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## ECOLOGICAL INSURANCE OF ENTREPRENEURS IN POLAND

*Чех М. Страхування екологічних ризиків підприємців у Польщі. Досліджено визначення поняття екологічного страхування у науковій літературі. Проаналізовано окремі положення екологічного права у польському законодавстві щодо можливості практичного застосування механізмів екологічного страхування. Висвітлено суттєві проблеми у сфері екологічного страхування у польському нормативно-правовому полі і представлено деякі рішення, застосовані в українському законодавстві.*

*Ключові слова:* екологічне страхування, підприємницька діяльність, екологічна шкода, забезпечення платіжних вимог.

*Чех М. Страхование экологических рисков предпринимателей в Польше. Исследованы определения понятия экологического страхования в научной литературе. Проанализированы отдельные положения экологического права в польском законодательстве относительно возможности практического использования механизмов экологического страхования. Освещены существенные проблемы в сфере экологического страхования в польском нормативно-правовом поле и представлены некоторые решения, применяемые в украинском законодательстве.*

*Ключевые слова:* экологическое страхование, предпринимательская деятельность, экологический ущерб, обеспечение платежных требований.

### 1. Initial remarks

Prevention from negative impact in environment is the basic and essential task of environmental law. The process of economic development of countries is inevitable and consequently business activity repeatedly causes environmental pollution, for instance due to gases and dust excessively put into the air or putting sewage into the ground or water. Very often it leads to serious damages in the environment. Such situations cause civil, administrative and criminal liability of entities using the environment. Ecological insurance is the instrument of private law, whose aim is to guarantee that claims of the injured related to environmental damages would be covered.

The aim of this paper is to indicate some significant problems existing in the sphere of economic insurance on the ground of Polish legislature and to present some solutions that were recently applied in Ukrainian law.

Ecological insurance is one of the types of economic insurance. Analysis of the provisions of contracts offered by prominent insurance

companies indicates that in reality of Polish insurance market, the majority of such insurance for entrepreneurs exist as voluntary civil liability insurance that are expanded by environmental clauses.

## **2. Regulations on ecological insurance in Polish system of law**

From theoretical point of view, Polish environmental law does not include any definition of the ecological insurance issue and does not regulate it in any separate legal act. It is only signalized in the act that is basic for the branch of environmental law which is more and more self-contained among other branches in Polish legal order. It is the article 187 of the Act of 27 April 2007 on Environmental Law [1] where insurance is one of the forms of security of claims due to occurrence of negative results and damage in the environment. Nevertheless, general aspects of the contract of civil liability insurance is regulated in article 822 of Civil Code [2].

The provision of article 187 of the Act on Environmental Law stipulates that in case of occurrence of particularly important social interest related to environmental protection, in particular to danger of environmental condition deterioration in a large scale, as well as to danger of environmental damage, in the permission that is mentioned in article 181 of the Act on Environmental Law, there can be established the security of claims due to occurrence of negative results and damage in the environment. In subsequent parts of this paper there are indicated forms of security of claims, such as insurance policy, deposit, bank guarantee and insurance guarantee.

Calling the above-mentioned article 181 at this moment demands some short and brief explanation the issue of the permission, understood as the protective instrument that limits emissions to the environment and determines the conditions of conducting business activity that has an impact on the environment. In Polish environmental law there exist two kinds of permissions. First is a sectorial permission (in the scope of putting gases and dust into the air, putting sewage into the ground or water and waste production). Second is an integrated permission (that is one complex permission for conducting an installation, concerning the whole of the environment) [3]. Permissions are being issued as administrative decisions by the authorities of environmental protection, as a rule after submitting an application by the entity conducting the installation.

Widely understood security of claims, whose aim is to protect the entities potentially exposed to damage by providing its remedy, is the institution of civil law [4]. However, on the ground of the Act on Environmental Law, it gains administrative character, because of its form, the way of its establishing and the entity who establishes it. Establishing security of claims by virtue of article 187 of the Act on Environmental Law constitutes an example of infiltration of civil law norms with administrative law norms on the ground of environmental law. As far as obligation itself to establish

security of claims within the form of insurance policy is imposed in administrative mode (decision of administrative authority), the act of fulfilling this obligation by means of insurance contract, is regulated by civil law norms. It is worth noting that possession of an insurance policy is not the factor that absolutely conditions the issuance of a permit to the entity who is applying for it. This is said in the article 187 of the Act on Environmental Law, that "security of claims *may* be established", therefore it allows to treat the authority's actions as optional and discretionary. Here appears the problem of borders of authority's discretion in the scope of imposing obligation of establishing security of claims. In abovementioned provision clear criteria for evaluation of certain situation are not indicated, there is no conclusion how to establish the sum of security or how to assess the risk of damage occurrence. However, fulfilling the obligation to secure the claims imposed by the authority is the condition that enables to perform the emission permit [5]. The obligation to establish security is an element of the permit's contents, what indicate words: "*in the permit* security of claims may be established". That also leads to reflect on the character of ecological insurance. It seems to me that on the one hand it has compensative character because it should guarantee remedying of potential damage, and on the other hand it may also have preventive character because it is an element of the permit and is established before starting to conduct certain activity.

The remarks presented above allow to conclude more about imprecision of mentioned provisions what results in complications with its application in practice. The Legislator used many expressions that are indeterminate and difficult to interpret or define. Examples of such expressions are: "particularly important", "considerable size", "social interest", "danger of deterioration", "negative consequences". Firstly, it seems that security should be established only in special cases. In my opinion, it does not have positive influence on ecological insurance development in Poland. Secondly, abovementioned expressions cause that the provision is so problematic that practically it is not applied in reality. It results from the lack of detailed criteria of evaluation of the grounds to establish security of claims, the problem with their justification, as well as necessity to use specialized expertise while assessing negative consequences of business activity towards the environment [6].

Another issue on the ground of discussed regulation of the Act on Environmental Law is that the Legislator does not indicate any specific solutions in the scope of the form of security of claims which is the subject of this paper, that is insurance policy. Moreover, it is not precise who decides about the application of a certain form of security, and that is, what should be noticed, from financial point of view significant for the entity conducting business activity. M. Górski claims that construction of the article 187 of the Act on Environmental Law suggests that this is the task of

the authority that imposes the obligation of establishing security, however, he proposes it should be done in agreement with the entity applying for a permit [7]. K. Gruszecki has a different opinion. According to him, the authority cannot impose the form of security of claims in a permit, the choice should be given to addressee of the decision because he is aware of his own financial condition and all the costs of establishing security will burden him [8]. In the article 187 paragraph 4 of the Act on Environmental Law there is included a provision, according to which insurance policy should stipulate in its content that in case of occurrence of negative consequences in the environment as a result of the entity's failure to fulfill obligations indicated in a permit, an insurance company will cover liabilities to the authority giving the permit. Neither a kind of required insurance nor the way of determining its amount is regulated here.

The provision presently discussed would be far more efficiently and effectively applied if it was supplemented by regulations. In the article 187 paragraph 5 of the Act on Environmental Law there is a statutory delegation directed to the Minister of the Environment to issue the regulation determining kinds of installations which usage requires establishing security of claims. This is the optional delegation, which is proved by expression "may define". Furthermore, paragraph 6 also includes the delegation to define within the frames of a regulation methods of determining amount of security of claims, that depend on the kind of activity conducted by entity using the environment, the amount of production and technical parameters of the installation. The same as in the previous delegation, such regulation may be facultatively issued by the Minister of the Environment. Until now these delegations are not realized, what may facilitate making necessary arrangements and reduce their work effort while proceedings leading to receiving permits [9].

The legal relationship of civil liability insurance is included by virtue of agreement between the insurer (insurance company) and the insured (in case of ecological insurance this is an entrepreneur). The contract of civil liability insurance is regulated in article 822 of the Civil Code. According to the provision of this article, the contents of the contract include insurer's obligation to pay the amount of damages specified in the contract as a consequence of damage that was caused to the third party, as the insurer or the insured is liable for that. Within the frames of ecological insurance, the problem is to define the third party who is entitled to damages because of civil liability, as it is not exactly clear whether this may be the individual with relation to personal damage or damage to property as a result of enterprise's activity or the amount of damages goes to the budget of the municipality. This is also related to the doubt whether the environment should be treated as the common good or the personal right or both. Moreover, to

identify the entitled third party does not help the definition of third party contained in the General conditions of insurance offered by i.a. PZU [10] which explain that this is every person who is neither the insurer nor the insured. In the literature we can notice much narrower way of understanding this term. According to S. Byczko, third party is the person towards whom the insured stays liable in the scope of insurance contract, what means that this is not everyone to whom the insured is liable but only this person who is injured within the circumstances covered by the insurance contract [11]. However, the article 187 paragraph 4 of the Act on Environmental Law stipulates that the insurer has to fulfill the obligation towards the authority issuing the permit. Therefore the problem is who exactly is entitled to receive insurance benefit due to environmental damage, does the insurance offer covers third party as the injured individuals or the authorities of environmental protection.

### **3. The current condition of environmental insurance in Ukraine**

In November 2013 the Ukrainian government approved the Procedure and Rules for mandatory insurance of civil liability of investors including the damage to environment and human health. In comparison to the Act on Insurance it strengthens and enlarges the investor's liability for damage caused to the environment during activities performed on the basis of Production Sharing Agreement (PSA), that is envisaged in the Act, and enables enforcement of the provisions included there [12]. Experts claim that this government's ordinance will ensure legal and organizational basis for insurance, as well as state guaranties of repairing damage caused by the investor. It is also claimed that practical usage of environmental insurance will decrease the burden of reimbursement of the cost of repairing damage that was so far the state budget's burden. This is because presently insurance companies will be obliged to cover the cost. Moreover, it can have good effect on environmental protection standards [13]. There are also indicated some benefits for the investor, such as possibility to save money in case of being found guilty of the occurrence covered by insurance [14].

### **4. The entrepreneur's condition on the insurance market in Poland**

Optional and obligatory character of ecological insurance seems to be vital issue in reference to legislative changes introduced by the Ukrainian government. In Poland there are two obligatory insurance: civil liability insurance of entities exploiting a nuclear object and civil liability insurance of the owners of oil tankers for the damage caused by oil pollution [15]. Considering the structure of enterprises in Poland, where micro, small and middle enterprises dominate, the environmental insurance premium is relatively high expense that burdens the entrepreneur and implementing such an obligation may repeatedly deteriorate financial condition of enterprises. Apart from that, there should be elaborated the system of assessment and

criteria determining which business activity should be covered by compulsory insurance. M. Orlicki claims that insurance obligation deforms the market as it creates artificial demand for insurance services [16]. As far as my opinion is concerned, the best solution for this moment could be educational and social activity conducted by the state that would result in increase of insurance and ecological awareness, as well as encouraging entrepreneurs to conclude an insurance contract, for example by means of reducing the cost of insurance premium.

Analysis of available literature within this subject, as well as some offers of insurance companies may lead to the conclusion that entrepreneur who is interested in insurance policy is not in a comfortable situation in the reality of Polish insurance market. The quantity and quality state of insurance products in our country seems to prove that Poland drops behind other member states of European Union. More developed markets offer three kinds of solutions: environmental insurance within the frames of clauses additional to civil liability insurance related to business activity, clauses of insurance against environmental damage added to insurance package for entrepreneurs, environmental insurance as a separated and specialized form of *stand alone cover* product. The most common insurance companies in Poland do not offer any specialized insurance against environmental damage among their services for entrepreneurs (e.g. PZU, Ergo Hestia, Aviva). Predominantly, as it was indicated above, there are available civil liability insurance related to business activity.

However, it should be noticed that their basic version in general terms and conditions of insurance does not include liability for environmental damage, it is one of exclusions from the scope of insurer's liability [17]. In relation to increasing interest of entrepreneurs, insurance companies offer additional clauses to the contracts of civil liability insurance [18]. It automatically results in rise of policy price, what absolutely does not encourage an entrepreneur who is predominantly in bad financial condition. The policy that is extended with environmental clause, apart from higher insurance premium, has some other significant disadvantages. In my opinion the least beneficial for an entrepreneur is the condition that reserves that results of the damage must reveal very soon after the emission (predominantly 72 hours after [19]). Such reservation, that excludes insurer's liability, seems to be completely unrealistic, because the fact that a part, or even majority of environmental damage is visible after a period of time which should be measured not in hours but in years.

Realization of claims by virtue of environmental damage caused by business activity is frequently impossible because extent of these claims can be much higher than financial possibilities of an entrepreneur. That is why ecological insurance seems to be beneficial from entrepreneur's point of

view. According to insurance contract, it is the insurer who covers the claims of the injured – natural person or legal entity, including the State Treasury, municipalities and ecological organizations, if these claims are based on civil law norms [20]. Such claims are realized by means of *actio directa*, what means the injured may demand to satisfy them directly by the insurance company. Of course, the insurer does not guarantee that the claims will be fully covered. The maximum of his liability is the amount of cover specified in the insurance contract. However, what results from the essence of insurance system, realization of claims is much easier and effective if they are demanded from the insurer not the perpetrator of the damage.

### 5. Concluding remarks

The obstacle that disturbs to process of insurance market development is mainly the fact that norms of environmental law are not sufficiently adjusted to norms of insurance law and vice versa, insurance offered on the market do not fulfill the requirements within the norms of environmental law.

In the Register of accidents regarded as serious breakdown in 2012 that is led by the General Inspectorate of Environmental Protection, there is presented statistics showing that in 2012 there happened 91 accidents causing danger of environmental damage and 61,5 % of them happened on the area of works. What must be noticed, these accidents were registered and they are estimated to be just a small percentage of accidents that happened in fact but were not officially reported. These data partly show the scale of the problem and we can realize how frequent is the occurrence of environmental damage. As a consequence it is indicated that there is a huge need to construct the ecological insurance system which works efficiently. Apart from compensatory function towards the injured, ecological insurance may have also preventive function. They may prevent the entrepreneurs from taking hasty decisions to conduct business activity that potentially may cause damage in the environment as well as lead them to apply such technical solutions that will minimize the danger of damage.

It is definitely too early to be able to evaluate application and consequences of obligatory ecological insurance that were introduced to Ukrainian law just some months ago, as well as to claim whether Poland should apply the neighboring state's experience within this scope. As for now ecological insurance are on the Polish market at a very early stage of development, however, in my opinion they seem to be a good solution for management of the risk of environmental damage. On the other hand, it also raises concerns that the obligation of including insurance contracts will lead to reversing the burden of this obligation on the consumer by increase in prices of goods and services. The undeniable fact is that we should consider the problem of ecological insurance at many levels.

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**Czech M. Insurance of the environmental risks of the entrepreneurs in Poland.**

**Background.** Business activity always has significant impact on condition of the environment. The basic task of environmental law is to prevent it from environmental damage causing liability of entities using the environment. Ecological insurance may be one of the reasonable solutions for businessmen. However, in order to be applied in appropriate way, it needs to be supported by effective legal provisions.



**Review of scientific sources.** Ecological insurance seems to be still not fully recognized issue. As it is regulated in legal acts in a narrow way, there are only several available positions of literature, most of them do not contain detailed aspects, neither theoretical nor practical. In this article there are also used the websites of insurance companies in order to show how ecological insurance functions in practice.

**The purpose** of this article is to indicate some significant problems existing in the sphere of economic insurance on the ground of Polish legislature and to present some solutions that were recently applied in Ukrainian law.

**Results.** Accidents causing danger of environmental damage happen very often, while only small percentage of them is registered, therefore the real scale of the problem cannot be fully recognized. The process of development ecological insurance market faces many obstacles, significant part of them is related with lack of necessary legal provisions. Introduction of provisions concerning ecological insurance to Ukrainian law, as a new regulation should be evaluated after some time of their applying.

**Conclusions.** In the Author's opinion ecological insurance is a good solution for management of the risk of environmental damage. However, this issue should be concerned at many levels, as it also raises concerns that the obligation of including insurance contracts will lead to reversing the burden of this obligation on the consumer by increase in prices of goods and services.

**Keywords:** ecological insurance, business activity, environmental damage, security of claims.