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The legal situation of financial market participants in the context of the amendment of the Act on Trading in Financial Instruments

ABSTRACT

The main subject of this article is an attempt to resolve whether and on what principles active financial market participants were entitled to continue their activities related to trading in financial instruments during the so-called transition period determined by the provision of Article 29 of the Act of 1 March 2018 amending the Act on Trading in Financial Instruments and certain other acts (Dz.U. [Journal of Laws] of 2018, item 685).

To this end, the authors have interpreted this provision in the context of the overall regulation of the amending act, with particular attention paid to the new wording of the definition of trading in financial instruments. The analysis of the indicated issues is carried out primarily from the point of view of active participants of the financial market, which constitutes a significant enrichment of the studies that have so far dealt with the discussed problem.

Against the background of the above considerations, the authors draw attention to the influence of the Polish Financial Supervision Authority (Financial Supervision Commission) on other financial market participants, especially in relation to the supervisory proceedings conducted by the Authority and the supervisory measures applied. As a result of the conducted deliberations, the authors notice that the imprecision and incompleteness of the content of the analysed legal acts may be connected with significant negative consequences for the financial market participants, primarily in the form of financial sanctions.

KEYWORDS

financial market, Polish Financial Supervision Authority (Financial Supervision Commission), financial supervision

Introduction

In the face of emerging threats to the stability of the financial systems of many European countries, often caused by sudden and unforeseen events that result in, for example, cyclical slowdowns in the economic development of these countries, it seems justified for legislators to increase the protection of financial market participants as well as its rationing.¹ The implementation of such tasks takes place in particular through intensified legislative activities aimed at maintaining as well as expanding the legal instruments of financial market supervision, which are to secure business transactions. They are taken up both at the European level and more and more often with increased intensity also by the Polish legislator. This trend has been translated, first of all, into the manner and scope of regulation of activities related to trading in financial instruments within the meaning of the Act of 29 July 2005 on Trading in Financial Instruments,² hereinafter referred to as the “Trading Act”. In this context, special attention should be drawn to the amendment introduced by the Act of 1 March 2018 amending the Act on Trading in Financial Instruments and certain other acts,³ hereinafter referred to as the “Amending Act”.

The vast majority of the provisions of the Amending Act entered into force fourteen days after its announcement, however, the scope and significance of the introduced changes forced the legislator to set a period during which the current financial market participants would have the opportunity to adapt their businesses to the amended provisions. The *vacatio legis* period shaped in this way, especially in the context of the principle of continuity of business activity and imprecision of transitional provisions, makes it necessary to seek an answer to the question whether it was possible to conduct business activity consisting in offering financial instruments, i.e. *ipso iure* brokerage activity within the meaning of the provision of Article 69 of the Act on Trading, on the principles hitherto in force, i.e. those in force until the entry into force of the Amending Act, i.e. during the so-called transitional period. In case of a positive answer, it also needs to be determined on what principles and under what obligations it was possible to conduct such activity. In this respect, however, further doubts arise, namely whether conducting brokerage activity within the scope and within the time frame indicated above – if it was possible – required the consent (permit) of a competent financial supervisory authority, i.e. the Polish Financial Supervision Authority (Financial Supervision Commission),⁴ hereinafter referred to as the “Commission”, issued pursuant to Article 82 of the Act on Trading. On the other hand, if it is considered that it was possible to conduct this activity during the so-called transition period without any adjustment measures, in particular without obtaining the required permit, it should be examined whether the very intention to continue the existing activity could have been legally

1 P. Ochman, *Rola Komisji Nadzoru Finansowego w karnej ochronie rynku finansowego*, “Ius Novum” 2016, no. 4, p. 324.

2 Act of 29 July 2005 on Trading in Financial Instruments, Dz.U. (Journal of Laws) of 2020, item 89 as amended.

3 Act of 1 March 2018 amending the Act on Trading in Financial Instruments and certain other acts, Dz.U. (Journal of Laws) of 2018, item 685.

4 The Polish Financial Supervision Authority (also called Financial Supervision Commission), which is a competent authority in matters of supervision over the financial market within the meaning of Art. 3(4)(1) of the Act of 21 July 2006 on Financial Market Supervision, Journal of Laws (Dz.U.) of 2020, item 2059 as amended.

fulfilled by submitting an application for a permit during the transition period. Moreover, in case the application has been submitted and then withdrawn (regardless of the reason) by the interested entity, it should be determined whether the Commission will be ready to consider the above-mentioned circumstance as meeting the legal requirements applicable during the transition period or the above-mentioned activities will be treated in the same way as in the case of an entity that remains inactive.

Based on the questions posed this way, it is also necessary to establish the powers, including supervisory powers, which the Commission, as a public administration authority, has in relation to entities operating under the existing rules during the above-mentioned transitional period. As a consequence, both in the context of the presented legal regulation and the legislative aspirations expressed this way, which are part of the state policy, it seems right to consider whether all financial market participants, to an equal or at least appropriate degree (taking into account the degree of experience and professional character of individual participants) are or become beneficiaries of the protection by state institutions. At the same time, since the effects of a certain behaviour in the form of the Commission's supervisory activities may and most likely will continue even after the so-called transition period, the issue addressed in this paper remains valid.

Interpretation of Article 29 of the Amending Act

The issue can be considered in two ways, that is, with a narrower and wider approach, which allows for two different research perspectives. The first one – assuming some simplification – will refer to the legal relationship: an active financial market participant and the Commission, which will be shaped by rights and obligations resulting from the Amending Act. The second approach allows for the possibility of equal treatment, on a legislative basis, of all financial market participants, including the Commission, not forgetting, however, that through specific legal instruments of a supervisory nature, resulting from the current state policy, it interferes in the activity of other financial market players in order to ensure certainty of trading both in the near and long term.

At the beginning, it is necessary to cite the regulation contained in the disposition of Article 29 of the Amending Act, which is the starting point for the undertaken deliberations. In accordance with section 1 of the said provision:

An entity which, on the date of entry into force of this [Amending] Act, performs a business activity which did not require a permit before the date of entry into force of this Act, and which requires a permit in accordance with the provisions of Article 1, as amended by this Act, shall adjust its activity to the provisions of Article 1 [on trading], as amended by this Act, within 12 months from the date of entry into force of this Act.

At the same time, section 2 of Article 29 of the Amending Act states that:

The entity referred to in section 1, which within 12 months from the date of entry into force of this [Amending] Act will submit an application for granting the permit provided for by Article 1, as amended by this Act, may conduct the activity referred to in section 1 on the

existing principles until the date: 1) of the final decision on such application – in the case of a refusal to grant the permit provided for by Article 1, as amended by this Act; 2) of commencement of the activity on the basis of the permit granted, but not longer than 30 days from the date of obtaining the permit – in the case of granting the permit provided for by Article 1, as amended by this Act.

Both of the above-mentioned provisions determine the time frame of the so-called transition period, which is 12 months from the entry into force of the Amending Act, i.e. from 21 April 2018.

When considering the issue in the light of the narrower approach defined above, it is important to note the specific power of the Commission, which, in situations of ambiguity of the text of a legal act, has *de facto* power to interpret it in a binding way, as was the case with the Amending Act. The Commission, within the scope of its powers, including those resulting from the provisions of the Act on Supervision,⁵ has undertaken “educational and informational activities in the field of the functioning of the financial market”, which resulted in written explanations contained in the so-called Guidelines of the Commission Office.⁶ They were supposed to be a practical, detailed explanation of the behaviour of an entity operating in the sphere of offering financial instruments, among others, during the transitional period. At this point it should be stressed that the Commission, although it is not a legislative or, even more so, a judicial body, through the guidelines it issues, has the power to shape the legal situation of financial market players and to have real impact on the scope of their rights and obligations, which can be clearly seen in the context of this issue. As a result, the legislator’s use of undefined and vague words and phrases results in a situation where the Commission interprets them in a binding way and then severely imposes behaviour contrary to its position. This state of affairs significantly violates the principle of legal certainty and legal security, especially since the Commission is not obliged to issue so-called “guidelines”, which means that it is also not bound by any deadline and any potential omissions will not be legally stigmatized and corrected in any way. Therefore, the guidelines may also be issued only after a significant number of entities have been punished for behaviours contrary to the Commission’s position.

However, in this case, the Guidelines are limited to indicating the existence of a transitional provision (see Article 29 of the Amending Act) and citing its content, without further specification of the obligations of the entity operating in this area. For these reasons, it is reasonable and necessary to try to interpret this provision and determine the legal obligations arising from it. For this purpose, it is necessary to carry out primarily a linguistic interpretation of the above-mentioned provisions of the Amending Act. Taking into account this way of interpretation of the law, it should be pointed out that the meaning of section 1 of Article 29 of the Amending Act requires the entity performing its activity to offer,⁷ dur-

5 See Art. 4(1)(1) of the Act on Supervision.

6 *Stanowisko UKNF dotyczące definicji usługi oferowania instrumentów finansowych zawartej w art. 72 ustawy z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi*, https://www.knf.gov.pl/knf/pl/komponenty/img/Oferowanie_Instrumentow_65197.pdf. Accessed 27.07.2020.

7 And thus, an active financial market participant, whose aim, in the context of the issue raised, is to offer financial instruments.

ing the period preceding the moment of introduction of the amended rules of the Act on Trading and thus, to a certain extent without the need to have the consent of the Commission, to adapt its activity to the provisions of the “new” act within a specified period (the so-called transition period). It should be assumed that only in the case of the intention to continue the business activity by the above-mentioned economic entity, under the amended rules, it is obliged, within 12 months, to adjust its activity to the introduced legislative changes. Therefore, theoretically, the entity is entitled to take such actions even on the last day of the transition period. Moreover, in the absence of an intention to continue the business, after the expiry of the transition period and under the amended rules, it was entitled to continue to provide services of offering financial instruments in the previous manner, without taking any action to adjust such business, including the absence of an obligation to submit an application to the Commission for a permit to conduct such business. The above interpretation assumption is also confirmed by the systemic context referring to the disposition of section 2 of Article 29 of the Amending Act. As noted above, this provision provides for the possibility of extending the transitional period for conducting business activity under the “existing rules” if an application for the Commission’s approval during the transitional period has been submitted. In such a case, the right to conduct business activity under the rules in force prior to the entry into force of the Amending Act lasts until the date of final settlement of such application, in the case of refusal to grant the permit, or until the date of commencement of business activity on the basis of the permit granted, but not longer than 30 days from the date of obtaining such permit.

A different stance stressing the *ratio legis* of the above-mentioned provision assumes that the so-called transition period has been set by the legislator only for entities which intend to continue their brokerage activity on the amended principles set out in the Amending Act. In such a case, the 12-month period is, in the legislator’s opinion, sufficient to adapt the current activity to the new legal realities. If, however, it should prove inadequate, section 2 of Article 29 provides for two exceptions to extend this period of time. It is worth noting at this point that “business alignment” does not only mean the submission of an application for authorisation to the Commission but is undoubtedly the most obvious manifestation of the intention to continue brokerage activity. In such a case, the so-called “transition period” is an exception to the principle that after the entry into force of the Amending Act, every brokerage activity shall take place under new, stricter rules. In turn, the submission of an application for permission implies that the entity will adapt its activities to these principles as soon as possible. Therefore, it seems that the first thing to do is to submit an application to the Commission, which will allow the entity to conduct its business under the existing rules “(...) until the date: 1) of the final decision on such application – in the case of a refusal to grant the permit provided for by Article 1, as amended by this Act; 2) of commencement of the activity on the basis of the permit granted, but not longer than 30 days from the date of obtaining the permit – in the case of granting the permit provided for by Article 1, as amended by this Act”.

This means that an entity conducting such activity would have the competence (and therefore the right and obligation) to submit an application within 12 months from the

date of entry into force of the Amending Act, if, during the transitional period, it intends to conduct its activity under the existing rules (i.e. in force before the date of the amendment). However, this competence also exists in the situation of discontinuation of offering services during the indicated transitional period, which would mean that even if the above-mentioned entity provided services (offering), at least during the one day of the transitional period, it would be obliged to submit an application for a permit to the Commission. It seems that it would be unacceptable if the legislator, despite the entry into force of the law, whose aim is, among other things, to increase the protection of the financial market passive participants, will allow economic entities to carry out their activities on the existing principles without the intention of adapting them to the new rules. In the author's opinion, such an interpretation of the provision results from both the literal and systemic context related to the location of the interpretation of the provisions of Article 29 of the Amending Act, i.e. its sections 1 and 2. It is worth noting that the legislator, first of all, in section 1, provides for the "adjustment of activities to the amended regulations", and only in section 2 it does provide for the possibility of conducting activities "according to the existing principles". A different interpretation, taking into account the way of interpreting the law, would be prompted by the situation in which the legislator, while enacting a transitional provision, in this case Article 29 of the Amending Act, will omit its section 1.

Regardless of the interpretation, this provision undoubtedly creates space for far-reaching violations. It allows entities to create a kind of legal fiction by submitting applications to the Commission (regardless of their formal correctness or material validity) and then withdrawing them during the transitional period without the need to provide justification. This state of uncertainty is undesirable not only for active financial market participants but also because of the need to protect the interests of its passive participants.

Interpretation doubts related to the definition of offering financial instruments

The above interpretation of generally applicable laws, although not binding to any extent, is a manifestation of the desire to take into account and protect also the interests of active financial market participants. For them, a state of legal uncertainty is never advantageous, especially since their conduct, that is inconsistent with the Commission's assessment and position, may result in severe financial sanctions. Therefore, this paper should also include the broader approach to the issue indicated above. With regard to this broader approach, it seems important to take the position that, in the context of financial market supervision, the Commission, in terms of its administrative power, including supervisory powers, has a number of rights *vis-à-vis* other participants, which, however, does not correlate to an appropriate extent with clearly defined obligations of such entities, or even their internal statutes. This, in turn, translates into the possibility to clarify the appropriate behaviour (its framework) of these entities in connection with their activities, which in the context

of the issue raised is the right to offer, during the so-called transition period, the financial instruments.

However, before discussing the possible reasons for this assumption, it is advisable at first to refer to the legal matter covered by the Amending Act. Namely, the disposition of the provision of Article 72 of the Act on Trading has replaced, by way of legislative action, the term “seller” by the term “offeror”. Thus, the wording of the above mentioned provision is as follows:

Offering financial instruments shall be understood as undertaking, for the benefit of the issuer of securities, the issuer of a financial instrument or the entity offering a financial instrument, activities leading to the acquisition of financial instruments by other entities, by: 1) presenting, in any form and in any way, information on financial instruments and conditions of their acquisition, made available by the issuer or offeror, constituting a sufficient basis for making a decision on the acquisition of such instruments, or 2) mediating in the disposal of financial instruments acquired by the entities as a result of presenting the information mentioned in point 1, or 3) presenting, in any form and in any way, information made available by the issuer or offeror to individually marked addressees for the purpose of: a) promote, directly or indirectly, the acquisition of financial instruments, or b) encourage, directly or indirectly, the acquisition of financial instruments”.

In accordance with the above-mentioned content, the provision of Article 72 of the Act on Trading determines that the offering of financial instruments shall be understood as activities undertaken for the benefit of the issuer or seller (currently the offeror), hereinafter jointly referred to as the “issuer”, leading to the acquisition of financial instruments by other entities. However, the legislator neither specifies what is to be understood by the phrase “undertaken for the benefit of the issuer/offeror”, nor identifies the legal form in which this action could take place. It is therefore justified to refer to the line of case-law of the administrative courts,⁸ where it is noted that the legislature does not specify or indicate how the term “in the name of and for the benefit of someone” should be understood. Therefore, the jurisprudence, in the above-mentioned judgment, refers to a directive of linguistic interpretation, stating that it is legitimate to assume the meaning that these expressions have in common language (the directive of presumption of common language). It is thus established that the expression “for the benefit of” is equivalent to action “in favour of someone, for someone, for the good of someone”. This meaning can also be applied to the said provision, with the preservation of appropriateness.

Thus, once again, the legislator uses vague and undefined terms, which allows for a wide range of applications and implies the need to assume that practically every activity of entities operating under the rules of the previous act, and thus before the entry into force of the amendment, may be recognized as offering financial instruments, which will require, in particular, the Commission’s approval. At the same time, any omissions, in case of a different assessment by the Commission as a body authorised to make arrangements in

⁸ See, inter alia, the judgment of the Voivodship Administrative Court (VAC) in Gdańsk of 12 July 2011, case file no. I SA/Gd 551/11, Legalis no. 417880.

this respect, may be subject to specific sanctions, related to conducting brokerage activities without a permit.

In this paper, only two regulations of significant importance for the financial market active participants have been pointed out. Far-reaching interpretation of the problems noticed in this “space” allows us to assume that this is only a small percentage of ambiguities faced everyday by the financial market players. This statement is a starting point for further reflection on the legal and financial implications that follow from the above doubts primarily for the financial market active participants.

Governing powers of the Polish Financial Supervision Authority

The analysis carried out so far reveals a specific way in which the Commission “practices” financial market supervision. In order to protect the financial market passive participants, the legislator imposes rather unspecified legal obligations on active participants of this market. Then, the Commission, which has been equipped with a number of empire powers, including the power to impose severe financial sanctions, may find their violation (based on evaluation criteria). In order to confirm the above positions, it is necessary to approximate the Commission’s powers in relation to financial traders.

There is no doubt that the powers, and more precisely the competences of the indicated public administration authority in relation to the active participants of this market, due to the political position of the Commission, are shaped by the norms of public law, hence of an administrative and legal nature. Moreover, by means of the legal instruments granted to the Commission, this authority may exert direct or indirect influence not only on the administrative proceedings conducted on its own, but also on the actual conducted, as well as potential criminal proceedings, which are related to financial market cases.⁹ Thus, in this respect, the Commission’s activities, although this body does not have the status of a law enforcement or judicial authority,¹⁰ have a key impact on the postulated behaviour of the financial market active participants. Therefore, the Commission’s competence translates into the possibility of initiating the so-called investigation procedure, provided for in the provision of the Act of 21 July 2006 on Financial Market Supervision,¹¹ hereinafter referred to as the “Act on Supervision”, which seems to be important. The consequences of these proceedings have an effect on the controlled entity not only on the administrative grounds, including the possibility of applying administrative sanctions, but also on the grounds of criminal law, since the Commission has the power to file a notification on suspicion of committing a crime. In this respect, special attention shall be paid to the scope of application of Article 18a of the Act on Supervision. The conditions contained therein entitle the Commission, and in principle its Chairman, to initiate (by way of an order) such proceedings in any case in which it is necessary to determine whether there are grounds for filing

9 P. Ochman, *op. cit.*, p. 325.

10 *Ibidem*.

11 Act of 21 July 2006 on Financial Market Supervision, Dz.U. (Journal of Laws) of 2006, no. 157, item 1119 as amended.

a notification of suspicion of a specific offence or to initiate administrative proceedings for an infringement of the law in the range the Commission is authorised to do it. Thus, the norm contained in the above-mentioned provision constitutes a legal instrument of criminal law protection of the financial market, which the Commission has in its possession.¹²

While acknowledging the validity of the thesis posed at the beginning of this paper, according to which there is a need to increase the protection of financial market participants, in particular by maintaining certainty or increasing the security of economic trading, it should be pointed out that an active participant of this market, when the Commission applies, among others, such a legal instrument, is often deprived of the possibility to actively participate in the proceedings, including the right to submit effective applications, which might determine the protection of its interest. This is another circumstance that supports the legitimacy of the question concerning equal treatment of “all” financial market participants. This is due to the fact that the regulation of the above-mentioned provision of the Act on Supervision directly excludes the application of the standards of the Code of Administrative Procedure,¹³ within the scope of the rights vested in a party within the administrative proceedings. Moreover, the selective application of the provisions of the Code of Administrative Procedure, provided for by this act, refers only to instruments from the scope of the public administration “empire”. This circumstance results in obligations on the part of the active participants of the investigation, as well as in the constitution of sanctions for a possible failure to comply with them by such active participants of the investigation.

Thus, in view of the supervisory and control functions¹⁴ assigned by the legislature to the Commission in the field of the financial market supervision, the competence of this authority in the discussed scope – even though, according to the representatives of the doctrine, there was no provision for the possibility of exercising a governing influence over the controlled entity¹⁵ during the investigation procedure – deprives this entity of effective protection of its rights to a certain extent. It is important that in a situation where the Commission determines on its own that there are grounds for submitting a notification of the possibility (suspicion) of committing a crime, without the necessity to provide any information and explanations to the controlled entity, the authority is competent or even obliged to submit such notification.

Apart from the definition of the Commission’s individual powers *vis-à-vis* the controlled entity in the framework of this investigation, two aspects should be noted. Firstly, there is no doubt that the Commission’s powers regarding access to information are very extensive.¹⁶ Secondly, however, these powers are not compensated by those of an active market

12 See P. Ochman, *op. cit.*, pp. 326-327.

13 Act of 14 June 1960 on the Code of Administrative Procedure, *Dz.U.* (Journal of Laws) of 2020, item 256 as amended.

14 J. Grabowski, *Publiczny obrót papierami wartościowymi. Ustrój prawny i procedury*, Warszawa 1996, p. 55.

15 C. Kosikowski, *Organizacja i funkcjonowanie kontroli i nadzoru państwa wobec gospodarki w świetle Konstytucji RP*, in: *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji*, C. Kosikowski (ed.), Warszawa 2005, p. 115.

16 A. Żywicka, *Kompetencje Komisji Nadzoru Finansowego w zakresie gwarantowania bezpieczeństwa finansowego RP. Wybrane zagadnienia dotyczące nadzoru nad rynkiem kapitałowym*, “Zeszyty Naukowe WSEI” 2013, seria Administracja, no. 3, p. 68.

participant that is a controlled entity. Thus, regardless of the unilateral findings made by the Commission in the framework of this procedure, the inspected party has no legal possibility to respond to such findings. Nor does any legal provision entitle it to inspect the file of the proceedings. Last but not least, the inspected party has no right to challenge the Commission's decision in any way.

Conclusions

While it can be accepted that, within the framework of the Commission's activities, it takes an active part in shaping state policy by ensuring the development of the (financial) market,¹⁷ such powers cannot be considered to be a manifestation of its interaction with participants (in this case active) of this market. The best expression of this is the fact that this paper, despite in-depth legal reflection, has failed to unequivocally resolve the interpretative uncertainties identified at the introduction and to establish the intention that accompanied the legislator amending the Act on Trading. Despite the application of different methods of interpretation, it is not possible to unambiguously determine how the financial market active participant should behave during the so-called transition period, in case it would like to continue its activities after the new regulations come into force. It is expected that this issue will soon be resolved by the Commission itself, which will probably result in significant fines. Another example of the raised thesis is the difficulty in clearly establishing the designators of the term "trading in financial instruments", which is likely to be resolved by the Commission *in concreto*. This leads to the general conclusion that, in the current state of law, an active participant is often deprived of the possibility to identify or even predict the correct behaviour. At the same time, being aware of the indicated powers of the Commission, in order to avoid any negative consequences of the action, including during the transitional period, it will be forced to discontinue its current activities.

Without questioning to any extent the legitimacy of the legislator's efforts to maintain or even increase the protection of the financial market, it is agreed to note that there is currently no regulation guaranteeing adequate protection of entities that are active participants of this market. Moreover, the possibility for the Commission to apply at least legal instruments from the scope of repressive administration,¹⁸ or to assign to the above-mentioned entity the responsibility from the scope of such administration, will be a particular ailment for such an entity, as it will allow the Commission to assign to an active participant the administrative tort.¹⁹ This circumstance, on the one hand, may cost the above-mentioned entity much more than even criminal liability, as it is connected, in particular, with the authority of a public administration body to impose a statutory administrative penalty.²⁰

17 R. Blicharz, *Nadzór państwa nad rynkiem kapitałowym*, in: *Publiczne prawo gospodarcze*, A. Powałowski (ed.), Warszawa 2012, p. 283.

18 See P. Ochman, op. cit., p. 326.

19 See W. Radecki, *Kilka uwag o zastępowaniu odpowiedzialności karnej odpowiedzialnością administracyjną*, in: *Współczesne problemy nauk penalitych*, M. Bojarski (ed.), Wrocław 1994, pp. 13-22.

20 Ibidem.

On the other hand, it deprives such participant of the possibility to exercise the rights that a party has in administrative proceedings. It also entitles the Commission (public administration authority) to submit a notification of a possible crime.

While the doctrine, according to which the Commission's activity is to protect both public and private goods,²¹ remains valid, it certainly does not serve to protect, or at least to safeguard, entities which together constitute an active part of the financial market. From this point of view, *de lege ferenda*, it becomes necessary to take into account, on a statutory basis, also the interests of such entities. Otherwise, a situation in which the initiators of certain investment undertakings on the regulated markets withdraw from it, leading to the limitation of its development is not excluded. The consequence of such a situation will be the impossibility of further participation in this market also by its passive participants, who, according to the legislator's assumption, have been protected by the Commission. Therefore, the protection of the financial market passive participants assumed by the legislator cannot function without a simultaneous precise and unquestionable determination of duties and rights of active entities. Strict and unambiguous determination of the normative space in which active entities may operate will enable the Commission to identify only unacceptable behaviours, which will strengthen its lawfulness and at the same time make it easier for experienced passive participants of this market to identify potential threats themselves. It should be agreed that the state of legal uncertainty does not serve either active or passive participants, whose involvement and prosperity in the financial market is linked to the existence and success of investments by active participants.

The inability to achieve in practice, regardless of the reason, the postulated degree of legislative precision will require each time detailed explanations to be made by the competent public administration authorities (in this case, the Commission), which *in abstracto*, in an unquestionable manner, within the framework of at least guidelines, if not legal interpretations (because, as a matter of fact, such bodies are not established for it²²), whose content will also be binding on the authority applying the law. However, it should be clearly stressed at this point that a state in which citizens and the economic entities they create cannot determine what is prescribed, prohibited, or permitted under the applicable law cannot be assessed positively in the context of the constitutional principle of the democratic state of law and the resulting assumptions of legal certainty and security. However, in the case of the Amending Act, such explanations have not been provided. Furthermore, within the framework of the regulation of Article 11b(2) of the Act on Supervision, it will also not be possible to submit an application for an individual interpretation as to the scope and manner of applying the regulations, unless it concerns "products and services which are aimed at the development of the financial market innovation". Therefore, in the transitional period, carrying out activities on the basis of the existing principles exposes an entity operating on the financial market to criminal liability – through the possibility of filing a report on suspicion of committing a crime (Article 18a of the Act on Supervision). Such an entity is thus

21 J. Monkiewicz, *Wybrane problemy kształtowania nadzoru ubezpieczeniowego w Polsce w minionym piętnastolecu*, "Rozprawy Ubezpieczeniowe" 2007, no. 1, pp. 5-6.

22 With a few exceptions, see, among others, the provision of Article 11b of the Act on Supervision.

exposed to the risk of disclosing to the public information on filing a notification on suspicion of a specific crime,²³ on a dedicated website of the Commission called “List of Public Warnings of the KNF – Polish Financial Supervision Authority” (Article 6b(1) and (4)). At the same time, at the stage of proceedings conducted by the Commission, the aim of which is to determine whether a specific crime could have occurred, the entity will not have the rights of the party resulting from the provisions of the Code of Administrative Procedure.

All of the above seems to support the need for legislative action that takes greater account of the interests of active market participants. This is caused by, as it is emphasised in the literature:

- the effectiveness of the Commission’s actions, with the indication of obtaining a more undefined desired behaviour of the controlled entity,²⁴ as well as
- referring to the legitimacy of applying a number of repressive measures as a manifestation of enforcing the lawful behaviour of that entity, or
- indicating the legitimacy of applying the above-mentioned measures as an educational element,²⁵

together with the frequent legislative failure to define a precise scope, or a catalogue of obligations of the controlled entity, as well as the abandonment of the prior use of soft legal instruments, which should first constitute a warning (in certain cases) preceding the application of the above-mentioned sanctions, in the long run, for various reasons, may significantly contribute to the exclusion of some of the active participants from involvement in the financial market, which is crucial for the state’s economic policy.

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23 The catalog of crimes has been defined in Article 6b(1) of the Act on Supervision.

24 A. Żywicka, op. cit., p. 71.

25 Ibidem.

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