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Problems of consistent interpretation of substantive criminal law illustrated on the basis of Polish regulation pertaining to punishability of inside information disclosure*

1. Introduction[1]

The membership in the European Union results in the multitude of decision-making centres responsible for applying, legislating and interpreting law, which does not facilitate the interpretation of norms referring to the matters covered by EU law.

This applies especially to the countries of the continental tradition of criminal law, where accession to the European Union has introduced a noticeable modification both in the context of the perception of cooperation between the Member States of the European Union in criminal matters, as well as in the sources of national law. In majority of cases, the hierarchically constructed monocentric model that had been undisputed, has been supplanted by the necessity of multicentric understanding of the legal system[2], where in the process of interpretation it is necessary to consider not only national but also EU sources of law. This was also recognized by the Polish Constitutional Tribunal, inter alia, in a judgment of 12th January 2005, in which it stated directly that while in the pre-accession period the exercise

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1 This article is an updated and modified version of the article published previously in Polish in this magazine, titled "O sposobach rozwiązywania kolizji między prawem Unii Europejskiej a prawem krajowym (na przykładzie penalizacji niezachowania w tajemnicy informacji poufnych)", CPKiNP, no.1/2017.

2 See, E. Łętowska, *Dialog*..., p. 6.

of legislative function "meant that the parliament, whose source of power is the Sovereign's will directly expressed in general elections, practically ruled the entirety of universally binding law in Poland".

The situation changed diametrically after 1st May, 2004. On this day, the Polish parliament lost a significant part of influence on the shape of the universally binding law in Poland[3]". At present, it is no longer surprising that in the process of interpretation more and more frequently it is necessary (indispensable) to go beyond the typically national regulation to the provisions of EU law, and also to use in the so-called EU issues (ie. in matters with elements of EU law) interpretation of national law in accordance with the objectives and wording of European Union law[4]. For this reason, on national basis, it is generally agreed that failure to perform the obligation described above may not only constitute an effective ground of appeal, but also in many cases even give rise to State's liability for damages towards the individual[5].

There is no need to convince anyone that especially in the period after the Treaty of Lisbon[6] came into force, the situation described above gained

[3] See the judgement of the Constitutional Tribunal of Poland of 12 I 2005, K 24/04, Dz.U. z 2005, nr 11 poz. 89.

[4] This is one of the forms of application of EU law, when the norm of EU law is used as an basis to interpret of another norm, which, although it is ultimately applied before a court and has been constructed in the light of the latter (see, G. Betlem, *The Doctrine*..., p. 397).

[5] In this matter see in particular Joined cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, ECLI:EU:C:1991:428; Joined cases C-46/93 and C-48/93, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, ECLI:EU:C:1996:79.

[6] Looking in this context at the changes introduced by the Treaty of Lisbon, it is worth nothing that Article 3 (2) TEU clearly states already, that the Union makes as the one of its objectives to "offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Article 4 confirms on the other hand, that in accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. In this way, it was clearly specified the scope and rules of the division of competences between the EU and its Member States. This is to avoid the aforementioned problems that have occurred over the years in connection with the tendency to extend the Community's influence to more and more new areas. Currently, Article 4 (2) j TFEU puts the "Area of freedom, security and justice" among the competences shared between the Union and the Member States. In addition, under this treaty reform, the former area of "Police and Judicial Cooperation in criminal matters" has been transferred from TEU to Title V TFEU ("area of freedom, security and justice"). As a part of the changes indicated above it is also clearly stated in article 67 (3) TFEU that "The Union shall endeavour to ensure a high level of security through measures to

special significance also in the area of substantive criminal law[7], which some time ago was a realm of explicit sovereign jurisdiction, which gave the states the right to punish their own citizens according solely to independently created penal regulations. The persistent maintenance of substantive criminal law only in the sphere of national jurisdiction[8] obviously had not been of no significance for respecting the key postulates in this respect, such as the principle of exclusivity of statutes, legal definiteness of the offense or general legal certainty[9]. Even if certain issues seemed to raise doubts in the jurisprudence or literature of the subject, in principle it was possible to seek solutions only on the basis of national law and according to the methods of interpretation specified in national order.

However, such understanding of criminal law must certainly undergo gradual transformations in relation to those matters that have been included in the regulatory scope of European Union law. While until recently the issues discussed in this text have more broadly related only to the law of criminal procedure[10], currently they are being increasingly transferred to the realm of substantive criminal law, in particular in the aspect of types aimed at protecting the proper functioning of market turnover, property or tax law – and thus protection of the common EU market[11].

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prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws". Finally, the most important issue – and explicitly referring to material of a criminal law nature – is that article 83 TFEU confirms the Union's competence to create by means of directives, in accordance with the ordinary legislative procedure, minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, defining such areas of crime at the same time.

[7] See in particular, A. Klip (ed.), *Substantive*..., passim.

[8] What, moreover, was clearly seen on the example of Pre – Lisbon so-called "battle of pillars". In this respect, see for example M. Wasmeier, N. Thwaites, *The "battle*..., s. 613; A. Weyembergh, *Approximation*..., s. 1567–1597.

[9] In this regard see also W. Hassemer, *Einfuhrung*..., s. 256, Ch. Peristeridou, *The Principle*..., p. 70–71. For a more general review of the EU general principles, see in particular T. Tridimas, *The General*..., passim.

[10] It is worth nothing that, it was the most widely commented in the literature and judicial decisions, such as the European Arrest Warrant, the principle of mutual recognition, the principle of *ne bis in idem*, the European Evidence Warrant, *etc*.

[11] In this regard, see, in particular, the recently widely commented judgment C-105/14, *Taricco and others*, ECLI: EU: C: 2015: 555 and C – 42/17 – *criminal proceedings against MAS and M.B.*, not yet published (also known as *Taricco II*).

In this text I will point out the practical problems resulting from the increasingly frequent obligation to take into account European Union law in the course of interpretation of national provisions of substantive criminal law. This particularly pertains to cases when a failure of the national legislator, it is necessary to resort to alternative methods of ensuring full effectiveness of EU law (mainly by way of consistent interpretation). On the other hand, there is a question of punishability of such behaviour, where there is no possibility to construe an applicable norm directly from the provision of national law. In order to illustrate the problem, this has been referred to the situation that has become apparent in Polish law as a result of the delayed adoption of provisions covering the application of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16th April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (hereinafter referred to as MAR[12]). Due to the fact that since 3rd July 2016 until 6th May 2017 (ie for about a year), the provisions of the Polish act on Trading in Financial Instruments regulations were not adapted to the application of MAR (in particular in the scope of changes in the definition of "inside information" and explicit references to the definition of that term not compliant with EU law), in practice a very important question arose about the possibility of punishing illegal disclosure and use of inside information while respecting traditionally understood principles of *nullum crimen sine lege*, *lex certa*, and finally the prohibition of interpreting *contra legem* (or in order to establish or extend criminal liability). Bearing in mind that due to the specificity of European Union law, similar problems may also appear in other Member States, the considerations in this text are undoubtedly of universal character.

2. Where there will be a need for a consistent interpretation?

Most frequent problems related to the correct reconstruction of the substantive criminal law norm in EU law will occur in the case of legislative omission (or improper implementation) on the part of the national legislator, which is not at all unusual in the Member States legal systems. In this case, in order to ensure maximum effectiveness of European Union law,

[12] See, *Market Abuse Regulation*. In this paper I will use this abbreviation while refer to aforementioned EU regulation.

bodies applying law on an EU issue will always be required to make an autonomous legal analysis in the area of European and national law as well, and then to answer the question whether it is possible to make such an interpretation that will contribute to overcoming the perceived discrepancy (collision)[13] to the greatest extent (as the Court of Justice has it – "as far as possible"[14]) i.e. interpretation consistent with the purposes and wording of European Union law[15].

If, however, it does not bring any results, it will be necessary to apply the mechanisms provided for in the legal system that allow for the removal of the perceived discrepancy between these simultaneously binding sources of law. This position seems to be fully accepted by the Polish Constitutional Tribunal, which, based on the ruling of 11th May 2005, clearly pointed to the demand "to respect and favour the properly shaped and valid international law regulations in force on the territory of the Republic of Poland[16]". In the

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[13] See in particular Opinion of Advocate General J. Kokott delivered on 30 April 2015 in the case C – 105/14, *Taricco and Others* – "In particular, the referring court will have to assess whether, on the basis of an interpretation consistent with EU law, it is able to achieve an outcome…", and "If the referring court were unable to interpret the national law in such a way as to achieve an outcome consistent with EU law, it would be required to give full effect to EU law, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, there being no requirement for that court to request or await the prior setting aside of such provision by legislative or other constitutional means".

[14] See in particular the CJEU judgements, C-14/83 – *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153; C-106/89, *Marleasing v. Comercial Internacional de Alimentación*, ECLI:EU:C:1990:395; or CJEU judgment in the joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, ECLI:EU:C:2004:584 – where it was clearly stated that results of such an interpretation cannot go beyond the *contra legem* border.

[15] There is no uniform definition of the commented principle in the literature and jurisprudence. It is commonly known as: indirect effect, concurring or concurrent interpretation, loyal interpretation, harmonious interpretation, benevolent interpretation, conciliatory interpretation, consistent interpretation, interpretative obligation, principle of purposive interpretation, Von Colson principle, uniform interpretation, invocabilité d'interprétation. Despite of the above it is usually described as an indirect effect (see. S. Prechal, *Directives in EC Law*, Oxford 2004, p. 181. G. Betlem, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, Oxford Journal of Legal Studies 2002, vol. 22, no. 3, passim, G. Betlem, A. Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, European Journal of International Law 2003, no. 14 (3), passim, P. Craig, *The legal effect of Directives: policy, rules and exceptions*, European Law Review, 3/2009, pp. 349–377.

[16] See, the judgement of the Constitutional Tribunal of Poland of 11 may 2005, K 18/04, Dz.U. 2005, 86, 744, LEX nr 155502.

view of the Constitutional Tribunal, they should therefore "coexist on the basis of a mutually friendly interpretation and cooperative co-application[17]".

Obviously, the aforesaid issue will be shape completely differently in the case of those EU-law acts that are directly applicable[18], and those whose implementation into the national system will yet be required – due to their nature (e.g. directive). In the latter case, it will be possible only to refer to the principle of direct effect of certain provisions of EU law[19] or to employ consistent interpretation of national law (sometimes referred to as leading to the so-called "indirect effect" of EU Law)[20].

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[17] See, the judgement of the Constitutional Tribunal of Poland of 11 may 2005, K 18/04, Dz.U. 2005, 86, 744, LEX nr 155502.

[18] In this paper a distinction between "direct applicability" and "direct effect" of EU law must be shown. Under the term "direct applicability" I will understand the situation when legal acts are binding in their entirety and directly applicable in all European countries. It means that a provision of such a legal act: 1) "applies immediately" as the norm in all EU countries, without needing to be transposed into national law, 2) creates rights and obligations for individuals and they can therefore invoke it directly before national courts, 3) can be used as a reference by individuals in their relationship with other individuals, EU countries or EU authorities (see, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14522). As it was pointed out by the CJEU "the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of , and take precedence in , the legal order applicable in the territory of each of the member states – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions" (C-106/77, *Amministrazione delle finanze dello Stato v Simmenthal*, ECLI:EU:C:1978:49). On the other hand, The principle of "direct effect" enables individuals to immediately invoke a European provision before a national or European court. In this aspect, all legal acts which are "direct applicable" are "direct effect". In certain cases the Court of Justice recognises the direct effect of directives also in order to protect the rights of individuals. Therefore, the Court laid down in its case-law that a directive has direct effect when its provisions are unconditional and sufficiently clear and precise and when the EU country has not transposed the directive by the deadline (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14547).

[19] CJEU established the principle of the "direct effect", as the *Van Gend & Loos test.* It laid down the condition that the obligations must be precise, clear and unconditional and that they do not call for additional measures, either national or European (see, C – 26/62,*Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1. Compare also, S. Prechal, *Directives in EC Law*, Oxford 2004, passim.

[20] This issue seems to be of considerable importance because, according to art. 83 (1) and 2 TFEU, the main source of law, through which solutions in the field of substantive criminal law are currently being introduced, remain directives (which, for their

Are there any limits to the consistent interpretation of substantive criminal law? At this point, however, it should be noted that the issue of the possibility of using the direct effect of the provisions (as well as employing consistent interpretation) as part of criminal proceedings will face significant limitations, primarily due to the rules governing this area of law. Similarly, it should be pointed out that according to the generally accepted statement of the Court of Justice, the state can rely on the direct effectiveness of a provision[21] in proceedings brought against an individual not at all (the so-called reversed vertical direct effect of a directive[22]), especially when it could result in establishing or exacerbating the individual's criminal liability on the basis of the provisions of the directive and irrespective of the legislation of the Member State issued for its implementation.

Thus, in the well-known ruling of Kolpinghuis Nijmegen BV[23], the Court acknowledged that, however "in applying national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purposes of the directive in order to achieve the result referred to in the third paragraph of article 189 of the Treaty", the obligation to take into account the provisions of the Directive in the process of consistent interpretation remains "limited by the general principles of law which form part of community law and in particular the principles of legal certainty and non-retroactivity". Consequently, this results in the fact that while "in applying national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purposes of the directive", "a directive cannot, of itself and independently of a national law adoped by a member state for its implementation, have the effect of determining or aggravating

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effectiveness, need to be implemented into national law). Accordingly, pursuant to art. 288 TFEU, "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

[21] The state also has to be understood as all the organs constituting the emanation of the "state", i.e. the legislative, executive, and judiciary power, and moreover, the persons performing the function in these organs.

[22] A directive can only have "direct vertical effect". It means, that a Directive could not be relied on against an individual ("horizontal direct effect"). See, C-152/84, Marshall v Southampton and South-West Hampshire Area Health Authority, ECLI:EU:C:1986:84.

[23] C-80/86 – *Kolpinghuis Nijmegen BV*, ECLI:EU:C:1987:431

the liability in criminal law of persons who act in contravention of the provisions of that directive[24]".

As witnessed by the ruling cited, where the state acts against an individual, there are significant restrictions to applying consistent interpretation as well, because due to the above-mentioned principles, i.e. primarily *nullum crimen sine lege*, *lex retro non agit* or *nullum crimen sine lege certa*[25], its result should always be within the acceptable linguistic meaning of the legal text[26] and cannot lead to *contra legem* decisions[27].

Therefore, if we assume that the national legislator failed to implement the law allowing to punish the perpetrators of a certain category of offenses, then such an obligation will most probably not be satisfied also by means of through the purposeful interpretation of the national regulation[28]. Such an opinion was presented by the Court even in the judgment of 12th December 1996 in joined cases of C-74/95 and C-129/95, criminal proceedings against X, where it was explicitly pointed out that "a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty[29]".

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[24] See CJEU judgments, C-14/86 – *Pretore di Salò v. X*, ECLI:EU:C:1987:275; C-168/95 – *Arcaro*, ECLI:EU:C:1996:363; Joined cases C-74/95 and C-129/95 *Criminal proceedings against X*, ECLI:EU:C:1996:491.

[25] In this respect, it should be noted that currently there are no doubts that the aforementioned rules are included into the general principles of European law. This is indicated not only by the Charter of Fundamental Rights of the European Union, but also by the case law of the Court of Justice. (in this respect see in particular, T. Tridimas, *The general principles of EC Law*, Oxford 1999; A. Klip (ed.) *Substantive criminal law of the European Union*, Maklu–Antwerpen–Apeldoorn–Portland 2011, M. Rams, *Rola zasad ogólnych w procesie wykładni zgodnej prawa krajowego* (in:) M. Rams, *Specyfika wykładni prawa karnego w kontekście brzmienia i celu prawa Unii Europejskiej*, Warszawa 2016, s. 231 i n.

[26] By the term "acceptable linguistic meaning of the legal text" I mean the lexical meaning, which is still possible according to a given language rules. Thus I will distinguish them from a narrower natural linguistic meaning, referred in this case to the typical meaning of a given expression

[27] C-105/03 – *Pupino*, ECLI:EU:C:2005:386. See also C-80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431.

[28] Here, however, one must not forget that in the jurisprudence of the Court of Justice, in principle, it is possible to determine the criminal liability based on the interpretation conducted under the abovementioned acceptable linguistic meaning of the legal text

[29] See, Joined cases C-74/95 and C-129/95 *Criminal proceedings against X*, ECLI:EU:C:1996:491. At the same time, it should be noted that in the opinion of the author of this text, the wording contained in this judgment does not mean a total prohibition of making

The Court of Justice sometimes allows for consistent interpretation against an individual. From the point of view of this study, however, it is worth noticing that at least some of the authors rightly point out that the Court of Justice sometimes allows for consistent interpretation against an individual in the situation of an unimplemented or incorrectly implemented directive (ie against the so-called 'estoppel' doctrine in this respect)[30]. This is the case when, as a result of such an interpretation, there is no infringement of the general EU law principles applicable to the field of substantive criminal law. This can be seen in particular on the example of the judgment in Case C-321/05 Kofoed[31], which explicitly states that "true that the requirement of a directive-compliant interpretation cannot reach the point where a directive, by itself and without national implementing legislation, may create obligations for individuals or determine or aggravate the liability in criminal law of persons who act in contravention of its provisions, a Member State may nevertheless, in principle, impose a directive-compliant interpretation of national law on individuals".

Looking from this perspective to the Court of Justice's well-known ruling in the Pupino case, it seems that, as a rule, this will only apply to the criminal proceedings[32], where, in the Court's opinion, the restrictions traditionally associated with criminal law do not apply, among others to the course of

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an interpretation that is "disadvantageous to the individual", but a prohibition on making it beyond the acceptable linguistic meaning of the legal text.

30 Here, it is also worth to point out, for example: S. Prechal, *Directives in EC Law*, Oxford 2004, p. 215. G. Betlem opposes this solution in, *the doctrine of unanimous legal management*, Oxford Journal of Legal Studies 2002, vol. 22, no. 3, p. 415.

31 See, C-321/05, *Kofoed*, ECLI:EU:C:2007:408, p. 45, and the judgments cited there, C-80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431 and C-168/95, *Arcaro*, ECLI:EU:C:1996:363. See also C-53/10, *Franz Mücksch*, ECLI:EU:C:2011:585.

32 Unless, of course, it is possible in every case to distinguish precisely the material relevant to criminal proceedings and substantive criminal law. It should be noted that, that CJEU in its judgements consequently distinguishes criminal substantive law from procedural law, nevertheless this division is not always clear, as CJEU wanted. Moreover, in reference to criminal procedure. In this matter I agree with F. Giuffrida, that is 'the general problem of the difference between rules of substantive and procedural criminal law according to the CJEU' (See F. Giuffrida, *The limitation period of crimes: same old Italian story, new intriguing European answers, Case note on C-105/14, Taricco*, New Journal of European Criminal Law, Vol. 7, Issue 1, 2016, p. 105. With reference to A. Dashwood, M. Dougan, E. Spaventa and D. Wyatt, *European Union Law*, Hart Publishing, 2011, p. 2440. Compare with CJEU judgments, C-105/03, *Pupino*; ECLI:EU:C:2005:386 or C-303/05 – *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, ECLI:EU:C:2007:261).

proceedings or the manner of carrying out evidence[33]. Of course, it cannot be ruled out that in such a wide and imprecise approach there may be a danger of extending those statements to other areas as well, but it seems that at least for the time being criminal courts are using this way of interpreting European law very carefully.

Concluding this plot of considerations, it should be pointed out that in the event of improper or untimely implementation of European Union law that is relevant to the determination or aggravation of criminal liability, a state cannot invoke a directly effective provision of such EU law (direct effect) or consistently interpret such national law (indirect effect), that would go beyond the *contra legem* border described above. This in turn means that in such cases, the general principles of EU law referred to above will, in principle, prevail over the obligation to ensure its effectiveness – thus protecting the individual against the jeopardy of criminal liability based on non-codified (or incorrectly codified) regulations in the scope of European Union law.

The classic vertical arrangement. A completely different situation occurs within the classic vertical arrangement (in the relation between an individual against the state), where an individual in the course of proceedings against him will already have the right to refer to a directly effective provision of the directive in front of the law enforcement authorities if the state has not performed its duties imposed by EU law. At that time, the state agency will be obliged to: 1) use a directly effective provision of European Union law as a legal basis for the decision, including omitting the Polish provision which is inconsistent with it; or 2) only omitting a regulation incompatible with EU law. It is also worth noting that in such a case the "omitted" provision will not cease to be binding (it does not have to be eliminated from the national legal system), but due to the non-compliance with European Union law determined by the agency, it cannot be applied in a specific EU issue[34].

Such consequences have already been pointed out in the well-known ruling of the Court of Justice of 9th March 1978 in case C-106/77 – Simmenthal[35], emphasising that any national court, recognising a discrepancy between EU law and national legislation, has, if necessary, an obligation to

[33] See, C-105/03, *Pupino*; ECLI:EU:C:2005:386. In this regard compare also CJEU judgment in the case C-105/14 – Taricco and Others, ECLI:EU:C:2015:555.

[34] This is primarily about the ability to quickly ensure the effectiveness of EU law, without the need to wait for the decision of the legislator.

[35] Constituting in fact the so-called the principle of primacy of EU law.

refuse to apply such a provision, without the need to wait for the repeal of that provision. Here, the double-track and collision-free nature of the actions of national courts and the Court of Justice is perfectly visible, where "possible discrepancy of the national act with EU law, especially discrepancy resulting from formal and legal negligence of appropriate Member State's authorities, does not automatically affect the assessment of compliance of the content of the challenged provisions of such a law[36]".

3. The problem of „discrepancy" between the Member State's law and EU law

Of course, the perception of a "discrepancy" between the national law and European Union law may not always seem so obvious, leading in consequence to problems related to updating the premises enabling the individual to use directly effective provisions of the directive[37] and thus weakening the effectiveness of EU law. However, one should agree with the opinion of S. Biernat that the "discrepancy" between the national law and the European Union law will always occur in a situation where it is not possible to apply the EU law norm and the norm resulting from the national law at the same time. At that time, the authority applying the law should refuse to apply a provision that is contrary to EU law or base its decision on a possibly directly effective provision of the directive. At the same time, there are no grounds for a provision whose application was refused due to the lack of compliance with European Union law, had to be replaced in each case by an appropriate EU law[38]. In reality, the Court of Justice does not establish such a requirement. Quite the opposite – to always be in favour of replacing an incompatible national regulation with a provision of EU law could obviously

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[36] See, the decision of the Polish Supreme Court of 27 November 2014, II KK 55/14, OSNKW 2015/4/37.

[37] In Poland, this was evident on the occasion of problems related to the failure to notify the European Commission of the provisions of the Gambling Act. Here also in accordance with the jurisprudence of the Tribunal, national courts should have refused to apply provisions which have not been notified. Many courts, however, took the view that there is no way to find a conflict between the lack of notification and the provision of national law. This was justified by the fact that there is no "material contradiction between them (see, C-194/94, *CIA Security International v Signalson and Securitel*, ECLI:EU:C:1996:172 and C-65/05, *Commission v Greece*, ECLI:EU:C:2006:673).

[38] See, separate opinion of the Judge of the Polish Constitutional Tribunal Stanisław Biernat to the decision of the Tribunal of 11 March 2015, P 4/14, Dz.U. 2015, 369.

undermine the effectiveness of EU law, e.g. it comes to regulations that were not directly effective.

Of course, on the basis of the example above, it is perfectly clear that in a situation where EU law cannot constitute an independent basis for decision[39], the institution of consistent interpretation of national law can be pivotal for ensuring maximum effectiveness of European Union law, sometimes with the help of teleologically oriented (onto European Union law) interpretation methods to achieve the so-called indirect effect of EU law.

Although the above-mentioned problems were mostly related to directives, it should be pointed out that this will look a bit different in the situation of a regulation. Unlike the directives regulated in art. 288 sentence 2 TFEU, the regulation "has general scope. It shall be binding in its entirety and directly applicable in all Member States. "The above means that the regulation as a rule is both directly effective and is to be directly applied when deciding upon individually specific cases[40].

The "priority of application" v the "priority of validity". Moreover, in the case law of the Court of Justice pertaining to this scope, it is emphasised that an EU regulation "by reason of their nature and their function in the system of the sources of community law, all regulations have direct effect and are, as such, capable of creating individual rights which national courts must protect[41]". Consequently, the direct application of a regulation, including its "entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law. a legislative provision of national law reproducing the content of a directly applicable rule of community law can in no way affect direct applicability, or the court' s jurisdiction under the Treaty[42]".

Respectively, in the Polish legal order, due to its specific nature, the regulation "is applicable" in addition to acts of national law and in accordance

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[39] This is in a situation where, regardless of the lack, or incorrect implementation, it does not meet the requirements arising from the ruling in the *Van Gend en Loos* case.

[40] Of course, it cannot be ruled out that, in certain cases, the Regulation would also require the Member State to issue executive provisions. The case law of the Court of Justice indicates that in such a situation "thereby making it possible to transpose to the present case the Court's reasoning in respect of directives" (C – 60/02, *Criminal proceedings against X*, ECLI:EU:C:2004:10, para. 62).

[41] C-43/71, *Politi v Ministero delle finanze*, ECLI:EU:C:1971:122, para. 43–71.

[42] C-34/73, *Fratelli Variola Spa v Amministrazione delle finanze dello Stato*, ECLI:EU:C:1973:101.

with art. 91 sec. 3 of the Constitution[43], as a law established by an international organization and is of direct application, "having precedence in the event of a conflict of laws". In the light of the comments presented above, if the premises referred to in art. 91 sec. 3 of the Constitution, the national authority applying the law will be forced to apply directly only the provisions of EU law, while disregarding national laws that are still in force (they are not repealed[44]), but cannot be the basis for resolving a specific EU issue.

The principle of precedence of EU law used in the analysed situation is, therefore, obviously referred to as the "priority of application" and not the "priority of validity[45]". From the point of view of the considerations carried out in this text, it should finally be pointed out that due to the features of the EU regulations described above, the Court of Justice's case-law clearly states that "it cannot be accepted that a member state should apply in an incomplete or selective manner provisions of a community regulation so as to render abortive certain aspects of community legislation which it has opposed or which it considers contrary to its national interests . practical difficulties which appear at the stage when a community measure is put into effect cannot permit a member state unilaterally to opt out of fulfilling its obligations[46]".

This is of significance since in the event of a possible conflict between the regulation and the provisions of Member State's law, it is not possible to refer to the provisions of the Regulation only to the extent coinciding with the national regulation. Such an action would not only distort the essence of this directly applicable and effective legal act, but would also be contrary to the explicit content of the above-mentioned art. 91 sec. 3 of the Polish Constitution.

4. Problem of Market Abuse Regulation (MAR)

Analyzing the above-mentioned remarks in the perspective of the topical issue of interpretation of provisions relating to the unauthorized disclosure and use of inside information, it is impossible to disregard that this problem is currently the subject of the regulatory matter of MAR.

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[43] See, article 93 (1) of the Polish Constitution: "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

[44] Although, at a later date, this is advisable, so as not to maintain regulation in the national system that is obviously contrary to EU law.

[45] In this respect, see the most important judgment of the CJEU in this matter – C-106/77, *Amministrazione delle finanze dello Stato v Simmenthal*, ECLI:EU:C:1978:49.

[46] C – 128/78, *Commission v United Kingdom*, ECLI:EU:C:1979:32.

At the same time, it is impossible to overlook the fact that the mentioned regulation also refers to the same issues that have been regulated, among others, by the Polish act on Trading in Financial Instruments of 29th July 2005[47]. In particular, this applies to the definition of "inside information", the principles of its unlawful "using", "disclosing", people obliged to comply with it, etc[48].

The definition of "inside information". The aforementioned circumstances would not be of relevance in practice if it were not for the MAR introducing a broader and slightly different definition of 'inside information' than was required by the provisions of Section VI, Chapter 2 ATFI until 6th May 2016. In particular, this concerned the extension of the definition of "inside information" to the so-called "intermediate stage" – which seems to be a consequence of the judgment of the Court of Justice of 28th June 2012 in case C-19/11 – *Markus Geltl v Daimler AG*[49]. At that time, the Court also drew attention to for that "in the case of a protracted process intended to bring about a particular circumstance or to generate a particular event, not only may that future circumstance or future event be regarded as precise information within the meaning of those provisions, but also the intermediate steps of that process which are connected with bringing about that future circumstance or event".

At the same time, it was raised that the "meaning (used under then-current EU regulation[50]) that the notion of 'a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so' refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments"[51]. In this context, art. 7 of MAR currently provides:

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[47] Dz.U. 2016, 1636 of 7 October 2016, referred to later in this article as "ATFI".

[48] In this respect, see, in particular, Chapter 2 of the MAR Regulation.

[49] C – 19/11, *Markus Geltl v Daimler AG*, ECLI:EU:C:2012:397.

[50] This judgment was issued in connection with the interpretation of the provisions of Directive 2003/6 / EC of the European Parliament and of the Council of 28 and 2003 on the use of confidential information and market manipulation (market abuse) and art. 1 point 1 of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.

[51] Compare points 1 and 2 of the operative part of the cited judgment.

1. For the purposes of this Regulation, inside information shall comprise the following types of information:

a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;
b) in relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets;
c) in relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments;
d) for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client's pending orders in financial instruments, which is of a precise nature, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.

2. For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts,

or the auctioned products based on the emission allowances. In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.

3. An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article.

4. For the purposes of paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.

In the case of participants in the emission allowance market with aggregate emissions or rated thermal input at or below the threshold set in accordance with the second subparagraph of Article 17(2), information about their physical operations shall be deemed not to have a significant effect on the price of emission allowances, of auctioned products based thereon, or of derivative financial instruments.

5. ESMA shall issue guidelines to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in point (b) of paragraph 1. ESMA shall duly take into account specificities of those markets.

Notwithstanding the foregoing, further provisions of Chapter 2 of MAR regulate issues related to the issue of inside information in the context of "Insider dealing" (art. 8 MAR), "Legitimate behaviour" of a person who has been in possession of inside information (art. 9 MAR), "Unlawful disclosure of inside information" (art. 10 MAR), "Market soundings" (art. 11 MAR), "Market manipulation" (art. 12 MAR), "Accepted market practices" (art. 13 MAR), "Prohibition of insider dealing and of unlawful disclosure of inside information" (art. 14 MAR), "Prohibition of market manipulation" (art. 15 MAR), and finally "Prevention and detection of market abuse" (art. 16 MAR).

The Polish Act on Trading in Financial Instruments. It should be pointed out that despite the fact that MAR came into force as early as 3rd July 2016, the Polish legislator did not manage to adjust the provisions of Act on Trading in Financial Instruments to the provisions of this EU legal act until 6th May 2017[52]. Although the regulation does not require implementation in national law for its effectiveness, due to the obvious failure of the national legislator, the situation of the MAR Regulation and the conflicting provisions of the ATFI coexisted in the same area of the Polish legal system[53]. There is therefore no doubt that in many places the reference to the national law provisions alone could lead to a restriction of the provisions of MAR which was not compliant with EU law.

From the point of view of this study, it is of significance since the collision noticed above also concerns issues relating to the sphere of "inside information". Therefore, applying the provision of art. 91 sec. 3 of the Polish Constitution, the domestic regulator of the financial market (Polish Financial Supervision Authority)[54] even issued an official statement in which it informed market participants that in the event of a conflict between specific provisions of the ATFI with the provisions of the MAR, they remain "valid, but the scope of their application is narrowed". According to the proper assessment of the Polish Financial Supervision Authority: "For market participants, this means the necessity to apply the provisions of MAR and disregarding the provisions of the aforementioned acts and by-laws issued under them that are contrary to the MAR Regulation"[55]. As it results from the content of the analyzed document, the above-mentioned claim restriction refers to "Chapter 2 in Section VI of the ATFI (Articles 154-161a)[56]", and

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[52] It was only on November 4, 2016, the Polish Council of Ministers sent a draft legislative amendment to the Sejm. (See. http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=991 >). The proposed changes came into force only on 6 May 2017.

[53] In this respect, it should be recalled that, in accordance with the judgment C-106/77 – *Simmenthal,* any provision that could lower the effectiveness of EU law should be regarded as contrary to EU law.

[54] Responsible for taking actions to ensure the proper functioning of the financial market and for educational and information activities in the field of the functioning of the financial market, its threats and entities operating therein, in order to protect the legitimate interests of market participants

[55] The position of the Office of the Polish Financial Supervision Authority on some of the effects of non-compliance to 3 VII 2016 of the Polish legal order to the provisions of the MAR Regulation (https://www.knf.gov.pl/Images/przepisy_uchylane_przez_MAR_stanowisko_28_06_2016_tcm75-47398.pdf).

[56] Ibid.

therefore the provisions regulating the sphere of inside information under the Act on Trading in Financial Instruments.

The above-mentioned view of the Polish Financial Supervision Authority seemed to properly reflect the meaning of settling the conflict between EU law and the national law, hence it does not require a broader comment here. In fact, even before the amendment of ATFI (ie before 6th May 2017), market participants were already bound by the definition and regulation of inside information according to the (broader) MAR provisions, and not the Act on Trading in Financial Instruments. Thus, it was the directly effective and applicable European Union law that set the basic reference point for each market participant concerned[57].

Apart from the MAR Regulation discussed above, the issue of fraud in the single market is also subject to regulation of Directive 2014/57/EU of the European Parliament and of the Council of 16th April 2014 on criminal sanctions for market abuse (market abuse directive), also referred to as MAD II[58]. According to art. 3 sec 1 of this directive "Member States shall take the necessary measures to ensure that insider dealing, recommending or inducing another person to engage in insider dealing as referred to in paragraphs 2 to 8, constitute criminal offences at least in serious cases and when committed intentionally".

Both the definition of "inside information" and the regulations referring to its unlawful "disposing" and "using" refer to the terminology used in the MAR Regulation. Art. 3 sec. 3 of the directive also points out to the group of entities to be held criminally liable for the offenses described therein, obliging Member States to take the necessary measures to ensure that corporations can be held liable for offenses referred to in art. 3-6, committed in their favour by a person holding a managerial position, acting individually or as a member of the body of the legal person in question. Similarly as in the case of the MAR Regulation, also here, the period for the implementation of the discussed EU derivative law act to the Polish legal system expired on 3rd July 2016 without effect (it took place on 6th May 2017).

Regardless of the lack of changes enabling the implementation of the MAD II Directive and ensuring the application of the MAR Regulation, the Polish Act on Trading in Financial Instruments already had provided in section X (criminal provisions) for punishability of behavior that involves

[57] Of course, I am talking about "the market" in the sense of the provisions of the MAR Regulation.

[58] Market Abuse Directive.

unlawful "disclosure" and "use" of "inside information" and recommending or inciting to acquire or sell financial instruments to with "inside information" pertains.

According to art. 180 ATFI (before 6th May 2017) "Anyone who, in violation of the prohibition referred to in Art. 156.2.1, discloses inside information shall be liable to a fine of up to PLN 2,000,000 or a penalty of imprisonment for up to three years, or to both these penalties jointly".

While art. 181 AFTI penalised "using" inside information "in violation of the prohibition referred to in Art. 156.1", determining at the same time in § 2, that "If the act referred to in Art. 181.1 is perpetrated by a person referred to in Art. 156.1.1a, the perpetrator shall be liable to a fine of up to PLN 5,000,000 or a penalty of imprisonment for a period from six months to eight years, or to both these penalties jointly".

According to the then-current of art. 182 ATFI "Anyone who, in violation of the prohibition referred to in Art. 156.2.2, issues a recommendation or induces another person to acquire or dispose of financial instruments to which inside information relates shall be liable to a fine of up to PLN 2,000,000 or a penalty of imprisonment for up to three years, or to both these penalties jointly".

The whole problem, however, consisted in the fact that all these criminal provisions explicitly referred to art. 156 of the Act, which provided for a national and narrower definition of inside information. Moreover, with the entry into force of MAR, this provision could no longer be formally applied by national courts, because it was undoubtedly replaced by the aforementioned art. 7 of the MAR regulation.

5. Consistent interpretation (indirect effect) as the only method to ensure the effectiveness of EU law

In the light of the comments made above, including in particular those relating: 1) firstly to evident conflict between the provisions of the MAR Regulation and Chapter 2, in Section VI of ATFI, 2) secondly to the need to apply directly applied and effective regulations contained in the MAR regulation instead of the above-mentioned provisions of the Act on Trading in Financial Instruments, and 3) thirdly the lack of implementation of the provisions of the MAD directive relating to the need to punish these behaviours – the basic question arises whether the offenses described in the referenced provisions of art. 180, 181 and 182 ATFI, which were committed

in the period from 3rd July 2016 to 6th May 2017, are punishable, and thus whether, due to the circumstances described above, it is possible to interpret them consistently so as to ensure the effectiveness of the law the EU.

Otherwise, it will be necessary to state that such an untimely amendment "privileged" the perpetrators, exempting them from criminal liability based on the principle of *nullum crimen sine lege,* also confirmed in art. 49 of the EU Charter of Fundamental Rights.

In this context, it should first be pointed out that the offenses described in art. 180, 181 and 182 ATFI have in part the character of typical blanket rules that require reaching for other regulations from the sphere of capital markets. This reservation applies to the types of phrases used in the framework of the construction of the discussed types, such as "inside information", "insider dealing" and "disclosure of inside information" that have their normative meaning. Each of the analyzed offenses also had a clause referring to the provision of art. 156 ATFI, in the form of an indication: 1) "Anyone who, in violation of the prohibition referred to in art. 156.2.1.... "(article 180 ATFI), 2) " Anyone who, in violation of the prohibition referred to in art. 156.1... "(article 181 ATFI), 3) " Anyone who, in violation of the prohibition referred to in art. 156.2.2"(article 182 ATFI). In this respect, it should be agreed that without supplementing these provisions with regulations referring to "inside information" they will be empty and thus there will be no possibility to adequately reconstruct the content of the order / prohibition, and thus the possibility of punishing the perpetrators for the behaviour described there[59]. The only question arises is whether such actions do not contradict the *lex cetra* principle and the prohibition of interpreting *contra legem*.

Bearing in mind the above, one should therefore consider whether, as a consequence of the inability to rely on some of the provisions of the Polish act on Trading in Financial Instruments because of their inconsistency with the MAR Regulation, a behaviour that violates the obligation to keep inside information secret were punished in the period described above (from 3rd July 2016 to 6th May 2017) – or due to the identified legislative omission, their unintentional decriminalization took place. Such voices appear more and more frequently, especially in the context of an evident reference under Art. 180-182 ATFI to the provisions of Chapter VI, Section 2 ATFI, which should now be replaced by the relevant regulations of the MAR Regulation.

At the same time, in the context of the above-mentioned remarks, it is obvious that the possible basis for punishing such perpetrators for the behaviour

[59] See. T. Sójka, *Commentary...*, Commentary to article 180 ATFI, para. 7.

committed between 3rd July 2016 to 6th May 2016 cannot be a provision of the (not implemented yet) MAD II Directive, because it would violate general principles of European Union law, on which the Court of Justice expressly commented, for example, cited in the case 80/86 – *Kolpinghuis Nijmegen* or C-168/95 – *Arcaro*.

The solution. However, attempting to make a consistent interpretation of the national regulation (based on the MAR provisions), it seems that the impossibility of applying Polish act on Trading in Financial Instruments, which is incompatible with EU law, does not preclude the possibility of invoking the provisions of art. 180-182 ATFI for the purpose of punishing those acting against the obligation to keep inside information secret. It should also be pointed out here that due to the principle of "priority of application" and not "priority of validity" of the EU regulation, provision of art. 156 ATFI called in on the basis of the construction of art. 180-182, does not cease to apply, and for this reason, it can still be an adequate reference basis to a certain extent (consistent with the provisions of the MAR). Therefore, we can not *a priori* say that it cannot be used (or its elements) in any case, as such a result can only be in the event of a conflict with the law in a specific and individual EU issue (Article 91 sec. 3 of the Polish Constitution provides for the same conclusion).

In fact, it should be noted that for the purposes of these offenses, this provision really indicates to whom Articles 180-182 ATFI are addressed and in this aspect it does not contradict the MAR regulation (the provision of Articles 180 – 182 ATFI contains an autonomous reference to the action "contrary to the prohibition", referred only to the entities listed in Article 156 ATFI[60]). The design of the old wording of art. 156 ATFI to the extent used on the basis of the provisions in question, it is open and undefined (this provision does not actually introduce a closed catalogue of entities obliged to keep inside information secret, only categorizing them[61]), which in essence allows for all those persons who are also subject to criminal liability referred to in the provisions of the MAR Regulation. It is worth emphasising once again that by explicitly referring to art. 156 ATFI in the form of a reference clause, the context of its use changes in a certain aspect. It is therefore used

[60] See. for example art. 180 a.t.f.i.: "Whoever against the prohibition referred to in art. 156 para. 2 point 1, discloses confidential information...", where art. 156 is in my opinion, in fact, a reconstruction of the addressees of the norm. An analogous situation takes place against the background of the interpretation of the provisions of art. 181-182 ATFI

[61] See. T. Sójka, *Commentary…*, Commentary to article 180 ATFI, para. 7.

only to determine the circle of addressees of the discussed offenses (as individual types) and this is how it should be understood in the perspective of a consistent interpretation of art. 180-182 ATFI

If, therefore, one takes into account that at the stage of interpretation it is impossible to omit these structural elements of art. 180-182 ATFI, which refer to the indication " Anyone who, in violation of the prohibition referred to in art. 156... "– it is certain that the question of the impossibility of applying the analyzed provisions is not to be determined by the reference in their further part to "inside information" or its "unlawful disclosure" and "use". At the same time, it is difficult to deny that they indeed have an independent normative characteristic which had so far been reflected in the provisions of ATFI. Therefore, when looking for an appropriate reference in the context of this legal act, it should be noted that in the part referring to the abovementioned issue, the national act is in clear discrepancy with art. 7 of MAR, also in force in the Republic of Poland. In the light of the above, in accordance with the principle of the precedence of European Union law, the application of the provisions of the Act on Trading in Financial Instruments, that contradict EU law, should be refused and in every specific case individually requiring reference to Art. 180-182 ATFI, they should be replaced by directly effective and applicable provisions of the MAR Regulation.

Due to the above-mentioned comments, it seems that such an operation would not lead to violation of the ban on the *contra legem* interpretation. At the same time, it would not introduce retroactive criminal liability, since in the period between 3rd July 2016 and 6th May 2017, the definition of "inside information" specified in the MAR Regulation was fully binding for the market participants in Poland. Thus, it should be assumed that in order to ensure full effectiveness of EU law, this definition could also pertain to the analyzed provisions.

Consequently, this should allow the contents of the analyzed concepts to be filled with the meaning given to them by EU law in the framework of this regulation. (At this point, it should be emphasized once again that if you look at the construction of Articles 180-182 ATFI, in reality nothing stands in the way of such a move. As already stated, the only normative clause contained therein serves only to clarify the scope of perpetrators. Inside information, as well as its disclosure and use does not refer to any other provision of the Act).

In conclusion, it should be recognized that from 3rd July 2016 the norms of Article 180-182 ATFI protected "inside information" during the said period, and moreover its unlawful "disclosure" and "use" as defined by the provisions of the MAR Regulation. There is therefore no reason to claim that

as a result of linking the analyzed provisions to Art. 156 ATFI they cannot currently constitute a basis for penalizing conduct that results in a violation of the obligation to keep inside information secret.

6. Summary

Summarizing the considerations in this text, it should be pointed out that the analyzed problem of Polish act on Trading in Financial Instruments perfectly demonstrates how EU law can now influence the matter of national criminal law. As it has been indicated above, this is often done not only by creating special minimum norms relating to criminal offenses and sanctions, but also other regulations that have a significant impact on the correct reading of a criminal provision. While in the case of a directive there is no doubt that the lack of implementation cannot lead to establishing or exacerbating criminality (also by referring to its directly effective provisions against the individual), a slightly different situation is already taking place in "directly applicable" and "directly binding" regulation. However, also here the obligation to make consistent interpretation obliges the courts to ensure full effectiveness of EU law "as far as possible" if the provisions of the regulation are important for the correct interpretation of national provisions. If, therefore, it does not infringe the *contra legem* limit and the principle of legal definiteness of a prohibited act, the court cannot refuse to refer to EU law in the interpretation process. At the same time, the analyzed example shows how the complex task of decoding norms correctly lies now within the courts. If the correct reading of a provision on EU issues requires reaching for several sources of law and undertaking specific interpretative measures, then it can be said that the obligation to respect the *lex certa* principle is also encumbered the courts.

Consistent interpretation is not indifferent for the legislator as well. This is particularly the case where it introduces provisions allowing the use of the EU regulation (or implementing the directive) after the expiry of the period provided for in EU law. In my opinion, these provisions should then be constructed in such a way as to confirm the possibility of applying a consistent interpretation in the period preceding their introduction into the national legal system (if it is possible and does not interfere with the above-mentioned boundaries of interpretation). The legislator should not, therefore, formulate such regulations that *ex post* would lead to the conclusion that before their entry into force such an interpretation would be unacceptable.

Such a situation can now take place in Polish law, where the provisions of art. 180–182 ATFI have been amended in such a way that it is indicated that "Anyone who, in violation of the prohibition referred to in art. 14 lit. c of Regulation 596/2014 ..." discloses, uses, recommends or solicits to acquire or dispose of financial instruments subject to inside information. It seems that such a reference directly to the provisions of the MAR regulation may currently encourage the claim that the behaviors described in these provisions were not punished in the period between 3rd July 2016 to 6th May 2017, because then the provision referred to provisions of the acts that could not be applied due to a conflict with the regulation. Meanwhile, since the definition of inside information needed expressly referral to the EU regulation, it cannot be said that this is a separate normative category. For this reason, I would argue that if the Polish legislator merely limited himself to stating that "Anyone who, contrary to the prohibition, discloses, uses, recommends or incites to acquire or dispose of financial instruments subject to inside information referred to in EU legislation on the scope of trading in financial instruments ", it would be in line with the MAR regulation, and at the same time would confirm that this is a separate normative category that does not need defining by referring to the MAR regulation because nowadays it is clearly an act of EU law that defines it. It seems that this would facilitate the possibility of reasoning for consistent interpretation, and at the same time introduced a greater state of legal certainty as to the regulation from the period when Polish law was not adjusted to the MAR Regulation.

Concluding the above considerations, there is no doubt that in cases where EU law regulations referring to other areas of law will affect the modification of the statutory description of prohibited acts, the obvious question arises about the possibility of the citizen predicting what is punishable and what is already decriminalized. Therefore, it is also necessary to redefine this aspect, and to ask the question about how to treat any possible mistake of law in the field of EU regulation.

Summary

There is no doubt that membership in the European Union results in the multitude of decision-making centres responsible for applying, legislating and interpreting law, which does not facilitate the interpretation of norms referring to the matters covered by the EU law. There is also no doubt that in cases where EU law regulations referring to other areas of law will affect the modification of the statutory description of prohibited acts, the obvious question arises about the possibility of the citizen predicting what is punishable and what is already decriminalized. Therefore, it is also necessary to redefine this aspect and to ask the question

about how to treat any possible mistake of law in the field of EU regulation. In this text I will point out the practical problems resulting from the increasingly frequent obligation to take into account European Union law in the course of interpretation of national provisions of substantive criminal law. This particularly pertains to cases in which a failure of the national legislator creates a necessity to resort to alternative methods of ensuring full effectiveness of EU law (mainly by way of consistent interpretation).

Keywords

European Union law, capital markets law, consistent interpretation, European criminal law

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