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LEGAL NATURE OF THE POLISH FINANCIAL SUPERVISION AUTHORITY ANNOUNCEMENT

Abstract

The main issue of the article is to present the legal nature of the PFSA (KNF) Announcement. The KNF's Announcement should therefore be treated as a type of "information message" or, in other words, an "instrument of communication with the market" that fulfils supervisory purposes and whose value is to present a specific supervisory position to market trading participants in areas that are key for the supervisor. The crucial author's thesis are the following. Firstly, it is important to underline that this instrument cannot be used for purposes other than conveying "supervisory expectations" towards trading participants. Secondly, there is no clear legal basis for the KNF to issue Announcements, which are then published on the website of this office. Therefore, this case requires the intervention

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of the legislator, which should be treated as a *de lege ferenda* conclusion of this article. The regulation area analyzed in this article has never been the subject of scientific research before, which confirms the originality and novelty of the article. The research methodology adopted in the article was based on the analysis of the regulations, analysis of the literature and court's verdicts.

Key words: Polish Financial Supervision Authority; Announcement; Communication; Financial Market;

JEL Classification: K2, K4

1. Introduction

The KNF Announcement is not a source of law and cannot be an independent legal basis for issuing an administrative decision (for example, see Gałus 2022: 23]). It is a set of guidelines or information addressed *erga omnes*, referring to a specific phenomenon identified by the financial supervision as important. Therefore, the Announcement should be treated as a type of „information message" or, in other words, an „instrument of communication with the market", fulfilling supervisory purposes, and the value of which is to show trading participants on the market a specific position of the supervisor, in areas that are key for the supervisor. It is important that this instrument is not abused or used for purposes other than communicating „supervisory expectations" towards trading participants. The purpose of this article is to identify the legal basis for the KNF to issue Announcements – strictly assigned to the implementation of financial supervision – which, however, is not an unambiguous and obvious issue.

2. PFSA (KNF) communication with the Market

A circumstance warranting particular attention is the imperative for as effective as possible collaboration between financial supervisory authorities and the supervised entities engaged in commercial activities within the financial market. This constitutes a constant relationship that must be assessed from the perspective of the regulatory sphere, *ius publicum*, which denotes the public-law competencies of a state's economic administration body to exert authoritative influence (intervene) in the realm of entrepreneurs' autonomous activities. The concept of regulating commercial activities derived from constitutional axiology (Article 22 in conjunction with Article 20

of the Constitution of the Republic of Poland[1] prescribes the execution of specific supervisory tasks towards entrepreneurs selected by the legislator through the state's economic administration bodies, which, in the context of the present subject matter, is carried out by the Financial Supervision Authority (KNF) in relation to designated financial institutions. These tasks are associated with the necessity of protecting the *important public interest* – as a fundamental premise for the regulation of commercial activities[2]. The entire concept of the regulation of economic activity, particularly with regard to financial institutions, therefore presupposes the exercise of supervisory authority by the Polish Financial Supervision Authority (KNF) over financial institutions from the very commencement of their business operations up to the potential liquidation of a given entity. To put it in a certain schematic simplification, it ought to be noted that the KNF grants authorisations and issues other administrative acts to financial institutions *in statu nascendi*—that is, at the stage preceding the commencement of their operational activity—and subsequently, by exercising its supervisory powers, continuously monitors such institutions. This includes scrutinising their capital adequacy, identifying risks inherent in their activity, as well as issuing consents for amendments to articles of association, changes in the shareholding structure, modifications in the composition of corporate bodies, *et cetera*—for as long as the institution in question pursues regulated economic activity.

Whereas the concept of financial supervision, emanating from the necessity to maintain oversight of regulated economic activities, presupposes substantial intervention of state administration in the sphere of entrepreneurs freedom (specifically concerning financial institutions), it is imperative to establish appropriate communication channels between the parties within this distinctive 'supervisory relationship'.

In this context, communication encompasses the conveyance of 'supervisory expectations' to supervised entities in such a manner as to ensure their comprehensive understanding of both the direction of supervisory policy

[1] *Verba legis*: The restriction of the freedom of commercial activity is permissible only by statute and solely on the grounds of an **important public interest**.

[2] The justification for restricting economic freedom rests on the **important public interest**. The Constitution does not define it, but jurisprudence of the Constitutional Tribunal (TK) and scholarly consensus generally hold that this concept encompasses national security, public order, environmental protection, public health, and public morality (cf. e.g. [Garlicki 2001: 5 et seq.]).

and the specific requirements stipulated by the Financial Supervision Authority.

It must be hereby emphasized that the aforementioned 'supervisory expectations' may incorporate both directives concerning the requisite conduct of financial institutions and information bearing substantial market significance. Said mechanism indisputably serves the mutual benefit of both parties within the 'supervisory relationship', insofar as its primary objective is to preclude unnecessary misinterpretations and potential disputes between the supervisory authority and the financial institutions subject to its oversight.

Of material significance is the incontrovertible circumstance whereby the aforementioned communication between the supervisory authority and supervised entities **must be strictly confined to serving supervisory objectives**. Accordingly, the Financial Supervision Authority is precluded from employing such communications as a vehicle for the dissemination of *erga omnes* information or recommendations that fall outside the scope of supervisory functions, particularly where such communications lack statutory foundation. The principle enshrined in Article 7 of the Constitution of the Republik of Poland (the principle of legality) must, in this context, be adhered to with unwavering consistency[3].

By way of recapitulation, it is pertinent to note that the legislature has vested the Financial Supervision Authority with various legal instruments for executing financial supervision, which may be fundamentally categorised into two groups: 'soft' instruments (predicated upon the concept of soft law, including, inter alia, the issuance of recommendations) and 'hard' instruments, which entail specific legal liability of supervised entities (including the issuance of administrative decisions in individual cases)[4]. The art

[3] Article 7 of the Constitution of the Republic of Poland stipulates that 'Public authorities shall function on the basis of, and within the limits of, the law'. This regulation corresponds with Article 6 of the Code of Administrative Procedure, which provides that 'Public administration bodies shall act on the basis of legal provisions'."

[4] Another distinction recognised in doctrine differentiates between preventive measures, which establish supervisory guidelines for proper operation, and repressive measures, aimed at eliminating identified irregularities and implementing corresponding sanctions. Preventive supervision aims to limit excessive levels of various banking risks, whose materialisation could adversely affect safe and stable banking operations. Conversely, repressive supervision aims to impose specific penalties on particular individuals or banking institutions in response to identified irregularities in their operations, thereby preventing future improper actions that might threaten banks' safe and stable functioning [Ofiarski 2013: Note 1).

of conducting effective financial supervision lies in the judicious application of 'soft' supervisory instruments – and ultimately 'hard' instruments when necessary. The supervised entities' awareness of the supervisor's possession of such diverse supervisory instruments results in the majority of supervisory actions being resolved through persuasive approaches in the preliminary stages of supervision. Drawing upon banking law regulations as an example, it can be demonstrated that the Financial Supervision Authority ultimately possesses a considerable spectrum of supervisory tools classified as 'hard instruments' (known as *ad personam* measures) [Banasiński, Glibowski, Gronkiewicz-Waltz, Jaroszyński, Kaszubski, Wierzbowski 2009: 366–367 or Mikos-Sitek, Zapadka 2022: 1066], which include, inter alia: (i) submission of a motion to the competent bank authority for the dismissal of the president, vice-president, or other management board member directly responsible for irregularities identified by the Financial Supervision Authority; (ii) suspension of the aforementioned management board members until the supervisory board adopts a resolution regarding their dismissal at its next meeting; (iii) restriction of the bank's operational scope or that of its organisational units; (iv) imposition of financial penalties on the bank; and (v) revocation of the bank establishment permit and decision on bank liquidation [Article 138(3) of the Banking Law Act][5]. The implementation of *ad personam* supervisory measures concerning supervised banks typically occurs in response to the supervised entity's failure to react to warnings issued by the Financial Supervision Authority [Mianowana 2013: 475]. It is noteworthy that the *ad personam* measures available to the Financial Supervision Authority in relation to banks are directed either towards specific individuals serving as bank organ members or, alternatively, directly towards the bank as an entity [Bączyk 2000: 150–151].

Nevertheless, appropriately conducted dialogue between the supervisory authority and supervised entities does not invariably warrant the deployment of the aforementioned 'hard instruments', which should be preserved as ultima ratio measures, to be implemented solely in circumstances necessitating the escalation of supervisory mechanisms vis-à-vis a particular supervised entity. Consequently, the availability of 'soft' (persuasive) supervisory instruments proves fundamentally significant, as such instruments facilitate the effective realisation of supervisory objectives without necessitating

[5] For more information on supervisory instruments, see inter alia: [Ofiarski 2011: 517–521].

recourse to 'hard' supervisory instruments in the absence of compelling circumstances.

In summation, the execution of financial supervision therefore represents a delicate balance between the continued deployment of 'soft' supervisory instruments and the point at which 'hard' supervisory intervention becomes necessary within the sphere of economic activity under supervision.

3. PFSA (KNF) Announcement

In order to position the **Financial Supervision Authority's announcements** within the broader spectrum of supervisory instruments available to financial supervision (presuming a certain proficiency in undertaken actions), it is first necessary to emphasise the significant role of the 'persuasive' supervisory instrument embodied in the **Financial Supervision Authority's recommendations**. In other words, within the discussed communication framework between the supervisor and financial institutions, recommendations indisputably play a paramount role, acquiring particular significance in the context of banking supervision[6]. These recommendations constitute one of the so-called 'soft' mechanisms through which the supervisor influences financial market operations. They should therefore be construed as a form of **'official didactic** instruments, establishing operational models for banks in relation to specific risk types, as they serve their proper assessment and address appropriate safeguards against specific risks' [Krzyżewski: 2000, 111–121].

The legal position and functional significance of the Financial Supervision Authority's recommendations must be derived from the model (structure) of Poland's system of universally binding law. The Financial Supervision Authority, as a state economic administration body, operates exclusively on the basis of legal provisions (*vide* the aforementioned principle of legality), must observe the closed catalogue of sources of universally binding law (Article 87 of the Constitution of the Republic of Poland), and furthermore conducts proceedings based on highly formalised administrative procedure provisions[7]. Conversely, the Banking Law Act, for instance, contains numer-

[6] Pursuant to Article 137(1)(5) of the Banking Law Act, the Financial Supervision Authority may issue recommendations concerning good practices for prudent and stable bank management.

[7] For further discussion, see inter alia [Wajda 2009].

ous indeterminate provisions, introduced to facilitate the challenging art of financial supervision, which incorporate an element of discretion[8] (e.g., the occurrence of such indeterminate premises as 'warranty of prudent and stable bank management', applicable both to candidates for bank management board membership and potential bank shareholders)[9]. **The supervisory art thus consists, inter alia, of maintaining market-comprehensible coherence (for supervised entities and their clients) between 'rigid' administrative law norms and 'indeterminate' banking law norms**, which, considering Polish supervisory experience post-1989 and the high level of security in the Polish financial market, has been executed by the supervisor with near impeccability.

A significant nexus (binding element) between these two spheres of supervision (administrative and banking) is therefore constituted by 'soft' recommendations, sometimes categorised as **soft law** – a formula particularly prevalent in contemporary normative constructions and appropriate for modern free-market economies[10]. The aforementioned supervisory recommendations[11] represent a distinctive means by which the supervisor communicates certain spheres of good practice that supervised entities should implement – prior to any necessity arising for the application of 'hard' (administrative) supervisory instruments[12]. Supervised entities, whilst occasionally expressing varying degrees of justified reservations regarding the arbitrariness of supervisory recommendations, have become accustomed to this distinctive 'communication channel' with the authority – thereby securing a high degree of certainty regarding supervisory expectations. By way of conclusion, one might venture the proposition that maintaining 'soft' recommendations serves the interests of supervised entities themselves, as such recommendations may, in certain operational areas, reduce uncertainty regarding supervisory policy direction.

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8 Discretion in decisions taken by public administration bodies is permissible to the extent that such latitude is provided for by legal provisions – as is the case with numerous indeterminate provisions of banking law.

9 e.g., Article 30(1)(2) of the Banking Law Act.

10 For further discussion on soft law, see inter alia [Zapadka 2007: 41 et seq].

11 For instance, those concerning credit policy in banks.

12 By way of example, through recommendations, the supervisor advocates certain actions expected from supervised entities from the perspective of 'prudent and stable bank management', compliance with which obviates the necessity for the Financial Supervision Authority to initiate specific proceedings against particular financial institutions

Beyond the aforementioned recommendations, the **Financial Supervision Authority's announcements** constitute another distinct mode of 'market communication'. Whereas the legal basis for the issuance of recommendations by the Financial Supervision Authority derives explicite from statutory provisions (as heretofore discussed), the question of legal foundations for the issuance of announcements presents a more intricate matter, as shall be expounded hereinafter.

Incontrovertibly, as demonstrated by analyses situating announcements within the operational framework of the Financial Supervision Authority, **the purpose of issuing communications by the Financial Supervision Authority is to disseminate guidelines or information of supervisory significance, thereby elucidating and publishing *erga omnes* supervisory expectations in such a manner as to obviate the necessity for implementing 'hard' supervisory instruments.**

It may therefore be ascertained that this represents a supplementary instrument (mechanism) facilitating 'market an', deployed for the expeditious transmission of specific supervisory content. Whereas the formulation of recommendations, bearing soft law characteristics, necessarily entails a temporally extensive legislative process (notwithstanding circumstances where such law-making process is confined to resolutions adopted by the Financial Supervision Authority), arising from both the normative sphere incorporated within said recommendations and the statutorily prescribed methodology for recommendation adoption, **announcements serve as a vehicle for the expeditious dissemination to the market of specific guidelines or information, such being strictly assigned for supervisory purposes.**

This therefore constitutes a form of immediate response by the supervisor to certain events and circumstances of such significance to the fulfilment of statutory supervisory duties as to necessitate the expeditious deployment of this type of communicative instrument.

In seeking legal foundations for the Financial Supervision Authority's issuance of the discussed communications, two fundamental regulations must be considered, although these **do not provide explicit and unambiguous bases** for the Authority's issuance of such communications, namely:

- **Article 2** of the Act on Financial Market Supervision, which stipulates that the objective of financial market supervision is to ensure proper

market functioning, its stability, security and transparency, confidence in the financial market, as well as protection of market participants' interests, inter alia through **reliable information** concerning market operation, by achieving objectives specified in specific ('sectoral') acts; and

- **Article 4(1)(4)** of the Act on Financial Market Supervision, which stipulates that the Financial Supervision Authority's tasks include, inter alia: undertaking educational and **informational activities** regarding financial market operation, its risks and entities operating therein, for the protection of justified interests of financial market participants, in particular through gratuitous publication – in form and time determined by the Authority – of **warnings and announcements** via public radio and television.

Incontrovertibly, the *ratio legis* of the aforementioned Financial Supervision Authority's tasks derives from the circumstance that the financial market undergoes continuous evolution, resulting in novel yet increasingly sophisticated financial services, frequently combining characteristics of various financial 'products'. Market participants' security therefore necessitates that decisions taken by persons intending to utilise such services be well-considered and appropriately motivated, which is guaranteed only when market processes are properly comprehended. The Financial Supervision Authority's initiatives may serve to ensure such comprehension: namely, information campaigns, publishing activities, and training programmes.

Nevertheless, whilst acknowledging the ratio legis of both regulations, the legal basis for the Financial Supervision Authority's publication of its announcements remains highly indeterminate and exceedingly general. In other words, **the legislator merely delineates indirect and highly general legal parameters for activities undertaken by the Financial Supervision Authority**, although a certain insufficiency persists regarding the necessity to derive purposive interpretation in this respect, which would not be requisite had the Authority's competence to issue communications assumed a clear and unambiguous form.

In consequence, it becomes incumbent at this point to raise considerable doubt **as to whether such general and indeterminate legal foundations for the Authority's dissemination of specific supervisory content maintain**

coherence with the requirements of the principle of legality as enshrined in Article 7 of the Constitution of the Republic of Poland.

The content of the aforementioned Article 2 of the Act on Financial Market Supervision establishes an exceedingly general (broad) competence to undertake actions necessary for ensuring 'proper market functioning'. It should be noted parenthetically that even this term (i.e., 'proper market functioning') constitutes an indeterminate phrase. It may therefore be concluded that the legislature has thereby obligated the Financial Supervision Authority to employ all other instruments – both authoritative and non-authoritative – serving the proper functioning of the financial market. Within the scope of this task, the Authority may, for instance, inform supervised entities about adopted interpretations of legal provisions from which rights or obligations for these entities derive. Such actions enhance legal certainty for supervised entities and, consequently, positively impact market security. However, this competence is so broad in scope that it could essentially encompass all Authority actions which could subsequently be presented as necessary for ensuring 'proper market functioning'.

However, such expansive competence of the Financial Supervision Authority as delineated in the aforementioned Article 2 of the Act on Financial Market Supervision, which effectively amounts to 'the capacity to undertake any action', necessarily raises legitimate concerns from the perspective of constitutional axiology.

Indeed, pursuant to the construction of the principle of legality as formulated in Article 7 of the Constitution of the Republic of Poland, as uniformly accepted in legal doctrine and Constitutional Tribunal jurisprudence, the competence (and consequent activities) of any public authority must be predicated upon **explicitly articulated legal provisions.**

In such circumstances, precisely circumscribed competence of a public administration body **necessarily excludes the possibility of presumed or implied competences.**

This denotes that in a state governed by the rule of law, any exercise of authority necessitates legal foundations, specifically, legitimacy derived from legally bestowed authorisation to act – which cannot be presumed or 'augmented' through extensive interpretation. The manner of competence execution by state authorities does not constitute arbitrary action but rather

emanates from the implementation of conferred powers. Actions transcending the scope of such powers are consequently devoid of legitimacy. Hence, there exists no scope for discretionary decisions nor excessive latitude in public authority operations. Any transgression of parameters defined by the Constitution of the Republic of Poland divests such authority of legitimate basis for action.

Significantly within the instant context, the Supreme Administrative Court has correctly derived from Article 7 of the Constitution that it necessitates the **primacy of linguistic interpretation**. Given that public authorities operate on the basis of and within the limits of law, the Court holds that interpretation of provisions 'cannot lead to attributing them meaning **extending beyond conclusions** flowing from the application of unambiguous and methodologically sound interpretative directives. Moreover, **it should not involve making generalisations or simplifications** that ignore the linguistic and logical aspects of given regulations' [NSA[13], FPS 5/02)

Article 7 of the Constitution of the Republic of Poland thus establishes an obligation for the determination of competences to act through universally binding legal acts, a **prohibition against the presumption of such competences**, and a prohibition against their discretionary execution. The aforementioned principles find reflection in Constitutional Tribunal jurisprudence, wherein the Tribunal has held that: 'pursuant to Article 7 of the Constitution, public authorities shall function on the basis of, and within the parameters of, the law. This denotes, inter alia, that public authorities' competences must be unequivocally and precisely delineated in legal provisions, all actions of such authorities must derive their basis from such provisions, and – in circumstances of interpretative ambiguity – **public authorities' competences cannot be presumed.** These principles apply with particular force to the competences of public administration bodies conducting tax proceedings' [TK[14], K 53/05]

In consequence of the foregoing, it warrants observation that whilst the content of the aforementioned subsequent regulation – Article 4(1)(4) of the Act on Financial Market Supervision – *prima facie* establishes that the Authority's duties encompass 'educational and informational' activities, this provision remains (once again) sufficiently indeterminate that **it does not *explicite* confer**

[13] "NSA" stands for "Naczelny Sąd Administracyjny" (Supreme Administrative Court).
[14] "TK" stands for "Trybunał Konstytucyjny" (Constitutional Tribunal).

the right to issue the announcement in question. Hence, a legitimate doubt emerges anew (predicated upon the discussed line of jurisprudence pertaining to Article 7 of the Constitution of the Republic of Poland) – whether such Authority competence constitutes adequate and autonomous foundation for communications issuance. Deriving teleological interpretations on this basis, in pursuit of presumed legal foundations for the Authority's issuance of announcements, risks engaging in **practices of prohibited presumption of competence,** deemed inadmissible by Constitutional Tribunal jurisprudence.

However, in the subsequent portion of this provision, the legislator more precisely circumscribes the Authority's competence to issue gratuitous 'warnings and announcements', which are to be issued – as must be presumed in circumstances of urgency, immediacy and crisis – (verba legis) **via public radio and television** – thereby leaving the primary form of Authority communications disseminated through channels other than public radio and television (e.g., the Internet) **beyond explicit legal foundation**.

However, the experience of the Polish financial market does not provide favourable examples of the Financial Supervision Authority's utilisation of public radio and television for the purpose of issuing gratuitous (and implicitly urgent/crisis) 'warnings and communications'. Firstly, the Authority's educational campaigns directed at a broad audience, wherein the Authority sensitises and warns society against unfair market practices, are also conducted via private media (other than public) and the Internet. Secondly, these constitute educational campaigns conveying specific expert knowledge – rather than urgent/crisis 'warnings and announcements'. Consequently, **this signifies that even this more precise legal basis for issuing gratuitous 'warnings and announcements ' via public radio and television does not constitute sufficient foundation for the Authority's established practice of issuing communications which subsequently appear on the Authority's website.**

4. Conclusion

By way of conclusion to the foregoing analyses, two aspects warrant emphasis.

Firstly, the communication between the supervisor and supervised entities (and indirectly with other market participants) incontrovertibly constitutes a desirable, justified phenomenon that elevates financial supervision

standards. Through such communication, supervision executes its duties employing 'soft' persuasion, apprising the market of guidelines or circumstances bearing significant supervisory importance. It must remain beyond doubt that the utilisation of market communication instruments must correspond to and be strictly subordinated to supervisory objectives. Improper deployment of communication instruments, exempli gratia through dissemination of information not deriving from supervisory competences or transcending legal foundations, may constitute official malfeasance. All the more so because changes in the functioning of the financial supervision authority, caused by, for example, the Act of 16 August 2023 amending certain acts in connection with ensuring the development of the financial market and the protection of investors on this market (the so-called "Lex Warzywniak") aim to increase the flow of information on the market situation between various entities.

Secondly, however, the conducted legal analysis reveals an absence of unequivocal legal foundations for the Authority's issuance of communications subsequently published on its website, whilst extensive interpretation or attempts to presume the Authority's competence in this regard stands in conflict with the axiology of the constitutional principle of legality.

This matter necessitates legislative intervention, taking into consideration the aforementioned circumstances, which ought to be treated as a *de lege ferenda* conclusion.

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