programme-related norms targeted at an ordinary legislator and laid down in the body of law above the statutory law level (the Constitution, international agreements, effective acts passed by international organisations), the set of law determining the objectives to be achieved in the policy areas such as market and income, or structural policies in agriculture and rural areas.

Perceived in the broad sense, contemporary agricultural law comprises rules dispersed in different areas of legislation and separated in accordance with the criterion of the subject matter of a given regulation. These provisions enable the contents of legal norms to be construed and understood as statements requiring entities or persons to behave in a certain way in certain circumstances, or to refrain from certain behaviour in others. Therefore, any legal norm should always specify its addressee, the scope of application and categories of actions prohibited or required by the norm (range of normalisation). In the theory of law, these norms are grouped in two classes: fundamental norms defining the prescribed behaviour of the norm addressee in separation from the addressee's guiding purpose of conduct, and purposive norms identifying the means to achieve a goal chosen by the norm addressee. It must be noted that such an approach towards purposive norms assumes the existence of instrumental relationship between the conduct specified in the norm disposition and the achievement of that goal, whereas there is no such a relationship between the act of issuing a norm and the achievement of that goal.⁵

2. THE PROGRAMME-RELATED NORMS

However, modern agricultural law is also created thanks to norms issued because of, and closely related to, the legislator's intention of achieving goals of general nature that he has chosen with a view to ensuring economic development,

⁴ A. Lichorowicz, *Ewolucja polskiej definicji prawa rolnego na tle doktryny zachodnioeuropejskiej*, „Kwartalnik Prawa Prywatnego” 1997, bulletin 4, pp. 611–612.

⁵ T. Gizbert-Studnicki, A. Grabowski, *Normy programowe w konstytucji*, (in:) J. Trzciniński (ed.), *Charakter i struktura norm konstytucyj*, Warsaw 1997, p. 96.

food security, productive employment, adequate agrarian structure, etc. Such norms prescribing the achievement of the legislator's goals, and not those of the norm's addressee, are referred to in the doctrine as *the programme-related norms*. "Therefore, they do not indicate how to act in order to achieve a certain goal, but prescribe which goal should be achieved".⁶ Given their structure, such norms are more optimisation principles (rather than prescribing rules)⁷, which means that they can be implemented to some greater or lesser extent with current factual and legal options⁸ taken into account. T. Gizbert-Studnicki and A. Grabowski point out that "it is impossible to determine what behaviour is required or forbidden by the statements constituting the bulk of the program-related norms without making reference to the elements going beyond the legal text, and in particular, without reference to the knowledge of causal relationships (...) Program-related norms do not impose specific duties on their addressees. They impose duties only *prima facie*".⁹ J. Trzeciński speaks of the nature of the programme-related norms in a similar manner. "Programme-related norms are those that require a goal to be achieved, or to be pursued. The goals meant here are those of the norm creator, they are the objectives and tasks addressed to a public authority, and not the law on the citizen's side.

Therefore, a programme-related norm does not indicate how to behave in order to accomplish a certain goal, but specifies which goal should be achieved. It often specifies which goal can be implemented given the opportunities available to the public authority".¹⁰ It is believed that the provisions of the law generating the programme-related norms provide the basis for the reconstruction of norms of conduct warranting that the appropriate action shall be taken to achieve the goals set out in the relevant provisions. In other words, "there is no reason to deny the normative nature to the statements indicating what goals should be achieved. These statements in fact indirectly indicate what necessary action should be taken. (...) Thus, the normative discourse is actually very rich and includes many types of statements".¹¹

Given the above it seems only reasonable to consider whether the programme-related norms impact also the subject matter of agricultural law, and supplement a set of norms in this branch of law. I believe there are strong arguments for doctrinal separation of "programme-related method of regulation" in the area of agricultural law, both at European and national level.

⁶ *Ibidem*, p. 97.

⁷ Comp. P. Tuleja, *Normatywna treść praw jednostki w ustawach konstytucyjnych RP*, Warsaw 1997, pp. 60–87.

⁸ *Ibidem*, p. 101.

⁹ *Ibidem*, pp. 99, 104.

¹⁰ J. Trzeciński, *Komentarz do art. 68*, (in:) K. Działocha, L. Garlicki, P. Sarnecki, W. Sokolewicz, J. Trzeciński, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. III, Warsaw 2003, p. 4.

¹¹ T. Gizbert-Studnicki, A. Grabowski, *Normy programowe w konstytucji*, (in:) J. Trzeciński (ed.), *Charakter i struktura norm...*, p. 106.

The origin of norm-related programmes, incorporated in agricultural law regulations can be found in the United States of America, where the intervention processes shaping the agricultural system¹² was initiated in the twenties and thirties decades of the twentieth century. As part of a broader program of state intervention, *i.e.* the so-called. *New Deal*, they were established to define a number of goals and actions of the state aimed at counter-acting the consequences of a great economic crisis while questioning the liberal economic concepts. This programme provided the basis, among others, for the preparation of the *Agricultural Adjustment Act* published in 1933, which introduced a number of legal solutions shaping the American agricultural market and the position of the farmer. Until today, the assumptions of this program have been implemented in the legislation of the United States in an evolutionary manner by the way of using, among others, some instruments to support agricultural production or the mechanism of excluding land from production.¹³ They are implemented periodically each time the Congress passes the acts called the *Farm Bills* to comprehensively update pivots of agricultural policy and set specific mechanisms of its implementation¹⁴ in place.

3. THE PROGRAMME GOALS UNDER THE CAP

The method of creating the program-related goals in agriculture was also adopted in the Treaty of Rome of 25 March 1957 establishing the European Economic Community. These goals have been successively modified and supplemented in subsequent acts of primary in the reports and memoranda of the European Commission and the projects of reform of the Common and secondary law of the European Union, as well as made more specific Agricultural Policy, such as the Mansholt Plan (1968), MacSharry's Plan (1992) or Fischler's Plan, or as part of Agenda 2000¹⁵ (1998). This kind of programme documents provided the basis for the introduction of normative regulations. One of the first and important ones was the Council Regulation (EC) No. 1257/1999 of 17 May 1999 on support for rural development by the European Agricultural Guidance and Guarantee

¹² Starting from the programme of maintaining agricultural prices implemented in 1929 and administered by Federal Farm Board.

¹³ More about the scope and instruments of support to American family farms by federal institutions: P. Blajer, *Amerykańskie family farms – status i instrumenty wspierania przez instytucje federalne*, (in:) P. Litwiniuk (ed.), *Prawne mechanizmy wspierania i ochrony rolnictwa rodzinnego w Polsce i innych państwach Unii Europejskiej*, Warsaw 2015, pp. 309–322.

¹⁴ P. Czechowski (ed.), *Agricultural law*, Warsaw 2015, pp. 58–61.

¹⁵ More in: P. Czechowski, *Proces dostosowania polskiego prawa rolnego i żywnościowego do prawa Unii Europejskiej*, Warsaw 2001, pp. 20–25.

Fund (EAGGF) and amending and repealing certain regulations,¹⁶ as it included the first major programme-related norm and provided the framework for later norms for the policy creation and the implementation of rural development policy. In this regulation Member States were entrusted with the power of designing national or regional programs (plans) of rural areas development, which would be then approved by the European Commission. The adoption of the rural development program (plan) for a given territory resulted in a requirement for the competent authorities to have the legislative instrumentation set in place with the view to implementing some applicable mechanisms and targets laid down in the document.

4. THE LEGAL STATUS OF THE RDP

Given the hypothesis presented in this paper, it is important to make an attempt at determining what legal nature is to be attributed to the Rural Development Programme, and in particular: does it include any programme-related norms, and, moreover, can they be attributed the value of commonly effective law? Other than statements constituting internally effective law or soft law, it is this very value that would decide about the paramount importance of programme-related norms derived from the Programme as being those which overrule ordinary regulations of the national legislature in the field of agricultural law.

A. THE PARTNERSHIP AGREEMENT

Given the current state of the law, and in accordance with para. 20 of the preamble of Regulation 1303/2013, each Member State shall prepare the so called partnership agreement. The purpose of the document is to translate the elements listed in Common Strategic Framework (CSF)¹⁷ into “national context” and indicate some specific commitments aimed at the achievement of the EU objectives.

As stipulated in Art. 2.20 of Regulation 1303/2013, a Partnership Agreement is a document prepared by the Member State to determine its strategy, priorities and conditions for the effective and efficient use of the EU funds. Partnership Agreement covers all the support from the EU funds, including the European Agricultural Fund for Rural Development (EAFRD, Art. 14.3 of the Regulation). The Agreement should be submitted to the European Commission (Art. 14.4

¹⁶ Polish JoL No. L 160, 26.6.1999, p. 80.

¹⁷ See in particular Art. 10 and Annex to the a/m Regulation.

of the Regulation), and then, in principle, it is subject to its approval – by the way of an implementing decision of the Commission (Art. 16.2 of the Regulation).

According to Polish law (Act of 6 December 2006 on the implementation rules of development policy), a draft partnership agreement, once prepared by the minister competent for regional development in conjunction with other authorities and partners, is then adopted as a resolution of the Council of Ministers. After the Agreement is approved by the European Commission, it is “communicated to the members of the Council of Ministers”. Moreover, an announcement is published in “Polish Monitor” or the Official Journal of Laws of the Republic of Poland proclaiming the Commission decision to approve the Partnership Agreement. It also specifies the website address where the content of the Agreement is posted.

The European Commission approved some elements of the Partnership Agreement for the years 2014–2020 prepared by Poland in the commission Decision of 23 May 2014, OJ No. C (2014) 3517. An Announcement of the Minister for Infrastructure and Development of 1 August 2014 “on the European Commission’s decision approving the Partnership Agreement for the years 2014–2020” was published in Polish Monitor 2014, item 673.

B. THE PROGRAMMES

Disbursement of various EU funds is based on the so-called programmes. They should be consistent with the framework defined in the partnership agreements.¹⁸ As regards the European Agricultural Fund for Rural Development (EAFRD), the relevant program is called “Rural Development Programme” (hereinafter referred to as “RDP”; see Art. 2.6 of the Regulation).

Programs should be developed by the Member States “according to transparent procedures and in accordance with their legal and institutional framework” (point 27 of the preamble to Regulation 1303/2013). Regulation 1303/2013 indicates (see especially Art. 27), the contents to be included in a program. In particular, programmes should contain “a strategy for the program’s contribution to the European Union strategy for smart and sustainable growth conducive to social inclusion”, as well as spell out “arrangements to ensure effective, efficient and coordinated implementation of the European Fund for Strategic Investments (EFSI) along with projects aimed at reducing administrative burden for beneficiaries”. The program should, among others, define “priorities setting out specific objectives, appropriations of financial support from the EFSI and the relevant national co-funding”, as well as include “the description of measures” in accordance with the Fund-specific rules.

¹⁸ See Art. 26.1 Regulation No. 1303/2013.

According to Art. 29 of Regulation 1303/2013, the Commission performs the evaluation of programmes primarily in terms of their compliance with the EU law and the partnership agreement. Furthermore, it examines also the effectiveness of their contribution to the selected thematic objectives and priorities of the EU. As stipulated in Art. 29.1, sentence. 2 of the Regulation “The assessment shall address, in particular, the adequacy of the programme strategy, the corresponding objectives, indicators, targets and the allocation of budgetary resources”. Within 3 months from the submission of the program, the Commission shall submit observations and the Member State should provide the Commission with any additional information and, if necessary, make changes to the program (Art. 29.3 of the Regulation). If the comments of the Commission are taken into account, the Commission should approve the programme in accordance with the Fund-specific rules (Art. 29.4 of the Regulation) no later than 6 months of the submission date.

The EU rules concerning the RDP are laid out in detail in Regulation 1305/2013 (the Regulation, according to its Art. 1.2, complements the provisions of Part. II of the Regulation No. 1303/2013), and the Commission Implementing Regulation No. 808/2014.

The key goal of the RDP is to use the EAFRD support through the implementation of a strategy to achieve the EU priorities in the field of rural development (see Art. 6.1 Regulation 1305/2013). The content of RDP is regulated primarily in Art. 8 of the Regulation. The programme should include, among others, specification of needs to be met, description of a strategy, description of each selected measure, financial plan along with the conditions relevant to the program implementation.

C. THE PREPARATION AND APPROVAL OF THE RDP

According to Art. 10.2 Regulation (EU) No. 1305/2013, the Commission approves the RDP by the way of issuing an implementing act, *i.e.* the so-called implementing decision. Also, as a rule, any changes in the RDP should be approved by the Commission (see Art. 11 of the Regulation).

In Polish law, regulations for the development of the RDP are presented in the Act on the principles of development policy. Preparation of the draft programme is a task of a minister competent for rural development (Art. 14g.4 of the Act). The legislator has stressed that the programs – including RDP – should take into account the provisions of the partnership agreement.

Once the draft of RDP it is prepared, and prior to its submission to the European Commission, it is “adopted by the Council of Ministers (...) by way of a resolution”. Following the approval of the RDP by the Commission, it is next notified “to the members of the Council of Ministers”. As stipulated in Art. 14kd of the above mentioned Act, the RDP should be “communicated to the public” (on the web site of BIP [Public Information bulletin] of the minister competent for rural development). In addition, an announcement about the approval of the RDP by the

Commission must be published in Polish Monitor along with the address of the website where the program has been posted.

The responsibility for the implementation and control of operations of the EU programmes lies first of all with the Member States (para. 66 of the preamble to Regulation 1303/2013). The primary duties of the Member States include the adoption of relevant “legislative, statutory and administrative provisions” for the implementation of the RDP (see Art. 65.1 Regulation 1305/2013). In particular, the Member State should appoint the so-called Managing Authority (responsible for managing the program), the so-called accredited paying agency and the so called certification body (Art. 65.2 of the Regulation). In addition, the state should ensure that “for each rural development programme some relevant management and control system are created in such a way as to ensure a clear allocation and separation of functions between the Managing Authority and other bodies” (Art. 65.3 sentence. 1 of the Regulation). The EU legislator underlines that “Member States shall be responsible for ensuring that the systems function effectively throughout the programme period” (Art. 65.3 sentence 2 of the Regulation).

The currently effective Polish RDP was submitted to the Commission on 15 April 2014. Next (*i.e.* on 24 July 2014), the Commission assessed the programme and submitted observations. The final version of the programme was submitted on 5 December 2014, and the RDP was approved by Commission Implementing Decision of 12 December 2014, [OJ] No. C (2014) 9783. Apart from granting approval for the RDP (Art. 1 of the Decision), the Commission decision identified also the maximum EAFRD contribution, the annual allocation of the total contribution from the Union, the amount of resources allocated to less developed areas during the transitional period, and the amount of contribution for each measure and type of operation, together with special amount of the EAFRD contribution (Art. 2.1 of the Decision in connection with part I of the Annex to the said Decision). Moreover, Part II of the Annex to the Decision determined the value of the target indicators for each of the specific objectives included in the programme (see Art. 2.2 of the Decision).

The Annex to the Decision comprises two parts. The first one consists of “a table showing the annual contribution from EAFRD” and “the table showing the rates of contribution from the EAFRD in a breakdown by measure and types of operations, together with a special rate of EAFRD contribution” while the second one includes “the table showing measurable targets related to each of the specific objectives”. The provision in Article 4 of the Decision stipulates that “this Decision is addressed to the Republic of Poland”.

Pursuant to art. 14kd, section 2 of the Act, Polish Monitor of 17 June 2015, in item 541 publishes an announcement of the Minister of Agriculture and Rural Development of 21 May, 2015 “on the approval by the European Commission of the Rural Development Programme 2014–2020 and the address of the website where it is posted”.

The legal basis for the implementation of the RDP in the years 2014–2020 is provided mainly in the Act of 20 February 2015, on support for rural development with the use of the EAFRD funds under the RDP¹⁹ for the years 2014–2020, as well as in a dozen of regulations published under this Act.

D. THE POLISH ADMINISTRATIVE JURISDICTION ON THE RDP

The issue pertaining to the legal nature of RDP has emerged in the jurisprudence of administrative courts. 20²⁰ Cases settled in these courts concerned mainly complaints against the decisions on granting aid, which the issuing authority based not only on the existing laws and regulations, but also on the provisions of the RDP. The basic question that had to be decided by the administrative court was whether, besides the acts of law and regulations, the RDP could constitute the legal basis for administrative decisions. This question is related to another dilemma: whether RDP should be used in the process of judicial review of an administrative decision (or some other verdict of a public administration body) as part of the base (module) for the assessment of the decision legality.

In its judgment of 21 January 2008, file ref. No. II GSK 287/07, the Supreme Administrative Court stated that “the allegations of the complaint are not accurate if based on the assertion that, because of the approval of the RDP by the European Commission, the provisions of the plan had to be regarded as a material and substantive basis for the issuing of an administrative decision (...)”. It was argued by the Court that “the European Commission’s Decision of 6 September 2004, approving the RDP, was directed only to the Republic of Poland as a state, and not to its citizens. Therefore, it cannot be stated that the Decision was binding and could be applied directly in the state as is the case with any regulation (see Art. 249 sentence. II of the Treaty establishing the European Community). Following the adoption of the decision, it has been up to the State to make sure that the consequences of the Decision binding for that State should be transferred in an appropriate form into the national legal system (with the account taken of the constitutional sources of universally effective law), so that the RDP regulations could be then regarded as a legal basis for issuing administrative decisions in relation to its citizens”. The Court has decided also that “because of the very fact of having been approved by the European Commission, the RDP has not become an act of the Community law, and, therefore, in order to analyse its effects, the

¹⁹ Polish JoL, 2015, item 349.

²⁰ The currently prevailing jurisprudence on the issue under discussion here is aptly reflected in the decision of the Voivodship Administrative court (VAC) of 14 March, 2007, III SA/Kr 1403/06, LEX No. 533772 (see also E. Kremer, *Wybrane zagadnienia z problematyki rozwoju obszarów wiejskich, płatności bezpośrednich w orzecznictwie sądów administracyjnych*, „Studia Iuridica Agraria” 2009, Vol. VII, p. 143).

criteria resulting from the Polish constitutional order should be applied in full, in particular with the view to evaluating it as the source of universally binding law, which could provide the basis for issuing the administrative decisions”.

As discussed above, the position presented in the judgments of Voivodship Administrative Court (VAC) in Cracow and Supreme Administrative Court (SAC) was – *in principle* – supported in the subsequent court jurisprudence.²¹ First of all, the emphasised point is that, since the draft RDP is adopted as a resolution by the Council of Ministers, then, given the constitutional system of sources of law, it has the status of an act of internal law, as referred to in Article 93 of the Constitution. Consequently, contrary to the generally applicable legislation (national laws, regulations), the RDP cannot provide legal basis for decisions taken with regard to entities or individuals (see Art. 93.2 sentence 2 of the Constitution), which is notwithstanding the RDP approval by the European Commission. However, regardless of the prevailing court jurisprudence presented above, it is sometimes pointed out in the case law that the very contents of the programme can be applied as guidance to the interpretation of the RDP implementing regulations to dispel any doubts in this respect.²² There are also some judgments of administrative courts that adopted a different viewpoint from the one discussed above, and they permit the use of the RDP provisions as the basis for an administrative decision.²³ This confirms that the view arguing that the RDP cannot act as the basis for an administrative decision because, in light of the Constitution, it is exclusively an act of internal law, is occasionally questioned in jurisprudence. Sometimes administrative courts come to the conclusion, even though they justify it in different ways, that RDP can constitute both, a part of the legal basis for administrative decisions on granting or refusing a specific benefit, as well as a criterion of the judicial assessment of a decision legality.

Given the above it becomes clear that the legal nature of the RDP is debatable in judicial practice. It is also acknowledged in literature that “the RDP is effective in Poland basing on an announcement of the Minister of Agriculture and Rural Development, which is not included in the constitutional catalogue of sources of the universally binding law. All the other implementing regulations relating specifically to individual activities are linked to RDP. This structural complexity raises some legal uncertainty, especially when it comes to the effectiveness of the references made to the RDP and the legal consequences associated with failure to

²¹ See *e.g.* SAC decision of 7 March, 2008, II GSK 336/07, LEX No. 469726; SAC decision of 18 March, 2008, II GSK 401/07, www.nsa.gov.pl; SAC decision of 22 April, 2008, II GSK 504/07, LEX No. 469725; SAC decision of 13 November, 2008, II GSK 627/08, LEX No. 526044; SAC decision of 17 February, 2009, II GSK 765/08, LEX No. 517035; SAC decision 21 May, 2009, II GSK 953/08, LEX No. 547120; VAC decision in Gorzów Wlkp. of 24 June, 2009, II SA/Go 161/09, LEX No. 563671.

²² *E.g.* SAC decision of 17 February, 2009, II GSK 765/08, LEX No. 517035.

²³ *E.g.* VAC decision in Warsaw of 6 May, 2011, V SA/Wa 2779/10, LEX No. 996036; VAC decision in Warsaw of 19 July, 2011, V SA/Wa 715/11, LEX No. 1094948.

adjust in line with the announcement requirements, as the latter cannot possibly define the rights and obligations of citizens. The inclusion of the Rural Development Programme in a legal act not granted the status of a universally binding law should be approached with caution due to the confusion it creates, and failure to precisely define the legal position of RDP”.²⁴

Moreover, you can also find the view expressed in literature that the RDP does not constitute an act of binding law, as this document actually belongs to soft law,²⁵ which, among others, is presumed to follow from the fact that the RDP is “an operational document setting out the objectives, priorities and principles of providing support to sustainable rural development”, or it constitutes a “specific »act of law« of the EU as it is approved by a decision of the European Commission”.²⁶

E. THE EUROPEAN COURT OF JUSTICE ON THE RDP

The issue of the legal nature of the EU programmes has emerged in the case law of the European Court of Justice and the Court of First Instance.

In particular, the judgment of the ECJ on *Huber* case (C-336/00) of 19 September 2002 is worth mentioning. In its judgment, *inter alia*, the ECJ ruled that, based on Article 7.2 Council Regulation (EC) No. 2078/92 on agricultural production methods compatible with the requirements of environmental protection and maintenance of the countryside, the decision of the European Commission approving the so-called national aid program included the contents of that program on the one hand, but in doing so, on the other hand, it did not give the programme the status of an act of the Community law.²⁷ According to the ECJ, when, in some specific circumstances, the agreement concerning assistance is not compliant with the programme approved by the Commission, then the national courts are competent to decide on legal consequences following from that situation that are defined in national law.

Furthermore, the EU Court also emphasized that the Commission decision is addressed to the Member State only. However, national courts are competent to assess the legality of a measure granting individual support in the light of both, the program approved by the Commission, as well as Regulation 2078/92. This position was sustained in an order of the Court of First Instance of 28 February 2005 in the *Pezold* case (T-108/03).

²⁴ P. Czechowski, A. Niewiadomski, *Wpływ funduszy strukturalnych na wzrost konkurencyjności polskiego rolnictwa – aspekty prawne*, „Studia Iuridica Agraria” 2012, Vol. X, pp. 327–328.

²⁵ See P. Będźmirowska, *Program Rozwoju Obszarów Wiejskich 2007–2013 – problematyka prawno-organizacyjna*, doctoral thesis, Warsaw 2013 [typescript], pp. 80–97.

²⁶ K. Zalega, *Wspólnotowa Polityka Rozwoju Obszarów Wiejskich*, „Kontrola Państwowa” 2011, No. 4, p. 72.

²⁷ See para. 2 of the judgement and item 40–41 of justification.

The above-cited case law shows that, even though the programme itself is not recognized to be the one constituting a distinct act of the EU law, also once approved by the Commission's decision, yet its provisions can be of general and abstract nature. However, the task of determining the position of the programme in national law, and the decision as to any consequences following from the breach of the programme provisions by the Member State authorities constitute the competence of national courts.

Consequently the analysis of constitutional regulations needs to be performed in order to determine the rank of the RDP in the Polish legal system.

F. THE RDP IN THE POLISH CONSTITUTIONAL LAW

The analysis of jurisprudence and views expressed in literature lead to the conclusion that it is not clear what position RDP takes in Polish constitutional system of sources of law. Still, the answer to this question is of fundamental importance from the viewpoint of the binding force that the RDP has as a basis for action by public authorities (legislative, executive and judicial), and the possibility of making references to the provisions of RDP by entities or individuals. This is an issue of practical importance especially when encountering discrepancies between the RDP and the regulations laid down in laws and implementing regulations.

Based on the current views of the doctrine it must be assumed that if a given act is addressed to the state (its authorities) and imposes on the state some binding obligations of general and abstract nature (*e.g.* the obligation to implement the provisions of the act of law by the legislative bodies), then, in principle, such an act should be regarded as a source of law in the meaning of constitutional law. Another question is, in which of the categories of sources of law such an act should be included. Given the European Commission's decision approving the RDP, this program should be considered a document addressed to the state. As stipulated in the EU law and in general constitutional clause on the observance of binding international law (Art. 9 of the Constitution), it is the state authorities that have the obligation to implement the programme, meaning they need to "translate" the subject matter contained therein into the substantive rules of national law (in particular, laws and regulations) as well as to create proper "environment" comprising procedures and systems that enable the achievement of the RDP objectives. Therefore, pursuant to the Commission decision approving the RDP, the state becomes bound by its provisions in the sense that it must ensure that the programme requirements are adequately reflected in national legislation (in particular laws and regulations). From this viewpoint, *i.e.* the obligations of the state, or those following for the State from the act of the RDP approval in Commission's Decision, the fact that the draft RDP is adopted by the Council

of Ministers' resolution is of no significance whatsoever. It is so because a difference must be made between the draft RDP and the programme approved by Commission Decision. The contents of these acts may indeed be identical, but they differ in respect of their legal significance. The draft RDP (resolution of the Council of Ministers) cannot be regarded as an act binding for all the authorities responsible for the shape of Polish law, including the Parliament. It is the act on the application of law, issued under the general competence of the Council of Ministers to conduct foreign policy and exercise leadership in relations with international organisations.²⁸ However, once approved by the Commission's decision, the RDP should be implemented by the Parliament first of all. This obligation has its constitutional source in Art. 9 of the Constitution.

Given the aim of determining the legal nature of the RDP, it is necessary to refer to the contents of the provisions in this document. One must answer the question, whether it is of a normative nature, *i.e.* whether it contains provisions spelling out binding rules of conduct of a general and abstract nature. The fact of no importance for such an assessment is that the RDP does not contain provisions (articles, paragraphs etc.) formulated in a manner typical of laws or regulations.

It is worth recalling at this point the findings of case law and science of administrative law regarding the acts related to program-planning as issued by the authorities.

The point emphasised above all in literature is the difficulty involved in the clear-cut qualification of all the acts having the character of plans, strategies, programs, etc. It is pointed out that "the programs generally do not contain legal norms, so they do not meet the criteria relevant for acts of internal law; they are not acts of creating law. Rather, they determine how to perform tasks and competences already designated by some commonly applicable law and do not establish any new powers and responsibilities for their recipients. To a large extent, these acts are, in fact, plans of cooperation and integration of activities of government bodies and local government authorities as well as those of other public and non-public entities".²⁹ Some representatives of the doctrine believe that "the discussed forms can be of informative, indicative or imperative nature. Their development and application can be made mandatory, but they can also be performed basing on discretionary powers. They are usually acts of abstract and general nature, but they can be also individual and specific. Mostly, they assign duties to administration authorities, but they also can have some impact on the administered bodies or units as they frequently determine their legal situation and sometimes public rights. This means that they can take the form of normative acts

²⁸ See Art. 146. 1 and para. 4.9 of the Constitution.

²⁹ Z. Duniewska, M. Górski, B. Jaworska-Dębska, E. Olejniczak-Szałowska, M. Stahl, *Plany, strategie, programy i inne zbliżone formy działania administracji*, (in:) *Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z konferencji jubileuszowej Profesora Eugeniusza Ochendowskiego*, Toruń 2005, p. 174.

or other acts of general or individual nature, or undertakings of material and technical nature, socio-organizational and other types of activities that are difficult to place in a traditionally developed directory of legal forms of action”.³⁰

Planning acts take different forms. “They can be normative acts (budget law, strategy of a country development, local zoning plans) and then fall into the category of legislative acts of general application, or they can be policy acts and then are classified in a very broad category of internal normative acts (...) or in an even broader category of general acts”.³¹

A debate on the normative aspects of documents focused on program-planning was also performed at the time of the People’s Republic of Poland. S Rozmaryn presented a particularly interesting view on the so-called national economic plan. According to the author, a national economic plan was a normative act, as “the very fact that the plan includes indications concerning specific units of national economy and determines precise figures specifying some tasks, does by no means deprive the plan of its nature of a general act, and it even establishes legal norms. In any event, the national economic plan (...) is not addressed to any individually specified recipients, and, therefore, it never deals with any specific individuals’ matters”.³²The author mentioned above took the view that “it is impossible to consider (...) the function of putting tasks and organising their execution to constitute a specific feature of solely such legal standards, which are supposedly not abstract, and whose nature, therefore, would be that of legal norms, but of another kind. (...) Both budgets and plans in their entirety are general acts establishing legal standards”.

According to position of the Constitutional Court,³³ which needs to be agreed with, the mere fact that a document is adopted in the form of a resolution of the Council of Ministers does not mean that we have to deal with the source of law, including the sources of internal law referred to in Art. 93 of the Constitution. The opinion of the Constitutional Court is that, in order to determine the legal nature of a document, one should examine its contents presented by the Act provisions along with the function the document fulfils. It is characteristic that the Constitutional Court has referred not only to the “formal” criterion of evaluating the normative nature of an act (based on the analysis of the content of the provisions contained therein), but has also stressed the need to assess the function of an act in question.

³⁰ *Ibidem*, p. 175; compare also E. Olejniczak-Szałowska, (in:) M. Stahl (ed.), *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warsaw 2013, p. 494.

³¹ M. Stahl, *Szczególne prawne formy działania administracji*, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego*, Vol. 5, *Prawne formy działania administracji*, Warsaw 2013, pp. 365–366.

³² S. Rozmaryn, *Ustawa w Polskiej Rzeczypospolitej Ludowej*, Warsaw 1964, p. 67.

³³ Judgement of Constitutional Tribunal of 3 July, 2012, K 22/09, OTK-A 2012, No. 7.

Given the above it must be concluded that the assessment of legal nature of the RDP should be based, on the analysis, firstly, of the content of a document determined in the law (of the European Union in this case), and, secondly, the function the document fulfils in the legal reality, and in particular to what extent the provisions of the RDP determine the duties of a specific group to which it is addressed.

Regarding the content of the RDP, the starting point is set by the provisions of Art. 27 Regulation (EU) No. 1303/2013 and Art. 8 Regulation (EU) No. 1305/2013. However, as the Voivodship Administrative Court in Lublin aptly stated in the justification of the judgment dated 6 November 2012, file ref. No. III SA/Lu 620/12, the legal significance of RDP lies in the fact that this document “indicates the essence, objectives and scope of specific measures under which aid is granted, along with beneficiaries, access criteria as well as the form, the amount, and level of support”. As included in the RDP, the description of needs, strategies, activities, and financial plans, indicators, conditions of the implementation of the programme (including descriptions of procedures, rules regarding the criteria for selecting operations, the designation of the bodies acting as Managing Authority, the Paying Agency or Certification Body etc.) are presented in such a degree of detail, that they can be regarded as a statement of an obligatory (normative) nature. They specify how the support from EAFRD for a given state will be implemented in accordance with substantive or procedural aspects along with those related to a given system or organisation. Moreover, there is no doubt that the provisions of the RDP are not addressed to an individual entity and they are not issued on a merely one-off basis. Thus, they are general and abstract norms.

As regards the function fulfilled by the RDP in legal reality, it should be emphasized that once the document is approved by the European Commission, some legal obligations are established on part of the member state as stipulated in the law of the EU and in line with Art. 9 of the Constitution, namely the obligation to implement its provisions. In particular, this involves the drafting of appropriate regulations (laws, regulations) aimed at translating the RDP into Polish legislation and providing appropriate conditions in terms of procedures and organisation to ensure effective implementation of the programme provisions. It should be born in mind that, in accordance with Art. 65.1 Regulation 1305/2013 “Member States shall adopt all the laws, regulations and administrative provisions in accordance with Art. 58.1 Regulation (EU) No. 1306/2013 in order to ensure the effective protection of financial interests of the Union”. Furthermore, in accordance with para. 3 of the provisions referred to hereinabove, “Member States shall ensure that, for each rural development program, an adequate management and control system are set up to ensure a clear allocation and separation of functions between the Managing Authority and other bodies. Member States are responsible for ensuring effective functioning of the systems throughout the program period”. What is more, state authorities are bound by the provisions of the RDP in the sense that any discrepancy between the RDP and national regulations can be considered to

constitute a violation of international obligations of the state. Moreover, regardless of the content of domestic law, any case of giving an individual decision (e.g. administrative decision) incompatible with the RDP should be also treated as a breach of the obligations towards the EU.

Consequently, in terms of its function, the RDP, once approved by the European Commission, produces an effect similar to that of a decision or a directive addressed to the Member State, namely it produces a need to have its provisions transposed into the national law. From this viewpoint, and in the light of the case law of the Court of Justice of the European Union discussed hereinabove, the fact of no consequence whatsoever is that the programme is not in itself an act of secondary legislation of the European Union.

For the reasons discussed above, it needs to be acknowledged that the RDP – after its approval by the European Commission – is a normative act, that is, an act containing general and abstract norms, which are binding for the state and its authorities (especially the authorities with legislative powers). Therefore, the RDP meets the criteria that enable its classification as the source of law. Consequently, one cannot agree with a claim that the RDP is merely an act of “soft law”. A typical feature of the latter type is that – as a rule – their performance is not a legal obligation, but they provide some guidance (recommendation) of the body issuing the act. Provisions of the “soft law” acts may be relevant to the interpretation of provisions (as a guide line in this respect), but, they do not, in their own right, constitute any source of obligations for the recipient.³⁴ However, these acts are intended to provide some guidance for the interpretation of law – both in terms of its subject matter, as well as reconstruction of the pattern. In this respect, the Constitutional Court should take them into account during the examination of constitutionality”. However, the provisions of the RDP are not merely some indications or recommendations. The RDP spells out detailed solutions in terms of institutional, procedural and substantive aspects that have to be judiciously transposed into national law. The state is obliged to implement them and, as has been already mentioned, any irregularities in this respect should be regarded as a breach of the EU law.

Considering the above and the fact that, in accordance with the intention of the EU legislator reflected in Art. 10.2 Regulation 1305/2013, the RDP is approved by the Implementing Decision of the Commission, then, from the point of view of the Polish system of sources of law, the RDP should be regarded in the same way as the decision approving the programme, even though the RDP does not belong to the secondary EU legislation. In other words, the RDP should be considered as part of that decision, which means that, as a result of the approval in the Com-

³⁴ Regarding the function fulfilled by the acts of the *soft law* type during the examination of constitutionality, see the judgement of the Constitutional Tribunal of 11 May, 2007, K 2/07, OTK-A 2007, No. 5 – the position of the Tribunal is that the *soft law* acts (...) do not create binding patterns for the examination of constitutionality.

mission's decision, the RDP becomes – just like the decision – an act referred to in Art. 91.3 of the Constitution, *i.e.* the act belonging to the sources of universally binding law.

This thesis is not weakened by the fact that the Commission's decision approving the RDP is directed to the State and not to its citizens and other entities, because the issue of the act addressee is not a determinant to include the act into a catalogue of sources of universally binding law. RDP should be "translated" into the national legislation which – as in the case of the EU directives – is important from the viewpoint of direct applicability, and not from the point of view of its positioning in the system of sources of law.

For the foregoing reasons, it should be assumed that the RDP, after its approval by the European Commission Implementing Decision issued pursuant to Art. 10.2 Regulation 1305/2013, becomes a source of universally binding law referred to in art. 91.3 of the Constitution.

This thesis is not contradictory to the position of the ECJU Court cited above, which indicates that the RDP is not, in its own right, an act of the EU secondary legislation. It must be born in mind that the question of legal classification of RDP in national law was left by the EU Court for the decision of national courts. Meanwhile, in the light of Polish Constitution, there are strong arguments to justify the inclusion of the RDP in a group of acts referred to in Art. 91.3 of the Constitution, regardless of whether they are secondary legislation from the perspective of the EU law. Adoption of such a position in legal practice would enable a more effective implementation of the Union's objectives and eliminate a number of practical problems arising in a situation where there are discrepancies between the contents of the RDP and the provisions of national laws or regulations.

5. CONCLUSIONS

Considering the reasons presented above, my position is that the normative provisions of the Rural Development Programme addressed to the Polish public authorities represent the framework of programme-related norms in modern agricultural law as they theoretically meet the distinct conditions identified in the doctrine with regard to such regulations.

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PROGRAMME-RELATED NORMS IN MODERN AGRICULTURAL LAW

Summary

Modern legal studies recognise the usefulness and necessity of distinguishing agricultural law norms. As part of the analysis of the legal impact of agricultural law norms, the phenomenon of publicization is also pointed out, which means a gradual increase in public legal regulations within the framework of agricultural law norms. As part of this phenomenon, not only do administrative norms gain in importance, but also programme norms within the framework of the implementation of the Common Agricultural Policy.

The aim of this article is to assess the scope of legal impact of programme norms in agricultural law, determining the objectives to be achieved in the market and income policy and the structural policy in agriculture and rural areas, in particular through an attempt to establish the legal character of the Rural Areas Development Programme as an act of the application of EU and national programme regulations.

The author presents and justifies the position that the normative provisions of the Rural Areas Development Programme, due to its role, construction and manner of enactment, should be classified as mandatory legal provisions.

KEYWORDS

programme-related norms, common agricultural policy, rural development programme

SŁOWA KLUCZOWE

normy programowe, wspólna polityka rolna, program rozwoju obszarów wiejskich