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An Excess or Deficiency of Legal Regulations of the Specific Part of Commercial Agreements Law in the Civil Code?

Abstract

One of the consequences of the post-1989 significant legislative activity of the Sejm of the Republic of Poland is the fact that legal acts that play a special role in the legal system (codes) are also subject to numerous amendments. What is the influence of such amendments on the cohesion and transparency of the legal regulations included in these codes? Was the intention to fulfil the demands of the business trading of the time, undoubtedly deserving of approval, by modernising the existing regulations, introducing new ones, and – potentially – abandoning those whose practical significance and application is currently marginal in the context of the discussed matter an essential motive for undertaking many legislative changes applied to the Civil Code regarding the legal regulations of economic relations – including in particular the legal regulations of the specific part of commercial contracts law – after the transformation of the socio-economic system in the years 1989–1990? Is it therefore possible to say with respect to the present shape of the specific part of commercial contracts law in the Civil Code that this is in an optimal state? Or perhaps there is an excessive or insufficient number of legal regulations in this matter? Are there any draft amendments to the said area of legal regulations? What directions do they follow? The subject matter of this paper is to search for answers to the questions asked above.

Keywords: commercial law, commercial activities, commercial contracts

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Introduction

Subsequent terms of the Sejm of the Republic of Poland end with summaries in which information on the number of Journals of Laws (Dzienniki Ustaw) issued and acts adopted during a given term is provided. It is clear from those summaries that the number of Journals of Laws issued and acts adopted in individual years has been growing systematically for many years. Motives for applying legislative changes are varied. While some of them are a consequence of Poland's international obligations, particularly those connected with the country's membership in the European Union and obligations resulting from it that concern the adjustment of national law to the constantly changing law of the European Union, other obligations originate in internal relations when subsequent governments pursue different (frequently opposing) reforms of particular areas of the functioning of the country and of legal regulations related to those areas. The directions in which legislative changes are going are also varied. Some of those changes, creating new legal regulations, thereby lead to a gradual increase in the number and scope of applicable legal acts, which may have a negative influence on the cohesion and transparency of the legal system. Other changes, however, indicating the issue of the excessive number of existing legal regulations and problems resulting from that fact, aim at limiting their scope.

A consequence of the legislative activity of the Sejm presented above is also, among others, the fact that legal acts which play a special role in the legal system (codes) are also subject to numerous amendments. What is the influence of those amendments on the cohesion and transparency of legal regulations in codes? Was, for instance, the essential motive for undertaking many legislative changes applied to the Civil Code regarding the legal regulations of economic relations – particularly the legal regulations of the specific part of commercial agreements[2] law – after the transformation of the socio-economic system in the years 1989–1990, the intention to realise a postulate that undoubtedly deserved approval? A postulate that the needs of modern economic relations should be considered by the modernisation of existing regulations, introducing new ones and, potentially, by abandoning those existing legal regulations in the matter discussed the practical meaning and

[2] In this paper, the term "commercial agreement" is understood as an agreement which was shaped by its design features, specified by law or custom, as an agreement into which an entrepreneur enters into in connection with that person's business.

use of which is currently scant? Is it thus possible to say, with respect to the present shape of the specific part of commercial agreements law in the Civil Code, that this is in an optimal state or that there is an excessive[3] or deficient[4] number of legal regulations in this matter? Are there any draft amendments to the above-mentioned area of legal regulations, and where do they lead? The subject of this paper is searching for answers to the questions above.

Legal regulations of the specific part of commercial agreements law in the Civil Code and their disposition after 1964

The Commercial Code[5] consisted of two books, the second one, entitled "Commercial activities" ("Czynności handlowe"), included, among others, the legal regulations of the following commercial agreements: a current account agreement (Articles 533–541 of the Commercial Code), a commercial sale agreement (Article 542–567 of the Commercial Code, including a hire purchase agreement – Articles 555–567 of the Commercial Code), an agency agreement (Articles 568–580 of the Commercial Code), a consignment agreement (Articles 581–597 of the Commercial Code), a dispatch agreement (Articles 598–612 of the Commercial Code), a transport agreement (Articles 613–629 of the Commercial Code), a storage agreement (Articles 630–646 of the Commercial Code) and a silent partnership agreement (Articles 682–695 of the Commercial Code). The internal cohesion of the legal regulations of the specific part of commercial agreements law in the Commercial Code was to be ensured by key definitions of a merchant and commercial activities and by considering customary law as the source of commercial law. A merchant was a person who ran a commercial enterprise in their own name (Article 2 § 1 of the Commercial Code), and an agricultural holding was not considered to be a commercial enterprise (Article 2 § 2 of the Commercial Code). An essential complement to the definition of a merchant

3 In this paper, the term "excess of legal regulations" should be understood as the existence of a completely or partially unnecessary (from the perspective of the needs of modern economic relations) legal regulation of a specific commercial agreement in the Civil Code.

4 In this paper, the term "deficiency of legal regulations" should be understood as a complete lack of a desired (from the perspective of the needs of modern economic relations) legal regulation of a specific commercial agreement in the Civil Code or the existence of such a regulation that is limited, inadequate to meet those needs.

5 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 czerwca 1934 r. – Kodeks handlowy (Dz.U. Nr 57, poz. 502).

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was a decision that the provisions of the Commercial Code regarding merchants, are applicable to those who run commercial enterprises even when public law forbids them to manage such enterprises or it makes the authorisation of the said commercial enterprise dependable on the fulfilment of certain conditions (Article 11 of the Commercial Code). Commercial activities, in turn, were a merchant's acts in law that were related to that person's enterprise (Article 498 § 1 of the Commercial Code), while an essential complement of that definition was establishing a presumption that every act in law of a merchant is a commercial activity (Article 498 § 2 of the Commercial Code). Considering customary law as the source of commercial law resulted from Article 1 of the Commercial Code, pursuant to which the provisions of the Civil Code apply to commercial relations in case of the lack of provisions of the Commercial Code and specific acts or the common customary law of the country. The definitions of a merchant and commercial activities were used for defining the design features of the majority of commercial agreements, using a legislative technique that was based on indicating the party to the agreement who was obligated to tender characteristic performance by using the phrase "merchant (agent/consignee/shipper/carrier/warehousekeeper)", eventually, the legislator lacked consistency because when defining the design features of the other commercial agreements (the current account agreement, the commercial sale agreement, the hire purchase agreement, and the silent partnership agreement), different legislative techniques were used. The consideration of customary law as the source of commercial law emphasised the meaning of commercial practice when evaluating the proper fulfilment of obligations arising from commercial agreements.

On 1 January 1965, with the entry into force of the Civil Code, major changes were applied to the legal regulations of commercial agreements which had so far functioned under the Commercial Code.[6] Provisions on the current account agreement[7] and the silent partnership agreement were lifted entirely,[8] and provisions

[6] It was indicated in the statement of reasons concerning the draft of the Civil Code that provisions regarding (...) agreements entered the draft from the existing Commercial Code; however, it is not simple reception, but a thorough reform of those provisions in many respects. See Komisja Kodyfikacyjna przy Ministrze Sprawiedliwości, *Projekt kodeksu cywilnego*, Warszawa 1961, p. 203.

[7] It was indicated in the statement of reasons regarding the draft that the bank account agreement (Articles 725–733 of the Civil Code – P.B.'s note) is not the reception of the provisions of the Commercial Code on the current account, but it is supposed to be an adjustment to the needs of the socialist system of the regulation of the civil law relation between a bank and a customer. See Komisja Kodyfikacyjna przy Ministrze..., p. 203.

[8] See art. VI § 1 ustawy z dnia 23 kwietnia 1964 r. – Przepisy wprowadzające kodeks cywilny (Dz.U. Nr 16, poz. 94).

on the commercial sale agreement were lifted almost entirely.[9] When it comes to the other types of commercial agreements, the legal regulations of which were moved to the Civil Code, there was at least an essential (a forwarding agreement) or even a fundamental (a hire purchase agreement, an agency agreement, a consignment agreement, and a storage agreement) limitation (reducing the extent) of their legal regulations; only in respect of a (goods) transport agreement, it may (with some simplification) be argued that its legal regulation retained its previous shape. As a result of the indicated legislative changes, there was a change in the legal nature of an agency agreement which was deprived of the subjective design features of a commercial agreement, while maintaining its subject(!) unchanged, and of a forwarding agreement which turned from a transport consignment agreement into a qualified type of a commission contract. Apart from this, there was an extension of the scope of the transport agreement (it also covered transport of individuals and luggage) and of the forwarding agreement (it also covered sending or collecting a shipment and providing other services related to the transport of that shipment).

The internal consistency of the legal regulations of commercial agreements that existed under the Commercial Code was ensured (not fully, though, as discussed above) by the key definitions of a merchant and commercial activities. The fact that provisions which defined these terms were lifted in 1965 should be considered the most serious flaw of the legal situation after the Civil Code entered into force, but it is by no means possible to consider the lack of their equivalents in the Civil Code to be a natural consequence of relinquishing the dualistic model[10] of the regulation of private law in favour of the monistic model[11] of the regulation of that branch of law in Polish law in 1964. In the monistic model, the Civil Code acts as the basic source of law also for commercial relations, so it should also regulate (and it does regulate) commercial agreements law in which it is the definitions of a mer-

[9] Article 549, Article 551, Article 563 and Article 564 of the Civil Code may be considered (with some simplification) the equivalents of Article 544, Article 545, Article 546 and Article 552 of the Commercial Code.

[10] The essence of the dualistic model of the regulation of private law comes down to the formal separation of commercial relations law (commercial law) from civil relations law (civil law) by establishing a separate hierarchy of the sources of commercial law, justified by specific needs of the course of trade.

[11] The essence of the monistic model of the regulation of private law comes down to recognising that if commercial relations law (commercial law) and civil relations law (civil law) are based on identical assumptions (particularly considering the method of regulation, including the principle of the party autonomy for the parties of a legal relationship), there is no justification for their formal separation by establishing a separate hierarchy of the sources of commercial law, justified by specific needs of the course of trade (particularly specific needs of the course of trade are not such a justification).

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chant and commercial activities that have essential functions. Due to the fact that the provisions defining those terms were lifted in 1965, it became necessary to determine the commercial nature of the agreements discussed in another way; therefore, the phrase "within the scope of the activities of one's enterprise", which referred to the indicated terms, but was undefined and thus caused serious discrepancies in the judiciary and the doctrine, was used when defining the design features of a hire purchase agreement, a consignment agreement, a forwarding agreement, and a transport agreement, however, when defining the design features of a storage agreement, the phrase "(storage) enterprise" was used. Apart from this, the position of the Civil Code as a legal act which serves a key function in the private law system was lowered by provisions in the legal regulations of the hire purchase agreement, the forwarding agreement and the transport agreement. The said provisions self-limited the scope of application of those regulations.[12]

Changes of the socio-economic system in the years 1989–1990 led to undertaking legislative work which was extended over time, the purpose of which was to adjust the Civil Code to the needs of modern economic relations. As regards commercial agreements, the legal regulations of which were moved from the Commercial Code to the Civil Code, those needs were taken into consideration only to a small extent, only the legal regulation of the agency agreement (which, in this context, gained the nature of a two-sided commercial agreement),[13] and the storage agreement (the regulation was now supposed to be supplemented by the provisions of the Act on Warehouses)[14] was fundamentally reformed, whereas the legal regulations of the hire purchase agreement, the forwarding agreement and the transport agreement, in fact, remained in their state from 1964 which can in no way be considered optimal.

One should note the direction of legislative changes regarding the agency agreement and the storage agreement under the Civil Code; after the fundamental limitation of the legal regulations of both of these agreements in 1965, there was a significant extension of these agreements in the years 2000–2001, but as long as in case of the agency agreement, it occurred with only a partial reference to the legal

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12 See Article 587, Article 795 and Article 775 of the Civil Code. The issue of provisions self-limiting the scope of application of specified legal regulations was noticed by the Codification Commission on Civil Law – see Z. Radwański (ed.), *Zielona księga. Optymalna wizja kodeksu cywilnego w Rzeczypospolitej Polskiej*, Warszawa 2006, p. 23 ff., where it was indicated i.a. that negative legislation technique (restricting or eliminating the use of the norms of the Civil Code) was of an accidental nature, was inconsistent and caused the instability of the Civil Code and raised doubts as to the scope of application of code norms.

13 See art. 1 pkt 2 ustawy z dnia 26 lipca 2000 r. o zmianie ustawy – Kodeks cywilny (Dz.U. Nr 74, poz. 857).

14 See art. 70 ustawy z dnia 6 listopada 2000 r. o domach składowych oraz o zmianie Kodeksu cywilnego, Kodeksu postępowania cywilnego oraz innych ustaw (Dz.U. Nr 114, poz. 1191).

regulation of that agreement under the Commercial Code (the new design of the legal regulation of the agency agreement had to take account of primarily the requirements of the law of the European Union),[15] in case of the storage agreement, it was, in fact, almost copying the legal regulation of that agreement that applied under the Commercial Code. The fact of lifting the Act on Warehouses in 2011 must be all the more astonishing.[16] In turn, examples of contradictory legislative decisions on taking the position of the Civil Code as a legal act which serves a key function in the private law system into consideration may be: on the one hand, the entry into force of the Act of 1984 – the Transport Law[17] which completely marginalised the legal regulation of the transport agreement in the Civil Code, on the other hand, the lifting of the provisions, which concerned national forwarding, of the Act of 1961 on Road Transport and National Forwarding[18] in 1989, which caused the legal regulation of the forwarding agreement to stop being, as a matter of fact, a regulation that self-limited the scope of its application.[19]

The Codification Commission on Civil Law[20] has worked on the form of the future Civil Code in recent years, and although it ultimately did not publish a draft specific part of the law of obligations, it may be claimed on the basis of materials documenting the direction of its work which have been published so far (primarily "Zielona księga"[21]) that although the Commission noticed the issue of the deficiency of some legal regulations when it came to commercial agreements the provisions of which were moved from the Commercial Code to the Civil Code (the consignment agreement),[22] when it came to other agreements (the hire purchase agreement, the

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15 See: uzasadnienie projektu ustawy o zmianie ustawy – Kodeks cywilny, Sejm RP III kadencji. Druk sejmowy nr 1699.

16 See art. 104 ustawy z dnia 25 marca 2011 r. o ograniczaniu barier administracyjnych dla obywateli i przedsiębiorców (Dz.U. Nr 106, poz. 622), and also the statement of reasons for that draft act, the Sejm of the Republic of Poland, 6th term, Sejm paper No. 3656 in which it was pointed out that entrepreneurs were not interested in running warehouses, which means that there is no need for further legal regulations in this matter.

17 Ustawa z dnia 15 listopada 1984 r. – Prawo przewozowe (Dz.U. Nr 53, poz. 272).

18 Ustawa z dnia 27 listopada 1961 r. o transporcie drogowym i spedycji krajowej (Dz.U. Nr 53, poz. 297) regulated the rules of domestic forwarding in Articles 23–25. Those provisions were lifted on 1 January 1989 by Article 37 of the ustawa z dnia 23 grudnia 1988 r. o działalności gospodarczej (Dz.U. Nr 41, poz. 324).

19 It was stated in Article 795 of the Civil Code that the provisions of the Civil Code on the forwarding agreement only apply to forwarding insofar as it is not regulated by separate provisions. There are no such separate provisions at the moment.

20 In Polish: Komisja Kodyfikacyjna Prawa Cywilnego [translator's note].

21 In English: "Green Paper" [translator's note].

22 See Z. Radwański (ed.), op. cit., p. 132 ff., where it was pointed out that changing the provisions of the Civil Code on a consignment agreement in such a way that this would also refer to the

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forwarding agreement, the transport agreement), there was a staggering silence. The Commission's silence also referred to the question of the advisability of including the legal regulations of the current account agreement and the silent partnership agreement in the future Civil Code. While it is impossible to objectively evaluate whether the current account agreement may still have any significant meaning for participants of economic relations, the situation is obviously different in case of the silent partnership agreement, where there have been fully justified postulations of re-establishing the legal regulation of that commercial agreement for many years.[23]

In order to conclude the discussion above, one may thus claim that when it comes to commercial agreements the legal regulations of which were moved from the Commercial Code to the Civil Code, there is a significant deficiency of those legal regulations rather than an excess of them in the current legal situation. The published drafts of legislative changes in the discussed matter do not, however, indicate, any intention to make major changes to that legal situation.

New legal regulations of the specific part of commercial agreements law in the Civil Code and their disposition after 1990

The Civil Code of 1964 provided the legal regulations of the following new commercial agreements: a supplier's agreement (Articles 605–612 of the Civil Code), a cultivation contract (Articles 613–626 of the Civil Code), a construction works contract (Articles 647–658 of the Civil Code), a bank account agreement (Articles 725–733 of the Civil Code) and an insurance agreement (Articles 805–834 of the Civil Code). The internal cohesion of the legal regulations of those commercial agreements in the Civil Code was to be ensured by a key definition of a state-owned

purchase or sale of securities would make it possible to apply this agreement in the private securities market. A possible extension of the subject of the consignment to intermediation in private trading in securities would probably require the extension of the current weak regulation of the consignment agreement using the solutions provided for in the Commercial Code.

23 See e.g. S. Sołtysiński, A. Szajkowski, A. Szumański, *Ustawa – Prawo spółek handlowych. Projekt z 20 maja 1998 r. Uzasadnienie projektu ustawy*, "Studia Prawnicze" 1998, 1–2, p. 153 ff., where it was stated that the issue of a possible regulation of the silent partnership agreement as a contract of obligations remained open (the authors of the draft act – the Commercial Companies Law – were in favour of regulating that agreement in the Civil Code); see also A. Herbet, *Założenia przyszłej regulacji umów o współdziałanie (ze szczególnym uwzględnieniem spółki cywilnej)*, Conference within the Academic Project of the Civil Code, Katowice, 13 October 2017, where the issue of the advisability of re-regulating the silent partnership agreement in the Civil Code was analysed.

company. The term was not a classical definition indicating the design features of a specified category of participants of economic relations, but it was only a summary which covered numerous varied organisational entities (Article 33 § 1 of the Civil Code in the original wording[24]). The term of a state-owned company was used when defining the design features of the majority of new commercial agreements, using a legislative technique that was based on indicating the party to the agreement who was obligated to tender characteristic performance, and sometimes indicating both parties to the agreement, by using the phrase "state-owned company (supplier/recipient, contractee/contractor/investor)"; eventually, the legislator lacked consistency because when defining the design features of the other new commercial agreements (the bank account agreement and the insurance agreement), different legislative techniques were used.

The Civil Code of 1964 included new regulations of commercial agreements, some of which could be entered into exclusively by state-owned companies (the supplier's agreement, the construction works contract), in case of other agreements, a state-owned company had to be one of the parties (the cultivation contract), which obviously limited the scope of their application. It was only in respect to the bank account agreement and the insurance agreement that the indication of the party to the agreement who was obligated to tender characteristic performance occurred by using the phrase "bank" and "insurance company", though also in this case it should be remembered that up to the years 1989–1990, it was, in fact, only banks and insurance companies that were state-owned companies that could conduct banking and insurance activities. Apart from this, the position of the Civil Code as a legal act which serves a key function in the private law system was lowered by a provision in the legal regulation of the insurance agreement. The said provision self-limited the scope of application of that regulation.[25]

Changes of the socio-economic system in the years 1989–1990 led to undertaking legislative work which was extended over time, the purpose of which was to adjust the Civil Code to the needs of modern economic relations. As regards commercial agreements the legal regulations of which were first included in the Civil Code, those needs were taken into consideration only to a small extent, only the legal regulation

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24 Pursuant to Article 33 § 1 of the Civil Code in the original wording, legal entities were the following entities of social economy: the State Treasury, state enterprises and their unions as well as state banks, other state organisational units to which special provisions granted legal personality, co-operatives and their unions, farm circles and their unions and other social organisations of the working people, to whom special provisions granted legal personality.

25 See Article 820 of the Civil Code.

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of the insurance agreement[26] was essentially reformed, and the scope of application of the cultivation contract was extended (which thus resulted in its nature turning from a two-sided commercial agreement into a one-sided commercial agreement),[27] whereas the legal regulation of the bank account agreement, in fact, remained in its state from 1964 which can in no way be considered optimal, as evidenced by the gradual extension of the legal regulation of that agreement in the Act of 1997 – the Banking Act.[28] One should note the direction of legislative changes regarding the supplier's agreement and the construction works contract: in 1990, changes were made to them, and the nature of those agreements was changed as a result. They were deprived of the subjective design features of a commercial agreement, while maintaining their subject(!)[29] unchanged. In 2000, a new legal regulation of a leasing contract was introduced into the Civil Code.[30] When defining that agreement, a legislative technique for commercial agreements the legal regulations of which were moved from the Commercial Code to the Civil Code was referred to. It was based on indicating the commercial nature of that agreement by using the phrase "within the scope of the activities of one's enterprise". A similar legislative technique was used in 2007 when redefining the insurance agreement.

The Codification Commission on Civil Law has worked on the form of the future Civil Code in recent years, and although it ultimately did not publish a draft specific part of the law of obligations, it may be claimed on the basis of materials documenting the direction of its work which have been published so far (primarily "Zielona księga") that when it came to commercial agreements the provisions of which were first included in the Civil Code, the Commission noticed the issue of the deficiency of some legal regulations of those agreements (the bank account agreement[31]) and the excess of other legal regulations of (former) commercial agreements

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[26] See art. 1 pkt 2–27 ustawy z dnia 13 kwietnia 2007 r. o zmianie ustawy – Kodeks cywilny oraz o zmianie niektórych innych ustaw (Dz.U. Nr 82, poz. 557).

[27] See art. 1 pkt 84 ustawy z dnia 28 lipca 1990 r. o zmianie ustawy – Kodeks cywilny (Dz.U. Nr 55, poz. 321).

[28] Ustawa z dnia 29 sierpnia 1997 r. – Prawo bankowe (Dz.U. Nr 140, poz. 939).

[29] See art. 1 pkt 83 i 84 ustawy z dnia 28 lipca 1990 r. o zmianie ustawy – Kodeks cywilny (Dz.U. Nr 55, poz. 321).

[30] See art. 1 pkt 1 ustawy z dnia 26 lipca 2000 r. o zmianie ustawy – Kodeks cywilny (Dz.U. Nr 74, poz. 857).

[31] See Z. Radwański (ed.), op. cit., p. 85 ff., where it was pointed out that the Codification Commission on Civil Law shared the view of M. Bączyk who considered the request for the regulation of some banking contracts (including the bank account agreement) only in banking law, at the time of one of the subsequent amendments to the banking law, to be dubious. It would be more appropriate to reverse the idea, i.e. to regulate (synthetically) certain banking contracts, first of

(the supplier's agreement[32]). However, when it came to the rest of the agreements, there was a staggering silence. The Commission's silence referred particularly to the question of the advisability of including the legal regulations of the cultivation contract or the construction works agreement in the future Civil Code, and to their nature and form. In the course of the work on the implementation of individual acts of Community law, the Codification Commission on Civil Law acknowledged that one should seek to fully incorporate consumer agreements law into the Civil Code, and within the scope in which such an action would not be possible, one should achieve non-code implementation, and then consider moving a specified matter to the Civil Code.[33]

In order to conclude the above discussion, one may thus claim that when it comes to commercial agreements the legal regulations of which were first included in the Civil Code, there is both a significant deficiency of those legal regulations and an excess of them in the current legal situation. The published drafts of legislative changes in the discussed matter do not indicate, however, any intention to make major changes to that legal situation.

Conclusions

In the monistic model of the regulation of private law, the Civil Code acts as the basic source of law also for commercial relations.[34] This statement is also valid with respect to the legal regulations of the specific part of commercial agreements law. In the Civil Code, there are commercial agreements the legal regulations of which were moved from the Commercial Code (the hire purchase agreement, the agency agreement, the consignment agreement, the forwarding agreement, the transport agreement, and the storage agreement), and commercial agreements the legal

all in the Civil Code, and a different regulation leads to the decomposition of civil law creating a non-integrated system of civil law acts.

[32] See ibidem, p. 87, where it was pointed out that considerations regarding the scope of the Civil Code should also cover the question of whether it should not be "slimmed down" by repealing unnecessary institutions; it seems that such an institution is a delivery contract, which was established mainly due to the needs of a centrally controlled economy in the Polish People's Republic (PRL), whereas in the market economy system the functions of the said agreement can be successfully fulfilled by a sales agreement – as it is generally accepted in Western European countries – or contract work.

[33] See ibidem, p. 92 ff.

[34] See ibidem, p. 28, where it was stated that modern European codifications had already moved away from that (dualistic – P.B.'s note) model, also by covering private-legal relationships of persons who conduct business professionally.

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regulations of which were first included in the Civil Code (the supplier's agreement,[35] the cultivation contract, the construction works agreement,[36] the bank account agreement, the insurance agreement, and starting from 2000 – also the leasing contract). The legal regulations of the former were created in a legal system in which market economy principles and the dualistic model of the regulation of private law were applied, whereas the legal regulations of the latter were created in a legal system in which planned economy principles and the monistic model of the regulation of private law were applied, which had a major impact on their different objectives, form, scope of the application and legislative technique principles used. Both commercial agreements, the legal regulations of which were moved from the Commercial Code to the Civil Code, and the ones, the legal regulations of which were first included in the Civil Code, were subject to numerous legislative changes which had an impact on their original cohesion.

It is difficult to regard the current legal situation in terms of the legal regulations of the specific part of commercial agreements law in the Civil Code as fulfilling the requirements of a coherent legal system and legislative technique principle which apply in it. Firstly, a major influence on ensuring the internal cohesion of the legal regulations of commercial agreements is given by its general assumptions, and their key elements are (should be) the definitions of an entrepreneur and commercial activities. The term of an entrepreneur was defined in the Civil Code only in 2003[37] (however, there is still no equivalent with the function of Article 11 of the Commercial Code that is of importance to the safety of economic relations),[38] whereas the

[35] The supplier's agreement was deprived of the subjective design features of a commercial agreement in 1990.

[36] The construction works agreement was deprived of the subjective design features of a commercial agreement in 1990.

[37] See art. 1 pkt 4 ustawy z dnia 14 lutego 2003 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Dz.U. Nr 49, poz. 408).

[38] The Codification Commission on Civil Law initially proposed the introduction (restoration) of the equivalent of Article 11 of the Commercial Code in the future Civil Code (see Komisja Kodyfikacyjna Prawa Cywilnego, *Księga pierwsza Kodeksu cywilnego*, Warszawa 2006, p. 71, where it was stated that – despite the prevailing, particularly in practice and partially in writings, administrativistic attitude – the status of an entrepreneur is not a privilege which should be absolutely taken away if the business activity of a particular person infringes on the law or, in particular, if it covers a prohibited object; also in this situation, the entrepreneur's business contractors also have the right to rely on that person's obligations resulting from conducting business on a large scale; it is required by the safety of turnover. See also Article 64 of the draft, according to which the provisions of the Code [Civil Code – P.B.'s note] regarding the entrepreneur also apply to a person who conducts business despite being statutorily prohibited to do so, or by violating statutory restrictions. Finally, however, in the revised draft of Book I of the Civil Code of 2015, the Codification Commission on Civil Law abandoned that idea, justifying its decision by the fact that Articles 58–65 of the draft of 2008 referring to different types of entrepreneurs and registering them entered

term of commercial activities has been functioning since 1965 only as a doctrinal term. At the latest since the term of an entrepreneur was defined in the Civil Code as an entity that conducts business activity in their own name in every form, the form of that definition should be reflected in the manner of defining commercial agreements. Unfortunately, the phrase "within the scope of the activities of one's enterprise" that is inconsistent with the definition of an entrepreneur still functions in most of them. Secondly, the position of the Civil Code in the private law system requires that it be the place of legal regulations of commercial agreements which are essential for the practice of economic relations. The persistent marginalisation of the legal regulation of the transport agreement (the Transport Law) in the Civil Code or the duality of the legal regulation of the bank account agreement (next to the Civil Code, there is also the Banking Act) certainly do not favour the realisation of that postulate. Thirdly, the position of the Civil Code in the private law system requires that it be the place of legal regulations of commercial agreements which are tailored to the needs of modern economic relations. The persistent legal situation concerning the form and scope of application of the hire purchase agreement, the consignment agreement, and the forwarding agreement certainly does not favour the realisation of that postulate. Fourthly, the position of the Civil Code in the private law system requires that it not be place of legal regulation of commercial agreements the modern use of which is marginal. The persistent legal situation concerning the supplier's agreement (deprived of the subjective design features of a commercial agreement in 1990) does not seem to favour the realisation of that postulate. Fifthly, the position of the Civil Code in the private law system requires that it be the place of legal regulations of commercial agreements which have for long had a permanent place in the legal systems of countries where market economy principles apply. The persistent legal situation regarding the silent partnership agreement and perhaps also the current account agreement certainly does not favour the realisation of that postulate. Sixthly, the position of the Civil Code in the private law system requires that it be the place of legal regulations of commercial agreements of a consumer nature. The persistent legal situation regarding the place of the regulations of the agreements mentioned above does not favour the realisation of that postulate. Seventhly, the position of the Civil Code in the private law system requires that the

into the area that belonged to public law (the regulation of business activity), and they were not necessary for using further provisions of the Code which referred to entrepreneurs. See Komisja Kodyfikacyjna Prawa Cywilnego, *Kodeks cywilny. Księga I. Część ogólna. Projekt z 2015 r. z objaśnieniami*, Warszawa 2015, p. 9.

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legal regulations of commercial agreements taking shape in the practice of economic relations be introduced into the said Code with great caution.[39]

In order to conclude the discussion in this paper, one may thus claim that present shape of the specific part of commercial agreements law in the Civil Code is characterised by both a deficiency of those legal regulations (to a large extent) and (to some degree) an excess of legal regulations in this matter, however, the published drafts of legislative changes do not indicate any intention to make major changes to that legal situation.

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[39] The Codification Commission on Civil Law thought about introducing the legal regulations of commercial agreements taking shape in the practice of economic relations into the future Civil Code. See Z. Radwański (ed.), op. cit., p. 88, where it was stated that i.a. it concerned considering the question of whether the catalogue of named agreements should not be extended in the Civil Code by such types of agreements which have already been permanently adopted in economic practice, and at the same, the existing regulation would not be enough to decide conclusively on the legal effects resulting from them. This issue requires an extensive legal discussion. So agreements which would require consideration according to the just indicated evaluating criteria can only be pointed out as examples here. It is mainly about factoring agreements, forfaiting agreements, franchising agreements, compensation agreements, pool agreements, framework agreements.