The Limitation Period and Taking Into Account Expiry of the Limitation Period *Ex Officio* in Polish Civil Law

The adoption of a certain form of limitation institution is not subject to *a priori* rule which would force a specific legal effect. It is up to the legislator to decide whether, after the expiry of the limitation period, the claim will expire or whether it will continue to exist as a non-complete claim. Similarly, the underlying issue is the way in which the circumstances of an expired claim are taken into account. It is worth mentioning here that the Polish legislator has made changes in this field over the years. These modifications were caused by ideological and social reasons. This raises the following question: Which way of taking the limitation period into account – whether by court or at the request of a party – fits more appropriately the Polish legal system, since both are legally permissible?

The law of 13 April 2018 on the amendment of the Polish Civil Code and some other laws (Journal of Laws, item 1104), which has substantially modified the limitation of property claims, is crucial for the above deliberations. Such a fundamental change in the rules on the statute of limitations has not been carried out for almost 30 years (when in 1990 the legislator abandoned dualism in the way that the limitation period had been taken into account). It has been restored by way of an amendment and precisely by requiring *ex officio* limitation against consumers (Article $117(2^1)$ of the Polish Civil Code), which was intended to improve the performance of the limitation function. The continuation of the legislator's intention is included in Article 117^1 of the Polish Civil Code, in which it has legitimately introduced an instrument to prevent the making of transparently unfair judgments, enabling courts to correct judgments on the basis of justice. The second important element of the reform was the reduction of the overall limitation period from 10 to 6 years (Article 118 sentence 1 in conjunction with Article 125 § 1 of the Polish Civil Code). The last major component of the institution modification was, in the opinion of the legislator, the simplification of the way in which the end of the limitation period of more than two years was determined (Article 118 sentence 2 of the Polish Civil Code).

The explanatory memorandum to the draft amendment states that its purpose is to shorten the basic limitation periods and to tighten the limitation regime for claims against consumers. Shorter deadlines are intended to mobilize the parties to shape their legal relations more quickly. It is noted that disciplinary changes will also have a positive impact on the

interests of third parties, as they will contribute to the stability and security of social relations. The explanatory memorandum to the draft law amending the Polish Civil Code states that the certainty and security of legal trade and the objective predictability of the effects of the conduct of civil law entities, as derived from the rule of law, are not sufficiently achieved by a legal structure in which the limitation period could only be taken into account at the request of the party. However, as further explained, the amendment does not mean that the court will, of its own motion, carry out proceedings to take evidence. Its duties will include assessment whether the consideration of the limitation period will not be in conflict with the principle of justice.

The introduction of separate rules applicable to expired claims against consumer is explained by the general argument of protection of consumer, who is a weaker party of the legal relationship. Many consumer protection mechanisms are derived from the fact that there is information asymmetry between the consumer and the professional player in the economic market. The consumer is not always aware of the possibility of exercising the limitation power and is not aware of the mechanisms governing the legal institution. The pursuit of an expired claim caused considerable uncertainty as to the decision of the court. Not only did the framework have a negative impact on the interests of private parties that were unaware of the possibility of avoiding the effects of the defendant's limitations, but also on the efficiency of the justice system or the stability of legal trade. The main reason for the ineffectiveness of the legal structure has been linked to the consumer, and therefore only if the claim is against the consumer, the court will take limitation into account *ex officio*.

All circumstances presented so far encourage the author to defend the thesis that changing the way in which the limitation period has been taken into account in relation to a claim against the consumer is sufficiently system consistent solution, substantially improves the situation of the debtor-consumer and is a positive factor in the stability and security of social relations.

Although this dissertation is devoted to methods of taking into account the expiry of the limitation period, there is a need for a wider examination of the issue. It is not possible to achieve the limitation objective solely by implementing a single legal provision or a single legal norm. A legal provision setting out how the limitation period is taken into account is a part of a larger whole. The interpretation should also include, among others, a normative system (at least a legal institution to which the provision under consideration refers) and

axiological governance system. Legal entities are guided by a certain scheme of action, i.e. functionally linked sets of solutions. The limitation period cannot be counted as an easy to present legal institution. Among the reasons for this, there are many statutory limitation periods, which are often different in length; this is an argument that often undermines the concept of rational legislator or legislative motives, which are often mutually exclusive rather than strengthen axiologically questionable legal institution.

An analysis of changes in legal framework over the years contributes to a fuller understanding of the modern legal framework and to identifying its possible development trends. The origin of the effects of the limitation period in Polish civil law will be presented in Chapter I. The specific objectives which the legislator intended to achieve by adopting specific measures to take the limitation period into account will be shown. The regulation existing at the time of the entry into force of the 1964 Civil Code, which provided for a two-pronged solution seems particularly interesting (however, both in the so-called state-owned and the common sector turnover, limitation was taken into account *ex officio*). An analysis of the evolution of a legal institution, with clarifying its properties existing at a given stage of the development of the nation, prevents hasty drawing from the theoretical framework of foreign law, not always based on identical assumptions, but operating in different systems of law.

Reference to historical arguments is methodologically similar to the comparative method, which will prevail in the next chapter. They both see the law as a dynamic phenomenon, unlike the static view of the law adopted by the dogmatic method. In contemporary law science, it would be overly simplified to assess a given legal institution, a legal norm or a legal thought and to draw conclusions in relation to them *de lege lata* or *de lege ferenda* without a historical and comparative analysis. The comparative analysis refers to solutions in German, French, English and Welsh law.

Changing the method of taking into account the expiry of the limitation period requires a re-examination of the relationship between the general principle of basing private law mechanisms on the concept of subjective law and the institution of limitation. In addition, the issue of the constitutionality of the new legal solution will be addressed. The effect of the expiry of the limitation period is the transformation of the total liability into *obligatio naturalis*. Therefore, the considerations will also include the issue of challengeability of claims. Above all, however, attention should be paid to ambiguities that arise when a court takes into account the limitation solely on the plaintiff's claim. The views established by the

doctrine and decisions of the common courts of law will be helpful in revealing the dilemmas concerning practice in the application of the limitation in the previous legal situation, i.e. before the dualism in this respect.

The number of judgments concerning limitation enforce a decision to limit the number of rulings to be taken into account in the study and to determine the criteria for their selection. At the same time, it should be noted that reference only to the courts' statements directly relating to the way limitation is taken into account would not allow the subject matter to be fully exposed. The initial research area shall be the judgments assigned to Article 117(2) of the Polish Civil Code entered into the Omega Academy LEX Legal Information System. The norm included in this paragraph provides for the defendant to waive the claim after it has been made past due. It includes both the limitation structure and the mechanism for taking it into account. The content of the paragraph has not changed since the amendment made in 1990, but the added §21 has significantly reduced its scope. As at 2 July 2020, in the LEX system there were assigned 2,889 judgments concerning Article 117(2) of the Polish Civil Code all of which have been thoroughly examined. Such extensive research material could not be fully cited in the dissertation; only judgments which clearly illustrate the practical problems that have emerged and the ways in which they have been dealt with, have been taken into account. It should also be noted that the views of the jurisprudence expressed in the paper will also apply to other regulations than the limitation period, and therefore their place in the LEX system will be different from the aforementioned Article 117(2) of the Polish Civil Code.

The issues most frequently addressed in court judgments in the context of the application of the norm under examination are: the way in which the debtor can effectively invoke the expiry of the limitation period, the addressee to whom the statement is addressed and the time frame within which such action is possible. In addition, the following issues will also be addressed: the legal nature of the waiver of the limitation period, the correct way of calculating the limitation period (i.e. the concept of a claim due, the circumstances which trigger the beginning of the period, the interruption – in particular the recognition of the claim, the suspension of the limitation period) and the legal effects of the expiry of the limitation period. In reference to the case law, it has also been considered whether application of an *actio Pauliana* is possible in the event of the debtor's failure to exercise the limitation against creditors and to treat the limitation claim as an abuse of subjective rights. The wider view of the judiciary on the subject matter is also interesting, where courts refer to the concept

of subjective rights by presenting a regulatory limitation model, read the *ratio legis* of regulation or analyze the limitation binding in other areas of law.

The last chapter of the paper is intended to help answer the question of whether the amendment is justified. In this part of the study, materials relating to the legislative work on modernizing the legal institution has been widely used. They will allow the author to understand the objective of the change made by the legislator. In the course of the work on the law there were already opinions criticizing a double-track system and how it takes into account the expiry of the limitation period. These views are an important illustration of the possible reservations that in the studies carried out were used to verify the legal structure in the light of constitutional law or civil procedure standards. Limiting the new solution only to claims directed against the consumer requires the highlighting of the problems arising when granting the consumer status to the party. Any change in the law raises certain doubts, so in addition to the proposals of other legislative measures that allow for achieving the objective pursued by the legislator, the paper includes considerations on the possibility of reducing the consumer's low legal awareness in a non-regulatory way.