

## **‘PUBLIC INTEREST’ AND ‘COMMON GOOD’ GENERAL CLAUSES IN BOTH POLISH AND EUROPEAN UNION LAW**

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### **1. Introduction**

Public interest<sup>1</sup> and common good general clauses are key terms in constitutional law<sup>2</sup>, administrative law and public business law<sup>3</sup>. They are also important from the perspective of European Union law. Public

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<sup>1</sup> The name “general clause” comes from J.W. Hedemann, it was included in: *Die Flucht in die Generalklauseln*, Tübingen 1933 (after: A. Szpunar, *Nadużycie prawa podmiotowego* [*The Abuse of Process*], ‘Polska Akademia Umiejętności, Prace Komisji Prawniczej’ 1947, no 2, p. 63, fn. 1). The clauses are described in greater detail in: L. Leszczyński, *Tworzenie generalnych klauzul odsyłających* [*Creating General Clauses That Refer to Other Rules*], Lublin 2000, p. 17 *et seq.*; L. Leszczyński, *Stosowanie generalnych klauzul odsyłających* [*Applying the General Clauses That Refer to Other Rules*], Kraków 2001, at p. 21.; Z. Ziemiński, *Stan dyskusji nad problematyką klauzul generalnych* [*The Discussion on The problem of General Clauses*] ‘Państwo i Prawo’ 1989, no 3, p. 14; K. Wójcik, *Teoretyczna konstrukcja klauzuli generalnej* [*Theoretical Construction of a General Clause*], ‘Studia Prawno-Ekonomiczne’ 1990, vol. 44, at p. 47 and the literature provided there.

<sup>2</sup> C.f. J.L. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, ‘University of St. Thomas Law Journal’ 2005, vol. 3, no. 1, 2005, pp. 48-74.

<sup>3</sup> See. A. Żurawik, *Interes publiczny w prawie gospodarczym* [*Public Interest in Business Law*], Warszawa 2013, p. LXIII.

interest clauses within treaties have a constitutional and statutory character, which is also sometimes identified, in European Union Law as well, with the common good clause. However, the question arises as to whether it is appropriate to amalgamate those two clauses, as is the case in the Constitution of Poland (e.g. Art. 1 and 22) and in different contexts. Is it correct to perceive those terms as synonyms? The following analysis seeks to resolve the above-mentioned dilemma, which is important since it concerns the question of the acceptable degree of interference in the area of freedom and the acceptable degree of appropriation of private law to the public law arena.<sup>4</sup>

Article 1 of the Constitution of Poland states that the Republic of Poland is the common good of all its citizens. A similar phraseology was to be found in Art. 1 para 1. of the constitutional act from 23.4.1935, in the April Constitution of Poland, which stated that “The Polish State is the common good of all its citizens.”<sup>5</sup> However, today this clause also appears in other contexts.<sup>6</sup> The public interest clause constitutes a substantive law premise for interference in the freedom of economic activity (Article 22 of the Constitution), and Article 31, Item 3 of the Constitution of Poland

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<sup>4</sup> This phenomenon is discussed in greater detail in, e.g.: M. Safjan, *Pojęcie i systematyka prawa prywatnego* [The Notion and Taxonomy of Private Law] [in:] M. Safjan (ed.), ‘System prawa prywatnego’ [The System of Private Law], vol 1: *Prawo cywilne – część ogólna* [Civil Law – General Part], Warszawa 2007, pp. 47-50; A. Żurawik, *Problem publicyzacji prawa prywatnego w kontekście ustrojowym* [The Problem of the Publicization of Private Law in the Legislative Context], ‘Państwo i Prawo’ 2010, no 5, at pp. 32-41.

<sup>5</sup> This is investigated in greater detail by: M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego* [Common Good as the Foundation of Polish Constitutional Order], Warszawa 2012, p. 166 . C.f. W. Brzozowski, *Konstytucyjna zasada dobra wspólnego* [Constitutional Rule of Common Good], ‘Państwo i Prawo’ 2006 no 11, at pp. 19-20.

<sup>6</sup> Article 25, para 3 of the Constitution states that the relationship between the state and churches as well as other religious associations are based on the rules of respecting their autonomy and the mutual independence of each of them as well as a cooperation for the good of a man and common good. According to Article 82 every Polish citizen’s duty is loyalty to the Republic of Poland, as well as concern for the common good. The legislator also refers to the notion of the common good in the Preamble to the Constitution, by enlisting the citizens’ duties to their common good – Poland.

refers to it indirectly.<sup>7</sup> However, it is rooted in various contexts and has different functions.<sup>8</sup>

Until the French Revolution, the common good was considered to represent one of the two main aims of a state, the other being the safety of its citizens. The category of public interest, propagated by the French Revolution, and the category of social interest, popular in socialist countries, resulted in the almost complete dissipation of common good theory.<sup>9</sup> Nevertheless, today it once again represents one of the most important concepts in legal theory. One can find evidence of this popularity in the jurisdiction of the Polish Constitutional Tribunal (hereafter TK), wherein this concept features quite significantly.

Obviously, this author is cognizant of the problems that would be encountered by anyone wishing to discuss or write about both public interest and the common good. Such difficulties arise because of the multiplicity of initial underlying assumptions which cause one to look at this topic differently each time one analyses it.<sup>10</sup> Another aspect that often draws attention is the variability of the living conditions of particular societies

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<sup>7</sup> The values underlined in this regulation are elements of the notion of public interest. Allow me to remind the reader that according to this paragraph “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights”.

<sup>8</sup> Article 17, para 1 states that “By means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.” According to Article 63 “Everyone shall have the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person – with his consent – to organs of public authority, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering petitions, proposals and complaints shall be specified by statute.” Article 213, para 1 states that “The National Council of Radio Broadcasting and Television shall safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television.”

<sup>9</sup> K. Complak, *Normy pierwszego rozdziału Konstytucji RP [The Standards in the First Chapter of The Constitution of Poland]*, Wrocław 2007, p. 47 and the references quoted therein.

<sup>10</sup> See also M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego [Common Good as the Foundation of Polish Constitutional Order]*, *op. cit.*, p. 20.

and, in consequence, their expectations. Sometimes it is stated directly on this basis that the understanding of public interest or common good considerably exceeds the structures of each historical society and this is why it is inevitable that these concepts change their meaning from century to century and society to society. Therefore, people believe that it is impossible to define public interest and the common good in an ultimate way, irrespective of changing social conditions.<sup>11</sup> Despite such difficulties, it remains necessary to discuss and write about public interest and common good, especially because these concepts are of a standard basis. Additionally, both clauses are increasingly frequently used to define the concept of contemporary public administration<sup>12</sup> and they have also acquired a new context since Poland acceded to the European Union.<sup>13</sup>

One should add that the attitude of particular authors towards the common good-public interest relationship varies considerably; sometimes they differentiate between those terms and sometimes they equate or conflate them. Other authors limit their writing to the common good whilst making no reference whatsoever to the public interest. This dichotomy is investigated in greater detail later in this paper. It is also worth mentioning that some authors writing about the common good refer to values, whilst others prefer to speak of aims and/or needs.<sup>14</sup> This differentiation

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<sup>11</sup> See e.g. New Catholic Encyclopedia, vol. IV, entry “common good” formulated by A. Nemetz; J.I. Lavastid, *Health care and the common good: a Catholic theory of justice*, Boston 2000, p. 170; D. Prabuca (ed.), *Dobro wspólne [Common Good]*, Kraków 2010, passim; V. Held, *The Public Interest and Individual Interests*, New York – London 1970, p. 1; A. Downs, *The Public Interest: Its Meaning in a Democracy*, ‘Social Research’ 1963, vol. 29, at p. 1; W.A.R. Leys, *The Relevance and Generality of The Public Interest*, [in:] C.J. Friedrich (ed.), New York 1962, p. 249.

<sup>12</sup> J. Blicharz, *Kategoria interesu publicznego jako przedmiot działania administracji publicznej [The Category of Public Interest as the Subject of the Public Administration Actions]*, ‘Przegląd Prawa i Administracji’, vol. 60, Wrocław 2004, at p. 39.

<sup>13</sup> C.f. A. Héritier (ed.), *Common Goods: Reinventing European and International Governance*, Lanham 2002, passim.

<sup>14</sup> See. M. Zdyb, *Dobro wspólne w perspektywie art. 1 Konstytucji RP [Common Good in the Perspective of the Article 1 of the Constitution of Poland]*, [in:] Collective work, ‘Trybunał Konstytucyjny. Księga XV-lecia’ [Constitutional Tribunal. The Book commemorating the 15<sup>th</sup> Anniversary], Warszawa 2001, p. 190; H. Skorowski’s utterance in a collective work titled *.Preambuła Konstytucji Rzeczypospolitej Polskiej [The Preamble to the Constitution of Poland]*, Warszawa 2009, pp. 95-96; to compare see a different attitude of M. Piechowiak included in this volume, pp. 111-124. See also a TK sentence of 10.4.2006., SK 30/04 (OTK-A 2006/4/42), in which the TK appeals to the needs when analysing common good.

was important for my previous investigation of public interest<sup>15</sup> and this distinction will also be important when analysing the common good clause.

Given the constraints of the present article, I will confine my analysis to describing selected views on the subjects mentioned above, since a detailed investigation would merit a separate paper which, even then, would probably not encompass all of the issues and problems at hand.

## 2. The understanding of “public interest”

The most representative concepts of public interest are presented in greater detail in some of my other publications<sup>16</sup>, hence I will only briefly recall some of the problems in this text.

The views presented thus far regarding public interest can be divided into certain groups. A starting point for this are the popular concepts combining the public interest with values, i.e. axiological (x represents the public interest of community A, considering *value* y).<sup>17</sup> However, other concepts associate public interest with objectives (praxeological concepts – x is the

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<sup>15</sup> See A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym* [The Public Interest Clause in both Polish and European Union Economic Law], 'Europejski Przegląd Sądowy' 2012, no 12, at pp. 24-30.

<sup>16</sup> A. Żurawik: *Interes publiczny w prawie gospodarczym* [Public Interest in Business Law] *op. cit.*, pp. 127-176; A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym*, [The Public Interest Clause in both Polish and European Union Economic Law], *op. cit.*, pp. 25-28.

<sup>17</sup> J. Nawrot, entry *Interes publiczny* [Public Interest], [in:] A. Powałowski (ed.), 'Leksykon prawa gospodarczego publicznego' [Lexicon of the Law on Public Economic Activities], Warszawa 2009, pp. 66-72. Values are also considered by: A. Wróbel, *Interes publiczny w postępowaniu administracyjnym* [Public Interest in Administrative Proceeding] [in:] 'Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr. hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej' [Public Administration at the Turn of the 21st Century. Texts Dedicated to Professor Jan Szreniawski on the Occasion of the 45th Anniversary of his University Work], Przemyśl 2000, pp. 701-702, 707; M. Szaraniec, *Klauzula interesu publicznego i określenia nieostre – próba wyodrębnienia tych pojęć na gruncie ustawy o działalności ubezpieczeniowej* [Public Interest Clause and Ambivalent Definitions – an Attempt to Distinguish those Terms on the Ground of the Act of Insurance Activity], [in:] B. Gnela (ed.), 'Ubezpieczenia gospodarcze. Wybrane zagadnienia prawne' [Business Insurances. Selected Legal Issues], Warszawa 2011, p. 247; TK sentence of 25.2.1999 (K 23/98; OTK 1999/2/25).

public interest of community A, considering *purpose y*.)<sup>18</sup> Other scientists associate it with needs (x is the public interest of community A, considering *need y*), but they are very rare.<sup>19</sup> The majority of authors prefer the mixed (hybrid) concepts of public interest that merge its various aspects. One should highlight the concept of Eugeniusz Modliński, which was frequently referred to in many later investigations. Modliński likened the public interest to needs and objectives and he also propagated the priority of the public interest against the interests and needs of an individual<sup>20</sup>, something which is today rejected in the majority of cases. The predominant contemporary view calls for the balancing of both public and individual interests in every case.

A mixed concept was also presented by Mirosław Wyrzykowski.<sup>21</sup> When writing on the social (public) interest, <sup>22</sup> he referred to values and

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<sup>18</sup> M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym* [The concept of Public Interest in Administrative Law], Warszawa 1986, p. 37 and the references quoted there.

<sup>19</sup> F. Longchamps, *Osobiste świadczenia wojenne* [Personal War Benefits], Lwów 1936, pp. 33-34. C.f. A. Duda, *Interes prawny w polskim prawie administracyjnym* [Legal Interest in the Polish Administrative Law], Warszawa 2008, pp. 26-27; J. Lang, *Struktura prawna skargi w prawie administracyjnym* [The Legal Structure of a Complaint in Administrative Law], Wrocław 1972, p. 96.

<sup>20</sup> E. Modliński, *Pojęcie interesu publicznego w prawie administracyjnym* [The Concept of Public Interest in Administrative Law] Warszawa 1932, *passim*.

<sup>21</sup> M. Wyrzykowski, *Pojęcie interesu społecznego...* [The concept of Public Interest ...], p. 28.

<sup>22</sup> M. Wyrzykowski treated the clauses of public and social interest interchangeably. Obviously, it is also possible to express the opposite view but this issue deserves a separate study (see e.g. W. Sokolewicz, *Komentarz do art. 213 Konstytucji* [A Commentary to the Article 213 of the Constitution], [in:] L. Garlicki [ed.], 'Konstytucja Rzeczypospolitej Polskiej. Komentarz' [The Constitution of Poland. A Commentary], vol. 3, Warszawa 2003, pp. 14-15; L. Leszczyński, *Wykładnia generalnych klauzul odsyłających prawa administracyjnego* [Interpretation of the Administrative Law General Clauses that Refer to Other Rules], [in:] R. Hauser, Z. Niewiadomski, A. Wróbel [eds], 'System Prawa Administracyjnego' [Administrative Law System], vol. 4, 'Wykładnia w prawie administracyjnym' [Interpretation in Administrative Law] Warszawa 2012, pp. 319-320; L. Leszczyński, *Kategoria interesu w stosowaniu prawa administracyjnego. Przykład art. 7 KPA* [The Category of Interest in the Application of Administrative Law. Example: Article 7 of Polish Administrative Procedure Act], [in:] A. Korybski, M.W. Kostycki, L. Leszczyński [ed.], 'Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym Polski i Ukrainy' [The Concept of Interest in legal sciences, statutory law and the legislation of both Poland and Ukraine], Lublin 2006, p. 81; A. Żurawik, *Interes publiczny w prawie gospodarczym* [Public Interest in Business Law], *op. cit.*, p. 453).

objectives. He emphasised the role of the relation between a value system and the public interest content defined by such values, which is accentuated in both the theory of law and politics.<sup>23</sup> The author highlighted the complex and relative character of the social (public) interest, which is variable in space and time, although this does not imply absolute freedom in interpreting the clause.<sup>24</sup>

One can add that the legislator's pronouncements have not been conclusive on this point, since legal provisions have been adopted on the basis of different concepts.<sup>25</sup>

### **3. Public interest and similar clauses in European Union law<sup>26</sup>**

The fact that Poland is a member of the European Union necessitates the balancing of foreign and domestic interests. Particularly important at this point are the provisions of the Treaty on European Union (TUE) and the Treaty on the Functioning of the European Union (TFUE). They indicate that the problem of specific common good and the interests of

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<sup>23</sup> M. Wyrzykowski, *Pojęcie interesu społecznego... [The concept of Public Interest...]* pp. 39-40.

<sup>24</sup> M. Wyrzykowski, *Pojęcie interesu społecznego... [The concept of Public Interest...]* pp. 44-47.

<sup>25</sup> You can find examples in particular legal definitions of public interest such as the Spatial Planning and Land Development Act of 27.3.2003 (Polish OJ 2012, item 647), in which the legislator in Article 2 p. 4 understands public interest as "generalised goal of efforts and actions, which take into consideration the objectified needs of the whole society or local communities, which are connected with land development". Therefore, it is referred to as both goals and needs. Another legal definition is included in The Act On Providing Services in the Territory of the Republic of Poland (Polish OJ 2010, no 47, item 278), which is also applied in the light of the Act on Freedom of Economic Activity (Polish OJ 2013, item 672), by a reference included in Article 5, p. 7. Article 2 para 1, p. 7 of The Act On Providing Services in the Territory of the Republic of Poland states that the superior public interest is a protected value, in particular public order, public safety, public health etc. In this case the legislator prefers the axiological concept. I will return to this topic in the latter part of this study.

<sup>26</sup> See also: A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym, [The Public Interest Clause in both Polish and European Union Economic Law], op. cit.* pp. 27-28; A. Żurawik, *Interes publiczny w prawie gospodarczym [Public Interest in Business Law], op. cit.,* pp. 241-246.

this organisation play a leading role. However, the Union's legislator does not use coherent concepts and introduces various clauses similar to the public interest clause.

Whilst the concept of public interest is rare in primary legislation, one can find it in Art. 15 (3) TFUE. According to this provision, which determines the right of access to documents of the institutions, organs and organizational units of the EU, "General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure"<sup>27</sup>.

Primary legislation also uses clauses similar to the public interest clause. Art. 17 (1) TUE contains reference to the "general interest of the Union", whereas the TFUE contains such expressions as "Interests of the Union" (Art. 106 [2] of TFUE), "common interest covered by a Union policy" (Art. 88 [1] of TFUE), "financial interests of the Union" (e.g. Art. 85 [1] of TFUE), "common European interest" (art. 107 [3] of TFUE) and "the Union's general interest" (Art. 285 of TFUE), the latter of which also appeared in the original Treaty. Moreover, the TFUE speaks of "specific regional interests" which thereby covers multifarious interests which are concentrated and realized in particular regions.<sup>28</sup>

An analysis of the legal provisions containing reference to the "general interest of the Union", "Interests of the Union", "common interest covered by a Union policy" and "common European interest" seems to indicate that, despite linguistic variety, they all nevertheless refer to the same ultimate concept of the "Interest of the Union". Dawid Miąsik states that the Communities' interest (today: the interest of the Union) is based on "(...) eliminating all obstacles to the functioning of the internal market

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<sup>27</sup> See Regulation (EC) No 1049/2001 of The European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 31.5.2001 L 145 pp 43—48. For further information see D. Adamski, *Prawo do informacji o działaniach władz publicznych Unii Europejskiej [The Right of Information on the Work of Public Authorities in European Union]*, Warszawa 2011; K. Kowalik-Bańczyk, *Komentarz do art. 15 TFUE [A Commentary to the Art. 15 of TFUE]*, [in:] A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz [A Treaty on Functioning of the European Union, A Commentary]*, vol. 1, Warszawa 2012, pp. 280-300.

<sup>28</sup> For further information see A. Zawadzka-Łojek, *Komentarz do art. 307 TFUE [A Commentary to Art. 307 of TFUE]*, [in:] A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz [A Treaty on Functioning of the European Union, A Commentary]*, vol. 3, Warszawa 2012, pp. 822-824.



and ensuring maximum efficiency of Community law (today: European Union law – A. Ż.) in accordance with the efficiency rule (...) <sup>29</sup>.

EU secondary legislation contains reference to the concept of “overriding reasons relating to the public interest”, which is mentioned in e.g. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market <sup>30</sup>. The recitals of this Directive (40) refer to the concept of “overriding reasons relating to the public interest” to which reference is made in certain provisions of this Directive has been developed by the Court of Justice and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious

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<sup>29</sup> D. Miąsik, *Zasada proporcjonalności w prawie wspólnotowym i jej zastosowanie przez sądy krajowe* [The Rule of Proportionality in the European Community Law and its Application by National Courts], [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy* [The Application of the European Union Law by the courts], Kraków 2005, p. 218. See also M. Szydło, *Komentarz do art. 106 TFUE* [A Commentary to Art. 106 of TFUE], [in:] A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz* [A Treaty on Functioning of the European Union, A Commentary], vol. 2, Warszawa 2012, pp. 418-419.

<sup>30</sup> OJ 27.12.2006, L 376. Cf. e.g. K. Klafkowska-Waśniowska, *Przegląd orzecznictwa TS w zakresie swobody świadczenia usług z 2010 r. (cz. I)* [The Review of the Court of Justice's Legislation in the Matter of the Freedom of Providing of Services, part I], *Europejski Przegląd Sądowy* 2012, no 4, at pp. 35-39; K. Klafkowska-Waśniowska, *Przegląd orzecznictwa TS w zakresie swobody świadczenia usług z 2010 r. (cz. II)* [The Overview of the Court of Justice's Legislation in the Matter of the Freedom of Providing of Services, part II], *Europejski Przegląd Sądowy* 2012, no 6, at pp. 28-33; M. Feintuck, M. Varney, *Media Regulation, Public Interest and the Law*, Edinburgh 2006, pp. 40-125; R. De Bruijn, H. Kox, A. Lejour, *The Trade-Induced Effects of the Services Directive and the Country of Origin Principle*, European Network of Economic Policy Research Institutes, Working Paper no 44, 4/2006, pp. 34-36 (available on the website: <http://www.enepri.org/files/Publications/WP044.pdf> – accessed 1.10.2013).

and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy. Accordingly, it constitutes an open catalogue of numerous interests.

Art. 4(8) of the above mentioned Directive defines “overriding reasons relating to the public interest” in a more specific way and refers to reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives.

This Directive constitutes a summary of the Union’s achievements when it comes to understanding “overriding reasons relating to the public interest” and therefore there is no reason to discuss here all individual statements of the Court of Justice related to the clause discussed in this article.

## **4. The understanding of “common good”**

### **4.1. Historical draft.**

The concept of common good dates back to ancient times.<sup>31</sup> When investigating this concept, one must start with Aristotle, born in Stagira on the seashore of Trace, who was *fons et origo*, the source and the reason of many aspects of the reflection on common good. Aristotle also formulated the rule of the priority of common good. He wrote: “For even if the end is the same for a single man and for a state, that of the state seems at all events something greater and more complete whether to attain or to preserve; though it is worthwhile to attain the end merely for one man, it is finer

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<sup>31</sup> This is investigated in greater detail by: A. Żurawik, *Interes publiczny w prawie gospodarczym* [Public Interest in Business Law], *op. cit.*, p. 205.

and more godlike to attain it for a nation or for city-states.”<sup>32</sup> According to Aristotle, the best state is that which takes care of the common good. However, this good requires the rule of law and the virtue of the rulers.<sup>33</sup>

The common good was also investigated by Jean-Jacques Rousseau<sup>34</sup> and Jeremy Bentham. The latter built his system of utilitarian ethics, whose main standard he termed the principle of utility or the greatest happiness principle. According to this principle, people's behaviour is moral only when it causes the greatest possible happiness of the greatest possible number of people in given circumstances. The common happiness, the happiness of the greatest number of people, was for Bentham the ultimate goal of human actions as the greatest good – *summum bonum*. Providing the greatest number of people with the greatest potential happiness was deemed to constitute the very basic task of a state.<sup>35</sup>

In turn, George Friedrich Hegel claimed that a man is motivated not only by the good of individuals, but also by the common good. A civil society must rely on the framework of moral principles and the broad notion of the “ethicalness”, which is a link between the interests of individual citizens and the good of the whole. A state also has to resolve conflicts that arise as a result of the clash between conflicting interests in the society.<sup>36</sup> “The point was not to eliminate public interest, but to make this particular coherent with common interest (...)”<sup>37</sup> Hegel perceived the state as the highest

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<sup>32</sup> Arystoteles, *Etyka nikomachejska [Nicomachean Ethics]*, I 1094b, Warszawa 2008, p. 78.

<sup>33</sup> P. Śpiewak, *W stronę wspólnego dobra [Towards Common Good]*, Warszawa 1998, p. 110.

<sup>34</sup> See H. Olszewski, M. Zmierczak, *Historia doktryn politycznych i prawnych [The History of Political and Legal Doctrines]*, Poznań 1994, pp. 167-173. C.f. e.g. W. Tatarkiewicz, *Historia filozofii [The History of Philosophy]*, vol. II, Warszawa 1993, pp. 150-154; V. Held, *The Public Interest...*, *op. cit.* p. 99; R.E. Flathman, *The Public Interest. An Essay Concerning The Normative Discourse of Politics*, Nowy York – London – Sydney 1966, pp. 38-39, 44-46.

<sup>35</sup> See e.g. H. Maślińska, *Bentham i jego system etyczny [Bentham and His Ethical System]*, Warszawa 1964, p. 11.; H. Olszewski, M. Zmierczak, *Historia doktryn politycznych i prawnych [The History of Political and Legal Doctrines]*, *op. cit.*, pp. 227-229.

<sup>36</sup> M. Tymińska, *Spółeczeństwo obywatelskie – szkic z historii idei [Civil Society – an Overview of the History of the Idea]*, [in:] ‘Przegląd Naukowy Disputatio’, vol. 4, Gdańsk 2008, p. 13.

<sup>37</sup> K. Chojnicka, W. Kozub – Ciembroniewicz (ed.), *Doktryny polityczne XIX i XX wieku [The Political Doctrines of the 19th and 20th centuries]* Kraków 2000, p. 145.

level of a social system<sup>38</sup>, “a divine idea” which exists on Earth. From the perspective of liberals, the state was created for citizens, whereas from Hegel’s perspective the reverse was true. In every aspect he preferred the whole to a part.<sup>39</sup>

The important role of a state and common good which is available for every individual was also propagated by Hannah Arendt, a German political theorist, philosopher and publicist, and one of the most influential thinkers of the 20<sup>th</sup> century.<sup>40</sup> Her ideological character resulted largely from her totalitarian experience, since as a person of Jewish origin she was forced to emigrate. She thus spent many years in the United States, where she conducted her research and was active in fields other than academia. With reference to ancient thought, she distinguished the private sphere from the public, prioritizing the latter.<sup>41</sup> In her text about the virtues that are necessary in public life, she recalls the Aristotelian concept of *phronesis*, which enables right judgement and effective action. The reality is created mainly through the things present in the public sphere, and the elements of the private sphere are elusive and uncertain.<sup>42</sup> Courage is visible in the act of abandoning privacy, in leaving the safety provided by the home to enter the public sphere. Courage also means responsibility for the common good, leaving the interest in your and your family’s life only, in your private interest. According to the philosophical tradition, the common good

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<sup>38</sup> See T. Buksiński, *Prawo a władza polityczna [The Law and the Political Power]*, Poznań 2009, pp. 54-58.

<sup>39</sup> W. Tatarkiewicz, *Historia filozofii [The History of Philosophy]*, vol. 2, *op. cit.*, p. 215. See also H. Olszewski, M. Zmierczak, *Historia doktryn politycznych i prawnych [The History of Political and Legal Doctrines]*, *op. cit.*, p. 221.

<sup>40</sup> See mostly H. Arendt, *Korzenie totalitaryzmu [The Origins of Totalitarianism]*, vol. 1-2, Warszawa 1993; *O rewolucji [On Revolution]*, Kraków 1991; *Myślenie [The Life of the Mind]*, Warszawa 1991; *Między czasem minionym a przyszłym: osiem ćwiczeń z myśli politycznej [Between Past and Future]*, Warszawa 1994; *O przemocy; Nieposłuszeństwo obywatelskie, [On Violence; Civil Disobedience]* Warszawa 1998; *Kondycja ludzka [The Human Condition]*, Warszawa 2000; *Polityka jako obietnica [The Promise of Politics]*, Warszawa 2005.

<sup>41</sup> See also E. Barańska, *Ryzyko bycia publicznego [The Risk of Being Public]*, [in:] J.P. Hudzik, W. Woźniak (ed.), ‘Sfera publiczna. Kondycja – Przejawy – Przemiany’ [Public zone. Condition – Symptoms – Changes], Lublin 2006, pp. 149-166.

<sup>42</sup> B. Stefańska, *W poszukiwaniu dobra wspólnego. Refleksje nad polityką w myśli Arystotelesa, św. Tomasza z Akwinu, i Hannah Arendt [In Search of Common Good. Reflection of the Politics in the Thought of St. Thomas of Aquine and Hannah Arendt]*, Warszawa 2009, pp. 57-58.

is a criterion of action and, for Arendt, the very existence of the political sphere was already a certain kind of common good, deserving protection.

The "common good" idea also plays a very significant role in Christian thought, although it is not the monopoly of Catholics. It has been rooted in Christianity since its very beginning, but it did not become truly important until the 20<sup>th</sup> century.<sup>43</sup> The doctrine of the Roman Catholic Church understands the common good (*bonum commune*) as a collective, public and general value.<sup>44</sup> The Catholic concept of the common good has its roots in both Plato's and Aristotle's theories of man and society.<sup>45</sup> In the early Christian period, the development of the common good idea was noticeable, albeit indistinctly so, in St Augustine's texts,<sup>46</sup> before this concept was investigated by Isidore of Seville<sup>47</sup> who claimed that a state's legislation has to protect the general benefit of the citizens.<sup>48</sup> However, this idea blossomed in the concepts of St Thomas Aquinas. He referred to the concept of common good throughout the first two initial parts of *Summa Theologiae*<sup>49</sup>, and concentrated on this concept in many of his other texts, especially in the *Commentary to Nicomachean Ethics* and in *Summa Contra Gentiles*. The commentators to St. Thomas have contributed more than 300 texts in which the concept of the common good was investigated. It was also broadly described in later papal encyclicals.<sup>50</sup>

In my subsequent investigations I will concentrate on the legal concepts of common good, dividing it into concepts that differentiate common good and public interest and those which can be equated with them.

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<sup>43</sup> See J. Krucina, *Dobro wspólne. Teoria i jej zastosowanie* [*Common Good Theory and its Application*], Wrocław 1972, passim; *Encyklopedia katolicka* [*Catholic Encyclopedia*] KUL, vol. 3, p. 1382; J.F. Godlewski, *Katolicka myśl kościelna o prawie i państwie* [*The Catholic Church's Thought on Law and State*], Warszawa 1985, p. 118.

<sup>44</sup> J.F. Godlewski, *Katolicka myśl kościelna o prawie i państwie* [*The Catholic Church's Thought on Law and State*], *op. cit.* p. 119.

<sup>45</sup> See e.g. J.B. Carey, *The Common Good in Catholic Social Thought*, 'St. John's Law Review' 2001, vol. 75, no 2, p. 311.

<sup>46</sup> J.F. Godlewski, *Katolicka myśl kościelna o prawie i państwie* [*The Catholic Church's Thought on Law and State*], *op. cit.*, pp. 119-120.

<sup>47</sup> He lived between the years 570-639.

<sup>48</sup> F. Godlewski, *Katolicka myśl kościelna o prawie i państwie* [*The Catholic Church's Thought on Law and State*], *op. cit.*, p. 120.

<sup>49</sup> *Summa theologiae*.

<sup>50</sup> *Rerum novarum* (Leon XIII), *Divini illius magistri* (Pius XI), *Quadragesimo anno* (Pius XI), *Pacem in terris* (John XXIII), *Mater et Magistra* (John XXIII), *Populorum progressio* (Paul VI), *Centesimus annus* (John Paul II), *Caritas in Veritate* (Benedict XVI). See also: K. Wojtyła, *Osoba i czyn*, Kraków 1969, pp. 294 and 308.

## 4.2. Concepts distinguishing the common good and the public interest

One of the concepts worth mentioning is the concept presented by Krystian Complak. He believes that the common good means the sustainable development of the quality of life among the members of every separate group of people, and in every separate social or political group, depending on their specific goals. However, this represents neither the sum of individual goods<sup>51</sup>, nor a collective need. It is a result of the coordinated action of all (or the majority) members of the collective, who are combining their efforts in order to carry out the well-being of all. However, what is important, in Complak's opinion the common good differs from the public interest, as they are not identical categories. "The public interest belongs to individuals to the same extent as they are members of a larger united collective. The common good is based on a difference between an individual submitted to a community and a person understood as a scope of all things. The concept of the common good has some parallels with the concepts of the common will and the public utility. The common good and common will express the moral will of the individual. The common good is more objective. The common will – due to the relation to the individual goods or to the partial will of the individual – is more subjective. (...) In contrast to the concept of the interest (and the public utility) – formulated in the Greek and Roman times – the term »common good« is closely associated with the Christianity. From the moral and religious point of view, the common good is a higher value than the public interest (or public utility). The interest is subjective and variable. It belongs to the sphere of »to have«, whereas the common good belongs to the sphere of "to be". The common good is the value that encompasses the overall examination of the world. It presupposes the idea of "a man and his relation to the society and to everything that is beyond our experience and the cognizable world."<sup>52</sup>

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<sup>51</sup> This was previously described by St. Thomas.

<sup>52</sup> K. Complak, *Normy pierwszego rozdziału Konstytucji RP [The Standards in the First Chapter of The Constitution of Poland]*, *op. cit.*, p. 49. The author refers to following texts: M.-P. Deswarte, *Intérêt général, bien commun*, 'Revue du Droit Publique et de la Science Politique en France et à l'Étranger' 1989, no 5, pp. 1289-1313 and J. Ortiz Díaz, *El bien común y la Administración pública, Estudios dedicados al Profesor García Oviedo con motivo de su jubilación*, Sevilla 1954. K. Complak describes also a corporatist doctrine saying that common good comprises of an active amalgamation of a citizen and the state by working for it. A state is a natural and necessary civil association based on solidarity

To this author, however, it appears difficult to make adequate unequivocal assumptions that the common good constitutes a higher value than the public interest, since the former belongs to the realm of “to be” and the latter is situated in the realm of “to have” (its character is subjectively changeable as opposed to the more objective common good). Both categories *de facto* appear in various understandings, which have been known for decades, including legal and juridical understandings, which constitute a reflection of more general conceptions. It is sufficient to look at the legal definitions of the public interest I have discussed elsewhere<sup>53</sup>, which prove that the legislator sometimes uses an axiological justification of the public interest and sometimes prefers a more objective – at least *purportedly* more objective – understanding, which clearly follows from the definition contained in an Art. 2 pt. 4 of Poland’s Spatial Planning and Development Act. Significant ranges of the common good and the public interest can therefore be different each time, and the realm of “to be” may well characterise both categories instead of merely one of them. This will be the case when the public interest is treated as a concrete, feasibly existing, protectable legal value. Values can be understood differently, also materially.<sup>54</sup>

Wojciech Sokolewicz has adopted a similar concept of the superiority of the common good over the public interest<sup>55</sup>, evoking K. Complak.

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and mutual dependence. All efforts to distinguish the good of a group diminishes the good of all people, and therefore are harmful for the state. Therefore citizens duties to the state are of great importance, since it is of absolute primacy over individual good and can limit the natural personal freedoms (see also K. Complak, *Normy pierwszego rozdziału Konstytucji RP [The Standards in the First Chapter of The Constitution of Poland]*, *op. cit.* pp. 51-52).

<sup>53</sup> See footnote 25 and: A. Żurawik, *Interes publiczny w prawie gospodarczym [Public Interest in Business Law]*, *op. cit.*, p. 176; A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym [The Public Interest Clause in both Polish and European Union Economic Law]*, *op. cit.*, pp. 28-30.

<sup>54</sup> See e.g. A.L. Zachariasz, *Wartości, czyli obowiązki i powinność jako momenty bytowe kultury [Values understood as obligation and duty as the Existential Moments of Culture]*, [in:] A.L. Zachariasz (ed.), *‘Byt i powinność, czyli status i funkcje wartości’ [Existence and Duty, the Statute and Functions of Values]*, Rzeszów 2005, pp. 15-27; A. Żurawik, *Interes publiczny w prawie gospodarczym [Public Interest in Business Law]*, *op. cit.*, *passim*.

<sup>55</sup> See W. Sokolewicz, *Komentarz do art. 1 Konstytucji [A Commentary on Article 1 of the Constitution]*, [in:] L. Garlicki (red.), *‘Konstytucja Rzeczypospolitej Polskiej. Komentarz’ [The Constitution of Poland. A Commentary]*, Warszawa 2007; pp. 9-37, particularly p. 11.

He treated the common good axiologically as a value.<sup>56</sup> Additionally, he thought that the common good, primarily as defined in the art. 1 of the Constitution, cannot be identified only with the state since the legislator would have used the notion of the good of the state. The legislator allows then for many common goods, even though the state is of most importance here. However, this attribute can be ascribed to various laws and institutions as well as aims or tasks.

Dependencies and relations between the common good and the public interest can be, according to W. Sokolewicz, very diverse. In some cases, the public interest actuates the concept of the common good, creating the basis for its realisation in particular domains of the social life in which the state is active<sup>57</sup>; whereas in other cases there might even occur a collision between these values, which finds support in a decision of the Constitutional Tribunal in which the Tribunal, considering *inter alia* the public interest, recognised the unconstitutionality of certain statutory provisions governing concession obligations, without questioning the legislator's intentions resulting from the protection of the common good.<sup>58</sup>

Wojciech Brzozowski adopts an interesting concept of the common good, considering it from the perspective of the world-view pluralism. Trying to precisely define the contents encoded in the rule of the common good, he notices that the contents of Art. 1 of the Constitution – given the problematic nature of its interpretation, which involves the interpreters in axiological disputes – should rather be looked at from a meta-political perspective. The formula of the common good constitutes a general norm which outlines the borders of political order, without determining the content thereof. He ascertains that the public authority, working in the interest of the common good in conditions of the pluralism of values and interests, is an authority which fosters a climate of worldview diversity and simultaneously supports the sense of community to such a degree as not to deny the moral autonomy of legal entities. For him, the crux of the matter is that the public authority acts in the service of the common good whilst being guided by impartiality. Otherwise, it would only constitute

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<sup>56</sup> See W. Sokolewicz, *Komentarz do art. 1 Konstytucji* [A Commentary to the Article 1 of the Constitution], [in:] L. Garlicki (red.), 'Konstytucja Rzeczypospolitej Polskiej. Komentarz' [The Constitution of Poland. A Commentary], Warszawa 2007; pp. 9-37, particularly p. 11.

<sup>57</sup> See also W.J. Wołpiuk, *Dobro wspólne a interes publiczny* [Common Good vs Public Interest], 'Zeszyty Naukowe Wyższej Szkoły Informatyki, Zarządzania i Administracji' 2006, no 1, at p. 24.

<sup>58</sup> See the judgment of 10.10.2001 r., K 28/01, OTK ZU 2001, No 7, pos. 212.



a form of the institutionalisation of social conflict and would distort the intentions of the authors of the Constitution.<sup>59</sup>

He also addresses the comparison of art. 1 of the Constitution and the requirement to balance the proportions between the general interest and particular interests, encountered in specialist literature. According to him, the common good is then treated as a synonym of the public interest and becomes a basis for laws and restrictions of freedoms. He considers this standpoint as false, particularly since in such an interpretation art. 1 would repeat the normative contents included in art. 31 section 3 of the Constitution of Poland (or in detailed limiting clauses). Yet, the concept of the common good is not only a justification for such limitations but, above all, something that everyone can use. The public authority working for the common good does not enforce its guardians' concept of virtue, it avoids paternalism and eschews the promotion of its own moral convictions. The common good requires that everyone has equal opportunity to realise their model of a good life, therefore – paradoxically – it requires the rejection of the temptation to popularize “common values”. The law is an instrument of the realisation of such a formulated task. It is imperfect but it also constitutes a “common good of all the citizens of Republic of Poland”.<sup>60</sup>

Personally, I consider such axiological debates to be inescapable, since every legal order relies on a system of values of some kind. However, linking a legal order with specific values which constitute its axiological basis and this order's respect for difference of convictions are two separate things. Worldview pluralism is respected in Poland, but only to a certain degree. A transgression of these borders can result in the authorities' reaction and they will not tolerate certain actions based on convictions.

Marek Piechowiak has also contemplated the common good in detail in one of his monographs.<sup>61</sup> He writes:

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<sup>59</sup> W. Brzozowski, *Konstytucyjna zasada dobra wspólnego* [Constitutional Rule of Common Good], *op. cit.*, pp. 27-28. See also: the same, *Bezstronność światopoglądowa władz publicznych w Konstytucji RP* [The Objectivity of Views Presented by Public Authorities in the Constitution of Poland], Warszawa 2010, *passim*. C.f. M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego* [Common Good as the Foundation of Polish Constitutional Order], *op. cit.*, p. 226.

<sup>60</sup> W. Brzozowski, *Konstytucyjna zasada dobra wspólnego* [Constitutional Rule of Common Good], *op. cit.*, p. 28.

<sup>61</sup> M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego*, [Common Good as the Foundation of Polish Constitutional Order] Warszawa 2012.

The common good should be clearly distinguished from the common interest, the public interest, the general interest etc. (...) In a case of interpretation of art. 1 according to the paradigmatic conception, the common interest (public, general etc.), as well as the interest of an individual (personal interest, group interest etc.) can be considered elements of the common good.<sup>62</sup>

The author derives this opinion from an analysis of Constitutional Tribunal decisions.<sup>63</sup> At the same time he describes the common good as “the first constitutional value”, emphasising its uniqueness.<sup>64</sup> Summarising the entirety of his analyses, he ascertains that the common good is a sum of conditions of the social life which allow for, and facilitates, an integral development of all the members of a political community and the communities they form. According to the rule of the common good expressed in art. 1 of the Constitution, the state should be considered as such a sum of conditions of social life. Therefore, each of its elements, including every legal regulation, should be, to a possibly large degree, elements constituting a whole which creates the conditions for the integral development of the members of a political community and the communities they form. On the basis of the rule of the common good, he also promulgates the thesis that the servitude of the state towards an individual is the central idea of the Constitution of 1997. Decisions pertaining to the relations of an individual towards the state included in art. 1 indicate that the conditions of the state’s existence as a whole, including those related to external security, are not absolute values, the realisation of which should always be prioritized over the realisation of other values. An actually existing state and its existence is not a prime and inviolable value.<sup>65</sup>

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<sup>62</sup> *Op. cit.* pp. 430-431. The same, p. 438.

<sup>63</sup> Chapter *Orzecznictwo Trybunału Konstytucyjnego a paradygmatyczne rozumienie dobra wspólnego* [The Legislation of the Constitutional Tribunal vs the Paradigmatic understanding of Common Good], pp. 359-432.

<sup>64</sup> M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego* [Common Good as the Foundation of Polish Constitutional Order], *op. cit.*, p. 430, 441.

<sup>65</sup> *Op. cit.* p. 433. C.f. M. Piechowiak, [in:] Collective work, ‘Preambuła Konstytucji Rzeczypospolitej Polskiej’ [The Preamble to the Constitution of Poland], Warszawa 2009, pp. 111-124; J. Trzeciński, *Rzeczpospolita Polska dobrem wspólnym wszystkich obywateli* [The Republic of Poland as the Common Good of all its Citizens], [in:] J. Góral, R. Hauser, J. Trzeciński (ed.), ‘Sądownictwo administracyjne gwarantem wolności i praw obywatelskich’ [Administrative Jurisdiction as the Guarantee of the Freedom and Rights of Citizens] 1980-2005, Warszawa 2005, pp. 452-460. See also A. Żurawik, *Interes publiczny w prawie gospodarczym* [Public Interest in Business Law], *op. cit.*, passim.

### 3.3. The concepts identifying the common good and the public interest

A different approach to the problem currently discussed was presented by the Constitutional Tribunal. K. Complak, discussing the Tribunal's judicature, wrote:

From the references to this category in the justifications of its sentences results that it puts an equal sign between the common good and the public interest (of all people). It refers to the common good when wants to limit the individual rights, protect the balance of budget and the government's finances or to prevent the avoidance of bearing the public burdens by citizens. The discussed concept is also a directive of choosing, if it is necessary, the common good rather than the individual good or particularistic interest of the group. This directive should be used as a criterion of action in the social market economy or as an obligation of solidarity. In other words, Art. 1 of the Constitution can be interpreted as an opportunity to sacrifice some of our private interests for the common good.<sup>66</sup>

In such a context, the Tribunal's judgment of 20.3.2006<sup>67</sup> states that "the restriction of certain rights protected by the constitution may be introduced due to the common good. According to the Constitutional Tribunal, the right to privacy is such an example. *Not always, however, will the common good outweigh individual interests* (emphasis by the author)."

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<sup>66</sup> K. Complak, *Normy pierwszego rozdziału Konstytucji RP [The Standards in the First Chapter of The Constitution of Poland]*, *op. cit.*, p. 50. The author refers to the sentences in the following cases: SK 11/98 (OTK 1999/2/22), K 17/00 (OTK 2001/1/4), K 47/01 (OTK-A 2002/1/6) and SK 23/01 (OTK-A 2002/3/26). C.f. M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego [Common Good as the Foundation of Polish Constitutional Order]*, *op. cit.*, p. 437. See also M. Stahl (ed.), *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie [Administrative Law. Terms, Institutions, Rules in both the Theory and the Legislation]*, Warszawa 2009, pp. 72-73; L. Bielecki, „Interes publiczny” jako samodzielna przesłanka w zakresie ulg w spłacie zobowiązań podatkowych w świetle przepisów ustawy Ordynacja podatkowa – zarys zagadnienia [„Public Interest” as the Independent Premise of Tax Liabilities in the Light of the Provisions of the Tax Ordinance Act – an outline of the issue], [in:] M. Münnich, A. Zdunek (ed.), *Stanowienie i stosowanie prawa podatkowego w Polsce [Establishing and Applying the Tax Law in Poland]* Lublin 2010, p. 236; M. Tabernacka, *Zakres wykonywania zadań publicznych przez organy samorządów zawodowych [The Scope of the Public Tasks Execution by the bodies of professional authorities]*, Wrocław 2007, p. 88.

<sup>67</sup> K 17/05; OTK-A 2006/3/30.

Thus, the Tribunal identifies the common good with the public interest, since it states that the common good does not always outweigh the interests of the individual. Furthermore, it refers to the relationship between the public interest and individual interests and to the dispute regarding the importance of these particular interests.<sup>68</sup>

Adam Szafranski writes about the public interest and the common good when discussing legal problems surrounding the activities of public entrepreneurs.<sup>69</sup> In his opinion, an analysis of legal provisions, particularly those contained in the Constitution, leads to the conclusion that it is possible to use both terms interchangeably, hence the meaning of the term “common good” does not differ from the meaning presented by the Author in relation to the public interest.

What is the proof for such a position? First of all, the sentence of the Constitutional Tribunal in which it held that “the directive chooses, if necessary, the common good rather than the good of the individual or particularistic interest of the group”<sup>70</sup> results from Art.1 of the Constitution of Poland. He also adds that the public interest cannot merely constitute the opposite of private interests, yet neither is it the sum of private interests.

In this case, certain doubts may also be expressed regarding whether it is appropriate to treat the category of the common good and the public interest within the same range, to use these terms interchangeably and without clear reference to the particular meaning, axiological or other i.e. praxeological, is ascribed to them by the Author. These categories can be understood differently and, moreover, if the legislator considers the concept of the public interest unequally and gives it a different meaning and different nature at the same time, depending on the subject of the regulation that was visible in the above-mentioned legal definitions, therefore, the identification of both categories is very doubtful. The common interest and the common good are also considered as being equivalent by Anetta Jaxa – Dębicka<sup>71</sup> and Joanna Blicharz.<sup>72</sup>

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<sup>68</sup> See also the Tribunal’s judgment of 30.1.2001, K 17/00, OTK 2001/1/4.

<sup>69</sup> See A. Szafranski, *Przedsiębiorca publiczny wobec wolności gospodarczej [A Public Entrepreneur vs the Economic Freedom]*, Warszawa 2008, p. 124.

<sup>70</sup> The aforementioned Tribunal judgment in the case K 17/00.

<sup>71</sup> A. Jaxa – Dębicka, *Sprawne państwo [Efficient State]*, Warszawa 2008, p. 94.

<sup>72</sup> J. Blicharz, *Kategoria interesu publicznego jako przedmiot działania administracji publicznej [The Category of Public Interest as the Subject of the Public Administration’s Actions]*, op. cit., p. 41. C.f. B. Jordan, *The Common Good: Citizenship, Morality and Self-interest*, Oxford 1989, passim.

Certainly, the above do not constitute the sun total of views in which reference to the relationship between the common good and the public interest has been made. Moreover, in a number of statements about the common good, this relationship was not discussed at all, as the authors were interested in completely different issues.<sup>73</sup>

## 5. Common good in European Union law

The issue of common good (*bonum commune*) can be considered, *inter alia* in relation to community good (*bonum communitatis*) or, to be precise, to the good of the European Union.<sup>74</sup>

It may be concluded from my earlier considerations that the common good is capable of being understood in different ways. It may be defined in the axiological sense by certain values, in the praxeological sense, associated with aims, or in terms of needs. The reference to values may be deemed beneficial, since many of them are directly mentioned in national constitutions and in international Treaties. They may be seen as values-objectives, as they constitute values and an effort is made to achieve them by implementing individual regulations.<sup>75</sup>

The European Union is undoubtedly a guarantor of the protection of certain common goods, such as peace, security, public health, cultural

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<sup>73</sup> See e.g. the concept of Z. Cieślak, expressed in a dissenting opinion to the TK sentence of 20.4.2011 r., 7/09, OTK-A 2011/3/26.

<sup>74</sup> I would like to remind the reader that Article 1 of TUE says that “The Union shall replace and succeed the European Community”.

<sup>75</sup> The values you do not want to achieve are not values-objectives. See K. Pałeczki, *Prawoznawstwo. Zarys wykładu. Prawo w porządku społecznym [Jurisprudence. An Outline of a Lecture. Law in the Social Order]*, Warszawa 2003, pp. 86-87. The concept of the values-objectives in general philosophy was noticed by, for example, Henryk Elzenberg (1887-1967): In his formal axiology, and similarly to Kant, Elzenberg determined values as both value and the purpose of somebody's effort (...) acknowledging that values are an aim of someone's aspirations (...) and not excluding the fact that some purposes are worthless, as well as that there are values that nobody wants to achieve. Elzenberg assumed that there is something that is both the value and the purpose of someone's efforts. (M. Michalik, *Wartości a potrzeby [Values vs Needs]*, [in:] A.L. Zachariasz, 'Byt i powinność czyli status i funkcje wartości' [Existence and Duty, the Status and Functions of Values], Rzeszów 2005, p. 153).

heritage, democracy, the rule of law, human rights and freedoms or pluralism.<sup>76</sup> It goes without saying that some of the values are not permanent and universal, given the development of societies (*NB* development is also regarded as one of the most important values), therefore certain objectives can be equally variable, depending on the political, social, economic, and, consequently, legal perspective.<sup>77</sup> This in turn causes issues based on the concept of common good to be analysed by such bodies as the Court of Justice of the European Union. Over the years, the Court has used a number of similar phrases in its case law, including:

- 1) common good<sup>78</sup>,
- 2) general good<sup>79</sup>,
- 3) good of public interest.<sup>80</sup>

The Court has also used different varieties of the term “interest”:

- 1) common European interest<sup>81</sup>,
- 2) common interest<sup>82</sup>,

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<sup>76</sup> See also e.g. A.D. Smith, *National Identity and the Idea of European Unity*, ‘International Affairs’ (I)1992, at pp. 55-76.

<sup>77</sup> See. M. Goldoni, *Constitutional Pluralism and the Question of the European Common Good*, ‘European Law Journal’ 2012, vol. 18, no 3, at pp. 385-406.

<sup>78</sup> Judgment of the Court of 26.3.2009, Commission of the European Communities v Italian Republic, C-326/07, ECR 2009 p. I-02291.

<sup>79</sup> Judgment of the Court of 7.3.2013, DKV Belgium v Association belge des consommateurs Test-Achats ASBL, C-577/11, nyr.

<sup>80</sup> A. Wentkowska, *Bonum commune v. bonum communitatis- harmonia czy rozdzźwięk?* Selected Cases from the Case Law of the Court of Justice of the EU, the Paper on the convention of Departments of the Theory and Philosophy of the Law, 19-22 September 2010, Hawk Mountain, p. 4 (text available on the website: <http://www.prawo.univ.gda.pl/teoria/uploads/zjazd/Wentkowska.pdf> – 18.6.2013); see also: A. Wentkowska, *Bonum commune versus bonum communitatis. Wybrane przypadki z orzecznictwa Trybunału Sprawiedliwości UE* [Selected Cases from the Case Law of the Court of Justice of the EU], [in:] O. Nawrot, S. Sykuna, J. Zajadło (ed.), ‘Konwergencja czy dywergencja kultur i systemów prawnych?’ [Convergence or Divergence of legal Cultures and Systems?] Warszawa 2012, pp. 323-329.

<sup>81</sup> Judgment of the Court of 9.6.2011, Comitato «Venezia vuole vivere» (C-71/09 P), Hotel Cipriani Srl (C-73/09 P) and Società Italiana per il gas SpA (Italgas) (C-76/09 P) v European Commission. Joined cases C-71/09 P, C-73/09 P and C-76/09 P. ECR 2011 p. I-04727.

<sup>82</sup> Judgment of the General Court of 1.7.2010, Métropole télévision (M6) and Télévision française 1 SA (TF1) v European Commission, joined cases T-568/08 and T-573/08, ECR 2010 p. II-03397.

- 3) general interest<sup>83</sup>,
- 4) public interest<sup>84</sup>,
- 5) interest of parties, including the interests of the Member States<sup>85</sup>.

A. Wentkowska notes, however, that the Court of Justice of the European Union refers surprisingly rarely to the common good. The clause is most frequently used by the Court to justify restrictions on the right to the free movement of persons and establishment with requirements of common good, at the expense of the rights of individuals.<sup>86</sup>

Undeniably, many goods or interests are common to all of the societies of the European Union whilst the common good, which is a stimulus of the integration of communities, is not only a reflection of legal factors, since it is equally determined by political and socio-cultural elements. Therefore, the analyses conducted by the Court of Justice of the European Union are based largely on a contextual analysis of legal status, often supported by non-normative economic and social considerations. For these reasons, A. Wentkowska believes that the Court “has developed a pragmatic definition of common good or common interest of the European Union, which differs depending on the circumstances of a given case, and which focuses

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<sup>83</sup> Judgment of the General Court (Third Chamber) of 27.2.2014, *Ahmed Abdelaziz Ezz and Others v Council of the European Union*, T-256/11, nyr; see also: T. Hamoniaux, *L'intérêt général et le juge communautaire*, Paris 2001, passim. M. Dybowski underlines the difference between the concept of general interest itself and its goals. He claims that in order to justify the limitations of fundamental rights it is not enough to refer to general interest. One should rather identify this interest by indicating the goals that are subordinate to it. The phrase “the goals of general interest” is related to a collection of certain states of affairs, understood in a distributive sense, each of which is a certain aspect of general interest. Those goals can be also described as goods constituting the common good. M. Dybowski notices also that the Court of Justice perceives the category of general interest as a “counterweight” to fundamental rights, which do not have absolute character and are subject to balancing. Additionally, the broad scope of functions of the category of general interest and the difficulties of defining it precisely in practical jurisdiction suggest also some risks connected with using this concept by the Court. This can lead to an overuse of the discussed clause. (M. Dybowski, *Prawa fundamentalne w orzecznictwie ETS [Fundamental Rights in the Jurisdiction of the European Court of Justice]*, Warszawa 2007, pp. 152 – 153, 167 and the references provided there).

<sup>84</sup> Judgment of the Court of 6.3.2014, *Napoli*, C-595/12, nyr.

<sup>85</sup> Order of the President of the Court of 17.10.2011, *Lück GmbH & Co KG, Sandler AG and Gesamtverband der Deutschen Textil- und Modeindustrie eV v Council of the European Union and Others*, C-3/11 P(I), ECR 2011 p. I-00153; judgment of the Court of 19.9.2013 *Pensionsversicherungsanstalt v Peter Brey*, C-140/12, nyr.

<sup>86</sup> A. Wentkowska, *Bonum commune*, *op. cit.* pp. 5-7.

on common good of the European Union (in the sense of the EU objectives), rather than the good of other entities. (...) The principles of public interest, general interest or common good are used interchangeably, without drawing a clear distinction.”<sup>87</sup> The author goes on to say that the judges of the Court, as well as its advocates-general, do not regard the category of the common good as particularly significant, in contrast to the courts and tribunals of the Member States. They rather refer to it in the sense of an additional requisite and a secondary argument included in the statement of reasons for a decision or opinion. According to the author, it may arise from the fact that the term “common good” is not directly mentioned in the nomenclature of the Treaties. Instead, the Treaties contain similar phrases, such as “common interest”, that are used in their pure sense.<sup>88</sup>

However, it should be noted that such interpretation of the common good and public interest, which justify intrusion into the realm of constitutional liberties and the freedoms guaranteed by the Treaties, may have slightly different connotations in times of prosperity and stable development, than they do during times of crisis, such as that which the Member States of the European Union have experienced in recent years.

<sup>87</sup> A. Wentkowska, *Bonum commune ...*, *op. cit.* p. 10.

<sup>88</sup> *Op. cit.* pp. 10-11. See also: E. Falkowska, K. Rudzińska-Ludwiczynska, *Spór o najwyższe dobro* [Argument over the Greatest Good], Warszawa 2001; M.A. Krąpiec, *Dobro wspólne i zagrożenie alienacją* [Common Good and the Risk of Alienation] [in:] T. Rakowski (ed.), ‘U źródeł tożsamości kultury europejskiej’ [At the Sources of the European Culture Identity], Lublin 1994; J. Krucina, *Dobro wspólne* [Common Good], [in:] *Encyklopedia katolicka* [Catholic Encyclopedia], vol. 3, Lublin 1989, col. 1379-1382; R. Piotrowski, *Dobro wspólne i prawo* [Common Good and Law], ‘Przegląd Socjalistyczny’ 2007, no 2, p. 12; M. Wierzbicki, *Dobro wspólne jako kategoria normatywna* [in:] O. Bogucki, S. Czepita (ed.), ‘System prawny a porządek prawny’ [Legal System vs. Legal Order] Szczecin 2008; W. Wołpiuk (ed.), *Dobro wspólne. Problemy konstytucyjnoprawne i aksjologiczne* [Common Good. Constitutional and Axiological Problems], Warszawa 2008; S. Bok, *Common Values*, Columbia 1984; J.B. Carey, *The Common Good in Catholic Social Thought*, ‘St. John’s Law Review’ 2001, vol. 75, no 2; B. Cronin, *Institutions for the Common Good. International Protection Regimes in International Society*, Cambridge 2003; B.J. Diggs, *The State, Justice, and the Common Good; An Introduction to Social and Political Philosophy*, Chicago 1974; L. Dupré, *The Common Good and the Open Society*, [in:] R.B. Douglass, D. Hollenbach (ed.), ‘Catholicism and Liberalism’, Cambridge University Press, 1994; R.A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty With the Common Good*, Massachusetts 1998; Ch.J. Erasmus, *In Search of the Common Good*. New York 1977; J. Maritain, *The Person and The Common Good*, New York 1947; M.G. Raskin, *The Common Good: Its Politics, Policies, and Philosophy*, New York – London 1986; L.J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, ‘University of St. Thomas Law Journal’ 2005, vol. 3, no 1.



This problem has primarily affected the financial sphere, where it has triggered a series of changes, both in the European Union and the Member States. It gave particular importance to the question of regulation.<sup>89</sup>

It is submitted that the term “regulation”, which often carries pejorative connotations, and which is associated with the limitation of freedom and capacity for action, may be interpreted differently in times of crisis than in times of prosperity. This conclusion is based on the observation that it is much easier to introduce changes to regulatory policy in difficult times, when such issues as the need for reduction of the propensity to take financial risks are widely accepted; whereas in times of prosperity it is difficult to make regulatory changes, because of the possibility of widespread criticism and the risk of surrendering to pressure. Hence, the term “regulatory pendulum” is sometimes used to refer to the increased need for regulation in times of crisis and in the wake of a crisis, and deregulatory pressure during periods of prosperity.

It may be also added that financial markets in individual Member States and the internal market of the European Union constitute (or, at least, *should* constitute) one body. This again makes it necessary to take action on an international, European scale, as it is insufficient to merely reform national markets.<sup>90</sup> In recent years, this assumption has given rise to the necessity of introducing a series of reforms arising from the crisis within the European Union, including reforms regarding the structure of European financial supervision. In fact, the experience of the crisis revealed many significant deficiencies in the system. The hitherto solutions were found to be grossly insufficient in effectively preventing an international crisis. This revealed serious shortcomings in the field of cooperation, coordination and trust between national supervisory authorities, as well as in terms of the consistency of their actions.<sup>91</sup>

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<sup>89</sup> It is understood as the legal increase of the public factor’s influence on the freedom realm. It should be differentiated from so called “economic regulation”, particularly with regards a state’s intervention in the market economy, and whose basic purpose is to ensure the market mechanisms and competition in those areas of economic activity, in which those mechanisms do not exist, particularly in the net sectors of public use, e.g. energy, telecommunication etc.

<sup>90</sup> See also: K. Działocha, *Podstawy prounijnej wykładni Konstytucji RP [The Rules of the European Union – Pro Interpretation of the Constitution of Poland]*, ‘Państwo i Prawo’ 2004, no 11, at pp. 28-33.

<sup>91</sup> See R. Barrell, T. Fic, J.F. Gerald, A. Orazgani, R. Whitworth, *The Banking Sector and Recovery in the EU Economy*, ‘National Institute Economic Review’ 2011, no 216,

Therefore, the common market requires common actions and sacrifices in times of crisis, so as to enable the possibility of taking advantage of its benefits during periods of prosperity.

## 6. Conclusions

To summarize the above considerations, it may be discerned that constitutional legislators use the term “common good” in a variety of meanings, and the common good which plays a fundamental role here is the Republic of Poland. This interpretation may serve as one of the possible approaches to the clause in question.<sup>92</sup>

In other cases, no consent exists as regards how to understand the term. In particular, some authors undertake to distinguish between the common good and public interest, whereas others use these terms synonymously.<sup>93</sup> Moreover, some authors associate the common good with values, thus understanding the notion in an axiological sense, whereas others identify it with objectives or needs, although they sometimes combine different approaches. However, it is fundamentally understood that the common good is not the sum of individual goods, an observation which was made by St Thomas Aquinas. What is more, the essence of the notion changes with time.

Some authors have tried to describe the relationship between the common good and public interest in terms of primacy and inferiority. However, as mentioned above, it is difficult to clearly state that the common

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p. 41; J.-Ch. Rochet, *Why Are There So Many Banking Crises? The Politics and Policy of Bank Regulation*, Princeton 2008, pp. 23-27; S.G. Cecchetti, D. Domanski, G. von Peter, *New Regulation and the New World of Global Banking*, ‘National Institute Economic Review’ 2011, no 216, *op. cit.*, pp. 29-40; M. Dewatripont, J.-Ch. Rochet, J. Tirole, *Balancing the Banks: Global Lessons from the Financial Crisis*, Princeton 2010, p. 10.

<sup>92</sup> W. Brzozowski also states that the Republic of Poland does not use the content of the common good concept entirely (see. W. Brzozowski, *Konstytucyjna zasada dobra wspólnego [Constitutional Rule of Common Good]*, *op. cit.* p. 20).

<sup>93</sup> See also: R. Sowiński, *Interes publiczny – dobro wspólne. Wartości uniwersalne jako kategorie kształtujące pojęcie administracji [Public Interest – Common Good. Universal Values as the Categories that Shape the Concept of Administration]*, [in:] Z. Niewiadomski, Z. Cieślak (ed.), *Prawo do dobrej administracji. Materiały ze zjazdu Katedr Prawa i Postępowania Administracyjnego* [A Right to Good Administration. Materials of the Congress of the Law and Administration Chairs], Warszawa 2003, pp. 564-583.

good is a higher or more important value than public interest, since it is objective and belongs to the realm of “being”, whereas public interest is placed in the realm of “having” and has a rather subjective character. Both categories are *de facto* used in different senses. The legislature itself sometimes uses an axiological justification of public interest, whereas on other occasions it diverges from such an interpretation in favour of the hybrid approach. Thus, the scope of meaning of both the common good and public interest may change from situation to situation and the realm of “being” might well be characteristic of both categories, rather than merely one of them. This interpretation is possible if the public interest is understood as a specific, truly-existing value, which is entitled to protection, and which may sometimes have a physical character.

However, it is typically assumed that the common good contributes to achieving and protecting the individual good and that it is connected with human dignity. Intrusion into the realm of the dignity of an individual constitutes such a serious violation of the fundamental principles of the social order that it no longer solely concerns the persons involved.